SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2731-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LESTER HUGHES,

Defendant-Appellant.

Submitted February 2, 2017 – Decided March 1, 2017

Before Judges Hoffman and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 11-03-0239.

Joseph E. Krakora, Public Defender, attorney for appellant (Alan I. Smith, Designated Counsel, on the brief).

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Tom Dominic Osadnik, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from the denial of his petition for post-conviction relief (PCR) without an evidentiary hearing. For the reasons that follow, we affirm.

I

On October 17, 2011, defendant pled guilty to first-degree robbery, N.J.S.A. 2C:15-1(a)(1) and N.J.S.A. 2C:15-1(a)(2), and third-degree eluding, N.J.S.A. 2C:29-2(b). At the time, defendant was extended term eligible, see N.J.S.A. 2C:44-3, and faced a life sentence if convicted. However, as part of the plea negotiations, the State agreed to recommend an aggregate term of eight years imprisonment, if defendant pled to the offenses.

Three days before he pled, defendant appeared in court and attempted to plead guilty, but was unable to provide a complete factual basis. He did state he and his brother, the co-defendant, robbed a jewelry store in Clifton. But when counsel asked him if the co-defendant "indicate[d]" to the employees in the store he was armed, defendant responded he did not know. The court instructed defendant and plea counsel to discuss the matter while the court handled another case.

Following the recess, plea counsel requested the hearing, which was taking place on a Friday, be adjourned to the following Monday, for the following reasons:

PLEA COUNSEL: Mr. Hughes is facing a life sentence on this matter. It's a very, very serious matter. He has an offer of eight years with 85 percent. I had strongly, strongly, strongly, recommended to him and it may have been to the point that in recommending it too hard that he feels in his heart that I'm trying to push him into something that he's not ready to do or I don't have his best interest at heart. Because of that, I hate to have someone turn down an offer, which I believe, for the record, is in his best interest to take and his family's best interest because he's more concentrating on this anger towards me or his anger towards that he's being rushed to make a decision or things of that nature . . . The number didn't come out of nowhere, eight with 85, and I really believe he feels that he's being pressured into taking such a difficult decision. . . .

I believe — I'll give him his file. He'll be able — definitely be able to find an attorney today or Saturday if he wants to speak to someone else and discuss the offer and the — I have all discovery so he could show the new attorney that. And then on Monday he can make a decision. . . .

I explained to him, again, in order to plead guilty to first-degree robbery, he has to acknowledge that the threat of force was used during a robbery, and if he does not give a factual basis, either force a gun or the threat of a gun or some type of weapon was used, then the court will not accept —

THE COURT: Or threatened to be used.

PLEA COUNSEL: Threatened. Threatened to be used, the court has to acknowledge — I mean he has to acknowledge before the court in order for the court to accept his plea. So I want him to think about that this weekend

> and I'm hopeful that he'll go speak to someone else, and I'm pretty confident that attorney, when reviewing it, will have similar advice that I have. Maybe he won't or she won't, but I think it's in his best interest, based on the fact that this is a life sentence if Mr. Hughes gets convicted . . . .
>
> THE COURT: All right. We'll . . . continue with this matter until Monday . . . Mr. Hughes should certainly understand the significance of what his attorney said a moment ago. On Monday Mr. Hughes is prepared to put forth a factual basis which would satisfy the requirements of a first-degree robbery, as he indicated, either being armed or threatening the use of a weapon even if there was none in fact on his person or that of his brother. If he's prepared to do that, this plea agreement will go through on Monday. If he is not prepared to do that, then all plea negotiations will end on Monday, an order will be entered, cutting off any plea possibilities.

Defendant acknowledged on the record he understood the court's comments.

The following Monday, the plea hearing resumed and defendant endeavored to provide a factual basis to his plea. He stated after he and his brother arrived at the jewelry store, his brother put on a mask and ran inside of the store. Seconds later, defendant joined his brother in the store. Defendant believed his brother had threatened the employees and customers in the store, because "they were terrified." He and his brother

smashed jewelry cases and took necklaces, rings, and a bracelet. He and his brother then left the store, jumped into defendant's car, and drove away.

Soon thereafter a police car got behind defendant's car. Although the lights on the police car were activated, defendant did not pull over and a chase ensued. Defendant knew he was required to but refused to pull over and stop. At one point, his brother jumped out of the car, but defendant kept driving. Eventually, defendant side-swiped another vehicle, causing damage to one of his tires and making his vehicle inoperable.

The court was not satisfied defendant established his brother used or threatened to use force against the robbery victims, and took a break in the proceeding to give defendant and plea counsel an opportunity to speak in private. After the recess, defendant clarified when he first entered the store, his brother had his finger positioned in his jacket in such a way to make it appear as though he was holding a firearm. His brother pointed the finger inside of his jacket at a person near the cash register to induce such person to open it. The court then accepted defendant's factual basis.

On December 2, 2011, the court sentenced defendant in accordance with the plea agreement, ordering an eight-year term of imprisonment for robbery, subject to the No Early Release

Act, N.J.S.A. 2C:43-7.2., and a concurrent five-year flat term for eluding. Defendant appealed his sentence, which we affirmed during our excessive sentencing oral argument calendar. See R. 2:9-11.

In January 2013, defendant filed a petition for PCR. In his brief, defendant asserted, among other things, he received ineffective assistance from plea counsel because counsel pressured him into fabricating the factual basis to his plea, in order to induce the court to find the plea acceptable. Defendant also sought to set aside his guilty plea pursuant to State v. Slater, 198 N.J. 145 (2009), arguing his attorney's conduct warranted vacating the plea.

In a certification filed in support of his petition, defendant alleged his brother and his brother's friend, Blitz, robbed the store. Defendant gave them a ride to the store in his car and remained in the car while they were in the jewelry store, but was unaware they planned to or did participate in a robbery. After the robbery, his brother got back into defendant's car and Blitz took off on foot.

Defendant claimed he told his attorney he had not been involved in the robbery, pointing out there was no evidence he was in the store. Defendant asserted counsel ignored him and advised if he went to trial, he would not prevail and would be

imprisoned for the rest of his life. When defendant told counsel he could not provide a factual basis establishing he participated in the robbery, counsel allegedly told defendant he "could" say he had participated to get the benefit of the plea deal. However, defendant stated he ultimately accepted the plea deal because of the prospect he might go to prison for life if he went to trial.

In his certification, defendant claimed the transcript shows he initially "waivered" when he attempted to provide a factual basis. He stated he had difficulty providing a factual basis because he had not in fact been in the jewelry store at the time of the robbery. When the plea hearing resumed three days later, he maintained he again faltered when giving a factual basis, but "eventually caved to my lawyer's pressure and lied about seeing my brother brandish a gun and threaten people in the jewelry store." Defendant did not address the factual basis he gave in support of the charge for eluding, or what the State's discovery revealed.

It is not disputed the police report states the co-defendant gave a statement to the police asserting defendant and Blitz committed the robbery, while the co-defendant waited in the car outside of the store. When defendant and Blitz returned to the car, they were holding a bag of jewelry. Defendant drove

the car, and, after the police began to pursue them, the co-defendant and Blitz fled from the car. In his certification in support of his PCR petition, defendant claimed his brother implicated him because his brother harbored animosity toward him.

The police report noted the police never saw three people in the car or any evidence as many as three people were involved in the robbery. The police suspected the co-defendant fabricated the existence of a third party to distance himself from the criminal acts that occurred inside of the store. The police report also revealed defendant failed to pull over after the police activated the lights on the patrol car, and, after his car became disabled, defendant abandoned his car and fled.

On October 14, 2014, the PCR court denied defendant's petition on the merits without an evidentiary hearing.

II

On appeal, defendant raises the following points for our consideration:

> POINT I — WHEN THE DEFENDANT ALLEGES THAT TRIAL COUNSEL TOLD HIM IN AN OFF-THE-RECORD CONFERENCE THAT TOOK PLACE IN THE HALLWAY OF THE COURTHOUSE DURING THE PLEA HEARING "TO LIE" TO ESTABLISH A FACTUAL BASIS TO A CRIME HE DID NOT COMMIT IN ORDER TO SECURE WHAT WAS PERCEIVED TO BE A FAVORABLE PLEA BARGAIN, AND THE STATE DOES NOT FIND IT APPROPRIATE TO SUBMIT A CERTIFICATION OR

AFFIDAVIT FROM TRIAL COUNSEL CONTESTING THE ALLEGATION, A PRIMA FACIE SHOWING OF INEFFECTIVE ASSISTANCE OF COUNSEL WAS MADE.

POINT II — THE COURT'S RULING DENYING POST-CONVICTION RELIEF VIOLATED DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

POINT III — THE PCR COURT ERRED IN DENYING DEFENDANT'S POST-CONVICTION RELIEF MOTION TO SET ASIDE HIS GUILTY PLEA PURSUANT TO STATE V. SLATER.

We are not persuaded by any of these arguments and affirm. As he argued before the PCR court, defendant contends there is no evidence he was in the jewelry store at the time of the robbery, claiming he succumbed to plea counsel's urging he lie about his participation in the robbery when providing a factual basis so the court would accept his plea. Because counsel's actions were inappropriate and defendant's factual basis false, he contends his plea should be vacated.

To establish ineffectiveness of counsel, a defendant must satisfy both prongs of the test enunciated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42 (1987). Those two prongs are: (l) counsel made errors so egregious he or she failed to function effectively, as guaranteed by the Sixth Amendment to the United States

Constitution; and (2) the defect in counsel's performance prejudiced defendant's rights to a fair trial such that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, supra, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 2068, 80 L. Ed. 2d at 693, 698.

In the context of a guilty plea, a defendant claiming ineffective assistance of counsel must show his or her attorney misinformed him or otherwise rendered inadequate legal assistance in the plea process and, but for his attorney's deficient performance, defendant would not have pled guilty but instead "would have insisted on going to trial." See State v. Gaitan, 209 N.J. 339, 350-51 (2012) (quoting State v. Nunez-Valdez, 200 N.J. 129, 139 (2009)). To satisfy the second prong, a defendant must convince the court it would have been rational to reject the proffered plea in favor of a trial. See Padilla v. Kentucky, 559 U.S. 356, 372, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284, 297 (2010).

Here, there is no dispute plea counsel stressed the benefits of accepting the plea. During the initial plea hearing, counsel volunteered as much. In fact, counsel stated he had "strongly, strongly, strongly" recommended defendant accept the plea deal because, if defendant went to trial and

lost, he would face a life sentence. Because defendant was impervious to his advice, counsel requested and obtained a three-day break in the plea hearing to enable defendant to reflect over the plea offer and consult with another attorney.

In our view, there was nothing inappropriate about plea counsel strongly recommending defendant accept the State's plea offer under these facts; arguably, counsel would have been remiss had he not done so. There were valid reasons to accept the plea deal.

First, defendant does not dispute he was at the scene and defendant's brother squarely implicates him in the robbery. While defense counsel could have cross examined the brother about his alleged hostility toward defendant had the matter gone to trial, this strategy was accompanied by risks, including the jury would find the brother's testimony credible and defendant's conviction would likely result in a sentence of life in prison. Second, given defendant's exposure to life in prison should he proceed to trial and lose, accepting a plea offer that capped his prison term to eight years was unquestionably reasonable. Third, defendant does not challenge the State's discovery clearly establishing he engaged in eluding.

Defendant claims his struggle to provide a factual basis during the plea hearing is evident from the transcript. He

claims this is proof he was not drawing from and describing what actually occurred, but instead was attempting to concoct a factual basis. Although counsel seemingly had difficulty eliciting from defendant exactly how his brother exhibited a show of force and how such conduct put the victims in fear of immediate bodily injury during the course of the robbery, elements of N.J.S.A. 2C:15-1(a)(2), the transcript does not bear out defendant's claim he waited in the car because he clearly explained what happened inside the jewelry store.

A fair reading of the transcript reveals the problem was the form of counsel's questions. Counsel's questions initially failed to educe what defendant was trying to say; however, through his questions, counsel ultimately clarified defendant's perspective of how his brother exhibited a show of force. The exchange between defendant and counsel during the hearing actually indicates an effort on defendant's part to be accurate.

In addition, defendant's answers to two questions exposed he was speaking from personal knowledge about what occurred in the store. Specifically, counsel asked defendant if his brother had threatened the victims in a manner to suggest he would hurt them if they did not cooperate. Defendant replied, "They were terrified, so I imagine that's what he did." Counsel also asked, "And the items you took [from the jewelry store] were,

what, watches, chains, rings?" Defendant corrected counsel, clarifying, "No watches, but all – all the rest of that. Necklaces, rings, bracelet." Defendant's responses are consistent with one present during the robbery.

We are satisfied from our review of the record defendant failed to make a prima facie showing he met the first prong of ineffectiveness within the Strickland-Fritz test. In light of the record refuting defendant's claims he never entered the store, his claims of innocence defeat a request to vacate his guilty plea under Slater, supra. Given the evidence against him and the stakes involved, it would not have been rational to reject the proffered plea in favor of a trial. See Padilla, supra, 559 U.S. at 372, 130 S. Ct. at 1485, 176 L. Ed. 2d at 297. Accordingly, the PCR court correctly concluded an evidentiary hearing was not warranted. See State v. Preciose, 129 N.J. 451, 462-63 (1992).

Affirmed.