SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1970-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMES R. COOPER,

Defendant-Appellant.

Argued February 28, 2017 – Decided March 30, 2017

Before Judges Fasciale and Gilson.

On appeal from Superior Court of New Jersey, Law Division, Somerset County, Municipal Appeal No. 35-15.

Alan S. Albin argued the cause for appellant.

Lauren Martinez, Assistant Prosecutor, argued the cause for respondent (Michael H. Robertson, Somerset County Prosecutor, attorney; Ms. Martinez, of counsel and on the brief).

PER CURIAM

Defendant James R. Cooper appeals from a December 4, 2015 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

I.

In 2010, a municipal judge convicted defendant of driving while intoxicated (DWI), N.J.S.A. 39:4-50, and careless driving, N.J.S.A. 39:4-97. Following a trial de novo, the Law Division also convicted defendant of DWI and careless driving. On the DWI conviction, the Law Division sentenced defendant to a seven-month suspension of his driver's license, twelve hours in the intoxicated driver's resource center, and imposed fines, surcharges, and assessments.

Defendant filed a direct appeal and we affirmed. State v. Cooper, No. A-1057-10 (App. Div. May 16, 2011). In making that ruling, we stated:

> Here, based on the proofs presented by the State, both testimonial and documentary, there was ample evidence to support the Law Division judge's conclusion that defendant was driving under the influence of alcohol, despite the fact that the BAC was below the per se level. We again note that defendant admitted that he had consumed two beers with a shot and two Lorazepams prior to driving.
>
> [Id. at 10.]

In 2015, defendant, represented by counsel, filed a petition for PCR in the municipal court. The municipal court heard oral arguments and denied the petition. Defendant, thereafter, filed for de novo review by the Law Division. The Law Division heard oral argument and denied defendant's petition without an

evidentiary hearing. The Law Division memorialized its ruling in an order and written opinion issued on December 4, 2015.

Defendant's DWI conviction was based on events that took place on September 11, 2009. On that evening, a police officer saw the vehicle driven by defendant fail to fully stop at a stop sign. The officer initiated a motor vehicle stop and observed that defendant's hands were slow and fumbling, and his eyes appeared watery and bloodshot. The officer then conducted a series of field sobriety tests, some of which defendant passed and others he failed. Another officer then arrived and observed that defendant's breath smelled of alcohol, his eyes were bloodshot and watery, his eyelids were droopy, and his pupils constricted.

Defendant was arrested on suspicion of driving while under the influence. He was taken to police headquarters where he was asked to perform more balancing tests, which he failed. Defendant was also given an Alcotest, which revealed that he had a blood alcohol content (BAC) of 0.05%.

While at police headquarters, defendant received Miranda[1] warnings, which he waived. Thereafter, an officer who was trained in drug recognition examined him. During defendant's examination, he told the officer that he had consumed two beers, a shot, and

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

had taken two Lorazepam pills, for which he had a prescription. The drug recognition officer assessed defendant and opined that defendant was under the influence of a central nervous system depressant and alcohol.

At the municipal trial, the State submitted a laboratory certification of an analysis of defendant's blood sample obtained after his arrest. That lab report indicated that defendant had tested positive for the presence of oxycodone, TCH-COOH (a marijuana metabolite), and citalopram.

In his certification in support of his PCR petition, defendant contended that his trial counsel had been ineffective in failing to object to the laboratory report and failing to call an expert. Defendant detailed that his counsel had consulted with an expert prior to trial and had received a written report from the expert.

In denying defendant's PCR petition, the Law Division reasoned that defendant's original conviction for DWI was based on the observations of the police officers, defendant's failure to successfully perform sobriety tests, and defendant's admission that he drank alcohol and took Lorazepam. Thus, the Law Division found that defendant did not satisfy the prejudice prong of the Strickland[2] test because defendant's trial counsel's failure to

[2] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984).

call a defense expert or object to the lab report would not have changed defendant's conviction for DWI. Accordingly, the Law Division found that there was no reasonable probability that undermined the confidence in defendant's DWI conviction.

II.

On this appeal, defendant presents three arguments for our consideration:

> POINT [I]
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> Petitioner's Trial Counsel Made Multiple Significant Errors Which Could Not Have Been Challenged by Petitioner on Direct Appeal and Demonstrate that He Received Ineffective Assistance of Counsel, Because Counsel's Performance Was Seriously Deficient, and Sufficient to "Undermine Confidence" In the Outcome.
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> POINT [II]
>
> Viewed In The Light Most Favorable to Defendant, Defendant Was And Is Entitled to Reversal Based On The State's Failure To Present The Testimony of Trial Counsel Or Any Other Evidence Opposing The Petition. The State Waived That Opportunity. The Convictions Must Be Reversed.
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> POINT [III]
>
> The Superior Court Erred In Failing to View the Evidence In a Light Most Favorable to Petitioner Which Under the Authority of [State v. Preciose, 129 N.J. 451 (1992)] Requires Reversal or at a Minimum, An Evidentiary Hearing.
>
> [(Emphasis omitted).]

We first review the well-established principles guiding our review of an order denying PCR. Defendant's petition arises from the application of Rule 3:22-2, which permits collateral attack of a conviction based upon a claim of ineffective assistance of counsel within five years of the conviction. See R. 3:22-12(a)(1); see also Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); State v. Fritz, 105 N.J. 42, 58 (1987). To establish a claim of ineffective assistance of counsel, a defendant must satisfy the two-part Strickland test: (1) "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[,]" and (2) "the deficient performance [truly] prejudiced the defense." Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693 (quoting U.S. Const. amend. VI); Fritz, supra, 105 N.J. at 58-59 (adopting the Strickland two-part test in New Jersey).

Rule 3:22-10(b) provides that a defendant is only entitled to an evidentiary hearing on a PCR petition if he establishes a prima facie case in support of PCR. Moreover, there must be "material issues of disputed fact that cannot be resolved by reference to the existing record," and the court must determine that "an evidentiary hearing is necessary to resolve the claims for relief." State v. Porter, 216 N.J. 343, 354 (2013) (quoting

R. 3:22-10(b)). To establish a prima facie case, a defendant must demonstrate "the reasonable likelihood of succeeding under the test set forth in Strickland." State v. Preciose, 129 N.J. 451, 463 (1992).

Here, the Law Division focused on the second prong of the Strickland test and found that defendant had not demonstrated that he had a reasonable likelihood of showing prejudice from his trial counsel's alleged failures. We agree.

The second prong of Strickland requires the defendant to "show that the deficient performance prejudiced the defense." Supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. The defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. The defendant must affirmatively prove prejudice to the defense. Ibid.

Defendant identifies two failures of his trial counsel. First, he contends that his trial counsel failed to object to the lab report. Second, he contends that his trial counsel failed to call an expert witness.

Prior to trial, the State produced a lab report regarding an analysis of a sample of defendant's blood. That report disclosed that defendant's blood had traces of oxycodone, a metabolite of

marijuana, and citalopram. By statute, defendant had to give notice of grounds for objecting to that report within ten days of the receipt of the report or such objections would be waived. N.J.S.A. 2C:35-19(c). It is undisputed that defendant's trial counsel failed to give timely notice of any grounds for objection.

Defendant now argues that had his trial counsel given notice, the State would have been required to bring the lab technician to trial to give testimony. What defendant has failed to establish, however, is whether testimony by the lab technician would have disclosed any grounds for excluding the lab report. In other words, defendant was asking the PCR court to speculate that had the lab technician testified, there may have been grounds for excluding the report. It is well established that speculation is insufficient to satisfy the Strickland test. Fritz, supra, 105 N.J. at 64.

Defendant argues that the failure of his trial counsel to object to the lab report is analogous to the situation in State v. Heisler, 422 N.J. Super. 399 (App. Div. 2011). We disagree because the facts giving rise to our holding in Heisler were markedly different from the facts of this case. In Heisler the State produced only the lab certificate and not the underlying lab reports and data. Id. at 408. We held that defendant's ten-day period to object commenced only after the production of both the

certificate and any underlying reports or data. Id. at 422. Thus, defendant's objection was timely and therefore the trial court erred in admitting the lab certificate without testimony from the lab analyst. Ibid. Here, in contrast, defendant is speculating that had the lab technician testified, that testimony may have provided grounds to exclude the lab report.

Next, defendant argues that had his trial counsel called an expert, he might not have been convicted of DWI. In his certification in support of his petition for PCR, defendant explained that his trial counsel had consulted with an expert and had even received a written report from that expert. In his report, the expert stated that he was prepared to testify:

> An individual having a blood alcohol concentration of 0.05% would not normally be considered to be in an impaired state. Furthermore, given the circumstances of this case, there exists no reasonable degree of scientific evidence to support the contention that [defendant] was driving under the influence of oxycodone, citalopram, and/or marijuana on the day of his arrest.

We agree with the Law Division PCR judge that even if defendant had called such an expert, that testimony does not establish a reasonable probability that defendant would not have been convicted of DWI. When the Law Division conducted its de novo review on the charges, it found defendant guilty of DWI based on the testimony of the officers and defendant's own admissions.

Two different officers observed defendant and testified that defendant had watery and bloodshot eyes, his hand movements were slow and fumbling, and he smelled of alcohol. A third officer, a drug recognition expert, examined defendant a short time later and testified that he made similar observations, but did not note that defendant's eyes were bloodshot. Moreover, Defendant was administered a series of field sobriety tests, and he failed several of those tests. The drug recognition expert that examined defendant opined that defendant was under the influence of a central nervous system depressant and alcohol. Thus, the officer testified that defendant was unable to safely operate a motor vehicle. The officer based part of his opinion on defendant's own admission that he had consumed two beers, a shot, and had taken two Lorazepam pills before driving.

The expert report produced by defendant does not raise material challenges to the observations of the officers. Indeed, the expert report produced by defendant in the PCR proceeding does not address the effects of combining alcohol with Lorazepam. Thus, defendant is again asking the court to speculate that had an expert been called, he might have been able to challenge the testimony of the drug recognition expert. Such speculation does not establish a prima facie showing of prejudice.

In short, defendant has failed to present a prima facie case of ineffective assistance of counsel, he was not entitled to an evidentiary hearing, and his PCR petition was properly denied. Defendant's remaining arguments lack sufficient merit to warrant further discussion in a written opinion. See R. 2:11-3(e)(2).

Affirmed.