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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2643-22**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GARY JONES, a/k/a
GARY W. JONES,

Defendant-Appellant.

Argued June 3, 2024 – Decided June 20, 2024

Before Judges Gilson and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment Nos. 17-04-0304 and 17-04-0305.

Michael Confusione argued the cause for appellant (Hegge & Confusione, LLC, attorneys; Michael Confusione, of counsel and on the briefs).

Michele C. Buckley, Assistant Prosecutor, argued the cause for respondent (William A. Daniel, Union County Prosecutor, attorney; Michele C. Buckley, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Gary Jones appeals from the May 3, 2023 order of the Law Division denying his petition for post-conviction relief (PCR) after an evidentiary hearing. We affirm.

I.

In 2018, defendant was tried on a seven-count indictment arising from an armed robbery and shooting of a man outside an Elizabeth liquor store. The victim testified that he parked in front of the store and as he entered, he noticed two people standing near the entrance outside the store. After making a purchase and leaving the store, the victim was immediately approached by a man, later identified as defendant, who demanded the victim turn over the contents of his pockets.

The victim responded that he had nothing in his pockets and continued walking toward his car. Defendant grabbed him by the arm and said, "Oh, you think I'm playing?" The victim saw that defendant was holding a handgun and asked, "You really want to do this?" The victim then heard a "pop," looked down, and saw that he had been shot in the leg.

The victim "took off running" down the street toward the nearby police headquarters. Defendant gave chase. The victim noticed a patrol car and attempted to flag it down. The two officers in the patrol car had heard the gunshot and were heading toward the noise. They saw defendant chasing the victim, who shouted that he had just been shot. The officers told the victim to "get down" by the patrol car and began pursuing defendant, who had changed direction as he fled.

During the chase, Officer Luis noticed defendant was carrying a black object in his hand. When defendant stumbled, Luis tackled him to the ground. During an ensuing struggle, Luis noticed that the black object was a handgun. In the commotion, Luis slapped the handgun out of defendant's hand and the gun landed on a grassy area alongside the sidewalk. Three additional officers arrived and assisted in subduing defendant. Once defendant was subdued, Luis secured the handgun. Defendant was transported by patrol car to the victim, who identified him with "one hundred percent" certainty as the assailant.

At trial, the victim and Luis testified as fact witnesses for the State. The victim again identified defendant with "one hundred percent" certainty. Luis recounted his pursuit and capture of defendant and recovery of the handgun.

Through the testimony of two witnesses, the State introduced video recordings and still photographs from surveillance cameras that captured the crime.

The defense's central argument was that defendant never possessed a gun during his interaction with the victim. To support this theory, the defense relied on inconsistencies between the State's witnesses regarding the presence and position of the gun at various moments during the encounter. The defense also presented the testimony of Officer Papakostas, who responded to the scene several minutes after Luis had captured defendant. Papakostas's body worn camera recording was played for the jury without audio. It showed the officer and other officers searching for a gun after defendant's capture. Defendant elected not to testify. In closing, defendant's attorney argued that the fact that Papakostas was searching for a gun after defendant was captured supported their theory that no gun was recovered from defendant's person on arrest.

The jury convicted defendant of first-degree armed robbery, N.J.S.A. 2C:15-1(a)(1); third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1), second-degree possession of a weapon for an unlawful purpose (handgun), N.J.S.A. 2C:39-4(a)(1), fourth-degree aggravated assault with a firearm (pointing), N.J.S.A. 2C:12-1(b)(4), and fourth-degree obstruction, N.J.S.A. 2C:29-1(a). The jury

acquitted defendant of third-degree resisting arrest, N.J.S.A. 2C:29-2(a)(3)(a) and N.J.S.A. 2C:29-2(a)(3)(b). After merging the possession of a weapon and pointing convictions with the first-degree robbery, the judge sentenced defendant to a discretionary persistent offender extended term of fifty years, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2.

We affirmed defendant convictions, vacated his sentence, and remanded for resentencing. State v. Jones, No. A-1499-18 (App. Div. Mar. 17, 2020). We rejected defendant's argument that the trial court erred when it denied his motion for judgment of acquittal:

Applying the same standards used by the trial court to deny the motion, it is clear that the State's overwhelming proofs meant that a reasonable jury could readily find that defendant committed the armed robbery beyond a reasonable doubt. See State v. Tindell, 417 N.J. Super. 530, 549 (App. Div. 2011).

Defendant contends the standard set forth in State v. Reyes, 50 N.J. 454, 458-59 (1967), was not met because the videos do not show defendant actually holding a gun while attempting to rob the victim. Furthermore, defendant called as a witness one of the responding officers, who testified he conducted a separate search for the gun. Defendant argues this casts reasonable doubt on Luis's testimony that he recovered the weapon immediately upon arresting defendant.

Giving the State the benefit of all reasonable testimony, however, it is clear that the officer who was called by defendant as a witness did not cast doubt on the

credibility of his colleagues. It was no doubt a chaotic crime scene – approximately six officers arrived within minutes of the robbery while an injured victim was placed in an ambulance, and several officers struggled to subdue the suspect. It is not surprising that one officer not engaged in defendant's immediate arrest or the victim's care would have heard that a gun was involved, and on that information engaged in a quick search.

The victim testified unequivocally that the perpetrator was defendant. The videos clearly established defendant's presence at the scene and movements corroborating the victim's narrative. Luis and [his partner] saw defendant chasing the victim, and Luis never lost sight of him. When Luis was finally able to subdue defendant, Luis slapped the gun away. No further discussion of the point is necessary. See R. 2:11-3(e)(2).

[Slip op. at 6-7.]

The Supreme Court denied defendant's petition for certification. State v. Jones, 250 N.J. 282 (2022).

In 2021, the trial court resentenced defendant to a twenty-five year term of imprisonment. We remanded for reconsideration of an aggravating factor. State v. Jones, No. A-0647-20 (June 7, 2021). In 2022, the trial court clarified the aggravating and mitigating factors and did not change defendant's sentence. We affirmed the twenty-five-year sentence. State v. Jones, No. A-2929-21 (Oct.

19, 2022). The Supreme Court denied defendant's petition for certification. State v. Jones, 253 N.J. 570 (2023).

On the same day that the jury announced its verdict on the charges arising from the armed robbery, defendant entered a guilty plea to second-degree certain persons not to possess a handgun, N.J.S.A. 2C:39-7(b)(1), charged in a separate indictment. In providing a factual basis for the plea, defendant admitted that on the day of the armed robbery, he unlawfully possessed a handgun without a permit in Elizabeth.

Prior to sentencing on the certain persons conviction, defendant moved to withdraw his guilty plea. He argued that the victim possessed the weapon, not him. He also claimed ineffective assistance of trial counsel, arguing that his counsel failed to call unnamed witnesses and failed to introduce certain evidence favorable to him. The trial court denied defendant's motion and sentenced him to a concurrent ten-year term of imprisonment with a five-year period of parole ineligibility on the certain persons conviction.

We affirmed, except for defendant's allegations of ineffective assistance of trial counsel, which we preserved for a future application by defendant for PCR. State v. Jones, No. A-5502-18 (App. Div. Dec. 24, 2020). The Supreme

Court denied defendant's petition for certification. State v. Jones, 250 N.J. 284 (2022).

Defendant thereafter filed a PCR petition in the Law Division. He alleged that his trial counsel was ineffective because he: (1) failed to present at trial recordings from body worn cameras of police officers searching for a gun for several minutes after defendant's apprehension; (2) failed to call those officers as witnesses; (3) unreasonably advised defendant not to testify; and (4) failed to sufficiently investigate possible exculpatory witnesses prior to trial and to call those witnesses at trial.¹

The PCR court held an evidentiary hearing on some of the issues raised by defendant at which defendant's trial counsel testified. On May 3, 2023, Judge Robert Kirsch issued a comprehensive written opinion denying defendant's petition. The judge found that defendant's trial counsel was "without question, a seasoned criminal trial lawyer" and that his testimony at the hearing was "highly credible" and entitled to "great weight."

Judge Kirsch found that defendant's trial counsel used the body worn camera footage from Papakostas to argue that a handgun was not found on

¹ Defendant alleged other grounds for PCR, which were rejected by the PCR court and not raised by defendant in this appeal.

defendant at the time of his arrest. The judge rejected defendant's argument that his counsel was ineffective for not calling other officers as witnesses to establish they too were searching for a gun after defendant's capture. Judge Kirsch concluded,

[t]here is no rational basis to conclude that any additional videos would have any more success than Officer Papakostas's did. At best, they would be redundant – demonstrating only that officers in the same position as Officer Papakostas – i.e., officers belatedly responding to the chaotic crime scene – also did not know that a gun had been recovered until later.

The judge noted that "[s]uch testimony could also have damaged the defense's argument in the same way that Officer Papakostas's testimony may have, by allowing the [S]tate to elicit testimony on cross-examination confirming that their search concluded on information that a gun had already been recovered at the scene of the arrest."

Judge Kirsch also found that defendant's trial counsel made the reasonable strategic decision not to call additional officers, given that their body worn camera recordings likely contained incriminating and harmful information, such as the victim shouting that defendant had shot him. According to the judge, counsel's reasonable strategy included playing the Papakostas video without audio to allow counsel to control the narration of the video.

Judge Kirsch also rejected defendant's allegation that his counsel coerced him not to testify. The judge found that the trial court reviewed with defendant his right to testify and found that he understood his rights and voluntarily chose not to testify. In addition, Judge Kirsch found that the trial court reviewed with defendant and his counsel the jury instructions that would be given regarding his election not to testify and ensured that defendant still wished not to testify after hearing those instructions. The judge also found that the trial court broke for lunch and upon its return again confirmed with defendant that he did not wish to testify. Judge Kirsch concluded "defendant affirmed under oath and on the record that it was his decision not to testify, that he had plenty of time to review his decision with his lawyer, and that the decision was his alone. There is no indication that defendant was coerced by counsel not to testify."

Judge Kirsch also found that the evidence admitted at the PCR hearing did not support defendant's coercion claim. The judge found that the crux of trial counsel's advice regarding defendant testifying was his concern that defendant's extensive criminal history – four indictable convictions in the past ten years and an older conviction for aggravated assault with a weapon – would be used against him on cross-examination. Trial counsel's testimony at the PCR hearing confirmed that when, during the trial, defendant expressed a desire to testify, his

attorney advised him that doing so would be unwise. Defendant's counsel advised him that his criminal record would be problematic and that the narrative defendant intended to give – that the victim was armed and shot himself during a scuffle with defendant, and defendant chased him down the street to make sure that he was not injured – was unlikely to be believed by the jury.

Finally, Judge Kirsch rejected defendant's claim that his trial counsel was ineffective for not investigating and calling several witnesses. According to defendant, John "Bossy" Winn was prepared to testify that defendant was high on cocaine, paranoid, and drinking alcohol when he encountered the victim, who was armed, and shot himself after defendant asked him for money. In addition, defendant alleged that Bradley Harrell witnessed defendant's encounter with the victim and was prepared to testify that defendant did not possess a gun. Defendant argued that his counsel refused to call Harrell as a witness because he was incarcerated at the time of defendant's trial. Defendant also alleged two officers should have been interviewed by counsel because they likely would have corroborated defendant's version of events. Defendant failed to produce affidavits from Winn and Harrell, as their addresses are unknown, or from the officers.

Judge Kirsch denied defendant's request to hold an evidentiary hearing with respect to these witnesses, which, defendant argued, would have given him subpoena power to compel their testimony. The judge found that defendant's allegations were too conclusory to warrant an evidentiary hearing. In addition, the judge found that

[e]ven assuming Bradley Harrell or Bossy could and would testify to defendant's narrative described in his petition, much of the testimony adduced would be detrimental to the defense's case. For instance, it could be elicited from Bossy or Bradley that defendant was high on cocaine, paranoid and angry, that he instigated the incident and provoked the victim, and that he was broke and sought money from his friends and others, including the victim.

Each witness would also suffer from substantial credibility issues, which would undermine the force of any testimony to whether defendant possessed a gun. For example, defendant's own petition avers that both witnesses had been drinking at the time of the incident. PCR counsel's submissions also indicate that each witness also appears to have a criminal history, which could have been used for impeachment depending on its substance. Moreover, each witness would likely have been biased in favor of the defendant's narrative as friends of defendant.

The judge found that counsel's failure to call the officers was unlikely to have prejudiced defendant, as their testimony would have had no other value than to bolster Papakostas's testimony.

A May 3, 2023 order memorializes Judge Kirsch's opinion.

This appeal followed. Defendant raises the following arguments.

POINT I

THE TRIAL COURT ERRED IN RULING THAT DEFENDANT'S TRIAL COUNSEL PROVIDED CONSTITUTIONALLY EFFECTIVE ASSISTANCE IN COUNSELING DEFENDANT ABOUT HIS RIGHT TO TESTIFY ON HIS OWN BEHALF, AND IN INVESTIGATING, EVALUATING, AND DECIDING WHICH EVIDENCE TO PRESENT ON DEFENDANT'S BEHALF AT TRIAL.

POINT II

THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON DEFENDANT'S CLAIM THAT HIS TRIAL COUNSEL FAILED TO SUFFICIENTLY INVESTIGATE, BEFORE TRIAL, POSSIBLE EXCULPATORY WITNESSES ON DEFENDANT'S BEHALF.

II.

"Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." State v. Preciose, 129 N.J. 451, 459 (1992). Under Rule 3:22-2(a), a defendant is entitled to post-conviction relief if there was a "'substantial denial in the conviction proceedings' of a defendant's state or federal constitutional rights." Ibid. "A petitioner must establish the right to such relief by a preponderance of the credible evidence." Ibid. (citing State v. Mitchell,

126 N.J. 565, 579 (1992)). "To sustain that burden, specific facts" that "provide the court with an adequate basis on which to rest its decision" must be articulated. Mitchell, 126 N.J. at 579.

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee criminal defendants the right to the effective assistance of counsel. State v. O'Neil, 219 N.J. 598, 610 (2014) (citing Strickland v. Washington, 466 U.S. 668, 686 (1984); State v. Fritz, 105 N.J. 42, 58 (1987)). To succeed on a claim of ineffective assistance of counsel, the defendant must meet the two-part test established by Strickland, and adopted by our Supreme Court in Fritz. 466 U.S. at 687; 105 N.J. at 58.

Under Strickland, a defendant first must show that his or her attorney made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687. Counsel's performance is deficient if it "[falls] below an objective standard of reasonableness." Id. at 688.

A defendant also must show that counsel's "deficient performance prejudiced the defense[,]" id. at 687, because "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different[,]" id. at 694. "A reasonable probability is a probability

sufficient to undermine confidence in the outcome" of the trial. Ibid. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Id. at 697; State v. Marshall, 148 N.J. 89, 261 (1997). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Strickland, 466 U.S. at 697.

"We defer to trial court's factual findings made after an evidentiary hearing on a petition for PCR." State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016). "However, we do not defer to legal conclusions, which we review de novo." State v. Holland, 449 N.J. Super. 427, 434 (App. Div. 2017).

With respect to defendant's allegation that trial counsel failed to investigate possible exculpatory witnesses, we review a judge's decision to not hold a PCR evidentiary hearing for abuse of discretion. State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013) (citing Marshall, 148 N.J. at 157-58). A hearing is required only when: (1) a 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. Porter, 216 N.J. 343, 354 (2013) (citing R. 3:22-10(b)). "A prima facie case is established when a defendant demonstrates 'a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits.'" Id. at 355 (quoting R. 3:22-10(b)).

Where a PCR court does not hold an evidentiary hearing, this court's standard of review is de novo as to both the factual inferences drawn by the trial court from the record and the court's legal conclusions. Blake, 444 N.J. Super. at 294; see State v. Lawrence, 463 N.J. Super. 518, 522 (App. Div. 2020) (quoting State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014)).

"[T]o establish a prima facie claim, a petitioner must do more than make bald assertions that he was denied the effective assistance of counsel." Porter, 216 N.J. at 355 (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)). A PCR petition must be "accompanied by an affidavit or certification by defendant, or by others, setting forth with particularity[.]" State v. Jones, 219 N.J. 298, 312 (2014), "facts sufficient to demonstrate counsel's alleged substandard performance[.]" Porter, 216 N.J. at 355 (quoting Cummings, 321 N.J. Super. at 170); see also R. 3:22-10(c).

Having carefully reviewed defendant's arguments in light of the record and applicable legal principles, we affirm the May 3, 2023 order for the reasons stated by Judge Kirsch in his thorough and well-reasoned written opinion. The judge's findings of fact and conclusions of law are well-supported by the record and we are not persuaded by defendant's arguments that the denial of his PCR petition was unwarranted or that an additional evidentiary hearing was necessary.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION