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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3112-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARIQ C. ERNEST,
a/k/a MARIZ ERNEST,
and MARIO ERNEST,

Defendant-Appellant.

Submitted May 1, 2023 – Decided August 11, 2023

Before Judges Whipple and Smith.

On appeal from the Superior Court of New Jersey,
Law Division, Camden County, Indictment No. 19-03-
0588.

Joseph E. Krakora, Public Defender, attorney for
appellant (Abby P. Schwartz, Designated Counsel, on
the brief).

Grace C. MacAulay, Camden County Prosecutor,
attorney for respondent (Natalie A. Schmid
Drummond, Assistant Prosecutor, of counsel and on
the brief).

PER CURIAM

Defendant Mariq C. Ernest appeals from an order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm in part but vacate the sentence and remand for re-sentencing for the reasons set forth below.

I.

We glean the following facts from the record. On October 3, 2018, police were dispatched to Cooper Hospital where a gunshot victim had been dropped off. The police located a witness who provided a statement. The police learned the witness saw defendant exit a vehicle parked in front of a residence. Defendant then engaged in a physical altercation with a man who was standing with a group of people at the scene. Witnesses observed defendant with a gun in his hand during the confrontation. During the struggle, the man was shot in the leg. Defendant returned to the car and left the area. Commercial video surveillance cameras in the area recorded portions of the incident and their contents were eventually retrieved by police investigators.

On March 13, 2019, defendant was charged with: first-degree attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3(a)(1); first-degree conspiracy to

commit murder, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:11-3(a)(1); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(4); two counts of second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); fourth-degree tampering with or fabricating physical evidence, N.J.S.A. 2C:28-6(1); third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1); third-degree possession of a CDS within 1000 feet of a school with intent to distribute, N.J.S.A. 2C:35-7(a); third-degree possession of a CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3); second-degree possession of a weapon while committing a certain crime, N.J.S.A. 2C:39-4.1; fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a)(2); and two counts of second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b)(1).

Less than two weeks later, a grand jury charged defendant with: third-degree possession of a CDS, N.J.S.A. 2C:35-10(a)(1); and two counts third-degree possession of a CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3).

On June 6, 2019, defendant pled guilty to one count of second-degree certain persons not to have weapons, and one count of third-degree conspiracy

to possess a CDS with intent to distribute. At the plea colloquy, defendant denied being threatened or coerced to plead guilty and stated that his plea was voluntary. Defendant also stated to the court that he was satisfied with the advice and services of trial counsel. Next, defendant admitted to his crimes, acknowledging that he agreed with others to possess heroin with the intent to distribute it. He also admitted that he possessed a handgun, even though he was disqualified from doing so because of his prior criminal record.

On July 29, 2019, in accordance with the plea agreement, the sentencing court imposed two consecutive five-year terms in state prison on defendant. On the certain persons conviction, defendant was sentenced to a five-year term of incarceration subject to a five-year period of parole ineligibility. On the conspiracy conviction, defendant was sentenced to a five-year term of incarceration, subject to an eighteen-month period of parole ineligibility. At the time of the sentencing, defendant raised no objections. Although the court performed an aggravating and mitigating factor analysis, it made no Yarborough¹ findings.

Defendant did not file a direct appeal. However, on November 13, 2019, he filed a pro se petition for PCR. Over ten months later, appointed counsel

¹ State v. Yarborough, 100 N.J. 627 (1985)

filed an amended petition on September 25, 2020. In his PCR petition, defendant alleged trial counsel was ineffective for not filing a Wade² motion prior to his guilty plea and for failing to argue against the imposition of consecutive sentences.

The PCR court denied the petition without a hearing. In its written statement of reasons, the court found the petition was in part procedurally barred by Rule 3:22-4(a), since defendant could have raised his excessive sentence argument via direct appeal.

Having concluded the petition was at least partially procedurally barred, the court nonetheless addressed the merits of the ineffective assistance of counsel claims in its written statement of reasons. The court found defendant failed to submit any evidence related to witness identification of the defendant which would have led to a successful Wade hearing. The court stated, "[t]here is no description of facts to demonstrate that the identification of defendant was inherently suggestive, and there is no evidence of which variables—system, estimator, or both—defendant claims could have led to a mistaken identification."

² United States v. Wade, 388 U.S. 218 (1967).

As to the failure of trial counsel to argue for a concurrent sentence, the PCR court first noted that this claim should have been brought by defendant on direct appeal. Evaluating the claim on the merits, the court noted the sentencing court failed to conduct an analysis pursuant to State v. Yarborough. The PCR court then conducted the Yarborough analysis³ itself, concluding

³ The Supreme Court in Yarbough directed sentencing courts to consider the following:

- (1) there can be no free crimes in a system for which the punishment shall fit the crime;
- (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
- (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:
 - (a) the crimes and their objectives were predominantly independent of each other;
 - (b) the crimes involved separate acts of violence or threats of violence;
 - (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
 - (d) any of the crimes involved multiple victims;

consecutive sentences were warranted. The court rejected the ineffective assistance of counsel claim, finding that if there was ineffectiveness of counsel on this issue, defendant could not show he was prejudiced by it.

Defendant appealed and filed a motion to supplement the record before us. He sought inclusion in the record of a probable cause affidavit and supplemental offense report which he did not attach to his PCR petition. We remanded to the PCR court for consideration. The PCR court denied the motion, finding the affidavit and police report defendant sought to include in the record "would not affect the outcome of defendant's PCR petition, because

(continued)

(e) the convictions for which the sentences are to be imposed are numerous;

(4) there should be no double counting of aggravating factors;

(5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense; and

(6) there should be an overall outer limit on the cumulation of consecutive sentences for multiple offenses not to exceed the sum of the longest terms (including an extended term, if eligible) that could be imposed for the two most serious offenses.

[Yarborough, 100 N.J. at 643-44].

defendant [could] not establish that his motion for a Wade hearing would have been successful." On appeal, defendant argues the following points:

POINT I

COUNSEL FOR DEFENDANT WAS INEFFECTIVE AS SHE FAILED TO FILE A MOTION TO CONTEST THE IDENTIFICATION OF DEFENDANT (A WADE HEARING) AND THE TRIAL COURT ON REMAND[] FAILED TO ADDRESS TO ADDRESS THE ISSUES, DENYING DEFENDANT DUE PROCESS AND A FAIR TRIAL

POINT II

COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE FOR CONCURRENT SENTENCES

II.

We use a de novo standard of review when a PCR court does not conduct an evidentiary hearing. State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016) (citing State v. Harris, 181 N.J. 391, 421 (2004)). When petitioning for PCR, a defendant must establish he is entitled to "PCR by a preponderance of the evidence." State v. O'Donnell, 435 N.J. Super. 351, 370 (App. Div. 2014) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)).

We analyze ineffective assistance of counsel claims using the two-prong test established by the Supreme Court in Strickland. See Preciose, 129 N.J. at 463; see also State v. Fritz, 105 N.J. 42, 58 (1987). The first prong of the

Strickland test requires a defendant to establish counsel's performance was deficient. Preciose, 129 N.J. at 463. "The second, and far more difficult, prong . . . is whether there exists 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 463-64 (quoting Strickland, 466 U.S. at 694).

There exists a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Further, because prejudice is not presumed, "defendant must demonstrate 'how specific errors by counsel undermined the reliability' of the proceeding." State v. Drisco, 355 N.J. Super. 283, 289-90 (App. Div. 2002) (quoting United States v. Cronin, 466 U.S. 648, 659 n.26 (1984)).

III.

Defendant first argues trial counsel was ineffective for failing to move for a Wade hearing, and that the court erred in failing to grant the motion to supplement the record so he could introduce the police affidavit as evidence necessitating a Wade hearing. We address the motion to supplement first.

An appellate court reviews a trial court's decision to grant or deny a motion to supplement the record for abuse of discretion. See Musto v. Vidas,

333 N.J. Super. 52, 69 (App. Div. 2000). "A court abuses its discretion when its 'decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. Chavies, 247 N.J. 245, 257 (2021) (quoting State v. R.Y., 242 N.J. 48, 65 (2020)).

In deciding a motion to supplement the record, the court must consider two factors: "(1) whether at the time of the hearing or trial, the applicant knew of the information he or she now seeks to include in the record, and (2) if the evidence were included, whether it is likely to affect the outcome." Liberty Surplus, 189 N.J. at 452-53 (citing In re Gastman, 147 N.J. Super. 101, 114 (App. Div. 1977)).

Addressing the motion, the PCR court found defendant did not know of the affidavit at the time of the PCR hearing. The court next found that inclusion of the affidavit and report in the record would not have affected the outcome. Making findings, the court reviewed the proffered affidavit and report, which contained a written summary of extracted video surveillance cameras from near the scene and a report of the witness's recorded video statement. The court found that the surveillance report corroborated the witness's statement. Examining the witness's statement, the court concluded it was a confirmatory identification not requiring a Wade hearing. State v.

Pressley, 232 N.J. 587, 592-93 (2018). We find no abuse of discretion in the court's denial of the motion to supplement the record. State v. Sanchez, 247 N.J. 450, 457 (2021).

Turning to defendant's PCR merits claim that trial counsel erred by not moving for a Wade hearing, we agree with the trial court's finding that the witness identification at issue was confirmatory. A Wade motion would have been denied if trial counsel had made such a motion. In any event, we find nothing in the record, with or without the affidavit and police report, to show defendant met his burden of bringing "some evidence of suggestiveness" to show he is entitled to a Wade hearing. State v. Henderson, 208 N.J. 208, 288 (2011). Without it, defendant cannot show trial counsel's performance was deficient under the first prong of Strickland. 129 N.J. at 463.

Defendant's final point on appeal is that trial counsel was ineffective for failing to argue against a consecutive sentence. However, his actual substantive argument is that the trial court erred in failing to address Yarbrough factors when it imposed consecutive sentences. While the PCR court found this claim barred by Rule 3:22-4(a), it addressed the factors in its written statement of reasons accompanying its order denying defendant's PCR.

Rule 3:22-4(a)(2) states:

Any ground for relief not raised in the proceedings resulting in the conviction . . . or in any appeal taken in any such proceedings is barred from assertion in a proceeding under this rule unless the court on motion or at the hearing finds:

(2) that enforcement of the bar to preclude claims, including one for ineffective assistance of counsel, would result in fundamental injustice

We find it appropriate to consider defendant's Yarborough argument as to his sentencing, an argument normally heard on direct appeal, because the trial court's oversight regarding the Yarborough factors at sentencing, independent of trial counsel's failure to object to this omission, warrants our review in the interests of justice. R. 2:10-2. Enforcement of the PCR procedural bar here would result in a fundamental injustice to defendant.

The PCR court's Yarborough analysis, conducted after a non-evidentiary PCR hearing, is insufficient. Our court rules require defendant to be present "at every stage of the trial, including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, unless otherwise provided by Rule." R. 3:16(b). The PCR court's conduct of the Yarborough analysis in the defendant's absence, while an understandable effort to correct the oversight of the sentencing court, violates defendant's Fourteenth Amendment due process right to be present at trial, in addition to triggering the Rule. See State v.

Whaley, 168 N.J. 94, 99 (2001). We do not reach the question of whether trial counsel's failure to object at sentencing constituted ineffective assistance of counsel, because we find the sentencing court's omission of the Yarborough analysis was plain error.

Mindful that defendant must be sentenced as he stands before the court on the day of sentencing, State v. Jaffe, 220 N.J. 114, 124 (2014), we vacate defendant's sentence and remand for sentencing consistent with the principles outlined in Yarborough. See State v. Torres, 246 N.J. 246 (2021).

Affirmed in part, sentence vacated, and remanded in part for resentencing.

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



CLERK OF THE APPELLATE DIVISION