SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0624-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GEORGE A. HOLZMAN, a/k/a RAY RED HOLZMAN, GEORGE HOLTZMAN, GEORGE A. HOLTZMAN, GEORGE A. HOLZMAN, JR., and RED,

Defendant-Appellant.

Submitted December 19, 2017 – Decided April 20, 2018

Before Judges Fasciale and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Hunterdon County, Indictment No. 11-08-0296.

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

Anthony P. Kearns, III, Hunterdon County Prosecutor, attorney for respondent (Jeffrey L. Weinstein, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant George A. Holzman appeals from an order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

For acts against the nine-year-old daughter of his ex-girlfriend, defendant was indicted for second-degree sexual assault, fourth-degree criminal sexual contact, and third-degree endangering the welfare of a child.

Pre-trial motions resulted in mixed results for defendant. He was successful in opposing the State's motion to admit fresh complaint evidence. The trial court, however, denied his motion to dismiss the indictment, and in applying N.J.R.E. 404(b) granted the State's motion to admit a consensual phone intercept with his ex-girlfriend during which he stated he videotaped her daughter undressing to take a shower, despite his opposition set forth in his expert's report that the camera revealed no such recording.

Defendant subsequently pled guilty to second-degree sexual assault by admitting to touching the victim's buttocks with the intent of humiliating or degrading her. During his plea colloquy, he testified that he understood the charges, the terms of the plea offer, had reviewed the State's proofs with trial counsel, and was satisfied with counsel's services. Defendant also acknowledged that he signed, initialed and understood the plea forms, and that no one forced, coerced, or encouraged him to plead guilty. In

accordance with the plea agreement, he was sentenced to seven-years imprisonment subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, to be served at the Adult Diagnostic and Treatment Center. His appeal of sentence was affirmed on the Excessive Sentence Oral Argument calendar. State v. Holzman, A-1796-14 (App. Div. March 12, 2015).

Defendant then filed a pro-se PCR petition, which was later amended by assigned PCR counsel. Defendant contended that trial counsel[1] was ineffective by failing to: examine a camera that the victim's mother claims to have seen nude pictures of the victim; and to identify two witnesses, his roommate and his then live-in girlfriend, who would have verified that the victim's mother fabricated the allegations against him due to the break-up of their relationship. He also claimed that counsel failed to file motions: for speedy trial; to dismiss the indictment; to suppress evidence; to procure polygraph results from the State; to request a defense polygraph; and to suppress the consensual intercept phone recording. Lastly, he contended that counsel failed to disclose that she once worked in the same office as the prosecutor who was prosecuting the charges against him.

[1] Allegations were made against the second of the two trial counsels who represented defendant.

Five days after hearing oral argument, Judge Angela F. Borkowski issued an order and a twenty-six page written decision dismissing the petition without an evidentiary hearing. Applying the well-known standard in Strickland v. Washington, 466 U.S. 668, 687, 694 (1984) and State v. Fritz, 105 N.J. 42, 58 (1987), the judge found that defendant failed to set forth a prima facie case of ineffective assistance of counsel.

In her decision, the judge acknowledged that a counsel's inadequate investigation can constitute ineffective assistance where a defendant asserts facts through affidavits or certifications based upon personal knowledge, what the investigation would have revealed and that the inadequacy prejudiced his defense. See State v. Porter, 216 N.J. 343, 352 (2013); State v. Cummings, 321 N.J. Super. 154, 170 (1999). Thus, there must be more than "bald assertions" to support a claim of ineffective assistance. Cummings, 321 N.J. Super. at 170. Since defendant argued his guilty plea should be withdrawn because of counsel's ineffectiveness, the judge relied upon State v. DiFrisco, 137 N.J. 434, 457 (1994), which held a defendant must show 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" (citations omitted).

Noting defendant's plea colloquy, as well as the lack of affidavits or certification supporting his innocence, or asserting that pleading guilty was his only choice, or that had an investigation occurred he would have gone to trial rather than pleading guilty, Judge Borkowski found that a prima facie case of ineffective assistance based upon failure to investigate was not made. Pointedly, the judge found that counsel did investigate the video recordings of the victim, which defendant allegedly confessed to making, by retaining an expert who opined that no such recording was ever made with the camera, and used the opinion to oppose — albeit unsuccessfully — the State's motion to admit the alleged confession. The judge also found the petition was deficient because there were no affidavits or certifications from the witnesses supporting defendant's claim they had personal knowledge that the victim's mother fabricated the allegations due to her break-up with defendant. Moreover, the judge recognized that the mother's allegations did not initiate the investigation into defendant's conduct; rather it was the victim's disclosure to her school guidance counselor.

Turning to defendant's assertions that counsel did not file certain motions, the judge determined there was no ineffectiveness

of counsel because the motions were in fact filed or they would not have been successful. Counsel filed motions to dismiss the indictment and to suppress defendant's statement during a non-custodial investigation. As for the speedy trial claim, the judge reasoned it was procedurally barred under Rule 3:22-4 because defendant made a knowing and voluntary guilty plea. State v. Garoniak, 164 N.J. Super. 344, 349 (App. Div. 1978). Besides, defendant made no showing that the prosecution of the charges were unduly delayed and caused him any prejudice. Concerning the lack of polygraph motions, the judge maintained that even if the parties' stipulated, polygraphs are inadmissible at trial without a hearing to establish its reliability. State v. Mervilius, 418 N.J. Super. 138, 139 (App. Div. 2011). Despite this high standard, the judge found that the record revealed counsel[2] sought defendant's polygraph exam results, which suggested he was "truthful when he stated he did not touch the victim's vagina," but there was no assertion how he was prejudiced by the failure to pursue the State's offer that a defense expert[3] could examine the results, nor how he was prejudiced by the inability to present

[2] Initial counsel, who was substituted for prior to the plea agreement.

[3] No expert was retained.

the results at trial. And with respect to the failure to seek suppression of his statement during the consensual intercept, defendant failed to articulate the factual and legal grounds to demonstrate the motion would have been successful. State v. O'Neal, 190 N.J. 601, 618-19 (2007).

Lastly, the judge found that counsel's former employment with the prosecuting attorney did not violate R.P.C. 1.11, and that defendant failed to make any factual assertions how that relationship prejudiced his defense and caused him to plead guilty.

Based upon the findings that defendant failed to present a prima facie case of ineffective assistance and that there were no material facts in dispute that needed to be resolved, Judge Borkowski denied defendant's request for an evidentiary hearing in accord with Rule 3:22-1 and State v. Preciose, 129 N.J. 451, 462 (1992).

Before us, defendant contends in a single point argument:

> POINT ONE
>
> [DEFENDANT] IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT HIS ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL.

In his merits brief, defendant reiterates the arguments raised before and rejected by Judge Borkowski. Considering these arguments in light of the record and applicable legal standards,

these arguments lack sufficient merit to warrant discussion in a written opinion, Rule 2:11-3(e)(2), and we affirm substantially for the reasons set forth by the judge in her well-written decision.

Affirmed.