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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-5480-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RAFAEL A. CABRERA, a/k/a
RAPHAEL C. RUBIO,

Defendant-Appellant.

Submitted November 29, 2017 – Decided December 20, 2017

Before Judges Currier and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Indictment Nos.
07-01-0126 and 08-03-0430.

Joseph E. Krakora, Public Defender, attorney
for appellant (Monique D. Moyse, Designated
Counsel, on the brief).

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

PER CURIAM

Defendant Rafael A. Cabrera appeals a June 1, 2016 order
denying his petition for post-conviction relief (PCR). We affirm.

The following facts are derived from the record. On July 25, 2006, defendant was driving in Clifton, New Jersey. When a police officer attempted to stop defendant for a motor vehicle infraction, defendant sped away, ran a stop sign, hit a curb, and attempted to escape on foot after the vehicle came to a rest, creating a risk of injury to the pursuing officer. A Passaic County Grand Jury returned Indictment No. 07-01-0126, charging defendant with second-degree eluding, N.J.S.A. 2C:29-2(b) (count one); fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a)(2) (count two); and third-degree burglary, N.J.S.A. 2C:18-2 (count three).

On November 25, 2007, defendant was driving in the area of 21st Street in Patterson, New Jersey. As part of an investigation he was conducting, a uniformed police officer approached defendant's vehicle after defendant had stopped in a parking lot of a restaurant. After questioning defendant, the officer found more than one ounce of marijuana in a compartment of the car. A Passaic County Grand Jury returned Indictment No. 08-03-0430, charging defendant with fourth-degree possession of a controlled dangerous substance (CDS) (marijuana), N.J.S.A. 2C:35-10(a)(3) (count one); third-degree possession of CDS (marijuana) with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(11) (count two); third-degree possession of CDS (marijuana) with intent to distribute in a school zone, N.J.S.A. 2C:35-7 and

N.J.S.A. 2C:35-5(a) (count three); and second-degree possession of CDS (marijuana) with intent to distribute within 500 feet of a public housing facility, N.J.S.A. 2C:35-7.1 and N.J.S.A. 2C:35-5(a) (count four).

On March 16, 2009, defendant entered into a negotiated plea agreement, pleading guilty to count one of Indictment No. 07-01-0126 (second-degree eluding) and count two of Indictment No. 08-03-0430 (third-degree possession of CDS with intent to distribute), in exchange for a recommended sentence of concurrent, flat, three-year prison terms and dismissal of the remaining charges.

During the plea hearing, defendant testified that, after having the opportunity to review his case (including the investigation files) with his attorney, he understood the charges to which he was pleading guilty and that he was presumed innocent unless proven guilty by the State beyond a reasonable doubt. Defendant further testified to understanding his rights to a jury trial, to be represented by counsel at trial, to have his attorney confront the State's witnesses, to present his own witnesses, and to testify or remain silent, and that, by pleading guilty, he waived these constitutional rights. Defendant also acknowledged understanding the mandatory fines, penalties, and assessments that would be imposed, including forfeiture of his driving privileges

for six to twenty-four months. After discussing on the record a contemplated motion to suppress evidence on Indictment No. 08-03-0430, defendant testified he understood that by pleading guilty he would be waiving the right to have any pre-trial motions heard.

Defendant indicated he wished to plead guilty and was doing so voluntarily and of his own free will, without threat or coercion, because he was, in fact, guilty. He indicated that he was "completely" satisfied with his counsel and counsel's advice and that counsel answered all of his questions. After he confirmed he had read, answered, initialed, and signed the plea forms, including the Supplemental Plea Form for Drug Offenses, defendant gave a detailed factual basis for each plea. Based on his testimony, the court accepted defendant's guilty plea.

On November 19, 2010, defendant appeared for sentencing. During the sentencing hearing, the State modified its sentencing recommendation by asking the court to find mitigating factor twelve, N.J.S.A. 2C:44-1(b)(12) (defendant's willingness to cooperate with law enforcement authorities), treat the second-degree eluding as a third-degree offense for sentencing purposes, and impose concurrent probationary terms, conditioned upon defendant serving 180 days in jail.

The judge inquired as to the indication in the pre-sentence report that defendant might want to retract his guilty pleas. Both

defense counsel and defendant advised the court that, after discussing the issue, defendant decided not to retract his pleas, wanted to go forward with the plea agreement, and wished to be sentenced in accordance with the State's recommendation. Defendant never moved to withdraw his pleas.

The judge found aggravating factors three, N.J.S.A. 2C:44-1(a)(3) (likelihood of committing another offense); six, N.J.S.A. 2C:44-1(a)(6) (prior criminal record); and nine, N.J.S.A. 2C:44-1(a)(9) (need for deterring the defendant and others from violating the law); and mitigating factors ten, N.J.S.A. 2C:44-1(b)(10) (defendant is particularly likely to respond affirmatively to probationary treatment); and twelve, N.J.S.A. 2C:44-1(b)(12). The judgments of conviction state the aggravating factors preponderated over the mitigating factors. However, the judge stated she was "satisfied that . . . imprisonment would be a serious injustice" and "the presumption of imprisonment is overcome based on the weighing of the factors."

On count one of Indictment No. 07-01-0126 (second-degree eluding), the trial court imposed a downgraded sentence of a three-year term of probation conditioned upon 180 days incarceration. On count two of Indictment No. 08-03-0430 (third-degree possession of CDS with intent to distribute), the trial court imposed a concurrent three-year term of probation conditioned upon 180 days

incarceration. The jail term was stayed for three months. Appropriate fines, penalties, and assessments were also imposed. The remaining counts were dismissed. Defendant did not file a direct appeal of his conviction or sentence.

On July 21, 2015, defendant filed a pro se PCR petition and brief, later supplemented by a brief and certification prepared by appointed PCR counsel. Through counsel, defendant argued he was denied effective assistance of trial counsel for the following reasons: (1) trial counsel failed to fully investigate defendant's case; (2) against defendant's wishes, trial counsel did not take the charges to trial; (3) trial counsel failed to advise defendant of the collateral consequences of entering the guilty pleas; (4) had he known of the collateral consequences of pleading guilty, defendant would not have pled; (5) trial counsel did not file a motion to suppress evidence obtained from the search of his vehicle and person; (6) trial counsel did not retain and present a defense expert who could opine that the quantity of marijuana found on defendant was for personal use and not distribution; (7) trial counsel failed to advise him of his right against self-incrimination, right to a jury trial, the burden and standard of proof at trial, the presumption of innocence, right to counsel at trial, right to confront witnesses, right to present witnesses, and maximum possible penalty; (8) as to the eluding charge, trial

counsel failed to argue the arresting officer initiated the encounter outside his jurisdiction and lacked a reasonable suspicion to initiate a Terry¹ stop; and (9) trial counsel failed to object when the court did not allow defendant to allocute during sentencing.

The PCR court conducted a non-evidentiary hearing on June 1, 2016, and denied defendant's petition in a comprehensive oral decision rendered that day. As to defendant's claim that trial counsel did not fully investigate the eluding charge, the judge noted that defendant's "speeding and running a stop sign provided the police officer with an objective and reasonable suspicion to stop defendant's vehicle." Considering the detailed factual basis given by the defendant, coupled with the absence of a colorable claim of innocence, the judge concluded that further investigation would not have "impacted a defense to the charges."

As to the CDS case, the judge noted that defendant failed to provide specific facts to support his ineffective counsel claim. With regard to defendant's claim trial counsel should have obtained an expert who could have opined the quantity of marijuana found on defendant was consistent with personal use and not possession with intent to distribute, the court stated, "[i]t is a generalized

¹ Terry v. Ohio, 392 U.S. 1 (1968).

statement lacking in specifics to enable a court to determine whether it would be a viable defense." Moreover, the judge noted that defendant admitted to possessing between one ounce and five pounds of marijuana during the plea hearing. The judge explained that given defendant's prior criminal record, defendant faced up to eighteen months imprisonment on a fourth-degree possession charge, yet was sentenced to a three-year probationary term with 180 days in jail. As a result, the judge determined defendant was not prejudiced.

Regarding the failure to file a suppression motion in the CDS case, the judge found the claim lacked merit since plea offers are made prior to suppression motions being heard. The judge also concluded that, in light of the favorable plea offer that defendant accepted and the "very strong second[-]degree eluding case against the defendant, . . . [f]or defendant to argue now that he wanted to go to trial on all the charges in both indictments is an afterthought."

The judge also found that the transcript of the plea hearing demonstrated defendant was advised of his trial rights, and the transcript of the sentencing hearing demonstrated defendant spoke and apologized for his actions. Finally, the judge engaged in a thorough analysis of the likelihood of success if defendant had filed a motion to withdraw his guilty pleas, concluding defendant

would be unable to establish the requisite manifest injustice to permit him to withdraw his pleas.

Based on those findings, the judge denied the petition, holding that defendant failed to show trial counsel's performance was deficient or that defendant had suffered any prejudice.

On appeal, defendant raises the following issues:

POINT ONE

THIS CASE MUST BE REMANDED FOR NEW PCR COUNSEL, A NEW PCR HEARING, AND A NEW PCR JUDGE BECAUSE PCR COUNSEL FAILED TO REPRESENT MR. CABRERA.

POINT TWO

IN THE ALTERNATIVE, THIS MATTER MUST BE REMANDED BECAUSE THE PCR COURT USED THE WRONG STANDARD TO DECIDE THIS CASE.

POINT THREE

IN THE ALTERNATIVE, MR. CABRERA IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT HIS ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL.

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 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42 (1987). In general, in order to prevail on a claim of ineffective assistance of counsel, defendant must meet the following two-prong test: (1) counsel made errors "so serious that counsel was not functioning

as the 'counsel' guaranteed the defendant by the Sixth Amendment" to the United States Constitution; and (2) the errors 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, 466 U.S. at 687, 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 694. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. Id. at 687.

When applying the Strickland-Fritz test to challenges to guilty pleas based on ineffective assistance of counsel, our Supreme Court has explained that a defendant must demonstrate that "(i) counsel's assistance was not within the range of competence demanded of attorneys in criminal cases, and (ii) that there is 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. DiFrisco, 137 N.J. 434, 457 (1994) (alteration in original) (citations omitted).

"Judicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689. In reviewing such claims, courts apply a strong presumption that defense counsel "rendered adequate assistance and made all significant decisions

in the exercise of reasonable professional judgment." Id. at 690. Complaints relating merely to strategic decisions "will not serve to ground a constitutional claim of inadequacy of representation by counsel." Fritz, 105 N.J. at 54 (citing State v. Williams, 39 N.J. 471, 489 (1963); State v. Knight, 63 N.J. 187 (1973); State v. Bonet, 132 N.J. Super. 186 (App. Div. 1975)).

Defendant contends the court erred by denying him an evidentiary hearing on his ineffective assistance of counsel claim. Rule 3:22-10(b) addresses entitlement to an evidentiary hearing.

A defendant shall be entitled to an evidentiary hearing only 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. To establish a prima facie case, defendant must demonstrate a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits.

[R. 3:22-10(b).]

We review a judge's decision to deny a PCR petition without an evidentiary hearing for abuse of discretion. State v. Preciose, 129 N.J. 451, 462 (1992).


Having reviewed the briefs and the record, we are unpersuaded by defendant's arguments and affirm the denial of his PCR petition substantially for the reasons expressed by the judge in his oral decision. We add only the following comments.

Defendant's sworn testimony during the plea hearing, coupled with his statements to the court during the sentencing hearing, directly refute many of the points he raised in submissions to the PCR court. Defendant's claims that trial counsel did not take the charges to trial, failed to advise him of the rights associated with a trial, and failed to advise him of the collateral consequences of his convictions, are contradicted by the record. Similarly, his testimony made clear that it was his decision not to proceed with a motion to suppress evidence obtained from the search of his vehicle and person. Moreover, defendant was afforded the opportunity to allocute during sentencing.

Defendant failed to make a prima facie showing of ineffective assistance of counsel. We find no basis for vacating the order denying defendant's PCR petition.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION