SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3632-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RONALD ELLERMAN,

Defendant-Appellant.

Submitted October 26, 2016 – Decided April 7, 2017

Before Judges Fuentes and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment Nos. 10-07-1301 and 11-02-0313.

Joseph E. Krakora, Public Defender, attorney for appellant (Steven J. Sloan, Designated Counsel, on the brief).

Christopher J. Gramiccioni, Monmouth County Prosecutor, attorney for respondent (Mary R. Juliano, Assistant Prosecutor, of counsel; Anthony Puglisi, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Ronald Ellerman appeals from a January 29, 2015 order, denying his petition for post-conviction relief (PCR)

without an evidentiary hearing. Having reviewed the record in light of the applicable legal principles, we affirm.

I.

Defendant was charged in Monmouth County Indictment No. 10-07-1301 with third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(3) (Count One); first-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(b)(10)(a) (Count Two); first-degree maintaining or operating a CDS production facility, N.J.S.A. 2C:35-4 (Count Three); third-degree possession of CDS with intent to distribute within 1000 feet of school property, N.J.S.A. 2C:35-7 (Count Four); and second-degree possession of CDS with intent to distribute within 500 feet of a public park, N.J.S.A. 2C:35-7.1 (Count Five). While this indictment was pending, defendant was charged in Monmouth County Indictment No. 11-02-0313 with fourth-degree possession of CDS, N.J.S.A. 2C:35-10(a)(3) (Count One); third-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(b)(11) (Count Two); and second-degree attempt to maintain or operate a CDS production facility, N.J.S.A. 2C:35-4 and N.J.S.A. 2C:5-1 (Count Three).[1]

[1] Rachel Lee, defendant's girlfriend, was also charged in counts one and two.

On April 18, 2011, pursuant to a negotiated plea agreement, defendant pled guilty to counts three and five of Indictment No. 10-07-1301 and count three of Indictment No. 11-02-0313. In return, the State agreed to dismiss the remaining counts and recommend an aggregate twelve-year prison term with a forty-two month period of parole ineligibility based on the Brimage[2] guidelines for a pre-arraignment plea offer. The recommended sentence was subject to modification based upon a cooperation agreement that would reduce the sentence to an aggregate ten-year term if defendant assisted in "at least two (2) separate investigations" leading to arrests on first and second-degree charges.

At the plea hearing, in connection with Indictment No. 10-07-1301, defendant admitted that on January 6, 2010, he operated and maintained a marijuana growing facility with over ten marijuana plants in the basement of his residence, which was located within 500 feet of Liberty Park. Defendant admitted that he intended to distribute the illegal marijuana that he was growing. In connection with Indictment No. 11-02-0313, defendant admitted that on October 20, 2010, he was attempting to set up another marijuana growing facility at his new residence.

[2] State v. Brimage, 153 N.J. 1 (1998).

On October 14, 2011, defendant was sentenced to an aggregate ten-year term in accordance with the cooperation agreement. Defendant filed a Notice of Appeal on December 19, 2011, which was later withdrawn and the appeal dismissed. Thereafter, defendant filed a timely pro se petition for PCR and was later assigned counsel who filed an amended petition. In his petition, defendant contended that his plea counsel was ineffective for: (1) failing to move to suppress defendant's coerced confession; (2) failing to move to suppress the physical evidence seized; (3) failing to negotiate a better plea deal in light of defendant's cooperation; (4) failing to object to the timing of the extension of the Brimage offer; and (5) failing to challenge the sentence as excessive. Defendant sought to withdraw his guilty plea and asserted that the cumulative effect of plea counsel's errors constituted a violation of fundamental fairness.

In rejecting defendant's claim that his attorney was ineffective for failing to move to suppress his confession to the offenses charged in Indictment No. 10-07-1301, the PCR court expounded:

> Defendant alleges that his confession was coerced because the police threatened to arrest his girlfriend, Rachel Lee, for prostitution if he did not provide the officers with a statement. The defendant's claim fails for several reasons.

> First, notably absent from defendant's submissions in this PCR proceeding is any competent evidence that he ever informed his trial attorney about the police threats or promises he now alleges coerced his confession to these offenses. "A trial counsel cannot be ineffective for failing to raise claims as to which his client has neglected to supply the essential underlying facts when those facts are within the client's possession; clairvoyance is not required of effective trial counsel." Dooley v. Petsock, 816 F.2d 885, 890-91 (3d Cir.), cert. denied, 484 U.S. 863, 108 S. Ct. 182, 98 L. Ed. 2d 135[] (1987) . . . .
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> Second, even if defendant had informed his attorney of these allegations, a defense attorney's failure to file a motion to suppress does not constitute per se ineffective assistance under Strickland.[3] See Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 2588, 91 L. Ed. 2d 305, 325 (1986); State v. Goodwin, 173 N.J. 583, 597 (2002); State v. Fisher, 156 N.J. 494, 501 (1998). Instead, a defendant claiming ineffective assistance of counsel based on counsel's failure to file a suppression motion must not only satisfy both prongs of the Strickland test, but must also prove that the motion to suppress would have been granted had it been filed. Goodwin, supra, 173 N.J. at 597 (citing Fisher, supra, 156 N.J. at 501). Whether counsel's decision not to file a motion to suppress was reasonable must be "evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." Id. at 597-98 (quoting Kimmelman, supra, 477 U.S. at 384, 106 S. Ct. at 2588, 91 L. Ed. 2d at 325[])].

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

> Here defendant's alleged version of events surrounding his arrest for the charges in Indictment 10-07-1301 is in direct conflict with the factual narrative in [the arresting officer's] police report, which was provided to plea counsel in discovery. Had defense counsel filed a motion to suppress defendant's statement, the outcome of that motion necessarily would have turned entirely on which witness or witnesses the motion judge found credible. Yet, defendant has not alleged in this PCR petition that he would have even elected to testify at a pretrial Miranda[4] hearing as to his version of events; nor has he provided any affidavit from any other witness who claim that the police made any threats and/or promises. [(Citation omitted).] In the absence of such testimony at a pretrial suppression hearing, the only evidence before the motion judge would have been (1) the testimony of [the arresting officer]; (2) the Miranda form that was initialed and signed by defendant; and (3) the defendant's confession . . . at police headquarters. According to [the arresting officer's] police report, he made no threats or promises to defendant. Consequently, under these circumstances, defendant has failed to establish that a motion to suppress his statement would have been granted had one been filed. See State v. Worlock, 117 N.J. 596, 625 (1990).
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> Third, defendant has not alleged in his petition that, but for counsel's failure to file a motion to suppress his inculpatory statements to the police, he would not have pled guilty and would have insisted on going to trial. [(Citation omitted).] Defendant's failure to make such an allegation in his petition is fatal to his request for post-conviction relief. Without it, there is no

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

> evidence that he was prejudiced by counsel's inaction. [(Citation omitted).]
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> Fourth, even if defendant had included the necessary allegation in his petition . . . a successful motion to suppress defendant's post-arrest confession in this case would not have seriously undermined the State's case against defendant, and it certainly would not have prevented the State from going forward to trial with these charges successfully. To be sure, the search and seizure of all the physical evidence forming the basis of the charges in Indictment 10-07-1301 . . . occurred prior to defendant's police headquarters confession. As a result, the admissibility of the physical evidence found in defendant's home was not at all dependent upon the admissibility of defendant's later confession at police headquarters. [(Citation omitted).]

Likewise, the court rejected defendant's contention that his attorney was ineffective by failing to file a motion to suppress the physical evidence seized in relation to the charges contained in Indictment No. 11-02-0313, explaining:

> Defendant asserts that the police misled him into believing that the warrant for his arrest "related to an investigation for CDS manufacturing at his apartment rather than outstanding child support." He alleges that he would not have consented to the search had he known that the warrant was related to child support and not a search of his home.
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> First, defendant has neither asserted in his certification nor provided any other competent evidence that he ever informed his trial attorney of the factual allegations he now raises in support of his ineffective-assistance claim . . . . In the absence of

any evidence demonstrating that defendant informed his trial attorney of his version of facts, defendant fails to satisfy the first prong of the Strickland test.

Second, defendant has not alleged in this petition that, but for counsel's failure to file a motion to suppress the evidence seized during the October 20, 2010, consensual search of his home, he would not have pled guilty and would have insisted on going to trial. [(Citation omitted).] Again, defendant's failure to make such an allegation in his petition is fatal to his request for post-conviction relief; without it, there is no evidence of prejudice to satisfy the second Strickland prong. [(Citation omitted).] More importantly, given the extremely favorable negotiated sentence, no prejudice can now be discerned by his attorney's decision to forego the filing of a motion to suppress.

. . . .

Third, even if defendant's attorney had filed a motion to suppress the evidence on Indictment 11—02—0313, defendant has not shown that the motion to suppress would have been granted. . . . Here, defendant has not alleged in his PCR petition that, had his attorney filed a motion to suppress, he would have elected to testify at the pretrial suppression hearing as to his version of events surrounding his arrest and his subsequent furnishing police with consent to search his residence.

Even accepting as true defendant's claim that the police lied to him and told him that the arrest warrant was for growing marijuana at his address, there appears to be no case law that would invalidate defendant's consent to search under those circumstances. It is difficult to imagine exactly how any alleged misinformation about the subject of the arrest

> warrant could have affected defendant's decision to consent to a search of his residence, given the fact that the officers advised defendant: (1) that they had received information from a confidential source that he was attempting to set up another grow facility at his new address; (2) of his rights pursuant to Miranda; and (3) of his rights relating to consent searches including, inter alia, the right to refuse consent. [(Citation omitted).]

In dismissing defendant's contention that his attorney was ineffective by failing to negotiate a better plea deal for his cooperation, the court elaborated:

> Defendant argues that counsel failed to leverage or otherwise use defendant's participation in . . . controlled narcotics purchases to defendant's benefit and, in fact, failed to take defendant's cooperation into account.
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> Defendant had been charged under Indictment 10-07-1301 with narcotics-related crimes that, upon conviction, required imposition of a mandatory sentence of imprisonment and a mandatory minimum period of parole ineligibility. Defendant was charged with first-degree maintaining or operating a CDS production facility, a conviction for which requires imposition of a base term of between 10 and 20 years in prison, [(citation omitted)], and a mandatory minimum period of parole ineligibility "fixed at, or between, one-third and one-half of the" base term, [(citation omitted)]. As a result, any plea offer tendered by the State in this case was governed by the 2004 Brimage guidelines, which the State was required [to] follow. [(Citation omitted).] Applying those guidelines, the State calculated the following plea offers for defendant: 12 years in prison

> with a 42-month period of parole ineligibility for the []pre-arraignment offer[]; 12 years of imprisonment with a 48-month period of parole ineligibility for the []initial offer[]; and 12 years of prison with a 51-month period of parole ineligibility for the []final offer.[]
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> [T]he State allowed defendant the benefit of the "pre-arraignment offer" based on defendant's substantial cooperation as of the date of his plea. Pursuant to the terms of the plea and cooperation agreements between defendant and the State, the State agreed to modify its sentencing recommendation based on the nature, extent and quality of defendant's cooperation with law enforcement authorities in the months following defendant's entry of the guilty pleas. It is crucial to note that had it not been for defense counsel's January 26, 2011, letter to the Assistant Prosecutor, there would have been no formal cooperation agreement in this case and, hence, no modification of the State's original Brimage plea offer.

Further, the court dismissed defendant's assertion that plea counsel's failure to advocate effectively at sentencing resulted in the court applying only "'slight weight' to mitigating factor 12" and the imposition of an excessive sentence. The court pointed out that the State's recommendation of "a 'flat' 10-year sentence" constituted a waiver of "the minimum period of parole ineligibility otherwise mandated by N.J.S.A. 2C:35-4." As a result, the sentencing judge lacked discretion and "was legally obligated to impose the sentence negotiated by the State and the defendant pursuant to N.J.S.A. 2C:35—12, irrespective of any argument or

judicial finding as to how much weight could or should have been accorded to mitigating factor 12."[5] Also, in dismissing defendant's cumulative error argument, the court noted "[b]ecause none of defendant's claims of ineffective assistance of counsel alone constitute a basis for post-conviction relief, they do not do so in the aggregate."

Additionally, guided by State v. O'Donnell, 435 N.J. Super. 351 (App. Div. 2014), the court analyzed defendant's application as both a motion to withdraw his plea and a petition for PCR based on ineffective assistance of counsel. Relying on State v. Slater, 198 N.J. 145, 158 (2009), the court denied defendant's request to withdraw his guilty plea, finding that defendant failed to establish a "colorable claim of innocence," failed to provide a credible reason for his withdrawal request, and failed to overcome the State's strong interest in finality, given the existence of an extremely favorable plea agreement.

On appeal, defendant raises the following points for our consideration:[6]

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[5] The court also dismissed defendant's contention that his attorney was ineffective because he failed to challenge the prosecutor's failure to petition for a Brimage plea bargain "at the arraignment or first status conference." The court noted that there was "no legal authority to support defendant's assertion."

[6] Defendant's brief does not contain proper point headings. Rule 2:6-2(a)(5) requires that each legal issue "be divided, under

[POINT I]

THE TRIAL COURT MISAPPLIED THE LAW IN DENYING THE DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE WOULD NOT HAVE ACCEPTED THE PLEA BARGAIN IF HE HAD BEEN GIVEN CORRECT ADVICE ABOUT MOTION PRACTICE, ESPECIALLY IN LIGHT OF VIABLE DEFENSE MOTIONS IN THE CASE TO SUPPRESS STATEMENTS TAKEN IN VIOLATION OF MIRANDA [V.] ARIZONA AND TO SUPPRESS EVIDENCE SEIZED IN VIOLATION OF THE FOURTH AMENDMENT.

[POINT II]

THE TRIAL COURT MISAPPLIED THE LAW IN DENYING THE DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT DEFENDANT SHOULD BE PERMITTED TO WITHDRAW HIS PLEA BARGAIN TO CORRECT A MANIFEST INJUSTICE.

II.

We review the PCR court's findings of fact based on "live witnesses testimony" to determine whether such findings are supported by sufficient credible evidence in the record. State v. Nash, 212 N.J. 518, 540 (2013). However, we review the PCR's court's conclusions of law under a de novo standard. Id. at 540-41. See also State v. Harris, 181 N.J. 391, 420-21 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005). Where, as in this case, "no evidentiary hearing has been held, we

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appropriate point headings . . . into as many parts as there are points to be argued." As such, we have omitted Point I and renumbered the remaining arguments for clarity.

'may exercise de novo review over the factual inferences drawn from the documentary record by the [PCR judge].'" State v. Reevey, 417 N.J. Super. 134, 146-47 (App. Div. 2010) (alteration in original) (quoting Harris, supra, 181 N.J. at 421), certif. denied, 206 N.J. 64 (2011).

Defendant argues that he failed to receive adequate legal representation from plea counsel "in several different respects[,]" all of which were rejected by the PCR court. According to defendant, "he was at least entitled to an evidentiary hearing" and the court's denial of a hearing was erroneous. We disagree and affirm substantially for the reasons expressed in Judge Ronald Lee Reisner's cogent and comprehensive written opinion. We add only the following comments.

The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999). Rather, trial courts should grant evidentiary hearings only if the defendant has presented a prima facie claim of ineffective assistance, material issues of disputed fact lie outside the record, and resolution of the issues necessitate a hearing. R. 3:22-10(b); State v. Porter, 216 N.J. 343, 355 (2013). "Rule 3:22-10 recognizes judicial discretion to conduct such hearings." State v. Preciose, 129 N.J. 451, 462 (1992).

A PCR court deciding whether to grant an evidentiary hearing "should view the facts in the light most favorable to a defendant to determine whether a defendant has established a prima facie claim." Id. at 462-63. "To establish a prima facie claim of ineffective assistance of counsel, a defendant must demonstrate the reasonable likelihood of succeeding under the test set forth in [Strickland v. Washington, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 (1984)], and United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), which [our Supreme Court] adopted in State v. Fritz, 105 N.J. 42, 58 (1987)." Id. at 463.

Under the Strickland standard, a petitioner must show counsel's performance was both deficient and prejudicial. State v. Martini, 160 N.J. 248, 264 (1999). The performance of counsel is "deficient" if it falls "below an objective standard of reasonableness" measured by "prevailing professional norms." Strickland, supra, 466 U.S. at 687-88, 104 S. Ct. at 2064-65, 80 L. Ed. 2d at 693-94. In the context of a PCR petition challenging a guilty plea based on the ineffective assistance of plea counsel, the prejudice prong is established when the defendant demonstrates 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)

(alteration in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)). However, to obtain relief, a defendant "'must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.'" O'Donnell, supra, 435 N.J. Super. at 371 (quoting Padilla v. Kentucky, 559 U.S. 356, 372, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284, 297 (2010)). Applying these principles, we are persuaded that Judge Reisner properly declined to conduct an evidentiary hearing and properly denied defendant's petition for PCR. Furthermore, we discern no abuse of discretion in Judge Reisner's denial of defendant's motion to withdraw his guilty plea.

Affirmed.