SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0745-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KEITH BRAILEY,

Defendant-Appellant.

Submitted November 15, 2017 – Decided December 15, 2017

Before Judges Nugent and Currier.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 13-07-1487.

Joseph E. Krakora, Public Defender, attorney for appellant (Karen Ann Lodeserto, Designated Counsel, on the brief).

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Roseanne Sessa, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Keith Brailey appeals from the denial of his post-conviction relief (PCR) petition. Defendant contends that trial counsel was ineffective in failing to obtain a lesser prison

sentence, and one not subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Because we find that defendant has failed to present a prima facie showing of ineffective counsel, we affirm.

Defendant was charged in an indictment with aggravated assault, N.J.S.A. 2C:12-1(b)(1); possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d); and unlawful possession of a weapon, N.J.S.A. 2C:39-5(d), after he stabbed his nineteen-year-old son multiple times with a knife.

After trial had begun, defendant pled guilty to all three counts of the indictment. There was no plea agreement with the State. Judge Paul M. DePascale advised defendant at the plea hearing that the sentence range was between five and ten years.

At sentencing, the State requested a sentence of seven years; defense counsel asked for a five-year prison term, subject to NERA. Judge DePascale imposed a sentence of five years, subject to the NERA parole ineligibility period. Defendant's appeal of the sentence was affirmed. State v. Brailey, No. A-0711-14 (App. Div. Apr. 15, 2015).

In defendant's PCR petition before the trial court, he contended that he was offered a flat five-year sentence by his trial counsel, which he agreed to accept. However, he stated that his counsel did not convey his acceptance to the prosecutor, and as a result, when he did plead guilty, the offer became five years

subject to NERA. In a certification provided with the petition, defendant averred that his counsel told him to agree to a five-year flat term. He did so, but then counsel advised him that the prosecutor did not agree to that term.

Judge DePascale, having handled the matter at all stages, found in an oral decision on May 26, 2016, that defendant had misstated the facts. He stated that the initial offer to defendant was set forth in the arraignment order as a plea to second-degree aggravated assault with a seven-year prison term subject to NERA. Defendant did not accept the offer.

On the date of trial, the judge recalled that defendant pled to the indictment; there was no negotiated plea. Defense counsel attempted to make a counteroffer at that time and did ask defendant to accept a five-year flat term. When defendant finally agreed to the counteroffer, the Prosecutor rejected it. The judge stated:

> It wasn't a change of heart by the Prosecutor. [She] never offered the flat five. That was a bone of contention. It was a counteroffer by Defense Counsel. The original offer as I indicated is subject to the No Early Release Act. That was the offer that was made by the Prosecutor's Office throughout. It never changed.

Judge DePascale advised that he told counsel that the sentence would be the lowest permissible if defendant pled to the indictment. He said: "And if you read the sentencing transcript,

you can see the State was more than mildly upset with the [c]ourt for the sentence imposed. However, the sentence he got was the sentence I indicated he would get."

The judge concluded:

> So, there was no ineffectiveness on the part of . . . Counsel. Counsel [was] so determined in her advocacy, she convinced the [c]ourt to undercut the State, which is something I don't do with regularity and, [defendant was given] a minimum sentence and, it was unlikely that . . . would be the sentence should he go to trial and be convicted.
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> So, I cannot find and do not find ineffectiveness on the part of . . . Counsel. Rather, she did everything she could to secure the best possible deal for this Defendant and there is no question this plea was entered knowingly, voluntarily[,] and freely . . . . [T]here is no ineffectiveness at all and the Defendant was not prejudiced in any way by his Counsel's actions.

The PCR petition was denied.

On appeal, defendant asserts that his trial counsel was ineffective in failing to obtain a sentence of less than five years and not subject to NERA, and that PCR counsel was ineffective in "simply repeat[ing] the bald assertions that were made by [defendant] in his certification." We are not persuaded by these arguments.

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 (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 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, 466 U.S. at 687, 694.

We are satisfied from our review of the record that defendant failed to demonstrate the ineffectiveness of trial or PCR counsel under the Strickland-Fritz test. Defendant's certification is without support in the record and misrepresents the circumstances of his plea. The prosecutor and the judge advised that there was never an offer of a flat five-year sentence. That was a counteroffer that defense counsel attempted to make on the day of trial. It was never accepted by the State. As discussed by Judge DePascale, the sentence imposed was quite favorable to defendant and unsatisfactory to the State.

As for PCR counsel, he filed a brief with the court in which he indicated that he was incorporating all arguments previously presented by defendant in his PCR petition. At oral argument, the judge advised that he had read all of the briefs. PCR counsel responded that he had read the State's brief and he would rely on his own brief and supplemental certifications. There was no obligation to repeat the previously articulated arguments, particularly in these circumstances where the judge was familiar with all aspects of the case. There has been no demonstration of a deficient performance by either trial or PCR counsel.

Affirmed.