SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4431-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ADAM SOFIO,

Defendant-Appellant.

Submitted April 17, 2018 – Decided April 25, 2018

Before Judges Fisher and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Accusation No. 12-02-0299.

Joseph E. Krakora, Public Defender, attorney for appellant (John V. Molitor, Designated Counsel, on the brief).

Christopher J. Gramiccioni, Monmouth County Prosecutor, attorney for respondent (Mary R. Juliano, Assistant Prosecutor, of counsel; Antonino Laberdee, Legal Assistant, on the brief).

PER CURIAM

On February 27, 2011, after consuming a "considerable amount" of vodka, defendant drove his vehicle in excess of seventy miles

per hour in a twenty-five mile per hour zone, eventually losing control and striking a tree. That collision killed one passenger; defendant and another passenger sustained serious injuries. As part of a negotiated agreement, defendant pleaded guilty to second-degree vehicular homicide, N.J.S.A. 2C:11-5, and third-degree assault by auto, N.J.S.A. 2C:12-1(c)(2). As part of that plea agreement, the State expressed its willingness to recommend a six-year prison term, and defendant reserved the right to seek a lesser term.

Defendant was sentenced on May 24, 2012, to a six-year prison term subject to the parole ineligibility requirements of the No Early Release Act on the vehicular-homicide conviction, and a concurrent three-year term on the assault-by-auto conviction. He didn't file a direct appeal but, instead, in April 2015, filed a post-conviction relief (PCR) petition, arguing only that his sentence was excessive. Although the first PCR judge found that defendant failed to assert a cognizable claim for relief — because the excessiveness argument was an issue that should have only been pursued by way of direct appeal — the judge permitted the filing of an amended petition. In his amended petition, defendant argued his attorney was ineffective for failing to either discuss with him — or dissuade the sentencing judge from relying on — what defendant claims is "incorrect" information about his blood

alcohol content (BAC) at the time of the offense. Specifically, defendant argues — and it was not disputed — that blood was drawn twice on the night of the offense and resulted in different entities coming to different conclusions; one examiner found defendant's BAC was .314, and the other estimated his BAC was .142.[1]

For reasons expressed in a written decision, Judge Joseph W. Oxley denied the request for an evidentiary hearing and rejected defendant's arguments on their merits.[2] Defendant now appeals, arguing in a single point:

> THIS COURT SHOULD REVERSE THE TRIAL COURT'S DECISION TO DENY DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF.

We find insufficient merit in this argument to warrant extensive discussion in a written opinion, R. 2:11-3(e)(2), and add only the following comments.

In applying the familiar Strickland/Fritz[3] standard, Judge Oxley found no merit in defendant's contention that he was unaware

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[1] In the PCR court, defendant also argued this factual discrepancy supported his claimed right to a withdrawal of his guilty plea; he soon thereafter withdrew that argument.

[2] By this time, both the sentencing judge and the first PCR judge were no longer available to hear the matter.

[3] Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 52 (1987).

of the BAC discrepancy. As he observed, defendant's sentencing memorandum revealed that a psychologist consulting with defendant and his family was advised of that discrepancy by either defendant or his mother, thus strongly suggesting defendant was then aware of what he now argues was kept from him. Also, at the plea hearing, defendant acknowledged that, with his attorney, he went through all discovery, which included evidence of the BAC discrepancy. And, although the transcript suggests the sentencing judge assumed the higher BAC number when expressing his findings on aggravating factor nine, N.J.S.A. 2C:44-1(a)(9) (the need to deter),[4] Judge

[4] The sentencing judge, in specifically referring to this aggravating factor, "emphasize[d]" that defendant engaged in "underage drinking and was between three and four times above the legal limit for someone who was an adult to drive a car," a circumstance to which he gave "significant weight" in finding a need to deter defendant and others. The judge also observed that "the amount of alcohol [defendant] drank . . . could have killed [him] before [he] even got in the car." It seems clear from these observations that the sentencing judge was relying on the higher of the two BAC estimates. We agree with Judge Oxley that this has no great significance. The higher BAC has not been shown to be in error, nor, more importantly, has it been shown that the prison term imposed — which was in accord with the plea agreement — would have been different, or the sentencing judge would have viewed aggravating factor nine differently, if he considered the lower instead of the higher BAC estimate. Indeed, there were other good reasons for finding aggravating factor nine and giving it significant weight. During the plea colloquy, defendant acknowledged he consumed vodka in "considerable amounts" and then drove well in excess of seventy miles per hour in a twenty-five mile per hour zone as both the decedent and another passenger pleaded with him to slow down. We agree it is highly unlikely that the sentencing judge would have viewed differently either

Oxley correctly determined that whichever BAC number was considered, the fact remained that defendant was driving with a BAC well in excess of the legal limit. For all these and other reasons, the judge found that neither prong of the Strickland/Fritz test was met. We agree and affirm substantially for the reasons set forth by Judge Oxley in his cogent and well-reasoned written decision.

Affirmed.

aggravating factor nine or the overall sentence warranted here in light of these circumstances.