SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4648-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KENNETH A. DUCKETT, a/k/a ANTON DUCKETT, ANTWAIN DUCKETT, MICHAEL KENNETH STEWART, and TODD BARCLIFF,

Defendant-Appellant.

Submitted April 11, 2018 – Decided May 8, 2018

Before Judges Alvarez and Geiger.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 09-02-0457.

Joseph E. Krakora, Public Defender, attorney for appellant (Steven M. Gilson, Designated Counsel, of counsel and on the brief).

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

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Kenneth A. Duckett appeals from a March 18, 2016 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

The underlying facts, procedural history, and trial court rulings were recounted in detail in our opinion affirming defendant's conviction and sentence on direct appeal, State v. Duckett, No. A-4382-10 (App. Div. February 12, 2014), and need not be repeated here. On June 26, 2008, defendant fatally shot and killed his ex-girlfriend, Monica Paul, with whom he had two children. The shooting occurred at the Montclair YMCA in front of E.D., the couple's then ten-year-old daughter, and numerous witnesses, following a verbal confrontation. The exchange escalated to violence after Paul told defendant, "[N.D.] ain't even your son anyway." Defendant walked out of the room, paused, turned around, pulled out a gun, and shot Paul six times in the head, chest, and torso.

Defendant alleged he "blacked out" during the shooting and realized he shot the victim upon regaining consciousness. After shooting Paul, defendant fled to New York where he stayed with friends until his apprehension by the federal marshals.

After trial by a jury, defendant was convicted of first-degree murder, N.J.S.A. 2C:11-3(a)(count one); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(count two);

and second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a)(count three). On February 1, 2011, defendant was sentenced on count one to life in prison subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. On count two, defendant was sentenced to a concurrent five-year prison term. Count three was merged into count one for sentencing purposes.

On February 12, 2014, we affirmed defendant's conviction and sentence. The Supreme Court denied defendant's petition for certification. State v. Duckett, 219 N.J. 627 (2014).

On January 2, 2015, defendant filed a pro se petition for PCR alleging ineffective assistance of trial counsel and seeking an evidentiary hearing. In his petition, defendant raised the following issue:

> PETITIONER WAS DEPRIVED OF HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL THEREFORE, THE CONVICTION SHOULD BE REVERSED.

In his petition, defendant asserted: (1) trial counsel completely failed to object to the judge's erroneous charge to the jury instructing them to continue deliberations; (2) the trial judge gave an incorrect modified Czachor[1] jury charge after the jury indicated it had reached an impasse after three days of deliberations; (3) the trial judge should have given the model

[1] State v. Czachor, 82 N.J. 392, 405 n.4 (1980).

jury charge in its entirety, thereby instructing jurors "to continue deliberating and to consider each other's views without sacrificing their own honest convictions," without adding a final paragraph directing the jury to "complete its task;" (4) the modified Czachor charge omitted instructing the jurors "about not changing views solely for the purpose of reaching a verdict;" and (5) trial counsel's failure to object to the modified Czachor charge was highly prejudicial.

Defendant was assigned PCR counsel. In a supplemental pro se brief, defendant raised the following issues:

> POINT I
>
> APPELLATE ATTORNEY WAS INEFFECTIVE FOR NOT RAISING THAT TRIAL JUDGE IMPROPERLY REFUSED TO RECHARGE THE JURY WITH DIMINISHED CAPACITY DEFENSE WHEN THE JURY REQUESTED A READBACK OF MURDER, AGGRAVATED MANSLAUGHTER AND RECKLESS MANSLAUGHTER (not raised below).
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> POINT II
>
> TRIAL COUNSEL'S FAILURE TO PROPERLY ADVISE DEFENDANT REGARDING A PLEA AGREEMENT AND HIS MAXIMUM EXPOSURE AT TRIAL THAT HE WAS FACING DENIED DEFENDANT THE EFFECTIVE ASSISTANCE OF COUNSEL WHICH SEVERELY IMPACTED ON THE PLEA PROCESS CAUSING DEFENDANT SUBSTANTIAL PREJUDICE.

Defendant also submitted two certifications of his own in support of his petition. He stated his trial attorney failed to properly advise him regarding a plea agreement tendered by the

State and the maximum sentencing exposure of life in prison he was facing at trial. He contends that had he known his true sentencing exposure, he would have insisted on entering a plea agreement with the State and would not have taken the case to trial. He claims another attorney, who was not representing him, told him there was a plea offer of 30 years being offered by the state. Defendant did not submit certifications from an attorney or any documentation verifying that a plea offer was made.

During oral argument, PCR counsel argued the trial court erred by not conducting voir dire of the jurors regarding their note indicating their impasse and the alleged improper deliberations which resulted. PCR counsel further argued the playback of E.D.'s statements in the jury room was inappropriate and trial counsel erred by not objecting.

The PCR judge took the matter under advisement and issued a ten-page written opinion denying defendant's petition without an evidentiary hearing. The PCR judge considered the merits of each of defendant's claims and found defendant failed to demonstrate that either his trial counsel or appellate counsel was ineffective. The judge held:

> [Defendant] has not presented a prima facie case, nor are there any disputed issues as to material facts. [Defendant] has not demonstrated how any of the alleged errors in this case could have altered the ultimate

> verdict and sentence. [Defendant] argues in generalities, without offering any specifics as to how these alleged errors prejudiced his case. Furthermore, [defendant] has not identified any material facts that are in dispute at this time. Thus, [defendant] has not demonstrated a reasonable likelihood that his claim will ultimately succeed on the merits. [Defendant's] request for an evidentiary hearing is denied.

The judge further determined that almost all of defendant's claims were raised, addressed on the merits, and rejected on direct appeal.

The PCR judge concluded defendant "failed to demonstrate that either his trial counsel or appellate counsel was ineffective." More specifically, the judge determined: (1) the appellate panel found the modified Czachor charge given by the trial court judge was "substantially in accord" with the Model Jury Charge (Criminal), "Jury Instructions on Further Deliberations" (2013), was unlikely to have had a coercive effect, and did not result in prejudicial error; (2) the appellate panel also found the trial court did not err in denying defendant's request to voir dire the jury after it received letters from two jurors expressing their feelings of being pressured to return a guilty verdict, and the trial judge's polling of the jury sufficiently satisfied Rule 1:8-10; (3) defendant did not demonstrate sufficient good cause to warrant a post-verdict jury voir dire; and (4) defendant had failed

to present any evidence of the actual existence of a plea offer or of plea negotiations. The judge also found credible the State's representation that no plea offers were made in this case due to the seriousness of the charges.

Ultimately, the PCR judge determined defendant did not satisfy the second prong of the Strickland/Fritz[2] standard because he "failed to demonstrate a reasonable probability that, but for trial and appellate counsel[s'] alleged errors, his verdict or sentence would have been any different." Accordingly, having failed to make out a prima facie case, the judge denied defendant's petition without an evidentiary hearing. This appeal followed.

On appeal, defendant raises the following points:

> THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF COUNSELS' INEFFECTIVNESS.
>
> A. Trial Counsel Failed to Convey The State's Plea Offer to Defendant, Nor Did He Inform Defendant Of His Sentencing Exposure If Convicted.
>
> B. Appellate Counsel Failed To Pursue The Voir Dire of Jurors Who Were Improperly Influenced To Render Guilty Verdicts.
>
> C. Trial Counsel "Invited Error" By Allowing The Jury Unfettered Access To The Videotaped Statement of E.D. During Deliberations.

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

D. Trial Counsel Failed To Request The Proper Charge After The Jury Announced An Impasse.

E. Appellate Counsel Failed To Pursue The Trial Court's Not Re-Charging The Jury As To Diminished Capacity; In The Alternative, This Matter Must Be Remanded For Findings Of Fact And Conclusions Of Law Regarding This Issue. (Not Raised Below)

In a pro se supplemental brief, defendant raises the following additional point:

POINT ONE

THE STANDARD FOR AN EVIDENTIARY HEARING HAS BEEN MET

Under the Sixth Amendment of the United States Constitution, a criminal defendant is guaranteed the effective assistance of legal counsel in his defense. Strickland 466 U.S. at 687. The standard for determining whether counsel's performance was ineffective for purposes of the Sixth Amendment was formulated in Strickland and adopted by our Supreme Court in Fritz, 105 N.J. at 58. In general, in order to prevail on a claim of ineffective assistance of counsel, defendant must meet the following two-prong test: (l) counsel made errors so egregious he or she was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution; and (2) the errors prejudiced defendant's rights to a fair trial such that there exists a

"reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 687, 694. The defendant must overcome a "strong presumption that counsel rendered reasonable professional assistance." State v. Parker, 212 N.J. 269, 279 (2012). "These standards apply to claims of ineffective assistance at both the trial level and on appeal." State v. Guzman, 313 N.J. Super. 363, 374 (App. Div. 1998) (citing State v. Morrison, 215 N.J. Super. 540, 545-46 (App. Div. 1987)).

In order to be entitled an evidentiary hearing, the defendant must establish a prima facie claim of ineffective assistance of counsel, that there are material issues of disputed fact that cannot be resolved by reference to the existing record, and that an evidentiary hearing is necessary to resolve the claims for relief. R. 3:22-10(b). An evidentiary hearing shall not be granted "if an evidentiary hearing will not aid the court's analysis of the defendant's entitlement to post-conviction relief," or "if the defendant's allegations are too vague, conclusory or speculative." R. 3:22-10(e).

Having carefully considered defendant's arguments, we affirm substantially for the reasons expressed by Judge Verna G. Leath in her comprehensive, well-reasoned written opinion. We add the following comments.

All but two of defendant's arguments are not appropriate for PCR because they were previously raised and decided on direct appeal or could have been, but were not, raised on direct appeal.

> A defendant ordinarily must pursue relief by direct appeal, see R. 3:22-3, and may not use post-conviction relief to assert a new claim that could have been raised on direct appeal. See R. 3:22-4. Additionally, a defendant may not use a petition for post-conviction relief as an opportunity to relitigate a claim already decided on the merits. See R. 3:22-5.
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> [State v. McQuaid, 147 N.J. 464, 483 (1997).]

Defendant presents, although in somewhat different wrapping, the same arguments previously asserted or that could have been asserted in his direct appeal.

Defendant contends trial counsel was ineffective by failing to advise him of a plea offer made by the State. Defendant did not submit a certification from trial counsel or any documentation in support of his allegation that the State extended a plea offer. Noticeably absent from the record is any written plea offer, correspondence relating to a plea offer, or the pretrial order.

In Missouri v. Frye, the United States Supreme Court recognized the appropriateness of adopting "measures to help ensure against late, frivolous, or fabricated claims" of uncommunicated plea offers. 566 U.S. 134, 146 (2012). New Jersey has measures in place to help address such late or fabricated

claims. Rule 3:9-1 requires the prosecutor to present all plea offers to defense counsel in writing. Moreover, Rule 3:9-1(f) requires the trial court to ask the prosecutor to describe the State's final plea offer as part of the procedure for implementing the plea cutoff rule. A pretrial memorandum setting forth the State's final plea offer must be prepared if the case is not disposed of at the pretrial conference. See ibid.

Defendant did not personally hear or see any plea offer tendered by the State. Thus, he has no personal knowledge of the alleged plea offer. "Any factual assertion that provides the predicate for a claim of relief must be made by an affidavit or certification pursuant to Rule 1:4-4 and based upon personal knowledge of the declarant before the court may grant an evidentiary hearing." R. 3:22-10(c). Defendant did not meet that requirement. Instead, he relies upon his own self-serving certifications that consist of mere bald allegations that are unsupported by the record. Because defendant failed to make a prima facie showing of such a claim, he was not entitled to an evidentiary hearing on this issue. See State v. Porter, 216 N.J. 343, 357 (2013).

Defendant further contends his appellate counsel was ineffective by not raising the failure to recharge the jury on diminished capacity after the jury asked for further instruction

on the elements of murder, aggravated manslaughter, and reckless manslaughter in defendant's direct appeal. Relying on the unpublished opinion in State v. Ramalho, No. A-2056-09 (App. Div. Aug. 20, 2013), defendant contends the trial judge should have recharged the jury on diminished capacity.[3] We are unpersuaded by this argument.

The facts in Ramalho are readily distinguishable from this case. Here, there was no discrepancy between the oral and written instructions given to the jury. The jury asked for a read-back of the definition of murder, aggravated manslaughter, and reckless manslaughter, which the court provided. Thus, the jurors' question related to the differing element of intent for those three offenses, not diminished capacity due to defendant's mental condition. Additionally, the trial judge provided a virtually identical version of Model Jury Charges (Criminal), "Evidence of Mental Disease or Defect" (N.J.S.A. 2C:4-2) (rev. June 5, 2006), to the jury. The jury did not request a read-back of that

[3] "No unpublished opinion shall constitute precedent or be binding upon any court." R. 1:36-3. Unreported decisions "serve no precedential value, and cannot reliably be considered part of our common law." Trinity Cemetery Ass'n v. Twp. of Wall, 170 N.J. 39, 48 (2001) (Verniero, J., concurring). The court will engage in analysis of this unreported decision for the limited purpose of demonstrating that it is factually distinguishable from this matter. See Ryan v. Gina Marie, L.L.C., 420 N.J. Super. 215, 224 n.2 (App. Div. 2011).

instruction. Given these facts, defendant's claim does not satisfy either prong of the Strickland/Fritz standard.

Affirmed.