SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3202-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BRYON O. WRIGHT, a/k/a OMAR WRIGHT, ROGER WRIGHT,

Defendant-Appellant.

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Submitted September 11, 2017 – Decided November 2, 2017

Before Judges Messano and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 11-01-0022.

Joseph E. Krakora, Public Defender, attorney for appellant (Lee March Grayson, Designated Counsel, on the brief).

Robert D. Laurino, Acting Essex County Prosecutor, attorney for respondent (Tiffany M. Russo, Special Deputy Attorney General/ Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Following a jury trial, defendant Bryon O. Wright was convicted of various drug offenses, eluding, and resisting arrest. The judge sentenced him to an aggregate sixteen-year term of imprisonment. We affirmed defendant's conviction and sentence on direct appeal, preserving for post-conviction relief (PCR) his claim that trial counsel provided ineffective assistance (IAC). State v. Wright, No. A-6036-11 (App. Div. Jan. 16, 2014) (slip op. at 31). The Supreme Court denied defendant's petition for certification. 218 N.J. 531 (2014).

In a timely-filed PCR petition, defendant alleged, among other things, counsel failed to call certain witnesses at trial despite indicating she would. After the court appointed PCR counsel, defendant filed an amended petition in which he alleged neither trial counsel nor appellate counsel discussed severing certain counts in the indictment, charging conduct alleged to have occurred in December 2009, from other counts that alleged conduct occurring in February 2010. Defendant also stated counsel provided ineffective assistance regarding the denial of defendant's pre-trial motion to suppress evidence.

The PCR judge, who was also the trial judge but not the motion judge, considered oral argument. In a comprehensive written decision, the judge addressed these and defendant's other claims. He entered an order denying PCR relief and this appeal followed.

Before us, defendant limits his claims of error to the following:

> POINT I
>
> TRIAL COUNSEL WAS INEFFECTIVE BY NOT MOVING TO SEVER THE DECEMBER 16, 2009 OFFENSES FROM THE FEBRUARY 8, 2010 OFFENSES FOR SEPARATE TRIALS.
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> POINT II
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> BECAUSE THE LAWFULNESS OF THE MOTOR VEHICLE STOP WAS NOT ADJUDICATED BY EITHER THE TRIAL COURT OR THE APPELLATE DIVISION IN THE DIRECT APPEAL, THE PCR COURT ERRED BY FINDING DEFENDANT'S CLAIM THAT THE KNIFE SEIZED AFTER HIS CAR WAS STOPPED ON FEBRUARY 8, 2010 SHOULD HAVE BEEN SUPPRESSED WAS PROCEDURALLY BARRED.
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> POINT III
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> TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO PURSUE THE SUPPRESSION MOTION AS IT PERTAINED TO THE ISSUE THAT THE MOTOR VEHICLE STOP ON FEBRUARY 8, 2010 WAS A PRE-TEXT TO SEARCH THE DEFENDANT'S CAR AND TO ARREST HIM FOR THE ALLEGED EVENTS ON DECEMBER 16, 2009.
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> POINT IV
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> THIS CASE SHOULD BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE APPELLATE COUNSEL WAS INEFFECTIVE BY NOT RAISING THE SEVERANCE ISSUE AND SUPPRESSION ISSUE, AS IT PERTAINED TO THE PRE-TEXTUAL STOP OF THE CAR, IN THE DIRECT APPEAL.
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> POINT V
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> BECAUSE TRIAL COUNSEL FAILED TO CALL KEY DEFENSE WITNESSES TO TESTIFY DURING THE TRIAL, THE DEFENDANT'S CASE SHOULD BE REMANDED TO THE PCR COURT FOR AN EVIDENTIARY HEARING.

POINT VI

THE PCR COURT ERRED BY NOT GRANTING AN EVIDENTIARY HEARING.

We have considered these arguments in light of the record and applicable legal standards. We affirm.

To establish an IAC claim, 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, he must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Id. at 52 (quoting Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693). "To satisfy prong one, [a defendant] ha[s] to overcome a strong presumption that counsel exercised reasonable professional judgment and sound trial strategy in fulfilling his responsibilities." State v. Nash, 212 N.J. 518, 542 (2013) (citations omitted).

Second, a defendant must prove that he suffered prejudice due to counsel's deficient performance. Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. A defendant must show by a "reasonable probability" that the deficient performance affected the outcome. Fritz, supra, 105 N.J. at 58. "A reasonable

probability is a probability sufficient to undermine confidence in the outcome." State v. Pierre, 223 N.J. 560, 583 (2015) (quoting Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698; Fritz, supra, 105 N.J. at 52). "If [a] defendant establishes one prong of the Strickland-Fritz standard, but not the other, his claim will be unsuccessful." State v. Parker, 212 N.J. 269, 280 (2012). We apply the same standard to defendant's claims of ineffective assistance by appellate counsel. State v. Gaither, 396 N.J. Super. 508, 513 (App. Div. 2007) certif. denied, 194 N.J. 444 (2008) (citing State v. Morrison, 215 N.J. Super. 540, 546 (App. Div.), certif. denied, 107 N.J. 642 (1987)).

Before an evidentiary hearing is required, a defendant must establish a "prima facie case," that is, "a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits." R. 3:22-10(b). "[W]e review under the abuse of discretion standard the PCR court's determination to proceed without an evidentiary hearing." State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013) (citing State v. Marshall, 148 N.J. 89, 157-58, cert. denied, 522 U.S. 850, 118 S. Ct. 140, 139 L. Ed. 2d 88 (1997)).

We refer to our prior opinion to properly consider the arguments made in Points I through IV. In December 2009, police observed defendant exit his car carrying a cigarette box as he

entered and shortly exited a vehicle owned by Joseph Plum that was parked outside a tavern. Wright, supra, slip op. at 3. Plum had arranged for the purchase of cocaine by calling a man he only knew as "Scoop." Id. at 3-4. After Plum exited the tavern, he went to his car and retrieved a cigarette box; police detained him and found cocaine in the cigarette box. Id. at 4. Plum was arrested and gave police a complete statement.[1] Ibid. Further investigation led to defendant's identification as Scoop; phone records verified text messages exchanged between Plum and defendant. Id. at 4 n.1, 6-7.

In February 2010, the same police detective, Michael Watts, observed defendant driving the same car he used during the December transaction. Id. at 4-5. Police attempted to conduct a motor vehicle stop, but defendant fled before stopping the car in the parking lot of a diner. Id. at 5. Police surrounded the vehicle, but defendant refused their commands to exit. Id. at 6. Watts saw a knife on the floor of the car and, given defendant's continued refusal, broke the car window and, with the aid of the other officers, forcibly pulled defendant from the vehicle. Ibid. After obtaining a search warrant, police found forty bags of cocaine in the false bottom of a can in the car. Ibid.

[1] Plum testified for the State at trial.

Ultimately, the jury found defendant guilty of drug offenses related to the December 2009 events, and eluding and resisting arrest for the February 2010 events, but it acquitted him of the drug and weapon charges stemming from the knife and cocaine seized at that time.

In addressing the argument raised in Point I, the PCR judge correctly observed that the December 2009 events were the basis for defendant's February 2010 arrest. In other words, evidence of the December 2009 events would have likely been admitted at a separate trial regarding the February 2010 offenses, and therefore any motion to sever, if made, would have been denied. See State v. Chenique-Puey, 145 N.J. 334, 341 (1996) (holding that consolidation is appropriate if evidence of the offenses sought to be severed would have been admissible at trial on the remaining charges).

We agree. Because "[t]he failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel," State v. Worlock, 117 N.J. 596, 625 (1990), the judge correctly denied PCR relief on this claim.

The motion judge conducted a pre-trial evidentiary hearing on defendant's motion to suppress the knife and drugs found in his car in February 2010. We affirmed the judge's denial of that motion on direct appeal, concluding "Watts had a legitimate reason

for approaching defendant's car after [defendant] eluded the police," and his seizure of the knife was lawful under the plain view exception to the warrant requirement. Wright, supra, slip op. at 16-17.

Before the PCR judge, defendant argued neither the motion judge nor our colleagues ever decided whether Watts had a legitimate basis to initiate the stop in the first place. Defendant alleged, without any proof, that Watt's decision to stop the car was pretextual, and trial counsel provided ineffective assistance by not presenting a challenge to the search on that basis.

The PCR judge determined the claim was barred by Rule 3:22-5 because it had been expressly adjudicated on direct appeal. Moreover, he noted defendant suffered no prejudice because the jury acquitted him of the knife and drug charges from the February 2010 seizure.

In Points II, III and IV, defendant argues his IAC claim in this regard was not procedurally barred because whether the stop was initiated without a reasonable suspicion or probable cause was never presented and adjudicated, trial counsel failed to pursue that issue at the hearing, and appellate counsel was ineffective for not raising the issue on direct appeal. These claims warrant little discussion. R. 2:11-3(e)(2).

Our colleagues specifically addressed the issue by assuming arguendo some basis for defendant's claim that Watts lacked any probable cause to stop defendant's car in the first instance. They said:

> Thus, even if his original reason for stopping defendant did not amount to probable cause, Watts had the right to make an arrest for the crime of eluding. State v. Seymour, 289 N.J. Super. 80, 87 (App. Div. 1996). As the Supreme Court observed in State v. Crawley:
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> > [A] defendant has no right to commit the crime of resisting arrest, eluding, or escape in response to an unconstitutional stop or detention. For compelling public safety reasons, the resisting arrest, eluding, and escape statutes and interpretive case law require that a defendant submit to an illegal detention and that he take his challenge to court.
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> > [187 N.J. 440, 455, cert. denied, 549 U.S. 1078, 127 S. Ct. 740, 166 L. Ed. 2d 563 (2006)).]
>
> [Wright, supra, slip op. at 16 (alternations in original).]

With only bald assertions regarding the officer's bad faith, it follows that appellate counsel was not deficient for failing to raise a losing argument regarding the search on direct appeal. Worlock, supra, 117 N.J. at 625.

Addressing the issue now raised in Point V, the PCR judge listed the specific witnesses defendant alleged counsel should

have called at trial. The judge assumed the truth of defendant's version of these witnesses' testimony.[2]

He noted any testimony from defendant's father about a conversation he had with a friend on the police force confirming there was no knife in the car would have been hearsay. The testimony of two people who were in the diner in February 2010, saw defendant dragged out of the car and provided statements to Internal Affairs, would not have been "material . . . in [the] defense." The judge noted defense counsel had the relevant Internal Affairs records in her possession. Finally, the judge rejected the IAC claim regarding counsel's failure to call Plum's landlady as a witness. She was the sister of a police sergeant who gave a "pep talk" to Plum while he was being interrogated by Watts. The judge correctly noted Plum was cross-examined at trial about the landlady and the "pep talk."

Without any detailed explanation, defendant baldly asserts that had counsel called these witnesses at trial, they would have

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[2] These witnesses were named in the PCR petition, although there were no certifications or affidavits from them. See State v. Porter, 216 N.J. 343, 355 (2013) (stating a defendant must produce "specific facts and evidence supporting his allegations"); State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.) ("[W]hen a petitioner claims his trial attorney inadequately investigated his case, he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification."), certif. denied, 162 N.J. 199 (1999).

proven his claim that police planted the knife and drugs found in his car. This argument lacks sufficient merit to warrant further discussion. R. 2:11-3(e)(2).

For all these reasons, defendant failed to establish a prima facie case for PCR relief, and the judge did not mistakenly exercise his discretion to deny an evidentiary hearing.

Affirmed.