SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1754-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KENNETH BACON-VAUGHTERS,

Defendant-Appellant.

Submitted September 11, 2017 – Decided September 15, 2017

Before Judges Sabatino and Ostrer.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 09-07-1467.

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

Christopher J. Gramiccioni, Monmouth County Prosecutor, attorney for respondent (Mary R. Juliano, Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Kenneth Bacon-Vaughters appeals the trial court's denial of his petition for post-conviction relief ("PCR"). We affirm.

At a jury trial held over nine days in March 2011, defendant was found guilty of felony murder, N.J.S.A. 2C:11-3(a)(3), robbery, N.J.S.A. 2C:15-1, conspiracy to commit robbery, N.J.S.A. 2C:5-2 and 2C:15-1, and possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4. He was sentenced for those offenses to a forty-year term of imprisonment, subject to a period of parole ineligibility mandated under the No Early Release Act ("NERA"), N.J.S.A. 2C:43-7.2.

On his prior unsuccessful direct appeal, defendant raised the following issues:

> POINT I
>
> THE COURT'S REFUSAL TO CHARGE THE STATUTORY AFFIRMATIVE DEFENSE TO FELONY MURDER DEPRIVED THE DEFENDANT OF THE RIGHT TO PRESENT A DEFENSE, DUE PROCESS AND A FAIR TRIAL.
>
> POINT II
>
> THE CHARGES AS A WHOLE WERE DEFECTIVE BECAUSE THE COURT FAILED TO INSTRUCT THE JURY ON THE ELEMENTS OF CRIMINAL ATTEMPT IN A FACT PATTERN WHERE THE SUBSTANTIVE OFFENSE WAS NEVER COMPLETED (Not raised below).
>
> POINT III
>
> THE DEFENDANT'S MARCH 12 STATEMENT SHOULD HAVE BEEN SUPPRESSED BECAUSE DETECTIVES CONTINUED

TO QUESTION THE DEFENDANT AFTER HE REQUESTED AN ATTORNEY.

POINT IV

THE COURT ERRED IN ADMITTING THE VICTIM'S STATEMENT, "KENNY MIKE SHOT ME," BECAUSE IT WAS UNTRUE AND UNDULY PREJUDICIAL. FURTHER, THE INSTRUCTION LIMITING ITS USE FAILED TO NEUTRALIZE THE PREJUDICE.

A. THE COURT ERRED IN ADMITTING THE STATEMENT BECAUSE ITS PROBATIVE VALUE WAS OUTWEIGHED BY ITS PREJUDICE.

B. THE LIMITING INSTRUCTION WAS MISLEADING AND FAILED TO NEUTRALIZE THE PREJUDICE.

POINT V

THE DEFENDANT'S SENTENCE OF 40 YEARS, WITH AN 85% PAROLE BAR, WAS MANIFESTLY EXCESSIVE.

PRO SE POINT I

THE LOWER COURT ERRED WHEN IT DID NOT ADDRESS APPELLANT'S CLAIMS OF THE FAILURE OF THE POLICE TO SCRUPULOUSLY HONOR DEFENDANT'S RIGHT TO COUNSEL AMOUNTED TO THE CONSTRUCTIVE DENIAL OF COUNSEL AND SEPARATELY, INEFFECTIVE ASSISTANCE OF COUNSEL, BOTH IN VIOLATION OF THE FIFTH, AND SIXTH, AMENDMENTS OF THE UNITED STATES CONSTITUTION.

We found these contentions to lack merit and affirmed defendant's convictions and sentence. State v. Bacon-Vaughters, No. A-583-11 (App. Div. Feb. 25, 2013). The Supreme Court denied defendant's petition for certification. 216 N.J. 5 (2013).

In his ensuing PCR petition, defendant alleged that his trial counsel was ineffective in several respects, thereby depriving him of his constitutional rights. Defendant further asserted that a "pattern of cumulative error" at trial deprived him of his right to a fair trial.

Judge John R. Tassini, who did not preside over defendant's jury trial, heard oral argument on the PCR application on August 25, 2015 without conducting an evidentiary hearing.

Judge Tassini denied defendant's petition. In his detailed written statement of reasons accompanying his order, Judge Tassini concluded that defendant has not presented a prima facie case of ineffective assistance of counsel. He therefore found that no evidentiary hearing was necessary.

More specifically, Judge Tassini ruled that defendant's trial counsel during the pretrial Miranda[1] suppression hearing did not fail to adequately investigate or probe into defendant's statement to the police. The judge found that, in fact, trial counsel had "vigorously cross examined" witnesses at the hearing, and had called appropriate witnesses on defendant's behalf. Despite defendant's contrary assertions, Judge Tassini concluded there was

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

no evidence that his trial counsel had lied to him about his co-defendants' cooperation with the State.

Additionally, Judge Tassini found that defendant had not made a prima facie showing that his trial counsel had pressured him to not testify on his own behalf. The judge noted in this regard that the trial court had engaged in "extensive colloquy" with defendant about his decision not to testify, and that there were apparent tactical reasons for counsel to keep defendant off the witness stand.

Lastly, Judge Tassini found that defendant's remaining arguments complaining of procedural and evidentiary errors were barred under Rule 3:22-4, because those issues could have been raised on direct appeal.

On his present appeal, defendant raises the following issues for our consideration:

> POINT I
>
> THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE DID NOT RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL AS A RESULT OF TRIAL COUNSEL'S CONDUCT WHICH PRESSURED THE DEFENDANT INTO NOT TESTIFYING ON HIS OWN BEHALF AT TRIAL.
>
> POINT II

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL AS A RESULT OF COUNSEL'S ASSURANCE HE WOULD BE ENTITLED TO A REVERSAL ON APPEAL IN THE EVENT HE WAS CONVICTED AT TRIAL BASED UPON THE RULING MADE IN CONJUNCTION WITH THE MIRANDA HEARING, AS A RESULT OF WHICH HE DID NOT CONSIDER ANY PLEA RECOMMENDATION AND INSTEAD PROCEEDED TO TRIAL, SUBSEQUENTLY RECEIVING A SENTENCE SIGNIFICANTLY GREATER THAN THAT EMBODIED IN THE PROPOSED PLEA OFFER.

Defendant also raises the following arguments in a pro se supplemental brief, which are partly duplicative of those in his present counsel's brief:

SUPPLEMENTAL POINT I

TRIAL JUDGE ABUSED HIS DISCRETION BY FAILING TO CHARGE THE AFFIRMATIVE DEFENSE TO FELONY MURDER [UNDER N.J.S.A. 2C:11-3(a)(3)] SUA SPONTE.

SUPPLEMENTAL POINT II

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL DETECTIVE NELSON TO THE STAND AT THE MIRANDA HEARING.

Having considered these points in light of the record and the applicable law, we affirm the denial of the PCR petition, substantially for the sound reasons set forth in Judge Tassini's lengthy written decision. We add only a few amplifying comments.

The PCR court here applied correct principles of law in evaluating defendant's claims of ineffective assistance of counsel. Those principles instruct that to establish a deprivation of the right to counsel, a convicted defendant must satisfy the two-part test enunciated in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984) by demonstrating that: (1) counsel's performance was deficient, and (2) the deficient performance actually prejudiced the accused's defense. Id. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; see also State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the Strickland two-part test in New Jersey).

In reviewing such claims of ineffectiveness, courts apply a strong presumption that a defendant's trial counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, supra, 466 U.S. at 690, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695. "[C]omplaints 'merely of matters of trial strategy' will not serve to ground a constitutional claim of inadequacy[.]" Fritz, supra, 105 N.J. at 42, 54 (1987) (quoting State v. Williams, 39 N.J. 471, 489 (1963), cert. denied, 374 U.S. 855, 83 S. Ct. 1924, 10 L. Ed. 2d 1075 (1963), overruled on other grounds by, State v. Czachor, 82 N.J. 392 (1980)). The PCR court reasonably concluded that defendant failed to establish these elements here. Moreover,

defendant failed to present a viable prima facie case of ineffectiveness that would warrant an evidentiary hearing. State v. Preciose, 129 N.J. 451, 462-63 (1992).

We specifically concur with the PCR court's rejection of defendant's claim that his trial attorney was ineffective because she supposedly "demanded" that he waive his right to testify. We do so for several reasons. First, the allegation is set forth as a "bald assertion" within an unsigned certification, contrary to the verified or sworn form of statement that is required by Rule 3:22-8 and Rule 3:22-10(c). See also State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999). Second, the allegation does not overcome the lengthy colloquy on the record conducted by the trial judge, at which defendant's right to testify was extensively discussed. Third, trial counsel had a reasonable tactical basis to advise defendant not to take the witness stand. Doing so would have opened the door to the State using defendant's pretrial factual proffer against him, thereby undermining the defense trial theory that his inculpatory statements to the police were unreliable.

We also uphold Judge Tassini's rejection of defendant's claim that he would have pled guilty if his trial attorney had not been ineffective in her advice to pursue the Miranda issue. Defendant has not set forth with particularity how he was misled, what his

trial attorney said, and when the State's alleged twenty-year plea offer was communicated. It is also sheer speculation, in retrospect, to presume that defendant would have accepted a twenty-year plea offer if the State denied him an opportunity to enter into a conditional guilty plea.

We likewise find no merit in defendant's other contentions, including those in his supplemental pro se brief, raising issues that either were already decided on direct appeal or could have been. See R. 3:22-4 and R. 3:22-5. See also R. 2:11-3(e)(1)(E).

Affirmed.