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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1875-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DASEAN K. HARPER,

Defendant-Appellant.

Submitted October 26, 2022 – Decided November 10, 2022

Before Judges Accurso, Vernoia and Firko.

On appeal from the Superior Court of New Jersey, Law Division, Salem County, Indictment No. 14-02-0056.

Joseph E. Krakora, Public Defender, attorney for appellant (Monique Moyse, Designated Counsel, on the brief).

Kristin J. Telsey, Salem County Prosecutor, attorney for respondent (David M. Galemba, Assistant Prosecutor, of counsel on the brief).

PER CURIAM

Defendant Dasean K. Harper appeals from an order denying his post-conviction relief (PCR) petition without an evidentiary hearing. Unpersuaded by defendant's argument the court erred by finding he did not establish a prima facie ineffective-assistance-of-counsel claim warranting an evidentiary hearing, we affirm.

I.

On November 29, 2013, an officer investigated a truck parked in the wrong direction on a street with its tires over the fog line and partially in the roadway. The officer identified defendant as the vehicle's driver, obtained defendant's Pennsylvania driver's license from him, and determined there were two outstanding warrants for defendant's arrest. Defendant told the officer he had a handgun. The officer recovered a .357 magnum revolver loaded with four hollow-point bullets from defendant's waistband. Defendant told the officer he believed he did nothing wrong because he had a concealed gun carry permit in Florida.

A grand jury charged defendant in an indictment with second-degree unlawful possession of a handgun without a permit, N.J.S.A. 2C:39-5(b), and fourth-degree unlawful possession of hollow-point bullets, N.J.S.A. 2C:39-3(f). Subsequent to his indictment, defendant applied for admission to the pretrial

intervention (PTI) program. The Salem County Prosecutor's Office (SCPO) rejected defendant's application for PTI because he was charged with a second-degree offense and he had a prior 2002 Pennsylvania conviction for carrying a firearm without a license for which he was sentenced to a maximum period of incarceration of twelve months and three years minimum probation. The SCPO also rejected the application because defendant had "previously been afforded the opportunity of rehabilitation through probation and incarceration" and was "before the court on yet another offense."

The court heard argument on defendant's appeal from the SCPO's rejection of his application. The court determined he failed to present clear and convincing evidence overcoming the presumption of ineligibility for admission to PTI based on the charged second-degree offense. The court also found the nature of the pending charges and defendant's prior conviction supported the SCPO's decision.

A jury subsequently convicted defendant of the two offenses charged in the indictment. The court sentenced defendant to a five-year prison term with a forty-two-month period of parole ineligibility on the second-degree possessory weapons offense, and a concurrent 365-day term on the fourth-degree offense.

While defendant's direct appeal from his conviction and sentence was pending, he moved before this court for release on bail pending appeal and a limited remand for reconsideration of his PTI application under a 2014 Attorney General directive, which was issued three months after the court rejected defendant's appeal from the SCPO's denial of his PTI application and following the court's imposition of sentence. The 2014 directive, entitled "Clarification of 'Graves Act' 2008 Directive with Respect to Offenses Committed by Out-Of-State Visitors From States Where Their Gun-Possession Conduct Would Have Been Lawful"¹ (2014 Clarification), modified a 2008 directive entitled "Attorney General Directive To Ensure Uniform Enforcement Of The 'Graves Act' (Corrected Version as of 11/25/08)"² (2008 Directive).

Defendant also claimed his conviction for second-degree unlawful possession of a handgun was unlawful because on November 29, 2013, the date

¹ John J. Hoffman, Clarification of "Graves Act" 2008 Directive with Respect to Offenses Committed by Out-of-State Visitors From States Where Their Gun-Possession Conduct Would Have Been Lawful, Office of the Attorney General (Sept. 24, 2014), <https://www.state.nj.us/lps/dcj/agguide/directives/Graves-Act-clarification-2014.pdf> (last visited Nov. 1, 2022).

² Anne Milgram, Correction to "Graves Act" Directive Regarding Extended Term Eligibility, Office of the Attorney General, (Nov. 25, 2008), <https://www.state.nj.us/lps/dcj/agguide/pdfs/Graves-Act-Oct23-2008.pdf> (last visited Nov. 1, 2022).

of his arrest, he was entitled to amnesty from prosecution under L. 2013, c. 117, § 2, which the Legislature enacted on August 8, 2013. The amnesty statute permitted individuals who possessed a handgun in violation of N.J.S.A. 2C:39-5(b) to lawfully retain possession of the handgun for 180 days, from August 8, 2013, through February 4, 2014. Defendant claimed he was entitled to bail pending appeal, arguing his "continued detention [was] unconstitutional because his handgun possession [on the day of his arrest] was lawful under the amnesty provision of L. 2013, c. 117."

We temporarily remanded for a bail hearing and the trial court's consideration of defendant's claim he lawfully possessed the handgun under the amnesty law on the day of his arrest. We also remanded for the court to address defendant's claim it should reconsider its rejection of his appeal from the SCPO's denial of his PTI application.

On remand, the trial court released defendant on his own recognizance pending appeal. The court determined defendant was entitled to assert the defense of amnesty under L. 2013, c. 117 to the charge he unlawfully possessed the handgun on November 29, 2013, the day of his arrest. The court later entered an order vacating defendant's conviction for second-degree unlawful possession of a handgun, finding the offense allegedly occurred "during the amnesty period

provided by" L. 2013, c. 117 and "the issue of amnesty was never presented to the finder of fact." We denied the State's motion for leave to appeal from the court's order. The Supreme Court subsequently granted the State leave to appeal.

The Supreme Court reversed the trial court's order and reinstated defendant's conviction for unlawful possession of the handgun. State v. Harper, 229 N.J. 228, 244 (2017). The Court explained a defendant charged with unlawful possession of a handgun under N.J.S.A. 2C:35-5(b) may "raise the amnesty law as an affirmative defense" by "show[ing] two things."³ Id. at 241.

³ In pertinent part, the amnesty law, L. 2013, c. 117, provides:

[a]ny person who has in his possession a handgun in violation of [N.J.S.A. 2C:39-5(b)] or a rifle or shotgun in violation of [N.J.S.A. 2C:39-5(c)] on the effective date of this act may retain possession of that handgun, rifle, or shotgun for a period of not more than 180 days after the effective date of this act. During that time period, the possessor of that handgun, rifle, or shotgun shall:

- (1) transfer that firearm to any person lawfully entitled to own or possess it; or
- (2) voluntarily surrender that firearm pursuant to the provisions of N.J.S.[A.] 2C:39-12.

[L. 2013, c. 117, § 1.]

Defendants must first show they "possessed a handgun in violation of N.J.S.A. 2C:39-5(b) or (c) 'on the effective date of [the law]'—in other words, that [they] unlawfully possessed a handgun on August 8, 2013." Ibid. (emphasis in original). Defendants must further show they "took steps to transfer the firearm or voluntarily surrender it during the 180-day period beginning on August 8, 2013, consistent with N.J.S.A. 2C:39-12—that is, before authorities brought any charges or began to investigate [their] unlawful possession." Ibid. (emphasis in original).

The Court further explained a defendant must provide pretrial notice of an intention to rely on the amnesty defense and must present evidence supporting the defense at trial. Ibid. "Once raised, the State must rebut the defense and disprove it beyond a reasonable doubt." Id. at 242.

The Court determined defendant waived the amnesty defense at trial because he did not assert it. Id. at 243. The Court also concluded that even if defendant had asserted the amnesty defense, it was unclear the defense would apply because defendant lived and worked in Pennsylvania at the time of his arrest and there was no evidence defendant unlawfully possessed the handgun in New Jersey more than three months earlier, "on the effective date of [the] act." Ibid. (alteration in original) (quoting L. 2013, c. 117). The Court further

observed the record lacked evidence defendant had taken any "steps to transfer or surrender the handgun prior to his arrest." Ibid. The Court explained defendant could file a PCR petition to "try to demonstrate that his counsel was ineffective for not raising the amnesty defense at trial." Ibid.

The Court ordered the reinstatement of defendant's conviction for second-degree unlawful possession of the handgun and remanded for this court to "address any outstanding issues." Id. at 244. We then temporarily remanded to the trial court for reconsideration of defendant's PTI application. The court scheduled hearings to reconsider the application, but in each instance defendant failed to appear. We subsequently issued an order finding the appellate and temporary remand proceedings had stalled due to defendant's failure to make himself available and his "inactive fugitive" status, and we therefore vacated the order granting his request for a temporary remand and directed the issuance of a schedule for the filing of merits briefs on defendant's appeal.

In our decision on the appeal, we rejected defendant's renewed request for a remand to reconsider his PTI application, and we affirmed the trial court's rejection of his appeal from the SCPO's denial of his PTI application. State v. Harper, No. A-1707-14 (App. Div. Nov. 13, 2018) (slip op. at 7-11). In pertinent part, we rejected defendant's claim the trial court erred by rejecting his appeal

from the denial of his PTI application without considering the 2014 Clarification, explaining the clarification was inapplicable because it "was not promulgated until September 24, 2014, more than three months after the court heard argument and denied defendant's appeal from the SCPO's rejection decision . . . and nine days after defendant was sentenced on September 14, 2014." Id. at 9-10; see also State v. Waters, 439 N.J. Super. 215, 238-39 (App. Div. 2015) (explaining changes in Attorney General policy, such as those in the 2014 Clarification, which are issued following a prosecutor's denial of a PTI application, do not render the denial invalid). Defendant offered no other arguments challenging the court's order rejecting his appeal from the SCPO's denial of his PTI application. The Supreme Court denied defendant's petition for certification. State v. Harper, 238 N.J. 499 (2019).

Defendant filed a verified, pro se PCR petition alleging trial counsel was ineffective by "not raising the amnesty defense at trial" and he was "prejudiced" by counsel's alleged error. Defendant's PCR counsel filed a brief arguing trial counsel was also ineffective by failing to dispute the State's assertion, made in support of its denial of defendant's PTI application, that defendant's prior possessory weapons conviction in Pennsylvania was comparable to the second-degree unlawful-possession-of-a-handgun offense for which he was charged in

New Jersey. Defendant claimed the Pennsylvania offense for which he was convicted — a felony committed when a person carries a firearm in any vehicle or concealed on his person, except in his place of abode or fixed place of business, without a valid license, 18 Pa. C.S. § 6106(a)(1) — is a third-degree felony, *ibid.*, and therefore is not comparable to the second-degree offense with which he was charged in New Jersey. Defendant also argued the SCPO failed to follow newly promulgated Attorney General Guidelines for offering defendants charged with unlawful possession of a weapon — who possess the weapon lawfully in another state, but briefly transport it to New Jersey — a probationary sentence.

PCR counsel further asserted trial counsel was ineffective by failing to file a pretrial notice of intention to rely on the amnesty defense under L. 2013, c. 117, § 1. Defendant also generally claimed application of the amnesty law to only citizens of New Jersey violated the Privileges and Immunities clauses of the United States Constitution.

After hearing argument on the petition, Judge Sandra Lopez issued a thorough written decision addressing and rejecting each of defendant's claims. For example, the court explained the third-degree felony for unlawful possession of a firearm for which defendant was convicted in 2002 in Pennsylvania, 18 Pa.

C.S. § 6106(a), has the same essential elements as an offense under N.J.S.A. 2C:39-5(b), and carries a maximum prison term of seven years, 18 Pa. C.S. § 106(b)(4), which is comparable to the sentencing exposure defendant faced for the second-degree possessory weapons offense for which he was charged, see N.J.S.A. 2C:43-6(a)(2) (authorizing a five-to-ten-year sentencing range for second-degree offenses). Thus, the court rejected defendant's claim that trial counsel's performance was constitutionally deficient by failing to dispute defendant's 2002 Pennsylvania conviction is comparable to the second-degree offense charged in the indictment during the argument on his appeal to the Law Division from the SCPO's rejection of his PTI application.

The court also found defendant failed to show there is a reasonable probability that but for his counsel's purported error in agreeing the offenses are comparable, the result of his appeal from the SCPO's denial of his PTI application would have been different. The PCR court found the SCPO's denial of defendant's PTI application would have been affirmed by the trial court based on the other factors pertinent to a PTI determination even without counsel's concession defendant's prior Pennsylvania conviction, and the pending second-degree possessory handgun charge, are comparable.

The court further rejected defendant's claim the SCPO abused its discretion by rejecting his PTI application and by allegedly refusing to comply with Attorney General Guidelines he contends supported the imposition of a non-custodial sentence. As the court explained in detail, the SCPO's rejection of his PTI application was well-grounded in the record and was founded on a consideration of appropriate factors, including defendant's prior conviction for a possessory weapons offense, his failure to obtain the benefit of prior efforts at rehabilitation through probation, and the presumption against admission into PTI for those charged with second-degree offenses. The court concluded defendant failed to carry his burden of demonstrating the rejection of his PTI constituted the patent or gross abuse of discretion, or clear error in judgment, required to support a reversal of the SCPO's PTI rejection decision.

The PCR court also rejected defendant's contention he presented evidence supporting a prima facie claim his counsel was ineffective by failing to assert the amnesty defense at trial. The court observed defendant did not present any evidence he qualified for amnesty under L. 2103, c. 117, § 1 under the standard established by the Supreme Court in his prior appeal. See Harper, 229 N.J. at 241-43. That is, defendant did not present any evidence in support of his PTI petition establishing he unlawfully possessed the handgun in New Jersey on the

statute's effective date, August 8, 2013, or that he took action in accordance with N.J.S.A. 2C:39-12 to turn in or voluntarily surrender the handgun prior to the officer's discovery of it in his waistband. Id. at 243. The PCR court determined defendant did not demonstrate his counsel's performance was deficient by failing to assert a defense to which defendant made no showing he was entitled. For the same reason, the court concluded defendant did not demonstrate he suffered any prejudice as a result of counsel's purported error.

The court also rejected defendant's claim the amnesty law violates the Privileges and Immunities clauses of the United States Constitution. The court reasoned defendant failed to demonstrate any constitutional violation in the Legislature's enactment of the amnesty provision.

The PCR court further determined an evidentiary hearing was unnecessary because defendant failed to present competent evidence establishing a prima facie claim trial counsel was ineffective. The court entered an order denying defendant's PCR petition without an evidentiary hearing. This appeal followed.

Defendant presents the following argument for our consideration:

[DEFENDANT] IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIMS THAT HIS ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO ARGUE ADEQUATELY ABOUT PTI AND

PRESENT AN AFFIRMATIVE AMNESTY
DEFENSE AT TRIAL.

II.

We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). The de novo standard of review applies to mixed questions of fact and law. Id. at 420. Where an evidentiary hearing has not been held, it is within our authority "to conduct a de novo review of both the factual findings and legal conclusions of the PCR court." Id. at 421 (emphasis in original). We apply that standard here.

Defendant claims the court erred by denying his PCR petition without an evidentiary hearing. He contends he is entitled to a hearing because he presented sufficient evidence establishing a prima facie claim of ineffective-assistance-of-counsel. We reject defendant's argument for the reasons set forth in Judge Lopez's detailed and thorough written decision. We add only the following comments.

As recognized by Judge Lopez, defendant bore the burden of establishing a prima facie ineffective-assistance-of-counsel claim under the two-pronged standard established in Strickland v. Washington, 466 U.S. 668, 687 (1984), and adopted for application under our State constitution in State v. Fritz, 105 N.J.

42, 58 (1987). To establish a prima facie claim, defendant was required to present competent evidence, State v. Jones, 219 N.J. 298, 312 (2014), establishing facts demonstrating counsel's handling of the matter "fell below an objective standard of reasonableness," Strickland, 466 U.S. at 688, and there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," id. at 694.

A PCR court should grant an evidentiary hearing if a defendant establishes a prima facie ineffective-assistance-of-counsel claim in support of PCR. State v. Preciose, 129 N.J. 451, 462-63 (1992). "To establish a prima facie claim of ineffective assistance of counsel, a defendant must demonstrate the reasonable likelihood of succeeding under the" Strickland standard. Id. at 463 (emphasis in original). A defendant is not entitled to an evidentiary hearing where there is a failure to satisfy both prongs of the Strickland standard. Strickland, 466 U.S. at 700; see, e.g., State v. Gaitan, 209 N.J. 339, 350 (2012) (explaining a failure to make a prima facie showing of prejudice under Strickland's second prong requires dismissal of an ineffective assistance of counsel claim without an evidentiary hearing).

On appeal, defendant argues the court erred by rejecting his claim his counsel was ineffective by failing to raise the amnesty defense under L. 2013,

c. 117, § 1 at trial. Defendant failed to sustain his burden under the Strickland standard supporting the claim. He did not present any competent evidence he satisfied the requirements for amnesty under the statute as delineated by the Supreme Court in Harper, 229 N.J. at 241. Defendant's counsel's performance was not deficient by failing to assert a defense for which defendant makes no showing he was qualified. See generally State v. Worlock, 117 N.J. 596, 625 (1990) (citing Strickland, 466 U.S. at 688) ("The failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel."). Moreover, defendant did not demonstrate he suffered prejudice under Strickland's second prong as a result of his counsel's failure to assert the amnesty defense because, again, defendant failed to present any evidence demonstrating he is entitled to amnesty under the statute.⁴

⁴ In his brief on appeal, defendant does not renew his argument the amnesty statute violates the Privileges and Immunities clauses in the United States Constitution. See Drinker Biddle & Reath LLP v. N.J. Dep't. of L. & Pub. Safety, 421 N.J. Super. 489, 496 n.5 (App. Div. 2011) (explaining an issue not briefed on appeal is deemed abandoned). Instead, he only vaguely asserts the PCR court's rejection of the argument "is inapposite because" the amnesty statute "was applicable to" his "case and could have been raised as a defense." We reject the contention because it is based on the false factual premise defendant could have successfully raised the amnesty defense at trial; as we have explained, defendant makes no showing he qualified for a defense under the statute. We add only that any argument the amnesty statute violates the Privileges and Immunities clauses of the United States Constitution that may be

We reject defendant's assertion that requiring he produce competent evidence establishing he is entitled to amnesty to support his claim improperly shifts the burden of proof to him. The argument ignores defendant's burden under the Strickland standard. As the party moving for PCR based on an ineffective-assistance-of-counsel claim, defendant has the burden of presenting competent evidence satisfying each prong of the standard in the first instance. Strickland, 466 U.S. at 687; see, e.g., State v. Gideon, 244 N.J. 538, 551 (2021) (quoting Strickland, 466 N.J. at 693) (noting a "defendant must 'affirmatively prove prejudice'" under Strickland's second prong); see also State v. Nash, 212 N.J. 518, 542 (2013) (explaining a defendant's failure to sustain his or her burden under the Strickland standard requires dismissal of the PCR petition). Defendant failed to sustain that burden here.

Defendant's claim his counsel was ineffective by failing to challenge the State's contention his 2002 Pennsylvania conviction for unlawful possession of a handgun without a license is a crime comparable to the second-degree offense charged in the indictment suffers from similar infirmities. Counsel's performance was not deficient by conceding the offenses are comparable

gleaned from defendant's vague assertion is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

because, as Judge Lopez detailed in her opinion, the elements of the respective offenses are in fact comparable, and the range of punishment for the offenses, although not identical, are comparable. Defendant offers no evidence to the contrary.

Moreover, even assuming counsel's performance was deficient by conceding the offenses are comparable, defendant offers no competent evidence establishing that but for counsel's alleged error there is a reasonable probability the result of his appeal from the PTI denial would have been different. See Strickland, 466 U.S. at 694. Stated differently, defendant makes no showing that absent counsel's concession the offenses were comparable, there is a reasonable probability the trial court would have found SCPO's decision rejecting the PTI application "was not premised upon a consideration of all relevant factors," was founded on "a consideration of irrelevant or inappropriate factors," or constituted "a clear error in judgment" rising to the level of a patent and gross abuse of discretion. State v. Negran, 178 N.J. 73, 83 (2003) (quoting State v. Bender, 80 N.J. 84, 93 (1979)). Thus, the PCR court correctly concluded defendant failed to satisfy both prongs of the Strickland standard on his PTI claim.

In sum, defendant failed to sustain his burden under both prongs of the Strickland standard on each of his ineffective-assistance-of-counsel claims. Judge Lopez therefore correctly denied the PCR petition without an evidentiary hearing. Strickland, 466 U.S. at 700; Nash, 212 N.J. at 541. To the extent we have not expressly addressed any other arguments asserted on defendant's behalf, they are without sufficient merit to warrant additional discussion. R. 2:11-3(e)(2).

Affirmed.

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



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