RECORD IMPOUNDED

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the 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-1874-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

T.M.S.,

Defendant-Appellant.

Submitted March 16, 2022 – Decided May 19, 2022

Before Judges Hoffman, Geiger, and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 10-08-1409.

Joseph E. Krakora, Public Defender, attorney for appellant (Anderson D. Harkov, Designated Counsel, on the brief).

Mark Musella, Bergen County Prosecutor, attorney for respondent (William P. Miller, Assistant Prosecutor, of counsel; Catherine A. Foddai, Legal Assistant, on the brief).

PER CURIAM

Defendant appeals from the October 7, 2020 Law Division order denying his petition for post-conviction relief (PCR). Based on our review of the record, we are unpersuaded by defendant's arguments and affirm.

I.

We glean the following facts from the record. In 2000, defendant worked as a bus driver when he met P.H.[1], who worked as a babysitter. P.H. had one child, C.H., born in August 1996. Defendant and P.H. began a romantic relationship, marrying three years later.

Shortly after marrying, defendant and P.H. moved into a home in Hackensack. C.H. lived at the home with defendant and P.H., with C.H. staying in a bedroom upstairs, while defendant and P.H. occupied a downstairs bedroom. In September 2004, defendant and P.H. had another child, S.H., who slept in a crib in the couple's bedroom. Around this time, defendant's eighteen-year-old daughter from a previous relationship, A.S, moved into the home.

Defendant eventually became a driver for an adult day care center. When P.H. began working the night shift as a package handler for FedEx in late 2009, defendant or P.H.'s adult niece cared for C.H. and S.H. at night.

---

[1] We use the initials of defendant, the victim, the victim's mother, and the victim's peers to preserve the privacy of all parties involved. R. 1:38-3(d)(10)(12), N.J.S.A. 9:6-8.10(a).

In April 2010, C.H., then thirteen years old, and her best friend, C.A., were texting, each complaining about life's difficulties. At some point during this exchange, C.H. texted to C.A., "at least you don't have a rapist of a stepfather to worry about."

C.A. encouraged C.H. to speak with her mother about defendant's abuse but did not otherwise disclose C.H.'s revelation. The next day, C.H. told another friend, E.W., that defendant had "touched [her] inappropriately" on her breasts and "private area." E.W. also told C.H. to disclose defendant's actions to her mother or someone else.

C.H. told her mother of defendant's abuse soon thereafter. Her mother insisted that C.H. go to the police station, but C.H. refused. P.H. called defendant and began yelling at him, but the call eventually dropped. Defendant then called C.H., asking "what was wrong with P.H." C.H. informed defendant that she revealed his abuse to P.H.

The following Tuesday, Detective Michael Capone of the Hackensack Police Department called P.H., requesting she come to the police station. When P.H. arrived at the police station, C.H. was already there.[2] An anonymous caller

[2] A school resource officer brought C.H. to the police station.

informed the Division of Youth and Family Services[3] of potential abuse occurring in the home. The police interviewed C.H., who provided detailed accounts of defendant's abuse from the time she was eight years old until she was thirteen years old.

On August 10, 2010, a Bergen County Grand Jury returned a four-count indictment, charging defendant with first-degree aggravated sexual assault, N.J.S.A. 2C:14-2a(1) and (2), second-degree sexual assault, N.J.S.A. 2C:14-2b, third-degree aggravated sexual contact, N.J.S.A. 2C:14-3(a), and second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a).

After a jury found defendant guilty of all charges, the trial judge imposed two consecutive eighteen-year terms, with an eighty-five percent mandatory minimum, pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2., a consecutive ten-year term, a concurrent eighteen-year term, and a concurrent five-year term, resulting in an aggregate term of forty-six years with a 30.6-year mandatory minimum. Defendant appealed, and we affirmed defendant's convictions and sentence in August 2014. State v. T.M.S., No. A-2411-11, (App. Div. Aug. 13, 2014).

[3] The Division of Youth and Family Services is now known as the Division of Child Protection and Permanency.

Defendant filed his first petition for PCR in 2015, asserting that he received ineffective assistance of counsel. The Law Division denied the petition on August 10, 2016, and we affirmed on April 5, 2018. State v. T.M.S., No. A-1800-16 (App. Div. Apr. 5, 2018). Defendant filed his second pro se petition for PCR on November 12, 2019, challenging only the legality of his sentence. Following oral argument on September 3, 2020, the PCR court denied defendant's second petition in a written opinion.

This appeal followed, with defendant raising the following arguments for our consideration:

> POINT I
>
> SENTENCING COUNSEL'S FAILURE TO OBJECT TO A MAVERICK SENTENCING JUDGE SUBSTITUTING HER JUDGMENT FOR THE AGGRAVATING FACTORS LISTED IN THE CRIMINAL CODE AND IGNORING SENTENCING CASE LAW[] RESULTED IN DEFENDANT NOT HAVING THE ASSISTANCE OF COMPETENT COUNSEL AT HIS SENTENCE HEARING AND ALSO RESULTED IN THE IMPOSITION OF AN ILLEGAL SENTENCE REQUIRING DEFENDANT'S SENTENCE BE VACATED AND HIS CASE REMANDED FOR A NEW SENTENCE HEARING.
>
> POINT II
>
> THE FAILURE OF APPELLATE COUNSEL TO CHALLENGE DEFENDANT'S SENTENCE ON

DIRECT APPEAL BY ARGUING THE SENTENCING COURT ABUSED ITS DISCRETION AND IMPOSED AN ILLEGAL SENTENCE, WHEN IT MISAPPLIED AGGRAVATING FACTORS AND SENTENCED DEFENDANT TO CONSECUTIVE TERMS, DEPRIVED DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

II.

We begin our analysis by acknowledging the legal principles governing this appeal. 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 "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).

Post-conviction relief serves the same function as a federal writ of habeas corpus. State v. Preciose, 129 N.J. 451, 459 (1992). When petitioning for PCR, a defendant must establish by a preponderance of the credible evidence that he

or she is entitled to the requested relief. Ibid. (citations omitted). 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).

Both the Sixth Amendment of the United States Constitution and Article 1, paragraph 10 of the State Constitution guarantee the right to effective assistance of counsel at all stages of criminal proceedings. Strickland v. Washington, 466 U.S. 668, 686 (1984) (citing McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)). To demonstrate ineffectiveness of counsel, "First, the defendant must show that counsel's performance was deficient . . . . Second, the defendant must show that the deficient performance prejudiced the defense." Id. at 687.

In State v. Fritz, our Supreme Court adopted the two-part test articulated in Strickland. 105 N.J. 42, 58 (1987). To meet the first prong of the Strickland test, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Strickland, 466 U.S. at 687. Reviewing courts indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. The fact that a trial strategy fails to obtain the optimal outcome for a defendant is insufficient to show that counsel was ineffective.

State v. DiFrisco, 174 N.J. 195, 220 (2002) (citing State v. Bey, 161 N.J. 233, 251 (1999)). The second prong of the Strickland test requires the defendant to show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. Put differently, counsel's errors must create a "reasonable probability" that the outcome of the proceedings would have been different if counsel had not made the errors. Id. at 694.

The second Strickland prong is particularly demanding: "the error committed must be so serious as to undermine the court's confidence in the jury's verdict or the result reached." State v. Allegro, 193 N.J. 352, 367 (2008) (quoting State v. Castagna, 187 N.J. 293, 315 (2006)). "Prejudice is not to be presumed," but must be affirmatively proven by the defendant. Ibid. (citing Fritz, 105 N.J. at 52; Strickland, 466 U.S. at 693).

Rule 3:22-12(a)(2)(C) provides that "no second or subsequent petition shall be filed more than one year after the latest of the date of the denial of the first or subsequent application for post-conviction relief." R. 3:22-12(a)(2)(C). However, "[w]hen an illegal sentence is in question, no time limitations apply." State v. Mitchell, 126 N.J. 565 (1992).

Applying these legal principles, we agree with the PCR judge that defendant failed to meet the Strickland/Fritz test's demands; however, we reject the State's argument that defendant's second PCR petition was untimely since defendant's second PCR petition challenged the legality of his sentence, and "no time limitations apply" to bar petitions seeking such relief. Mitchell, 126 N.J. 565.

Defendant argues that during sentencing, his counsel was ineffective for failing to object to both the imposition of consecutive sentences and to the sentencing judge "substituting her judgment for the aggravating factors listed in the criminal code." Defendant relies heavily on the factors articulated in State v. Yarbough, 100 N.J. 627, 643 (1985), but our Supreme Court has since stressed "that the Yarbough guidelines are just that – guidelines." State v. Carey, 168 N.J. 413, 427 (2001). Sentencing courts "may impose consecutive sentences though a majority of the Yarbough factors support concurrent sentences." Id. at 427–28. Defendant's trial counsel argued for a lesser sentence but didn't challenge the imposition of the otherwise legal sentence. "The failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel." State v. Worlock, 117 N.J. 596, 625 (1990).

We reject defendant's argument that his sentence was illegal. At sentencing, the trial judge applied aggravating factors one, nature of the offense; two, seriousness of the harm; four, breach of trust; and six, extent of prior criminal record. N.J.S.A. 2C:44-1(a)(1)(2)(4) and (6). The PCR court concluded that "there was nothing illegal about the trial court's imposing three consecutive sentences and that the sentence actually imposed was 'nearly half of the maximum allowable under the law.'" "Mere excessiveness of sentence otherwise within authorized limits . . . is not an appropriate ground for [PCR] and can only be raised on direct appeal from the conviction." State v. Acevedo, 205 N.J. 40, 46 (2011).

The second Strickland/Fritz prong requires that deficient counsel prejudiced the outcome of the proceeding. Fritz, 105 N.J. at 52. Nothing in the record suggests that had defendant's trial counsel objected to the sentence imposed, a different outcome would have resulted. Defendant therefore failed to establish a prima facie case of ineffective assistance of counsel.

For substantially the same reasons, defendant's appellate counsel did not provide ineffective assistance of counsel. See Worlock, 117 N.J. at 625. ("The failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel.").

Any arguments not addressed lack sufficient merit to warrant discussion in a written opinion. 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.

CLERK OF THE APPELLATE DIVISION