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APPROVAL OF THE APPELLATE DIVISION**

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1289-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARQUIS SMITH,

Defendant-Appellant.

Submitted December 19, 2017 – Decided April 12, 2018

Before Judges Fisher and Sumners.

On appeal from Superior Court of New Jersey,
Law Division, Atlantic County, Indictment No.
11-09-2373.

Joseph E. Krakora, Public Defender, attorney
for appellant (Karen A. Lodeserto, Designated
Counsel, on the brief).

Damon G. Tyner, Atlantic County Prosecutor,
attorney for respondent (Mario C. Formica,
Deputy First Assistant Prosecutor, of counsel
and on the brief).

PER CURIAM

Tried before a jury, defendant Marquis Smith was convicted of one count of third-degree possession of heroin¹ and three diverse counts of second-degree possession with the intent to distribute heroin.² On direct appeal, we upheld his conviction and his sixteen-year prison term with eight years of parole ineligibility. State v. Marquis Smith, No. A-1595-12 (App. Div. July 28, 2014). Defendant did not file a petition for certification, but later sought post-conviction relief (PCR).

Applying the well-known two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987), the PCR court denied PCR without an evidentiary hearing, expressing its reasoning in a thorough fourteen-page single-spaced written decision.

Defendant now appeals the court's order denying PCR, arguing in his single-point merits brief:

¹ N.J.S.A. 2C:35-10(a)(1).

² Second-degree possession with intent to distribute heroin, N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(2); second-degree possession with intent to distribute heroin within 1,000 feet of school property, N.J.S.A. 2C:35-7; and second-degree possession with intent to distribute heroin within 500 feet of a public housing facility, N.J.S.A. 2C:35-7.1(b).

WHETHER DEFENDANT WAS DEPRIVED OF HIS
CONSTITUTIONAL RIGHT TO THE EFFECTIVE
ASSISTANCE OF COUNSEL

Specifically, defendant contends trial counsel failed to argue that the search warrant, which was based upon a confidential informant's (CI) four alleged drug buys from defendant and led to the seizure of heroin and other evidence used to convict him, was not based upon probable cause because the State did not provide discovery regarding the CI's identity and did not present the CI's testimony when it sought the warrant. We are unpersuaded.

In rejecting defendant's contention that counsel should have sought the CI's identity to invalidate the search warrant, the court recognized the claim spoke in terms of a Franks³ motion without arguing such. The court, however, viewed counsel's decision not to challenge the search warrant as strategic which is "virtually unchallengeable." Strickland, 466 U.S. at 690-91. As to its merits, citing State v. Milligan, 71 N.J. 373, 383-84 (1976), the court found that a Franks motion would have been unsuccessful because defendant was not charged with crimes related to the alleged drug sales to the CI, and thus, the CI's identity

³ In Franks v. Delaware, 438 U.S. 154, 171-72 (1978), the Supreme Court held a defendant may challenge the veracity of an affidavit submitted by law enforcement to procure a search warrant only by making a substantial preliminary showing that the affidavit was deliberately false or made with reckless disregard of the truth.

and the discovery related to those sales were not relevant. Rather, the CI's assertions were used to establish probable cause for the search warrant, upon which its execution uncovered the evidence presented to convict him. Moreover, the court determined defendant failed to establish "a substantial preliminary showing" that the CI's affidavit supporting the search warrant was false. See Franks, 438 U.S. at 155. Understandably, the CI was not required to testify before the judge who issued the warrant because his hearsay statements were acceptable. State v. Novembrino, 105 N.J. 95, 110 (1987); see also State v. Broom-Smith, 406 N.J. Super. 228, 240 (App. Div. 2009)(setting forth the manner under which a search warrant can be obtained through the use of a controlled drug buy by a CI, and the limit to which discovery may obtained to meet that standard). Lastly, the PCR court reasoned that since there was no prima facie showing of an ineffective assistance of counsel, an evidentiary hearing was not necessary to resolve defendant's claims. State v. Preciose, 129 N.J. 451, 462-63 (1992).

Our examination of defendant's claims and review of the record convinces us that defendant was not denied effective assistance of counsel, and there was no need for an evidentiary hearing. We affirm substantially for the reasons set forth in the PCR court's written decision. We only add that we part company with the

court's finding that counsel's decision not to file a motion to challenge the search warrant should be excused as strategic and thus not ineffective assistance. We envision no downside for filing a motion to suppress because we see no reasonable strategy in not filing the motion.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION