SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4672-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RYAN RHODIE,

Defendant-Appellant.

Submitted February 14, 2017 – Decided March 13, 2017

Before Judges Yannotti and Gilson.

On appeal from Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 98-07-0735.

Joseph E. Krakora, Public Defender, attorney for appellant (William Welaj, Designated Counsel, on the brief).

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Christopher W. Hsieh, Chief Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Ryan Rhodie appeals from an order entered by the Law Division on April 19, 2016, which denied his petition for post-conviction relief (PCR). We affirm.

A Passaic County grand jury charged defendant, Antoine Aikens, Shirley Morris, and Curtis Morris with the murder of Lamont Brown, N.J.S.A. 2C:11-3(a)(1) or (2), and N.J.S.A. 2C:2-6 (count one); felony murder, N.J.S.A. 2C:11-3(a)(3), and N.J.S.A. 2C:2-6 (count two); and armed robbery, N.J.S.A. 2C:15-1 and N.J.S.A. 2C:2-6 (count three). Thereafter, the co-defendants pled guilty.

Defendant then was tried before a jury, which found him not guilty of the charged offenses, but guilty of aggravated manslaughter, contrary to N.J.S.A. 2C:11-4(a). The trial court sentenced defendant to a thirty-year term of incarceration, and ordered that defendant serve eighty-five percent of that time before being eligible for parole, pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

Defendant appealed from the judgment of conviction (JOC) dated May 23, 2000, and the following arguments were raised on appeal:

> I. DEFENDANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSEL'S FAILURE TO ASSERT A VIABLE INTOXICATION DEFENSE (Not Raised Below).
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> II. THE CHARGE TO THE JURY ON THE DEFENSE OF INTOXICATION WAS ERRONEOUS SINCE THE CHARGE

> FAILED TO INDICATE THAT THE JURY COULD CONSIDER DEFENDANT'S USE OF MARIJUANA IN DETERMINING INTOXICATION (Not Raised Below).
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> III. THE SENTENCE IMPOSED BY THE COURT IS EXCESSIVE.
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> IV. APPLICATION OF THE NO EARLY RELEASE ACT TO DEFENDANT'S SENTENCE IS ILLEGAL (Not Raised Below).

We affirmed defendant's conviction and sentence in an unpublished opinion. State v. Rhodie, No. A-2525-00 (App. Div. Oct. 22, 2002). In our opinion, we summarized the relevant facts:

> On May 5, 1998, defendant and co-defendant Antoine [Aikens] were gathered with a number of young people at the apartment of [B.V.] in Paterson.[1] Defendant and others were drinking alcohol. [Aikens] was also smoking marijuana. Following an altercation between [Aikens] and defendant, both were asked to leave the apartment. On the street, defendant and [Aikens] met with co-defendants Shirley [Morris] and Curtis [Morris]. [M.B. and L.M.] may have also been present.
>
> At about 12:30 a.m., Lamont Brown, the victim, walked by. Brown was wearing an anchor medallion on a silver chain and was listening to a "[W]alkman" radio. Brown was not known to the defendant. Defendant approached Brown, put his arm around him, and talked to him. Eventually, defendant attacked Brown.
>
> According to Shirley [Morris], defendant said "watch this" as Brown approached. She and [L.M.] saw defendant, Aikens and their brother Curtis assaulting Brown. Brown's clothes came off. He was dragged along the ground by defendant and Aikens. Shirley then kicked

[1] We use initials for L.M. and others to protect their privacy.

Brown. She insisted that it was merely a probe designed to determine if he was still alive. Shirley finally testified that both she and her brother tried to rip the silver chain off of Brown's neck. They were unable to do so. However, Aikens took the chain and medallion.

According to Curtis, defendant yelled "let's get him." Defendant then walked off alone to join Brown. Curtis ran towards defendant and Brown with the intention of stopping the fight. He was unable to stop defendant and Aikens from attacking Brown. Curtis went to call the police. When he returned, Brown was naked. The next day, he told Aikens of Brown's death. This news prompted Aikens to throw Brown's chain and medallion into the sewer.

[L.M.'s] testimony was similar to that of her brother Curtis and her sister Shirley. According to [L.M.], defendant and Aikens attacked Brown while Curtis was standing between them. Aikens took the chain from Brown.

Aikens testified that Curtis spoke to Brown as he approached. Defendant then ran after Brown and caught him beneath a railroad trestle. Defendant put his arm around Brown before hitting him. Aikens admitted joining in the attack once defendant began to hit Brown. According to him, Shirley, [L.M.], Curtis and two others also kicked and attacked Brown. After Brown had been completely immobilized, defendant kicked him in the face several times. Then defendant jumped on Brown's head. Aikens admitted taking Brown's chain. He accused Shirley and [L.M.] of taking off all of Brown's clothes. Aikens testified that he gave the chain to Curtis, who threw it into a gutter.

Brown died of his injuries. It was later determined that the cause of death was blunt

> force trauma, traumatic injury to the head, and strangulation. His Hyoid bone, located deep inside the throat, had been fractured.
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> As part of the police investigation, Paterson police detective Pablo Muarte, went to defendant's home. There, he recovered defendant's Nike sneakers and a pair of black sweatpants that had been stained with blood. The stains on the sweatpants were later found to match Brown's blood. . . .
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> [Rhodie, supra, (slip op. at 2-4).]

Defendant then filed a petition for certification with the Supreme Court. The Court denied the petition. State v. Rhodie, 175 N.J. 547 (2003).

On April 17, 2015, defendant filed a pro se PCR petition, alleging ineffective assistance of counsel. The court appointed an attorney for defendant, and counsel filed a brief in support of the petition, arguing that defendant's petition should not be barred by Rule 3:22-12(a)(1) because defendant's failure to file the petition within five years of the date of the JOC was excusable, and the time-bar should be relaxed in the interests of justice.

Counsel also argued that defendant had been denied the effective assistance of trial counsel. Defendant claimed that his attorney did not maintain communication with him, failed to discuss the case, and did not engage the State regarding a possible plea agreement. He also claimed his appellate counsel was deficient for

failing to raise the issue of ineffective assistance of counsel on appeal. Defendant sought an evidentiary hearing on the petition.

The PCR court heard oral argument on the petition on April 19, 2016, and placed its decision on the record. The court found that the petition was barred by Rule 3:22-12(a)(1) because it had been filed almost fifteen years after the trial court entered the JOC, and that defendant failed to demonstrate excusable neglect.

The court nevertheless considered the petition on the merits, and found that defendant had not established a prima facie case of ineffective assistance under the test established by Strickland v. Washington, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The court therefore found that defendant was not entitled to an evidentiary hearing on his petition. The court entered an order dated April 19, 2016, denying PCR. This appeal followed.

On appeal, defendant raises the following arguments:

> POINT I:
> THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF, IN PART, UPON PROCEDURAL GROUNDS, PURSUANT TO RULE 3:22-12(a)(1).
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> POINT II:
> THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL.

As noted, defendant first argues that the PCR court erred by finding that his petition was barred by Rule 3:22-12(a)(1), which requires that the first PCR petition be filed within five years after the date upon which the JOC was entered, unless the defendant alleges facts showing that the failure to file the petition within that time was due to excusable neglect, "and that there is a reasonable probability that if the defendant's factual assertions were found to be true enforcement of the time-bar would result in a fundamental injustice."

Here, defendant claims that he was never told by his attorney or anyone else that a PCR petition had to be filed within five years after the JOC was entered. Defendant claims that, had he known, he would have filed his petition within the required time. He argues that under the provisions of the rule in effect at that time, the time-bar could have been waived if the interests of justice demanded it. In addition, defendant argues that the enforcement of the time-bar would result in an injustice. We disagree.

The record supports the PCR court's finding that defendant had not pled sufficient facts to show that his failure to file the petition within the time required by Rule 3:22-12(a)(1) was due to excusable neglect. Here, defendant did not file his PCR petition

until almost fifteen years after the date upon which the JOC was entered.

The PCR court noted that defendant was represented by counsel in his direct appeal and petition for certification. The court pointed out that presumably, defendant would have had conversations with his attorney about the filing of a PCR petition. The court pointed out that defendant failed to submit a certification stating he had never been advised by any attorney as to the five-year limitations period. He did not submit an affidavit or certification from his attorney corroborating his assertions.

Even if defendant had not received any advice regarding the time in which a PCR petition must be filed, he failed to explain why he did not make any inquiry about the filing of a PCR petition. Generally, ignorance of the law does not constitute excusable neglect. State v. Murray, 315 N.J. Super. 535, 539-40 (App. Div. 1998), aff'd in part and modified in part, 162 N.J. 240 (2000). Defendant also failed to show that enforcement of the time-bar in Rule 3:22-12(a)(1) would result in a fundamental injustice.

Even so, the PCR court considered the petition on the merits and concluded that defendant was not entitled to an evidentiary hearing on the petition. An evidentiary hearing is only required

> upon the establishment of a prima facie case in support of post-conviction relief, a determination by the court that there are material issues of disputed fact that cannot be resolved by reference to the existing record, and a determination that an evidentiary hearing is necessary to resolve the claims for relief.
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> [R. 3:22-10(b).]

See also State v. Porter, 216 N.J. 343, 355 (2013) (noting that an evidentiary hearing on a PCR petition is only required if defendant satisfied the requirements of Rule 3:22-10(b)).

Here, defendant claims he was denied the effective assistance of trial counsel. To prevail on such a claim, a defendant must satisfy the two-part test established in Strickland, and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987).

The first prong of Strickland requires the defendant to show that counsel's performance was deficient. Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. The defendant must establish "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Ibid. The defendant "must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-88, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

The second prong of Strickland requires the defendant to "show that the deficient performance prejudiced the defense." Id. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. The defendant must establish "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. The defendant must affirmatively prove prejudice to the defense. Ibid.

Here, defendant claims that his attorney failed to communicate with him, and did not discuss the strengths and weaknesses of his case. However, to establish a prima facie case for PCR, a defendant "must do more than make bald assertions that he was denied the effective assistance of counsel. He must allege facts sufficient to demonstrate counsel's alleged substandard performance." Porter, supra, 216 N.J. at 355 (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999)).

Here, defendant has not alleged sufficient facts to show his attorney's purported lack of communication "fell below an objective standard of reasonableness." Strickland, supra, 466 U.S. at 687-88, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. Moreover, defendant has not shown that he was prejudiced by the alleged lack of communication. He has not established a reasonable probability

that the result here would have been different if there had been more communication with his attorney.

Defendant also claims that his attorney was deficient because he allegedly failed to inform him of the State's plea offer. The record shows that on November 17, 1998, the chief assistant prosecutor provided a written plea offer to defendant's attorney. The offer provided that in exchange for defendant's plea to aggravated manslaughter, the State would agree to dismiss the other charges and recommend a thirty-year custodial sentence, subject to NERA.

The PCR judge noted that the Presiding Judge of the Criminal Division had presided over the last status conference in the case, and perhaps the last two status conferences. The judge also noted that the status conferences are generally the point at which any plea offer is addressed on the record, and defendant had not provided the PCR court with any transcripts of the conferences. The judge observed that it was "extremely unlikely" that defendant was not aware of the State's plea offer.

As the PCR judge found, however, even if defense counsel had not informed defendant of the plea offer, defendant was not prejudiced by the error. Here, defendant was found guilty of aggravated manslaughter, and his sentence is the same as the

sentence the State would have recommended if defendant had accepted the State's plea offer.

Defendant argues, however, that if he entered a guilty plea, his attorney could have sought a finding of mitigating factor twelve, N.J.S.A. 2C:44-1(b)(12) (defendant willing to cooperate with law enforcement authorities). He contends if the court found this mitigating factor, the court might have imposed a shorter prison term.

Mitigating factor twelve has been applied when a defendant cooperates in the prosecution of his co-defendants. See State v. Jaffe, 220 N.J. 114, 116 (2014). Here, however, there is no evidence indicating that the State would have been willing to enter into an agreement in which defendant cooperated in the prosecution of his co-defendants. In this matter, the State entered into agreements with defendant's co-defendants, and they agreed to cooperate in the prosecution of defendant.

Moreover, the trial court found aggravating factors three, N.J.S.A. 2C:44-1(a)(3) (risk that defendant will commit another offense); six, N.J.S.A. 2C:44-1(a)(6) (extent of defendant's prior criminal record and the seriousness of the offenses he has been convicted of); and nine, N.J.S.A. 2C:44-1(a)(9) (need to deter defendant and others from violating the law). Defendant has not

shown that, even if the court had found mitigating factor twelve, the court would probably have imposed a shorter custodial sentence.

We therefore conclude that the PCR court correctly determined that defendant failed to establish a prima facie case of ineffective assistance of counsel, and therefore defendant was not entitled to an evidentiary hearing on his petition.

Affirmed.