SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3229-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

J.B.,

Defendant-Appellant.

Submitted June 1, 2017 – Decided June 19, 2017

Before Judges Lihotz and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Burlington County, Indictment No. 00-06-0462.

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

Scott A. Coffina, Burlington County Prosecutor, attorney for respondent (Jennifer Paszkiewicz, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant J.B. appeals from an October 23, 2015 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. For the reasons that follow, we affirm.

I

In 1999, defendant was stopped by the police because of an outstanding traffic warrant. A search of his car revealed one hundred photographs of bound and gagged males between the ages of fifteen and twenty-two. The men were arranged in poses, and some were blindfolded. After receiving Miranda warnings, defendant confessed he took the photographs, but claimed every person photographed did so willingly.[1] Defendant admitted his bondage activities were "sex related," but denied having sex with any of those photographed. Taped to some of the photographs were locks of hair taken from the person pictured. Defendant referred to these pictures as his "trophies."

After being charged with three counts of third-degree luring and enticing a child, N.J.S.A. 2C:13-6, three counts of fourth-degree harassment, N.J.S.A. 2C:33-4(c) and (e), and one count of fourth-degree contempt, N.J.S.A. 2C:29-9(a), defendant contacted one of the boys he photographed and urged him to not

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

testify against him. Defendant was then charged with tampering with a witness, N.J.S.A. 2C:28-5(a)(1).

Because the police seized the photographs without a warrant, defendant's motion to suppress the pictures was granted. Before the motion was granted, the police identified and interviewed A.V., one of the underage males defendant photographed. A.V. reported he borrowed ten dollars from defendant and agreed to allow defendant to tie him up to pay off his debt. Defendant tied him up and blindfolded him with duct tape, and told A.V. if he tried to talk, defendant would gag him. Police also spoke with D.F. and T.D., who reported defendant tied them up as well.

After the photographs were suppressed, all but the tampering and contempt charge were dismissed. In January 2002, defendant pled guilty to the tampering charge, in exchange for the dismissal of the contempt charge and another indictment, in which defendant was charged with luring and enticing a child, as well as endangering the welfare of a child. Defendant was sentenced to a five-year term of imprisonment. Defendant did not file a direct appeal from his conviction and sentence.

Before his release from prison, in 2004, the State successfully petitioned the court for defendants civil commitment under the Sexually Violent Predator Act (SVPA),

N.J.S.A. 30:4-27.24 to -27.38. In a lengthy, comprehensive opinion, the court found defendant committed four "sexually violent offenses" as defined by N.J.S.A. 30:4-27.26(b), warranting commitment to the Special Treatment Unit. N.J.S.A. 30:4-27.26(b) states a sexually violent offense can be "any offense for which the court makes a specific finding on the record that, based on the circumstances of the case, the person's offense should be considered a sexually violent offense." Ibid.

Three of the sexually violent offenses occurred before the discovery of and were unrelated to the photographs discovered in defendant's car.[2] The court found the fourth sexually violent offense was putting young men, including underage males, in bondage, as evidenced by the subject photographs. The court acknowledged tampering with a witness is not a sexually violent offense, but placing underage males, who cannot render consent, in bondage was, noting the photographs defendant took of those he put in bondage "would do credit to the Marquis de Sade." The court further noted:

[2] Accounts of the other three offenses are detailed in our opinion affirming the commitment court, In re Civil Commitment of J.M.B., 395 N.J. Super. 69, 76-82 (App. Div. 2007), and the Supreme Court's opinion affirming our opinion. In re Commitment of J.M.B., 197 N.J. 563, 579-86 (2009).

> The [defendant] in the interview with Dr. Zeiguer admitted . . . bondage was his sexual preference. It was a sexual thing. . . .
>
> [Dr. Reeves] conclude[d] "[J.B.] is a sexual sadist." He bases this diagnosis on the established pattern of criminal offenses and the statements of [J.B.] himself. [Defendant] has acknowledged that he is sexually aroused by the bondage of his subjects.
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> [Defendant] also is sexually excited according to Dr. Reeves by the humiliation his victims endure when he cuts their hair. And by the fear his victims suffer when he ties them up.

Although the photographs were suppressed in the criminal matter, the court observed they were admissible in the civil commitment action, enabling the mental health witnesses to testify about the photographs and how they show defendant's "predilections" and "sexual deviancy." The court also noted defendant had a "continuing interest" in the photographs after they were turned over to the State, as exhibited by his motion to retrieve the photographs after the motion to suppress was granted. The court stated, "He not only wanted his pictures back but he wanted the locks of hair which he had collected from the victims, as well, demonstrating a continuing interest in matters of this sort."

We affirmed the trial court, see In re Civil Commitment of J.M.B., 395 N.J. Super. 69 (App. Div. 2007), and we were affirmed by the Supreme Court. In re Commitment of J.M.B., 197 N.J. 563 (2009), cert. denied, 558 U.S. 999, 130 S. Ct. 509, 175 L. Ed. 2d 361 (2009).

In 2006, defendant filed a PCR petition. He claimed plea counsel had been ineffective for failing to advise him he could be civilly committed under the SVPA if he pled to witness tampering. On March 30, 2007, the PCR court denied defendant's petition without prejudice, because the trial court's order civilly committing defendant was pending appeal. Defendant filed a notice of appeal challenging the PCR court's decision to deny his petition without prejudice, but later withdrew that appeal.

In July 2008, defendant filed a second PCR petition. On November 15, 2010, the PCR court denied this petition without prejudice because, although the New Jersey Supreme Court had issued its opinion, another petition defendant filed for certification to the Court was pending.

On April 5, 2011, the PCR court again denied without prejudice defendant's second PCR petition, because defendant "is currently involved in pursing the civil commitment matter through both the State and Federal Court systems[.]" However,

the April 5, 2011 order provided defendant could reinstate his petition within thirty days "after all Court proceedings involving the civil commitment have been concluded."

A federal habeas corpus application defendant filed was denied on June 20, 2012, concluding all challenges to the decision to civilly commit him. However, he did not re-file his second PCR petition until November 2014. Attached to his brief is a certification from a public defender who admitted forgetting, or advising the pool attorney to whom this matter was assigned, to refile the second petition within the thirty day deadline mandated by the April 5, 2011 order.

In his pro se brief filed in support of his second PCR petition, defendant complained that, before he pled to witness tampering, both the plea court and plea counsel failed to advise him there was a "potential possibility" he would be civilly committed under N.J.S.A. 30:4-27.26(b). His argument was not well articulated, but he seemingly asserts the plea to witness tampering provided a basis for the commitment court to examine during the commitment hearing the factual circumstances that culminated in this particular plea, and to conclude defendant had engaged in sexually violent acts with underage boys. Defendant claims had he known of this potential, he would not have pled guilty to witness tampering.

On October 23, 2015, the PCR court found the relief defendant sought procedurally barred as untimely; the court did not cite the specific authority under which it ruled. The court also rejected the petition on substantive grounds, determining the holding in State v. Bellamy, 178 N.J. 127 (2003), precluded plaintiff from relief.

II

On appeal, defendant presents the following issues for our consideration:

> POINT I: THE ORDER DENYING POST-CONVICTION RELIEF SHOULD BE REVERSED BECAUSE, REGARDLESS OF WHETHER TRIAL COUNSEL WAS INEFFECTIVE UNDER THE STRICKLAND TEST, DEFENDANT'S FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO BE CORRECTLY INFORMED OF ALL RELEVANT CONSEQUENCES OF HIS GUILTY PLEA DIRECTLY BY THE TRIAL COURT WAS VIOLATED.
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> POINT II: THE ORDER DENYING POST-CONVICTION RELIEF SHOULD BE REVERSED AND THE MATTER REMANDED FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT MADE A PRIMA FACIE SHOWING OF INEFFECTIVE ASSISTANCE OF COUNSEL.
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> POINT III: THE PCR COURT'S RULINGS VIOLATED DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.
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> POINT IV: THE PCR COURT MISAPPLIED ITS DISCRETION IN APPLYING THE PROCEDURAL BARS OF R. 3:22-5 AND R. 3:22-12.

We first address defendant's substantive contention plea counsel was ineffective for failing to advise his guilty plea

may lead to a finding he had engaged in a sexually violent offense, requiring commitment.

The standard for determining whether counsel's performance was ineffective for purposes of the Sixth Amendment was formulated 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). In general, in order to prevail on a claim of ineffective assistance of counsel, defendant must meet the following two-prong test: (1) counsel made errors so egregious he or she was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution; and (2) the errors 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 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

However, if seeking to set aside a guilty plea based on ineffective assistance of counsel, the second prong a defendant must meet is "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial." State v. Nuñez-Valdéz,

200 N.J. 129, 139 (2009) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)). Here, defendant failed to meet both prongs.

As for the first prong, in Bellamy, the Supreme Court did hold a defendant exposed to the possibility of commitment under the SVPA as a result of a guilty plea must be so advised at the time of the plea by either the court or counsel. Bellamy, supra, 178 N.J. at 139. The holding was based on "fundamental fairness," not upon the premise the consequences were considered "direct" or "penal." Ibid.

However, the obligation imposed by Bellamy was given only limited retrospective effect. Id. at 140. The Court made the case retroactive to only those cases on direct appeal. Id. at 142-43. That is, the Court gave the holding "pipeline" retroactivity only. Here, defendant was sentenced in April 2002; he did not file a direct appeal after he was sentenced. Accordingly, Bellamy's holding provides no support for his argument counsel was ineffective.

Second, defendant does not clarify why he would have rejected the subject plea and instead insisted on going to trial had he known there was a potential the State would seek to have him committed if he pled guilty. If he had gone to trial, he would have had to defend himself against not only the witness

tampering charge, but also other charges, including a charge in another indictment for luring and enticing a child.

But more important, even if he prevailed at trial, the State was still free to seek his civil commitment. There were other acts found to be sexually violent offenses that led to the commitment court's conclusion defendant's commitment was warranted. Defendant does not address this other significant evidence.

Satisfied from our review of the record defendant failed to make a prima facie showing of ineffectiveness of trial counsel within the Strickland-Fritz test, we conclude the PCR court correctly determined an evidentiary hearing was not warranted. See State v. Preciose, 129 N.J. 451, 462-63 (1992).

As for defendant's contention the plea court erred when it failed to advise defendant at the time of his plea he may be civilly committed under the SVPA, first, defendant was required to assert such contention on direct appeal. Second, the reasons we reject defendant's claim counsel was ineffective for failing to render this advice at the time of the plea apply as well to his argument the court similarly erred.

Because of our disposition, it is unnecessary to address whether defendant's second petition was time-barred.

Affirmed.