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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3985-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HISASHI POMPEY, a/k/a
DELON POMPEY

Defendant-Appellant.

Submitted January 23, 2017 – Decided February 17, 2017

Before Judges Sabatino, Haas, and Currier.

On appeal from the Superior Court of New
Jersey, Law Division, Bergen County,
Indictment No. 12-05-0709.

Evan F. Nappen, P.C., attorneys for
appellant (David W. Huang, on the brief).

Gurbir S. Grewal, Bergen County Prosecutor,
attorney for respondent (Catherine A.
Foddai, Senior Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

Defendant Hisashi Pompey appeals the April 15, 2016 order denying his petition for post-conviction relief (PCR), claiming the ineffective assistance of trial counsel for his failure to

raise a federal statute, the Federal Law Enforcement Officer Safety Act of 2004 (LEOSA), 18 U.S.C.A. § 926B, that would have permitted his carrying of a concealed weapon across state lines. Because we find the protection of LEOSA had not yet extended to defendant at the time of this incident, and that his trial counsel therefore was not ineffective in representing him under the then-existing law, we affirm.

Defendant was an active-duty sergeant in the Marine Corps and a military police officer. He had a permit to carry a weapon in Virginia where he was stationed, but not in New Jersey. In December 2011, while in New Jersey, defendant left his weapon in a friend's car while they went inside a nightclub. When police arrived at the club in response to a report of an altercation, they encountered defendant's friend in the parking lot holding defendant's loaded handgun that he had removed from the car. Defendant was charged and convicted of second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b).

LEOSA permits a "qualified law enforcement officer" to carry a concealed weapon across state lines. 18 U.S.C.A. § 926B(a). At the time of defendant's 2011 arrest, the statute defined a qualified law enforcement officer as a government agency employee who:

(1) is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest;

(2) is authorized by the agency to carry a firearm;

(3) is not the subject of any disciplinary action by the agency which could result in suspension or loss of police powers;

(4) meets standards, if any, established by the agency which require the employee to regularly qualify in the use of a firearm;

(5) is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and

(6) is not prohibited by Federal law from receiving a firearm.

[18 U.S.C.A. § 926B(c) (emphasis added).]

Military police officers did not qualify for protection under LEOSA because they possess statutory powers of apprehension, not arrest, as required by the statute. 158 Cong. Rec. S7381, S7390 (daily ed. Dec. 4, 2012) [hereinafter Congressional Record] (statement of Sen. Leahy).

On January 2, 2013, LEOSA was amended to add military police officers to the class of qualified law enforcement

officers.¹ National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 1089, 126 Stat. 1632, 1970-71 (2013).

In the legislative history of the 2013 amendment, Senator Patrick Leahy explained: "The amendment we adopt today will place military police and civilian police officers within the Department of Defense on equal footing with their law enforcement counterparts across the country when it comes to coverage under LEOSA." Congressional Record, supra, at S7389. To that end, "[t]he Senate [] agreed unanimously to extend LEOSA to the law enforcement officers that serve within our military who are currently not eligible for coverage." Id. at S7390 (emphasis added).

Defendant appealed his conviction, and in our affirmance, we noted that he had first raised the argument that his conviction was preempted by LEOSA in his direct appeal. State v. Pompey, No. A-1003-13 (App. Div. Sept. 9, 2015). In our consideration of the argument, we determined that "[i]t is not clear or obvious that the LEOSA applied to military police

¹ 18 U.S.C.A. § 926B(c)(1) now defines a qualified law enforcement officer as a government agency employee who "is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest or apprehension." (emphasis added).

officers before the 2013 amendment." Id. at 21. Because the statute was not raised before the trial court, the record was devoid of the prerequisites required for us to further determine its application to defendant. In response to defendant's appellate argument that the failure to request a LEOSA jury instruction was ineffective assistance of trial counsel, we advised that the issue should properly be raised in a PCR petition and dismissed defendant's LEOSA claims without prejudice.

Thereafter, defendant filed a petition for PCR, claiming the ineffective assistance of counsel for failing to raise the applicability of statutory protection under LEOSA. In denying the application, the PCR judge reviewed the legislative history of the statute and found that "the LEOSA Act did not apply to the military or military police until the applicable amendment of January 2, 2013." He determined that "it was clear that on the date of this offense in 2011, LEOSA did not exempt the defendant from liability under the closely regulated New Jersey gun laws" The judge noted there was nothing in the statute indicating the 2013 amendment was to be retroactive. Therefore, even if counsel had requested a LEOSA charge it would have been inappropriate for the trial court to grant it. He concluded: "[T]his Court determines that trial counsel was there

for [sic] non incompetent for failing to raise the exemption since it did not apply." (emphasis added). The judge continued the stay of defendant's sentence pending appeal of his order.

On appeal, defendant highlights this statement of the court, contending that the PCR judge erred in using the standard of "non incompetent" in his analysis.

The standard for determining whether counsel's performance was ineffective for purposes of the Sixth Amendment 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). In order to prevail on a claim of ineffective assistance of counsel, defendant must meet the two-prong test of establishing both that: (1) counsel's performance was deficient and he or she made errors that were so egregious that counsel was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution; and (2) the defect in performance prejudiced defendant's rights to a fair trial such 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 687, 694, 104 S. Ct. at 2064, 2068, 80 L. Ed. 2d at 693, 698.

In turning to defendant's arguments, we are satisfied from our review of the record that defendant failed to meet his burden of proof as to a showing of ineffectiveness of trial counsel within the Strickland-Fritz test. Defendant's argument hinges on the judge's finding that counsel was "non incompetent" and argues this is the erroneous standard to use in a PCR context. Whether the judge misspoke or this is a typographical error in the transcription,² we are satisfied the judge's conclusion was correct.

As the judge noted, LEOSA did not authorize military police officers to carry concealed weapons over state lines until the 2013 amendment. Previously, the statute defined "qualified law enforcement officer" and detailed six requirements an individual must satisfy to be covered by LEOSA. See 18 U.S.C.A. § 926B(c). One requirement was that the officer must possess powers of arrest. 18 U.S.C.A. § 926B(c)(1). Military police officers only possess powers of apprehension. Congressional Record, supra, at S7390. Therefore, defendant did not meet the requirements for the protection of LEOSA in 2011.

The 2013 amendment specifically extended LEOSA protection to military police officers who previously lacked the powers of

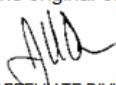
² We note the misspelling of "there for" immediately before "non incompetent."

arrest required under the statute to incur its coverage. The legislative statement makes that clear. Thus, defendant was not exempt from prosecution for carrying a weapon in New Jersey without the appropriate state permit at the time of his arrest in 2011 as the term "qualified law enforcement officer" did not include military police. The judge's conclusion that defendant could not meet the second prong of the Strickland standard is therefore supported by the credible evidence in the record. A request by trial counsel for the LEOSA charge would have been meritless and properly denied.

We need not address whether the 2013 LEOSA amendment should apply retroactively to this incident, as it is not an argument that has been presented to us. We note for completeness there is no legislative intent that the amendment was to apply retroactively, and the general rule is that "newly enacted laws are applied prospectively." Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 387 (2016).

Affirmed. The present stay of defendant's incarceration will expire in sixty days.

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


CLERK OF THE APPELLATE DIVISION