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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-1287-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JEREL WILKINS, a/k/a JEREL WILKENS,
and JERELL WILKINS,

Defendant-Appellant.

Submitted November 28, 2017 – Decided March 22, 2018

Before Judges Carroll and Leone.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Indictment No.
14-06-0589.

Joseph E. Krakora, Public Defender, attorney
for appellant (Michele A. Aduato,
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 Jerel Wilkins appeals the trial court's August 30, 2016 order denying his petition for post-conviction relief (PCR). We affirm.

I.

On October 26, 2013, defendant entered a liquor store at approximately midnight. He possessed a loaded .38 caliber revolver in a holster hidden from view. He did not have a permit, and he had a prior conviction for aggravated assault. In the liquor store, undercover police officers noticed the gun and drew their weapons. Defendant ran. An undercover officer grabbed defendant and he resisted.

Defendant was charged with: count one, second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b); count two, first-degree unlawful possession of a handgun by a person with a prior conviction, N.J.S.A. 2C:39-5(j); count three, fourth-degree possession of hollow-point bullets, N.J.S.A. 2C:39-3(f); count four, third-degree resisting arrest, N.J.S.A. 2C:29-2(a)(3); and count five, second-degree certain person not to have a firearm, N.J.S.A. 2C:39-7(b).

Pursuant to the plea bargain, defendant pled guilty to counts four and five. Defendant received the negotiated five years in prison for count four and a concurrent seven years in prison for count five, with five years of parole ineligibility.

The trial court ordered the sentences to run concurrent to defendant's sentence for a parole violation. He did not appeal the January 2, 2015 judgment of conviction.

On February 8, 2016, defendant filed a PCR petition. His certification alleged his plea counsel was ineffective because his counsel "failed to explore the amnesty issue" under L. 2013, c. 117 ("2013 amnesty act" or "act"). Defendant certified when he was arrested by police he "was committing no crime and was on [his] way to the police station to lawfully dispose of the weapon when [he] stopped for a meal." His certification also alleged his plea counsel "said the amnesty period was 'not official' and failed to explore the issue further."

On August 30, 2016, the PCR court heard oral argument and denied relief. In an oral decision, the court concluded plea counsel was not ineffective because defendant presented no evidence of a written notice of surrender pursuant to N.J.S.A 2C:39-12, and thus was not shielded from criminal liability by the 2013 amnesty act.

Defendant appeals, arguing:

POINT I - FAILURE OF THE PCR COURT TO GRANT [AN] EVIDENTIARY HEARING ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF PLEA COUNSEL WAS ERROR.

POINT II - THE PCR COURT ERRED IN NOT ALLOWING DEFENDANT TO WITHDRAW HIS GUILTY PLEA.

II.

Defendant argues the trial court erred in denying him an evidentiary hearing on his ineffective assistance of counsel claim. "A defendant shall be entitled to an evidentiary hearing only upon the establishment of a prima facie [case] in support of post-conviction relief." R. 3:22-10(b). "To establish a prima facie case, defendant must demonstrate a reasonable likelihood that his or her claim, viewing the facts in the light most favorable to defendant, will ultimately succeed on the merits." Ibid. As the PCR court did not hold an evidentiary hearing, we "conduct a de novo review." State v. Harris, 181 N.J. 391, 419 (2004). We must hew to that standard of review.

To show ineffective assistance of counsel, defendant must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984), and State v. Fritz, 105 N.J. 42 (1987). "First, defendant must show that counsel's performance was deficient." State v. Taccetta, 200 N.J. 183, 193 (2009) (quoting Fritz, 105 N.J. at 52). "Second, defendant must show that the deficient performance prejudiced the defense." Ibid. For a defendant who has pled guilty to show prejudice, he must show "that there is a reasonable probability that, but for counsel's errors, [defendant] would not have pled guilty and would have insisted on going to trial." State v. DiFrisco, 137

N.J. 434, 457 (1994) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

III.

Defendant claims plea counsel failed to explore the applicability of the 2013 amnesty act. The act became effective on August 8, 2013. L. 2013, c. 117, §3. The act created a 180-day window allowing persons to transfer or surrender firearms they possessed unlawfully without any legal consequences. State v. Harper, 229 N.J. 228, 236 (2017). The 2013 amnesty act provided:

Any person who has in his possession a handgun in violation of [N.J.S.A. 2C:39-5(b)] or a rifle or shotgun in violation of [N.J.S.A. 2C:39-5(c)] on the effective date of this act may retain possession of that handgun, rifle, or shotgun for a period of not more than 180 days after the effective date of this act. During that time period, the possessor of that handgun, rifle, or shotgun shall:

(1) transfer that firearm to any person lawfully entitled to own or possess it; or

(2) voluntarily surrender that firearm pursuant to the provisions of N.J.S.A. 2C:39-12.

[Ibid. (alterations in original) (quoting L. 2013, c. 117, § 1).]

Under N.J.S.A 2C:39-12, a person seeking to voluntarily surrender a weapon must "gi[ve] written notice of his intention

to do so," and voluntarily surrender the weapon, "to the superintendent or to the chief of police" before authorities file any charges and "before any investigation has been commenced concerning the unlawful possession" of the weapon. Ibid. A person invoking the 2013 amnesty act must "comply with the provisions of N.J.S.A. 2C:39-12[.]" Harper, 229 N.J. at 240; State in Interest of C.L.H.'s Weapons, 443 N.J. Super. 48, 56 (App. Div. 2015). Otherwise, the 2013 amnesty act's provisions "would be transformed from devices to encourage the surrender of firearms to a 'free pass' for those the police have already found or suspect to be in illegal possession[.]" Ibid. (quoting C.L.H.'s Weapons, 443 N.J. Super. at 57).

Thus, a defendant charged with violating N.J.S.A 2C:39-5(b) during the 180-day amnesty period may raise the amnesty act as a defense only if he can prove that he possessed a handgun on August 8, 2013, and "that he took steps to . . . voluntarily surrender it during the 180-day period beginning on August 8, 2013, consistent with N.J.S.A. 2C:39-12 – that is, before authorities brought any charges or began to investigate his unlawful possession." Harper, 229 N.J. at 241.

Other than unlawfully possessing the gun, defendant did not meet any of the requirements of the 2013 amnesty act. First, defendant did not even allege that on August 8, 2013, he

possessed the handgun he was arrested with on October 26, 2013. That was enough to defeat his claim. See C.L.H.'s Weapons, 443 N.J. Super. at 56. Second, defendant did not provide written notice of intent to surrender the gun prior to his arrest pursuant to N.J.S.A 2C:39-12. That too was a sufficient basis to reject the claim.

Third, "nothing in the record [of his prosecution] demonstrates that defendant took steps to transfer or surrender the handgun prior to his arrest." Harper, 229 N.J. at 243. Indeed, when defendant had the gun in the presence of police officers, he ran away.

Defendant's PCR certification claimed he was "on [his] way to lawfully dispose of the weapon when [he] stopped for a meal," in a liquor store at midnight on a Saturday. However, he did not claim he told that to plea counsel.

"The reasonableness of counsel's actions" depends on the "information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information." DiFrisco, 174 N.J. at 228 (quoting Strickland, 466 U.S. at 691). "Counsel cannot be faulted for failing to expend time or resources analyzing events about which they were never alerted." Ibid.

Defendant did certify his "plea attorney said the amnesty period was 'not official' and failed to explore the issue further." However, "[a] court shall not grant an evidentiary hearing . . . (2) if the defendant's allegations are too vague, conclusory or speculative." R. 3:22-10(e). "Rather, defendant must allege specific facts and evidence supporting his allegations." State v. Porter, 216 N.J. 343, 355 (2013). In order to show a prima facie claim, a petitioner for post-conviction relief "must do more than make bald assertions that he was denied the effective assistance of counsel." Ibid.

In any event, given defendant's inability even to allege he met the requirements of the 2013 amnesty act, defendant has not shown further investigation could have changed the outcome. He did not even allege, let alone show, that he would not have pled guilty and would have gone to trial if plea counsel had explained to him the requirements of the act. Therefore, defendant cannot show prejudice. Thus, the PCR court properly denied defendant's PCR petition without an evidentiary hearing.

IV.

In his pro se PCR petition, defendant argued he should be permitted to withdraw his guilty plea under Rule 3:21-1 based on the 2013 amnesty act. However, defendant's counseled brief did not raise such a claim. In its ruling, the PCR court said

defendant had not asked to withdraw his plea, but it would "consider such a motion so the record is complete." Defendant argues the trial court erred in denying withdrawal of his guilty plea. We disagree.

"[A] plea may only be set aside in the exercise of the court's discretion." State v. Slater, 198 N.J. 145, 156 (2009) (citing State v. Simon, 161 N.J. 416, 444 (1999)). Thus, an appellate court will reverse a "trial court's denial of [a] defendant's request to withdraw his guilty plea . . . only if there was an abuse of discretion which renders" the trial court's decision "clearly erroneous." Simon, 161 N.J. at 444.

A motion to withdraw a guilty plea after sentencing can be granted only "to correct a manifest injustice." R. 3:21-1. The court must consider "(1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of the defendant's reasons for withdrawal; (3) the existence of a plea bargain; and (4) whether withdrawal could result in unfair prejudice to the State or unfair advantage to the accused." Slater, 198 N.J. at 157-58. If one factor is missing, it does not "automatically disqualify or dictate relief." Id. at 162.

Defendant asserts he has a colorable claim of innocence under the 2013 amnesty act. However, Slater makes clear that a "bare assertion of innocence is insufficient to justify

withdrawal of a plea. Defendants must present specific, credible facts and, where possible, point to facts in the record that buttress their claim." Id. at 158. As set forth above, defendant failed to allege such facts to show he met the requirements of the 2013 amnesty act.

Defendant claims plea counsel's alleged advice that the 2013 amnesty act was "not official" was an adequate reason for withdrawal. However, as set forth above, that is not a strong reason for withdrawal. As the PCR court found, defendant's claim that he was on his way to the police station when he was arrested appears to be a meritless "after thought."

Defendant received a favorable plea bargain. He was initially charged with five different crimes including one first-degree and two second-degree offenses. However, the plea bargain allowed defendant to plead guilty to only a second-degree offense and a third-degree offense, with concurrent sentences totaling only seven years. "[D]efendants have a heavier burden in seeking to withdraw pleas entered as part of a plea bargain." Slater, 198 N.J. at 160.

The PCR court found no undue prejudice to the State. Nonetheless, balancing all of the factors, the PCR court did not abuse its discretion in finding defendant was not entitled to withdraw his plea.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION