SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2391-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DARVIN CANNON, a/k/a
DARVIN S. CANNON,

Defendant-Appellant.

Submitted March 21, 2018 – Decided April 16, 2018

Before Judges Fuentes and Suter.

On appeal from Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 14-02-0107.

Joseph E. Krakora, Public Defender, attorney for appellant (Kevin G. Byrnes, Designated Counsel, on the brief).

Jennifer Webb-McRae, Cumberland County Prosecutor, attorney for respondent (Kim L. Barfield, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from the November 18, 2016 order that denied his petition for post-conviction relief (PCR) without an evidentiary hearing. For the reasons that follow, we affirm.

On February 26, 2014, a man dressed in dark clothing with a mask and gun went into a convenience store in Bridgeton. When the store clerk saw him, she screamed. He put the gun to her back and told her to open up the registers. The storeowner was in the rear of the business and heard the employee scream. He looked at the surveillance monitor and saw an armed robber directing the employee to go behind the counter. The owner drew his own weapon. He and the robber exchanged gunfire until the robber fled the store. The owner's shirt was grazed. The surveillance video captured this exchange, showed the robber fall in the parking lot, get up and run toward a white car.

When the police responded to the store, they were notified that defendant was at the hospital with a non-life threatening gunshot wound to the head. Although he told the police officers at the hospital that he was shot in another area of Bridgeton, he and the clothing he was wearing matched the description of the armed robber.

Defendant was indicted on four counts, including first-degree armed robbery with a handgun, N.J.S.A. 2C:15-1 (count one); fourth-degree aggravated assault, N.J.S.A. 2C:12(1)(b)(4) (count two);

second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count three); and first-degree attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3(a)(1) (count four).

Pursuant to a negotiated agreement with the State, defendant pled guilty on June 18, 2015 to the first count in the indictment charging him with first-degree armed robbery. The State agreed to dismiss the other three counts. The sentencing court imposed the recommended sentence of fifteen-years imprisonment with an eighty-five percent period of parole ineligibility and five years of parole supervision under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Defendant did not file a direct appeal from his conviction or sentence.

Defendant filed a PCR petition on November 30, 2015, alleging ineffective assistance of counsel. He claimed his counsel advised him to plead guilty although he wanted to go to trial. He also wanted a change in venue and claimed the court lacked jurisdiction.

Defendant's PCR attorney filed a letter brief where he alleged that defendant's trial counsel did not review all of the discovery with him, including the videotape of the incident, did not look at the videotape, and did not complete investigation of the case. He contended the plea was not entered knowingly and voluntarily. Defendant requested an evidentiary hearing.

In September 2016, the PCR court allowed defendant to submit a certification in support of his PCR petition. In defendant's October 19, 2016 certification, he contended that he never received a complete copy of discovery and was not shown the surveillance tape footage of the robbery. He argued his trial counsel insisted that he plead guilty and accept the fifteen-year sentence. He alleged his trial attorney failed to file pretrial motions.

Defendant's PCR petition was heard on November 18, 2016. The PCR judge denied the petition after considering the oral arguments of counsel. Defendant alleges that his trial counsel told him before the plea hearing that she had not viewed the videotape. The PCR court found that even if counsel and defendant did not view the videotape before the plea, defendant did not allege there was a discrepancy between what the tape was purported to show and what it did show. There was no showing the tape deviated in any meaningful way from what was represented at the time defendant entered his guilty plea. Thus, even if defendant could show that his counsel's performance were deficient, defendant did not show that he was prejudiced.

Defendant presents the following issues for our consideration in his appeal.

POINT I

THE DEFENDANT WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 10 OF THE NEW JERSEY CONSTITUTION.

POINT II

THE GUILTY PLEA WAS NOT ENTERED KNOWINGLY AND VOLUNTARILY AS REQUIRED BY THE LAW.

POINT III

THE DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING.

We are not persuaded by any of these arguments and affirm.

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 order to prevail on an ineffective assistance of counsel claim, defendant must meet a two-prong test by establishing that: (1) counsel's performance was deficient and he or she made errors that were so egregious that counsel was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution; and (2) the defect in performance 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.

In the plea bargain context, "a defendant must prove 'that there is a reasonable probability that, but for counsel's errors, [he or she] would not have pled guilty and would have insisted on going to trial,'" State v. Gaitan, 209 N.J. 339, 351 (2012) (alteration in original) (quoting State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009)), and that "a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010).

We agree with the PCR court that defendant failed to show a prima facie case of ineffective assistance. The State provided discovery to defendant's counsel, including the surveillance videotape. Defendant acknowledged that before he pled guilty, he knew that his attorney had not viewed the tape.

We agree with the PCR court that even if his trial attorney did not look at the videotape and even if this were deficient performance, defendant failed to show a reasonable probability the results of the proceedings would have been different. The videotape purported to show defendant coming into the store dressed in dark clothes with a gun and threatening the employee. The storeowner and defendant shot at each other, and defendant left the store. Defendant never alleged that there was any discrepancy

between what the tape purported to show and what it actually showed. "[W]hen a petitioner claims his trial attorney inadequately investigated his case, he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." State v. Porter, 216 N.J. 343, 353 (2013) (alteration in original) (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)). Defendant did not meet his burden of showing factually that further investigation of the videotape would have made a difference.

We are satisfied from our review of the record that defendant failed to make a prima facie showing of ineffectiveness of trial counsel within the Strickland/Fritz test. Accordingly, the PCR court correctly concluded that an evidentiary hearing was not warranted. See State v. Preciose, 129 N.J. 451, 462-63 (1992).

We conclude that defendant's further arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.