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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2751-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KENNETH K. GUMBS,

Defendant-Appellant.

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Submitted January 22, 2018 – Decided May 24, 2018

Before Judges Messano and Vernoia.

On appeal from Superior Court of New Jersey,  
Law Division, Passaic County, Indictment No.  
11-09-0793.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Steven M. Gilson, 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 briefs).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Kenneth K. Gumbs appeals from an order denying his post-conviction relief (PCR) petition without an evidentiary hearing. Having carefully reviewed the record in light of the applicable law, we affirm.

I.

We described the underlying facts in our decision on defendant's direct appeal. See State v. Gumbs, A-5148-12 (App. Div. Aug. 25, 2015) (slip op. at 3-8).<sup>1</sup> We limit our discussion of the facts to those relevant to defendant's PCR petition.

Prior to executing a search warrant at the residence defendant shared with his girlfriend and young daughter, the police effectuated a motor vehicle stop of defendant. The police informed defendant he was under arrest and they had a search warrant for his residence. The police advised defendant of his Miranda<sup>2</sup> rights, and defendant said there was crack cocaine and marijuana, a firearm and possibly bullets in various locations within the residence. The police searched the residence and found "crack cocaine, . . . marijuana, two digital scales, a pipe, and a cutting straw along with drug packaging baggies." Gumbs, slip op. at 5.

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<sup>1</sup> Our initial opinion was filed on July 20, 2015. We filed an amended decision on August 25, 2015.

<sup>2</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

The marijuana was in numerous "small packaging baggies . . . and also in a larger bag with a larger quantity of marijuana." Ibid.

Defendant was convicted of third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1), second-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(2), third-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(11), fourth-degree possession of a handgun without a permit, N.J.S.A. 2C:58-3(a) and N.J.S.A. 2C:39-10(a), and second-degree possession of a weapon while committing a CDS offense, N.J.S.A. 2C:35-5(a) and N.J.S.A. 2C:39-4.1. He received an aggregate twenty-one-year sentence with a ten-and-one-half year period of parole eligibility. We affirmed his conviction and sentence. Gumbs, slip op. at 25-26. The Supreme Court denied defendant's petition for certification. State v. Gumbs, 224 N.J. 282 (2016).

In May 2016, defendant filed a pro se PCR petition asserting ineffective assistance of his trial and appellate counsel. In his petition, he generally claimed his counsel was ineffective by: failing to challenge the trial court's denial of his motion to suppress evidence; failing to challenge what he asserted was a "wiretap violation"; failing to challenge the identity of detectives to which references were made in the affidavit

supporting the issuance of the search warrant; failing to call witnesses in defendant's favor; failing to object to "one of the prosecutor['s] main witnesses" and to "other crime evidence"; failing to object to testimony of witnesses during the Miranda hearing; failing "to establish a Brimage<sup>[3]</sup> violation for failure to offer a pre-indictment plea offer"; failing to challenge on appeal the denial of defendant's motion for recusal of the trial judge; failing to raise constitutional issues on appeal; and failing "to investigate these claims."

Defendant submitted a certification supporting his petition, in which he represented that he told his trial counsel the search warrant affidavit falsely alleged he made two drug sales to a confidential informant. He further stated he was surprised there were no witnesses called at the motion to suppress evidence seized pursuant to the search warrant. He claimed that he

believed that [his] attorney would challenge the veracity of the [search warrant] affidavit at trial, when the police officers testified[, and that b]ased on this misunderstanding, [he] rejected the State's final plea offer and went to trial, where [he] believed [his] attorney would convince the jury that the police made false statements in the affidavit.

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<sup>3</sup> State v. Brimage, 153 N.J. 1 (1998).

Defendant certified that had he known there would be no challenge to the veracity of the search warrant affidavit at his trial, he would have accepted the State's final plea offer.

After the assignment of counsel, the PCR court heard argument and issued a written decision. The court rejected defendant's claim that his trial counsel's performance was deficient by failing to inform defendant he would be unable to contest the validity of the search warrant at trial. The court found that "[t]hough [defendant] may not have understood the exact procedural posture of each event in his criminal proceedings, [he] had three prior CDS offenses" and "understood generally how criminal proceedings work." The court further found defendant had been advised of the State's plea offer and his sentencing exposure if he proceeded to trial and, "[b]ecause of these facts, [his] arguments fail to satisfy" his burden of establishing a prima facie case for PCR. The court did not make any findings as to defendant's argument that as a result of his trial counsel's alleged failure to advise him the veracity of the search warrant affidavit would not be contested at trial, he opted to forego the State's plea offer and proceed to trial.

The court rejected defendant's contention that his trial counsel's performance was deficient because he allegedly failed to object to prejudicial testimony from the State's drug expert

witness. The court also rejected defendant's contention that his trial counsel was ineffective by failing to challenge the search warrant affidavit by arguing it was based in part on a police officer's overhear of a telephone conversation between defendant and the confidential informant that violated the New Jersey Wiretapping and Electronic Surveillance Control Act (Wiretap Act), N.J.S.A. 2A:156A-1 to -34. The court entered an order denying the PCR petition without an evidentiary hearing.

Defendant appealed, and his counsel offers the following argument for our consideration:

THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF TRIAL COUNSEL'S INEFFECTIVENESS FOR ADVISING DEFENDANT TO REJECT THE STATE'S PLEA OFFER IN LIGHT OF COUNSEL'S NOT PRESENTING A VIABLE DEFENSE.

Defendant makes the following arguments in his pro se supplemental brief:

Point One

DEFENDANT-PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

A. Trial Counsel was ineffective in Failing to review for any wiretap Violations.

B. Appellant asserts that trial counsel was ineffective and caused defendant extreme prejudice by failing to object to the highly prejudicial testimony giving by [S]tate[']s

expert witness during examination by the prosecutor. Appellant also contend[s] that if it had not been for the erroneously following of State v. Odom, 118 N.J. 65 (1989)[,] the results of this case would have been different.

#### POINT TWO

DEFENDANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT ORDERED THE JURY TO DISREGARD HIS ORIGINAL INSTRUCTIONS ON THE WEAPON POSSESSION COUNTS WITHOUT RE-INSTRUCTING THE JURY IN ITS ENTIRETY. U.S. Const. Amend. VI, XIV; N.J. Const. Art. I, Pars. 9 and 10.

A. TRIAL COUNSEL'S FAILURE TO OBJECT TO THE JURY BEING RECHARGED ON THE WEAPON POSSESSION COUNTS DEPRIVED DEFENDANT OF A FAIR TRIAL AND HIS DUE PROCESS RIGHTS.

#### II.

We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004) (citing Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). The de novo standard of review applies to mixed questions of fact and law. Id. at 420. Where an evidentiary hearing has not been held, it is within our authority "to conduct a de novo review of both the factual findings and legal conclusions of the PCR court[.]" Id. at 421. We apply that standard here.

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee

that a defendant in a criminal proceeding has the right to the assistance of counsel in his defense. The right to counsel includes "the right to the effective assistance of counsel." State v. Nash, 212 N.J. 518, 541 (2013) (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)).

In Strickland, the Court established a two-part test, later adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987), to determine whether a defendant has been deprived of the effective assistance of counsel. Strickland, 466 U.S. at 687. Under the first prong of the Strickland standard, a petitioner must show counsel's performance was deficient. It must be demonstrated that counsel's handling of the matter "fell below an objective standard of reasonableness" and "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Ibid.

Under the second prong of the Strickland standard, a defendant "must show that the deficient performance prejudiced the defense." Ibid. There must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

A petitioner must establish both prongs of the Strickland standard in order to obtain a reversal of the challenged conviction. Id. at 687; Nash, 212 N.J. at 542; Fritz, 105 N.J.



at 52. A failure to satisfy either prong requires the denial of a petition for PCR. Strickland, 466 U.S. at 700.

We have held that "bald assertions" are insufficient to sustain a defendant's burden of establishing a prima facie case of ineffective assistance under the Strickland standard. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). PCR petitions must be "accompanied by an affidavit or certification by defendant, or by others, setting forth with particularity," State v. Jones, 219 N.J. 298, 312 (2014), "facts sufficient to demonstrate counsel's alleged substandard performance." Ibid. (quoting State v. Porter, 216 N.J. 343, 355 (2013)); see also State v. Mitchell, 126 N.J. 565, 577 (1992) (finding that a PCR "petition itself must allege the facts relied on to support the claim.").

Defendant first argues his attorney's performance was deficient because he failed to advise "defendant to reject the State's plea offer" and "inform defendant that the propriety of the search could not be challenged at trial." In defendant's certification, he does not state that his counsel advised him to reject the plea offer, and the record before the trial court provides no evidential support for that contention. Defendant's claims are bald assertions that are unsupported by competent evidence. See Cummings, 321 N.J. Super. at 170.

Moreover, although defendant argues his attorney failed to inform him that "the propriety of the search could not be challenged at trial," that claim is also untethered to any competent evidence. To the contrary, defendant's certification states no more than that he "believed" his attorney would challenge the veracity of the search warrant affidavit at trial. Indeed, he characterizes his belief as a "misunderstanding," but provides no competent evidence establishing it was the result of the deficient performance of his trial counsel.

A prima facie case of ineffective assistance of counsel is not established either by a defendant's conclusory and unsupported assertions, ibid., or the arguments of counsel, see Baldyga v. Oldman, 261 N.J. Super. 259, 265 (App. Div. 1993) ("The comments following [Rule 1:6-6] illustrate that its purpose is to . . . eliminate the presentation of facts which are not of record by unsworn statements of counsel made in briefs and oral arguments."). But that is all defendant provided in support of the claim his trial counsel erred by allegedly misadvising him to reject the State's plea offer because defendant would be able to challenge the veracity of the search warrant at trial. We are therefore satisfied the PCR court correctly concluded defendant did not establish a prima facie case of ineffective assistance of counsel

based on his claim that his trial counsel misadvised him to reject the State's plea offer.<sup>4</sup>

We are also not persuaded by defendant's argument trial counsel was ineffective by failing to argue the search warrant affidavit included information obtained in violation of the Wiretap Act. The search warrant affidavit described that the confidential informant placed two phone calls to defendant, and the informant permitted a police officer to overhear the conversations. Defendant contends the overhears constituted illegal intercepts in violation of the Wiretap Act, and that his trial counsel was ineffective by failing to challenge the search warrant which in part was based on communications during those phone calls. See State v. K.W., 214 N.J. 499, 511-13 (2013) (requiring the suppression of communications obtained as the result of an intercept obtained in violation of the Wiretap Act).

In pertinent part, N.J.S.A. 2A:156A-3(a) provides that any person who "[p]urposely intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept

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<sup>4</sup> We recognize that our reasoning is different than that employed by the PCR court. However, "[i]t is a long-standing principle underlying appellate review that 'appeals are taken from orders and judgments and not from opinions . . . or reasons given for the ultimate conclusion.'" State v. Scott, 229 N.J. 469, 479 (2017) (quoting Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001)).

any wire, electronic or oral communication" is guilty of a crime of the third degree. The Wiretap Act defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical, or other device[.]" N.J.S.A. 2A:156A-2(c). An "electronic, mechanical or other device" means

any device . . . that can be used to intercept a wire, electronic or oral communication other than . . . [a]ny telephone . . . instrument . . . furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business.

[N.J.S.A. 2A:156A-2(d)(1).]

The Wiretap Act protects the privacy interests of individuals in their telephone conversations. State v. Worthy, 141 N.J. 368, 379 (1995); State v. Lane, 279 N.J. Super. 209, 219 (App. Div. 1995). The remedy for an illegal interception is the suppression of evidence. Worthy, 141 N.J. at 387. An "aggrieved person . . . may move to suppress the contents of an intercepted wire, electronic or oral communication . . . on the grounds that . . . the communication was unlawfully intercepted[.]" N.J.S.A. 2A:156A-21(a).

The Wiretap Act provides an exception for telephone conversations intercepted with the consent of either party to the

conversation. D'Onofrio v. D'Onofrio, 344 N.J. Super. 147, 154 (App. Div. 2001); Lane, 279 N.J. Super. at 218. Under the "consent exception" provision, it is lawful for:

A person not acting under color of law to intercept a wire, electronic or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception unless such communication is intercepted or used for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State or for the purpose of committing any other injurious act.

[N.J.S.A. 2A:156A-4(d).]

Measured against these standards, defendant fails to demonstrate that his counsel was ineffective by failing to argue the search warrant affidavit was based on information obtained in violation of the Wiretap Act. The police officer did not violate the Wiretap Act by listening to the calls with the confidential informant's consent. Defendant presented no evidence the officer "intercepted" the calls with an "electronic, mechanical or other device." Instead, defendant claims only that the officer listened as defendant spoke with the informant, who consented to the overhear. There is no merit to defendant's assertion the Wiretap Act was violated, and his counsel was not ineffective by failing to make a meritless argument before the trial court. See State v. O'Neal, 190 N.J. 601, 619 (2007) (holding "[i]t is not

ineffective assistance of counsel for defense counsel not to file a meritless motion . . . ."); State v. Worlock, 117 N.J. 596, 625 (1990) ("The failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel.").

Defendant further contends the PCR court erred by rejecting his argument that trial counsel was ineffective by failing to object to the testimony of the State's drug expert's testimony that the amount and packaging of the marijuana showed it was possessed for distribution. Defendant does not dispute such testimony was admissible at the time of his trial under State v. Odom, 116 N.J. 65 (1989). He contends, however, his counsel should have objected to the testimony under the principles later established by our Supreme Court in State v. Cain, 224 N.J. 410 (2016).

Counsel was not deficient by failing to object to testimony that was admissible under the law existing at the time of defendant's trial. See State v. Brewster, 429 N.J. Super. 387, 397-98 (App. Div. 2013) (determining whether defense counsel's performance was deficient under the "norms of the profession" existing when the alleged erroneous advice was given); see also State v. Davies, 394 F.3d 182, 189 (3d Cir. 2005) (finding counsel's performance under the Strickland standard is measured against the legal standards in effect at the time of trial).

Moreover, the standard for admission of expert testimony established in Cain is inapplicable here because the decision has been given only pipeline retroactivity, see State v. Green, 447 N.J. Super. 317, 328 (App. Div. 2016), and defendant's direct appeal was resolved prior to the Cain decision,<sup>5</sup> see State v. Hyman, 451 N.J. Super. 429, 446 (App. Div. 2017), certif. denied, 232 N.J. 301 (2018) (applying the Cain principles in a case that was "on appeal when Cain was decided").

Defendant therefore failed to satisfy the first prong of the Strickland standard on his claim that trial counsel was ineffective by failing to object to the expert's testimony. Defendant also failed to meet his burden under Strickland's second prong. Based on our review of the record and the evidence of defendant's guilt, even if defendant's trial counsel erred by failing to object to the testimony, defendant has not demonstrated that but for the alleged error, there is a reasonable probability the result of the trial would have been different. See Strickland, 466 U.S. at 694; see also State v. Gaitan, 209 N.J. 339, 351 (2012).

We also reject defendant's claim the court erred by failing to conduct an evidentiary hearing. A hearing is required when a

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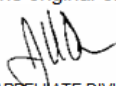
<sup>5</sup> The Cain decision was issued on March 15, 2016. Cain, 224 N.J. at 410. The Court denied defendant's petition for certification on his direct appeal in a March 8, 2016 order that was filed on March 14, 2016. Gumbs, 224 N.J. at 282.

defendant establishes a prima facie case for PCR under the Strickland standard, the existing record is inadequate to resolve defendant's claim, and the court determines an evidentiary hearing is required. Porter, 216 N.J. at 354 (citing R. 3:22-10(b)). Here, the existing record provided an adequate basis for the court's finding defendant did not establish a prima facie case of ineffective assistance of counsel and therefore an evidentiary hearing was not required.

Defendant's remaining arguments are without merit sufficient to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION