SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0629-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LIONEL D. BROWN, a/k/a DAVID STYLES, a/k/a LIONEL BROWN, JR., a/k/a LYNEL BROWN, a/k/a KEVIN L. COOPER,

Defendant-Appellant.

Submitted January 18, 2017 – Decided October 10, 2017

Before Judges Ostrer and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 09-08-0689.

Joseph E. Krakora, Public Defender, attorney for appellant (Charles P. Savoth, III, Designated Counsel, on the brief).

Diane M. Ruberton, Acting Atlantic County Prosecutor, attorney for respondent (Mario C. Formica, Special Deputy Attorney General/ Acting Chief Assistant Prosecutor, of counsel and on the brief).

The opinion of the court was delivered by

OSTRER, J.A.D.

Charged with murder and weapons offenses, Lionel Brown pleaded guilty to aggravated manslaughter of an alleged gang member. In accord with his plea agreement, he received a twenty-year sentence, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, which we affirmed in an excessive sentencing appeal. Brown later sought post-conviction relief, contending his attorney was ineffective in various ways. Of interest to us on appeal is his claim his attorney failed to move to suppress two custodial statements based on Brown's assertion of his right to remain silent.

The PCR court denied the petition without an evidentiary hearing. Lacking the benefit of the recordings or a transcript, and presented only with vague claims of ineffective assistance, the trial court's decision is unassailable. However, appellate counsel has presented us with the recordings, and we ordered preparation of a transcript. On the basis of that expanded record, we are constrained to reverse and remand for an evidentiary hearing.

The record reflects that police questioned Brown for about eleven hours on one day, and resumed questioning two days later. About six hours into the first interview, Brown had made no incriminating statements. The focus shifted to his family. Detectives asserted the family would be safe from gang retaliation

if Brown confessed. Brown was visibly upset and despondent. He stated he was not going to see his family as a result of his arrest. In this context, Brown said he was done talking and wanted to be taken to the jail. "I want to go to the County [jail] now, man," he said. The police persisted in questioning him and speaking about his family. Brown said, "I don't even wanna talk about this shit no more, man. It's over. It's over." Police continued, and Brown said, "Might as well just take me to the County and get this shit over with." The police still continued questioning. Defendant indicated that he would say nothing further until he spoke with his family. Questioning ceased but, in making arrangements to get his family to the police station, the detective persisted "you want all four of your sisters cause you want to be able to look them in the eye and straighten things out?" Eventually, after Brown conferred with family members, he stated that, while under the influence of PCP, he grabbed the victim's gun in the midst of an altercation, shot him as he tried to run, and then discarded the weapon.

In the second session two days later, police followed up on Brown's admissions, and elicited additional details related to the shooting, including where he discarded his jacket and stashed the weapon before discarding it. At his plea hearing, Brown stated

that he shot twice at the victim as he walked away, but did not intend to kill him.

In his pro se petition, Brown contended that his trial attorney was ineffective because he did not move to suppress his custodial statements, and had he done so, Brown would have proceeded to trial.[1] However, Brown's PCR counsel did not present the PCR court with the recordings or transcripts of the interrogation, nor did he present the court with other evidence showing Brown's requests to stop. Lacking such evidence, the court was unpersuaded Brown adequately showed a violation of his right to remain silent.

As did the trial court, see State v. Harris, 181 N.J. 391, 421 (2004) (stating appellate court conducts de novo review where PCR court does not hold an evidentiary hearing), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005), we apply the two-pronged Strickland test and determine whether the record — now expanded — reveals that Brown's plea counsel was ineffective, and that Brown suffered resulting prejudice. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984);

[1] He also faulted his attorney for not filing other pre-trial motions, and investigating grounds for a passion-provocation defense. Those claims are not before us, although Brown also contended that but for those attorney failures, he would have gone to trial.

State v. Fritz, 105 N.J. 42, 58 (1987). Where the claimed ineffectiveness involves an unfiled motion, the petitioner must demonstrate the motion would have succeeded. See State v. O'Neal, 190 N.J. 601, 619 (2007). Prejudice in a guilty plea case consists of showing "a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985). Also, "a petitioner must convince the court that a decision to reject a plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284, 297 (2010).

We conclude Brown has established a prima facie case of ineffective assistance of counsel warranting an evidentiary hearing. Brown's appellate PCR counsel asserts that Brown's assigned PCR counsel before the trial court did not possess the recordings of defendant's interrogation in his file. Notably, he referred only to police reports of the interrogation. This certainly raises a question whether plea counsel similarly failed to obtain or review the recordings. A motion to suppress defendant's custodial statements would likely have succeeded, because police did not honor Brown's repeated requests to terminate the questioning.

"Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he [or she] wishes to remain silent, the interrogation must cease." Miranda v. Arizona, 384 U.S. 436, 473-74, 86 S. Ct. 1602, 1627, 16 L. Ed. 2d 694, 723 (1966). After it is invoked, the defendant's right to remain silent must be "scrupulously honored." State v. Johnson, 120 N.J. 263, 282 (1990) (internal quotation marks and citation omitted). "[A]ny statement taken after the [defendant] invokes his [or her] privilege cannot be other than the product of compulsion, subtle or otherwise." Miranda, supra, 384 U.S. at 474, 86 S. Ct. at 1628, 16 L. Ed. 2d at 723.

"[A] request to terminate an interrogation must be honored however ambiguous." State v. Bey, 112 N.J. 45, 64-65 (1988) (internal quotation marks and citation omitted). A defendant is "not required to express his [or her] desire with the utmost of legal precision." Id. at 65. Furthermore, if a "defendant's conduct and remarks are . . . equivocal, and the police [are] reasonably . . . unsure of [the] defendant's wishes," they may ask the defendant "narrowly restricted" questions "to [clarify] the meaning of his [or her] statements." Id. at 65, n.10. However, the police may not respond to an unambiguous request to remain silent with questions designed "to keep the suspect talking, not

to uphold his right to remain silent." Johnson, supra, 120 N.J. at 283 (internal quotation marks and citation omitted). Such follow-up questioning "constitute[s] unlawful interrogation, not permissible clarification." Ibid.

The State bears the burden of proving beyond a reasonable doubt that it abided by Miranda, and that any confession was voluntary and uncoerced. State v. Yohnson, 204 N.J. 43, 59 (2010). Had Brown's counsel moved to suppress his confession, the State would have been unable to meet that burden, based on the record before us.

Brown unambiguously asked that questioning stop, and he be taken to the county jail. In State v. S.S., 229 N.J. 360, 383-84 (2017), the Court noted that a suspect who states he has nothing else to say has invoked his right to remain silent. That is just what Brown did when he repeatedly asked to be taken to the jail, and said, "I don't even wanna talk about this shit no more, man. It's over. It's over."

The State's contention that defendant was simply upset and did not want to stop talking is belied by the officer's response, "I know that you want to go to the County and I understand that." Rather than accede to Brown's unambiguous request, the officer asked, "I need to ask you why, why do you want to just want to go

to the County? Why?" Those questions were obviously designed to keep Brown talking after he said he wanted to stop.[2]

Although Brown willingly spoke to the officers two days later, the questioning was the fruit of the poisonous tree and would have been suppressed had trial counsel filed a timely motion. "[W]here the second confession is so intertwined with the first, it inevitably must be seen as the product of the first and thus wholly tainted by the preceding constitutional violation." Johnson, supra, 120 N.J. at 286-87. Here, police predicated their questions in the second interrogation on the disclosures in the first; the same officers participated; and it occurred relatively close in time.

We also reject the notion that the failure to file a suppression motion was a strategic move entitled to our deference, as it was apparently uninformed by a careful review of the interrogation record. See Strickland, 466 U.S. at 690-91, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695 ("strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the

[2] Brown's request apparently arose out of his resignation to the idea that his family would spurn him and allies of the victim would retaliate. However, this does not negate his repeated requests to stop talking and go to the jail. Defendant's motivation is of no moment.

limitations on investigation"); see also State v. Arthur, 184 N.J. 307, 342 (2005).

Therefore, we conclude that plea counsel's failure to file a suppression motion constitutes deficient performance that satisfies the first Strickland prong.[3]

The remaining issue is whether Brown was prejudiced. In other words, would Brown have insisted upon going to trial, and would it have been rational for him to do so? Brown contends he would have gone to trial, even though he would have risked conviction of murder and a life sentence. His credibility should be assessed not on the paper record before us, but in an evidentiary hearing. See State v. Pyatt, 316 N.J. Super. 46, 51 (App. Div. 1998) (noting credibility determinations "are best made through an evidentiary proceeding with all of its explorative benefits"), certif. denied, 158 N.J. 72 (1999).[4]

[3] As we conclude that Brown's confession would have been suppressed because he exercised his right to terminate the interrogation, we need not reach his additional claims that his will was overborne by the nature and length of the questioning, alleged threats to his family, and coercive promises to him.

[4] Notably, Brown asserted, in his pro se petition, that he would have gone to trial but for trial counsel's ineffectiveness in multiple ways. However, only one now remains in the case — the failure to move to suppress the confession. On remand, the court should consider whether Brown would have proceeded to trial but for that sole instance of ineffectiveness.

The State contends it possessed substantial proof of Brown's guilt, separate from his custodial statements, which would have made it irrational and implausible for Brown to go to trial and face the attendant risks, rather than accept the plea agreement. The State argues the police had witnesses willing to testify they saw Brown near the scene of the homicide, and that Brown had prior conflicts with the victim. Police also found physical evidence they said tied Brown to the scene.

However, the record does not permit us to assess the strengths of the State's proofs at the time Brown entered his plea, including, for example, the credibility of such witnesses and the likelihood they would testify. Nor can we weigh such evidence against the other discovery in the case. The State's claims at most create an issue worthy of an evidentiary hearing.

Considering the facts in a light most favorable to Brown, as we must, State v. Preciose, 129 N.J. 451, 462-63 (1992), Brown has presented a prima facie claim by showing (1) his trial attorney's performance was deficient by failing to file a motion to suppress his statement following invocation of his right to remain silent, and (2) he suffered prejudice because it would have been rational for him to reject the plea bargain and go to trial. Therefore, he is entitled to an evidentiary hearing to determine whether he in fact suffered the requisite prejudice. See id. at 462 (stating

that an evidentiary hearing should be held where a defendant has made a prima facie showing in support of PCR).

Reversed and remanded for an evidentiary hearing.