NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2656-07T4
A-0120-08T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EDWIN ORTIZ,

Defendant-Appellant.

Submitted May 12, 2010 – Decided July 27, 2010

Before Judges Axelrad and Sapp-Peterson.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 87-10-3284.

Yvonne Smith Segars, Public Defender, attorney for appellant (Steven M. Gilson, Designated Counsel, of counsel and on the brief).

Robert D. Laurino, Acting Essex County Prosecutor, attorney for respondent (Barbara A. Rosenkrans, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

These are back-to-back appeals consolidated for the purpose of this opinion. Defendant appeals from two trial court orders denying his post-conviction motions seeking a new trial in connection with his October 1987 conviction for felony murder,

two counts of first-degree robbery, aggravated assault, and weapons-related offenses. We affirm.

Defendant filed his first motion on July 6, 2007, nearly twenty years after his conviction and also after three unsuccessful motions for post-conviction relief were denied in 1991, 1995, and 1996. Defendant argued that he was entitled to a new trial based upon newly discovered evidence, namely, that the State suppressed exculpatory evidence by not disclosing the full extent of the plea agreement it had with Jose Espada, his co-defendant. Espada had entered guilty pleas to first-degree robbery, possession of a handgun for an unlawful purpose, and aggravated assault. At trial, the State informed the jury that in exchange for Espada's plea and trial testimony, it agreed to recommend an aggregate twenty-year custodial sentence with a ten-year period of parole ineligibility. Espada testified that he and defendant, along with their co-defendants, planned to commit robberies on September 13, 1986, and he witnessed defendant and co-defendant, Raul Jiminez, shoot two men. Two months after the jury reached its verdict and one week after defendant was sentenced, the court sentenced Espada to fifteen years' imprisonment with a five-year period of parole ineligibility. Several months later, the court also sentenced Espada on unrelated charges of receiving stolen property. The

court imposed two three-year custodial sentences that ran concurrently with his fifteen-year custodial sentence. In denying defendant's motion, Judge Ramona A. Santiago found that defendant could not meet the standard for the grant of a new trial.

In the second motion filed in February 2008, defendant claimed that Espada had recanted his trial testimony. Judge Donald J. Volkert, in a July 11, 2008 written opinion, concluded that Espada's recantation was not outcome determinative because one of the initial robbery victims, Darryl Stevenson, witnessed the murder and identified defendant at trial as one of the persons involved in the murder. Judge Volkert also observed that another victim, Sylvester Parker, identified defendant at trial as one of the men who shot at him. Additionally, the judge noted that Detective George S. Flynn testified that defendant had a bullet-proof vest in his possession when arrested, and Detective Joseph Roselli testified that the spent bullet retrieved from the murder victim was fired by the gun found in co-defendant Jiminez's possession. In view of this evidence, Judge Volkert determined that an evidentiary hearing was unnecessary because defendant failed to establish a prima facie case of a reasonable likelihood that he would succeed on the merits.

In appealing Judge Santiago's October 19, 2007 order, Ortiz contends:

> DEFENDANT'S MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE SHOULD HAVE BEEN GRANTED BECAUSE THE STATE SUPPRESSED EXCULPATORY EVIDENCE.

In appealing Judge Volkert's August 4, 2008 order, Ortiz argues:

> DEFENDANT SHOULD HAVE BEEN AFFORDED AN EVIDENTIARY HEARING REGARDING HIS MOTION FOR A NEW TRIAL BASED ON THE NEWLY DISCOVERED EVIDENCE, THAT THE STATE'S KEY WITNESS RECANTED HIS INCULPATORY TESTIMONY.

After carefully examining the record on appeal and after closely scrutinizing the parties' submissions, we find no merit in the arguments raised by defendant and conclude that discussion in a written opinion is unwarranted. R. 2:11-3(e)(2). We add only the following comments.

State v. Ways, 180 N.J. 171, 187 (2004), lays out a three-part standard for a new trial based on newly discovered evidence. To meet the standard, a defendant must show that "the evidence is 1) material and not 'merely' cumulative, impeaching or contradictory; 2) that the evidence was discovered after completion of the trial and was not 'discoverable by reasonable diligence beforehand'; and 3) that the evidence 'would probably change the jury's verdict if a new trial were granted.'" Ibid. (quoting State v. Carter, 85 N.J. 300, 314 (1981)). Each of the

three prongs of the test must be satisfied before a defendant will be granted a new trial. Ibid.

Here, the knowledge that Espada actually received a more favorable sentence than that which the State disclosed to the jury it would recommend does not "shake the very foundation of the State's case and almost certainly alter the earlier jury verdict." Id. at 189. Moreover, it is doubtful that the jury's verdict would have been affected had it known about the other negotiated plea reached between the State and Espada that disposed of the receiving stolen property charges with the imposition of an additional three-year, albeit concurrent, custodial term. Further, as noted earlier, the jury also had the benefit of damaging testimony implicating defendant from four other witnesses. Hence, it is far from clear that the jury would have reached a different verdict had it known that Espada received a lighter sentence and was also able to concurrently resolve other outstanding charges.

Likewise, in view of the compelling evidence from the four other witnesses, it is unlikely the jury would have accepted Espada's recantation of his trial testimony as credible. Moreover, even if the jury would find Espada's recantation statement that a police detective intimidated him into inculpating himself and defendant, the compelling evidence

offered by the other witnesses negates the likelihood that the recantation would so seriously impugn the State's evidence to such an extent that "the evidence 'would probably change the jury's verdict if a new trial were granted.'" Ways, supra, 180 N.J. at 187.

Affirmed.