SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3223-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SHAKEEM T. BRYANT,
a/k/a SHALEEM BRYANT,

Defendant-Appellant.

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Submitted June 6, 2023 – Decided July 5, 2023

Before Judges Sumners and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 17-09-0673.

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

Matthew J. Platkin, Attorney General, attorney for respondent (Boris Moczula, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant appeals from an order denying him post-conviction relief (PCR). He requests we vacate his guilty plea and sentence. Alternatively, defendant requests the matter be remanded for an evidentiary hearing. Defendant argues counsel was ineffective in not moving for a Wade[1] hearing and in not moving to dismiss the carjacking count in the indictment. He also contends, for the first time on appeal, counsel was ineffective for failing to investigate potential voluntary intoxication and insanity defenses and for failing to advance mitigating factors or argue for a lesser sentence at sentencing. Also for the first time on appeal, he argues the guilty plea should be vacated because it was not made knowingly, voluntarily, or intelligently. We disagree and affirm.

On June 25, 2017, at approximately 2:22 a.m., police officers in Union Township responded to a report of a carjacking. The report stated the victim's Toyota Camry was taken by two males who fled in the vehicle towards Irvington. The victim stated he had exited a Dunkin Donuts in the area and walked to his vehicle, which was parked a short distance away. After reaching his car, co-defendant[2] pointed a handgun at his head and both assailants ordered

[1] United States v. Wade, 388 U.S. 218 (1967).

[2] Co-defendant is not a party to this appeal.

him to "get on the ground." Once on the ground, defendant placed a switchblade against the victim's skull. Defendants ordered the victim to empty his pockets and took what he had, including his iPhone, driver's license, car keys, and debit card.

The victim provided detailed descriptions of defendant and co-defendant, whom he stated were two black males. Defendant was described as "lighter skinned" and in his early twenties. He was skinny, approximately five feet nine inches tall, and "wearing a white baseball hat, white t-shirt[,] dark coat [and] possibly red and dark [sweatpants]." Defendant was identified as the assailant who held the switchblade to the victim's head.

At approximately 3:03 a.m., police located the stolen vehicle traveling between Martin Luther King Boulevard and Williams Street in Newark. Officers attempted to stop the vehicle, but it accelerated, colliding head on with a police patrol vehicle. Defendant, who was the passenger in the vehicle, fled on foot after throwing a silver object over a fence next to the vehicle, which was discovered to be a cap gun with the plastic parts removed to resemble a real gun. A switchblade also was recovered from the vehicle's passenger-side seat. Defendant was eventually apprehended, arrested, and searched incident to his

arrest. The search yielded the victim's debit card, which was in defendant's pants pocket.

An officer transported the victim to the scene of the accident to conduct potential identifications of defendants. Prior to seeing defendants, the officer read to the victim from a form stating the persons whom he would see may or may not be the individuals who committed the crimes and the fact the victim was being shown these particular individuals did not mean the officers believed them to be suspects. The victim was told he should not feel compelled to identify the individuals as the assailants and was requested to not discuss the individuals with the officers or any other potential witnesses.

The officers brought defendant in front of the patrol vehicle where the victim was seated. Defendant was illuminated by the headlights of the patrol vehicle. The victim positively identified defendant as one of the individuals who had robbed him and stolen his vehicle.

Defendant was charged with the following offenses: first-degree carjacking, contrary to N.J.S.A. 2C:15-2(a)(2); first-degree robbery, contrary to N.J.S.A. 2C:15-1(a)(2); fourth-degree possession of a weapon for an unlawful purpose-imitation firearm, contrary to N.J.S.A. 2C:39-4(e); fourth-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5(d); third-degree

possession of a weapon for an unlawful purpose-other weapon, contrary to N.J.S.A. 2C:39-4(d); fourth-degree resisting arrest-flight, contrary to N.J.S.A. 2C:29-2(a)(3)(b); and fourth-degree hindering, contrary to N.J.S.A. 2C:29-3(b)(4).

Pursuant to a plea agreement, defendant pleaded guilty to first-degree carjacking and the State agreed to dismiss the remaining counts, recommending an eleven-year sentence, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, to run concurrent with any sentences to be imposed on separate charges pending in Morris and Essex counties. Following extensive questioning, the trial court accepted the plea, finding the plea was entered "knowingly, freely, and intelligently" and grounded in a sufficient factual basis.

The trial court sentenced defendant in accordance with the plea agreement to eleven years, subject to NERA, with a five-year parole supervision period. The remaining counts in the indictment were dismissed and the incarceration term was to be served concurrent to any subsequent pending indictments in other counties. Further, in imposing the sentence, the trial court noted:

> This is a lenient plea. [Your counsel] has done . . . an excellent job on your behalf to arrange for a plea in this range. The evidence in this case was overwhelming. It is a first-degree offense. I am not going to reduce the sentence any further. And although a more substantial

> sentence could be imposed, I'm not going to do that either. I'm going to honor the plea.

The trial court found aggravating factors three, six, and nine present and no mitigating factors.

Defendant did not file a direct appeal, but in July 2019, filed a pro se petition for PCR, claiming ineffective assistance of counsel. In March 2020, defendant's PCR counsel claimed trial counsel was ineffective for failing to seek a Wade hearing to challenge the admissibility of the show-up identification and for failing to move to dismiss the carjacking count in the indictment. The trial court denied defendant's petition without an evidentiary hearing, ruling trial counsel was not ineffective because the police dashcam video demonstrated the procedures utilized for the show-up identification were not inherently suggestive, and any motion for a Wade hearing would have been unsuccessful. Additionally, given the substantial evidence of defendant's guilt, any motion to dismiss the carjacking count in the indictment would also have been denied.

In reviewing a PCR petition, we afford deference to the PCR court's findings of fact, but our interpretation of the law is de novo. State v. Nash, 212 N.J. 518, 540-41 (2013). Pursuant to Strickland v. Washington, 466 U.S. 668 (1984), which our Supreme Court adopted in State v. Fritz, 105 N.J. 42 (1987), a defendant is entitled to PCR for ineffective assistance of counsel if he proves

"defendant's counsel's performance was deficient[,]" and counsel's "deficient performance prejudiced the defense." Fritz, 105 N.J. at 52 (quoting Strickland, 466 U.S. at 687). We provide counsel the benefit of a "strong presumption" of reasonableness when evaluating its performance. Ibid. (quoting Strickland, 466 U.S. at 689).

When a guilty plea is involved, the defendant must prove "a reasonable probability [exists] that, but for counsel's errors, [the defendant] would not have [pleaded] guilty and would have insisted on going to trial." State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009) (second alteration in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)). When PCR is denied without an evidentiary hearing, we review that decision for abuse of discretion. State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013).

Defendant's argument counsel was ineffective for failing to make a motion for a Wade hearing is unavailing. A Wade hearing is conducted to evaluate the admissibility of an out-of-court identification. State v. Micelli, 215 N.J. 284, 288 (2013). "The inquiry at a Wade hearing is whether the identification procedure presented a 'very substantial likelihood of irreparable misidentification' to undermine the reliability of the result as a genuine product of the eyewitness's memory rather than of improper influence." State v. Arteaga,

__ N.J. __ (App. Div. 2023) (slip op. at 31) (quoting State v. Henderson, 208 N.J. 208, 289 (2011)). If the defendant makes this preliminary showing, the burden shifts to the State to demonstrate the witness is reliable. Id. at 289.

Here, the PCR court correctly found a request for a Wade hearing would have been fruitless. See State v. Worlock, 117 N.J. 596, 625 (1990) ("The failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel."). The record and video recording of the identification display no indicia of suggestiveness. The area is well-lit and the audio recording of the conversation between the officer and the victim is clear. Prior to the victim making the identification, the officer read a thorough cautionary statement to the victim. Further, the show-up identification occurred less than two hours after the incident, each identification took place within minutes of each other, and the victim was quick to positively identify defendant. See Henderson, 208 N.J. at 290; see also State v. Wilson, 362 N.J. Super. 319, 327 (App. Div. 2003) ("So-called 'show up' or one-on-one identifications made within a reasonably short time at the scene of the crime are permissible under the Wade doctrine."). A show-up identification in and of itself "is not so impermissibly suggestive to warrant" a Wade hearing. State v. Herrera, 187 N.J. 493, 504 (2006).

Defendant has also failed to show there is a "reasonable probability" he would have rejected this lenient plea. See O'Donnell, 435 N.J. Super. at 369-70 (quoting Hill, 474 U.S. at 59). Defendant was sentenced to eleven years, despite being charged with seven counts under the indictment — including two first-degree offenses — and any sentences he received under the other indictments were to run concurrent to the carjacking sentence. The trial court noted the overwhelming evidence of defendant's guilt, irrespective of the show-up identification. Following the crash, defendant was seen in the vehicle before fleeing, the victim's debit card was found on his person, and a switchblade was found in the vehicle where he was sitting.

We also reject defendant's argument trial counsel was ineffective for failing to move to dismiss the first-degree carjacking charge. He contends because the victim was not physically inside the vehicle and defendant was not the driver of the car after it was stolen, he could not have been found guilty of carjacking within the meaning of N.J.S.A. 2C:15-2(a)(2). N.J.S.A. 2C:15-2(a)(2), does not require the victim of a carjacking to be in the vehicle when the robbery occurs. Rather, the victim need only be "in control" of the vehicle at the time it was taken. N.J.S.A. 2C:15-2(a)(2). Whether the victim is physically inside the vehicle is irrelevant, and we have previously declined to recognize

such an exception. See State v. Williams, 289 N.J. Super. 611, 616 (App. Div. 1996). The victim here was clearly in control of his vehicle and "within a heightened zone of danger with relationship to the subject vehicle" because defendants threatening him with a knife and what he perceived to be a firearm. State v. Jenkins, 321 N.J. Super. 124, 131-32 (App. Div. 1999). Defendant's contention he could not have been found guilty of carjacking because he was not driving the vehicle is similarly baseless.

Defendant raises several issues not raised to the trial court in his PCR. Although we may decline to consider any claim not raised before the PCR court if it does not involve jurisdictional issues or "matters of great public interest," see State v. Robinson, 200 N.J. 1, 20 (2009) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)), we address these claims briefly for the sake of completeness.

First, defendant argues trial counsel was ineffective for failing to investigate a possible voluntary intoxication defense. Defendant asserts because he was high on PCP at the time of the offense, he did not know what he was doing, and counsel's failure to utilize this defense constituted deficient performance, which mandates vacation of his plea. While "[v]oluntary intoxication is a defense to a purposeful or knowing crime," State v. R.T., 411

N.J. Super. 35, 46 (App. Div. 2009); see N.J.S.A. 2C:15-2(a)(2), defendant's argument is a mere bald assertion, and is therefore not cognizable for PCR. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999) ("[W]hen a petitioner claims his trial attorney inadequately investigated his case, he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification.").

Similarly, defendant's claim counsel was ineffective for failing to pursue an insanity defense is without merit. Defendant has not bolstered his claim with any factual or medical support and advances the conclusory argument he should be shielded from criminal liability due to a diagnosis of schizophrenia. See Cummings, 321 N.J. Super. at 170. The record belies any argument N.J.S.A. 2C:4-1 would apply because defendant admitted at the plea hearing the medication he is taking allowed him to comprehend the proceedings.

Next, defendant argues, again for the first time on appeal, counsel was ineffective at sentencing for failing to advocate for mitigating factors and a lesser sentence. We disagree. Although "the failure to present mitigating evidence or argue for mitigating factors" may establish ineffective assistance of counsel, defendant's claim cannot succeed because he has not suffered any

prejudice. State v. Hess, 207 N.J. 123, 154 (2011). As noted by the trial court, defendant received a highly favorable sentence.

Because defendant has not established a prima facie case of ineffective assistance of counsel, we decline to disturb the PCR court's decision to not hold an evidentiary hearing. A defendant may seek to show an evidentiary hearing is warranted to develop the factual record in connection with an ineffective assistance claim. State v. Preciose, 129 N.J. 451, 462 (1992). The PCR court should grant an evidentiary hearing only if: (1) a defendant is able to prove a prima facie case of ineffective assistance of counsel; (2) there are material issues of disputed fact that must be resolved with evidence outside of the record; and (3) the hearing is necessary to resolve the claims for relief. Ibid.; R. 3:22-10(b). As we have noted, to establish a prima facie case of ineffective assistance of counsel, a defendant "must do more than make bald assertions that" his counsel's performance was substandard. State v. Porter, 216 N.J. 343, 355 (2013) (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)). "Rather, [a] defendant must allege specific facts and evidence supporting his allegations." Ibid. Moreover, "a defendant is not entitled to an evidentiary hearing if the 'allegations are too vague, conclusory, or speculative.'" Ibid. (quoting State v. Marshall, 148 N.J. 89, 158 (1997)). Defendant's factual claims are belied by the

record. Defendant did not present a prima facie case and an evidentiary hearing was not required.

Affirmed.