SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1707-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARKUS SAUNDERS,
a/k/a MARCUS SAUNDERS,

Defendant-Appellant.

Submitted March 17, 2022 – Decided April 25, 2022

Before Judges Haas and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 08-06-2072.

Joseph E. Krakora, Public Defender, attorney for appellant (Frank M. Gennaro, Designated Counsel, on the brief).

Matthew J. Platkin, Acting Attorney General, attorney for respondent (Debra G. Simms, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Markus Saunders appeals from a June 29, 2020 order denying his petition for post-conviction relief (PCR) without a hearing. After a careful review of the record and the governing legal principles, we affirm, substantially for the reasons set forth in Judge Michael A. Petrolle's thorough and thoughtful written opinion. We add the following remarks.

On March 11, 2008, defendant was arrested after the United State Postal Service (USPS) notified law enforcement about a package addressed to defendant containing approximately fifteen pounds of marijuana. When an officer, disguised as a USPS worker, arrested defendant at his home, a search of the home uncovered eighteen additional bags of marijuana and a nine-millimeter handgun.

On June 30, 2008, an Essex County grand jury returned Indictment No. 08-6-2072, charging defendant with: second-degree conspiracy to possess and possession with intent to distribute marijuana, N.J.S.A. 2C:5-2 (count one); fourth-degree possession of over fifty grams of marijuana, N.J.S.A. 2C:35-10(a)(3) (count two); second-degree possession with intent to distribute five pounds or more but less than twenty-five pounds of marijuana, N.J.S.A. 2C:35-5(a)(1), (b)(10)(b) (count three); third-degree possession of marijuana with intent to distribute within 1,000 feet of school property, N.J.S.A. 2C:35-7 (count

four); second-degree possession with intent to distribute over one ounce of marijuana within 500 feet of a public housing facility, public park or public building, N.J.S.A. 2C:35-7.1 (count five); fourth-degree possession of drug paraphernalia, N.J.S.A. 2C:36-3 (count ten); second-degree unlawful possession of a firearm, to wit, a Glock 17 9mm handgun, N.J.S.A. 2C:39-5(b) (count eleven); second-degree possession of a Glock 9mm handgun while in the course of committing, attempting to commit or conspiring to commit a drug offense, N.J.S.A. 2C:39-4.1 (count twelve); third-degree unlawful possession of a sawed-off shotgun without having a firearms purchaser identification card, N.J.S.A. 2C:39-5(c)(1) (count thirteen); third-degree unlawful possession of a sawed-off shotgun, N.J.S.A. 2C:39-3(b) (count fourteen); second-degree possession of a sawed-off shotgun while committing, attempting to commit or conspiring to commit a drug offense, N.J.S.A. 2C:39-4.1 (count fifteen); and fourth-degree unlawful possession of hollow point bullets, N.J.S.A. 2C:39-3(f) (count sixteen).

On April 7, 2009, defendant pleaded guilty to second-degree conspiracy to possess and possession with intent to distribute marijuana (count one); second-degree possession with intent to distribute five pounds or more but less than twenty-five pounds of marijuana (count three); third-degree possession of marijuana with intent to distribute within 1,000 feet of school property (count

four); and second-degree unlawful possession of a firearm (count eleven). Pursuant to the plea agreement, the State agreed to recommend an aggregate sentence of five years with three years of parole ineligibility.

In his sworn testimony at the plea hearing, defendant stated that he could read, speak, and understand English and that he understood the terms of the plea form. He was aware that his maximum sentence was roughly thirty-five years with an eight-year period of parole ineligibility. Defendant denied that anyone made any promises or threats to induce him to plead guilty. He understood that by virtue of his plea he was waiving any right to pursue the pending motion to suppress evidence. Finally, defendant agreed to relinquish all right and claim to the $3,142 seized and to surrender his passport.

After accepting defendant's plea, the judge set a sentencing control date of June 1, 2009. Everyone was required to appear on that date, and at that time the judge would consider defense attorney's request for a later sentencing date. Defendant was advised of this requirement verbally and in writing. The judge made it clear that if defendant failed to appear for sentencing, he could impose a greater sentence and defendant would not be allowed to withdraw his plea. After defendant failed to appear on June 1, 2009, the judge issued a bench warrant for his arrest.

Defendant never voluntarily surrendered, however, and he absconded for nine years. On or about May 7, 2017, defendant was arrested on unrelated charges in Somerset County. On March 10, 2018, while defendant was in custody, he was arrested on the bench warrant.

On July 23, 2018, defendant, represented by new counsel, moved to withdraw his plea.[1] Defendant argued that his previous counsel "lied to him and told him that as long as he comes up with some additional money that he was gonna get him out of it and that he did not have to even appear for the . . . day when he was supposed to sentence, that he . . . took care of it." The judge denied defendant's motion because he did not assert a colorable claim of innocence and the nature and strengths of his reasons for withdrawal were not strong. See State v. Slater, 198 N.J. 145, 157-58 (2009). The judge stated defendant was notified that he had to return to court and was informed of the consequences of failing to appear. The judge noted defendant's allegations against his previous counsel were unsworn and not supported by any testimony, affidavit, or certification.

After hearing from the parties and referencing the pre-sentence investigation report, the judge applied aggravating factor three (risk that

[1] Defendant's previous counsel had been disbarred for causes unrelated to defendant's case.

defendant will reoffend) and nine (need to deter) and mitigating factor seven (lack of prior criminal conduct), finding that the aggravating factors significantly outweighed the mitigating factor. The judge then merged count one and count four with count three. On count three, the judge sentenced defendant to seven years' imprisonment with three years of parole ineligibility. On count eleven, the judge sentenced defendant to seven years' imprisonment with three and one-half years of parole ineligibility, to run concurrently with count three. The judge also imposed mandatory fines and awarded jail credit.

Defendant subsequently appealed, allegedly to challenge the sentence as excessive. On March 21, 2019, however, defendant withdrew his appeal because his appellate counsel advised him that his claims were better suited for PCR.

On March 26, 2019, defendant filed a pro se petition for PCR, arguing he was denied effective assistance of counsel during the plea stage, at sentencing, and on direct appeal. On April 9, 2020, defendant's designated counsel filed a supplemental letter brief. On June 29, 2020, after hearing from the parties, the judge denied defendant's PCR in its entirety, without an evidentiary hearing, in an order and written decision.

On appeal, defendant presents the following arguments for our consideration:

POINT I

THE PCR COURT IMPROPERLY DENIED DEFENDANT'S CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF HIS PLEA COUNSEL WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING

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

B. DEFENDANT ESTABLISHED A PRIMA FACIE CLAIM FOR POST-CONVICTION RELIEF, ENTITLING HIM TO AN EVIDENTIARY HEARING

1. The Performance of Plea Counsel
2. Counsel's Performance at Sentencing

3. Ineffectiveness of Appellate Counsel

"[W]e review under the abuse of discretion standard the PCR court's determination to proceed without an evidentiary hearing." State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013). "If the court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to post-conviction relief, . . . then an evidentiary hearing need not be

granted." Ibid. (alteration in original) (quoting State v. Marshall, 148 N.J. 89, 158 (1997)). We review the denial of a PCR petition with "deference to the trial court's factual findings . . . 'when supported by adequate, substantial and credible evidence.'" State v. Harris, 181 N.J. 391, 415 (2004) (alteration in original) (quoting Toll Bros. v. Twp. of W. Windsor, 173 N.J. 502, 549 (2002)).

Where, as here, "no evidentiary hearing has been held, we 'may exercise de novo review over the factual inferences drawn from the documentary record by the [PCR judge].'" State v. Reevey, 417 N.J. Super. 134, 146-47 (App. Div. 2010) (alteration in original) (quoting Harris, 181 N.J. at 421). We also review de novo the legal conclusions of the PCR judge. Harris, 181 N.J. at 415-16 (citing Toll Bros., 173 N.J. at 549).

A defendant seeking PCR must establish "by a preponderance of the credible evidence" that he is entitled to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). The defendant must allege and articulate specific facts that "provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

Ineffective assistance of counsel claims must satisfy the two-prong test set forth in Strickland v. Washington 466 U.S. 668, 687 (1984) which was also

adopted by the New Jersey Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). Under the first prong, a "defendant must show that counsel's performance was deficient" and that counsel's errors were so egregious that he "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. "[C]omplaints 'merely of matters of trial strategy' will not serve to ground a constitutional claim of inadequacy of representation by counsel." Fritz, 105 N.J. at 54 (quoting State v. Williams, 39 N.J. 471, 489 (1963)). The second prong requires a defendant to demonstrate that the alleged defects prejudiced his right to a fair trial to the extent "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694; Fritz, 105 N.J. at 60-61 (internal quotation marks omitted). The defendant "must do more than make bald assertions that he was denied the effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

Guided by these legal principles, we discern no abuse of discretion requiring reversal. As Judge Petrolle set forth in painstaking detail, every one of defendant's claims is a bald assertion unsupported by any competent evidence. See ibid. Many of his claims are directly contradicted by the transcripts of defendant's sworn testimony at the plea and sentencing hearings, at which he

acknowledged his understanding of the plea agreement, expressed satisfaction with counsel, denied that any promises had been made to induce him to accept the agreement, and understood that in accepting the plea he was waiving his right to pursue the pending motion to suppress.

Beyond this, defendant's claims against plea counsel are procedurally barred, either because they were raised and rejected on defendant's motion to withdraw his plea, see Rule 3:22-5, or because they could have and should have been raised at that time. See Rule 3:22-4. Defendant cannot now avoid the procedural bar by "attiring . . . the petition in ineffective assistance of counsel clothing." State v. Moore, 273 N.J. Super. 118, 125 (1994).

Equally unsupported are defendant's claims against sentencing and appellate counsel. Regarding appellate counsel's advice to withdraw the appeal in favor of a PCR petition, defendant failed to provide an independent certification or other evidence to overcome the presumption that the advice was reasonable trial strategy, see Fritz, 105 N.J. at 54 and explain what meritorious issues would have been raised on appeal, or how the results would have been different.

To the extent defendant seeks to capitalize on plea counsel's subsequent criminal conviction in unrelated matters, Judge Petrolle correctly found he failed

to prove prejudice as it related to plea counsel's conduct. We observe that, faced with a maximum sentence of thirty years and the overwhelming evidence against him, it is highly unlikely that a rational defendant would have rejected the plea offer of five years with a three-year period of parole ineligibility.

To the extent we have not addressed defendant's remaining arguments, we find they lack sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(2).

Affirmed.