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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1198-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FRANCIS MITCHELL,

Defendant-Appellant.

Submitted December 20, 2016 – Decided April 12, 2017

Before Judges Yannotti and Kennedy.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Indictment No.
07-01-0074.

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

Andrew C. Carey, Middlesex County Prosecutor,
attorney for respondent (Jason M. Boudwin,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant Francis Mitchell appeals from an order entered by the Law Division on August 21, 2015, which denied his petition for post-conviction relief (PCR). We affirm.

We briefly summarize the relevant facts and procedural history. On April 19, 2006, officers from the East Brunswick Police Department were dispatched to Northfield Bank in response to a reported robbery. Upon arrival, the officers spoke with a bank teller, Y.P., who said that an unknown black male had entered the bank with a gun and demanded cash.¹

According to Y.P., the perpetrator entered the bank wearing a straw hat. He had shoulder-length hair that was reddish in color. Y.P. described the perpetrator as between twenty-five and forty years old, and approximately five feet, seven inches in height. The man approached a teller and asked for change. When Y.P. asked the man if he had an account in the bank, he replied, "Yes."

The perpetrator produced a note, which stated, "I have a gun, give me everything." He reached over the counter and produced a black plastic bag, which made a loud noise when it struck the counter. Y.P. thought the bag contained a weapon. The man also produced a supermarket shopping bag and ordered Y.P. to fill it.

¹ We refer to the associate by her initials to protect her identity.

She filled the shopping bag with \$2506. The perpetrator took the bag and fled from the bank.

On August 24, 2006, officers from the North Brunswick Police Department were dispatched to Provident Bank in response to a reported robbery. They spoke to a teller, who said that a man had entered the bank and handed the teller a note. The teller could not recall exactly what was written on the note, but said the note indicated that the man was dying and he had nothing to lose. The teller gave the man \$1000 in cash, and he fled from the bank, leaving behind the plastic bag and a toy gun.

On September 6, 2006, defendant turned himself in to the Somerset Police Department. The Provident Bank teller later positively identified defendant from a photo array as the person who committed the robbery at the bank. On September 27, 2006, Y.P. also positively identified defendant from a photo array as the person who committed the robbery at Northfield Bank.

On January 11, 2007, a Middlesex County grand jury returned Indictment No. 07-01-0074, charging defendant with two counts of first-degree armed robbery, contrary to N.J.S.A. 2C:15-1. On January 9, 2009, defendant pled guilty to both counts.

Defendant also had been charged in Somerset County with committing bank robberies on August 3, 2006, and September 1, 2006. In the Somerset County matters, defendant was convicted of

first-degree armed robbery and second-degree armed robbery. He was sentenced on the Somerset County matter to an aggregate term of twenty-two years in State prison, with a period of parole ineligibility, as prescribed by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

On February 27, 2009, the court sentenced defendant on the Middlesex County matters. The court found aggravating factors three, N.J.S.A. 2C:44-1(a)(3) (risk that defendant will commit another offense); six, N.J.S.A. 2C:44-1(a)(6) (extent of defendant's prior criminal record); and nine, N.J.S.A. 2C:44-1(a)(9) (need to deter defendant and others from violating the law).

The court sentenced defendant to two ten-year terms of incarceration, subject to NERA, and ordered that the sentences be served concurrent to each other, and consecutive to the Somerset County sentences. The court awarded defendant thirty-three days of jail credits, and required defendant to pay the appropriate fines and penalties.

Defendant appealed from the judgment of conviction (JOC), dated February 27, 2009, and challenged his sentence. The appeal was heard on our excessive sentence oral argument calendar. R. 2:9-11. We affirmed the sentence, but with the consent of the State, remanded the matter to the trial court for entry of an

amended JOC awarding defendant seventy-seven days of gap-time credit. State v. Mitchell, No. A-6122-08 (App. Div. Oct. 1, 2010).

On October 15, 2014, defendant filed a petition for PCR, alleging ineffective assistance of counsel. The court appointed an attorney to represent defendant, and counsel filed a brief in support of the petition, arguing that defendant was denied the effective assistance of counsel at sentencing. Counsel argued that counsel failed to seek findings on certain mitigating factors and sought to have defendant sentenced as a second-degree offender, pursuant to N.J.S.A. 2C:44-1(f)(2).

In support of his petition, defendant submitted a certification in which he stated that he went to the two banks with a toy gun and demanded that the tellers give him money. He stated that, because he had a toy gun, he knew no one would get hurt. He stated that he had been addicted to heroin from age eighteen to age thirty-three. He said that he had successfully completed a program for his addiction.

Defendant also claimed that he had been drinking heavily when he entered both banks. He said that on both dates, he had consumed at least two pints of Cognac. He stated that he had owned a business, but he lost the business in 2005 and the money he had invested in it. He claimed he "got really depressed and started drinking heavily." He stated that he went to the banks because he

needed money to pay his bills and help support his family. Defendant also stated that he had helped support his seventy-five-year-old mother, who had certain ailments.

The PCR court heard oral argument on the petition, and filed an opinion and order dated August 21, 2015, denying PCR. The court noted that defendant claimed his attorney should have sought findings on mitigating factors two, N.J.S.A. 2C:44-1(b)(2) (defendant did not contemplate that his conduct would cause or threaten serious harm); three, N.J.S.A. 2C:44-1(b)(3) (defendant acted under a strong provocation); four, N.J.S.A. 2C:44-1(b)(4) (substantial grounds to excuse or justify defendant's conduct); nine, N.J.S.A. 2C:44-1(b)(9) (defendant's character and attitude indicate that it is unlikely he will commit another offense); eleven, N.J.S.A. 2C:44-1(b)(11) (defendant's imprisonment will cause excessive hardship to defendant or his dependents); and twelve, N.J.S.A. 2C:44-1(b)(12) (defendant was willing to cooperate with law enforcement authorities).

The PCR judge found that, at sentencing, the court had applied mitigating factor eleven, noting that defendant's incarceration would be a hardship to his family. The PCR judge further found that the other mitigating factors cited by defendant did not apply, and defendant's attorney was not deficient by failing to raise them at the sentencing proceeding. The PCR judge further found

that the court did not err by failing to consider these factors when sentencing defendant. This appeal followed.

On appeal, defendant raises the following single point:

POINT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF SINCE HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL.

Where, as here, a defendant asserts that he was denied the effective assistance of counsel, he must satisfy the two-part test established by Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). Under Strickland, a defendant must show that his attorney's performance was deficient, and that counsel's deficient performance prejudiced his defense. Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

Here, the PCR court correctly determined that defendant failed to satisfy the Strickland test. The judge initially noted that, although defendant had asserted he had taken certain actions while imprisoned to rehabilitate himself, these actions had no bearing upon whether his attorney provided effective assistance at sentencing.

The PCR court found that defendant's attorney was not deficient in failing to seek findings on mitigating factors two,

three, four, nine, or twelve. The court stated that mitigating factor two did not apply here. The court found that defendant could not reasonably claim that he did not contemplate that his conduct would cause or threaten harm because he entered the banks with what was apparently a toy gun.

The court observed that it was reasonable to conclude that under the circumstances, the tellers would have perceived that defendant had a real gun, with possible serious consequences. When defendant entered his plea, he admitted that he intended to put the tellers in fear of immediate bodily harm, or immediate use of a gun.

The PCR court also found that mitigating factor three did not apply. Although defendant asserted that he needed money to support his family, this did not constitute a "provocation" to support the commission of two armed bank robberies. N.J.S.A. 2C:44-1(b)(3). The judge found that the same reasoning applied to mitigating factor four. The need for money was not a "substantial ground[] tending to excuse or justify" committing two armed bank robberies. N.J.S.A. 2C:44-1(b)(4).

On appeal, defendant argues that his "severe drug addiction, as well as his highly inebriated condition" at the time he committed the robberies were sufficient to excuse or justify his criminal conduct. However, as the State points out, defendant's

addiction was known to the sentencing court, which acknowledged that it may have played a role in the commission of the offenses.

In addition, the pre-sentence report indicates that defendant only consumed alcohol socially. There is no evidence that defendant informed his attorney of his alleged inebriated state. No witnesses indicated that defendant appeared under the influence of any intoxicating beverage when he committed the robberies. In any event, the fact that defendant allegedly consumed two pints of Cognac on the days he committed the robberies was not sufficient to excuse or justify his criminal behavior.

Furthermore, there was no basis for finding mitigating factors here. The sentencing judge found that there was a risk that defendant would commit another offense. The record supports that finding. The pre-sentence report shows that defendant has had seven municipal court convictions, three prior drug-related Superior Court convictions, and a prior indictable conviction for robbery.


Defendant also had been convicted for committing the two Somerset County bank robberies. The PCR court correctly found that the record would not have supported a finding that, based on defendant's character and attitude, it was unlikely he would commit another offense. N.J.S.A. 2C:44-1(b)(9).

In addition, the PCR court found that mitigating factor twelve did not apply. Although defendant pled guilty to committing both robberies, this is not the sort of cooperation contemplated by N.J.S.A. 2C:44-1(b)(12). In its decision, the court observed that there is no evidence that defendant had agreed "to provide law enforcement with helpful information concerning the criminal activity of others."

Therefore, the PCR court correctly determined that defendant failed to establish that he was denied the effective assistance of counsel at sentencing. The court correctly found that defendant's attorney did not err by failing to raise the aforementioned mitigating factors at sentencing. Because these mitigating factors did not apply, there was no basis for counsel to seek to have defendant sentenced as a second-degree offender pursuant to N.J.S.A. 2C:44-1(f)(2).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION