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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1283-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WALLACE GASKINS, a/k/a WALLACE
N. GASKINS, WALLACE MICHAEL,
WALLACE MILLER, WALLACE N. MILLER
and WALLACE N. MOORE,

Defendant-Appellant.

Submitted March 28, 2017 – Decided May 1, 2017

Before Judges Yannotti and Sapp-Peterson.

On appeal from the Superior Court of New
Jersey, Law Division, Essex County, Indictment
No. 08-08-2556.

Joseph E. Krakora, Public Defender, attorney
for appellant (Carolyn V. Bostic, Designated
Counsel, on the brief).

Carolyn A. Murray, Acting Essex County
Prosecutor, attorney for respondent (Lucille
M. Rosano, Special Deputy Attorney
General/Acting Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

Defendant Wallace Gaskins appeals from a September 30, 2015 Law Division order denying his petition for post-conviction relief (PCR). We affirm, substantially for the reasons expressed by Judge Michael A. Petrolle in his oral opinion of the same date.

The facts underlying defendant's conviction are gleaned from the evidence adduced at trial, which we summarized in our unpublished decision in State v. Gaskins, No. A-4936-09 (App. Div. July 25, 2012), certif. denied, 213 N.J. 397 (2013), and incorporated herein:

During the evening of March 8, 2008, Mark Harper, Antoine Walker, and Anthony Stover attended a birthday celebration for their friend Antwan Johnson in Irvington. At the time, Johnson, Walker, and Stover were members of the Grape Street Crips, but Harper was not. As Harper, Walker, and Stover left the party and walked to their car, they came under gunfire. According to Harper, he heard a scream, turned around, saw two men running at them, and then heard and saw gunshots. Stover was shot and died at the scene.

Harper ran to the car and got inside, but was unable to get the key in the ignition. He saw an individual, whom he subsequently identified as Gaskins, standing a few feet away from the car window with a gun in his hand. The gun jammed while Gaskins was pointing it at Harper. While Gaskins attempted to un-jam the gun, Harper started the car and "mash[ed] on the gas pedal," at which time he was shot in the wrist. Harper drove to the home of his girlfriend, who drove him to the hospital.

Following their initial investigation, the police arrested Gaskins on March 12. He provided them with an audio-recorded statement, which was played at trial. Gaskins told police that he was in a bar in Irvington on the night of the shooting when someone known as "Jimmy" called him and told him he had a problem and needed a gun. Gaskins then met up with Jimmy and Alexander Owens.

Jimmy and Owens told Gaskins that they had been in an altercation with members of the Crips and Jimmy needed a gun. Although Gaskins told them he did not want to be involved because "it didn't have nothing to do with [his] set," he gave Jimmy a .45 caliber handgun. Owens already had a 9mm handgun.

In addition to providing the gun, Gaskins drove the men to an alleyway near the house "the [Crips] dudes" were visiting. According to Gaskins, Jimmy and Owens walked to the alleyway, while Gaskins waited in the car. Jimmy called him and told him to move the car to another street, which Gaskins did. He then "waited for them, turned the car off, waited for them, heard gunshots." He said it sounded as if "the whole clip" of the 9mm gun, and four or five shots from his .45 caliber gun, were fired. According to Gaskins, Jimmy and Owens then ran to the car. Jimmy told Gaskins that the .45 caliber gun was jammed. Gaskins "unjammed the gun, took the shell out, and gave him the gun back." He then drove them home.

Gaskins told the police that he met with Jimmy and Owens the following night. They told him that they had run after the victims, and that one of "these dudes was in the car." Owens shot the one outside of the car with his 9mm gun, while Jimmy shot the individual in the car through the car window with the .45

caliber gun. Jimmy told Gaskins that he had sold both guns that morning.

The police recovered four shell casings from the scene of the shooting. They determined that at least two weapons were used in the shooting: a 9mm and a .45 caliber gun. The bullet removed from Stover's head was determined to have come from a 9mm gun; the wound in Harper's hand was determined to have been caused by a .45 caliber gun.

[Id. at 2-4.]

An Essex County Grand Jury indicted defendant on charges of first-degree purposeful or knowing murder, N.J.S.A. 2C:11-3a(1) or (2) (Count One); first-degree attempted murder, N.J.S.A. 2C:5-1 and 2C:11-3 (Count Two); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b) (Count Three); and second-degree possession of a handgun for unlawful purposes, N.J.S.A. 2C:39-4(a) (Count Four). The indictment also charged defendant with second-degree possession of a firearm, N.J.S.A. 2C:39-5(b) (Count Eight), which allegedly occurred a few days earlier than the other offenses charged in the indictment. The court subsequently severed Count Eight for disposition in a separate proceeding that never occurred.

Following a thirteen-day trial, the jury found defendant guilty of first-degree aggravated manslaughter as a lesser-included offense of purposeful or knowing murder, attempted murder, unlawful possession of a weapon, and possession of a weapon for an unlawful purposes. At sentencing, the trial court granted

the State's motion seeking a discretionary extended term and also concluded that imposing consecutive sentences was warranted. The court merged defendant's convictions on Counts Two and Four and sentenced defendant to an aggregate extended term of life imprisonment with an eighty-five percent period of parole ineligibility under the No Early Release Act "NERA", N.J.S.A. 2C:43-7.2, which included the fifteen years required by the Graves Act, N.J.S.A. 2C:43-6(c), and five years of supervision upon release. On Count One, the court imposed a thirty-year custodial sentence, subject to an eighty-five percent period of parole ineligibility pursuant to NERA and the Graves Act. On Count Three, the court sentenced defendant to ten years imprisonment with a five-year period of parole ineligibility pursuant to the Graves Act. Finally, the court imposed a ten-year custodial sentence with a five-year period of parole ineligibility under the Graves Act for Count Eight, even though the court had severed that count and defendant had never been tried on this count.

Defendant filed a direct appeal of his conviction and the sentences imposed, arguing the trial court erred in denying his motion to admit his co-defendant's statement given as part of his guilty plea to reckless manslaughter as a declaration against interest, the sentences imposed were manifestly excessive, and his conviction for possession of a weapon without a permit, under

Count Eight, must be reversed because there was no evidence that he pled guilty or was ever found guilty of that offense. In an unpublished opinion, we affirmed the conviction, but vacated the sentence imposed on Count Eight and remanded for resentencing on the first two counts, with direction to the trial court to consider the NERA consequences of consecutive sentences. State v. Gaskins, supra, (slip op. at 26). The Supreme Court denied defendant's petition for certification. State v. Gaskins, supra, 213 N.J. at 397.

In December 2014, defendant filed his first pro se PCR petition. Thereafter, through appointed counsel, defendant filed an amended PCR petition alleging ineffective assistance of trial counsel. The PCR judge, who also presided over the jury trial, rendered an oral decision denying the petition without first conducting an evidentiary hearing. The court found that its instructions on accomplice liability "followed" the language of the Model Jury Charge (Criminal) and were more than adequate.

The court additionally found that the defense strategy conceding the gun charge, in light of defendant's admission that he possessed the weapon, but denying defendant's involvement in the homicide, was not ineffective assistance of counsel merely because the strategy did not succeed. Likewise, the court found no merit to the claim that defense counsel's failure to cross-

examine Detective Jenkins, the arresting officer, who testified at trial, but who did not testify at the Miranda hearing, was ineffective assistance of counsel, in the absence of a certification from Detective Jenkins confirming that his testimony would have been as defendant alleged it would have been in defendant's certification. Finally, with regard to defense counsel's failure to object to the portion of the prosecutor's summation during which he suggested that the jury take the streets back, the court noted that it promptly addressed that comment. The present appeal followed.

On appeal, defendant argues:

POINT I

THIS MATTER MUST BE REMANDED BECAUSE THE PCR COURT FAILED TO ADDRESS THE DEFENDANT'S ARGUMENT THAT TRIAL COUNSEL'S FAILURE TO FULLY ADVISE THE DEFENDANT OF THE PENAL CONSEQUENCES OF THE STATE'S PLEA OFFER DURING THE PLEA NEGOTIATIONS RENDERED COUNSEL'S REPRESENTATION INEFFECTIVE.

POINT II

THE PCR COURT ABUSED ITS DISCRETION BY REFUSING TO HOLD AN EVIDENTIARY HEARING WHERE THE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL IN VIOLATION OF U.S. CONST. AMENDS. VI, XIV; N.J. CONST. ART. I, PAR. 10.

A. TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO REQUEST AN APPROPRIATE ACCOMPLICE LIABILITY JURY INSTRUCTION THAT DELINEATED DIFFERING DEGREES OF RESPONSIBILITY AS STATED IN THE MODEL JURY CHARGE.

- B. TRIAL COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S INFLAMMATORY AND PREJUDICIAL CALL FOR THE JURY TO RE-TAKE THE STREETS FROM GANGS DURING THE STATE'S SUMMATION, AND TRIAL COUNSEL'S FAILURE TO REQUEST A CURATIVE INSTRUCTION, RENDERED HIS PERFORMANCE INEFFECTIVE.

- C. TRIAL COUNSEL'S ERRORS DURING THE MIRANDA HEARING AND AT TRIAL CANNOT BE EXCUSED AS REASONABLE LEGAL STRATEGY AND CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.
 - 1. Trial Counsel Was Ineffective During the Miranda Hearing.

 - 2. Trial Counsel's Concession of the Defendant's Guilt Resulted in Ineffective Assistance of Counsel.

 - 3. Defense Counsel's Failure to Move to Redact The Defendant's Taped Statement Resulted in Ineffective Assistance of Counsel.

- D. APPELLATE COUNSEL'S FAILURE TO RAISE MERITORIOUS ISSUES ON DIRECT APPEAL RENDERED HIS PERFORMANCE [] INEFFECTIVE.

To establish a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test formulated in 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). "First, the defendant must show . . . that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth

Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." Id. at 52 (quoting Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693). To establish prejudice, the defendant must show by "a reasonable probability" that the deficient performance "materially contributed to defendant's conviction[.]" Id. at 58.

The determination on whether to hold an evidentiary hearing on an ineffective assistance of counsel claim is left to the sound discretion of the PCR judge. State v. Preciose, 129 N.J. 451, 462 (1992). "An evidentiary hearing . . . is required only where the defendant has shown a prima facie case and the facts on which he [or she] relies are not already of record." Pressler & Verniero, Current N.J. Court Rules, comment 2 on R. 3:22-10 (2017).

Based upon our review of the record and applicable law, we are satisfied defendant failed to establish a prima facie case of ineffective assistance of counsel, as he has failed to show his attorney's performance was deficient or resulted in prejudice. Consequently, he was not entitled to an evidentiary hearing. Preciose, supra, 129 N.J. at 462-64.

Defendant contends remand is warranted because the PCR court neglected to address defendant's argument that trial counsel failed to inform him of the penal consequences of the State's plea offer during plea negotiations. Defendant alleges that he would

have accepted the State's plea offer had trial counsel explained the consequences that flow from such a decision. However, appellate counsel, in a footnote in the brief submitted on behalf of defendant, states that "[i]t is unclear from the record whether the State offered the defendant a plea agreement." Notably, although PCR counsel incorporated defendant's claims, which included his allegation that he had not been advised of the State's plea offer and the consequences of failing to accept the plea, in the Amended PCR petition, PCR counsel did not argue this particular issue before the PCR court. See R. 3:22-6(d) (requiring PCR counsel to only advance "all legitimate arguments requested by the defendant that the record will support").

Nor has defendant provided a transcript of any pre-trial proceeding where the State extended a plea offer. See also R. 3:9-1(c) (stating that where defendant has pled not guilty, counsel, in open court, "shall report on the results of plea negotiations") and R. 3:22-6(c) (permitting the court "to grant an application for the transcript of testimony of any proceeding shown to be necessary in establishing the grounds of relief asserted"). In the absence of supporting evidence, counsel was not obliged to advance this contention and the court was not required to address this claim.

Next, the court properly rejected defendant's contention that his petition should have been granted because trial counsel failed to object to the court's jury charge on accomplice liability, which defendant urges was legally flawed. Initially, in as much as this claim could have been raised on direct appeal, it is procedurally barred. R. 3:22-4(a). Turning to the merits, as the PCR court observed, the trial court's instruction on accomplice liability "tracked" the language of the Model Jury Charge (Crimnal), which requires a clear instruction that a defendant may have a different state of mind from other co-defendants to commit a separate offense. State v. Bielkiewicz, 267 N.J. Super. 520, 527-28, 532, 533 (App. Div. 1993).

The trial court issued the accomplice liability charge several times. Specifically, the trial court provided the following instruction:

Remember that this defendant can be held to be an accomplice with equal responsibility only if you find, as a fact, that he possessed the criminal state of mind that is required to be proved against the person actually [] committing the act.

Now, in order to find the defendant guilty as an accomplice to the specific crime charged, you must find the defendant had the purpose to participate in that particular crime. He must act with the purpose of promoting or facilitating the commission of the substantive crime with which he is charged.

It is not sufficient to prove only that the defendant had knowledge that another person was going to commit the crimes charged. The state must prove that it was defendant's conscious object that the specific conduct charged be committed.

In addition, the third time the court instructed the jury on accomplice liability the court charged that the State had to prove defendant "possessed the criminal state of mind that is required to be proved against a person who actually committed the crime." The trial court told the jury that they were evaluating the "state of mind of this defendant . . . [n]ot the state of mind of some other person." Hence, the trial court's instructions comported with the language of the Model Jury Charge (Criminal).

An additional claim advanced by defendant, which is procedurally barred because it could have been raised on direct appeal, is defendant's claim of prosecutorial misconduct during summation when the prosecutor suggested that the jury take back the streets. We agree, as the PCR court found, that once the statement is considered in context, it was not so egregious as to warrant post-conviction relief.

It is undisputed that the State's theory and evidence presented during trial indicated that the crimes were gang-related. There was testimony during the trial from one witness that the area between Howard and Grace Streets in Irvington was

the territory of the Bloods and that the witness, himself, was a Crip living in the middle of Bloods' territory. In summation, the prosecutor remarked:

Well, I got news for [B]loods and [C]rips. Now this . . . is not their territory. Those streets belong to people of the City of Irvington, the County of Essex, all of us. They're not their streets[,] okay. They don't get -- he had his friends do not get to decide who lives and dies.

The trial court immediately intervened and directed the prosecutor to "stay with the evidence." The comment was never repeated.

Prosecutors "are expected to make a vigorous and forceful closing argument to the jury," and "are afforded considerable leeway in that endeavor[.]" State v. Jenewicz, 193 N.J. 440, 471 (2008) (quoting State v. Nelson, 173 N.J. 417, 460 (2002)). However, a prosecutor's conduct may not be "so prejudicial to an accused as to deny him a fair trial[.]" State v. Rose, 112 N.J. 454, 509 (1988). Where a prosecutor's conduct oversteps the bounds of propriety so as to deny a defendant a fair trial, reversal is may be warranted. Nelson, supra, 173 N.J. at 461. The conduct, however, must be "clearly and unmistakably improper, and must have substantially prejudiced the defendant's fundamental right to have a jury fairly evaluate the merits of his or her defense." State v. Ingram, 196 N.J. 23, 43 (2008) (quoting State v. Harris, 181 N.J. 391, 495 (2004)).

Here, the prosecutor's comment, though inappropriate, was fleeting, not repeated, and quickly quelled by the court. Thus, when considered as whole, in the context of the entire trial and summation, the statement was not "so egregious as to deny to defendant a fair trial." See State v. Engel, 249 N.J. Super. 336, 382 (App. Div.), certif. denied, 130 N.J. 393 (1991).

Finally, defendant also contends that trial counsel rendered ineffective performance by conceding defendant's guilt during trial. We disagree.

Because defendant admitted he possessed the weapon, trial counsel attempted to limit defendant's guilt, by conceding defendant's culpability in connection with that offense, while vigorously defending against the remaining charges. Because the jury convicted defendant of the crimes charged, the strategy employed did not prove successful. Nonetheless, as the PCR court noted, trial counsel was not ineffective simply because the trial strategy employed failed. State v. Bey, 161 N.J. 233, 251 (1999).


Defendant's reliance upon State v. Harrington, 310 N.J. Super. 272 (App. Div.), certif. denied, 156 N.J. 387 (1998), is misplaced. There, the defendant's counsel admitted defendant's guilt to robbery, an essential element of felony murder. Id. at 282; see also N.J.S.A. 2C:11-3(a)(3). Here, defendant's admission

that he possessed the weapon was not an essential element of the murder and attempted murder charges.

The remaining points raised by defendant not specifically addressed in this opinion are without 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.


CLERK OF THE APPELLATE DIVISION