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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3371-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KAREEM T. TILLERY, a/k/a
KAREEM ALI TILLERY,
KAREEM A. TILLERY, KAREEM
J. TILLERY, KARIEM TILLERY,
KARIM TILLERY, KARIEM A.
TILLERY, KAREEM R. JONES,
and KAREEM TILLERY-JONES,

Defendant-Appellant.

Submitted March 13, 2023 – Decided April 10, 2023

Before Judges Whipple and Mawla.

On appeal from the Superior Court of New Jersey,
Law Division, Essex County, Indictment No. 14-06-
0084.

Joseph E. Krakora, Public Defender, attorney for
appellant (Mark Zavotsky, Designated Counsel, on the
brief).

Matthew J. Platkin, Attorney General, attorney for respondent (Sarah D. Brigham, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Kareem T. Tillery appeals from a May 3, 2021 denial of post-conviction relief (PCR). Defendant was convicted of two counts from an eight-count indictment: second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b); and fourth-degree unlawful disposition of a weapon, N.J.S.A. 2C:39-9(d).

At sentencing, defendant was classified as a persistent offender based on his record and sentenced to the maximum extended-term sentence on the possession charge—twenty years. We affirmed defendant's conviction and sentence in a direct appeal where we detailed the facts and procedural history. The Supreme Court affirmed our decision. State v. Tillery, 238 N.J. 293 (2019). Defendant subsequently brought the current petition, arguing ineffective assistance of counsel. The PCR court denied relief.

On appeal, defendant argues his trial counsel was ineffective because she failed to object to the court's consideration of his status as a "sovereign

citizen"¹ in finding aggravating factors; failed to object to the prosecutor's closing statement; and failed to file a motion to recuse.

We only repeat the history relevant to the issues raised.

The jury found defendant guilty of second-degree unlawful possession of a handgun as well as fourth-degree unlawful disposition of a weapon, and was unable to reach a unanimous verdict on six remaining charges. At sentencing, the court found the following aggravating factors: the risk the defendant will commit another offense, N.J.S.A. 2C:44-1(a)(3); the extent of defendant's prior criminal record and the seriousness of the offenses of which he has been convicted, N.J.S.A. 2C:44-1(a)(6); and the need for deterring the defendant and others from violating the law, N.J.S.A. 2C:44-1(a)(9).

When he found aggravating factor nine, the judge stated defendant identified as a sovereign citizen. Prior to the start of trial, another judge had issued an order rescinding defendant's application to proceed pro se. Defendant wrote to the first judge, stating he did "not wish to be adjudicated

¹ "Sovereign citizens . . . believe that even though they physically reside in this country, they are separate or 'sovereign' from the United States. As a result, they believe they don't have to answer to any government authority, including courts, taxing entities, motor vehicle departments, or law enforcement." *Domestic Terrorism, The Sovereign Citizen Movement*, FEDERAL BUREAU OF INVESTIGATION (Apr. 13, 2010) https://archives.fbi.gov/archives/news/stories/2010/april/sovereigncitizens_041310/domestic-terrorism-the-sovereign-citizen-movement.

under this commercial law jurisdiction," is "not a corporate fiction" and is "sovereign." The first judge sent this letter to the trial judge. At sentencing, upon noting the sovereign citizen issue in finding aggravating factor nine, the following exchange occurred:

[THE COURT]: [T]here's been a more fundamental impediment imposed by the defendant that in correspondence to this court, . . . he communicated that he was, in fact, a sovereign citizen, that he was a [--]

[DEFENDANT]: I never said I was sovereign citizen.

THE COURT: [--] a separate, --

[DEFENDANT]: I didn't say that.

THE COURT: -- a nation unto himself.

[DEFENDANT]: Do you --

THE COURT: And, therefore, --

[DEFENDANT]: Do you understand?

THE COURT: -- not subject to either personal or subject matter jurisdiction of this court. The court views that fact . . . as [portending] strongly that the defendant --

[DEFENDANT]: He can't --

THE COURT: -- will not --

[DEFENDANT]: He can't declare that --

THE COURT: -- comply with the laws --

[DEFENDANT]: -- I'm a sovereign citizen.

THE COURT: -- of the state as he finds himself or he views himself as being not subject to those laws. . . . [I]t is his right . . . to maintain that he is a separate state, but there's consequences of it, and that's applied through the sentencing here.

In a letter supplementing his sentencing reasons, the trial judge reiterated defendant had previously sent a letter to the court indicating he—as a sovereign citizen—considered himself not subject to the court's jurisdiction. This supported a finding defendant believed himself to be a sovereign citizen, which in turn supported the application of aggravating factors.

The judge found no mitigating factors. He determined an extended term was appropriate, and sentenced defendant to the maximum term of twenty years with a ten-year period of parole ineligibility pursuant to the Graves Act, N.J.S.A. 2C:43-6, for the second-degree possession charge, and a concurrent eighteen-month sentence for the fourth-degree disposition charge.

Defendant filed a pro se PCR petition on September 5, 2019, arguing he received ineffective assistance of counsel. PCR counsel was assigned and filed a brief in support of his petition. Defendant unsuccessfully moved to have the trial judge recuse himself from the PCR proceeding.

The trial judge heard defendant's petition on April 29, 2021, as well as the motion for recusal. He denied relief. This appeal followed.

"[PCR] 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)). It provides "a built-in 'safeguard that ensures that a defendant was not unjustly convicted.'" State v. Nash, 212 N.J. 518, 540 (2013) (quoting State v. McQuaid, 147 N.J. 464, 482 (1997)). The standard of review depends on the errors alleged. An appellate court "defer[s] to the PCR court's factual findings, given its opportunity to hear live witness testimony, and . . . 'uphold[s] the PCR court's findings that are supported by sufficient credible evidence in the record.'" State v. Gideon, 244 N.J. 538, 551 (2021) (quoting Nash, 212 N.J. at 546). However, we review a PCR court's interpretation of the law de novo. Nash, 212 N.J. at 540-41.

To succeed on an ineffective assistance of counsel claim, a defendant must satisfy the two-part test found in Strickland v. Washington:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

[466 U.S. 668, 687 (1984); see also State v. Fritz, 105 N.J. 42, 52 (1987) (adopting Strickland).]

When we consider the first prong, there is a strong presumption that counsel's performance was reasonable. Pierre, 223 N.J. at 578-79. Prejudice under the second prong exists where "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.

Defendant argues his trial counsel's performance was deficient because she did not challenge the court's application of aggravating factors nine, the need for deterring the defendant and others from violating the law, N.J.S.A. 2C:44-1(a)(9), or three, the risk that the defendant will commit another offense, N.J.S.A. 2C:44-1(a)(3). The court partially based its finding of these factors on defendant's alleged identification as a sovereign citizen.

The sentencing transcript shows defendant denied being a sovereign citizen. The PCR court found counsel's failure to object at his urging was deficient performance, and we agree. However, defendant did not demonstrate the failure to object to the court's categorization of defendant as a sovereign

citizen prejudiced him, and thus he cannot meet the second prong of Strickland.

When the sentencing judge found aggravating factors three and nine, he also considered defendant's prior record and the fact even probationary supervision did not deter him from misconduct. For factor nine, the judge noted "defendant at no time . . . acknowledged responsibility for his conduct in any [of the] sales."

Even if defendant's trial counsel had objected to the court's consideration of his status as a sovereign citizen, the sentencing court still would have found these aggravating factors. Moreover, defendant's contention trial counsel's objection "would have likely resulted in a sentence that was not at the maximum end of the range allowable" is speculative; it does not show "a reasonable probability . . . the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

Defendant received an extended sentence because he met the statutory requirements to be categorized as a "persistent offender[,]" under N.J.S.A. 2C:44-3(a). His trial counsel conceded this at sentencing and defendant does not deny it on appeal. The court had the discretion to sentence him to a maximum of twenty years on the possession charge. See N.J.S.A. 2C:39-5(b).

Nothing suggests the court's assessment of the factors was devoid of credible evidence or reasonableness. To the contrary, the Supreme Court affirmed defendant's sentence, and approved of the trial court's weighing of the aggravating and mitigating factors. Tillery, 238 N.J. at 327-28 ("[T]he trial court properly considered defendant's criminal record in deciding defendant's statutory eligibility for an extended term, and in weighing aggravating and mitigating factors to determine that such a term was warranted.").

We also reject defendant's argument that at trial, the prosecutor gave a closing statement that included impermissible interjection of her "personal beliefs" and opinions, and his trial counsel's failure to object was deficient performance.

Prosecutors are "afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented." State v. McNeil-Thomas, 238 N.J. 256, 275 (2019) (quoting State v. Frost, 158 N.J. 76, 82 (1999)). However, it is true a prosecutor "cannot express a personal opinion regarding the credibility of a defendant's testimony" State v. Jenkins, 299 N.J. Super. 61, 70 (App. Div. 1997). The prosecutor's closing statement here presented no such risk. She asked the jury to consider the evidence and find certain inferences, via phrases such as: "I submit," "I invite," "I ask you," and "I encourage you[.]" Nothing was

indicative of her opinion, much less the defendant's credibility. The prosecutor's summation was "within the evidence and the legitimate inferences therefrom" McNeil-Thomas, 238 N.J. at 275 (quoting R.B., 183 N.J. at 330).

Therefore, defendant's trial counsel's "failure to object" was no failure. Her performance was not deficient—and certainly not to the point she "was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Strickland, 466 U.S. at 687.

We also reject the argument the PCR court erred by considering the weight of the evidence against defendant in evaluating the second prong of Strickland. The Supreme Court in Strickland said, in addressing "whether there is a reasonable probability that, absent [counsel's] errors, the factfinder would have had a reasonable doubt respecting guilt[.]" the court "hearing an ineffectiveness claim must consider the totality of the evidence before the . . . jury." 466 U.S. at 695. The PCR court did just that, and found "the evidence of guilt was overwhelming."

Lastly, defendant argues his trial counsel was ineffective for failing to move to recuse the trial judge from presiding over defendant's PCR proceeding asserting the judge held "an unfair bias against him" at sentencing.

The standard for whether a recusal is warranted is put forth in In re Reddin: "Would an individual who observes the judge's personal conduct have a reasonable basis to doubt the judge's integrity and impartiality?" 221 N.J. 221, 234 (2015). A motion to recuse is "made directly to the judge presiding over the case[,]" and the decision of whether recusal is appropriate is left to that judge's discretion. State v. McCabe, 201 N.J. 34, 45 (2010).

Defendant asserts "per se questions of impropriety" here because the sentencing decision was influenced by an outside source. We are unpersuaded.

The court did not rely solely on an "outside source" for this information. Defendant made clear at trial, through his attorney, he does not recognize the Constitution and the authority of the State of New Jersey. Moreover, at sentencing, the only constraint on what evidence may be considered is that the evidence must be "competent" and "credible. . . ." State v. Roth, 95 N.J. 334, 363 (1984). Here, the letter forwarded by the first judge was written by defendant and signed in, according to the PCR court, defendant's red thumbprint. It was credible and competent evidence which the court was permitted to consider at sentencing.

Additionally, whether recusal is appropriate is within the discretion of the trial judge. Thus, even if we found failure to move to recuse the trial judge to be deficient performance, we cannot say it prejudiced defendant. If a

motion to recuse were successful, and a judge without information that defendant was a sovereign citizen presided, defendant would still meet the statutory requirements of a persistent offender, and thus be eligible for the extended-term sentence. Given defendant's extensive criminal history and the seriousness of the crime, there is no reasonable probability his sentence would have been any different. See Tillery, 238 N.J. at 327.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION