SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0008-23

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DENZELL SUITT,

Defendant-Appellant.

———————————————

Submitted October 16, 2024 – Decided January 2, 2025

Before Judges Susswein and Perez Friscia.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 19-02-0197.

Helmer, Conley & Kasselman, PA, attorneys for appellant (Patricia B. Quelch, of counsel and 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

This matter returns to us following our limited remand. State v. Suitt, No. A-2971-20 (App. Div. June 10, 2022). Defendant Denzell Suitt was convicted at trial of official misconduct and theft. We granted leave for the State to cross-appeal the trial court's decision to waive the two-year mandatory term of parole ineligibility prescribed under N.J.S.A. 2C:43-6.5(a) and (b)(17). Ibid. We determined the trial court abused its discretion by imposing a noncustodial probationary sentence and remanded for resentencing. The trial court on remand sentenced defendant to three years imprisonment. Defendant now asks us to vacate his custodial sentence and reinstate the original probationary sentence. He argues the custodial sentence constitutes double jeopardy. He also contends for the first time that he received ineffective assistance of counsel. In the alternative, defendant contends that he is entitled to credit for time served while on probation. After carefully reviewing the record in light of the parties' arguments and governing legal principles, we affirm.

I.

The facts adduced at trial and the procedural history leading up to the State's motion for leave to appeal the trial court's waiver of the mandatory prison sentence are thoroughly recounted in our prior opinion and need not be repeated here. As noted, we remanded for resentencing in accordance with N.J.S.A.

2C:43-6.5(a) and (b)(17). Suitt, slip op. at 2. We also concluded defendant did not overcome the presumption of imprisonment set forth in N.J.S.A. 2C:44-1(d), explaining:

> defendant has not shown any such injustice sufficient to override the need to deter police officers from exploiting vulnerable citizens during motor vehicle stops. Nor are we convinced that defendant's personal background is so unusual and idiosyncratic . . . as to justify an exception to the mandatory minimum sentence.
>
> [Id. at 33 (citing State v. Jabbour, 118 N.J. 1, 7 (1990)).]

In accordance with our remand instructions, on February 9, 2023, the trial court resentenced defendant to an aggregate sentence of three years imprisonment with a two-year period of parole ineligibility. On defendant's fourth-degree theft conviction, the trial court imposed a concurrent term of eighteen months. The trial court awarded defendant one day of jail credit, reimposed the fines and penalties, and informed defendant that any payments he had already made would not need to be paid again.

This appeal followed. Defendant raises the following contentions for our consideration:

> POINT I
>
> DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON THE

FOLLOWING: FAILURE TO EXPLAIN SERVING THE PROBATIONARY SENTENCE DURING THE STATE'S APPEAL WAS A POSSIBLE WAIVER OF ANY DOUBLE JEOPARDY CLAIM; FAILURE TO FILE AN APPEAL OF THE CUSTODIAL SENTENCE AS REQUESTED; AND, FAILURE TO RAISE BEFORE THE RESENTENCING COURT THE ISSUE OF DOUBLE JEOPARDY OR CREDITS FOR TIME SERVED ON PROBATION.

POINT II

COUNSEL'S FAILURE TO ADVISE THE DEFENDANT AS TO THE CONSEQUENCES OF COMMENCING SERVICE OF A STAYED SENTENCE ENTITLES THE DEFENDANT TO REINSTATEMENT OF THE PROBATIONARY SENTENCE ORIGINALLY IMPOSED ON GROUNDS OF DOUBLE JEOPARDY.

POINT III

ALTERNATIVELY, DEFENDANT IS ENTITLED TO CREDIT FOR TIME SERVED ON HIS PROBATIONARY SENTENCE AND COUNSEL'S FAILURE TO REQUEST CREDIT CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

II.

We first consider defendant's contention that his double jeopardy rights were violated. The Double Jeopardy Clauses of the federal and New Jersey Constitutions provide that no person shall be tried twice for the same criminal offense. U.S. Const. amend. V; N.J. Const. art. I, ¶ 11. The Supreme Court "has consistently interpreted the State Constitution's double-jeopardy protection as

coextensive with the guarantee of the federal Constitution." State v. Miles, 229 N.J. 83, 92 (2017) (citing State v. Schubert, 212 N.J. 295, 304 (2012)). "The Double Jeopardy Clause contains three protections for defendants." Ibid. "It protects against (1) 'a second prosecution for the same offense after acquittal,' (2) 'a second prosecution for the same offense after conviction,' and (3) 'multiple punishments for the same offense.'" Ibid. (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

In State v. Thomas, we explained that "[w]hen the State appeals a sentence, it implicates 'the prohibitions against multiple punishment incorporated in the double jeopardy provisions of the Federal and State Constitutions.'" 459 N.J. Super. 426, 433 (App. Div. 2019) (quoting State v. Johnson, 376 N.J. Super. 163, 171 (App. Div. 2005)).

In State v. Sanders, our Supreme Court stressed that "the touchstone of the double jeopardy analysis lies in the expectation of finality that a defendant vests in his sentence." 107 N.J. 609, 619-20 (1987) (applying the analysis set forth in United States v. DiFrancesco, 449 U.S. 117, 136, 138-39 (1980)). See also State v. Rodriguez, 97 N.J. 263, 270 (1984) (holding that "the commencement of sentence coupled with the defendant's expectation of finality

in his original underlying conviction and sentence" is what bars that sentence from being increased (emphasis added)).

A defendant has no expectation of finality in their sentence when they know the State can appeal the sentence imposed and the State has yet to exhaust all avenues of appellate review. See DiFrancesco, 449 U.S. at 136; Sanders, 107 N.J. at 619 (noting that because the defendant in DiFrancesco "was charged with knowledge of the statute's appeal provisions [even if not specifically advised of them], he could not have had a [legitimate] 'expectation of finality' in his sentence until all avenues of appellate review were exhausted").

Importantly, N.J.S.A. 2C:43-6.5(c)(3) explicitly provides that when a judge waives the mandatory minimum sentence prescribed for persons convicted of official misconduct under N.J.S.A. 2C:43-6.5(a), "such sentence shall not become final for 10 days in order to permit the appeal of the sentence by the prosecution." Furthermore, in this instance, we need not rely on an assumption that defendant was on notice of the ten-day stay provision because it is set forth in the statute. Here, solidifying defendant's notice that his imposed sentence was not final, the judge explicitly told defendant on the record that his sentence was being stayed for ten days so the State could determine what action it wanted to take regarding an appeal. See Sanders, 107 N.J. at 619-20 (considering, in

expectation-of-finality analysis, that the judge had explicitly advised defendants that their sentences would be stayed to permit State to appeal). In these circumstances, we conclude defendant could not have had a legitimate expectation of finality in his original probation sentence pending the outcome of the State's appeal, and, therefore, his newly-minted double jeopardy argument fails.

III.

We next address defendant's ineffective assistance of counsel claims. Defendant contends both his trial and resentencing attorneys rendered ineffective assistance with respect to his rights against double jeopardy. Defendant relies on State v. Allah, for the proposition that the "[f]ailure to raise the defense of double jeopardy constitutes ineffective assistance of counsel." 170 N.J. 269, 285 (2002).

Specifically, defendant argues he "began serving his probationary sentence and was not advised [by his counsel] that by doing so, he arguably waived his right to a double jeopardy claim." He also contends that had his resentencing counsel "argue[ed] that double jeopardy barred the imposition of a custodial sentence after the probationary sentence started[,]"

> the court may have reinstated the probationary sentence. It is also possible that the court would have

> followed the remand orders of the Appellate Division. However, it is just as likely that the court would have granted a stay of the custodial sentence to permit defendant to appeal this valid issue without having to begin the custodial sentence. The defendant would have continued serving the probationary sentence.

Defendant's ineffective assistance of counsel arguments presuppose that his double jeopardy rights were violated. But as we concluded in Section II, his double jeopardy rights were not violated because he could not have had the required expectation of finality in the probationary sentence that was originally imposed. That conclusion is fatal to defendant's ineffective assistance contentions.

New Jersey courts follow the two-part test the United States Supreme Court articulated in Strickland v. Washington, 466 U.S. 668, 687 (1984). See State v. Fritz, 105 N.J. 42, 58 (1987). "First, the defendant must show that counsel's performance was deficient." State v. Gideon, 244 N.J. 538, 550 (2021) (quoting Strickland, 466 U.S. at 687). "Second, the defendant must have been prejudiced by counsel's deficient performance." Ibid. (quoting Strickland, 466 U.S. at 687).

To meet the first prong of the Strickland/Fritz test, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466

U.S. at 687. Reviewing courts indulge in "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. "A court evaluating a claim of ineffective assistance of counsel must avoid second-guessing defense counsel's tactical decisions and viewing those decisions under the 'distorting effects of hindsight.'" State v. Marshall, 148 N.J. 89, 157 (1997) (quoting Strickland, 466 U.S. at 689).

The second Strickland prong requires the defendant show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. Put differently, counsel's errors must create a "reasonable probability" that the outcome of the proceedings would have been different if counsel had not made the errors. Id. at 694. This "is an exacting standard." Gideon, 244 N.J. at 551 (quoting State v. Allegro, 193 N.J. 352, 367 (2008)). "Prejudice is not to be presumed," rather the defendant must "affirmatively prove" it. Ibid. (first citing Fritz, 105 N.J. at 52; and then quoting Strickland, 466 U.S. at 693).

We also acknowledge that as a general matter, "ineffective assistance of counsel claims are not entertained on direct appeal 'because such claims involve allegations and evidence that lie outside the trial record.'" See Allah, 170 N.J. at 285 (quoting State v. Preciose, 129 N.J. 451, 460 (1992)). See also State v.

Mohammed, 226 N.J. 71, 81 n.5 (2016) (declining to address an ineffective-assistance claim raised first on appeal because such was "better suited for review on [PCR]"). The more appropriate forum to raise such claims is in a petition for post-conviction relief where an adequate, reviewable record can be developed. See State v. Miller, 216 N.J. 40, 70 n.7 (2013); State v. McDonald, 211 N.J. 4, 29-30 (2012).

In this instance, the record on appeal does not include, for example, certifications or testimony as to any discussions between defendant and his trial and resentencing attorneys concerning the State's authority and intention to appeal the probationary sentence. Furthermore, because defendant raises his ineffective assistance claims for the first time in this appeal, the trial court did not have an opportunity to make findings with regard to the Strickland/Fritz test. However, because we conclude that defendant cannot establish a double jeopardy violation for the reasons explained in Section II, we see no need to put off addressing defendant's ineffective assistance contentions pending a petition for post-conviction relief.

Counsel did not provide ineffective assistance under the first prong of the Strickland/Fritz test by failing to make a constitutional argument that lacked merit. See State v. Worlock, 117 N.J. 596, 625 (1990) ("The failure to raise

unsuccessful legal arguments does not constitute ineffective assistance of counsel." (first citing Strickland, 466 U.S. at 688; and then citing Fritz, 105 N.J. at 52)).

Relatedly, even if counsel had raised the argument of a double jeopardy violation at the resentencing proceeding, that would not have created a "reasonable probability" that the trial court would have reimposed a probationary sentence given the instructions we gave to the trial court. Defendant has thus also failed to satisfy the second prong of the Strickland/Fritz test. See Strickland, 466 U.S. at 694; Fritz, 105 N.J. at 52.

IV.

We turn to consider defendant's alternative contention that he is "entitled to some form of credit [towards his prison sentence] for the supervised time he already served on probation." He asserts that the fundamental fairness doctrine applies because the interests are compelling. We are unpersuaded.

"The fundamental fairness doctrine is an integral part of the due process guarantee of Article I, Paragraph 1 of the New Jersey Constitution, which protects against arbitrary and unjust government action." State v. Njango, 247 N.J. 533, 537 (2021); see Doe v. Poritz, 142 N.J. 1, 108 (1995). "The 'one common denominator' in our fundamental fairness jurisprudence is 'that

someone was being subjected to potentially unfair treatment and there was no explicit statutory or constitutional protection to be invoked.'" Id. at 548-49 (quoting Doe, 142 N.J. at 109). The doctrine "promotes the values of 'fairness and fulfillment of reasonable expectations in the light of the constitutional and common law goals.'" State v. Vega-Larregui, 246 N.J. 94, 132 (2021) (quoting State v. Saavedra, 222 N.J. 39, 68 (2015)). Courts apply the fundamental fairness doctrine "'sparingly' and only where the 'interests involved are especially compelling.'" Saavedra, 222 N.J. at 67 (quoting Doe, 142 N.J. at 108).

Defendant's reliance on State v. Williams, 167 N.J. Super. 203, 206 (App. Div. 1979), aff'd, 81 N.J. 498, 500 (1980), is misplaced. In Williams, we credited time spent on probation that was improperly ordered because it constituted multiple punishments for the same offense. 167 N.J. Super. at 206-08. The defendant had to complete an in-patient drug-rehabilitation program and was subject to probation restrictions while the State's appeal was pending for years. Id. at 205. Furthermore, the State failed to apply to stay the sentence. Ibid.

The Supreme Court affirmed the award of credit for the defendant's time served on probation against the prison sentence that was eventually imposed.

State v. Williams, 81 N.J. 498, 500 (1980). The Court reasoned that "[t]he interest of justice would not be served by denying the defendant credit for his probation, particularly in view of the fact that during that time he successfully completed the drug rehabilitation program." Ibid.

The circumstances in Williams are starkly different from the situation now before us. Here, defendant was not in a residential program. The record shows he performed 9.35 hours of community service per month. He had one office visit to his probation officer and seven telephonic check-ins. He also continued to own his restaurant. We are not persuaded the interests of justice require that he be awarded with jail credit for time served on probation.

To the extent we have not specifically addressed them, any remaining arguments raised by defendant lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

Affirmed.