SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1058-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMAAL A. SHOCKLEY,

Defendant-Appellant.

Submitted March 1, 2018 – Decided March 20, 2018

Before Judges Simonelli and Rothstadt.

On appeal from the Superior Court of New Jersey, Law Division, Salem County, Indictment No. 11-03-0161.

Joseph E. Krakora, Public Defender, attorney for appellant (Frank M. Gennaro, Designated Counsel, on the brief).

Gurbir S. Grewal, Attorney General, attorney for respondent (Jennifer E. Kmieciak, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Jamaal A. Shockley appeals from the August 23, 2016 Law Division order, which denied his petition for post-conviction relief without an evidentiary hearing. We affirm.

We need not recite in detail the factual background of this matter and incorporate herein the facts set forth in State v. Shockley, No. A-1063-12 (App. Div. Aug. 13, 2014) (slip op. at 3-6. The following facts are pertinent to our review.

A grand jury indicted defendant for third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1) (count one); third-degree possession of a CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1) (count two); and second-degree eluding a law enforcement officer, N.J.S.A. 2C:29-2(b) (count three). Id. at 4. The eluding charge stemmed from defendant

> eluding police while riding a dirt bike after he ignored their signal to stop. Instead of pulling over, defendant rode away from the police at a high rate of speed. While doing so, he failed to heed stop signs on at least fourteen occasions. Eventually, the pursuit ended when defendant fell off his bike while attempting to turn. Even then, defendant continued to avoid his apprehension by running away from police. It was not until one of the officers tackled defendant that he was apprehended and arrested.
>
> [Id. at 4-5.]

Defendant's person and clothing were searched prior to his transport to the county jail, and no contraband, including CDS, was found. Id. at 5. "Later, after defendant's clothing had been removed from him and he was incarcerated, [Corrections Officer Robert Brooks] discovered fourteen 'bags of a rock-like substance in a purple Crown Royal Bag' in defendant's sweatshirt's right pocket," which tested positive for cocaine. Id. at 6. "Brooks contacted the police[,] who ultimately charged defendant with CDS offenses." Ibid.

Defendant's first trial ended in a mistrial. At the second trial, Brooks testified he eventually told defendant what he found in defendant's clothes. When the prosecutor asked Brooks, "Did [defendant] say anything?[,]" Brooks testified, "No, sir."

On retrial, defendant was convicted on all counts and sentenced to an eight-year term of imprisonment with a four-year period of parole ineligibility. Defendant appealed his CDS convictions and sentence, but not the eluding conviction. We reversed and remanded for a new trial as to the CDS convictions and for a recalculation of defendant's jail credits. Id. at 12. We found Brooks' testimony about defendant's silence violated defendant's constitutional right to remain silent. Id. at 3, 11. On remand, the State dismissed the CDS counts.

Defendant filed a PCR petition, arguing that trial counsel rendered ineffective assistance by failing to adequately cross-examine Police Officer Demetrius Brittingham about whether and when the siren on his patrol car was activated during the pursuit. At the first trial, Brittingham testified that the overhead lights on his patrol car were on, but the siren was not on when he began to make a stop of defendant's dirt bike. At the second trial, Brittingham testified on direct that the siren was activated when he and Officer John Colon attempted to stop the dirt bike. On cross-examination, Brittingham testified as follows:

> Q. Now, do you remember how far down the street you were when you first turned on your overheads?
>
> A. No.
>
> Q. And isn't it true that you didn't turn your siren on right away?
>
> A. Not -- I'm not sure. We turned the siren on. I don't know if it was right away or when we turned but the siren was on.

Colon testified on cross-examination as follows:

> Q. Okay. At the time you made contact with your supervisor, had you already turned on your sirens?
>
> A. Correct.
>
> Q. Did you make a report?
>
> A. I did.

Q. And what's the purpose of writing a report?

A. For court purposes.

Q. And you also write the report rather contemporaneous or close to the time that the event happens. Is that correct?

A. Correct.

Q. And that's certainly so you remember it better or it's fresher in your mind? Is that correct?

A. Yes.

Q. And you're indicating that you turned on the siren the same time you turned on your light. Isn't it true that you didn't turn on your siren until after you had already spoke[n] with your supervisor, so there was a gap?

A. It's a possibility. I don't know.

Q. Let me show you your report and ask you, first of all at this point, just to identify this, if you could, as to if what it purports to be.

A. This is the report of the incident that occurred.

Q. Okay. And you'll turn to page two of the report and just read the paragraph of -- just to yourself and see if it refreshes your recollection as to when you first turned on your siren.

A. Okay.

Q. Does it refresh your recollection?

A. Yes.

> Q. Okay. And was there a gap between the time you turned your lights on and when you turned the siren on?
>
> A. I turned the siren on after I contacted the supervisor, yes.

During the direct examination of Corporal John Sieber, who was driving a separate patrol car, the State played dash-camera footage of the pursuit. The trial transcript reads as follows:

> (Whereupon [the video] was played for the Court and jury at this time, commencing at 3:14:35 p.m., with the witness narrating during the video playing, as follows)
>
> THE WITNESS: I am on East Broadway, stationary, or going to be stationary, getting ready to do -- there's the sergeant that's hanging up the street signs. I'm facing eastbound, which is facing like the Sunoco or the Mc Donald's.
>
> Heading westbound there's the <u>(inaudible – sirens on video drowning out the witness speaking)</u>. Turning left onto Akin Street . . . .
>
> [(Emphasis added).]

Sieber also described his pursuit of defendant, stating his patrol car's lights and siren were activated during the chase, and he chased defendant for at least twelve blocks. The video confirmed his siren was activated.

Defendant asserted that the inconsistencies in Brittingham's testimony at the second trial and the testimony of Colon and Sieber called each officer's credibility into question. Therefore, trial

counsel should have more effectively cross-examined Brittingham on the subject.

In a comprehensive written opinion, Judge Linda L. Lawhun found that trial counsel cross-examined Brittingham about when the siren was activated on his patrol car and Brittingham testified he was "not sure." The judge determined defendant failed to show counsel was deficient in choosing "not to further question Brittingham on th[e] subject[.]" The judge also determined the jury heard evidence that the siren in Sieber's patrol car was activated during the pursuit, and thus, defendant failed to show that, but for counsel's alleged deficiency to elicit other testimony from Brittingham about the siren, the outcome of the trial would have been different.

Defendant also argued trial counsel was ineffective for failing to effectively cross-examine Brittingham about the circumstances that led to the pursuit. Defendant asserted "that Brittingham's testimony at the second trial [about] why he effectuated the motor vehicle stop differed from his testimony at the first trial," and trial counsel was deficient in failing to cross-examine Brittingham on the inconsistencies in his testimony.

At the first trial, Brittingham testified that "someone came by on a dirt bike, all black clothing, mask, no light on the bike"

and the lack of a headlight was why he began pursuing the dirt bike. On cross-examination, he testified as follows:

> Q. You said you find the -- you saw him and then you started following him, correct?
>
> A. Well, he cut in front of us. Actually, we almost hit him, because he cut in front of us to make a left-hand turn onto Grant Street.
>
> Q. This . . . bike didn't have any lights?
>
> A. No lights.

At the second trial, Brittingham testified that prior to the pursuit, he and Colon were on patrol on Grant Street and made a right-hand turn onto Johnson Street when "[a] subject on a little dirt bike, a black ski mask, just was coming towards us on Johnson Street. Cut in front of the vehicle, made a turn onto Grant Street and kept going." At that point, he radioed for backup and attempted to make a motor vehicle stop. On cross-examination, he testified about what drew his attention to the dirt bike as follows:

> Q. -- on the night in question, the first thing that called your attention to this motorcycle operation was the operation of the motorcycle itself. Is that correct?
>
> A. Right.
>
> Q. And I think that you indicated that it made a turn and almost came in contact with a vehicle?
>
> A. Yes.

> Q. In your report, does it actually indicate that it was your patrol vehicle?
>
> A. Yes.

Judge Lawhun found Brittingham's testimony at both trials was nearly identical, as Brittinghan testified both times that the dirt bike was coming toward the officer's vehicle and made a turn onto Grant Street. The judge concluded that "[w]hile the phrasing was not identical, the [] differences were de minimus."

Lastly, defendant argued appellate counsel rendered ineffective assistance by failing to argue that Brooks' testimony regarding his post-arrest silence, which resulted in the vacatur of the CDS convictions, also tainted his eluding conviction. Judge Lawhun found "Brooks' testimony only related to the drugs found in defendant's clothing, and Brooks made no mention of [defendant's] flight on the dirt bike[.]". The judge determined that, in view of the State's evidence on the eluding charge, which included the video recording of the pursuit, it was unlikely Brooks' testimony altered or affected the jury's consideration of the eluding charge. The judge concluded defendant failed to establish a reasonable probability that, had appellate counsel raised the argument on appeal, it would have been successful.

This appeal followed. On appeal, defendant raises the following contention:

> POINT ONE: THE TRIAL COURT ERRED IN DENYING DEFENDANT'S [PETITION] FOR POST-CONVICTION RELIEF WITHOUT AFFORDING DEFENDANT AN EVIDENTIARY HEARING.
>
> A. Ineffective Assistance of Trial Counsel.
>
> B. Ineffective Assistance of Appellate Counsel.

The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). Rather, trial courts should grant evidentiary hearings and make a determination on the merits only if the defendant has presented a prima facie claim of ineffective assistance, material issues of disputed facts lie outside the record, and resolution of the issues necessitates a hearing. R. 3:22-10(b); State v. Porter, 216 N.J. 343, 355 (2013). 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).

To establish a prima facie claim of ineffective assistance of counsel, the

> defendant must satisfy two prongs. First, he must demonstrate that counsel made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." An attorney's representation is deficient when it "[falls] below an objective standard of reasonableness."

> Second, a defendant "must show that the deficient performance prejudiced the defense." A defendant will be prejudiced when counsel's errors are sufficiently serious to deny him a "fair trial." The prejudice standard is met if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A "reasonable probability" simply means a "probability sufficient to undermine confidence in the outcome" of the proceeding.
>
> [State v. O'Neil, 219 N.J. 598, 611 (2014) (quoting Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984).]

"[I]n order to establish a prima facie claim, [the 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." Cummings, 321 N.J. Super. at 170. The defendant must establish, by a preponderance of the credible evidence, that he is entitled to the required relief. State v. Nash, 212 N.J. 518, 541 (2013).

Not pressing a witness on minor inconsistencies in his or her testimony does not push counsel's "performance below an objective standard of reasonableness." State v. Harris, 181 N.J. 391, 451 (2004) (citing Strickland, 466 U.S. at 687). In addition, "[t]he failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel." State v. Worlock, 117 N.J. 596, 625 (1990).

We have considered defendant's arguments in light of the record and applicable legal principles and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We affirm substantially for the reasons Judge Lawhun expressed in her written opinion. The judge correctly found defendant failed to establish a prima facie case of ineffective assistance of trial and appellate counsel to warrant an evidentiary hearing.

Affirmed.