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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0850-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KAREEM T. TILLERY, a/k/a
KAREEM JONES, KAREEM
J. TILLERY, KARIEM A.
TILLERY, and KAREEM
TILLERY JONES,

Defendant-Appellant.

Submitted May 2, 2023 – Decided July 5, 2023

Before Judges Gilson and Messano.

On appeal from the Superior Court of New Jersey, Law
Division, Union County, Indictment No. 14-06-0497.

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

William C. Daniel, Union County Prosecutor, attorney
for respondent (Milton S. Leibowitz, Assistant
Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Kareem Tillery appeals from an August 31, 2021 order denying his petition for post-conviction relief (PCR) following an evidentiary hearing on some of his claims of ineffective assistance of counsel. Having reviewed the record and governing law, we affirm.

I.

On February 6, 2014, a red Ford Mustang was stolen in Virginia. Six days later, in the early morning hours of February 12, 2014, two Union Township police officers were on patrol when they saw a red Ford Mustang drive by. They checked the vehicle's license plate and learned that the vehicle had been reported stolen. Accordingly, the officers made a U-turn and began looking for the Mustang. Shortly thereafter, they saw the car parked on the side of a road and observed one occupant in the car. The officers stopped their vehicle in front of the Mustang and exited their car with their guns drawn. As the officers approached the Mustang, the occupant, who was later identified to be defendant, exited the vehicle. The officers then ordered defendant to put his hands up, confirmed that the vehicle had been stolen, and placed defendant under arrest.

Thereafter, other officers arrived, including a sergeant who activated the motor vehicle recorder (MVR) on his vehicle. The Mustang was searched, and

police found a loaded handgun between the front passenger seat and the center console. They also found a bottle containing pills inside the center console and two boxes of bullets in the trunk.

Defendant was indicted for fifteen crimes, including third-degree receiving stolen property (the Ford Mustang), N.J.S.A. 2C:20-7; second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b); and various drug and weapon offenses.

Defendant moved to suppress the evidence seized from the Mustang. Following a hearing, the trial court denied that motion in part and granted it in part. The court suppressed the bullets found in the trunk but found that the police had lawfully seized the handgun and pills found in the center console.

At trial, the State introduced recordings from two MVRs, including the MVR recording from the sergeant's vehicle. The sergeant was also called as a witness and was questioned about the MVR recording from his car and the Union Township Police Department's policies concerning activation of MVRs. The MVR recording from the sergeant's vehicle was shown to the jury at trial and depicts the sergeant's vehicle pulling up to the scene after defendant had been arrested. The recording does not show the Mustang, however, and at one point

the sergeant can be seen walking in front of his car and yelling: "Leave it there and don't touch it." Shortly thereafter, the video ends.

At trial, defense counsel cross-examined the sergeant regarding the policies and procedures of the police department relating to MVR recordings. Defense counsel argued that the video from the sergeant's car had been cut short in violation of the police department's policies, and the sergeant's direction not to "touch it" supported the defense's argument that the handgun belonged to the owner of the Mustang and that defendant had not been aware that the gun was in the car because it was located deep between the passenger seat and the center console.

After hearing the evidence, the jury found defendant guilty of receiving stolen property and unlawful possession of a handgun. The jury acquitted defendant of other charges and the State dismissed the remaining charges.

In April 2017, defendant was sentenced to an aggregate prison term of seven years with forty-two months of parole ineligibility. That sentence was run consecutive to a sentence defendant was already serving for other convictions.

Defendant filed a direct appeal challenging his convictions and sentence. We rejected his arguments and affirmed. State v. Tillery, No. A-4281-16 (App.

Div. June 5, 2019). Thereafter, the Supreme Court denied defendant's petition for certification. State v. Tillery, 240 N.J. 196 (2019).

In July 2019, defendant filed a petition for PCR. He was assigned PCR counsel, and the PCR court conducted an evidentiary hearing in July 2021. The hearing was focused on whether the MVR recording from the sergeant's vehicle was incomplete or doctored and whether defendant's trial counsel had been ineffective in examining that issue and in not requesting a spoliation charge.

At the PCR evidentiary hearing, the court heard testimony from defendant's two trial counsel and defendant. Neither of defendant's trial counsel had a clear recollection of the trial. Nevertheless, both counsel recalled that MVR evidence had been presented at trial. Although neither counsel specifically recalled reviewing the MVR recordings with defendant before trial, one counsel testified that he was "quite confident" that he had done so and recalled having discussed the recordings with defendant. Indeed, that counsel recalled that he had had concerns that one of the MVR recordings might have been cut short and, therefore, requested the MVR policies and procedures for Union Township. The other defense counsel testified it was his practice to review video evidence with a defendant before trial.

During his testimony at the PCR hearing, defendant admitted that he had reviewed the MVR recordings with his counsel before trial. Defendant asserted that the MVR recording from the sergeant's vehicle was incomplete and claimed that the "missing" portion of the recording would have shown "who handled th[e] gun and . . . the position of the gun." In that regard, defendant asserted that the gun was planted because he did not know it was in the car.

On August 31, 2021, following the completion of the evidentiary hearing, the PCR court issued a written opinion and order denying defendant's petition. In its opinion, the court addressed the arguments raised both by defendant and his PCR counsel. Before the PCR court, defendant and his PCR counsel had argued that his trial counsel had been ineffective in (1) failing to move to dismiss the indictment; (2) failing to completely examine and explore whether the MVR recording had been cut short or "doctored"; and (3) failing to request a spoliation charge. Defendant's PCR counsel also argued that defendant's appellate counsel on his direct appeal had been ineffective in failing to raise those issues.

The PCR court rejected all of defendant's arguments on two grounds. First, the court found that the arguments could have been raised on direct appeal and were, therefore, procedurally barred. Second, the court went on to analyze the substance of the arguments and found that defendant had failed to establish

a prima facie showing of ineffective assistance of counsel. In analyzing the substance of defendant's claims, the court found that trial counsel had testified credibly at the PCR hearing. While the PCR court recognized that defendant's trial counsel did not have complete recalls of the trial, the court found that there was no evidence that they had failed to properly explore the MVR recording. The PCR court also found defendant's testimony to be incredible and self-serving. Specifically, the PCR court found that defendant had failed to show the "State intentionally withheld, altered, or destroyed the video with purpose to disrupt litigation." The PCR court, therefore, found that there was no evidence of ineffective assistance of counsel nor a basis for a spoliation charge.

II.

On this appeal, defendant presents four arguments, which he articulates as follows:

POINT I – AN EVIDENTIARY HEARING IS REQUIRED ON DEFENDANT'S CLAIMS HE RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILING TO MOVE TO DISMISS THE INDICTMENT, AND FOR FAILING TO REQUIRE A SPOLIATION INSTRUCTION TO THE JURY.

- (a) APPLICABLE LAW
- (b) DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE

TO FILE A MOTION TO DISMISS THE INDICTMENT IN ITS ENTIRETY.

- (c) DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO REQUIRE THE JURY BE GIVEN AN INSTRUCTION ON SPOLIATION.

POINT II – THE PCR COURT ERRED WHEN IT FOUND THE TESTIMONY PROVIDED BY TRIAL COUNSEL AT THE PCR HEARING ON THE ISSUE OF THE LACK OF INVESTIGATION OF THE VIDEO EVIDENCE FAILED TO RISE TO THE STANDARD OF INEFFECTIVE ASSISTANCE OF COUNSEL.

POINT III – DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

POINT IV – DEFENDANT'S PETITION FOR [PCR] SHOULD NOT BE BARRED BECAUSE DEFENDANT COULD NOT HAVE BROUGHT HIS CLAIMS IN A PRIOR PROCEEDING AND THE INTERESTS OF JUSTICE REQUIRE THAT HIS CLAIMS BE HEARD.

We begin our analysis by addressing defendant's fourth argument concerning the procedural bar. The PCR court found that all the arguments raised by defendant could have been challenged on his direct appeal and were, therefore, procedurally barred. See R. 3:22-4(a). Nevertheless, the court considered defendant's arguments on their merits. We will do likewise because

we agree with the PCR court that all of defendant's arguments lack substantive merit.

Appellate courts apply a deferential standard of review to an appeal of a denial of a PCR petition following an evidentiary hearing. State v. Pierre, 223 N.J. 560, 576 (2015); State v. Nash, 212 N.J. 518, 540 (2013). The factual findings made by a PCR court will be accepted if they are based on "sufficient credible evidence in the record." Pierre, 223 N.J. at 576 (quoting Nash, 212 N.J. at 540). In contrast, interpretations of the law are "reviewed de novo." Id. at 576-77 (quoting Nash, 212 N.J. at 540-41).

To establish a claim of ineffective assistance of counsel, a defendant must satisfy a two-part test: (1) "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) "the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984); accord State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the Strickland test in New Jersey).

A. The Failure to Move to Dismiss the Indictment.

Defendant first argues that his trial attorneys were ineffective in failing to move to dismiss the indictment. He contends that the testimony presented to the grand jury was all hearsay and, therefore, the indictment was not based on

competent evidence. The law is well-established that hearsay testimony can be presented to a grand jury. See State v. Tringali, 451 N.J. Super. 18, 26 (App. Div. 2017); State v. Thrunck, 157 N.J. Super. 265, 278 (App. Div. 1978). Accordingly, defendant's argument lacks substantive merit. In other words, his trial attorneys were not deficient in failing to make a motion to dismiss the indictment and defendant failed to show that even if a motion had been made, it would have been successful. See State v. Echols, 199 N.J. 344, 361-62 (2009).

B. The MVR Recording.

Defendant's second and third arguments both challenge the PCR court's findings concerning his claim that trial and appellate counsel were ineffective in exploring an MVR recording that was presented at trial. Defendant contends that the recording was cut short or was "doctored." Defendant also argues that because the MVR recording was incomplete, trial counsel should have asked for a spoliation charge.

The PCR court conducted an evidentiary hearing on defendant's contentions concerning the MVR recording. Based on the testimony from trial counsel and defendant, the court found that there was no evidence that the MVR recording had been improperly cut short or had been otherwise altered. Without such evidence, there was no showing that defendant's trial or appellate counsel

had been ineffective. There was also no showing that defendant had suffered any prejudice. Those findings are all amply supported by evidence at the PCR hearing. Moreover, the denial of the PCR petition was based on well-established law.

III.

In summary, having reviewed all of defendant's arguments, we find no merit in any of them. Accordingly, we affirm the order denying his PCR petition.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION