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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3492-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DONALD P. O'GRADY, JR.,
a/k/a DONALD PATRICK O'GRADY,
a/k/a DON O'GRADY,
a/k/a DONALD PATRICK O'GRADY, JR.,
a/k/a MICHAEL RHATICAN,
a/k/a KEVIN BUSINSKI,

Defendant-Appellant.

Submitted November 14, 2017 – Decided March 5, 2018

Before Judges Yannotti and Leone.

On appeal from Superior Court of New Jersey, Law Division, Warren County, Indictment No. 08-01-0025.

Joseph E. Krakora, Public Defender, attorney for appellant (William Welaj, Designated Counsel, on the brief).

Richard T. Burke, Warren County Prosecutor, attorney for respondent (Kelly Anne Shelton, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Donald P. O'Grady, Jr. appeals from a January 12, 2016 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. Defendant claims his trial counsel was ineffective for advising him to reject a plea offer and decline to testify on his own behalf. We affirm.

I.

The facts proven at trial were set forth in the record and our opinion denying defendant's direct appeal. State v. O'Grady, Jr., No. A-3811-11 (App. Div. Mar. 20, 2014). It is sufficient to summarize the facts here.

On August 18, 2006, defendant and Thor Frey (Frey) surreptitiously entered a home to steal money held in a safe. Once inside, defendant restrained the 75-year-old homeowner by placing a blanket over her face while Frey located the safe. The victim eventually asphyxiated and died while defendant held her. The two men then drove away with the safe and split the proceeds.

Defendant spoke of his involvement in the crime to several people. When he was arrested several days later, he confessed to police that he restrained the victim and caused her death.

The jury convicted defendant of first-degree felony murder, N.J.S.A. 2C:11-3(a)(3) (count one); second-degree robbery, N.J.S.A. 2C:15-1(a) (count two); third-degree burglary, N.J.S.A.

2C:18-2 (count three); and criminal mischief, N.J.S.A. 2C:17-3(a)(1) (count four).

The trial court sentenced defendant for felony murder to fifty years in prison with an 85% period of parole ineligibility under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. The court merged counts three and four into the robbery conviction, on which it imposed a concurrent ten-year sentence. We affirmed, and the Supreme Court denied certification. State v. O'Grady, 219 N.J. 630 (2014).

Defendant filed his PCR petition in 2014. The PCR judge had been the trial judge. The PCR court found that defendant had not shown a prima facie case to merit an evidentiary hearing. On appeal, defendant argues the following:

> POINT I: THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION AT THE TRIAL LEVEL.
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> > A. THE PREVAILING LEGAL PRINCIPLES REGARDING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, EVIDENTIARY HEARINGS AND PETITIONS FOR POST CONVICTION RELIEF.
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> > B. THE DEFENDANT FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL SINCE, AS A RESULT OF COUNSEL'S FAILURE TO ACCURATELY INFORM HIM WITH RESPECT TO THE POTENTIAL PUNISHMENT HE COULD RECEIVE IF CONVICTED AT TRIAL, HE

REJECTED THE PLEA RECOMMENDATION OFFERED BY THE STATE AND INSTEAD PROCEEDED TO TRIAL, SUBSEQUENTLY RECEIVING A SENTENCE SIGNIFICANTLY GREATER THAN THAT EMBODIED IN THE PLEA OFFER.

C. TRIAL COUNSEL DID NOT ADEQUATELY REPRESENT THE DEFENDANT ARISING OUT OF HIS FAILURE TO THOROUGHLY DISCUSS WITH HIS CLIENT ALL RELEVANT RAMIFICATIONS ASSOCIATED WITH THE DECISION WHETHER OR NOT TO TESTIFY, AS A RESULT OF WHICH THE DEFENDANT DID NOT TESTIFY IN HIS OWN DEFENSE.

II.

To show ineffective assistance, defendant must meet the two-pronged test of Strickland v. Washington, 466 U.S. 668 (1984), and State v. Fritz, 105 N.J. 42 (1987). "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.' In making that demonstration, a defendant must overcome a strong presumption that counsel rendered reasonable professional assistance." State v. Parker, 212 N.J. 269, 279, (2012) (citation omitted).

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. This "is an exacting standard: '[t]he error committed must be so serious as to undermine the court's confidence in the jury's verdict or the result reached.'" State v. Allegro, 193 N.J. 352, 367 (2008).

A PCR court need not grant an evidentiary hearing unless "'a defendant has presented a prima facie [case] in support of post-conviction relief.'" State v. Marshall, 148 N.J. 89, 158 (1997). "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." Ibid.; see R. 3:22-10(b).

If the PCR court has not held an evidentiary hearing, we "conduct a de novo review." State v. Harris, 181 N.J. 391, 420-21 (2004). We must hew to that standard of review.

III.

Defendant's first ineffectiveness claim asserts his trial counsel advised him to reject a plea offer and go to trial. As the PCR court recognized, the decision whether to plead guilty or go to trial belonged to defendant, not his counsel. A defendant "has 'the ultimate authority' to determine 'whether to plead guilty[.]'" Florida v. Nixon, 543 U.S. 175, 187 (2004) (citation omitted); see State v. Williams, 277 N.J. Super. 40, 46 (App. Div. 1994).

Nonetheless, "[a] defendant can challenge the voluntary, knowing, intelligent nature of his plea by showing that the advice he received from counsel was not within the standards governing a reasonably competent attorney." State v. Lasane, 371 N.J. Super. 151, 163 (App. Div. 2004) (citing Hill v. Lockhart, 474 U.S. 52, 56-57 (1985)). Similarly, a defendant can challenge his rejection of a plea offer by claiming he was not afforded "'the effective assistance of competent counsel.'" Lafler v. Cooper, 566 U.S. 156, 162 (2012) (citation omitted). Moreover, "viewing the facts alleged in the light most favorable to the defendant," we must assume trial counsel gave the advice defendant alleges, as there is nothing in the record to show otherwise. See R. 3:22-10(b).

We examine defendant's allegations in light of the record. At his arraignment, defendant was offered a deal to plead guilty to the charges and receive a thirty-year term of incarceration without possibility of parole in exchange for his testimony against Frey. Trial counsel confirmed he had conveyed that offer to defendant, and defendant's PCR certification admitted counsel accurately conveyed the State's offer.

In his certification, defendant alleged his trial counsel advised him to go to trial because he would receive forty years with an 85% parole disqualifier, which would only be four years

and four months longer than the State's offer. Defendant alleged he followed trial counsel's advice and thus went to trial.

Defendant argues trial counsel was ineffective for failing to accurately inform him of the maximum sentence he could receive if he declined the State's plea offer and proceeded to trial. However, at his pretrial conference, defendant reviewed a pretrial memorandum that made clear he faced a "Maximum Sentence if convicted" of "NERA life" for felony murder, with 85% parole ineligibility, with a "Maximum parole ineligibility period" of "63 ½ years." He initialed that page, and signed the pretrial memorandum, as did trial counsel.

Moreover, the pretrial memorandum reminded defendant of the State's plea offer of thirty years with thirty years before parole if defendant would cooperate against Frey. The memorandum asked: "Do you understand that if you reject this plea offer, the Court could impose a more severe sentence than recommended by the plea offer, up to the maximum sentence permitted if you are convicted after trial?" Defendant answered "Yes." Defendant also initialed that page, and he signed the memorandum right below the statement: "I understand that except in extraordinary circumstances, the filing of this Memorandum ends all plea negotiations[.]"

At the pretrial conference, the trial court reviewed defendant's pretrial memorandum. In his presence, the court

reiterated the State's plea offer, and noted it had "been denied." The court addressed defendant, noting the plea offer was now "withdrawn" and the case was headed to trial. Defendant responded: "Thank you."

Thus, defendant cannot claim he was unaware that if he went to trial he could receive a maximum sentence of life and a minimum sentence of sixty-three and one-half years. He nonetheless chose to reject the State's offer and to go to trial. He got less than those maximum and minimum sentences, receiving fifty years with a minimum sentence of forty-two and one-half years.

Moreover, plaintiff concedes he was unwilling to accept the precondition for the State's plea offer, namely that he agree to testify against Frey. Defendant's certification admitted "I was afraid to do that because of my co-defendant's gang affiliation."

Thus, defendant cannot show prejudice as required by Lafler. In Lafler, "all parties agree[d] the performance of respondent's counsel was deficient when he advised respondent to reject the plea offer on the grounds he could not be convicted at trial." 566 U.S. at 163. Further, it was "conceded" that respondent's decision to reject the offer and go to trial "was the result of ineffective assistance during the plea negotiation process." Id. at 166.

Nonetheless, Lafler held the defendant must still show "a reasonable probability that but for counsel's errors he would have accepted the plea." Id. at 171. Specifically, the court held that where deficient advice leads to the rejection of a plea offer,

> a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.
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> [Id. at 164.]

Defendant offered no such evidence. His certification does not claim that but for the advice of trial counsel he would have taken the plea and agreed to testify against Frey. Because defendant was unwilling to agree to that precondition, he cannot show that he "would have accepted the plea," or that "the prosecution would not have withdrawn" its offer because he would not agree to testify. Ibid.

Moreover, defendant cannot show prejudice because he chose to reject the State's plea offer and go to trial despite knowing he could receive life with a parole ineligibility of over sixty-three years. The pretrial memorandum adequately warned defendant

of the maximum sentence he could receive, and he said he understood he could receive that sentence. See State v. Dwight, 378 N.J. Super. 289, 292 (App. Div. 2005) (noting the defendant "was informed in the pretrial memorandum that if he failed to appear, the trial could be conducted in his absence").

Notably, defendant's certification did not claim he would have pled guilty if he had received better advice about how long a sentence he could receive after trial. He could not make that claim, as he rejected the plea offer after receiving accurate advice from the pretrial memorandum that he could receive maximum and minimum sentences far longer than the plea offer and longer than he ultimately received. See, e.g., State v. Gaitan, 209 N.J. 339, 374 (2012) (finding the plea form put the defendant "on notice of the issue of potential immigration consequences" of the plea decision). Thus, defendant failed to show "there is a reasonable probability" that he "would have accepted the plea" had trial counsel repeated what the pretrial memorandum told him. Lafler, 566 U.S. at 164.

As defendant thus cannot show prejudice, we "need not determine whether counsel's performance was deficient." Marshall, 148 N.J. at 261 (quoting Strickland, 466 U.S. at 697). Therefore, no evidentiary hearing was needed to determine whether and why trial counsel gave the advice alleged by defendant.

IV.

Defendant argues trial counsel was ineffective because he advised defendant not to testify at trial. "The decision to testify rests with the defendant," rather than trial counsel. State v. Bey, 161 N.J. 233, 269 (2000). During trial, defendant stated on the record that he understood his constitutional right to testify, that he knew it was his decision alone, and that he chose not to testify.

Nonetheless, "[t]he decision whether to testify, although ultimately defendant's, is an important strategical choice, made by defendant in consultation with counsel." State v. Savage, 120 N.J. 594, 631 (1990). "[I]t is the responsibility of a defendant's counsel . . . to advise defendant on whether to testify and to explain the tactical advantages or disadvantages." Bey, 161 N.J. at 270 (quoting Savage, 120 N.J. at 630-31); see, e.g., State v. Jones, 219 N.J. 298, 315 (2014).

Defendant now claims he wished to testify to explain his statement to police. After his arrest, defendant gave a tape-recorded statement admitting he committed the charged crimes with Frey. Defendant specifically admitted he killed the victim during the robbery. However, in his PCR certification, defendant claimed:

> Towards the end of my trial, I told [trial counsel] . . . that the jury never heard the truth behind my statement and why I now have

> a change of heart. I need to take the stand and present the truth to the jury and at first [trial counsel] agreed but then a day or two later he stated to me that he believed it to be a mistake to take the stand and he didn't believe that the State proved their case and again I took his advice, but felt the jury needed to hear why I felt I had to protect my Son[.]

Again, "viewing the facts alleged in the light most favorable to the defendant" under Rule 3:22-10(b), we assume trial counsel gave the advice defendant alleged. Even if that advice was deficient, defendant had to make "the showing of prejudice required by the second prong of the Strickland/Fritz test." Bey, 161 N.J. at 271-72. Thus, he had to show a "reasonable probability [that] the result of the trial would have been different" had he given his proposed testimony. Fritz, 105 N.J. at 60-61, 63; see, e.g., Bey, 161 N.J. at 272 (finding the defendant's "testimony would not have affected substantially the penalty-phase deliberations"); State v. Ball, 381 N.J. Super. 545, 557 (App. Div. 2005) ("we do not disagree with the judge's assessment" that the "defendant's proffered testimony would not have changed the outcome of the trial"); Cummings, 321 N.J. Super. at 170-71 (finding inadequate the defendant's proposed testimony, a belated, "bare assertion of an alibi" unsupported by other evidence).

The PCR court, who sat as the trial judge, found defendant's proposed testimony "would not likely have rendered a different

outcome at trial, as the evidence against [defendant] is compelling." We agree. Witnesses testified defendant and Frey left a bar together at 2:00 a.m., shortly before the crime. Defendant's statement to police detailed how he and Frey broke into the victim's house and stole her safe, and how defendant restrained the elderly victim by covering her head and holding her down until she stopped breathing. Defendant also detailed how they initially could not open the safe, so they took it to the woods in Pennsylvania and opened it there, finding several thousand dollars in cash. Defendant's statement was corroborated by the condition of the victim's house, her cause of death, defendant's and Frey's possession of thousands of dollars on arrest, and the discovery of the safe and its remaining contents in the woods. Moreover, defendant knew details known only to a perpetrator.

Further, a tattoo artist testified that defendant and Frey met him near a motel to get a tattoo together, that defendant had the tattoo artist give him a ride him to the woods where defendant led him to the safe, and that defendant talked about robbing and killing the victim. The tattoo artist drove defendant back to the motel, and the police arrested both defendant and Frey near the motel. Both defendant and Frey were carrying around $2,000 in cash.

Thus, the evidence showed defendant and Frey committed the crime together, split the proceeds, and were at the same motel. Given that evidence, defendant's belated and unsupported attempt to blame his own son was highly unlikely to be credited by the jury. Further, defendant would have been cross-examined about the fact that his ex-wife, as well as his son and his son's girlfriend, reported to the police that defendant had told them he committed the crimes. The judge who heard both the trial and the PCR petition properly found "[t]here was no reasonable probability that the outcome at trial would have been different, as the weight of the evidence was substantially in favor of the State." The judge also correctly found an evidentiary hearing was unnecessary as "the evidence presented by [defendant] is deficient to entertain even a prima facie case of ineffective assistance of counsel."

Affirmed.

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

CLERK OF THE APPELLATE DIVISION