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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2458-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHRISTOPH G. COSKY, a/k/a
CHRISTOPHER G. COSKY,
CHRISTOPHE G. COSKY, and
CHRISTOPHER COSBY,

Defendant-Appellant.

Submitted May 16, 2022 – Decided May 27, 2022

Before Judges Fasciale and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Accusation No. 17-10-0769.

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

Christine A. Hoffman, Acting Gloucester County Prosecutor, attorney for respondent (Jonathan I. Amira,

Special Deputy Attorney General/Acting Assistant
Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from a February 10, 2021 order denying his petition for post-conviction relief (PCR) following an evidentiary hearing. Defendant maintains that he received ineffective assistance from plea counsel¹ for failing to file motions to dismiss his possession of controlled dangerous substance (CDS) charge under the Overdose Prevention Act (OPA), N.J.S.A. 2C:35-30 to -31. We affirm.

I.

On or around 6:33 p.m. on May 2, 2017, a male caller (9-1-1 caller) phoned 9-1-1 and reported that there was "a gentleman" in front of his home "in the middle of the street passed out in his car." When asked if the driver was breathing, the caller stated

Ah well the car is rolling backwards. Yes he's got a cigarette in his mouth and he's moving at [two] miles an hour now. Let's see. Looks like he's pulling over. But he's been here for [five] minutes in the middle of the street. Somebody gotta get here quick.

¹ Defendant was represented by two attorneys at different stages of the proceedings. An attorney represented defendant at a pre-indictment calendar, which resulted in defendant's application to Drug Court. A different attorney represented defendant at the plea and sentencing hearings.

Officer Dennis P. McGrail was dispatched in front of the caller's home to respond to "an unconscious male behind the wheel of a black Chevy Envoy bearing a Florida registration." Officer McGrail observed the driver, later identified as defendant, "to be 'slumped' over the steering wheel." Defendant's vehicle was still in drive and its brake lights were activated. Officer McGrail observed defendant to be "quite sluggish, disheveled, and disoriented."

When Officer McGrail "guided [defendant] completely out of his vehicle, several blue wax paper folds containing a white powdery substance suspected of being heroin then fell on the street." Officer McGrail placed defendant under arrest and transported him to Kennedy Memorial Hospital (KMH). Officers who stayed on the scene conducted a probable cause search of the vehicle and collected thirty-six blue wax paper folds containing suspected heroin from the vehicle and the street.

KMH records state defendant admitted to using heroin and ingesting ethanol. The examining doctor observed multiple needle scars on defendant's upper extremities. After being cleared for incarceration, police transported defendant for processing and service on charges of possession of CDS (heroin), N.J.S.A. 2C:35-10(a)(1), and multiple motor vehicle tickets. Following his release, defendant met with his initial assigned counsel and discussed the

consequences of a plea. The initial assigned counsel filed an application for defendant to participate in Drug Court.

Defendant agreed to a waiver of indictment on October 4, 2017. That same day, defendant appeared before the plea judge² with his new assigned plea counsel. The State advised the plea judge that defendant agreed to plead guilty to third-degree possession of heroin, N.J.S.A. 2C:35-10(a)(1), in exchange for five years in Drug Court. Defendant stated he understood that if did not successfully complete the Drug Court program, he was subject to an alternate sentence of four years in prison with a one-year parole disqualifier. The plea judge accepted defendant's plea and factual basis.

Defendant's plea counsel also appeared on behalf of defendant at sentencing. The judge sentenced defendant to five years in Drug Court in accordance with the plea agreement. On May 3, 2018, defendant appeared before the judge with plea counsel for violating his Drug Court sentence due to a March 22, 2018 administrative discharge in direct violation of his probation. The sentencing judge ordered that defendant continue with Drug Court and re-enroll in an intensive out-patient drug rehabilitation program. The alternative sentence remained four years in prison with one year of parole ineligibility.

² The same judge presided over the plea and sentencing hearings.

Defendant submitted the present pro se petition for PCR on March 13, 2019. Assigned counsel submitted a supplemental brief and defendant's certification. The PCR judge heard testimony from defendant, his initial assigned counsel, and his plea counsel at two different hearings before entering the order denying defendant's PCR petition and issuing a written decision.

II.

On appeal, defendant raises the following points:

POINT ONE

BECAUSE DEFENDANT RECEIVED
INEFFECTIVE ASSISTANCE OF [PLEA]
COUNSEL, HE IS ENTITLED TO [PCR].

A. Defendant Was Entitled To Immunity Under
The [OPA], However, [Plea] Counsel Failed To
File A Motion To Dismiss The Accusation.³

POINT TWO

DEFENDANT HAS MADE A PRIMA FACIE
SHOWING OF INEFFECTIVE ASSISTANCE OF
COUNSEL, AND THUS, THE PCR COURT ERRED
IN NOT GRANTING A FULL EVIDENTIARY
HEARING.

³ To comport with our style conventions, we altered the capitalization of defendant's subpoint A. We omitted these alterations for readability.

Where, as here,⁴ the PCR judge conducts an evidentiary hearing, we must uphold the judge's factual findings, "so long as those findings are supported by sufficient credible evidence in the record." State v. Rockford, 213 N.J. 424, 440 (2013) (quoting State v. Robinson, 200 N.J. 1, 15 (2009)). We defer to the PCR judge's findings because they are "substantially influenced by [the PCR judge's] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Ibid. (quoting Robinson, 200 N.J. at 15). However, we conduct a de novo review of a PCR judge's determinations based on his/her legal conclusions. Ibid. When considering "mixed questions of law and fact" we defer "to the supported factual findings of the trial [judge]" but we exercise plenary review of the trial judge's "application of any legal rules to such factual findings." State v. Pierre, 223 N.J. 560, 577 (2015) (quoting State v. Harris, 181 N.J. 391, 416 (2004)).

⁴ Defendant contends the PCR judge did not conduct a full evidentiary hearing because the 9-1-1 caller did not testify; however, the PCR judge stated at the first hearing on January 12, 2021 "[w]e're here today for an evidentiary hearing with respect to the PCR application" and proceeded to hear testimony from defendant and defendant's plea counsel. We conclude the PCR judge conducted a full evidentiary hearing for purposes of our standard of review.

III.

For defendant to obtain relief based on ineffective assistance grounds, he must show not only the particular manner in which counsel's performance was deficient, but also that the deficiency prejudiced his right to a fair trial. Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 58 (1987). Both the United States Supreme Court and the New Jersey Supreme Court have extended the Strickland/Fritz test to challenges of guilty pleas based on ineffective assistance of counsel. Lafler v. Cooper, 566 U.S. 156, 162-63 (2012); State v. DiFrisco, 137 N.J. 434, 456-57 (1994).

To meet the first Strickland/Fritz prong, the defendant must establish that his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. The defendant must rebut the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." Id. at 689. Thus, we consider whether a trial counsel's performance fell below an objective standard of reasonableness. Id. at 687-88.

To satisfy the second Strickland/Fritz prong, the defendant must show a "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. Defendant must demonstrate with

"reasonably probability" that the result would have been different had he received competent advice from his plea counsel. Lafler, 566 U.S. at 163 (quoting Strickland, 466 U.S. at 694).

A.

Defendant argues his plea counsel rendered ineffective assistance of counsel for failing to file motions to dismiss the accusation under the OPA.

The OPA's purpose is to save lives by "encouraging people who witness or experience a suspected drug overdose to seek medical assistance." N.J.S.A. 24:6J-2. A drug overdose is defined under the Act as

an acute condition including, but not limited to, physical illness, coma, mania, hysteria, diminished consciousness, respiratory depression, or death resulting from the consumption or use of a controlled dangerous substance or another substance with which a controlled dangerous substance was combined and that a layperson would reasonably believe to require medical assistance.

[N.J.S.A. 24:6J-3.]

The OPA confers immunity upon two categories of qualifying individuals from being "arrested, charged, prosecuted or convicted" for certain enumerated possessory drug offenses. State v. W.S.B., 453 N.J. Super. 206, 219 (App. Div. 2018); see N.J.S.A. 2C:35-30(a). The two categories are for persons: (1) who act in good faith to request medical assistance for individuals perceived to be

experiencing a "drug overdose," as defined by N.J.S.A. 24:6J-3; or (2) who experience a drug overdose and have been the subject of such a good faith request for medical assistance by others, or who have sought the assistance themselves. N.J.S.A. 2C:35-30 (immunity for persons making requests for assistance); N.J.S.A. 2C:35-31 (immunity for persons who are the subject of the requests). Because defendant was the subject of the 9-1-1 caller's request for emergency assistance, the applicable OPA statute is N.J.S.A. 2C:35-31.

In W.S.B., we instructed that the person reporting the overdose must "possess a 'reasonable belief' the subject requires medical attention" and the call for help "must reasonably appear to be 'required' under the circumstances presented." 453 N.J. Super. at 228 (first quoting N.J.S.A. 24:6J-3). The reporting person must call for medical assistance in "good faith." Id. at 229. The defendant has the burden of establishing OPA immunity by "a preponderance of the evidence." Id. at 221.

At the PCR hearing, defendant testified that he "had ingested a lot of drugs that particular day. Um, I remember playing a game on my phone in my car in front of my house—well, actually like—it was like a house down or two, and next thing I know the cops were there." He testified he ingested "maybe [thirty] bags" of heroin that day and was using thirty to fifty bags daily. Defendant

testified that "[i]t was my neighbor that called the 9-1-1 on me and he's a retired officer and he's like, yeah, I thought you were overdosed."⁵

The PCR judge ruled defendant failed to demonstrate by a preponderance of the evidence that he would be entitled to immunity under the OPA and, thus, his plea counsel provided effective representation. The PCR judge found that

[t]here is no evidence from which the court can conclude that the 9-1-1 caller requested medical assistance for . . . defendant. [The caller] did not report any observation of a medical condition but rather described the movements of the motor vehicle that had been in front of his house for five minutes. He did not indicate that he recognized the vehicle or knew its owner or occupant. He did not request either an ambulance or emergency medical assistance. Initially he was about [twenty] yards from the vehicle, but when he got closer, he observed that the driver had passed out. The 9-1-1 operator asked if he saw a needle in the driver's arm, and he said he did not. This inquiry may certainly have caused the caller to consider the fact that the driver may have overdosed, but there is no basis to support a finding that at the time the call was made, its purpose was to request medical assistance.

⁵ Defendant requests in his merits brief that we reverse the PCR judge's order and remand for a full evidentiary hearing with testimony from the 9-1-1 caller. The reason for the 9-1-1 caller's absence at the evidentiary hearing—or failure to submit an affidavit—is not clear from the record. Defendant's testimony that the 9-1-1 caller was his neighbor indicates he is readily identifiable. At the evidentiary hearing, defendant's PCR counsel stated that he only intended to call defendant as a witness and the State only offered initial assigned counsel and his plea counsel. We decline to address the failure to call the 9-1-1 caller as a witness on this appeal, which will be preserved for a subsequent PCR petition.

The judge's findings are supported by sufficient credible evidence. Based solely on the 9-1-1 transcript, the caller does not express a reasonable belief that defendant required medical attention due to a suspected drug overdose.

The 9-1-1 caller starts the call by stating there is a man in front of his house "passed out in his car." The caller's concern is focused on the speed at which defendant's car is rolling backwards and that "he's been [outside the caller's house] for [five] minutes in the middle of the street." The caller answered that defendant was breathing and that he had "a cigarette in his mouth." The caller requested that "[s]omebody's gotta get here quick" but never specified whether emergency response is needed for medical assistance or to prevent a car accident. The caller's statements that he is "a former State Trooper," the situation is "bad," and that "[w]e gotta get somebody here right away" do not reflect a specific concern about defendant's possible overdose.

The caller's distance from defendant's car—approximately twenty yards from the car—was too far to develop a reasonable belief that defendant was overdosing. The caller did not "want to spook [defendant]" out of concern that if he was scared, he would leave the area. This concern is not consistent with a belief that defendant was suffering a drug overdose. If the 9-1-1 caller was concerned that getting too close to defendant could cause him to flee the scene,

the caller could not have a reasonable basis, in good faith, that defendant was experiencing a drug overdose. It was not until the caller walked up to defendant's car door later during the call that he could even observe defendant closely enough to form a reasonable belief.

The 9-1-1 operator and police expressed concern about a possible overdose, as the operator asked the caller if there was a needle in defendant's arm and an unknown officer mentioned that he "grabbed the Narcan kit." And it was "police communications" who commented to the caller that they received a similar call "on the other end of town" and that "[i]t's going around man." The judge was correct in noting that the caller never brought up drugs or overdosing, and that it was the police or the 9-1-1 operator who first introduced the possibility of an overdose in the transcript.

The 9-1-1 caller clearly expressed concern about defendant, potentially unconscious, whose car was idling in the middle of the street in front of his house. But the 9-1-1 caller does not specifically express a belief that defendant was suffering from a drug overdose, or even that he was intoxicated. The caller may have sought emergency assistance in part because he feared defendant was in danger, but the transcript indicates the 9-1-1 caller's primary concern was the car's movements. And the transcript does not demonstrate the caller had a

reasonable belief, in good faith, that defendant was experiencing an "acute condition" related to a drug overdose. From the record below and the testimony presented at the PCR evidentiary hearing, defendant has not demonstrated that he is entitled to OPA immunity by a preponderance of the evidence.

As there is insufficient evidence establishing defendant's OPA immunity, it follows that defendant's attorneys were not ineffective in failing to file motions to dismiss the accusation under the Act. Defendant's plea counsel successfully advocated for defendant to receive a sentence of five years of Drug Court probation as part of the plea agreement. He avoided the potential alternative sentence of four years in prison with one-year of parole ineligibility. Contrary to defendant's contentions, defendant's attorneys' conduct "fell within the wide range of reasonable professional assistance" by effectively advocating for his admission to Drug Court. Fritz, 105 N.J. at 52 (quoting Strickland, 566 U.S. at 689). Evaluating the evidence available at the time and defendant's exposure to potential jail time, his plea counsel provided objectively reasonable assistance under the first Strickland prong.

B.

Defendant argues that he was prejudiced by his attorneys' failures "because if the accusations were dismissed, he would not have been sentenced

to five years in Drug Court[] or in the alternative, four years in State prison with[] one year of parole ineligibility."

The PCR judge determined defendant was not substantially prejudiced under the second Strickland prong because "[i]t is far from clear that . . . defendant's actions would have been any different if [he] had knowledge of the [OPA] prior to his admission to Drug Court." Defendant testified that if he had been aware of the OPA, he would have discussed it with his attorneys. Defendant's petition declares that had he been aware of the OPA, he "would have asked [his] counsel to motion the court for dismissal . . . based upon the immunity offered by the OPA. In his pro se PCR petition, defendant asserts that his initial assigned counsel advised him that his best offer would be 364 days in county jail, and defendant chose to go to Drug Court to avoid jail time.

Defendant fails to show prejudice, or but for his attorney's failure to move to dismiss the accusation under the OPA, he would not have pled guilty and entered Drug Court. Defendant was familiar with Drug Court, wanted to avoid jail time, and had been offered a favorable plea agreement to enter the program. PCR counsel's argument at the PCR hearing that "if the OPA had been filed, it would have been granted," and defendant would have avoided any Drug Court and any subsequent violation of the program, amounts to a bald assertion.

Defendant also testified regarding his strong desire to avoid jail time. Defendant failed to carry his burden of "affirmatively prov[ing] prejudice," thus, we decline to disturb the PCR judge's conclusion as to Strickland's second prong. State v. Gideon, 244 N.J. 538, 561 (2021) (quoting Pierre, 223 N.J. at 583).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION