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APPROVAL OF THE APPELLATE DIVISION

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3580-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GEORGE JENEWICZ,

Defendant-Appellant.

Submitted November 1, 2017 — Decided November 30, 2017

Before Judges Fuentes, Manahan and Suter.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Indictment No.
99-01-0031.

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

Andrew C. Carey, Middlesex County Prosecutor,
attorney for respondent (Nancy A. Hulett,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

A forensic investigation confirmed defendant's account of E.G.-J.'s death and dismemberment, including the location in a park where the victim's severed arms were located.

At trial, defendant testified alleging self-defense. Other defense witnesses, including defendant's mother, testified relative to the argumentative and threatening character of E.G.-J. A defense toxicology expert testified that E.G.-J., at the time of the incident, was substantially intoxicated and while in that condition, would become a "risk taker" whose lack of judgment could lead to violence.

In 2008, defendant was tried before a jury and convicted of capital murder, N.J.S.A. 2C:11-3(a)(1)(2); second-degree possession of a weapon for unlawful purposes, N.J.S.A. 2C:39-4(a); and third-degree hindering apprehension, N.J.S.A. 2C:29-3(b). After merging the murder conviction with the weapons possession, the trial judge sentenced defendant to a term of life imprisonment with a thirty-year period of parole ineligibility, and a consecutive term of five years with two-and-a half years of parole ineligibility for the hindering apprehension conviction.

On direct appeal, we affirmed the conviction and sentence in an unpublished opinion, State v. Jenewicz, Docket No. A-0013-02 (App. Div. Aug. 8, 2006). The Supreme Court granted defendant's petition for certification, State v. Jenewicz, 189 N.J. 103 (2006),

and thereafter reversed the murder conviction and remanded the matter for a new trial. State v. Jenewicz, 193 N.J. 440 (2008). The conviction for hindering apprehension was not disturbed.

Over the course of seven days in September 2008, defendant was retried before a jury on the murder charge and the possession of a weapon for unlawful purpose. Defendant was found guilty on both charges. The trial judge sentenced defendant to life imprisonment with a thirty-year period of parole ineligibility to run consecutively to the sentence previously imposed on count three, and awarded defendant 1597 days of jail time credit pursuant to Rule 3:21-8. Count two was merged with count one. Appropriate fines and fees were imposed.

Defendant filed a notice of appeal in June 2009. In an unpublished opinion, State v. Jenewicz, Docket No. A-5031-08 (App. Div. Oct. 16, 2013), the judgment of conviction was upheld. The Supreme Court subsequently denied certification. State v. Jenewicz, 217 N.J. 304 (2014).

On May 1, 2014, through counsel, defendant filed a petition for PCR, which was later supplemented by a pro se brief. Following argument, the PCR judge issued a decision on October 8, 2015,

denying the petition without an evidentiary hearing.² This appeal followed.

Defendant raises the following points on appeal:

POINT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST[-]CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION AT THE TRIAL LEVEL.

A. THE PREVAILING LEGAL PRINCIPLES REGARDING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, EVIDENTIARY HEARINGS AND PETITIONS FOR POST [-] CONVICTION RELIEF.

B. THE DEFENDANT DID NOT RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL AS A RESULT OF COUNSEL'S FAILURE TO UTILIZE READILY AVAILABLE EXPERT PSYCHIATRIC TESTIMONY WHICH HAD BEEN UTILIZED DURING THE FIRST TRIAL.

C. THE DEFENDANT DID NOT RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL AS A RESULT OF COUNSEL'S FAILURE TO MAKE A MOTION TO SUPPRESS BASED UPON THE DEFENDANT'S INABILITY TO PROVIDE A VALID KNOWING AND VOLUNTARY CONSENT TO POLICE TO ENTER HIS RESIDENCE.

² Prior to this petition, defendant's brief notes he filed a petition for PCR in Nov 2013, which resulted in an order that denied his petition without prejudice. Thereafter, petition for certification was denied by the Supreme Court. Defendant then refiled his petition on May 1, 2014.

POINT II

THE TRIAL COURT ERRED IN REJECTING THE DEFENDANT'S PETITION FOR POST[-]CONVICTION RELIEF, IN PART, ON PROCEDURAL GROUNDS PURSUANT TO RULE 3:22-5.

We have closely examined the record in the light of the contentions posed in this appeal. Our examination included the considerable amount of evidence, unrelated to the grounds upon which the PCR petition was based, that supported defendant's conviction. Upon conclusion of that examination, we affirm substantially for the reasons set forth by Judge Barry A. Weisberg in his thorough oral decision. We add only the following.

The test for ineffective assistance of counsel was formulated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42 (1987). To establish a deprivation of the Sixth Amendment right to the effective assistance of counsel, a defendant must satisfy the following two-pronged Strickland/Fritz test: (1) that counsel's performance was deficient and he or she made errors that were so serious that counsel was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution; and (2) that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland,

supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. A defendant must overcome a strong presumption that counsel rendered reasonable professional assistance. State v. Parker, 212 N.J. 269, 279 (2012). If a defendant establishes one prong of this test, but not the other, the petition for PCR must fail. Id. at 280. Thus, both prongs of the Strickland/Fritz test must be satisfied before post-conviction relief may be granted. Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

When petitioning for PCR, the defendant must establish by a preponderance of the credible evidence that he or she is entitled to the requested relief. State v. Preciose, 129 N.J. 451, 459 (1992). To sustain that burden, the defendant must allege and articulate specific facts, which "provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

We apply the Strickland standard and review the reasonableness of counsel's assistance with "a heavy measure of deference to counsel's judgments." State v. Martini, 160 N.J. 248, 266 (1999) (quoting Strickland, supra, 466 U.S. at 691, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695). Judge Weisberg applied this standard and concluded that the defendant's arguments did not support a finding of ineffective assistance of counsel.

On appeal, defendant argues that the PCR judge erred by failing to find his trial counsel was ineffective for not utilizing readily available expert psychiatric testimony and to file a motion to suppress based upon defendant's inability to provide knowing and voluntary consent to police to enter his residence. We are unpersuaded by these arguments.

At the conclusion of the hearing, Judge Weisberg first addressed the procedural infirmity of the PCR. The judge held that the arguments relating to the search of his residence were raised on direct appeal when defendant argued that the bag containing E.G.-J.'s remains should not have been opened. The judge further held that since this court considered the legality of the search on the merits, defendant was barred from relitigating the issue on collateral review. R. 3:22-5. From our review of the record, we agree that the legality of the search of the garbage bag was litigated on direct appeal. Although the basis for the argument was not lack of consent, the issue of the search's validity was clearly determined.

Regarding counsel's alleged ineffectiveness due to not challenging the consent to search based upon defendant's alleged intoxicated condition, the PCR judge noted that the trial judge listened to the tape of defendant's statement and found him to be cogent and responsive. As such, Judge Weisberg held that

defendant's intoxication argument relative to his knowing consent would have been unsuccessful. We agree.

Notwithstanding the determination that the argument was procedurally barred, the judge rejected on its merits that the lack of challenge to defendant's consent affected the outcome of the search's legality. The judge cited two exceptions to the search warrant requirement, the emergency aid doctrine and community caretaking, that would have satisfied the warrantless search.

Even were we to conclude that not raising the issue of defendant's consent constituted "ineffective assistance," we agree with Judge Weisberg that the validity of the search could be premised on the emergency aid doctrine first enunciated in State v. Frankel, 179 N.J. 586, cert. denied, 543 U.S. 876, 125 S. Ct. 108, 160 L. Ed. 2d 128 (2004) and later modified in State v. Edmonds, 211 N.J. 117 (2012).³ That doctrine requires only that the police possess an objectively reasonable basis to believe that "there is danger and need for prompt action." Id. at 599 (citation

³ In Edmonds, the Frankel test was modified to remove as a factor the police officer's subjective motivation predicated upon the United States Supreme Court decisions in Michigan v. Fisher, 558 U.S. 45, 130 S. Ct. 546, 175 L. Ed. 2d 410 (2009), and Briqham City v. Stuart, 547 U.S. 398, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006).

omitted).⁴ Here, the report by citizens of a dead body in defendant's residence (reasonable belief of a need to protect or preserve life) and finding the remains in the basement (reasonable nexus between the emergency and the area searched) clearly satisfied the test enunciated in Frankel and in Edmonds to establish the doctrine.⁵

The judge also found no merit to defendant's claim of ineffective assistance of appellate counsel for failure to raise arguments on direct appeal since defendant himself raised those arguments in his pro se brief. R. 3:22-5.⁶

Concerning counsel's decision to not call as a defense witness the expert psychiatrist who testified at the first trial, we note that the first trial resulted in a conviction even though later reversed on grounds unrelated to the testimony. We also note that the issue of E.G.-J.'s mental status and her level of intoxication were presented to the jury at the second trial. As such, we are

⁴ Given this determination, we do not need to address the applicability of community caretaking.

⁵ The Court in Frankel noted the "oft-quoted words of Chief Justice (then Judge) Burger in Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir.) cert. denied, 375 U.S. 860, 84 S. Ct. 125, 11 L. Ed. 2d 86 (1963), "[e]ven the apparently dead often are saved by swift police response."

⁶ Defendant does not challenge this determination on appeal. Arguments not raised or briefed on appeal are deemed abandoned. Gormley v. Wood-El, 218 N.J. 72, 95 n.8 (2014).

competency standard enunciated by Strickland is both broad and flexible. Ibid. It is intended to encompass varied factual scenarios and circumstances. The proper test is whether counsel's advice was within the range of competence required of attorneys in criminal cases. While attorneys are expected to fulfill their duty of competent representation, a conviction should not be overturned unless there was a breach of that duty that mattered. To the extent, if any, trial counsel's performance was deficient, we hold that it did not result in prejudice to the defense since there is not a reasonable probability of a different result sufficient to undermine our confidence in the outcome. See State v. Arthur, 184 N.J. 307, 319 (2005) (quoting Strickland, supra, 466 U.S. at 693, 104 S. Ct. at 2067, 80 L. Ed. 2d at 697).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION

Appendix F

SUPREME COURT OF NEW JERSEY
C-796 September Term 2017
080450

STATE OF NEW JERSEY,

PLAINTIFF-RESPONDENT,

v.

ON PETITION FOR CERTIFICATION

GEORGE JENEWICZ,

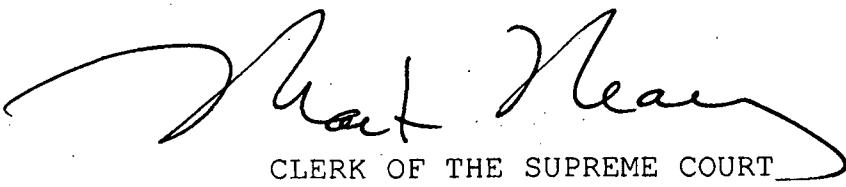
DEFENDANT-PETITIONER.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-003580-15
having been submitted to this Court, and the Court having
considered the same;

It is ORDERED that the petition for certification is
denied.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at
Trenton, this 1st day of May, 2018.


CLERK OF THE SUPREME COURT

**Additional material
from this filing is
available in the
Clerk's Office.**