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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4716-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HOWARD WOODS,

Defendant-Appellant.

Submitted February 28, 2017 – Decided March 21, 2017

Before Judges Fisher and Ostrer.

On appeal from the Superior Court of New
Jersey, Law Division, Union County, Indictment
No. 10-12-1299.

Joseph E. Krakora, Public Defender, attorney
for appellant (Lee March Grayson, Designated
Counsel, on the brief).

Grace H. Park, Acting Union County Prosecutor,
attorney for respondent (Bryan S. Tiscia,
Special Deputy Attorney General/Acting
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

In this appeal, we consider a claim that counsel was
ineffective in failing to file a direct appeal following the entry

of a judgment of conviction. Because of uncertainties about the record in the post-conviction relief proceedings, we vacate the order denying relief and remand for further proceedings.

Defendant was charged in a fourteen-count indictment as a result of an event, on July 18, 2010, when he disregarded police attempts to have him stop and instead raced his vehicle through three or four municipalities, colliding with other vehicles and causing personal injuries. He was charged in another indictment and two accusations with numerous drug offenses. Defendant entered into a plea agreement pursuant to which he pleaded guilty to one count of second-degree eluding and two counts of second-degree aggravated assault regarding the July 18, 2010 incident; he also pleaded guilty to some of the drug offenses charged in the other indictment and the two accusations. All remaining charges were dismissed.

On April 5, 2012, defendant was sentenced to an eight-year prison term on the eluding conviction, and concurrent eight-year terms on the aggravated assault convictions, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2. The judge also imposed concurrent terms on the drug convictions.

Defendant did not appeal. Instead, on April 7, 2014, while unrepresented by counsel, defendant filed a post-conviction relief (PCR) petition. Counsel was later appointed, and a supplemental

petition was filed. Among other things, defendant argued that his attorney failed to file the appeal he requested. In his written decision, the judge thoroughly discussed and rejected all defendant's arguments except the claim regarding counsel's failure to file a direct appeal; that claim went unmentioned.

Defendant appeals the denial of his PCR petition. He argues:

THE ORDER DENYING POST-CONVICTION RELIEF SHOULD BE REVERSED AND THE CASE REMANDED FOR A FULL EVIDENTIARY HEARING BECAUSE THE DEFENDANT MADE A PRIMA FACIE SHOWING OF INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE STRICKLAND/FRITZ^[1] TEST.

A. COUNSEL WAS INEFFECTIVE BECAUSE HE DID NOT EXPLAIN TO THE DEFENDANT THE LAW UNDERLYING THE CHARGES OR THE CONSEQUENCES OF THE PLEA AGREEMENT, RENDERING THE PLEAS INVALID.

B. [] COUNSEL WAS INEFFECTIVE [FOR FAILING TO] FILE AN APPEAL, EVEN THOUGH THE DEFENDANT ASKED HIS ATTORNEY TO FILE THE APPEAL.

Because of the manner in which the alleged failure to file a direct appeal comes before us, we must vacate the order under review and remand for further proceedings. We first discuss the principles that guide such an ineffectiveness claim, and then outline what

¹ Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Fritz, 105 N.J. 42 (1987).

should follow the PCR court's disposition of the remand proceedings.

I

In State v. Jones, 446 N.J. Super. 28, 33-34 (App. Div. 2016), we held that a right to post-conviction relief is established – and a direct appeal must be permitted – when there is no dispute that a defendant directed counsel to file an appeal and counsel failed to comply. Although decided after the PCR judge's decision here, Jones was firmly based on Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000), which was decided fifteen years earlier.² Defendant never cited Flores-Ortega, but his PCR attorney argued that his trial attorney was ineffective in failing to file a direct appeal. Lest we relegate defendant to a future PCR petition based on PCR counsel's failure to more adequately brief this ineffectiveness argument – a result that would only delay the administration of justice in this case – and because we must remand for reasons that follow, we disregard PCR

² We also note that, by way of an unpublished order in a separate matter entered a few months after our decision in Jones, supra, 446 N.J. Super. at 28, our Supreme Court agreed that, when there is no dispute that a defendant's attorney failed to file a requested appeal, ineffectiveness is established and an appeal as within time must be permitted. State v. Carson, A-61 (Sept. 8, 2016). Because the Supreme Court did not publish its summary order in Carson, we are barred by Rule 1:36-3 from relying on it.

counsel's failure to adequately brief or argue the matter in the trial court.

More important, however, is whether defendant presented an adequate factual basis for his Flores-Ortega argument. As we have held, a defendant must demonstrate an appeal was requested. Jones, supra, 446 N.J. Super. at 32 (citing Flores-Ortega, supra, 528 U.S. at 477, 120 S. Ct. at 1035, 145 L. Ed. 2d at 995). And, as with any other ineffectiveness allegation, that showing must be based on sworn statements or materials. State v. Porter, 216 N.J. 343, 353 (2013); State v. Cummings, 321 N.J. Super. 154, 164 (App. Div.), certif. denied, 162 N.J. 199 (1999). We, thus, turn to whether defendant made a proper showing. Unfortunately, on its surface, the record suggests that what defendant certified is not relevant and what is relevant was not certified.

Defendant's appendix contains, among other things, a document labeled "Petition for Post-Conviction Relief," which bears what we assume to be defendant's signature and his certification of the truth of its contents. That eight-page document, however, does not provide a factual basis for the Flores-Ortega issue; other than mentioning an appeal was not filed, this pro se petition did not assert that defendant instructed his attorney to file an appeal.

The appendix also contains a second document, which consists of fourteen pages and is labeled "Verified Petition," which appears

to be an amalgam of numerous documents, some likely created by defendant and some likely prepared by appointed counsel. This "Verified Petition" warrants close examination. First, it incorporates a typed three-page "Supplemental Certification," ostensibly prepared for defendant's signature, that asserts "on the day [he] was sentenced, [defendant] directed [his] attorney . . . to file an appeal, but [the attorney] never did so." The copy of this document does not bear a signature. The "Verified Petition" also contains: one handwritten page of no apparent relevance here; two pages of our decision in State v. Norman, 405 N.J. Super. 149 (App Div. 2009) reprinted from an unofficial reporter; four more handwritten pages of no apparent relevance to the issue at hand; one page that contains the printed words of N.J.S.A. 2C:44-1 and N.J.S.A. 2C:12-1, with handwritten annotations; a two-page signed certification of defendant's PCR trial counsel that, among other things, confirms no direct appeal was filed; and a one-page certification of service.

As for the Flores-Ortega argument, we focus our attention on the three-page, unsigned certification. It is here that defendant purports to contend that he asked for but his attorney never filed an appeal. As a general matter, an unsigned certification signifies nothing.

But we do not know whether defendant signed this certification and the appendix contains a copy that lacks defendant's signature. And, in light of the logistical difficulties likely presented when an attorney seeks the signature of an imprisoned client, it might be appropriate to allow defendant an opportunity to sign the document if he can certify to the truth of its contents. In remanding, we seek clarification of what it was that defendant submitted, whether the submitted documents were actually executed by defendant, and whether, under the circumstances, it is appropriate to allow defendant to sign the certification during the proceedings that will follow.

If the PCR judge resolves those concerns in a manner favorable to defendant, he may then determine whether it is appropriate to seek a factual response from the State. That is, if there was confusion over what defendant was asserting by way of his PCR petitions³ on this particular point, the judge may deem it appropriate to provide the State with an opportunity to dispute defendant's contention. If that should occur, and if the State creates a genuine disputed fact question about whether defendant directed his attorney to file an appeal, the PCR judge should conduct an evidentiary hearing to resolve that factual dispute.

³ We would observe, however, PCR counsel argued this precise point in open court.

II

We recognize that until the PCR judge disposes of the issues for which we remand, the future course of these proceedings is uncertain. We offer the following for guidance as to the future proceedings depending upon the possible outcomes of the remand proceedings.

1. If the PCR judge finds defendant is entitled to relief, then defendant may file a notice of appeal including whatever he would have raised in a direct appeal – as well as whatever other issues were raised in this appeal⁴ – within forty-five days of the PCR judge's order.

2. If the PCR judge grants relief and defendant files a direct appeal, and if the State is desirous of seeking our review of that order, then the State may file a notice of cross-appeal within forty-five days and the Clerk will enter an appropriate briefing schedule regarding defendant's direct appeal – as permitted by the grant of post-conviction relief and which may include the issues not addressed in this appeal – and the State's cross-appeal.

⁴ Regardless of the outcome of the remand proceedings, defendant is entitled to continue to pursue the other PCR arguments posed in this appeal even though they may be mooted by the disposition of the other issues that may be raised after disposition of the remand proceedings. In vacating the order under review and remanding for further proceedings, we do not express any view of the merits of those other issues.

3. If the PCR judge denies relief, then defendant may file a notice of appeal seeking review of that order within forty-five days, and the Clerk will enter an appropriate briefing schedule on the issues therein raised. Defendant may also pursue in that new appeal the other PCR issues raised in this appeal.

The order denying post-conviction relief is vacated and the matter remanded for further proceedings in conformity with this opinion. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION