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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0987-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARK A. BRANTLEY,

Defendant-Appellant.

Submitted May 24, 2023 – Decided June 6, 2023

Before Judges Accurso and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 18-02-0376.

Joseph E. Krakora, Public Defender, attorney for appellant (David A. Gies, Designated Counsel, on the briefs).

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (Joie D. Piderit, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Mark A. Brantley appeals from an order denying his post-conviction relief (PCR) petition without an evidentiary hearing. Having considered the record and the parties' arguments, we are convinced the court correctly determined defendant failed to establish any prima facie ineffective-assistance-of-counsel claims and, for that reason, the court correctly denied the petition without an evidentiary hearing.

I.

A grand jury returned an indictment charging defendant with eighteen possessory controlled dangerous substance and weapons offenses. The charges were founded the August 11, 2017 seizure of drugs — heroin, cocaine, marijuana, and phencyclidine — and weapons pursuant to a search warrant for defendant's New Brunswick apartment and defendant's person.¹

Defendant moved to suppress the evidence. He argued in part the affidavit of New Brunswick Police detective Victor Delgado that supported its issuance contained material falsehoods and, for that reason, defendant was entitled to a Franks hearing.² The affidavit stated that during the third and fourth weeks of

¹ The search warrant also authorized the search of a 1996 blue GMC van, but the motion court stated defendant moved to suppress evidence seized only from the apartment and his person, rather than from the van.

² Franks v. Delaware, 438 U.S. 154 (1978).

July 2017, defendant sold drugs — heroin and cocaine — during three separate transactions with confidential informants working with the police. Pertinent here, detective Delgado represented that during the final week in July 2017, defendant sold cocaine to a confidential informant and travelled to the location of the transaction by driving a blue GMC van.

In support of the suppression motion, defendant argued detective Delgado's falsely represented he observed defendant deliver cocaine to a confidential informant while driving the blue GMC van. Defendant claimed the statement was false because the van had flat tires and was therefore immobile at the time of that alleged transaction. Defendant also argued detective Delgado falsely stated he observed defendant engage in the drug transactions with the confidential informants because detective Delgado was in a location where his line of sight made such observations impossible.

At the suppression hearing, defendant testified on direct examination in support of his request for a Franks hearing. However, the court struck defendant's testimony because he refused to answer questions posed by the State on cross-examination about the phone number for the cellular phone he used in July 2017, the month detective Delgado asserted defendant used the cellular phone to arrange the three drug transactions with the confidential informants.

The court denied the suppression motion and defendant's request for a Franks hearing. The court found defendant did not present any competent evidence establishing detective Delgado's statements concerning defendant's use of the blue GMC van during the last week of July 2017, and the detective's observations of defendant's participation in the three transactions, were false. The court entered an order denying defendant's suppression motion.

Following its denial of the motion, the court granted defendant's motion for leave to represent himself and assigned defendant standby counsel. Defendant later pleaded guilty to second-degree possession of a firearm while committing a controlled dangerous substance offense, N.J.S.A. 2C:39-4.1, and second-degree possession with intent to distribute a controlled dangerous substance, N.J.S.A. 2C:35-5(a)(1) and -5(b)(2), pursuant to a negotiated plea agreement. The court imposed an aggregate sixteen-year sentence with a six-and-one-half year period of parole ineligibility.

On his direct appeal, we affirmed defendant's conviction and sentence, as well as the court's order denying the suppression motion. State v. Brantley, No. A-5558-17 (App. Div. Jan. 14, 2020) (slip op. at 20). The Supreme Court denied defendant's petition for certification. State v. Brantley, 241 N.J. 503 (2020).

Defendant's PCR Petition

Defendant subsequently filed a pro se verified PCR petition asserting trial counsel was ineffective by failing to: move for complete discovery; "investigate allegations of the inoperable GMC van"; "investigate [an] unrelated arrest by [d]etective Delgado"; and "communicate with [defendant] regarding the preliminary Franks hearing."

Defendant also filed a certification in support of the petition asserting trial counsel was ineffective by failing to support the suppression motion with an affidavit or other competent evidence establishing his claimed right to a Franks hearing. The certification did not identify any competent evidence trial counsel could have presented that would have established an entitlement to a Franks hearing.

Defendant further asserted he was compelled to testify at the suppression hearing because trial counsel did not submit evidence supporting the request for the Franks hearing. Defendant claimed he testified at the suppression hearing "without any prior preparation" by counsel, but defendant did not assert that his testimony would have been different if he had been prepared by counsel.

Defendant also claimed he was not advised by trial counsel that he "could not invoke" his Fifth Amendment right to remain silent during the suppression

hearing "by testifying" at the hearing. He claimed his testimony at the suppression hearing was stricken after he asserted his right to remain silent and refused to answer questions about his telephone number. Defendant did not assert he would have opted not to testify if he had been advised differently by his counsel or that he would have presented other evidence in support of his request for a Franks hearing had he been advised differently.

In his certification, defendant also asserted trial counsel was ineffective by failing to use an investigator to conduct an investigation of his neighborhood to "determine whether [d]etective Delgado's observations of certain alleged transactions between [defendant] and a confidential informant were reliable." Defendant also claimed trial counsel provided ineffective assistance by failing to ensure "the defense had received complete discovery . . . before the" suppression hearing.

In addition to the verified petition and certification, defendant submitted an unsigned and unsworn investigation report. The November 2017 report was prepared at the request of defendant's trial counsel. The report explained that the investigator interviewed an individual who identified himself as the owner of the apartment building where defendant resided at the time of the commission of the charged offenses. According to the report, the individual said there was

a period of time "around July 4" that defendant's "van was sitting on the ground with at least two tires flat." The individual, however, also told the investigator "he could not remember exact dates and does not want to testify in court."

The PCR Court's Decision

Following argument on the petition, the court issued a detailed and thorough opinion from the bench. The court explained that an August 8, 2017 search warrant was issued for defendant's apartment and a 1996 blue van registered in his name. The court noted New Brunswick Police Department detective Victor Delgado submitted the affidavit supporting the issuance of the search warrant.

In part, the affidavit stated detective Delgado used two confidential informants to make three controlled purchases of heroin and cocaine from defendant during the last two weeks of July 2017. The PCR court explained the affidavit stated that during the first transaction, defendant drove a gray Dodge van with a Pennsylvania license plate. The second transaction occurred in defendant's apartment. The court found the search warrant affidavit showed defendant arrived drove to the location of the third transaction in a blue GMC van, defendant sold the confidential informant cocaine, and defendant departed in the blue van after completing the transaction.

The PCR court further explained that following the denial of his suppression motion, defendant applied for, and was granted, leave to represent himself during the ensuing proceedings on the charges against him. The court also noted defendant later pleaded guilty to two of the eighteen offenses charged in the indictment and was sentenced.

The PCR court also found that on his direct appeal, defendant argued the trial court erred by denying his motion for a Franks hearing and by rejecting his claim the search warrant affidavit did not provide probable cause for the authorized searches. The PCR court observed we affirmed defendant's conviction and sentence, as well as the order denying the suppression motion, and the Supreme Court denied defendant's petition for certification.

The PCR court also confirmed with defendant's counsel that defendant's petition was founded on claims his trial counsel was ineffective by failing to: "adequately investigate the case and present relevant material evidence"; prepare for the suppression hearing; and "challenge the entirety of the search warrant." The PCR court confirmed defendant asserted appellate counsel was ineffective by failing to: provide on direct appeal the "surveillance photographs used during" the suppression hearing; and challenge defendant's sentence on the direct appeal from his conviction.

The PCR court considered defendant's arguments under the two-pronged standard for determining ineffective-assistance-of-counsel claims established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987), under our State constitution. As recognized by the PCR court, the Strickland standard requires a defendant first show counsel's handling of the matter "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. Second, a defendant must show there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. Moreover, "[t]o establish a prima facie claim of ineffective assistance of counsel, a defendant must demonstrate the reasonable likelihood of succeeding" under both prongs of the Strickland standard. State v. Preciose, 129 N.J. 451, 463 (1992).

The PCR court then addressed and rejected defendant's claim trial counsel was ineffective by failing to conduct an adequate investigation of the case and failing to consult with him prior to the suppression hearing. More particularly, the court explained defendant argued trial counsel failed to have an investigator canvas the neighborhood for witnesses who would testify detective Delgado's search warrant affidavit was false because defendant's blue GMC van was

disabled by flat tires at the time the detective represented defendant delivered cocaine to a confidential informant while driving the van. The court further noted defendant claimed trial counsel was ineffective by failing to challenge whether detective Delgado could have observed defendant engage in the transactions from his purported locations as reported in the search warrant affidavit.

The PCR court determined defendant did not sustain his burden under Strickland on those claims because he failed to present any competent evidence establishing what those investigations would have revealed. See State v. Porter, 216 N.J. 343, 353 (2013) (alteration in original) (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)) ("[W]hen a petitioner claims his trial attorney inadequately investigated his case, he 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.").

The court also rejected defendant's reliance on the November 2017 investigation report as establishing what an investigation would have revealed. The court noted the individual who was interviewed said he could not remember the dates defendant's van had a flat tire. The court further observed that the

individual referred to July 4 but the controlled purchase of cocaine from defendant during which he drove the blue van did not occur until the last week of July 2017.

The court also rejected defendant's reliance on the report because it included purported facts untethered to the requisite affidavit or certification. See State v. Jones, 219 N.J. 298, 312 (2014) (explaining PCR petitions must be "accompanied by an affidavit or certification by defendant, or by others, setting forth with particularity" the facts supporting the petitioner's claims); see also Porter, 216 N.J. at 355 (same). The court further noted defendant's production of the investigation report, which shows it was requested by trial counsel, actually established counsel did undertake an investigation.

Additionally, the court determined that even if defendant's claim the 1996 GMC van was immobile and could not have been used as described in detective Delgado's affidavit, there was no need for a Franks hearing. The court reasoned that because defendant did not establish the detective made any false representations concerning the first two transactions described in the affidavit, there was probable cause for the issuance of the search warrant independent of the allegedly false representations concerning the use of the van for the third transaction. See State v. Howery, 80 N.J. 563, 568 (1979) (explaining a

defendant seeking a Franks hearing must show the misstatements alleged to be false are material "to the extent that when they are excised from the affidavit, that document no longer contains facts sufficient to establish probable cause."). The court therefore concluded that even if trial counsel erred by failing to investigate the mobility of the van on the day of the third transaction, defendant failed to sustain his burden under Strickland's second prong of establishing a reasonable probability that but for counsel's error the result of the suppression hearing, and defendant's request for a Franks hearing, would have been different. Strickland, 466 U.S. at 694.

The court also addressed defendant's claim his counsel's performance was deficient by failing to introduce into evidence the photographs he claims showed that due to line of sight obstructions, detective Delgado could not have made the observations concerning the transactions reported in his affidavit. The PCR court rejected the claim because the transcript of the suppression hearing showed the court viewed and considered the photographs and made findings in its decision based on those photographs. The PCR court therefore concluded that the failure to admit the photographs in evidence did not result in any prejudice at the suppression hearing under the Strickland standard. The court also rejected defendant's claim the failure to introduce the photographs in evidence caused

him to plead guilty, explaining defendant was a self-represented litigant when he pleaded guilty and therefore could not properly claim ineffective-assistance-of-counsel in making the decision to do so.

The court also addressed and rejected defendant's claim appellate counsel was ineffective by failing to argue on his direct appeal that his sentence was excessive. The PCR court noted the sentence imposed was two years less than the one provided for in the plea agreement and defendant did not offer any evidence or argument demonstrating the sentence was excessive. The court further found defendant made no showing that had appellate counsel challenged his sentence on that basis, there is a reasonable probability the result of his sentencing proceeding would have been different.

The court found defendant failed to establish a prima facie claim of ineffective assistance of either trial or appellate counsel and denied defendant's request for an evidentiary hearing on that basis.³ R. 3:22-10(b). The court entered an order denying the petition. This appeal followed.

Defendant presents the following arguments for our consideration:

³ The PCR court considered and decided other claims trial and appellate counsel were ineffective, but we do not detail or address them because defendant does not challenge the court's rejection of those claims on appeal.

POINT ONE

DEFENDANT'S BURDEN OF PROVING PREJUDICE UNDER THE STRICKLAND/FRITZ TEST IS NOT EQUIVALENT TO A PREPONDERANCE OF THE EVIDENCE BURDEN OF PROOF.

POINT TWO

THE PCR JUDGE WRONGFULLY CONCLUDED THAT DEFENDANT DID NOT PROVE HIS TRIAL ATTORNEY WAS CONSTITUTIONALLY INEFFECTIVE.

POINT THREE

THE PCR JUDGE WRONGFULLY CONCLUDED THAT DEFENDANT DID NOT PROVE HIS APPELLATE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE.

POINT FOUR

DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING WHERE HE DEMONSTRATED A PRIMA FACIE CASE OF INEFFECTIVENESS.

II.

We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). The de novo standard of review also applies to mixed questions of fact and law. Id. at 420. Where, as here, an

evidentiary hearing has not been held, it is within our authority "to conduct a de novo review of both the factual findings and legal conclusions of the PCR court." Id. at 421. We apply that standard here.

Based on our de novo review of the record, we are satisfied defendant's arguments lack sufficient merit to warrant discussion in a written opinion, R. 2:11-3(e)(2), and we affirm substantially for the reasons in the PCR court's well-reasoned decision. We add the following comments.

We reject defendant's argument the court erred by primarily focusing on the prejudice prong of the Strickland standard in its determination of his various claims. As our Supreme Court has explained, "[a]lthough a demonstration of prejudice constitutes the second part of the Strickland analysis, courts are permitted leeway to choose to examine first whether a defendant has been prejudiced, and if not, to dismiss the claim without determining whether counsel's performance was constitutionally deficient." State v. Gaitan, 209 N.J. 339, 350 (2012) (internal citation omitted). The PCR court properly applied this principle here.

We also reject defendant's claims the PCR court erred by failing to find trial and appellate counsel should have relied on the November 2017 investigation report to challenge the validity of the search warrant, trial counsel

failed to introduce into evidence the photographs at the suppression hearing, and counsel did not make other challenges to the veracity of detective Delgado's affidavit. As the PCR court found, those claims are unsupported by competent evidence establishing there is a reasonable probability that but for counsel's alleged errors the result of the suppression hearing and defendant's request for a Franks hearing would have been different. Strickland, 466 U.S. at 694.

We also find no merit to defendant's claim the PCR court erred by failing to consider the real-time consequences of defendant's sentence in its assessment of his claim appellate counsel was ineffective by failing to argue the sentence was excessive. We have reviewed defendant's presentence report, his plea agreement, and the transcripts of the plea and sentencing proceedings. The court imposed a sentence two years less than that permitted under defendant's plea agreement, see State v. Fuentes, 217 N.J. 57, 70 (2014) ("A sentence imposed pursuant to a plea agreement is presumed to be reasonable"), and defendant makes no showing the sentencing court violated the sentencing guidelines, erred in its application of the aggravating and mitigating factors, or imposed a sentence that shocks the judicial conscience, ibid. Thus, we find no basis to conclude there is a reasonable probability that but for appellate counsel's

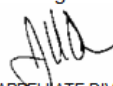
purported error in failing to argue the sentence was excessive, the result of the defendant's appeal would have been different. Strickland, 466 U.S. at 694.

The court also correctly denied the PCR petition without an evidentiary hearing. An evidentiary hearing is not required on a PCR petition where, as here, the defendant does not sustain his burden of establishing a prima facie ineffective assistance of counsel claim. Porter, 216 N.J. at 355; R. 3:22-10(b).

We have considered all the arguments presented on defendant's behalf and, to the extent we have not expressly addressed any of those arguments, they are without 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