SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3289-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BRIAN K. LINDSEY,

Defendant-Appellant.

Submitted September 27, 2017 – Decided November 20, 2017

Before Judges Alvarez and Currier.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 00-04-0490.

Joseph E. Krakora, Public Defender, attorney for appellant (Janet A. Allegro, Designated Counsel, on the brief).

Joseph D. Coronato, Ocean County Prosecutor, attorney for respondent (Samuel Marzarella, Chief Appellate Attorney, of counsel; Nicholas D. Norcia, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Brian K. Lindsey seeks reversal of the September 9, 2015 Law Division order denying his petition, after an

evidentiary hearing, for post-conviction relief (PCR) based on ineffective assistance of counsel. Because we do not agree that additional steps should have been taken to assess his disabilities before the entry of his guilty plea, we affirm. We also concur with the Law Division judge that the record establishes defendant's understanding of the nature and consequences of his decision, including the possibility of civil commitment under the Sexually Violent Predator Act (SVPA), N.J.S.A. 2C:47-5(d), N.J.S.A. 30:4-27.24 to 30:4-27.31.

Defendant pled guilty to only one count of the indictment, a second-degree sexual assault, N.J.S.A. 2C:14-2(c). The Adult Diagnostic Treatment Center (ADTC) found defendant's conduct in the commission of the offense was characterized by a pattern of repetitive and compulsive behavior, and recommended treatment at Avenel. See N.J.S.A. 2C:47-2.[1] Defendant was finally sentenced on July 17, 2003, after remand, to nine years imprisonment, in accord with the agreement.[2] The term of imprisonment was subject

[1] The original sentencing judge did not make a finding regarding defendant's amenability to treatment and willingness to participate, which must be included in the Judgment of Conviction (JOC). Accordingly, the JOC was thereafter amended a third time on March 21, 2005, to enable defendant to participate in sex offender treatment.

[2] Defendant's 2001 sentence was remanded because the Law Division judge, mistakenly believing it was mandatory, deviated from the

to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Upon becoming eligible for parole on February 14, 2008, defendant was civilly committed pursuant to the SVPA. Defendant filed the PCR petition on January 23, 2013. During the hearing, the judge found it was counsel's "habit and custom" to review the plea forms with his clients before their entry of a guilty plea. We detail counsel's testimony in the relevant section of the opinion. Fourteen years had passed since this plea was entered, unsurprisingly, counsel had no recollection of the matter. The judge said that "it would have been consistent with this custom that he would have gone over the plea forms with [d]efendant including . . . the possibility of civil commitment." The judge further found that although counsel "could not recall many details of the (SVPA) [he] claimed that he would have gone over it with his client at the time of his plea." It had been years since counsel had represented a defendant subject to the SVPA.

At the hearing, defendant denied that counsel had explained anything to him, or that he had signed or initialed the plea forms. He claimed that if he had understood the civil commitment

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agreement and imposed a ten-year sentence of imprisonment. State v. Lindsey, No. A-4644-01 (App. Div. June 11, 2003)(slip. op. at 18-19). On that appeal, defendant argued that not only was his sentencing erroneous, but that the court double counted an element of the offense and ignored mitigating factors. Ibid.

ramifications of his plea, he would have chosen to go to trial. Defendant denied that counsel read the plea form to him, and said when he told his attorney he could not read or write, his attorney merely told him to do the best he could.

The judge found counsel credible, and defendant incredible. When the plea was entered, counsel clearly stated on the record that defendant had a developmental disability, and that he reviewed the forms with defendant with that in mind. The judge was satisfied that the plea colloquy not only supported counsel's testimony, it demonstrated that defendant's plea was knowing and voluntary.

The judge observed that defendant's testimony during the PCR hearing was wholly inconsistent, not only with his sworn statements when the plea was entered, but even with the factual assertions made in his pro se petition. During the plea colloquy, defendant acknowledged that his attorney read the forms to him, and that he initialed and signed them.

The judge also noted that at sentencing, the prosecutor specifically mentioned the possibility of civil commitment because of the ADTC findings. Defendant did not then question the prosecutor's statements or challenge the findings that prompted them.

The judge who accepted defendant's guilty plea thoroughly reviewed the process and the forms with him, to ensure the record reflected his understanding of the nature of the plea and the consequences despite any intellectual limitations. While the plea was being taken, defendant said that although he understood everything at that moment, he might not remember it in the future. During the plea colloquy defendant asked questions.

During his sentencing, defendant made a statement. He said:

> Yes. I want to say something to the victim and my mom. Sorry for what I done. I know I can't take back what I done, but I can't change my ways and actions. I ask God every[ ]day and every night to forgive, and I hope that you can forgive me too. But if you can't, that's okay too, 'cause I already have been forgiven from God. Thank you.

Now on appeal, defendant states:

> POINT I: THE COURT ERRED IN DENYING DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF SINCE HE MET HIS BURDEN THAT HE FAILED TO RECEIVE EFFECTIVE LEGAL REPRESENTATION AT THE TRIAL LEVEL
>
> > (A) TRIAL COUNSEL'S TESTIMONY AT THE PCR HEARING WAS INSUFFICIENT TO SUPPORT "HABIT" EVIDENCE UNDER N.J.R.E. 406
> >
> > (B) DEFENDANT WAS NOT PROPERLY ADVISED REGARDING THE POSSIBLE CONSEQUENCES OF CIVIL CONFINEMENT IN LIGHT OF HIS DEVELOPMENTAL DISABILITY

POINT II: TRIAL COUNSEL'S FAILURE TO ARRANGE FOR THE APPROPRIATE TESTS TO DETERMINE THE EXTENT OF DEFENDANT'S DEVELOPMENTAL DISABILITY AND ABILITY TO MAKE A KNOWING, VOLUNTARY GUILTY PLEA CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL

I.

A PCR petition alleging ineffective assistance of counsel is governed by the two-prong Strickland test.[3] To prevail on a claim of ineffective assistance of counsel, the defendant bears the burden of proving both prongs of the test by the preponderance of the evidence. Id. at 687-88, 690, 694 104 S. Ct. at 2064, 2066, 2068, 80 L. Ed. 2d at 693, 695, 698.

Under the first prong, the defendant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. at 690, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695. "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Ibid. However, there is a presumption that counsel provided "adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Ibid.

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

The second prong requires that defendant show actual prejudice. Id. at 687-88, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. Under the second prong, "[t]he defendant must show that there is 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. A reasonable probability is one that undermines confidence in the outcome. Ibid.

In State v. Fritz, 105 N.J. 42, 58 (1987), the New Jersey Supreme Court adopted the two-prong test set out in Strickland. "[T]he key inquiry is 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" State v. Holmes, 290 N.J. Super. 302, 310 (App. Div. 1996) (quoting Strickland, supra, 466 U.S. at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93).

The standard of review for ineffective assistance of counsel claims when a defendant enters into a guilty plea is essentially the same. Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985). A defendant must first establish that the representation was deficient. Ibid. Second, a defendant must demonstrate that, but for counsel's errors, he or she would not have entered into a plea agreement with the State. Ibid.

In reviewing the denial of a PCR petition, we ask whether the trial court's fact findings are supported by sufficient credible evidence. State v. Nunez-Valdez, 200 N.J. 129, 141 (2009). Deference is given to the trial court's credibility determinations. State v. Reevey, 417 N.J. Super. 134, 146 (App. Div. 2010), certif. denied, 206 N.J. 64 (2011). Questions of law, however, are reviewed de novo. State v. Harris, 181 N.J. 391, 420 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005).

II.

During the hearing, defendant's trial attorney testified that he had been associated with the Public Defender's Office, and served as pool counsel, for over forty-six years. He had been involved in over one thousand trials, and over four or five thousand plea agreements. Since representing this defendant, counsel had been involved in approximately seventy-five trials. He had no specific recollection of this defendant.

Before trial counsel began to testify about his "custom and habit" when representing a client entering a guilty plea, defense counsel objected. The judge overruled the objection given counsel's years of experience as a criminal defense attorney. The judge opined that an attorney with that background, in the absence of a specific recollection, should be allowed to testify about his

habit and custom. Although no one cited to the rule by number, the references and discussion concerned N.J.R.E. 406. That rule provides that evidence of habit or routine practice "is admissible to prove that on a specific occasion a person or organization acted in conformity with the habit or routine practice." N.J.R.E. 406(a).

Actions engaged in as part of a repeatedly performed business practice support the inference that the action in question was taken, and is admissible. See Merchants Express Money Order Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 561 (App. Div. 2005), certif. appeal dismissed, 217 N.J. 591 (2006). The disputed action in that case was a banking procedure, found to be admissible because it was well-established routine. In this case, where the attorney had engaged in the practice of criminal law for many years, and had clients who had entered guilty pleas in thousands of cases, it was reasonable for the judge to admit habit and custom evidence. The attorney's practices were more than well-established.

The attorney's testimony, together with the transcript of the plea proceeding, constituted sufficient evidence that counsel explained the plea forms to defendant, including the potential consequence of commitment under the SVPA. The judge's admission of the evidence during the PCR hearing was thus a reasonable

exercise of his discretion. McDarby v. Merck & Co., Inc., 401 N.J. Super. 10, 79-80 (App. Div. 2008) (finding no reversible error where the judge permitted evidence of habit or custom). Just as counsel had in thousands of other cases, he explained the plea bargain process to this client, reviewed the forms, and discussed the significant consequences. Therefore, we do not agree that trial counsel's testimony was insufficient to support the admission of habit evidence under N.J.R.E. 406.

III.

It is well established law that a defendant must be advised of the possibility of civil confinement — fundamental fairness demands it. State v. Bellamy, 178 N.J. 127, 139-40 (2003). The plea forms in use at the time defendant entered his guilty plea included a separate page regarding the possibility of civil commitment.

Defendant's claim that he was not told about civil commitment is simply not corroborated by the record. Not only did he initial the relevant page, but he said under oath that his attorney reviewed the forms with him and he understood what they were.

Question eight on defendant's plea form[4] states that if a defendant is incarcerated at Avenel or any other facility "for

[4] "Additional Questions for Certain Sexual Offenses Committed After December 1, 1988."

commission of a sexually violent offense," he might be civilly committed under the SVPA. As we have said, the record and counsel's habit and custom support the conclusion that it was explained to him, as were the other provisions of the plea agreement. It is noteworthy that when defendant was sentenced, the issue of civil commitment was specifically raised by the prosecutor, who referred to defendant as a danger to society because of his prior conviction history and the Avenel evaluation.

IV.

Finally, we address defendant's claim that his attorney was ineffective because he failed to arrange for testing to determine "the extent of defendant's developmental disability and ability to make a knowing, voluntary guilty plea[.]" Defense counsel noted at the beginning of the plea hearing that the issue of defendant's competence was a "borderline situation."

Because of the concern, the judge closely attended to defendant's responses as he proceeded to take the plea. At the end of the colloquy, the judge said:

> There's no question, in my mind, he's competent. He understands me. He's asked intelligent questions.
>
> He responded lucidly and appropriately in all respects.
>
> Had counsel not even mentioned what he did mention — I'm pleased that he did, lest it be

> raised later, as opposed to being mentioned on the record now, that the Court would not have noticed anything unusual about this particular defendant.
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> I'm satisfied, he's competent. He understands what the proceedings are all about. And the court will accept the plea at this time.

Most tellingly, absent from the record is any documentation regarding defendant's cognitive functioning. No examinations or reports were referred to in the pleas and sentences. Presumably, the issue arose in defendant's prior matters, yet he was never found incompetent. Funding for expert evaluations is available through the Office of Public Defender, yet none was obtained. At the sentence hearing, at which defendant's Avenel evaluation was mentioned, no one discussed finding that, in addition to being a repetitive and compulsive offender, defendant had legally significant intellectual limits. When the PCR petition was filed, again, no evaluation was provided. We were not provided with a copy of the Avenel report, presumably because it was not helpful to defendant's cause. Defendant's claims amount to nothing more than bald assertions. See State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

V.

The State asserts that the court should have rejected defendant's petition because it was untimely. If calculated from

the date of defendant's first resentence in 2003, or even his final resentence in 2005, defendant's petition was not filed within the five years required by the rule within which such petitions should be considered. See R. 3:22-12. Because of the nature of defendant's factual claims, we elect not to reach the argument.

Affirmed.