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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0335-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROBERT I. TANNER,

Defendant-Appellant.

Submitted December 5, 2017 – Decided December 19, 2017

Before Judges Yannotti and Carroll.

On appeal from Superior Court of New Jersey,
Law Division, Somerset County, Indictment No.
10-09-0504.

Joseph E. Krakora, Public Defender, attorney
for appellant (Louis H. Miron, Designated
Counsel, on the brief.)

Michael H. Robertson, Somerset County
Prosecutor, attorney for respondent (Perry
Farhat, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Robert I. Tanner appeals from a September 8, 2016
order denying his petition for post-conviction relief (PCR)

without an evidentiary hearing. Defendant maintains his plea counsel rendered ineffective assistance. We affirm.

Defendant and his brother, Joseph Tanner, were jointly charged in Somerset County Indictment No. 10-09-0504 with first-degree possession of cocaine with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(1) (count one); second-degree possession of heroin with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(2) (count two); and second-degree conspiracy to possess a controlled dangerous substance with intent to distribute, N.J.S.A. 2C:35-5(a)(1), N.J.S.A. 2C:35-5(b)(1), and N.J.S.A. 2C:5-2 (count three). Defendant was also separately charged with four counts of third-degree distribution of cocaine, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3) (counts four, five, six, and seven); and one count of third-degree distribution of cocaine within 1000 feet of a school, N.J.S.A. 2C:35-5(a) and N.J.S.A. 2C:35-7.

Defendant moved to suppress evidence seized pursuant to a search warrant that was issued for his residence, detached garage, automobile, and his person. He contended the supporting affidavit failed to (1) establish probable cause for the issuance of the warrant; and (2) describe the place to be searched with sufficient particularity because it inaccurately described the home as a single-family residence instead of a multi-family residence.

Following oral argument on March 6, 2012, the court denied the motion in an order filed on March 13, 2012.

In a written opinion, the motion judge found the search warrant for the residence was based on probable cause. She noted that, in support of their application, two detectives testified concerning the details of their investigation, which included a series of controlled drug buys made through an undercover officer, and surveillance they conducted on defendant's residence. The judge further noted that records obtained from Public Service Electric and Gas Company (PSE&G) reflected that one account holder paid the bills for the entire residence.

The judge also concluded the search warrant did not violate the particularity requirement. She observed defendant failed to demonstrate the home was a multi-family residence occupied by someone else other than himself and his brother, Joseph. Although the building had multiple electric meters, two doorbells at the front door, and the PSE&G records reflected that the residence was multi-family, the judge pointed to the fact the sole account holder for the entire residence was Joseph. She characterized the fact that the residence was set up for multi-family use as irrelevant, because it was not actually being used as a multi-family residence.

After the motion was denied, defendant entered into a plea agreement pursuant to which the State dismissed count three of the

indictment as well as the charges against Joseph Tanner and defendant pled guilty to the remaining charges. In accordance with the plea agreement, defendant was sentenced to an aggregate fifteen-year prison term with six years of parole ineligibility.

On direct appeal, defendant's sole argument was the trial court erred in upholding the validity of the search warrant and denying his suppression motion. State v. Tanner, No. A-5055-12 (App. Div. Feb. 11, 2015) (slip op. at 6). Specifically, defendant contended the evidence should have been suppressed because (1) the testimony of Detective Michael DeCarolis, when applying for the search warrant, was not given under oath or affirmation as required by the federal and state constitutions and Rule 3:5-3(a); and (2) the warrant was not sufficiently particular about the location to be searched and thus violated the particularity requirement of the Fourth Amendment to the United States Constitution. Id. (slip op. at 6-16).

We rejected defendant's argument that the oath requirement was violated because defendant had the opportunity to raise this issue in his suppression motion but failed to do so. Id. (slip op. at 10). We also rejected defendant's argument that the warrant failed to describe the premises to be searched with sufficient particularity. We concluded:

[T]he motion judge correctly found that probable cause justified the search of the entire residence. We note that [defendant] has not challenged the finding of probable cause. We conclude that it is of no moment that the description of the residence in the warrant failed to mention that it could be used to house more than one family. The warrant describes the home as a "single[-] family" residence, which was technically correct given the information available to the officers at the time. While [defendant] points to evidence suggesting that the residence could be occupied by more than one family, there was no evidence that this was actually the case at the time the application for the warrant was made. The PSE&G bills showed that Joseph paid the utility bills for all of the accounts, and [Detective Selim] Senel witnessed the brothers leave the front entrance of the residence together. The fact that there was a single front entrance suggested that both of them could access the entire dwelling.

[Id. (slip op. at 14-15).]

Consequently, we affirmed the denial of defendant's motion to suppress and the conviction that followed his guilty plea. The Supreme Court denied defendant's petition for certification. State v. Tanner, 222 N.J. 15 (2015).

Defendant filed a timely PCR petition, supported by a supplemental certification claiming ineffective assistance of plea counsel. Among other things, defendant contended counsel was ineffective in failing to: (1) investigate inaccurate information contained in the search warrant concerning the address of the

locations searched and the fact the premises was actually a multi-family dwelling and not a single-family dwelling as testified to by the detectives in securing the search warrant; (2) support defendant's motion to suppress based on a facially defective search warrant; and (3) challenge the chain of custody and testing of the seized drugs. Defendant also argued the cumulative effect of these errors constituted ineffective assistance of counsel.

The PCR judge considered oral argument, denied the petition, and issued a comprehensive oral opinion. The judge concluded without an evidentiary hearing that defendant did not establish a prima facie showing of ineffective assistance of counsel.

On appeal, defendant argues:

I. THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL DEPRIVED [DEFENDANT] OF A FAIR TRIAL AND RENDERED THE JURY'S VERDICT AS FUNDAMENTALLY UNRELIABLE.

II. THE PCR COURT ERRED IN NOT RULING THAT COUNSEL'S ERRORS, CONSIDERED CUMULATIVELY, CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL AND THAT [DEFENDANT] WAS PREJUDICED BY THOSE ERRORS AND ENTITLED TO PCR RELIEF AS A MATTER OF LAW.

III. THE PCR COURT SHOULD HAVE CONDUCTED AN EVIDENTIARY HEARING TO ADDRESS ALL OF [DEFENDANT'S] CLAIMS.

For defendant to obtain relief based on ineffective assistance grounds, he is obliged to satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984),

as adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). The test requires a showing of deficient performance by counsel, and "'that the deficient performance prejudiced the defense.'" Fritz, 105 N.J. at 52 (quoting Strickland, 466 U.S. at 687).

In considering ineffective assistance of counsel claims concerning a guilty plea, defendant must satisfy a modified Strickland standard:

When a guilty plea is part of the equation . . . "a defendant must show that (i) counsel's assistance 'was not within the range of competence demanded in criminal cases;' and (ii) that there is a reasonable probability that but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial.'"

[State v. Nunez-Valdez, 200 N.J. 129, 139 (2009) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994) (second alteration in original).]

Moreover, to obtain relief under the second prong, "a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010) (citing Roe v. Flores-Ortega, 528 U.S. 470, 480, 486 (2000)).

An evidentiary hearing for PCR is only required when the defendant has made a prima facie showing of entitlement to such relief by demonstrating "a reasonable likelihood that his or her

claim will ultimately succeed on the merits." State v. Marshall, 148 N.J. 89, 158 (1997) (citing State v. Preciose, 129 N.J. 451, 463 (1992)). A petitioner must establish the right to relief by a preponderance of the evidence. Preciose, 129 N.J. at 459.

Guided by these standards, we conclude based on our review of the record that the alleged deficiencies in plea counsel's performance clearly fail to meet either the performance or prejudice prongs of the Strickland-Fritz test.

As he did before the trial court and on direct appeal, defendant focuses much of his attention on his assertion that his residence was a multi-family dwelling rather than a single-family residence as described in the search warrant. As noted, we previously rejected this contention and concluded the motion judge correctly found probable cause existed to search the entire residence and its detached garage.

Contrary to defendant's argument, plea counsel urged the court to suppress the evidence on the basis that the residence was a multi-family home, and the garage had a separate address and was being used for various business purposes. Specifically, counsel argued the PSE&G records and the presence of two door bells and separate meters and steps clearly showed the property was a multi-family dwelling. Although the motion judge found these arguments unpersuasive, a determination we affirmed on appeal, defendant

fails to show how counsel's performance was deficient, or how his further investigation would have led to a different result. Moreover, the fact the detached garage had a separate street address or a commercial use is of no moment, as the search warrant particularly described the location of the garage and, based on the police surveillance, there was probable cause to search it.

Defendant further argues trial counsel was ineffective for failing to cross-examine the police officers about the search warrant affidavit. However, the hearing on the validity of the search warrant was not a testimonial hearing, and no witnesses were presented. In any event, defendant has again failed to show the result would have been different had defense counsel questioned the officers.

Defendant next contends plea counsel "failed to challenge meaningfully the chain of custody of the seized drugs or the fact that only a small sample of the drugs was ever tested by the State laboratory and confirmed to be an illegal substance." However, counsel filed a separate motion to suppress the drug evidence based upon perceived legal deficiencies in the chain of custody. The trial court conducted an evidentiary hearing on the motion, during which defense counsel questioned the State's evidence custodian extensively regarding issues relating to the chain of

custody. Defendant's argument on this issue is thus clearly belied by the record.

With respect to the testing of the drugs, defendant does not appear to have raised this argument before the PCR court. "Generally, an appellate court will not consider issues, even constitutional ones, which were not raised below." State v. Galicia, 210 N.J. 364, 383 (2012). In any event, the record reveals the police seized over five ounces of cocaine and more than one-half ounce of heroin when the search warrant was executed. Defendant cites no legal authority to support his argument that the State was required to analyze the entirety of the drugs to confirm their illegal nature. Rather, case law instructs otherwise. See State v. Jester, 68 N.J. 87, 91 (1975) (noting "[i]f a random sample from the bulk is obtained and if that sample tests positive for heroin, that is sufficient to support the conclusion that the unsold residue is of the identical substance, absent any evidence to the contrary.").

In summary, we are satisfied from our review of the record defendant failed to make a prima facie showing of ineffectiveness of plea counsel under the Strickland-Fritz test. The PCR court correctly concluded an evidentiary hearing was not warranted. Preciose, 129 N.J. at 462-63.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION