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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3958-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROBERT J. PRITCHETT,

Defendant-Appellant.

Submitted March 20, 2018 – Decided May 1, 2018

Before Judges Yannotti and Mawla.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Indictment No.
12-05-1438.

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

Gurbir S. Grewal, Attorney General, attorney
for respondent (Sarah Lichter, Deputy Attorney
General, of counsel and on the brief).

PER CURIAM

Defendant appeals from an order entered by the Law Division on March 10, 2017, which denied his petition for post-conviction relief (PCR). We affirm.

I.

Defendant was charged by a Camden County grand jury with third-degree possession of cocaine, N.J.S.A. 2C:35-10(a)(1) (count one); second-degree possession of cocaine with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and (b)(2) (count two); third-degree possession of cocaine with intent to distribute within 1000 feet of a school, N.J.S.A. 2C:35-7 (count three); second-degree possession of a firearm during the commission of a drug offense, N.J.S.A. 2C:39-4.1(a) (count four); fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a) (count five); and second-degree certain persons not to possess weapons, N.J.S.A. 2C:39-7(b) (count six). In September 2012, the court denied defendant's motion to suppress evidence. Thereafter, defendant was tried before a jury.¹

At trial, Sergeant Christopher Frucci of the Camden County Police Department testified that on February 15, 2012, he was conducting routine surveillance outside the Chestnut Court Apartments, which is located in a known, high-crime area of the City of Camden. Frucci observed defendant and a female engage in what Frucci believed to be an illegal drug transaction. Frucci announced his intent to arrest the individuals involved and

¹ Counts one through five were tried first. A separate trial on count six followed.

defendant ran into a building, entered an apartment, and locked the door.

Outside the apartment, Frucci heard the sound of a toilet flushing. Believing defendant was trying to destroy evidence, Frucci called out, "Police. Stop. You're under arrest." He began to force his way into the apartment, when T.B. let him in. Frucci arrested defendant as he emerged from the bathroom area. T.B. told Frucci she knew defendant and allowed him to sleep in the apartment.

T.B. identified several large black trash bags near the sofa, which she said contained defendant's belongings. A small leather bag was on top of the black trash bags. Frucci looked inside the small leather bag and observed a black revolver. T.B. consented to a search of the apartment. Frucci retrieved the revolver and ammunition from the small leather bag. The police found a semi-automatic handgun, ammunition, drugs, packaging materials, and a digital scale in the kitchen. They also seized \$4118 in cash.

T.B. denied ownership of the guns and drugs. Ballistics tests established that the revolver and semi-automatic handgun were both operable. The manager of the apartment complex said that defendant was not a tenant on the lease, and T.B. resided in the apartment with her son. Defendant's mother testified that defendant lived with her at another address.

The jury found defendant not guilty on counts two, three, and four, but guilty on counts one (third-degree possession of cocaine) and five (fourth-degree resisting arrest). In the second trial, the same jury found defendant guilty on count six (certain persons not to possess weapons). The trial judge sentenced defendant to an aggregate term of twelve years of incarceration, with seven years of parole ineligibility.

Defendant appealed from the judgment of conviction dated September 25, 2013. He raised the following arguments:

POINT I

THE ASSISTANT PROSECUTOR'S SUMMATION WENT FAR OUTSIDE THE BOUNDS OF PROPRIETY WHEN HE TOLD THE JURY THAT "WHAT WE'RE HERE FOR" IS TO FOCUS ON THE "CANCER" OF "GUNS AND DRUGS" THAT [ARE] "TEARING APART THE SOCIAL FABRIC OF OUR COUNTRY" AND TURNING CAMDEN INTO "ONE OF THE FIVE MOST DEADLY CITIES IN AMERICA." (Not Raised Below).

POINT II

THE JURY INSTRUCTION ON THE CERTAIN-PERSONS COUNT INCORRECTLY TOLD THE JURORS THAT THEY COULD BE NON-UNANIMOUS ON WHICH FIREARM DEFENDANT POSSESSED. (Not Raised Below).

POINT III

IN A CERTAIN-PERSONS CASE WHERE THE DEFENSE IS NOT CONTESTING THE EXISTENCE OF THE PRIOR CONVICTION, OR THE FACT THAT IT SATISFIES THE ELEMENT OF THE CRIME, AND WHERE ALLOWING THE JURY TO HEAR THE NATURE OF THAT PRIOR CONVICTION WILL SUBSTANTIALLY PREJUDICE THE DEFENDANT, THE OFFER MUST BE MADE BY THE TRIAL JUDGE TO DEFENSE COUNSEL TO STIPULATE TO THE EXISTENCE OF THAT CONVICTION UNDER STATE V.

ALVAREZ, THEREBY AVOIDING TELLING THE JURY THE NATURE OF THE CONVICTION. (Not Raised Below).

POINT IV

THE SENTENCE IMPOSED IS MANIFESTLY EXCESSIVE.

We affirmed defendant's conviction and sentence in an unpublished opinion. State v. Pritchett, No. A-2758-13 (App. Div. Dec. 1, 2015) (slip op. at 15). Defendant thereafter filed a petition for certification, seeking review of our judgment by the Supreme Court. The Court denied the petition. State v. Pritchett, 224 N.J. 282 (2016).

On September 6, 2016, defendant filed a pro se petition for PCR in the Law Division, alleging without elaboration that he had been denied the effective assistance of trial counsel. The court appointed counsel for defendant.

PCR counsel filed a brief arguing that defendant was denied the effective assistance of counsel because defendant's trial attorney (1) did not object to Frucchi's expert opinion; (2) failed to object to inadmissible hearsay testimony by Frucchi; (3) did not challenge the State's introduction of evidence regarding the black trash bags attributed to defendant despite the State's failure to preserve that evidence; and (4) introduced a starter pistol on cross examination and then allowed Frucchi to give unresponsive opinion testimony that the pistol could be modified into a weapon. PCR counsel further argued that defendant was denied the effective

assistance of appellate counsel because these issues had not been raised on direct appeal. In addition, counsel argued that defense counsel erred by failing to call T.B. as a witness at trial. Defendant sought an evidentiary hearing on his petition.

On March 10, 2017, the PCR judge heard oral argument on the petition, and placed his decision on the record. The judge found that the claims raised regarding Frucci's testimony, the State's failure to preserve the black trash bags of items attributed to defendant, and the introduction of the starter pistol were barred by Rule 3:22-4(a) because they could reasonably have been raised on direct appeal.

The judge found, however, that there was no procedural bar to defendant's contention that he was denied the effective assistance of appellate counsel and his claim that his trial attorney was ineffective because he did not present T.B. as a witness at the suppression hearing. The judge then addressed the merits of all of defendant's claims, found that he had not established a prima facie case of ineffective assistance of trial or appellate counsel, and determined that he was not entitled to an evidentiary hearing on the petition. The judge entered an order denying the petition. This appeal followed.

II.

Defendant contends the PCR court erred by failing to conduct an evidentiary hearing on his petition. He argues that the judge erred by finding he failed to present a prima facie case of ineffective assistance of counsel. He also argues the judge erred by finding that his claims of ineffective assistance of counsel were barred by Rule 3:22-4(a) because they could have reasonably been raised on direct appeal.

A defendant is entitled to an evidentiary hearing on a PCR petition if the defendant presents a prima facie case in support of PCR, the court determines there are material issues of fact that cannot be resolved based on the existing record, and the court finds that an evidentiary hearing is required to resolve the claims presented. R. 3:22-10(b); see also State v. Porter, 216 N.J. 343, 355 (2013) (citing R. 3:22-10(b)).

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee criminal defendants the 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, a defendant must meet the two-part test

established by Strickland, 466 U.S. at 686, and adopted by our Supreme Court in Fritz, 105 N.J. at 58.

Under Strickland, a defendant first must show that counsel made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687. Counsel's performance is deficient if it "[falls] below an objective standard of reasonableness." Id. at 688.

A defendant also must show that counsel's "deficient performance prejudiced the defense." Id. at 687. The defendant must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome" of the proceeding. Ibid.

III.

Defendant argues he was denied the effective assistance of counsel because his trial attorney failed to object to Frucci's testimony about what T.B. told him when he entered her apartment. The officer testified that T.B. said she had a quid pro quo relationship with defendant, so she "kind of looks the other way" regarding his activities, including his sale of narcotics in the courtyard of the apartment complex.

Frucci further testified that T.B. told him that she permits defendant to sleep on her couch for a few dollars a day, and that several large black trash bags near the sofa belonged to him. She also told Frucci that defendant used the kitchen, and denied that she possessed any weapons in the apartment.

On appeal, defendant argues that his attorney should have objected to Frucci's testimony because it was inadmissible hearsay. The PCR judge found that even if the testimony about what T.B. told Frucci was hearsay, defendant was not prejudiced by his attorney's failure to object because T.B. testified at trial and repeated the same statements.

Defendant argues that the defense strategy was to attack T.B.'s credibility, and thereby negate the nexus between defendant and the contraband. He asserts Frucci's testimony had the effect of buttressing the credibility of T.B.'s testimony. We disagree. We are not convinced defendant was prejudiced by Frucci's testimony. He merely recounted what T.B. told him. T.B. testified and trial counsel had the opportunity to question her and attack her credibility. The jury was not precluded from finding that T.B. was not a credible witness.

IV.

Defendant also contends his trial attorney was ineffective because he did not object to the State's failure to retain four

black bags of items, which T.B. said contained defendant's belongings. Frucci testified that he did not believe the bags contained anything of evidentiary value. He explained the State did not retain the bags because there was no room for them in its evidence vault and the State had no need for them. On cross examination, Frucci testified that the clothes in the bags were comparable in size to his clothing.

The PCR judge found that trial counsel's failure to object to the State's failure to preserve the black bags and seek an adverse inference instruction on that basis did not constitute the ineffective assistance of counsel. The judge found that there was no evidence that the State acted in bad faith when it discarded the black bags. Moreover, there was no indication that the bags possessed any evidence of exculpatory value. The judge concluded that on this claim, defendant had not established either prong of the Strickland test.

On appeal, defendant argues that the State acted in bad faith by failing to retain the black bags because the State acted intentionally and prevented him from using the contents of the bags to his benefit. Defendant contends the evidential value of the bags was "readily apparent" because the State used the bags to establish a nexus between the defendant, the apartment, and the various items of contraband found in the apartment.

We are not persuaded by these arguments. There is sufficient evidence in the record to support the judge's finding that the State did not act in bad faith by failing to retain the bags. As Frucci explained, he did not believe the bags contained anything of evidentiary value. Indeed, defendant was not charged with any offense based on the contents of the black bags.

In addition, T.B. testified that the black bags belonged to defendant. Frucci stated, however, that the items in the bags consisted of the clothes of an adult male, which were comparable to the size of his clothes. In summation, trial counsel emphasized that defendant was "nowhere near" Frucci's size and he "would not be able to fit into" Frucci's clothing.

Thus, counsel was able to make the argument that the bags did not belong to defendant, without actually presenting the contents of the bags as evidence. The record supports the PCR court's finding that counsel's failure to object to the State's failure to retain the black bags or seek an adverse instruction on that basis did not constitute the ineffective assistance of counsel.

V.

Defendant further argues that his trial attorney erred by eliciting testimony from Frucci on cross examination regarding the handgun found in the kitchen of T.B.'s apartment. The weapon had been identified as an "Ekodicle." Defense counsel asked Frucci if

it was his understanding that the "Ekodicle" was a "starter pistol."

Frucci replied that it was a "starter pistol now" but it was his understanding that "those types of weapons are easily modified to be fully functioning weapons" and "can be altered to perform the same as a . . . semi[-]automatic weapon." Defendant argues that his trial attorney should not have elicited this testimony, and should have asked the court to strike what defendant claims was an unresponsive answer.

The PCR court found, however, that the manner in which defense counsel handled this issue did not constitute the ineffective assistance of counsel. The judge determined that defendant was not prejudiced when counsel asked Frucci if the "Ekodicle" was a "starter pistol" because the answer to that question was essentially exculpatory. The court thus found that defense counsel had a legitimate, strategic reason for asking the question. The record supports that determination.

On appeal, defendant argues that the question allowed Frucci to explain at length that the starter pistol could be modified to become "fully functioning" and perform like a semi-automatic weapon. He contends the practical effect of trial counsel's cross examination was to inform the jury that, instead of possibly possessing two operable weapons and a relatively innocuous starter

pistol, defendant possessed a pistol that could easily be modified to become a third lethal weapon. We are convinced, however, that defendant was not prejudiced by the officer's testimony regarding this weapon.

As the PCR court found, the officer's testimony about the "Ekodicle" was essentially exculpatory. Furthermore, in the first trial, defendant was not found guilty of any weapons offenses. In the second trial, defendant was found guilty of the certain persons offense. That charge pertained to his possession of either the semi-automatic handgun or the revolver, which were admitted into evidence as S-8 and S-9. Defendant was not prejudiced by Frucci's testimony about the "Ekodicle," which was S-10.

Thus, the record supports the PCR court's determination that defendant had not established a prima facie case for PCR, and the existing record was sufficient to resolve the claims presented. Therefore, the court correctly found that an evidentiary hearing was not required. Porter, 216 N.J at 355 (citing R. 3:22-10(b)).

Moreover, because the PCR court addressed the merits of defendant's claims, and correctly determined that defendant had not been denied the effective assistance of counsel, we need not address defendant's argument that the court erred by finding that certain claims were barred by Rule 3:22-4(a).

Affirmed.

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

A handwritten signature in black ink, appearing to be 'JWA', written over the text 'CLERK OF THE APPELLATE DIVISION'.

CLERK OF THE APPELLATE DIVISION