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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2091-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALI SADDIE MORGANO,

Defendant-Appellant.

Submitted January 30, 2023 — Decided February 7, 2023

Before Judges Mawla and Smith.

On appeal from the Superior Court of New Jersey, Law
Division, Essex County, Indictment No. 88-10-3334.

Ali Saddle Morgano, appellant pro se.

Theodore N. Stephens II, Acting Essex County
Prosecutor, attorney for respondent (Stephen A.
Pogany, Special Deputy Attorney General/Acting
Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Ali Saddia Morgano appeals from an October 29, 2019 order denying his motion for custodial change, a February 27, 2020 order denying assignment of counsel for his tenth post-conviction relief (PCR) petition, and a December 9, 2020 order denying successive motions for reconsideration. We affirm.

The underlying facts were detailed in the motion judge's written opinion accompanying the February 2020 order. To summarize, in 1989, a jury found defendant guilty of: second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2 (count one); first-degree armed robbery, N.J.S.A. 2C:15-1 (count two); felony murder, N.J.S.A. 2C:11-3(a) (count three); murder, N.J.S.A. 2C:11-3(a)(1) and (2) (count four); unlawful possession of weapon, N.J.S.A. 2C:29-5(b) (count five); and possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count six). At sentencing, the court merged count one into two and count two into three. Defendant received an aggregate sentence of life imprisonment with a thirty-year period of parole ineligibility.

In 2018, defendant filed a PCR petition, a motion to correct an illegal sentence, and a motion for custodial change. The parties consented to the relief sought in the illegal sentence motion, namely, to merge counts three and four, and the judge amended the judgment of conviction accordingly.

Defendant was assigned counsel who prosecuted the custodial change motion on his behalf. Counsel argued for a custodial change on grounds defendant was suffering from addiction at the time he committed his offenses. Citing State v. McKinney¹ the judge rejected defendant's claims noting while he participated in several programs in prison, none involved substance abuse treatment. She further noted there was no mention of substance abuse in defendant's presentence report. The motion for a custodial change was denied on October 29, 2019.

In December 2019, defendant filed a pro se motion for reconsideration and alleged assigned counsel was ineffective for failing to adduce evidence of defendant's alleged alcohol addiction at the time of his offenses on the motion for a custodial change. He attached affidavits from Eric and Qadir Pugsley, which discussed defendant's alcohol and drug use in the 1980s.

Defendant also claimed counsel failed to raise mitigating factors, which could have resulted in a resentencing to a lesser sentence. Defendant's second reconsideration motion pointed to the then recently passed mitigating factor, N.J.S.A. 2C:44-1(b)(14), requiring a sentencing court to consider a defendant's youth.

¹ 140 N.J. Super. 160, 163 (App. Div. 1976).

The judge adjudicated the ineffective assistance of counsel claims under the two-prong Strickland² standard. She concluded counsel was not ineffective because defendant provided no evidence of addiction, failed to certify to facts showing counsel was ineffective, and the allegation of addiction was a bald assertion. Therefore, counsel had no obligation to investigate a claim for which there was no factual basis. She again found defendant had completed no rehabilitation programs and the pre-sentence report contained no evidence of any substance abuse problems. The judge also rejected the argument counsel was ineffective for failing to argue mitigating factors because the motion was for a custodial change, not a resentencing. She concluded there was "no reasonable probability that the results of the proceeding would be different and . . . [d]efendant's [m]otion for [c]ustodial [c]hange would have been granted."

The judge concluded defendant's claims lacked merit and the court would not appoint him counsel for the PCR petition. The February 27, 2020 and December 9, 2020 orders memorialized her decisions.

Defendant raises the following points on appeal:

POINT ONE

² Strickland v. Washington, 466 U.S. 668 (1984), adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987).

DEFENDANT CONTENDS THAT COUNSEL PERFORMANCE WAS INEFFECTIVE FAILING TO INVESTIGATE WITNESSES AND OBTAIN AFFIDAVITS TO CORROBORATE DEFENDANT['S] DRUG AND ALCOHOL ADDICTIONS FOR CUSTODIAL CHANGE HEARING WARRANT A RE-HEARING, BECAUSE DEFENDANT'S DUE PROCESS RIGHTS TO PRESENT EVIDENCE WAS VIOLATED.

POINT TWO

DEFENDANT CONTENDS THAT COUNSEL WAS INEFFECTIVE [FOR] FAILING TO PRESENT EVIDENCE OF THE DEFENDANT'S MITIGATING FACTORS AT THE HEARING IN CORRECTING AN ILLEGAL SENTENCE VIOLATED HIS DUE PROCESS RIGHTS.

An appellate court "defer[s] to the PCR court's factual findings" and "uphold[s] . . . findings that are supported by sufficient credible evidence in the record." State v. Gideon, 244 N.J. 538, 551 (2021) (quoting State v. Nash, 212 N.J. 518, 540 (2013)). However, a PCR court's interpretation of the law is reviewed de novo. Nash, 212 N.J. at 540-41.

We review the denial of a motion for reconsideration for an abuse of discretion. State v. Puryear, 441 N.J. Super. 280, 294 (App. Div. 2015). "Reconsideration is not to be granted lightly and the grounds for reconsideration are generally limited. The proper object of reconsideration is to correct a court's

error or oversight." Ibid. (citing Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010)).

A defendant may file a motion "changing a custodial sentence to permit entry of the defendant into a custodial or non-custodial treatment or rehabilitation program for drug or alcohol abuse" R. 3:21-10(b)(1). The motion must be "accompanied by supporting affidavits and such other documents and papers [which] set forth the basis for the relief sought. A hearing need not be conducted . . . unless the court . . . concludes that a hearing is required in the interest of justice." R. 3:21-10(c).

The burden rests with a defendant to establish they are an appropriate candidate for relief under Rule 3:21-10(b). McKinney, 140 N.J. Super. at 163. They must show they suffer from a "present addiction." See State v. Davis, 68 N.J. 69, 84-86 (1975). They must also demonstrate they have "taken advantage of the prison drug-therapy programs." State v. Le, 354 N.J. Super. 91, 94 (Law Div. 2002). "[T]he trial court must find that a change in custody would be in the best interests of society." Ibid.

Pursuant to these principles, we affirm substantially for the reasons expressed by the motion judge. We add the following comments.

The affidavits defendant provided from the Pugsleys discussed defendant's past substance abuse. The record is devoid of any evidence he presently suffers from alcohol and drug addiction. The prison reports, which are part of the appellate record, show no participation in a drug-treatment program. Defendant argues he tried enrolling in an Alcohol Anonymous program but provided no proof for his attempts to do so.

Defendant also claims he was too "ashamed" to discuss his drug use in the 1980s. He claims he continued to use narcotics while in prison. To demonstrate his addiction, defendant notes he was convicted of manufacturing, distributing, or dispensing controlled dangerous substances, N.J.S.A. 2C:35-5, in May 1990. However, this conviction militates against his arguments because it does not evince personal substance abuse and instead demonstrates a change in custody would not be "in the best interests of society." Ibid. For these reasons, the motion judge's denial of custodial change and her finding counsel was not ineffective did not constitute an abuse of discretion.

Finally, our Supreme Court recently held N.J.S.A. 2C:44-1(b)(14) does not apply retroactively, except in cases where a defendant's sentence is on appeal and has been remanded for resentencing. See State v. Lane, 251 N.J. 84, 97 n.3 (2022). That is not the case here because defendant's judgment of conviction

was merely amended to correct an illegality. Even if N.J.S.A. 2C:44-1(b)(14) applied here, the sentencing record reveals the court took defendant's age into consideration at that time. Indeed, the sentencing judge stated:

I see one mitigating factor although I don't find it to be a strong mitigating factor. I think [defendant]'s age of [twenty-two] would hopefully lead me to believe that he perhaps could be rehabilitated. Again, that's a very weak mitigating factor. I'm clearly convinced in any event the aggravating factors substantially outweigh the one mitigating factor that exists in this case

For these reasons, the motion judge did not abuse her discretion and appropriately denied reconsideration.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION