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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3926-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JULIUS K. RISHER,

Defendant-Appellant.

Submitted November 15, 2016 – Decided March 7, 2017

Before Judges Rothstadt and Sumners.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Indictment No.
11-01-0031.

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

Camelia M. Valdes, Passaic County Prosecutor,
attorney for respondent (Marc A. Festa, Senior
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant Julius K. Risher appeals from the February 5, 2015
Law Division order denying his petition for post-conviction relief

(PCR) following an evidentiary hearing. On appeal, defendant argues:

POINT I

THE ORDER DENYING POST-CONVICTION RELIEF SHOULD BE REVERSED BECAUSE DEFENDANT ESTABLISHED BY PREPONDERANCE OF THE EVIDENCE THAT HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AND HIS SIXTH AMENDMENT RIGHT TO BE PROTECTED AGAINST ENTERING A GUILTY PLEA TO A CRIME HE DID NOT COMMIT, WERE VIOLATED.

For the reasons that follow, we affirm.

We glean the following facts and procedural history from the record. On August 2, 2010, a man entered a bank and approached a teller. He then held up a piece of paper stating "[g]ive me all your money. Don't say anything or I will shoot you." Although the teller did not see a gun, she emptied her cash drawer and gave the man \$866. During the subsequent investigation, police viewed a video surveillance of the incident, obtained a physical description of the robber from the teller and other eyewitnesses, and received information that defendant committed the crime. Based upon the video recording, police showed a photo of defendant to the teller, who identified defendant as the robber. When defendant was searched incident to his arrest, a note was found on him, which stated, "[p]lease just give me all the money. Don't make me have to hurt you. Just give me all the money."

Defendant was indicted for various offenses arising from the bank robbery, and subsequently entered into an agreement with the State in which he agreed to plead guilty to first-degree robbery, N.J.S.A. 2C:15-1, third-degree escape, N.J.S.A. 2C:29-5(a), and third-degree burglary, N.J.S.A. 2C:18-2, in exchange for a recommended twelve-year sentence subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. On August 26, 2011, Judge Greta Gooden-Brown, who accepted defendant's plea, sentenced him to a lesser term of ten years subject to NERA.

Defendant did not file a direct appeal. Rather, on June 6, 2013, he filed a pro se PCR petition contending that his conviction should be reversed because of ineffectiveness of counsel. Specifically, defendant contended that the grand jury presentation only established a prima facie case for second-degree robbery, and that trial counsel failed to file a motion to dismiss the first-degree robbery charge. Defendant also claimed that counsel should have filed a Wade¹ motion to suppress an impermissibly suggestive out-of-court identification when police only showed the bank teller a photo of defendant. Defendant argues that these motions

¹ United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

would have been successful and as a result, he would not have pled guilty.

In addition, defendant asserted that counsel failed to argue applicable mitigating factors at sentencing, resulting in an excessive sentence. Furthermore, defendant argued that counsel failed to review the evidence and prepare a defense for trial, and failed to file a motion to exclude defendant's statements to the police. Defendant was assigned counsel, who filed an amended verified PCR petition adopting defendant's pro se submission.

In order to have a complete record, Judge Gooden-Brown conducted an evidentiary hearing on December 12, 2014, in which defendant and trial counsel testified. On January 30, 2015, the judge issued a thorough oral decision denying PCR because defendant did not satisfy the two-prong Strickland-Fritz² ineffective assistance of counsel standard, which requires a showing of the particular manner in which counsel's performance was deficient and that the deficiency prejudiced his right to a fair trial.

Judge Gooden-Brown determined trial counsel's testimony was credible in all respects. Counsel testified he met with defendant

² Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); State v. Fritz, 105 N.J. 42,58 (1987).

on at least three occasions to discuss the case. Counsel stated that a motion to dismiss the first-degree robbery charge would have been unsuccessful, as there was sufficient evidence that a threat of harm was involved in the alleged theft. Counsel also believed that a motion could have caused the State to withdraw its plea offer, resulting in a plea offer recommending a longer prison term.

The judge noted she sentenced defendant to a ten-year term subject to NERA that was two years less than the State's recommendation pursuant to the plea agreement. Thus, despite finding that no mitigating factors applied, defendant received a lighter sentence than he negotiated with the State.

In addition, Judge Gooden-Brown reasoned that, based upon the bank's video surveillance and descriptions of the robber by the bank teller and eyewitnesses, a Wade motion would have been meritless because the teller's photo identification was not so inherently suggestive to give rise to a very substantial likelihood of irreparable misidentification. Moreover, even if the teller's photo identification was inadmissible, the State still had a strong case given that the descriptions of the robber matched the surveillance video, and the defendant admitted that he robbed the bank.

In conclusion, the judge stated:

Based on trial [c]ounsel's compelling and credible testimony at the evidentiary hearing, it is evident to this [c]ourt that [c]ounsel's decisions were well thought out and well-reasoned. Rather than filing meritless motions and angering the prosecution [a]ttorney, trial [c]ounsel spent several months negotiating with the prosecuting [a]ttorney to secure the best deal for [d]efendant.

and further:

This court is satisfied that experienced trial counsel made an informed, strategic decision that negotiating a favorable plea agreement, as opposed to filing meritless motions was in [d]efendant's best interest. This [c]ourt is satisfied that experienced trial counsel was reasonable under the circumstances, and indeed, spared Defendant from a far worse outcome.

On February 5, Judge Gooden-Brown issued an order memorializing her decision. This appeal followed.

Where, as here, the judge conducts an evidentiary hearing, we must uphold the judge's factual findings, "so long as those findings are supported by sufficient credible evidence in the record." State v. Rockford, 213 N.J. 424, 440 (2013) (quoting State v. Robinson, 200 N.J. 1, 15 (2009)). Additionally, we defer to a trial judge's findings that are "substantially influenced by [the trial judge's] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot

enjoy." Ibid. (alteration in original) (quoting Robinson, supra, 200 N.J. at 15). We owe particular deference to the trial judge's credibility determinations. See State v. Locurto, 157 N.J. 463, 470-71 (1999).

A defense attorney's trial strategy is generally not second-guessed in a PCR proceeding. State v. Gary, 229 N.J. Super. 102, 115-16 (App. Div. 1988). To the contrary, trial counsel's informed strategic decisions demand our heightened deference, and "are virtually unchallengeable." Strickland, supra, 466 U.S. at 690, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695.

Defendant contends that Judge Gooden-Brown "misapplied [her] discretion in 'applying a presumption of competence' to trial counsel's performance[,]" attributing legitimate trial strategy to counsel's failure to file motions to dismiss the first-degree robbery indictment charge and to seek a Wade hearing. Defendant also argues the judge erred in finding that even if trial counsel should have filed the two motions, defendant suffered no prejudice because he received a favorable plea bargain. Defendant maintains the judge failed to focus on the unfair plea negotiations and plea hearing. In a PCR arising from a guilty plea, however, a petitioner must "show[] 'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" State v. O'Donnell, 435 N.J. Super.

351, 369-70 (App. Div. 2014) (quoting Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985)).

We have considered defendant's contentions in light of the record and applicable legal principles and conclude they are without sufficient merit to warrant a discussion in a written opinion. R. 2:11-3(e)(2). We affirm substantially for the reasons expressed by Judge Gooden-Brown in her comprehensive oral decision.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION