SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0981-22

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ELEX HYMAN,

Defendant-Appellant.

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Submitted April 30, 2024 – Decided May 23, 2024

Before Judges Sumners and Torregrossa-O'Connor.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 09-06-1015.

Jennifer Nicole Sellitti, Public Defender, attorney for appellant (Abby P. Schwartz, Designated Counsel, on the brief).

Bradley D. Billhimer, Ocean County Prosecutor, attorney for respondent (Samuel Marzarella, Chief Appellate Attorney, of counsel; Shiraz Deen, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Elex Hyman appeals the July 28, 2022 decision denying without an evidentiary hearing his petition for post-conviction relief (PCR). The PCR judge found defendant did not demonstrate trial counsel's ineffectiveness for failing to raise certain challenges to the grand jury presentation or his appellate counsel's error in failing to include this claim on direct appeal. We have carefully considered defendant's arguments, and we affirm.

I.

A.

We derive the following facts and procedural history from the record and from our prior opinion denying defendant's direct appeal of his conviction after his open-ended guilty plea to second-degree conspiracy to possess cocaine with intent to distribute, N.J.S.A. 2C:35-5(a) to (b)(1) and N.J.S.A. 2C:5-2. See State v. Hyman, No. A-3869-15 (App. Div. May 11, 2018), certif. denied, 236 N.J. 50 (2018). In April 2008, the Ocean County Prosecutor's Office investigated a "narcotics-distribution network led by [Alex] Gantt" involving defendant and other individuals. Hyman, slip op. at 2. A wiretap intercepted telephone calls between Gantt and different individuals, including the conversation between defendant and Gantt at issue on this appeal. Ibid. Detectives learned that on May 5, 2008, Gantt and another individual "transporting a large quantity of

cocaine" would be traveling separately to Gantt's home. Ibid. The officers then detained Gantt and others at the scene and "seized more than 900 grams of cocaine, currency[,] and drug paraphernalia from Gantt's house and garage." Id. at 2-3. Although "not present at Gantt's home," defendant "was later arrested on a warrant issued pursuant to intercepted conversations with Gantt between April and May . . . 2008." Id. at 3.

B.

The State presented the case against defendant and thirteen others to the grand jury in one presentation on June 3, 2009 through the testimony of sole witness Lakewood Police Patrolman Leroy Marshall. Marshall described his experience investigating cases concerning narcotics distribution, having participated in "well over 250 [cases]" involving cocaine, making him familiar with "the terminology used by sellers and buyers of narcotics," as well as "the language . . . used by persons . . . involved in the possession and/or distribution of narcotics." Marshall also testified that he became familiar with "the pedigree and voice[]" of defendant over the course of his investigation. Throughout the presentation, the State played recordings of various wiretap-intercepted conversations and asked Marshall to utilize his experience to describe the meaning of certain phrases and terminology.

Pertinent to defendant, the State played the following April 28, 2008 conversation between Gantt and defendant:

> GANTT: What it do my n[****]?
>
> DEFENDANT: Yo my dude.
>
> GANTT: Aight. Aight.
>
> DEFENDANT: Yo um. Yo tell me you got the six my dude?
>
> GANTT: Huh?
>
> DEFENDANT: Tell me you got the six.
>
> GANTT: Yea. Yea.
>
> GANTT: Yeah I got that six, six.
>
> DEFENDANT: Yo I got the um. I got the (stuttering). I got the five[-]fifty right now in hand.
>
> GANTT: Got you.
>
> DEFENDANT: Word up.
>
> GANTT: Aight be right there.
>
> DEFENDANT: Aight that's what it do.
>
> GANTT: For sure.
>
> DEFENDANT: One.

When asked to interpret the conversation, Marshall explained:

> [Defendant] is inquiring whether Gantt . . . can supply him with 600 grams of cocaine. He goes on to say that he has the 550 in hand, which I believe is money to purchase 550 grams. Gantt confirms it and goes into agreement that he would supply [defendant] with 600 grams although he's only receiving the money for 550.

That same day, the grand jury returned an indictment charging defendant with one count of "second-degree conspiracy to manufacture, distribute and/or possess with the intent to distribute a [c]ontrolled [d]angerous [s]ubstance," N.J.S.A. 2C:35-5(a) to (b)(1) and N.J.S.A. 2C:5-2.

Defendant engaged in pretrial motion practice, including two separate motions to dismiss. The trial court denied the first motion to dismiss filed by his codefendant and joined by defendant, finding the indictment was not "palpably defective" and "allege[d] the essential facts of the crime." The trial court denied defendant's second motion to dismiss, determining that "the indictment charge[d] defendant with the commission of a crime in reasonably understandable language setting forth all of the critical facts and each of the essential elements that constitute[d] the offense alleged." The court also found sufficient evidence to support the indictment, which "adequately identifie[d] and explain[ed] the criminal offense" for defendant to "prepare a defense."

Defendant ultimately entered an open guilty plea on January 26, 2016, preserving his right to appeal only the trial court's decisions regarding the

motions to suppress. R. 3:5-7(d). His written plea form, which he affirmed on the record, provided that the sentencing "[c]ourt will highly consider [a] [five] year[] . . . flat [prison term] concurrent to defendant's sentence he is now serving in state prison."[1] Defendant circled "yes" in response to the question of whether he understood he was "waiving [his] right to appeal the denial of all other pretrial motions . . . ." In April 2016, the trial court sentenced defendant in accordance with its earlier indications. As noted, we denied defendant's direct appeal in which he challenged the denial of his motions to suppress. Hyman, slip op. at 7-8.

C.

In March 2021, defendant filed a self-represented PCR petition arguing: "illegal [wiretapping]"; "ineffective assistance of counsel"; and "[t]he plea [was] unconstitutional." On March 14, 2022, PCR counsel filed a supplemental submission, alleging that defendant's trial and appellate counsels rendered ineffective assistance by failing to argue that Marshall's grand jury testimony constituted improper expert and hearsay testimony. Defendant urged that his arguments should not be barred by "procedural considerations" and his claims

[1] The presentence report indicates that defendant commenced a fourteen-year prison sentence with six years' parole ineligibility on August 2, 2013.

warranted PCR relief or, alternatively, an evidentiary hearing. The State countered that Rule 3:22-4 and Rule 3:22-5 barred PCR relief, as defendant failed to raise these claims in his direct appeal, and the trial court found the indictment was not "palpably defective" or "manifestly deficient."

On July 28, 2022, following argument, the PCR judge by order and accompanying written decision denied the PCR petition without a hearing, applying the two-prong test of Strickland v. Washington, 466 U.S. 668, 687 (1984). The judge first determined that neither Rule 3:22-4 nor Rule 3:22-5 barred defendant's arguments. The judge rejected defendant's claims, finding that controlling case law demonstrated that "rules of evidence d[id] not apply to grand jury proceedings." The judge further found defendant failed to meet his burden to show counsel's deficient performance as defendant "failed to cite to any rule or caselaw which stands for the proposition a witness at a grand jury presentment may not rely on a mixture of fact and opinion testimony." As such, the judge found that under State v. Worlock, 117 N.J. 596, 625 (1990), plea counsel was not ineffective for not raising unsuccessful legal arguments. Similarly, the judge found appellate counsel did not render ineffective assistance "for failing to raise a meritless claim on appeal." The judge concluded that defendant "failed to demonstrate counsel[s]' performance fell below an objective

standard expected of criminal defense attorneys" or otherwise show "specific facts" demonstrating prejudice from "counsel[s]' alleged[ly] deficient performance." The judge also found that "defendant . . . waived the right to challenge the denial of plea counsel's motion to dismiss the indictment" citing to defendant's guilty plea and express acknowledgment of that waiver in the plea form. This appeal followed.

II.

Defendant raises the following arguments:

> DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS LAWYER FAILED TO IDENTIFY THE ISSUES INHERENT IN THE MOTION TO DISMISS THE INDICTMENT, THEREBY DEPRIVING HIM OF THE EFFECTIVE ASSISTANCE OF COUNSEL.
>
> > A. There Was Insufficient Evidence To Indict Defendant For Conspiracy To Distribute Or Possess With The Intent To Distribute Cocaine.
> >
> > B. Marshall's Testimony Was That Of An Expert Witness And He Testified As To The Ultimate Issue Rather Than Allow The Grand Jury To Decide.

Defendant alleges that the PCR judge erred in finding Marshall's hearsay testimony sufficient to sustain the charge that defendant conspired or reached an "agreement" with Gantt. Defendant further asserts the judge should have

granted PCR relief because Marshall's testimony amounted to improper expert testimony regarding the ultimate issue of fact that usurped the role of the grand jury.

The State contends that the PCR judge correctly denied relief as Marshall's testimony regarding his interpretation of slang drug distribution language was permissible, and the evidence was sufficient to sustain the charge. The State further argues that no prejudice resulted here as defendant made no showing to dispute the State's ability to simply re-present to the grand jury and obtain another indictment had the original indictment been dismissed. As such, neither trial nor appellate counsel was ineffective for failing to raise these arguments in prior proceedings.

III.

We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004). In the absence of an evidentiary hearing, we may review without deference "both the factual findings and legal conclusions of the PCR court." Id. at 421.

New Jersey's PCR petition serves as an "analogue to the federal writ of habeas corpus." State v. Preciose, 129 N.J. 451, 459 (1992). "[N]either a substitute for direct appeal" for those criminally convicted nor a vehicle to re-

litigate matters already resolved on their merits, PRC proceedings can offer the best opportunity for ineffective assistance claims to be reviewed. Id. at 459-60.

The United States Supreme Court in Strickland, 466 U.S. at 687, established a two-part test to determine whether a defendant has been deprived of the effective assistance of counsel, which the New Jersey Supreme Court adopted in State v. Fritz, 105 N.J. 42, 58 (1987), under New Jersey's Constitution. Failure to establish either prong requires the denial of a PCR petition founded on an ineffective assistance of counsel claim. Strickland, 466 U.S. at 700. To satisfy the first prong, defendant must demonstrate counsel's performance was deficient and "fell below an objective standard of reasonableness" and "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687-88. Defendants "must allege specific facts and evidence supporting [their] allegations." State v. Porter, 216 N.J. 343, 355 (2013). "Bald assertions" will not suffice. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). Further, reviewing courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and "the defendant must overcome the presumption that, under the circumstances, the challenged action [by counsel] 'might be considered sound trial strategy.'"

Strickland, 466 U.S. at 689 (citing Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

Under Strickland's second prong, a defendant must "affirmatively prove" "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." State v. Gideon, 244 N.J. 538, 551 (2021) (quoting Strickland, 466 U.S. at 694). To show sufficient prejudice when a conviction results from a guilty plea, defendant must show a "reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial," State v. Nunez-Valdez, 200 N.J. 129, 139 (2009) (alteration in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)); see also State v. Gaitan, 209 N.J. 339, 351 (2012), and that "a decision to reject the plea bargain would have been rational under the circumstances," Padilla v. Kentucky, 559 U.S. 356, 372 (2010).

An evidentiary hearing need not be granted simply upon request for PCR relief, see Cummings, 321 N.J. Super. at 170; however, a hearing may be warranted if a defendant demonstrates its necessity to develop a sufficient factual record, see Preciose, 129 N.J. at 462-63. Evidentiary hearings are

> required only when: (1) the defendant establishes a prima facie case in support of PCR; (2) the court determines that there are disputed issues of material fact that cannot be resolved by review of the existing

> record; and (3) the court determines that an evidentiary hearing is required to resolve the claims asserted.
>
> [State v. Vanness, 474 N.J. Super. 609, 623 (App. Div. 2023) (citing Porter, 216 N.J. at 354).]

Against this well-settled legal backdrop, we consider defendant's claims.

IV.

Initially, although not addressed specifically by the parties on appeal, we note that the PCR judge correctly found that defendant, by entering a plea of guilty that was accepted by the trial court as knowing, intelligent, and voluntary, waived his right to appeal any pretrial motions other than his motions to suppress. See State v. Knight, 183 N.J. 449, 470 (2005). In question four of defendant's plea form, which defendant swore he reviewed, understood, and voluntarily signed, defendant waived his "right to appeal the denial of all other pretrial motions" without exception. "[A] guilty plea constitutes a waiver of all issues which . . . could have been addressed . . . before the guilty plea." State v. Robinson, 224 N.J. Super. 495, 498 (App. Div. 1988). "Generally, a defendant who pleads guilty is prohibited from raising, on appeal, the contention that the State violated his constitutional rights prior to the plea." Knight, 183 N.J. at 470 (quoting State v. Crawley, 149 N.J. 310, 316 (1997)). This waiver applies to constitutional defects in the investigation and the proceedings themselves.

Pressler & Verniero, Current N.J. Court Rules, cmt. 2. on R. 3:9-2 (2023). Although we will not enforce waiver in very limited situations where strict adherence would result in an injustice, State v. J.M., 182 N.J. 402, 410 (2005), like the PCR judge, we discern no grounds for the relaxation of the rule here.[2]

Nevertheless, we recognize that the State responded substantively to defendant's appeal, so we address the ineffective assistance claim and conclude that defendant has established neither error nor resulting prejudice. As such, defendant failed to satisfy either Strickland prong with respect to both trial and appellate counsel.

First, we find that defendant did not make a sufficient showing that by failing to raise this argument during the two motions to dismiss trial counsel "fell below an objective standard of reasonableness" and "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687-88. The standard to dismiss an indictment is formidable as "[a]n indictment is presumed valid[,]" State v.

[2] We note that although the plea was open ended, the trial court gave indications that it would strongly consider a sentence to the minimum flat five-year term of incarceration for the offense concurrent to the fourteen-year sentence defendant was currently serving. Appealing the motion to dismiss and seeking to vacate the conviction risked disturbing the court's adherence to those indications should a resentencing ultimately occur on a new conviction.

Feliciano, 224 N.J. 351, 380 (2016), and "should be disturbed only on the 'clearest and plainest ground,' and only when the indictment is manifestly deficient or palpably defective," State v. Hogan, 144 N.J. 216, 228-29 (1996) (quoting State v. Perry, 124 N.J. 128, 168 (1991)). Thus, "[a]s long as the State presents 'some evidence establishing each element of the crime to make out a prima facie case,' a trial court should not dismiss an indictment." Feliciano, 224 N.J. at 380 (quoting State v. Saavedra, 222 N.J. 39, 57 (2015)).

The grand jury is "an accusatory and not an adjudicative body." State v. Bell, 241 N.J. 552, 559 (2020) (quoting Hogan, 144 N.J. at 235). Its "role is not to weigh evidence presented by each party, but rather to investigate potential defendants and decide whether a criminal proceeding should be commenced." State v. Campione, 462 N.J. Super. 466, 498 (App. Div. 2020) (quoting Hogan, 144 N.J. at 235). In its role as independent investigative body, "the grand jury was intended to be more than a rubber stamp of the prosecutor's office." Hogan, 144 N.J. at 236.

Expert testimony and hearsay are both permissible forms of proof in grand jury proceedings where the rules of evidence do not apply. See State v. Tucker, 473 N.J. Super. 329, 348 (App. Div. 2022). Nevertheless, we recognize "an expert witness may not opine on the defendant's state of mind" in a drug case to

give an opinion on the ultimate issue of fact—whether defendant had the intent to distribute. Id. at 345 (quoting State v. Cain, 224 N.J. 410, 429 (2016)). As this court held in an earlier case involving defendant, expert opinion is permissible to assist in interpreting "drug slang or code words [that] remain beyond the average juror's understanding." State v. Hyman, 451 N.J. Super. 429, 446 (App. Div. 2017); see also State v. Nesbitt, 185 N.J. 504, 521 (2006) (Albin, J., dissenting) (stating that "[a]n average juror will not know the meaning of code language used by drug distributors," and an expert's testimony may serve to enlighten the jury on such "arcane subjects").

Consequently, as to the first prong of Strickland, we are not persuaded that trial counsel's failure to contest Marshall's testimony explaining defendant's purportedly coded drug conversation with Gantt was error. Although the officer presented his interpretations of the language, the intercepted call itself was also presented, giving the grand jury the ability to independently hear and assess its meaning within the context of the greater presentation. While we recognize that Marshall provided expert testimony from his experience in cocaine-related drug investigations in an unnecessarily cursory fashion, Marshall did not testify as to the ultimate issue of whether defendant conspired to possess with intent to distribute. Instead, he offered his understanding of the language used in the

exchange, which he characterized as agreeing upon a particular price for a specific quantity of cocaine.

Regardless, even if we were to conclude that Marshall's testimony rendered an impermissible opinion, defendant has not established the prejudice required under Strickland's "second, and far more difficult . . . prong . . . ." Gideon, 244 N.J. at 550. Defendant has failed to make an affirmative showing that it was reasonably probable that dismissal of the first indictment would have ended the case with finality or prevented its re-presentation of the case to the grand jury when all indications were to the contrary. The indictment had been twice challenged for its sufficiency, and twice those challenges were denied. An evidentiary hearing, therefore, would be immaterial to this calculus and to the conclusion we reach easily under prong two of Strickland.

Affirmed.