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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-5279-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

STEVEN TURNER,

Defendant-Appellant.

Submitted November 9, 2017 – Decided April 23, 2018

Before Judges Nugent and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Mercer County, Indictment No.
13-10-1391.

Law Offices of Jef Henninger, attorneys for
appellant (Jef Henninger, on the brief).

Angelo J. Onofri, Mercer County Prosecutor,
attorney for respondent (Stephen E. Parrey,
Assistant Prosecutor, on the brief).

PER CURIAM

Defendant appeals his judgment of conviction for state income
tax evasion. He presents four points for our consideration:

I. DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE
OF COUNSEL AND AS A RESULT DEFENDANT'S RIGHTS

WERE PREJUDICED UNDER THE STRICKLAND V. WASHINGTON TEST. (Not raised below).

II. A NEW TRIAL SHOULD BE OFFERED TO THE DEFENDANT DUE TO PROSECUTORIAL MISCONDUCT ON BEHALF OF THE STATE.

III. THE TRIAL COURT ERRED IN NOT GRANTING THE DEFENDANT'S MOTION FOR A NEW TRIAL AND MOTION FOR JUDGMENT OF ACQUITTAL.

IV. THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO JAIL TIME CONDITIONED UPON HIS ABILITY TO PAY TAXES.

We decline to consider defendant's ineffective-assistance argument as the record is inadequate to permit appellate review. Defendant should raise that issue in a petition for post-conviction relief (PCR). We affirm defendant's conviction, because the jury's verdict was supported by credible evidence and untainted by prosecutorial misconduct. We agree, however, that defendant's sentence is illegal. The trial court improperly conditioned the sentence's county jail component on defendant's nonpayment of his tax debt. For that reason, we vacate the sentence and remand for resentencing.

The legal proceedings against defendant began in 2013 when a grand jury charged him in a single-count indictment with third-degree failing to pay his 2008 taxes with the intent to evade paying them, N.J.S.A. 54:52-9A. The prosecutor rejected defendant's application for admission into the pretrial

intervention program, and the trial court upheld the prosecutor's decision. Defendant proceeded to trial, and a jury convicted him as charged. The trial court denied defendant's motions for a new trial and judgment of acquittal. The court sentenced defendant to a three-year probationary term "with an incarceration length of 364 days to be served on year [three] of probation," but added, "[p]robation may be terminated early if restitution is paid in full." This appeal followed.

The State presented the following evidence at defendant's trial. In 2008, defendant owed \$176,331 in state income tax. He timely filed a 2008 state income tax return, but paid no taxes. Around the time he filed the 2008 tax return, defendant paid off a \$72,265.83 judgment resulting from his non-payment of 2007 state income taxes. Defendant's payment of this judgment and his filing of the 2008 state income tax return as a married person filing separately – a change from the previous five years in which he filed jointly with his spouse – were key evidence in the State's proofs.

Defendant remarried in 2002. Before remarrying, he and his soon-to-be bride signed a pre-marital agreement that each would continue to own separately the assets he or she owned before the marriage. They agreed defendant's stock would remain his own and

her home, which she purchased in 2002 before they married, would remain in her name.

Notwithstanding their pre-marital agreement, defendant and his wife jointly filed their income tax returns from 2003 through 2007. When defendant did not pay state income tax for the 2007 tax year, the Division of Taxation obtained a \$72,265.83 judgment against him and his wife for the unpaid taxes. Because defendant's wife had filed jointly with him, the judgment became a lien on her house. Defendant paid the judgment on April 16, 2009, after filing his 2008 state income tax return as a married taxpayer filing separately. Although he paid off the 2007 judgment, thereby discharging the lien on his wife's home, he paid no 2008 income taxes.

On his 2008 return, defendant reported income of \$2,255,217, \$1,822,586 of which was derived from property distribution profits. Based on his income, defendant owed \$176,331 in state taxes. When defendant's trial began in 2016, he had yet to pay any of the 2008 income tax debt. He owed the State \$248,731, which included interest. By filing his 2008 return as a married person filing separately, defendant's state income tax obligation was approximately \$3,000 more than it would have been had he filed jointly; but his wife was not responsible for his delinquencies,

and the state was unable to file a tax lien against his wife's home.

In addition to the foregoing proofs, the State presented evidence that state agents from the Department of the Treasury attempted to resolve the matter with defendant. The outstanding tax debt was not resolved. When the trial began in 2016, defendant had paid none of the money he owed for 2008 state income taxes.

The trial court denied defendant's motion to dismiss the case at the close of the State's proofs. Defendant testified in his own defense. He explained he had worked for UPS for thirty-five years and received a monthly salary as well as yearly stock distributions. Stock distributions were held in trust for the employee who owned them. If an employee who had received stock distributions needed money, the employee could either sell the stock or borrow against it, but could only borrow a percentage of the full value.

Defendant gave this example: if he needed \$1000, he could either sell \$1000 worth of stock or borrow \$1000 using \$1250 in stock as collateral for the loan. The advantage was that if the stock increased in value to \$2000, he would now have a \$1000 debt and a \$2000 asset rather than a \$1000 debt and an approximately \$250 asset.

Defendant began borrowing against his stock in the early or middle 1980s. According to defendant, he had borrowed a significant amount of money by 2007 when the market began to experience one of its largest downturns. The value of UPS stock dropped. His shares dropped below the loan-to-value ratio he was required to maintain without repaying his loans. When that happened there was a "margin call." Defendant was forced to sell stock to pay his loan. His stock sales generated capital gains and consequent tax liabilities, but because the stock proceeds "retired" his loans, he received no cash from which to pay the tax liabilities.

Defendant also testified that in 2008 it took all his stock to pay off his loans, so at the end of the year, he had no stock, but large capital gains because he had begun accumulating the stock in 1978. He had no cash to pay the resulting tax liabilities on the capital gains. Defendant claimed he had a \$1.8 million dollar capital gain in 2008, but because the same company that held the stock in trust also had loaned him the money he borrowed against the stock, he never received any actual cash when he sold the stock to pay off his loans.

Defendant had other personal obligations he was unable to pay. He accumulated approximately \$400,000 in alimony arrears. He claimed to have no way of paying the arrears.

During the next several years, defendant communicated in writing, by telephone, and in person, with agents of the New Jersey Treasury Department about entering into a payment plan, but the parties could never agree on an acceptable plan. When defendant's trial began in 2016, he had paid nothing towards the 2008 tax liability. Defendant maintained he wanted to pay the taxes, but had no means to do so.

During cross-examination, defendant admitted that in 2008, he earned \$363,000 from which federal withholding was deducted, but no state withholding was deducted. Defendant claimed he received no tax refund. He produced no documents to corroborate this assertion.

Defendant also admitted that just before filing his 2008 state tax return, he paid the balance of his 2007 state income tax debt. And he admitted that in 2008, he changed his filing status from married filing jointly to married filing separately. In consequence, his tax liability in 2008 was \$3000 greater than it would have been had he filed jointly with this spouse. By filing separately, however, he avoided having his wife become liable for his tax liability. Had his wife been liable for the 2008 tax liability, a tax lien would have been placed against her home. According to defendant, this was consistent with his and her pre-

marital agreement that each party would retain his or her own pre-marital assets.

Defendant's wife eventually sold the New Jersey home, and she and defendant moved to Pennsylvania. A year after moving, his wife purchased a home in Pennsylvania which is now valued at \$500,000.

The prosecutor pressed defendant about documents corroborating his testimony about the margin calls. When the prosecutor asked if defendant had any documents supporting his margin call claims, defendant responded he did not. The following exchange occurred:

Q Well, you knew you were going to trial today, right, sir?

A Yes, sir.

Q And you knew that this is serious, right?

A Yes.

Q And you knew . . . exactly what the State was going to put up, right? You had received all the discovery in this case from the State, right? Yes?

A I didn't know everything you'd put up.

Q Every document that's been provided and placed in front of this jury was provided to you and your counsel, correct?

A I suppose. Well, I say it because
- yes, I'm not trying to evade the question.

Later, after defendant testified he used the cash he had available in 2008 to pay his 2007 taxes, the prosecutor again pressed him about documentation:

Q Where is any document to . . . back up what you're saying? Where are the documents to back them up?

A (No audible response).

Q You said that you came - you knew you were coming to trial today, right, sir?

A Yes, sir.

Q And you said that you have these documents, right?

A (No audible response).

Q Where are they?

A Well, when I paid my federal taxes in 2007, . . . when I filed my return, I paid my taxes. And it was a significant amount due as a result of the fact that I had to do the margin call routine in 2007.

Q Mr. Turner, you have provided no documents to this jury to back up anything that you have just said, correct?

A Well, that is correct.

Q And you knew you were coming to trial today, correct?

A Yes.

Q And you didn't even bring those documents so this jury can see whether anything that you're saying makes any sense.

A That's correct. I don't have them with me.

The prosecutor again hammered away at defendant's failure to bring documents to court when the prosecutor questioned defendant about the decline in UPS stock value:

Q Sir, your testimony is that UPS started dropping in its value - - the stock started dropping in its value in 2007, correct, that's your testimony?

A Yes.

Q You have no evidence of that, right?

A (No audible response).

Q So if we were to do a look up on the value of the UPS stock in 2007 and see that it didn't fall in 2007, that would be - that would undermine what you just said, wouldn't it?

A Yes. I don't think you'll find that to be the case or I would not have been in the margin call scenario.

Q Well, . . . we have nothing here saying you were in a margin call situation, do we?

A The brokerage reports - -

Q They're not here.

A They're not here, but they have been reviewed in the past. And since I haven't heard a single thing about that issue since

2014, I believe that it was accepted . . . that what I was saying was true because it hasn't been part of any [of] our conversations since I started walking this courtroom. I mean that's just me – that's an assumption on my part.

The prosecutor concluded his cross-examination by underscoring defendant's failure to bring documents to court:

Q And yet, you didn't bring any of the documents that you claim support everything that you said. You didn't bring one of those documents to put before this jury so that they could review and corroborate what you just said, right?

A That's correct . . .

[Prosecutor]: I have nothing further, Your Honor.

A And I explained why.

The jury convicted defendant. At sentencing, in addition to fines, penalties, and assessments, the court imposed a three-year probationary term "with an incarceration length of 364 days to be [served] on year [three] of probation." The judgment of conviction provided that "[p]robation may be terminated early if restitution is paid in full."

On appeal, defendant first argues his counsel's ineffective assistance deprived him of a fair trial. Defendant contends his trial counsel "did not adequately prepare for . . . trial or prepare the defendant as a witness to testify on his own behalf."

Specifically, defendant claims his counsel never asked for documentation to prove the validity of his testimony regarding the sale of his stock and subsequent fulfillment of his loan obligations, nor did counsel prepare defendant to be cross-examined. Defendant points to his counsel's bill, which shows the attorney only billed approximately eight hours and thirty minutes of total work, amounting to a maximum one hour and forty minutes spent outside of court preparing for trial.

We decline to address this argument. Although defendant has raised a colorable claim, "[o]ur courts have expressed a general policy against entertaining ineffective-assistance-of-counsel claims on direct appeal because such claims involve allegations and evidence that lie outside the trial record." State v. Preciose, 129 N.J. 451, 460 (1992) (citation omitted). Such is the case here. We do not know if defendant actually has any documentary evidence to support his claim, nor do we know if defense counsel considered presenting such evidence, or, if he did, why he presented no documents at trial. Assuming defendant can produce such documents and establish a prima facie ineffective-assistance claim in a petition for post-conviction relief, he will be entitled to an evidentiary hearing. His counsel will then have the opportunity to explain the alleged omission.

Defendant makes two additional arguments. First, he argues the prosecutor engaged in misconduct by doggedly cross-examining him about not producing documents to support his claims. Second, he argues the State's evidence did not support the element of intent. We find the arguments devoid of sufficient merit to warrant discussion. R. 2:11-3(e)(2). We add only the following brief comments.

When a defendant testifies "in his own behalf [he] waives his Fifth Amendment privilege against self-incrimination and must answer all relevant questions asked during cross-examination." State v. Petrovich, 125 N.J. Super. 147, 148-99 (Law. Div. 1973) (citing McGautha v. Cal., 402 U.S. 183, 215 (1971); Brown v. United States, 356 U.S. 148 (1958); Fitzpatrick v. United States, 178 U.S. 304, 314-16 (1900); Brown v. Walker, 161 U.S. 591, 597-98 (1896); accord, State v. Falco, 60 N.J. 570, 581 (1972)). The prosecutor's questions were relevant and presented a legitimate attack on defendant's credibility. Left unchallenged, defendant's uncorroborated testimony, much of which was arguably based on hearsay evidence, could have created reasonable doubt in the State's case. Of course, it is for just that reason that defendant's ineffective-assistance claim may have merit if such documentation exists.

As for defendant's motion for a new trial or judgment of acquittal, the jury could have inferred defendant's intent from the State's evidence, including: his decision to change his filing status to shelter the house that was his home; his failure to pay any state income taxes in 2008; his failure to pay anything at all in the nearly eight years between his filing of the 2008 return and the trial; and his available income during the intervening years. The jury was not obligated to accept defendant's testimony, particularly without corroborating documentary evidence.

Defendant also challenges his sentence. We conclude defendant's sentence is illegal because the court effectively conditioned his non-incarceration for 364 days on his payment of restitution.

Defendant, age sixty-three, faced sentencing as a first-time offender convicted of a non-violent, third-degree offense. The trial court acknowledged the statutory presumption of non-incarceration when it said to defendant, "[t]his is a third degree offense and simply because you have no prior history, I don't know that I have what it takes to be able to overcome the presumption of non-incarceration." Nonetheless, the court imposed a 364-day term of imprisonment as a condition of probation, but made clear the term of imprisonment would be vacated should defendant pay all restitution by the third year of his sentence. The court's

comments left little doubt that the period of incarceration was tied to defendant's non-payment of restitution. The court told defendant:

Now, let me clear about this. Okay. You have two years to pay this restitution. If you don't, come on in and you'll begin to serve your jail sentence. That does not preclude the State from asking for an additional two years of probation to give you time if they choose to do so. Don't think that you're just going to come in and serve 364 days and be done with it. You're still eligible for [an] additional two years of probation. You're still eligible for an additional five years [of] probation simply to pay off this fine. That's under the law. So please don't think that you're going to be leaving here without doing any jail time if you just blow off this money, not that you would tell me. Okay. I'd rather – you know what, instead of words from your mouth which you don't – you're an eloquent individual but instead of coming in here to share some words, come in here and write a check. That's what I'd be looking for. I'd be happy with that. Okay.

When imposing fines and restitution as part of a sentence, "the court shall not impose at the same time an alternative sentence to be served in the event that the fine or restitution is not paid." N.J.S.A. 2C:44-2(d). Rather, "[t]he response of the court to nonpayment shall be determined only after the fine or restitution has not been paid." Ibid. Here, it is clear from the court's comments the 364-day term of incarceration was to be served as an alternative sentence if defendant did not pay

restitution within two years. Accordingly, the sentence is vacated and this matter is remanded for resentencing.

In light of the remand, if defendant expeditiously files a petition for post-conviction relief and establishes a prima facie claim of ineffective assistance of counsel, the trial court may, in its discretion and in the interest of judicial economy and finality, conduct a hearing on the petition before resentencing defendant.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION