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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1139-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ORLANDO HARE,

Defendant-Appellant.

Submitted November 7, 2016 – Decided December 9, 2016

Before Judges Nugent and Currier.

On appeal from the Superior Court of New
Jersey, Law Division, Mercer County,
Indictment No. 07-03-0411.

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

Angelo J. Onofri, Acting Mercer County
Prosecutor, attorney for respondent (Brett A.
Berman, Special Deputy Attorney General/
Acting Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant Orlando Hare appeals from the denial of his petition for post-conviction relief (PCR) without an evidentiary hearing. After reviewing the record in light of the applicable legal principles, we affirm.

The salient facts are as follows. After defendant made a right turn without signaling, police officers turned on their lights and sirens to initiate a motor vehicle stop. Although defendant initially began to pull over to the curb, he failed to stop, and instead continued to drive down the street. A second police car attempted to pull over defendant when the officers observed him make a left turn at a stop sign without stopping. Defendant continued to disregard the sirens as the officers pursued his car. Two more officers, in a third police car, took over the pursuit as defendant drove through several towns. Although defendant eventually exited his car with his hands in the air, he then began to run; he was subsequently caught and arrested.

Following a jury trial, defendant was convicted of second degree eluding, N.J.S.A. 2C:29-2(b), and sentenced to a ten-year term of incarceration with a four-year period of parole ineligibility. We affirmed defendant's conviction and sentence in State v. Hare, No. A-4875-08 (App. Div. June 18), certif. denied, 204 N.J. 42 (2010).

Defendant filed a PCR petition pro se, and thereafter, a brief was filed by assigned counsel. Defendant asserted numerous allegations that his trial counsel was constitutionally ineffective regarding pre-trial preparation and trial and appellate performance. In a written decision rendered on April 11, 2014, the PCR judge¹ discussed each of defendant's arguments, applying the legal standards under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and State v. Fritz, 105 N.J. 42 (1987), and denied the petition.

On appeal, defendant argues that the PCR judge erred in not affording him an evidentiary hearing. He specifically contends that trial counsel was ineffective for: (1) failing to present a necessity defense at trial; (2) failing to dispute that the initial motor vehicle stop was illegal; and (3) conceding defendant's guilt of the eluding charge during summation.

The standard for determining whether counsel's performance was ineffective for purposes of the Sixth Amendment was formulated in Strickland v. Washington, supra, 466 U.S. at 668, 104 S. Ct. at 2052, 80 L. Ed. 2d at 674, and adopted by our Supreme Court in State v. Fritz, supra, 105 N.J. at 42. In order to prevail on a claim of ineffective assistance of counsel, defendant must meet

¹ The judge who handled the PCR petition was not the same judge who presided over the trial.

the two-prong test of establishing both that: (1) counsel's performance was deficient and he or she made errors that were so egregious that counsel was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution; and (2) the defect in performance prejudiced defendant's rights to a fair trial such that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, supra, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 2068, 80 L. Ed. 2d at 693, 698.

We are satisfied from our review of the record that defendant failed to meet his burden of proof as to a showing of ineffectiveness of trial counsel within the Strickland-Fritz test.

Defendant contends that he failed to stop when signaled to do so by the first set of police officers as he recognized one of the pursuing officers as having engaged in prior misconduct and civil rights violations. Defendant claimed to have been previously assaulted by other police officers, and therefore, he asserts he was in fear for his safety. As a result, defendant argues trial counsel should have presented the defense of necessity. We disagree.

In asserting the affirmative defense of necessity, defendant bears the burden of proof to produce evidence supporting the

defense. See N.J.S.A. 2C:1-13(b)(1). Defendant has not met his burden. He not only failed to stop for the first vehicle pursuing him, but also for the second and third marked police vehicles signaling through lights and sirens for him to pull over.

As the PCR judge stated: "[T]he reasons articulated by [defendant], fear of harm or planting of contraband, cannot serve as [a] legal defense to elude and lead six police officers in a twenty minute plus chase through the residential neighborhoods of Trenton and Ewing Township. There is no indication that [defendant] was seeking a safe haven due to his alleged fear of harm or the planting of contraband."

We briefly address defendant's argument that trial counsel was ineffective for failing to challenge the initial motor vehicle stop as pretextual. It is well established that "[a] person has no constitutional right to use an improper stop as justification to commit the new and distinct offense of . . . eluding . . . thus precipitating a dangerous chase that could have deadly consequences." State v. Crawley, 187 N.J. 440, 459 (2006). Defendant was required to stop his vehicle immediately upon the police officer's signal, regardless of whether the stop was legal or illegal. See State v. Seymour, 289 N.J. Super. 80, 87 (App. Div. 1996).

We conclude that the remainder of defendant's arguments lack sufficient merit to warrant discussion in a written opinion. R.

2:11-3(e)(2).

Affirmed.

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



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