

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**NOT FOR PUBLICATION WITHOUT THE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-0218-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

AARON D. MCMORRIS,

Defendant-Appellant.

Submitted October 17, 2017 – Decided November 27, 2017

Before Judges Yannotti and Leone.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Indictment No.
10-06-1037.

Joseph E. Krakora, Public Defender, attorney
for appellant (Charles H. Landesman,
Designated Counsel, on the brief).

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

PER CURIAM

Defendant Aaron D. McMorris appeals from an order entered by the Law Division on August 11, 2016, which denied his petition for post-conviction relief (PCR). We affirm.

I.

Defendant was charged with first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1) (count one); second-degree sexual assault, N.J.S.A. 2C:14-2(b) (count two); and third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a) (count three). On August 25, 2011, defendant pled guilty to count two, which was amended to charge fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b). Defendant had been incarcerated for eighteen months, and the State agreed to recommend a custodial sentence of time served. Defendant agreed the judgment of conviction would include a provision barring him from any contact with the victim.

At the plea hearing, defendant provided a factual basis for his plea. Defendant stated that on one occasion between December 24, 2009, and January 3, 2010, he was in an apartment in Hackensack with C.C. and three other females. Defendant said he touched C.C.'s buttocks and did so for his own sexual gratification. Defendant stated that at the time, C.C. was twelve years old, and he was eighteen years old.

The judge later sentenced defendant to time served, ordered defendant to comply with Megan's Law, N.J.S.A. 2C:7-1 to -23, and

ordered defendant to have no contact with the victim. The judge dismissed counts one and three of the indictment, required defendant to pay restitution in the amount of \$2475, and imposed other fees and penalties. Defendant did not appeal from the judgment of conviction dated October 18, 2011.

On July 29, 2015, defendant filed a pro se PCR petition. The PCR court appointed counsel to represent defendant, and counsel filed a brief in support of the petition. Defendant alleged he did not provide an adequate factual basis for the plea. He also alleged that he had been denied the effective assistance of counsel because his attorney: failed to conduct an adequate investigation; allowed him to enter a plea that was not knowing and voluntary; and failed to assert an intoxication defense. He requested an evidentiary hearing on his petition.

The PCR court considered the petition on August 11, 2016. After hearing oral argument, the judge placed an oral decision on the record. The judge found that Rule 3:22-4 precluded defendant from challenging the factual basis for his plea because he could have but did not raise that issue on direct appeal. The judge further found that if defendant is not procedurally barred from raising the issue, he provided an adequate factual basis for the plea to fourth-degree criminal sexual contact. The judge also found that defendant had not presented a prima facie case of

ineffective assistance of counsel; therefore, he was not entitled to an evidentiary hearing. The judge entered an order dated August 11, 2016, denying PCR. This appeal followed.

On appeal, defendant raises the following arguments: (1) the plea should be set aside because he did not provide an adequate factual basis for the plea; (2) he was denied the effective assistance of counsel because his trial attorney did not conduct an adequate investigation before he entered the plea; and (3) he was entitled to an evidentiary hearing on the petition.

II.

Defendant first argues that he should be permitted to withdraw his plea. He concedes that he did not file a motion in the trial court to withdraw the plea or file a direct appeal from the judgment of conviction entered in this matter. Defendant nevertheless argues that this court should set aside the plea by applying Rule 2:10-2, which states that on appeal, the court may disregard "[a]ny error or omission" unless shown to be "of such a nature as to have been clearly capable of producing an unjust result." The rule further provides that the court "may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court." Ibid.

We are convinced, however, that the PCR court correctly determined that defendant's claim regarding the adequacy of his plea is barred by Rule 3:22-4, which states:

(a) First Petition for Post-Conviction Relief. Any ground for relief not raised in the proceedings resulting in the conviction, or in a post-conviction proceeding brought and decided prior to the adoption of this rule, or in any appeal taken in any such proceedings is barred from assertion in a proceeding under this rule unless the court on motion or at the hearing finds:

(1) that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; or

(2) that enforcement of the bar to preclude claims, including one for ineffective assistance of counsel, would result in fundamental injustice; or

(3) that denial of relief would be contrary to a new rule of constitutional law under either the Constitution of the United States or the State of New Jersey.

The rule further provides that "[a] ground could not reasonably have been raised in a prior proceeding only if defendant shows that the factual predicate for that ground could not have been discovered earlier through the exercise of reasonable diligence."

Ibid.

Here, defendant has long been aware of all of the information necessary to file a motion to withdraw the plea. Indeed, the facts upon which such a motion could be brought are based on the record

established when defendant entered his plea. Moreover, enforcement of the procedural bar would not result in a fundamental injustice. As the PCR court found, defendant provided an adequate factual basis for his plea.

As noted, defendant pled guilty to an amended charge of fourth-degree criminal sexual contact. Under N.J.S.A. 2C:14-3(b), a person is guilty of this offense "if he commits an act of sexual contact with the victim" under any of the circumstances set forth in N.J.S.A. 2C:14-2(c)(1) to (4).¹ One of those circumstances is that "[t]he actor uses physical force or coercion, but the victim does not sustain severe personal injury." N.J.S.A. 2C:14-2(c)(1).

We have held that in determining whether an individual has committed the offense of criminal sexual contact, the non-consensual touching of the victim by the actor is sufficient to establish the use of physical force. State v. Triestman, 416 N.J. Super. 195, 220 (App. Div. 2010) (citing State in Interest of M.T.S., 129 N.J. 422, 443 (1992)). Therefore, the PCR court correctly found that defendant provided an adequate factual basis for fourth-degree criminal sexual contact, contrary to N.J.S.A. 2C:14-3(b).

¹ The latter statute provides that a person is guilty of "sexual assault if he commits an act of sexual penetration with another person" under any of the circumstances set forth in N.J.S.A. 2C:14-2(c)(1) to (4). Ibid.

III.

Defendant next argues that the PCR court erred by finding he did not present a prima facie case of ineffective assistance of counsel. He also argues that the court should have conducted an evidentiary hearing on his petition. Again, we disagree.

To succeed on his PCR claim of ineffective assistance of counsel, a defendant must meet the test established by Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 692 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). Under Strickland, the defendant must show that counsel's performance was deficient and, if so, there was 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, 104 S. Ct. at 2068, 80 L. Ed. 2d 698.

Where, as here, the defendant claims he was denied the effective assistance of counsel with regard to a guilty plea, the defendant must establish that counsel's performance was not "within the range of competence demanded of attorneys in criminal cases." State v. DiFrisco, 137 N.J. 434, 457 (1994) (quoting Tollett v. Henderson, 411 U.S. 258, 266, 93 S. Ct. 1602, 1608, 36 L. Ed. 2d 235, 243 (1973)). The defendant also must show "there is a reasonable probability that, but for counsel's errors, [the

defendant] would not have pled guilty and would have insisted on going to trial." Id. at 457 (quoting Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985)).

Defendant claims his attorney was deficient because he failed to obtain complete discovery before defendant entered his plea. He cites an undated letter he allegedly wrote to his attorney, in which he noted that the discovery he had reviewed did not include the minutes of the grand jury, reports of mental and physical evaluations, or a report on the line-up identification. According to defendant, his attorney failed to undertake a full and complete investigation of the matter before he entered his plea.

The PCR court noted that defendant's attorney reviewed the discovery materials with defendant and, even if counsel has not obtained the grand jury minutes, defendant had not shown that he would have rejected the plea offer and proceeded to trial if counsel had obtained the minutes. Likewise, defendant failed to show that any of the other information he believes counsel should have obtained would have supported his defense, or led him to reject the plea and go to trial.

Furthermore, as we noted previously, defendant was charged with first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1), and other charges. On the first-degree charge, defendant faced a potential sentence of twenty-five years to life

imprisonment, with a twenty-five-year period of parole ineligibility. N.J.S.A. 2C:14-2(a).

Defendant's attorney negotiated a favorable plea agreement, which allowed defendant to plead guilty to an amended charge of fourth-degree criminal sexual contact, provided for a custodial sentence of time served, and resulted in the dismissal of the other charges. At the plea hearing, defendant stated that he understood he was waiving his right to trial, his right to cross-examine and confront witnesses, and his right to have the State prove the charges beyond a reasonable doubt. He elected to waive those rights and enter his plea.

Defendant has not shown that but for his attorney's allegedly deficient investigation, he would not have pled guilty and would have elected to proceed to trial. He also has not shown that counsel was deficient in permitting defendant to enter his plea. The record shows that defendant entered his plea knowingly and voluntarily. We therefore conclude that the record supports the PCR court's determination that defendant failed to establish a prima facie case of ineffective assistance of counsel.


We also conclude that the PCR court correctly found that an evidentiary hearing was not required on the petition. As noted, defendant failed to establish a prima facie case for PCR. Moreover,

the existing record was sufficient to resolve defendant's claims.

R. 3:22-10(b); State v. Porter, 216 N.J. 343, 354-55 (2013).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION