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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3316-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

V.

ANTHONY SMITH, a/k/a
TONE NOYD,

Defendant-Appellant.

Submitted October 26, 2017 – Decided December 7, 2017

Before Judges Haas and Rothstadt.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Indictment No.
11-12-0175.

Joseph E. Krakora, Public Defender, attorney
for appellant (Frank M. Gennaro, Designated
Counsel, on the brief).

Christopher S. Porrino, Attorney General,
attorney for respondent (Jana Robinson, Deputy
Attorney General, of counsel and on the
brief).

PER CURIAM

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

Defendant pled guilty to first-degree racketeering, N.J.S.A. 2C:41-2(c), pursuant to a plea agreement in which the State recommended that he be sentenced to ten years, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. The court later sentenced defendant to that term in accordance with his plea agreement.

Defendant filed a direct appeal, only challenging his sentence. An excessive sentence panel of this court affirmed his sentence. See State v. Smith, No. A-5223-12 (App. Div. October 23, 2013).

The facts underlying defendant's convictions are summarized as follows. In 2010, through court-authorized electronic, telephone, and physical surveillance, the New Jersey State Police and the Camden County Police discovered that defendant's co-defendant Reynel Delvalle and others were distributing heroin, cocaine and firearms.¹ As part of the investigation, a police undercover officer arranged for a controlled purchase of 150 grams of heroin from Delvalle and defendant. After making the purchase,

¹ The investigation led to a grand jury issuing a thirty-eight count indictment charging twenty-eight individuals, including defendant, with numerous crimes.

the officer realized he did not receive the correct amount of heroin. In order to resolve the undercover officer being "shorted," defendant delivered a firearm to him to make up for the short sale.

The police continued their investigation and obtained authorization from a judge to conduct electronic wiretap surveillance of Delvalle and other co-defendants. Through the wiretap, police learned about a scheduled drug transaction and they arranged surveillance at the location where it was to occur. Police observed defendant arriving at the location in his vehicle, while Delvalle arrived in another vehicle with several passengers. The police witnessed no criminal activity before defendant, Delvalle and his passengers left in the two vehicles, which the police followed. The two vehicles stopped and the occupants transferred from Delvalle's vehicle into defendant's vehicle. A short while later, the police conducted a stop of defendant's vehicle and asked for permission to search it, which defendant refused. The police detained defendant and his passengers until a canine search could be conducted.

The canine arrived and alerted to the presence of drugs near the vehicle. The police allowed defendant and his passengers to go, but they impounded the car. Detectives obtained a warrant, searched the vehicle, and found a revolver loaded with hollow

point bullets and a shotgun. Defendant was subsequently arrested and found with additional firearms in his possession.

When defendant pled guilty, he testified to the facts underlying the crime he committed. Defendant told the court that he was involved in the group's enterprise of selling heroin and buying and selling firearms.

After being sentenced and pursuing his appeal, defendant filed a PCR petition on April 30, 2014. In his petition, defendant argued that he received ineffective assistance from his trial counsel because counsel failed to submit to the prosecutor exculpatory statements from three individuals, and failed to file motions. He also contended that counsel was inexperienced and because of counsel's ineffectiveness, defendant's sentence was subjected to NERA. In a brief filed by defendant's PCR counsel in September 2015, defendant specifically argued that trial counsel was ineffective for failing to file a motion to suppress the weapons found in his vehicle and the evidence acquired from the wiretap based on inadequate minimization,² and for not providing the State with exculpatory evidence.

² See N.J.S.A. 2A:156A-12(f), the minimization provision of the New Jersey Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A:156A-1 to -34, which requires that government officials monitoring wiretaps "mak[e] reasonable efforts" to minimize or eliminate the interception of conversations other than those they have been authorized to hear. State v. Catania, 85 N.J. 418, 428-29 (1981).

Judge John T. Kelley denied defendant's petition by order dated January 8, 2016, after finding defendant failed to present a prima facie claim of ineffective assistance of counsel. In his comprehensive oral decision, Judge Kelley rejected defendant's argument that his plea counsel was ineffective for failing to file a motion to suppress because there was no likelihood it would have been successful. The judge found that the information obtained through the wiretap and the ongoing investigation that "suggested an upcoming drug transaction" provided the requisite probable cause for the officers to stop defendant's vehicle and to have the canine search the vehicle's exterior.

Judge Kelley also addressed and rejected defendant's arguments that counsel failed to file a motion to suppress the information obtained from the wiretap, finding that defendant did not identify which conversation should have been minimized or demonstrate that a motion to suppress such evidence would have been successful. The judge also held that defense counsel was not ineffective because he strategically decided to withhold the alleged exculpatory statements to achieve a better plea agreement for defendant.³ After finding that defendant failed to establish

³ We granted the State's motion to expand the record to include evidence that, contrary to defendant's PCR argument, at least two of the "exculpatory" statements were provided to the prosecutor.

a prima facie claim, the judge denied defendant's request for an evidentiary hearing. This appeal followed.

Defendant presents the following issue for our consideration in his appeal.

THE TRIAL COURT ERRED IN DENYING
DEFENDANT'S MOTION FOR POST-
CONVICTION RELIEF WITHOUT AFFORDING
DEFENDANT AN EVIDENTIARY HEARING.

We are not persuaded and affirm, substantially for the reasons expressed by Judge Kelley in his thorough oral decision.

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 order to prevail on a claim of ineffective assistance of counsel, defendant must meet the two-prong test of establishing that: (1) "counsel's performance was deficient" and he or she made errors that were so egregious "that counsel was not functioning" effectively as guaranteed by the Sixth Amendment to the United States Constitution; and (2) the defect in 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.

This two-prong analysis applies equally to convictions after a trial or after a defendant pleads guilty. In the context of a PCR petition challenging a guilty plea, the first Strickland prong is satisfied when a defendant establishes a "reasonable probability that, but for counsel's errors, [he or she] would not have pled guilty. . . ." State v. Gaitan, 209 N.J. 339, 351 (2012). The second prong is met when a defendant establishes a reasonable probability he or she "would have insisted on going to trial." Ibid. "When a defendant has entered into a plea agreement, a deficiency is prejudicial if there is a reasonable probability that, but for counsel's errors, the defendant would not have decided to forego the plea agreement and would have gone to trial." State v. McDonald, 211 N.J. 4, 30 (2012) (citing Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985); State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009)).


We conclude from our review of the record that, as Judge Kelley found, defendant failed to make a prima facie showing of ineffective assistance of trial counsel within the Strickland-Fritz test. We note that, in addition to not establishing that counsel's performance was deficient, defendant failed to make any showing that had he established that trial counsel rendered deficient performance, how the outcome in his case would have been any different – i.e., he would have passed on the plea offer and

successfully gone to trial, facing what could have amounted to, in the aggregate, a life sentence.

Accordingly, we agree with Judge Kelley that an evidentiary hearing was not warranted. See State v. Preciose, 129 N.J. 452, 462-63 (1992).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION