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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1104-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EMILIO MCMAHON,

Defendant-Appellant.

Submitted January 25, 2017 – Decided March 29, 2017

Before Judges Simonelli and Gooden Brown.

On appeal from the Superior Court of New
Jersey, Law Division, Atlantic County,
Indictment No. 11-08-1930.

Joseph E. Krakora, Public Defender, attorney
for appellant (Monique Moyse, Designated
Counsel, on the brief).

Diane M. Ruberton, Acting Atlantic County
Prosecutor, attorney for respondent (Mario C.
Formica, Special Deputy Attorney General/
Acting Chief Assistant Prosecutor, of counsel
and on the brief).

PER CURIAM

Defendant Emilio McMahon appeals from an October 16, 2015
order denying his petition for post-conviction relief (PCR)

without an evidentiary hearing. Having reviewed the record in light of the applicable legal principles, we affirm.

I.

Defendant was indicted and charged with second-degree sexual assault, N.J.S.A. 2C:14-2(c) (Count One); fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b) (Count Two); third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a) (Count Three); and fourth-degree child abuse, N.J.S.A. 9:6-3 (Count Four). Pursuant to a negotiated plea agreement, defendant pled guilty to count three. In return, the State agreed to dismiss the remaining counts. In addition, the State recommended that defendant serve 364 days in the county jail, and be subject to parole supervision for life, N.J.S.A. 2C:43-6.4, and Megan's Law, N.J.S.A. 2C:7-1 to -23.

At the plea hearing, defendant admitted that on April 29, 2011, while he was a senior in high school, he engaged in "sexual conduct" with a fourteen-year-old high school freshman who was five years younger than he was. Specifically, defendant admitted touching "her intimate parts[,]" which was "conduct that would impair the morals of a child." On February 3, 2012, defendant was sentenced in accordance with the plea agreement. Defendant did not file a direct appeal.

Thereafter, defendant filed a timely pro se petition for PCR and was later assigned counsel who filed a supporting brief. In his petition, defendant contended that his plea counsel was ineffective for: (1) failing to file a Miranda¹ motion to suppress his statement made at the police station; and (2) failing to adequately advise defendant, resulting in a guilty plea that did not establish an adequate factual basis. Defendant also challenged his conviction as unconstitutional based on the purported deficient factual basis for his guilty plea and the disparate penal consequences between the third-degree child endangerment offense and the fourth-degree criminal sexual contact offense. After oral argument, the PCR court denied defendant's claims without conducting an evidentiary hearing.

Applying Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the court concluded that defendant failed to establish that plea counsel's performance "was inadequate" or that he was "prejudiced" by her performance. Regarding plea counsel's failure to file a suppression motion, the court expounded:

Defendant's allegations that his confession was obtained by the police by way of trickery and false promises are not

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

substantiated. The [c]ourt cannot take into consideration the alleged promises in exchange for the confession made by the police officers and the alleged unrecorded conversations, as [d]efendant's allegations are merely bald assertions. [State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999)] dictates that in order to establish a prima facie claim, a petitioner must do more than make bald assertions that he was denied the effective assistance of counsel. . . . He must allege facts sufficient to demonstrate counsel's alleged substandard performance. . . . In fact, [d]efendant's bald assertions . . . are not contained in his pro se petition and were not established under oath through an affidavit or certification. The [d]efendant failed to demonstrate the exact nature of "conversations and promises" and did not articulate how they resulted in "overbearing his will" in a manner that made his confession involuntary.

. . . .

Aside [from] the fact that [d]efendant failed to provide any affidavits from witnesses of alleged police misconduct, he also failed to provide an affidavit based on his personal knowledge as required by the rules. The [c]ourt cannot rely on [d]efendant's unsworn statements.

It is true that the Miranda standard [renders] inadmissible evidence that was obtained through coercion, however, nothing indicates that [d]efendant was coerced into giving a confession. On the contrary, the record demonstrates that [d]efendant was properly Mirandized on the first day of the interview and that he signed the form waiving his rights. Additionally, [d]efendant initially stated that he was ready to take the polygraph test immediately but later changed his mind and requested to speak with his aunt

first. It is demonstrated by the record that he left the station after the initial interview and voluntarily later returned for the polygraph test where he was Mirandized again and provided a full confession.

Defendant has not previously alleged the misconduct and is not able to demonstrate that he was in fact coerced. Defendant's allegations that he was interviewed off the record and asked to join "Team America", has surfaced for the first time four years after the incident allegedly occurred. There is no evidence that [d]efendant related his concerns to his attorney during the original proceedings or that the attorney refused or neglected to file the motion to suppress an allegedly illegally obtained statement. Indeed, based upon the record before the [c]ourt, the [d]efendant was advised of his Miranda rights and voluntarily waived his rights in writing resulting in a confession.

Assuming, arguendo, as alleged by the [d]efendant that police requested that [d]efendant "join Team America", the [c]ourt cannot determine that such a statement was "coercive and manipulative". The investigating officer permitted [d]efendant to speak to his aunt after his first interview only to call back the same day and volunteer to return a week later to complete his statement. Further, if a motion was filed and [d]efendant's confession was suppressed there was adequate evidence in the record from the statement of a victim that seemingly would have sustained [the] burden of proof.

During oral argument, [d]efendant addressed an issue, which was not previously addressed in written submissions. Defendant argued that the ineffective assistance claim had a probability of success because the initial conduct of the investigating officer was in violation of [d]efendant's rights as

the officers illegally seized him at his school during the initial investigation. It is [d]efendant's position that an element of coercion was present from the time when the police first approached him. . . . Defendant alleges that the officer's actions violated [d]efendant's rights because upon the officer's arrival to [d]efendant's high school, the officer failed to advise [d]efendant of the reason for the interview and that [d]efendant had an option of not entering the police vehicle and going to the station.

Defendant contends that he was not aware of a reason for his detention and initial interrogation. . . . Defendant argued that because he was not advised that he had the right not to go with the police and not to answer any questions before he was taken to the station, he was unlawfully seized and any statements made by him are inadmissible.

. . . .

Even if [d]efendant was not properly advised of the reason for the interview, the statement provided a week later still stands. No allegation has been made of improper questioning during the ride to the station At the station after [d]efendant was Mirandized he did not give any incriminating statements. Defendant initially denied all of the accusations and even volunteered to immediately take a polygraph test. Defendant was permitted to leave the station and given an opportunity to speak with his aunt. . . . [d]efendant's request to speak with his aunt did in fact constitute an invocation of his rights and since his request was immediately honored, his Fifth Amendment rights were not violated.

Defendant's statement that was acquired a week later after he volunteered to return

is not tainted even if the officers did not adhere to the proper procedures during the initial interview. Defendant's statement was too attenuated from the initial contact with police. He was not required to return and give any statements at all. Defendant's confession was not affected by the officer's alleged failure to advise him of the reasons for the investigation and the interview and his options of coming along or not prior to the initial interview.

In rejecting defendant's contention that his plea counsel's ineffectiveness resulted in a guilty plea with an inadequate factual basis, the court explained:

Defendant fails to demonstrate that the plea colloquy was deficient based on his failure to admit that his conduct was intentional. The offense charged did not require the mens rea of intent but rather knowledge and [d]efendant's conduct was so obviously of a sexual nature that knowledge is implied.

The court in [State v. Bryant, 419 N.J. Super. 15 (App. Div. 2011)] held that the legislature enacted N.J.S.A. 2C:2-2(c)(3), commonly known as the "gap filler" statute, which provides that when no culpable mental state is specified in a criminal statute, the mental state of "knowingly" shall be deemed the required mental element.

. . . .

Pursuant to Bryant, the mens rea required for the charge of endangering the welfare of the child is knowledge not intent.

. . . .

The present case is factually very similar to Bryant. The gap filler statute applies to the [d]efendant as he was convicted under the statute that did not have a specific mens rea requirement. Defendant, therefore, did not have to admit that his conduct was intentional during the plea colloquy, mere knowledge suffices.

There is no doubt that [d]efendant acted knowingly during the commission of the offense. In Bryant the court stated that some forms of sexual contact with a child, such as . . . touching the child's intimate parts, are by their nature, so obviously of a sexual nature that it would seem superfluous to require proof that the actor knew he was engaging in "sexual conduct" within the meaning of N.J.S.A. 2C:24-4(a). Almost by definition, one cannot engage in such conduct without recognition that it is sexual in nature. . . .

Knowledge is implied to the [d]efendant's conduct in this case. There is no uncertainty regarding the [d]efendant's awareness that when he touched the victim's bare breasts . . . that the conduct was of an obviously sexual nature. The record also demonstrates that defendant was aware of the victim's young age. As a result, [d]efendant did not need to admit to intentional conduct during the plea hearing.

The court also rejected defendant's argument that his conviction was unconstitutional because he was prosecuted under the generic child endangerment statute, rather than the specific criminal sexual contact statute. Initially, the court determined that defendant's claim was barred by Rule 3:22-4(a) because it could have been raised in a direct appeal and there was "no good

reason . . . for [d]efendant's failure to assert this claim earlier than four years after his conviction."² Nonetheless, the court rejected defendant's claim on the merits, reasoning:

Defendant alleged that prosecution under the wrong statute resulted in a disproportionate punishment because the endangerment statute is a third[-]degree charge, which attaches Megan's law and life parole supervision, while the criminal sexual contact statute is [a] crime of a fourth[-]degree, which unlike the former does not result in life parole and Megan's law registry.

. . . .

Defendant relies on State v. El Moghrabi, 316 N.J. Super. 139 (App. Div. 1998), where the court ruled that the legislature specifically designed a statute prohibiting a distinct offense thus prohibiting prosecution of that offense under a generic statute. The instant case, however, is not analogous to Moghrabi.

. . . .

In the present case, prosecution pursuant to the child endangerment statute does not frustrate the legislative will by any means. To the contrary, the statute is designed specifically to protect not only the physical wellbeing of the children from criminal

² Likewise, we note that defendant's contention that there was an inadequate factual basis for his guilty plea was barred by Rule 3:22-4(a) as the argument could have been raised on direct appeal, and the fact that defendant did not file a direct appeal does not obviate the bar. A defendant "is generally barred from presenting a claim on PCR that could have been raised . . . on direct appeal" State v. Nash, 212 N.J. 518, 546 (2013) (citing R. 3:22-4(a)). A PCR petition is not "a substitute for appeal." R. 3:22-3.

contact but also to protect the psychological health of children and prevent corruption of their morals. Legislative intent here is demonstrated by the requirement of the additional element for the charge of endangerment that is not required for the charge of criminal sexual contact.

. . . .

While the criminal sexual contact charge is satisfied in this case, the endangerment statute cannot be considered a generic statute as it requires an additional element, that the conduct "debauches the morals of the child". The breadth of the term sexual conduct is balanced by the requirement that the state show that the conduct would tend to debauch the morals of the child. . . . An act that would debauch the morals of the child is an act that tends to impair morals; actual impairment need not be shown. State v. Hackett, 166 N.J. 66, 76 (2001). In this case, defendant engaged in sexual contact with a fourteen year-old girl. Defendant's conduct in touching the victim's private parts . . . falls directly under the category of the conduct that would impair the morals of the child. During the plea colloquy, the [d]efendant admitted that his actions would impair the morals of the child.

Therefore, [d]efendant's conduct falls under the conduct contemplated by the legislature to be prohibited. Furthermore, defendant's indictment consisted of four counts, including . . . criminal sexual contact Defendant, did, however, accept the plea of child endangerment admitting on the record that his conduct impaired the morals of the victim. Defendant's claim that he was prosecuted under the generic statute, which resulted in disparate punishment, is therefore meritless.

This appeal followed. On appeal, defendant raises the same arguments rejected by the PCR court for our consideration:

POINT ONE

MR. MCMAHON'S PLEA LACKED A FACTUAL BASIS AND
THUS MUST BE VACATED.

POINT TWO

MR. MCMAHON'S PLEA VIOLATED THE WILL OF THE
LEGISLATURE AND THUS MUST BE VACATED.

POINT THREE

MR. MCMAHON IS ENTITLED TO AN EVIDENTIARY
HEARING ON HIS CLAIM THAT HIS ATTORNEY
RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL FOR
ALLOWING HIM TO PLEAD GUILTY WITHOUT A FACTUAL
BASIS AND FOR FAILING TO FILE A MOTION TO
SUPPRESS.

II.

We review the PCR court's findings of fact under a clear error standard, and conclusions of law under a de novo standard. See State v. Harris, 181 N.J. 391, 420-21 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005). However, where, as in this case, "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) (quoting Harris, supra, 181 N.J. at 421), certif. denied, 206 N.J. 64 (2011).

Defendant argues that "his attorney was ineffective for allowing him to plead guilty without a factual basis and for failing to file a motion to suppress [his statement]." According to defendant, since he established "a prima facie case of ineffective assistance of counsel[,]" the PCR court "should have held an evidentiary hearing on his ineffectiveness claim" to allow him to elicit testimony from plea counsel. We disagree and affirm substantially for the reasons expressed in Judge Michael J. Blee's cogent and comprehensive written opinion. We add only the following comments.

The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing. Cummings, supra, 321 N.J. Super. at 170. Rather, trial courts should grant evidentiary hearings only if the defendant has presented a prima facie claim of ineffective assistance, material issues of disputed fact lie outside the record, and resolution of the issues necessitate a hearing. R. 3:22-10(b); State v. Porter, 216 N.J. 343, 355 (2013). "Rule 3:22-10 recognizes judicial discretion to conduct such hearings." State v. Preciose, 129 N.J. 451, 462 (1992).

A PCR court deciding whether to grant an evidentiary hearing "should view the facts in the light most favorable to a defendant to determine whether a defendant has established a prima facie claim." Id. at 462-63. "To establish a prima facie claim of

ineffective assistance of counsel, a defendant must demonstrate the reasonable likelihood of succeeding under the test set forth in [Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698], and United States v. Cronin, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), which [our Supreme Court] adopted in State v. Fritz, 105 N.J. 42, 58 (1987)." Id. at 463.

Under the Strickland standard, a petitioner must show counsel's performance was both deficient and prejudicial. State v. Martini, 160 N.J. 248, 264 (1999). The performance of counsel is deficient if it falls "below an objective standard of reasonableness" measured by "prevailing professional norms." Strickland, supra, 466 U.S. at 687-88, 104 S. Ct. at 2064-65, 80 L. Ed. 2d at 693-94. In evaluating deficiency, counsel's performance must be reviewed with "extreme deference . . . requiring 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]'" Fritz, supra, 105 N.J. at 52 (quoting Strickland, supra, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694).

In the context of a PCR petition challenging a guilty plea based on the ineffective assistance of plea counsel, the prejudice prong is established when the defendant demonstrates a "'reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on


going to trial.'" State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009) (quoting State v. DiFrisko, 137 N.J. 434, 457 (1994)). However, to obtain relief, a defendant "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." State v. O'Donnell, 435 N.J. Super. 351, 371 (App. Div. 2014) (quoting Padilla v. Kentucky, 559 U.S. 356, 372, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284, 297 (2010)).

A defendant claiming ineffective assistance of counsel based on counsel's failure to file a suppression motion not only "'must satisfy both parts of the Strickland test but also must prove that his . . . [Fifth] Amendment claim is meritorious.'" State v. Goodwin, 173 N.J. 583, 597 (2002) (quoting Kimmelman v. Morrison, 477 U.S. 365, 375, 106 S. Ct. 2574, 2583, 91 L.Ed. 2d 305, 319 (1986)). "It is not ineffective assistance of counsel for defense counsel not to file a meritless motion" State v. O'Neal, 190 N.J. 601, 619 (2007).

Applying these principles, we are persuaded that Judge Blee properly declined to conduct an evidentiary hearing and properly denied defendant's petition for PCR. Furthermore, Judge Blee properly rejected as a matter of law defendant's meritless "disparate punishment" and "plea colloquy deficiency claims."

Affirmed.

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



CLERK OF THE APPELLATE DIVISION