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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3365-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JEFFREY SMITH,

Defendant-Appellant.

Submitted February 7, 2018 – Decided March 12, 2018

Before Judges Currier and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No. 13-
12-3070.

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

Robert D. Laurino, Acting Essex County
Prosecutor, attorney for respondent (LeeAnn
Cunningham, Special Deputy Attorney General/
Acting Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Jeffrey Smith appeals from a December 16, 2016 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

We glean the following facts from the record. Defendant was the subject of a narcotics investigation in which the police utilized a confidential informant to undertake controlled buys of narcotics from defendant. Based on their investigation, an investigating officer prepared an affidavit to establish probable cause for the issuance of a search warrant for defendant's residence. On July 26, 2013, a reviewing judge issued the search warrant. The search warrant was executed the same day. During the search, contraband was seized from defendant's house for which he was charged. Defendant's vehicle was impounded, a second search warrant was obtained for the vehicle, and the vehicle was searched.¹

On December 12, 2013, defendant was charged in an Essex County indictment with the following sixteen offenses: second-degree conspiracy to possess a controlled dangerous substance (CDS) with intent to distribute, N.J.S.A. 2C:5-2 (count one); third-degree possession of CDS (cocaine), N.J.S.A. 2C:35-10(a)(1) (count two); second-degree possession of CDS (cocaine) with intent to distribute, N.J.S.A. 2C:35-5(a)(1), (b)(3) (count three); third-

¹ The record does not disclose the results of the vehicle search.

degree possession of CDS (cocaine) within 1000 feet of school property, N.J.S.A. 2C:35-7 (count four); third-degree possession of CDS (heroin), N.J.S.A. 2C:35-10(a)(1) (count five); third-degree possession of CDS (heroin) with intent to distribute, N.J.S.A. 2C:35-5(a)(1), (b)(3) (count six); third-degree possession of CDS (heroin) within 1000 feet of school property, N.J.S.A. 2C:35-7 (count seven); fourth-degree possession of drug paraphernalia with intent to distribute, N.J.S.A. 2C:36-6 (count eight); fourth-degree regulatory provisions related to firearms, N.J.S.A. 2C:39-10 (count nine); second-degree possession of a firearm while committing a violation of N.J.S.A. 2C:35-5 or -7, N.J.S.A. 2C:39-4.1 (count ten); third-degree distribution of CDS (heroin), N.J.S.A. N.J.S.A. 2C:35-5(a)(1), (b)(3) (count eleven); third-degree distribution of CDS (heroin) within 1000 feet of a school, N.J.S.A. 2C:35-7 (count twelve); third-degree possession of CDS (heroin), N.J.S.A. 2C:35-10(a)(1) (count thirteen); third-degree possession of CDS (heroin) with intent to distribute, N.J.S.A. 2C:35-5(a)(1), (b)(3) (count fourteen); third-degree possession of CDS (heroin), N.J.S.A. 2C:35-10(a)(1) (count fifteen); and third-degree possession of CDS (heroin) with intent to distribute, N.J.S.A. 2C:35-5(a)(1), (b)(3) (count sixteen).

On April 7, 2014, defendant pled guilty to counts three, nine, and eleven. In exchange, the State agreed to recommend an

aggregate prison term of six years with a three-year parole disqualifier, pursuant to the Brimage² Guidelines,³ to run concurrently to an existing five-year prison term. Additionally, the State agreed to dismiss the remaining counts of the indictment as well as all charges under a separate, unrelated indictment, including a second-degree certain persons weapons offense, N.J.S.A. 2C:39-7.

At the plea hearing, defendant testified he understood the charges against him, that by pleading guilty he would be waiving the right to a jury trial, the right to confront witnesses against him, the right to present his own witnesses, the right to testify, and the right to remain silent. Defendant confirmed he initialed or signed each page of the plea forms after reviewing the forms with his attorney, he understood all of the questions on the forms, and his answers were honest. Defendant further testified he was satisfied with the services of his attorney, that no one threatened him or made any outside promises to him, and he was entering his plea voluntarily. He also testified he was pleading guilty because he was guilty of the charges and provided a factual basis for each charge. Specifically, he testified that on the date in question

² State v. Brimage, 153 N.J. 1, 25-26 (1998) (ordering the Attorney General to promulgate revised, uniform plea agreement guidelines).

³ See Attorney General Law Enforcement Directive 2004-2 (July 15, 2004) (setting forth the current revised Brimage Guidelines).

he was in possession of drugs with intent to distribute them and did, in fact, distribute them. He also testified he was in possession of a gun that was not registered and for which he did not have a permit. The plea judge accepted the plea, finding it was entered knowingly, freely, and voluntarily.

On May 21, 2014, defendant wrote a letter to the trial court asking to withdraw his guilty plea. In his letter, defendant alleged counsel was ineffective for failing to file motions to challenge the search warrants, suppress evidence, and conduct a probable cause hearing. However, defendant did not file a motion to withdraw his guilty plea either before or after sentencing.

On June 9, 2014, defendant appeared for sentencing. The sentencing judge asked defendant if he still wished to proceed with the plea agreement in light of his letter to the court in which he sought to withdraw his plea. Defendant indicated he had a change of heart and wished to go forward with his plea. Defense counsel also confirmed defendant wished to proceed with his plea. When later asked if there was anything he wanted to say before his sentence was imposed, defendant stated, "No, not at this time."

The sentencing judge noted defendant was forty-two years old, had eight prior indictable convictions, had served five prior prison terms, and had been convicted of seven disorderly persons offenses. The judge found the aggravating factors substantially

outweighed the non-existent mitigating factors and sentenced defendant in accordance with the terms of the plea agreement to an aggregate six-year prison term, subject to a three-year period of parole ineligibility, and dismissed the remaining counts. The judge also imposed appropriate fines, assessments, and penalties.

Defendant did not file a direct appeal from his conviction. Instead, he filed an excessive sentence appeal, which was presented to the court on a sentencing calendar pursuant to Rule 2:9-11. On April 15, 2015, we affirmed defendant's sentence, finding "the sentence is not manifestly excessive or unduly punitive and does not constitute an abuse of discretion." State v. Smith, Docket No. A-1947-14 (App. Div. April 15, 2015).

Defendant timely filed a pro se PCR petition on April 29, 2015. In his petition, defendant alleged trial counsel was ineffective because he failed to "challenge the [c]onstitutionality of the [defendant's] arrest for the alleged crime, acted to deprive the [defendant] of due process as well as fair proceeding leading to an unjust result." PCR counsel was assigned to represent defendant. Through counsel, defendant argued trial counsel was ineffective by failing to file the following motions: (1) to demand a probable cause hearing; (2) to quash the indictment; (3) to suppress physical evidence by challenging the validity of the search warrant and affidavit; (4)

to attack the credibility of the informant; (5) to attack the history of the arresting officers; and (6) to assert the public library he was charged with being near was no longer a public library.

The PCR court heard oral argument on December 13, 2016, and issued an oral decision, denying defendant's petition without conducting an evidentiary hearing. The court held defendant's claims were barred by Rule 3:22-4 due to his failure to raise them in a direct appeal. The PCR court nonetheless considered the merits of defendant's claims and rendered the following findings and conclusions:

Here the defendant has proffered no evidence that he could meet the burden necessary to establish that the validity of the warrant was deficient or that [the searches] exceeded the scope of the warrant, that the search was excessive, and that a suppression motion filed on his behalf would have succeeded.

Moreover, he has failed to allege facts to establish that counsel's performance fell below an objective standard of reasonableness. He does not allege any reasons why counsel could have filed a motion to suppress the evidence.

Given the defendant's prior history as noted in the sentencing transcript, it is possible that defense counsel did not file the motion because he did not want to lose a favorable plea offer and thus acted for sound, strategic reasons. The State notes in its brief that the plea would likely have been revoked by the State had defense counsel filed the motions.

From the sentencing transcript . . . it appears that the defendant had an excessive prior criminal history.

Specifically, the sentencing judge noted that as a result the defendant had a total of [thirty-seven] arrests and [eight] indictable convictions. As such he would have been subject to an extended term

As part of the plea, the defendant received the benefit of the sentence at the low end of the second degree range, six years with a parole ineligibility period of three years rather than the total of [sixteen] and a half years that he could have been exposed to on the two charges alone had he been tried and convicted on the charges he pled guilty to.

As part of the plea agreement, he also received the benefit of having all the remaining counts in the indictment including two other second charges . . . as well as a separate indictment charging him with a second degree convicted felon -- dismissed at the time of sentencing.

The judge further found defendant failed to show a reasonable possibility that he would have insisted on going to trial had he been properly advised by counsel. She also concluded defendant failed to set forth more than bald assertions that counsel was ineffective. The judge was satisfied "counsel's performance was reasonable under prevailing norms." The judge found no support in the record of unprofessional errors or that the outcome would have been different had counsel filed the motions. Accordingly, the judge found defendant failed to present a prima facie case of

ineffective assistance of counsel, and that an evidentiary hearing would not aid in determining whether defendant was entitled to PCR. This appeal followed.

Defendant raises the following points in this appeal:

POINT ONE

DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING BECAUSE HIS PLEA ATTORNEY WAS INEFFECTIVE IN FAILING TO FILE VARIOUS MOTIONS.

POINT TWO

DEFENDANT'S POST-CONVICTION RELIEF COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL (Not Raised Below).

Criminal defendants have a constitutional right to the effective assistance of counsel. State v. O'Neil, 219 N.J. 598, 610 (2014) (citing Strickland v. Washington, 466 U.S. 668, 686 (1984); State v. Fritz, 105 N.J. 42, 58 (1987)). To succeed on his PCR claim of ineffective assistance of counsel, defendant must satisfy the two-prong test established by Strickland, 466 U.S. at 686, and adopted by our Supreme Court in Fritz, 105 N.J. at 58. "The defendant must demonstrate first that counsel's performance was deficient, i.e., that 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" State v. Parker, 212 N.J. 269, 279 (2012) (quoting Strickland, 466 U.S. at 687). Second, "a defendant must also establish that the ineffectiveness of his

attorney prejudiced his defense. 'The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 279-80 (quoting Strickland, 466 U.S. at 694).

"Judicial scrutiny of counsel's performance must be highly deferential[.]" Strickland, 466 U.S. at 689. The defendant must overcome a "strong presumption that counsel's conduct falls within the wide range of professional assistance." Ibid.

"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 such a prima facie case, the defendant must demonstrate a reasonable likelihood that his or her claim will ultimately succeed on the merits." State v. Marshall, 148 N.J. 89, 158 (1997). The court must view the facts "in the light most favorable to defendant." Ibid. (quoting State v. Preciose, 129 N.J. 451, 462-63 (1992)).

Applying these standards, we affirm substantially for the reasons stated by Judge Marysol Rosero in her thorough and well-reasoned oral opinion. We add only the following comments.

Through the assistance of his trial counsel, defendant received an extremely beneficial and lenient plea agreement, particularly in light of his extensive criminal history. Thirteen

of the sixteen charges he was facing under the indictment were dismissed. The charges pending against him under a separate indictment, including a second-degree certain persons offense, were also dismissed. His sentence was at the low end for a second-degree offense, and all three terms ran concurrently with each other and with an existing sentence he was serving. It thus stands to reason that trial counsel would have been reluctant to file pretrial motions that were both unlikely to succeed and likely to result in the State withdrawing or unfavorably modifying the beneficial plea offer that defendant accepted. In any event, defendant testified he was satisfied with the services of his attorney, and indicated he wanted to proceed with his plea.

As to defendant's claim that trial counsel was ineffective for failing to file a suppression motion, we note the search of defendant's residence and vehicle were conducted pursuant to search warrants. "We accord substantial deference to the discretionary determination resulting in the issuance of the warrant." State v. Marshall, 123 N.J. 1, 72 (1991) (citing State v. Kasabucki, 52 N.J. 110, 116 (1968)). A search authorized by a search warrant is presumed valid. State v. Valencia, 93 N.J. 126, 133 (1983). Defendant bears the burden of proving the lack of probable cause for the issuance of the search warrants or that the searches were otherwise unreasonable. State v. Sullivan, 169 N.J.

204, 211 (2001). Defendant has not established any basis for overcoming that presumption. He has not proffered any evidence the warrants were invalid or the searches exceeded the scope of the warrants. Thus, defendant has not demonstrated that a suppression motion filed on his behalf would have succeeded.

In addition, any issues regarding the confidential informant, the investigating officers, and the validity of the search warrants and indictment could have been raised and addressed on direct appeal. Defendant did not raise these issues on direct appeal and does not claim his appellate counsel on direct appeal was ineffective.


A PCR petition is not "a substitute for appeal." R. 3:22-3. A defendant "is generally barred from presenting a claim on PCR that could have been raised . . . on direct appeal." State v. Nash, 212 N.J. 518, 546 (2013) (citing R. 3:22-4(a)); see also McQuaid, 147 N.J. at 483. The record supports Judge Rosero's conclusion that defendant's claims against his trial counsel were procedurally barred by Rule 3:22-4.

Defendant's arguments that trial counsel was ineffective by failing to move for a probable cause hearing and to dismiss the indictment, and that PCR counsel was also ineffective, lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

The record amply supports Judge Rosero's conclusion that defendant did not make a prima facie showing of ineffective assistance of counsel. Accordingly, defendant's petition was properly denied without conducting an evidentiary hearing.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION