SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1786-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DANIEL M. FURESZ,

Defendant-Appellant.

Submitted May 10, 2022 – Decided November 1, 2022

Before Judges Fisher and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Accusation No. 17-10-1245.

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

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Leandra L. Cilindrello, Assistant Prosecutor, of counsel and on the brief).

The opinion of the court was delivered by

SMITH, J.A.D.

Defendant Daniel M. Furesz (defendant) appeals from the denial of his post-conviction relief (PCR) petition. Defendant argues that his counsel: failed to challenge what he contends was an absence of factual basis in his guilty plea; failed to review discovery and available defenses with him; and improperly pressured him into pleading guilty.

The PCR court denied the petition without a hearing, finding that defendant failed to meet his burden to show ineffective assistance of counsel under Strickland.[1] We affirm.

I.

In August 2017, defendant Daniel Furesz drove alongside an SUV operated by Sandra Pedraza on the Garden State Parkway. There were five other people in Pedraza's SUV, including two adult women (Kaylynn Figueroa and Ann Ramos) and three minor children. Figueroa alerted Pedraza that defendant, while operating his car, was attempting to get her attention. When Pedraza met defendant's gaze, she realized that he was "masturbating his fully exposed penis while maintaining eye contact with her." Pedraza changed lanes to get away, but defendant followed her to ensure that she was still within his view. Figueroa

[1] Strickland v. Washington, 466 U.S. 668 (1984).

was able to take a photograph of defendant and his license plate. Defendant exited the Parkway shortly after the photograph was taken.

Police located defendant using his license plate number. Pedraza and Ramos positively identified defendant. When officers arrived at defendant's home, they were met by his girlfriend, Marion Buchinsky, who played them a voicemail from defendant. On the voicemail, defendant stated he had "done something stupid on the Garden State Parkway" and that he planned to go into hiding. He acknowledged that he was aware that the victims had gotten his license plate number. Defendant surrendered the next day and was charged with fourth degree lewdness, N.J.S.A. 2C:14-4(b)(1), harassment as a disorderly persons offense, N.J.S.A. 2C:33-4(c), and disorderly conduct, N.J.S.A. 2C:33-2(a)(2).

Defendant pled guilty to third degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a). As part of his plea, defendant agreed to time served, parole supervision for life, and Megan's Law registration.

Defendant was sentenced in accordance with the plea agreement. Defendant filed a direct appeal, contending the sentence was manifestly excessive. We affirmed.

Defendant filed a pro se petition for post-conviction relief. PCR counsel filed a supplemental brief, and the State opposed. Oral argument was held in May 2020. PCR counsel argued that because defendant didn't know there were children in Pedraza's car, he did not have the requisite mental state and should not have been allowed to plead guilty by his trial counsel. He also argued that he could not plead guilty to a violation of N.J.S.A. 2C:24-4(a) because the State presented no evidence that the children saw defendant's lewd act, which he contended was an element of the crime. Defendant argued that his trial counsel was ineffective because he was allowed to plead guilty despite these two defects.

The State responded that neither defendant's knowledge of the children's presence in the car, nor the children witnessing defendant masturbating were a necessary element of N.J.S.A. 2C:24-4(a). The State maintained that the statute's mental culpability element, "knowingly," only applied to the sexual act, and not to his knowledge of the minors referenced in the statute. Consequently, the State argued, defendant's plea was legally sufficient, and trial counsel's representation met the standard under Strickland.

Following argument, the PCR court issued a written opinion. The court denied defendant's application for post-conviction relief, finding that defendant failed to satisfy the two-prong test set forth in Strickland.

The PCR court rejected defendant's mental culpability argument, finding that "defendant's knowledge [of] his conduct and its capacity to impair the morals of a child . . . renders superfluous his knowledge of the identity of a particular child . . . ." The PCR court found that even if it entertained defendant's argument that he didn't know there were children in the car, the evidence that he should have known children were present was sufficient. The court stated, "[t]here is no question . . . that defendant had the capacity to know by virtue of his open sexual conduct on a major highway during rush hour traffic . . . there would very likely be minor passengers in [the SUV] or in any of the myriad other vehicles in . . . proximity." The court highlighted the presence of six other vehicles visible in the photograph taken of defendant by one of the victims, and defendant's voicemail admissions as further support for his findings.

Regarding defendant's claim that his attorney failed to advise him properly, the court noted defendant was facing significant prison time. The PCR court found that defense "counsel's acumen in ascertaining and explaining the proofs against her client - as [defendant] himself acknowledged - spared [him] a lengthy prison term." The court concluded that defense counsel "exercised 'reasonable professional judgement,' providing defendant with more than sufficient legal assistance . . . ."

The PCR court also rejected defendant's argument that he was pressured by trial counsel to plead guilty. The court found defendant's claim to be "flatly contradicted by the [defendant's] full-throated responses" during the plea colloquy.

Finally, the PCR court dismissed defendant's slew of sovereign citizen related claims as "universally without merit."

The court concluded that an evidentiary hearing was not required and denied defendant's petition. Defendant raises the following point on appeal:

> DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR COUNSEL'S FAILURE TO [CHALLENGE] THE LACK OF A FACTUAL BASIS USED TO ESTABLISH HIS GUILTY PLEA, FAILURE TO REVIEW DISCOVERY AND AVAILABLE DEFENSES WITH HIM, AND FOR IMPROPERLY PRESSURING HIM TO ENTER A PLEA OF GUILTY.

II.

We use a de novo standard of review when a PCR court does not conduct an evidentiary hearing. State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016) (citing State v Harris, 181 N.J. 391, 420-21 (2004)). When petitioning for PCR, a defendant must establish he is entitled to "PCR by a preponderance

of the evidence." State v. O'Donnell, 435 N.J. Super. 351, 370 (App. Div. 2014) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)).

We analyze ineffective assistance of counsel claims using the two-prong test established by the Supreme Court in Strickland. See Preciose, 129 N.J. at 463; see also State v. Fritz, 105 N.J. 42, 58 (1987). The first prong of the Strickland test requires a defendant to establish counsel's performance was deficient. Preciose, 129 N.J. at 463. "The second, and far more difficult, prong is whether there exists 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 463-64 (quoting Strickland, 466 U.S. at 694).

There exists a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Further, because prejudice is not presumed, defendant must demonstrate how specific errors by counsel undermined the reliability of the proceeding. State v. Drisco, 355 N.J. Super. 283, 289-90 (App. Div. 2002) (citing United States v. Cronic, 466 U.S. 648, 659 n.26 (1984)).

III.

Defendant argues first that he did not have the culpable mental state required to plead guilty to endangering the welfare of children. He argues that since he was unaware that there were minors in Pedraza's car and those minors did not see him, he could not be convicted of the crime. Using this construct, he posits that his trial counsel was ineffective for allowing him to plead guilty. We are not persuaded.

The pertinent section of the statute reads as follows:

> Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who engages in sexual conduct which would impair or debauch the morals of the child is guilty of a crime of the second degree. Any other person who engages in conduct or who causes harm as described in this paragraph to a child is guilty of a crime of the third degree.
>
> [N.J.S.A. 2C:24-4(a)(1).]

"Because [the child endangerment statute is] silent regarding the required mental state, the gap filler provisions of N.J.S.A. 2C:2-2c(3)[2] come into play

[2] "N.J.S.A. 2C:24-4(a) . . . contains no mental culpability element. In 1981, to address all similar statutes, the Legislature enacted what is commonly known as the "gap filler" statute, which provides that when no culpable mental state is specified in a criminal statute, the mental state of "knowingly" shall be deemed the required mental element. N.J.S.A. 2C:2-2(c)(3). The same statute specifies that the mental

and require the State to prove defendant acted "knowingly" to convict him of endangering the welfare of a child and child abuse." State v. Overton, 357 N.J. Super. 387, 393 (App. Div. 2003) (citing State v. Demarest, 252 N.J. Super. 323, 327 (App.Div.1991)). "A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence." N.J.S.A. 2C:2-2b(2). To act knowingly with respect to a result of his conduct, a person must be aware that his conduct is practically certain to cause such a result. Ibid.

"Proof of actual impairing or debauching of the victims' morals is not required. The legislative language prohibits any sexual conduct that would result in the impairing or debauching of an average child in the community. The word "would"[,] signals the futurity of a likely event; it does not require the event's actual occurrence." State v. Hackett, 166 N.J. 66, 80 (2001).

The PCR court properly rejected the criminal intent argument. To ensure a legally sufficient plea under N.J.S.A. 2C:24-4(a), defendant neither had to

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culpability element of "knowing" conduct may be required "with respect to *some or all* of the material elements" of the crime." State v. Bryant, 419 N.J. 15, 22 (App. Div. 2011).

knowingly debauch or impair the morals of the children riding in the SUV, nor did the children actually have to see him masturbating in his car while he sought their driver's attention. During his plea colloquy, defendant testified in response to questions from his trial counsel as follows:

> Trial Counsel: On that day while you were in that car, you unzipped your pants and pulled out your penis; isn't that correct?
>
> Defendant: Yes . . . .
>
> Trial Counsel: And by doing that, you were stroking and exposing your fully erect penis while you were in your car; is that correct?
>
> Defendant: Yes.

We conclude defendant's testimony that he knowingly engaged in sexual conduct was a legally sufficient factual predicate for his guilty plea to a violation of N.J.S.A. 2C:24-4(a). Contrary to defendant's argument, the jurisprudence spelled out in Hackett, Overton, and Bryant support our conclusion.

We turn to defendant's remaining ineffectiveness of counsel arguments: that his trial counsel failed to advise him regarding discovery and possible defenses, and that his trial counsel pressured him to plead guilty.

Defendant had the following exchange with the court regarding his satisfaction with trial counsel during his plea colloquy:

> THE COURT: I want to ask, sir, do you have any questions of any kind regarding any aspect of this plea? Do you have any questions? Do you understand everything?
>
> DEFENDANT: I understand everything fully, Your Honor. [Defense counsel] has explained everything to me quite adequately, so I'm okay with it.

Defendant testified that no one had promised him anything to plead guilty, nor did anyone pressure him to do so. He further testified that he had reviewed his "plea forms and the police reports" with his trial counsel, and that trial counsel had answered all of his questions. Finally, defendant testified that he was satisfied with trial counsel's services.

We find that trial counsel's actions "fell within the wide range of reasonable professional assistance." See Strickland, 466 U.S. at 689-90. We also find that defendant failed to offer any proofs to support his self-serving allegation that he was pressured to plead guilty by his counsel. Indeed, defendant's words at the plea colloquy reveal this argument to be without merit. In sum, defendant has failed to draw the required nexus between the "specific errors of counsel" he alleged, and how those alleged errors detracted from the reliability of the proceeding. See Drisco, 355 N.J. Super. at 290 (citation omitted). No evidentiary hearing is merited.

To the extent that we have not addressed any remaining arguments by defendant, it is because they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION