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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3214-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

COREY BRISBON, a/k/a
COREY PICKETT,

Defendant-Appellant.

Submitted January 10, 2023 – Decided February 9, 2023

Before Judges Whipple and Marczyk.

On appeal from the Superior Court of New Jersey, Law
Division, Mercer County, Indictment No. 13-04-0517.

Joseph E. Krakora, Public Defender, attorney for
appellant (Anthony J. Vecchio, Designated Counsel, on
the brief).

Angelo J. Onofri, Mercer County Prosecutor, attorney
for respondent (Michael Mauro, Assistant Prosecutor,
of counsel and on the brief).

PER CURIAM

Defendant Corey Brisbon appeals from an October 23, 2020 order denying post-conviction relief (PCR) without an evidentiary hearing. We remand for an evidentiary hearing.

Defendant raises the following issues on appeal:

I. DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF TRIAL COUNSEL'S FAILURE TO CONSULT AN EXPERT REGARDING DEFENDANT'S ABILITY TO MAKE A KNOWING, VOLUNTARY, AND INTELLIGENT DECISION REGARDING HIS PLEA OFFER.

II. THE [PCR] COURT ERRED IN NOT GRANTING DEFENDANT AN EVIDENTIARY HEARING.

On December 4, 2012, at about 1:30 a.m., Francisco Quijada awoke to see two men breaking into his work van, which was parked in front of his house. The van contained valuable tools and materials. He told his wife to call the police, then summoned his brother, who lived with him, and grabbed a metal pipe. The brothers went outside to confront the two men in the van. By this time, one of the suspected thieves had escaped on a bicycle, but one—defendant—remained.

Defendant attempted to leave, but the brothers pursued him. Quijada testified defendant stuck his hands in his pockets, stated that he had a weapon, and threatened to use lethal force if the brothers did not stop following him. In

response, Quijada called the police, which angered defendant. A physical struggle between the three men ensued. Defendant bit Quijada's brother. Quijada then struck defendant in the head with the pipe. The fight continued; Quijada struck him in the head a second time.

The police arrived and found defendant lying on the ground, moaning, his face bloody. He was arrested and taken to a nearby hospital via ambulance. In the hospital, he was given a CT brain scan and underwent surgery for his eye, which was badly injured.

The CT scan was labelled "negative," indicating that doctors at the time did not believe it demonstrated any problem with brain functioning.¹ However, defendant's appendix includes the written opinion of Dr. Randy Bressler, Psy.D., who contests this conclusion. Dr. Bressler, writing in 2019, nearly six years after the fact, contends

all medical records indicate that [defendant] was attacked . . . and suffered an orbital fracture with a retrobulbar hematoma. An initial mental status examination (MSE) conducted on the night of his hospitalization indicated questionable consciousness given his difficulty recalling the event (i.e. memory loss), splintered attention, and excessive agitation for

¹ Specifically, the PCR opinion states, "while the patient was being monitored for a possible concussion, the report never mentions any further issue regarding [defendant]'s potential brain trauma, and only continues to note that his brain scans appear normal."

which there was concern as to whether he was a danger to himself. During [defendant's] hospitalization and while held in detention, he experienced co-existing psychiatric conditions involving depression and anxiety that lingered, continued difficulties with memory/attention, and intermittent periods of drowsiness that may have been a byproduct of a head injury and/or the result of side-effects from psychiatric medications.

Dr. Bressler never met with or examined defendant. Instead, he reviewed statements from defendant's family, who suggested the pipe injury produced "changes in [defendant's] intellect" including memory lapses and disordered thinking, as well as changes in his personality.

Following the hospitalization, a grand jury indicted defendant on charges of burglary, N.J.S.A. 2C:18-2; robbery, N.J.S.A. 2C:15-1; and terroristic threats, N.J.S.A. 2C:12-3(a). The maximum sentence for these charges exceeded twenty years. However, the prosecutor offered him a plea deal for three years flat. Defendant rejected the deal, and the case went to trial. In rejecting the plea, defendant repeatedly and clearly communicated he understood the nature of the charges, possible sentence, and consequences of being found guilty.

Defendant was convicted of burglary and robbery and sentenced to twelve years with eighty-five percent parole ineligibility. N.J.S.A. 2C:43-7.2.

In 2017, defendant filed a timely petition for PCR. He submitted his rejection of the three-year plea offer was not made knowingly, voluntarily, or intelligently because of the head injury he sustained during the fight with Quijada. Defendant further alleged trial counsel's failure to have his mental functioning evaluated prior to rejecting the deal amounted to ineffective assistance of counsel.

In support of this claim, defendant certified he did not remember the underlying robbery incident with the Quijadas, and he "was not in the right state of mind" when deciding to plead not guilty. At the time, he "could not understand why someone would have hit [him] in the head like that." He also claimed to still be affected by the head trauma.²

The PCR court denied defendant's petition. It reasoned:

Based on the available record, the trial judge thoroughly and accurately reviewed the pretrial memorandum with [defendant] No evidence . . . suggested [defendant] was unable to make a voluntary, knowing, and intelligent decision regarding his plea.

[Defendant] clearly answered all questions asked and told the court that he understood everything discussed during the proceeding.

² Certain members of defendant's family also certified, seven years after the underlying offense, that defendant's demeanor and mental functioning was affected by his injury. Defendant's family could not recall ever speaking with defendant's trial counsel regarding these changes.

There is no evidence to indicate that trial counsel acted unreasonably [M]edical records available at the time from the jail, both pretrial and initially post-trial, did not indicate any neurological impairment.

The court concluded:

There have been only bald assertions from defendant, statements from family members that are vague and conclusory, and a medical report by a psychologist who has never met with [defendant] and which is based upon records that suggest there was no reason to warrant any investigation into [defendant's] mental state at the time he decided to reject the State's plea offer and exercise his right to a trial in this matter.

This appeal followed.

"Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." State v. Pierre, 223 N.J. 560, 576 (2015) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). PCR provides a "built-in 'safeguard that ensures that a defendant was not unjustly convicted.'" State v. Nash, 212 N.J. 518, 540 (2013). Our review is deferential to a PCR court's factual findings supported by sufficient credible evidence. State v. Gideon, 244 N.J. 538, 551 (2021) (quoting Nash, 212 N.J. at 546). Review of a PCR court's interpretation of law is de novo. Nash, 212 N.J. at 540-41.

Defendant argues his trial counsel should have retained an expert to evaluate his mental functioning prior to allowing him to reject the three-year

plea offer. He submits because "there was no conceivable strategic advantage" in failing to have defendant psychologically evaluated, counsel's lack of inquiry amounts to ineffective assistance of counsel.

Claims of ineffective assistance of counsel are evaluated under the test delineated in Strickland v. Washington, 466 U.S. 668, 687 (1984); adopted in State v. Fritz, 105 N.J. 42, 58 (1987). That test has two prongs. "First, the defendant must show that counsel's performance was deficient." Gideon, 244 N.J. at 550 (quoting Strickland, 466 U.S. at 687). "Second, the defendant must have been prejudiced by counsel's deficient performance." Ibid. Prejudice in this context means "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

There is a strong presumption that counsel's performance fell within the range of reasonable representation. Pierre, 223 N.J. at 578-79. Reviewing courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. If a decision was reasonable at the time it was made, it should be upheld, even if in hindsight another decision would have been advantageous. See Nash, 212 N.J. at 543. Counsel's error must be "of such

magnitude as to thwart the fundamental guarantee of [a] fair trial." State v. Castagna, 187 N.J. 293, 314-15 (2006) (alteration in original) (quoting State v. Buonadonna, 122 N.J. 22, 42 (1991)).

Counsel is obligated to order an expert appraisal of a defendant's mental condition if doing so is "critical" to making a competent strategy decision. State v. Savage, 120 N.J. 594, 622 (1990). However, the need for such an appraisal must be apparent on the facts known to counsel at the time. Savage concerned multiple outward signs of mental illness, such as defendant's jumping out of a window, heavy cocaine usage, potential hallucinations, and previous hospitalization for a mental condition while serving in the Navy. Id. at 618-20. Counsel's excuse for failing to order a mental exam—because "nothing jogged his mind"—was insufficient to overcome the overwhelming external signs of mental incapacity, which presumably should have alerted counsel to the need to pursue this line of inquiry. Id. at 622.

When these outward signs are not present, counsel has a lessened obligation to investigate. In State v. Cooper, this court declined to accept a claim of ineffective assistance where trial counsel failed to develop evidence on defendant's alleged fetal alcohol syndrome, given the lack of "demonstrable

physical irregularities in [defendant's] brain." 410 N.J. Super. 43, 74 (App. Div. 2009).

In this case, we review whether there were outward signs that should have alerted trial counsel to an obvious need to conduct a mental capacity evaluation prior to allowing her client to reject the favorable plea. To that end, the record cuts both ways. The fact that defendant suffered major head trauma after being repeatedly struck with a metal pipe in the underlying incident, coupled with his potentially irrational behavior in rejecting the plea, generally supports his contention counsel should have considered whether his mental functioning was sufficient to reject the plea and go to trial.

Certain portions of the medical reports from the hospital ruled out brain damage. If trial counsel had access to these records at the time of the plea deal, she might have rationally believed defendant was making a conscious and informed choice in choosing to plead not guilty. Plus, defendant appeared in court and unequivocally represented he understood the consequences of rejecting the deal and wanted to proceed to trial. Nothing in the transcripts suggests his mental functioning was impaired. These facts are "outward signs" defendant's mental performance was unaffected at the time. When viewed in

this light, there is little to suggest counsel's performance fell below the standard of the first Strickland prong.

Because the PCR judge considered the medical records and they were not filed with the appendix herein, we asked defense counsel to submit the underlying medical records from Capital Health and Cooper University for our review. We have received and reviewed this material. The PCR court previously reviewed these same documents and concluded there were insufficient signs, because "although [p]etitioner was admitted to the hospital and had surgery as a result of the injuries sustained [during] the night of the offense, all records indicated that the surgery was for injuries sustained to his eye, not his brain." The PCR court also noted that all CT brain scans performed at the hospital were normal.

Our review of these records calls this characterization into question, which in our view tips the scales towards a remand for an evidentiary hearing. First, the Capital Health records clearly describe a history of drug addiction and a positive test for cocaine. This is relevant because it mirrors the facts of Savage, which found heavy cocaine usage to be one of many "outward signs of mental illness." 120 N.J. at 618-20. Second, and more significantly, the records contain

conflicting reports of defendant's affect and functioning in the days following the assault.

Some reports imply normal functioning:

Mental status: speech clear . . . responds appropriately to questions.

Neuro: motor intact, sensory intact.

. . . .

Decision making: Patient examined and history obtained from patient, discussed findings of physical examination and treatment plan with patient. Questions solicited and answered.

However, other portions of the medical record contradict this characterization. Defendant is simultaneously described as "combative" and a "danger to self," having a "level of attention . . . not 100%," and being unable to complete certain mental status checks.

The records also show defendant expressed confusion about the underlying incident: "Patient states he does not know how many people assaulted him but he knows it was more than one."

While the PCR court correctly noted the CT scans came back negative and the doctors were obviously more concerned about defendant's eye, which required surgery, the inquiry is not whether doctors diagnosed the defendant

with brain damage, but rather whether there were sufficient signs that would compel competent counsel to inquire as to whether a client was behaving knowingly and rationally.

Defendant suffered severe trauma to the head in the incident underlying the indictment. The medical records call into dispute his ability to recall that incident. The same records also call into question his mental functioning in the period immediately following. Defendant has certified he has had mental difficulty ever since. Members of his family corroborate this characterization, and his case has been favorably reviewed by a psychologist who provided an expert report in this matter. Additionally, he had a substance addiction problem. Most of this would have been known (or discoverable) by trial counsel at the time defendant rejected the plea.

Rejecting the plea might be considered irrational behavior; as such, counsel may have had an obligation to inquire further. See Savage, 120 N.J. at 618-20. We remand for an evidentiary hearing to obtain counsel's reasons as to why a psychiatric evaluation was not requested. Given the circumstances, counsel must cite something more than "nothing jogged [her] mind." Id. at 622.

Vacated and remanded for an evidentiary hearing consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION