SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5321-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

STEVEN FOWLER,

Defendant-Appellant.

Submitted January 8, 2018 – Decided April 16, 2018

Before Judges O'Connor and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment Nos. 91-06-3262, 95-10-3280, 95-10-3289, and Accusation No. 97-01-0070.

Joseph E. Krakora, Public Defender, attorney for appellant (Andrew R. Burroughs, Designated Counsel, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent (Evgeniya Sitnikova, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Steven Fowler appeals from a May 24, 2016 order denying his petition for post-conviction relief (PCR), which

alleged the ineffective assistance of two attorneys. One represented defendant in connection with charges arising out of a 1991 indictment (Indictment No. 91-06-3262), and the other in connection with charges arising out of two 1995 indictments (Indictment No. 95-10-3280 and Indictment No. 95-10-3289) and a 1997 accusation (Accusation No. 97-10-0070). We affirm.

I

With respect to the 1991 indictment, defendant pled guilty to second-degree possession with intent to distribute a controlled dangerous substance (CDS), N.J.S.A. 2C:35-5(b)(2), and third-degree distribution of CDS within 1000 feet of school property, N.J.S.A. 2C:35-7(a). On January 16, 1992, he was sentenced in the aggregate to a five-year term of imprisonment; a judgment of conviction was entered the same day. Defendant did not file a direct appeal.

As for the 1995 indictments, defendant pled guilty to second-degree possession with intent to distribute a controlled dangerous substance, N.J.S.A. 2C:35-5(b)(2); two counts of second-degree possession of a weapon by a convicted felon, N.J.S.A. 2C:39-7(a); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); third-degree distribution of a controlled dangerous substance, N.J.S.A. 2C:35-5(b)(3); and

third-degree distribution of a controlled dangerous substance within 1000 feet of school property, N.J.S.A. 2C:35-7(a). With respect to the accusation, on March 7, 1997, defendant pled guilty to third-degree possession with intent to distribute a controlled dangerous substance within 1000 feet of school property, N.J.S.A. 2C:35-7(a).

On March 7, 1997, defendant was sentenced to a five-year term of probation on the charges arising out of the 1995 indictments and the 1997 accusation. The sentence on each charge ran concurrently to the others. The remaining charges in the indictments and accusation were dismissed, and a judgment of conviction was entered the same day. Defendant did not file a direct appeal.

For the balance of the opinion, we refer to the convictions arising out of the 1995 indictments and the 1997 accusation as the "1997 convictions," and refer to the attorney who represented him in these matters as "1997 counsel." Likewise, we refer to the convictions arising out of the 1991 indictment as the "1992 convictions" and the attorney who represented him as "1992 counsel."

In 1999, a federal jury convicted defendant of conspiracy to distribute in excess of fifty grams of cocaine, 21 U.S.C. §

841(a)(1) and 21 U.S.C. § 846. On August 18, 1999, defendant was sentenced to life in prison, pursuant to 21 U.S.C. § 841(b)(1)(A). Among other things, this statute provides a person convicted of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846 who has had at least two previous felony drug convictions must serve a life sentence.

It is not disputed that, in imposing sentence, the federal judge relied on defendant's 1990 conviction for possession of cocaine, the 1992 conviction for possession with intent to distribute, N.J.S.A. 2C:35-5(b)(2), and either the 1997 conviction for third-degree distribution of a controlled dangerous substance within 1000 feet of school property, N.J.S.A. 2C:35-7(a), or third-degree possession with intent to distribute a controlled dangerous substance within 1000 feet of school property, N.J.S.A. 2C:35-7(a).[1] The Fourth Circuit Court of Appeals affirmed the conviction and sentence. In his appeal, defendant did not challenge the applicability of the sentencing enhancement provision of 21 U.S.C. § 841(b)(1)(A). Defendant's petition for certiorari to the United States Supreme Court was denied.

---

[1] It is not clear from the record which of the two 1997 convictions the federal judge relied upon when sentencing defendant.

Defendant claims he filed a pro se petition for PCR on or about June 20, 2002, asserting both his 1992 and 1997 counsel were ineffective and the court lost the petition. Defendant does not have proof such petition was actually filed. We note that in the petition he filed in 2012, defendant states he did not file any previous petitions. However, we also observe that in a certification he executed on September 9, 2014, defendant stated his first petition for post-conviction relief was "drafted" in "2007 and 2008," and in the record there is a copy of a petition for PCR that was stamped by the Appellate Division as "received" on November 2, 2007.

In any event, not hearing from the court after filing a petition in 2002, defendant claims he sent correspondence to the court inquiring about the status of such petition between 2005 and 2007, but never received a response. Then, on October 12, 2012, defendant filed the within petition. After he was assigned counsel, defendant filed various certifications and both he and PCR counsel filed briefs.

The allegations of ineffective assistance defendant asserted before the PCR court are the same as those he maintains on appeal. They are: (1) neither the 2002 nor 2012 petition for PCR is time-barred under Rule 3:22-12(a)(1); (2) 1997 counsel

ignored defendant's claim he did not possess a sufficient quantity of drugs to sustain a conviction for third-degree distribution on or near school property, N.J.S.A. 2C:35-7(a); (3) 1997 counsel induced defendant to plead guilty by advising the ensuing convictions from such plea would not result in an enhancement of the sentence on the federal drug charge and, further, such convictions could be expunged; (4) defendant did not plead guilty to the 1997 convictions knowingly and voluntarily because of 1997 counsel's erroneous advice; (5) both 1992 and 1997 counsel failed to file a suppression motion challenging the warrantless search of defendant's home; (6) the factual bases defendant provided when he pled guilty to distribution within 1000 feet of a school in 1992 and 1997 were insufficient; and (7) 1997 counsel failed to investigate and vigorously advocate on defendant's behalf.

In a lengthy, comprehensive written opinion, Judge Martin G. Cronin carefully analyzed each contention and determined all were groundless; on May 24, 2016, Judge Cronin entered an order denying defendant's request for post-conviction relief.

II

On appeal, defendant asserts the following arguments for our consideration:

POINT I - DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF IS NOT PROCEDURALLY BARRED.

(1) THE PCR COURT RELIED ON THE WRONG DECISIONAL RULE TO FIND DEFENDANT'S PETITION WAS PROCEDURALLY BARRED.

(2) DEFENDANT IS ENTITLED TO RELAXATION OF THE PROCEDURAL BAR.

(3) AS DEFENDANT RAISES A CONSTITUTIONAL CLAIM, HIS PETITION AS IT RELATES TO [INDICTMENT NO. 91-6-3262] MAY BE CONSIDERED.

(4) DEFENDANT'S FAILURE TO FILE A DIRECT APPEAL WAS DUE TO HIS RELIANCE ON HIS ATTORNEY'S MISLEADING AND ERRONEOUS ADVICE.

POINT II — PLEA COUNSEL WAS INEFFECTIVE.

POINT III — THE FACTUAL BASES FOR DEFENDANT'S GUILTY PLEAS WERE DEFICIENT.

(1) INDICTMENT NO. 91-06-3262.

(2) ACCUSATION NO. 87-01-0070.

POINT IV — AS DEFENDANT'S ATTORNEY AFFIRMATIVELY MISLED HIM ABOUT THE COLLATERAL CONSEQUENCES OF ENTERING A GUILTY PLEA, DEFENDANT'S GUILTY PLEA WAS NOT VOLUNTARILY, INTELLIGENTLY, AND KNOWINGLY MADE.

POINT V- PLEA COUNSEL WAS INEFFECTIVE BY FAILING TO CHALLENGE THE VALIDITY OF THE SEARCHES.

(1) FIRST SEARCH.

(2) SECOND SEARCH.

POINT VI — DEFENSE COUNSEL AFFIRMATIVELY MISLED DEFENDANT ABOUT THE POSSIBILITY OF EXPUNGEMENT IF HE PLED GUILTY.

POINT VII — DEFENSE COUNSEL FAILED TO PROPERLY INVESTIGATE THE CASE.

POINT VIII — AS THERE ARE GENUINE ISSUES OF MATERIAL FACTS IN DISPUTE, AN EVIDENTIARY HEARING IS REQUIRED.

The standard for determining whether counsel's performance was ineffective for purposes of the Sixth Amendment to the United States Constitution was formulated in Strickland v. Washington, 466 U.S. 668 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42 (l987). In order to prevail on a claim of ineffective assistance of counsel, defendant must satisfy a two-prong test. The first prong requires defendant to prove counsel's performance was deficient and he or she made errors so egregious that counsel was not functioning effectively as guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687.

The second prong requires defendant to prove the defect in performance prejudiced defendant's rights to a fair trial and there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. If a defendant has pled guilty,

the second prong requires defendant to show "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial." State v. Nunez-Valdez, 200 N.J. 129, 139 (2009) (alteration in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)).

After perusing the record and examining the applicable legal principles, we are satisfied defendant's arguments have no merit. We affirm the denial of defendant's petition for substantially the same reasons expressed by Judge Cronin in his well-reasoned opinion. We highlight the judge's key findings.

Rule 3:22-12(a)(1)(A) provides no petition for PCR shall be filed more than five years after the day the judgment of conviction being challenged was entered, unless the petition alleges facts showing the delay in filing a timely petition is due to defendant's excusable neglect and there is a reasonable probability that if the defendant's factual assertions are found to be true enforcement of the time bar would result in a fundamental injustice.

Here, defendant articulates no basis to relax the clear time restrictions imposed by this rule. Even if defendant filed a petition for post-conviction relief on June 20, 2002, he

provides no reason or any explanation whatsoever why he waited until then to file a petition, which is more than ten years after the 1992, and more than five years after the 1997, judgments of conviction were entered.

Defendant seeks to have the 1992 and 1997 convictions vacated because of the impact they — or at least one — had upon the federal judge's decision to impose a life sentence for the federal drug conviction. Defendant argues the five-year time bar in Rule 3:22-12(a)(1)(A) did not start to run until he was sentenced on the federal drug conviction on August 18, 1999. He claims it was on this date he discovered 1997 counsel erred by advising the convictions emanating from the guilty plea would not enhance his sentence were he convicted of the federal drug charge. Defendant contends he is entitled to the application of the "discovery rule" utilized in civil matters, see Lopez v. Swyer, 62 N.J. 267, 272 (1973) (holding that in the appropriate case a cause of action will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered, that he may have a basis for an actionable claim), and, thus, had until August 18, 2004, to file his petition.

There is no legal authority that supports defendant's argument. To overcome the time restrictions in Rule 3:22-12(a)(1), in addition to showing a fundamental injustice will otherwise result, a petitioner must demonstrate he failed to file his petition on time due to excusable neglect. Here, defendant failed to identify what precluded him from filing his petition on a timely basis. Thus, defendant was required to file his petition challenging the 1992 convictions no later than January 15, 1997, and the 1997 convictions no later than March 6, 2002. If defendant filed a petition challenging both the 1992 and 1997 convictions on June 20, 2002, it was out of time, as was the October 12, 2012 petition.

Turning to defendant's substantive contentions, defendant claims 1997 counsel ignored his protests he did not possess a sufficient quantity of drugs to sustain a conviction for distribution; we note defendant does not state what he claims was the amount in his possession when arrested. He also contends counsel failed to file a suppression motion challenging the warrantless search of his home.

Our review of the record reveals there was sufficient evidence to support a conviction for distribution, and the police did have a search warrant when they entered and searched

defendant's home. Defendant admitted to the following when he pled guilty.

On May 31, 1995, defendant sold heroin to an undercover police officer, a sale that was made within 1000 feet of a school. Two days later, defendant again sold drugs[2] to an undercover police officer. Later in the day, the police searched defendant's home pursuant to a search warrant. During that search the police discovered heroin and cocaine in an amount greater than one-half of an ounce but less than five ounces. Defendant acknowledged his home was within 1000 feet of a school. He also conceded the police found two handguns in his home for which he did not have a permit, and that he had previously been convicted of a crime. Defendant further admitted that, on October 22, 1996, he was found in possession of 1.4 grams of cocaine, all of which he intended to sell, and that he was within 1000 feet of a school.

Defendant claims there was an inadequate factual basis to his plea. As is evident from what he admitted during the plea colloquy, this claim is devoid of merit, not to mention it could

[2] The transcript does not identify the kind or quantity of drugs defendant sold to the officer during this particular transaction.

have been raised on direct appeal and, thus, is a claim barred by Rule 3:22-4.

Defendant contends counsel induced him to plead guilty by advising the convictions resulting from such plea would not subject him to a sentence enhancement if convicted of the pending federal charge. It is not disputed the attorney representing him in the federal matter (federal counsel) informed defendant otherwise before he pled guilty to the state charges. Federal counsel advised defendant the convictions emanating from the guilty plea would result in a sentence enhancement in the federal matter if he were convicted. Defendant does not address why he rejected federal counsel's advice and accepted 1997 counsel's opinion on this issue.

Regardless, and more important, defendant failed to make any showing that, even if 1997 counsel advised he would be exposed to a sentence enhancement, there was a reasonable possibility he would have rejected the plea offer permitting him to serve a five-year probationary term on these second- and third-degree offenses, and would have instead opted to go to trial. As the plea court noted, if defendant went to trial and was convicted, he faced up to forty-five years of imprisonment.

Defendant maintains 1997 counsel failed to investigate the 1997 charges and "vigorously advocate" on his behalf. Other than making the specific allegations referenced above, defendant does not identify how counsel failed to do either. Asserting speculative deficiencies in representation does not provide a basis for post-conviction relief. "[A petitioner] must allege facts sufficient to demonstrate counsel's alleged substandard performance. . . . [H]e must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

We need not summarize the PCR court's remaining findings. Suffice to say defendant's substantive contentions lack merit and, in any event, both the 2002 and 2012 petitions are time-barred.

Affirmed.