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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1033-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TEJAY K. JOHNSON,

Defendant-Appellant.

Submitted May 2, 2023 – Decided July 20, 2023

Before Judges Gilson and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 15-12-1460.

Neil Law Practice, attorney for appellant (Durann Neil, Jr., on the briefs).

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

PER CURIAM

Defendant Tejay Johnson appeals from a November 15, 2021 order denying his "motion" for post-conviction relief (PCR) without an evidentiary hearing. On appeal, defendant reprises three of his arguments raised before the PCR judge:

POINT I

[DEFENDANT] WAS DENIED HIS SIXTH AMENDMENT RIGHT OF THE UNITED STATES CONSTITUTION TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL DUE TO COUNSEL'S FAILURE TO CONDUCT CERTAIN PRETRIAL MOTIONS.

POINT II

[DEFENDANT] WAS DENIED HIS SIXTH AMENDMENT RIGHT OF THE UNITED STATES CONSTITUTION TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL DUE TO COUNSEL'S FAILURE TO TIMELY ALERT THE COURT THAT [DEFENDANT] WANTED TO CHANGE HIS COUNSEL.

POINT III

[DEFENDANT] WAS DENIED HIS SIXTH AMENDMENT RIGHT OF THE UNITED STATES CONSTITUTION BECA[USE] DUE TO [TRIAL] COUNSEL'S INEFFECTIVE REPRESENTATION . . . DEFENDANT RECEIVED A SUBSTANTIALLY LONGER SENTENCE.

In his reply brief, defendant raises an additional point, which we renumber for the reader's convenience:

POINT [IV]

[DEFENDANT] WAS DENIED HIS SIXTH AMENDMENT RIGHT OF THE UNITED STATES CONSTITUTION TO THE EFFECTIVE ASSISTANCE OF [TRIAL] COUNSEL DUE TO COUNSEL'S FAILURE TO LITIGATE THE ALTERATION OF CONSENT FORM.

We reject the contentions raised in defendant's first, second, and third points. Because the argument raised in defendant's fourth point was not raised in defendant's merits brief, we decline to consider it. See, e.g., Borough of Berlin v. Remington & Vernick Eng'rs, 337 N.J. Super. 590, 596 (App. Div. 2001) ("Raising an issue for the first time in a reply brief is improper."); L.J. Zucca, Inc. v. Allen Bros. Wholesale Distribs. Inc., 434 N.J. Super. 60, 87 (App. Div. 2014) (determining that an argument raised for the first time in a reply brief is "deem[ed] . . . to have been waived"); State v. Smith, 55 N.J. 476, 488 (1970) (noting the impropriety of raising an "additional" issue in a reply brief). Accordingly, we affirm the order denying PCR.

I.

To give context to the PCR judge's decision, we summarize the pertinent facts and procedural history from the limited record provided on appeal. At some point, defendant was a member of the Rutgers University football team. In late April and early May of 2015, defendant and his cohorts committed a series of home invasion armed robberies on and off campus, targeting other students. In December 2015, defendant was charged in four Middlesex County indictments with various offenses stemming from the incidents.¹

After defendant could no longer afford his retained attorney, trial counsel was assigned to represent him. Trial counsel "filed several suppression motions related to the search warrant and consent to search [defendant]'s phone."² The trial court denied the motion and we denied defendant's ensuing motion for leave to appeal from the court's June 22, 2017 order.

The day before the January 3, 2018 trial date, trial counsel moved to be relieved as counsel. Prior to selecting a jury on January 3, trial counsel advised

¹ In his appellate appendix, defendant only provided one judgment of conviction (JOC). After his appendix was filed, defendant provided one indictment relating to a different JOC. The parties did not provide a copy of the plea agreement. We glean the terms of the plea agreement and defendant's sentence from the transcripts that he furnished at our request.

² The parties did not provide the court's order or the transcripts of the two-day testimonial hearing. We cite the PCR judge's references to the suppression motions and order.

the court that he filed the motion at defendant's request and noted "there has been a breakdown in communication." In response to the court's inquiry, defendant said he needed "a month" to retain the attorney he "had been communicating with." Referencing the communication problem between trial counsel and himself, defendant told the court he "tried to give it time," but he had not heard from trial counsel between the prior court hearing on November 16 and "last night to say we had court today."

Addressing defendant at length, the court cited the age of the case and its general assessment of the State's proofs, noting defendant was one of the "heavies" in the case. The court also stated it had not found credible defendant's testimony at the suppression motion.

Later the same day, defendant pled guilty to three counts each of second-degree conspiracy to commit armed robbery, first-degree armed robbery, and second-degree armed burglary regarding robberies that occurred on: (1) April 26, 2015 at a fraternity house on Prosper Street in New Brunswick; (2) April 27, 2015 at a residence on Hartwell Street in New Brunswick; and (3) May 4, 2015 at a residence hall in Piscataway. In exchange for defendant's guilty pleas and agreement to "truthfully testify," presumably against any remaining co-defendants, the State agreed to recommend an aggregate fifteen-year prison

sentence, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. The State also agreed to dismiss all remaining charges and Indictment No. 15-12-1463.

Defendant acknowledged if he failed to provide truthful testimony, the State's recommendation would increase to thirty years' imprisonment, subject to NERA. Defendant denied that anyone made any promises to him concerning his guilty plea, or that his attorney forced or threatened him to plead guilty. He confirmed he was satisfied with trial counsel's advice and had no questions concerning his guilty pleas.

On August 3, 2018, defendant was sentenced to an aggregate prison term of twelve years, subject to NERA. Defendant did not appeal from his convictions or sentence.

II.

On September 9, 2020, defendant moved for PCR. There is no indication in the record that defendant filed a verified petition in support of PCR as required under Rule 3:22-8. Instead, in his counseled brief, defendant challenged trial counsel's effectiveness, contending counsel failed to: file a motion to change venue; promptly move to be relieved as counsel; and file a

suppression motion asserting police altered the consent-to-search form. In a supplemental submission, PCR counsel raised a disparate sentencing argument.

Following argument, the PCR judge, who did not preside over the plea and sentencing proceedings, reserved decision and thereafter issued a well-reasoned written decision, denying all claims for relief. The judge thoroughly addressed the issues raised in view of the Strickland/Fritz³ framework. We summarize the judge's findings concerning the three issues reprised on appeal.

First addressing defendant's contention that counsel failed to file a motion for change of venue, the PCR judge found defendant could not overcome the "'strong presumption that counsel's conduct f[ell] within the wide range of reasonable professional assistance' and that the challenged action 'must be considered sound trial strategy.' Strickland, 466 U.S. at 689." Presuming trial counsel had "strategic reasons" for not moving to change venue, the judge noted, "The sens[ation]alized nature of the matter could have been to [defendant]'s benefit." Ultimately, the PCR judge found defendant failed to show "a reasonable probability that, but for counsel's failure to file a motion for change

³ Strickland v. Washington, 466 U.S. 668, 687 (1984) (recognizing to establish an ineffective assistance of counsel claim, a defendant must demonstrate: (1) "counsel's performance was deficient"; and (2) "the deficient performance prejudiced the defense"); State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the Strickland two-part test in New Jersey).

of venue, the result of the proceeding would have been different" under the second Strickland prong. See id. at 694.

The PCR judge also rejected defendant's second contention that trial counsel failed to timely advise the court that defendant wished to obtain a new attorney. Citing defendant's statements during argument on the motion, the PCR judge recognized there were communication issues between defendant and trial counsel. However, the judge found defendant failed to demonstrate "counsel's performance was deficient." The judge observed defendant failed to support his claim that trial counsel "inadequately investigated or prepared his case" with a supporting "certification as required by State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)."

The PCR judge nonetheless found defendant's contention was belied by the record. Quoting defendant's explanation to the trial court during oral argument, the PCR judge found notwithstanding defendant's "communication issues" with trial counsel, "he 'tried to give it some time . . . for communication to be better.'" Citing the trial transcript, the PCR judge noted defendant acknowledged he was satisfied with trial counsel. The PCR judge concluded there was no "reasonable probability that, but for trial counsel's purported errors,

the result of the proceedings would have been different." See Strickland, 466 U.S. at 689.

Nor was the PCR judge convinced by defendant's supplemental claim that "counsel's ineffective performance caused [defendant] to receive a substantially longer sentence than his co[-]defendants." The PCR judge found "trial counsel negotiated a resolution that provided for concurrent sentences on three indictments and the dismissal in its entirety of a fourth indictment." Referencing the State's aggregate fifteen-year custodial sentencing recommendation, the PCR judge further found trial counsel convinced the court to sentence defendant to an aggregate twelve-year prison term. The court also noted "the disposition of the other [d]efendants had not occurred at the time of [defendant's] sentencing," and one co-defendant received a similar term of incarceration on the same day as defendant's sentence. The judge concluded defendant failed to satisfy either Strickland prong.

Accordingly, the PCR judge denied defendant's motion for PCR. This appeal followed.

III.

Having considered defendant's contentions in view of the record and the governing law, we conclude they lack sufficient merit to warrant discussion in

a written opinion, R. 2:11-3(e)(2), beyond the brief remarks that follow. We affirm substantially for the reasons expressed by the PCR judge in her cogent written decision.

At the outset, defendant's "motion" for PCR failed to comply with the mandates of Rule 3:22-8 (providing a PCR petition "shall be verified by defendant and shall set forth with specificity the facts upon which the claim for relief is based, the legal grounds of complaint asserted, and the particular relief sought"). Moreover, it is well established that a claim of ineffective assistance must rest on more than "bald assertions." State v. Jones, 219 N.J. 298, 311-12 (2014) (quoting State v. Porter, 216 N.J. 343, 355 (2013)); see also R. 1:6-6 (requiring "affidavits made on personal knowledge" when a "motion is based on facts not appearing of record, or not judicially noticeable"). Because defendant's PCR application was wholly unsupported, we discern no reason to disturb the judge's decision denying relief.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION