

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1756-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TRAY BARNARD, a/k/a
TRAY K. BARNARD AND
TRAY KEITH BARNARD,

Defendant-Appellant.

Submitted February 15, 2017 — Decided March 1, 2017

Before Judges Fuentes and Simonelli.

On appeal from the Superior Court of New
Jersey, Law Division, Essex County, Indictment
No. 13-01-0167.

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

Carolyn A. Murray, Acting Essex County
Prosecutor, attorney for respondent (Maria I.
Guerrero, Special Deputy Attorney General/
Acting Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant Tray Barnard appeals from the August 24, 2015 Law Division order, which denied his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

We derive the following facts from the record. A grand jury indicted defendant on three counts of second-degree endangering the welfare of a child by knowingly distributing an item depicting the sexual exploitation or abuse of a child, N.J.S.A. 2C:24-4(b)(5)(a) (counts one, three, and four); and fourth-degree endangering the welfare of a child by knowingly possessing, viewing of having under his control an item depicting the sexual exploitation of a child, N.J.S.A. 2C:24-4(b)(5)(b) (count two).

Defendant pled guilty to count three. At the plea hearing on June 28, 2013, the State placed the terms of the plea agreement on the record: defendant would plead guilty to count three in exchange for the State's recommendation of a sentence not to exceed five years subject to the registration requirements of Megan's Law, N.J.S.A. 2C:7-1 to -23, and dismissal of the remaining charges. In providing a factual basis, defendant testified that while on his home computer, he used a peer-to-peer network to download and view images and/or movies of child pornography; was aware that using this network would cause the images and/or movies

of child pornography to be shared with other members of the network; actually shared a movie with a law enforcement officer; and the movie was child pornography.

Regarding the plea agreement, defendant testified that no one promised him anything other than what was set forth on the record before the court, and he understood he was waiving certain rights by entering into the plea agreement. Defendant testified that he reviewed the plea forms with his attorney; understood all pertinent parts of the plea agreement, including the penalties the court would assess and his registration requirements under Megan's Law; answered all questions on the plea forms truthfully; and initialed each page of the plea forms and signed them. Defendant had answered "none" to Question 21 on the plea form that asked him to "[l]ist any other promises or representations that have been made by you, the prosecutor, your defense attorney, or anyone else as part of this pleas of guilty[.]"

Defendant also testified that no one forced him to accept the plea offer, and he accepted it of his own free will and because he was guilty. Lastly, defendant testified he had sufficient time to discuss the plea agreement with his attorney; was satisfied with his attorney's services; and had no questions of his attorney or the court. Defendant's eligibility for the Intensive

Supervision Program (ISP) was not mentioned on the plea forms or during the plea hearing.

At sentencing on November 6, 2013, defense counsel asked the court to find mitigating factor N.J.S.A. 2C:44-1(b)(8), "[t]he defendant's conduct was the result of circumstances unlikely to recur." Counsel noted this conviction was a "terrible blemish [on] and otherwise . . . very accomplished life [and] represente[d] [defendant's] first contact with the Criminal Justice System as an adult." Counsel emphasized that defendant led a law-abiding life for a substantial period of time; graduated from college; achieved success in his life; supported his daughter and helped his mother; and an expert report indicated it was unlikely he would engage in similar conduct in the future.

Counsel also reiterated that defendant would receive a five-year sentence, and stated "the custodial aspect of this sentence is probably . . . the least injurious to [defendant]" given the damage to his reputation. Counsel then made a fleeting reference to ISP stating "[w]e like to think that at some point he'd been a likely candidate for [ISP], given his strong [shepherds] in the community, his character and attitude today." After counsel's colloquy, defendant responded "no" when the court asked if he wanted to say anything. The court then sentenced defendant in accordance with the plea agreement.

Defendant did not appeal his conviction or sentence. Instead, on April 22, 2014, he filed a pro se PCR petition. In his supporting certification, defendant stated that trial counsel rendered ineffective assistance by improperly advising him that he was eligible for admission into ISP and would likely be admitted into that program; however, the crime to which he pled guilty made him ineligible for ISP. Defendant submitted no documents showing why he was rejected from ISP.

The PCR judge found that the crime to which defendant pled guilty did not automatically bar him from admission into ISP, and there was no factual or evidential support for defendant's claim that trial counsel told him he would be admitted into ISP. The judge concluded as follows:

Here there is no demonstration that there was anything other than on the part of [defendant] and the defense at the time to get into ISP and there's not even a form of letter indicating that [defendant] was rejected from ISP or what the reasons for rejection were. And to simply say that he would not have taken a plea because . . . he was promised ISP. No one promised him ISP. There's no indication even in [defendant's] papers that there was a promise of ISP. It's . . . unreasonable to believe that such a promise could be made. And from what I can tell, no one asserts any such promise was made in any plea papers or anywhere else along the process.

The judge denied the PCR petition without an evidentiary hearing.

On appeal, defendant raises the following contentions:

POINT I:

DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FROM HIS ATTORNEY WHEN HE ENTERED HIS GUILTY PLEA BECAUSE COUNSEL GAVE DEFENDANT [ERRONEOUS] ASSURANCES THAT HE WOULD BE ACCEPTED INTO THE ISP PROGRAM.

POINT II:

DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS PETITION FOR POST-CONVICITON RELIEF.

POINT III:

DEFENDANT SHOULD BE ALLOWED TO WITHDRAW HIS PLEA BECAUSE HE RECEIVED MISINFORMAITON THAT HE WOULD BE ELIGIBLE TO BE PLACED IN AN ISP PROGRAM.

The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999). Rather, trial courts should grant evidentiary hearings and make a determination on the merits only if the defendant has presented a prima facie claim of ineffective assistance. State v. Preciose, 129 N.J. 451, 462 (1992). To establish a prima facie claim of ineffective assistance of counsel, the defendant

must satisfy two prongs. First, he must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the

Sixth Amendment. An attorney's representation is deficient when it [falls] below an objective standard of reasonableness.

Second, a defendant must show that the deficient performance prejudiced the defense. A defendant will be prejudiced when counsel's errors are sufficiently serious to deny him a fair trial. The prejudice standard is met if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability simply means a probability sufficient to undermine confidence in the outcome of the proceeding.

[State v. O'Neil, 219 N.J. 598, 611 (2014) (citations omitted).]

"[I]n order to establish a prima facie claim, [the defendant] 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." Cummings, supra, 321 N.J. Super. at 170. The defendant must establish, by a preponderance of the credible evidence, that he or she is entitled to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013).

With respect to a guilty plea, our Supreme Court has held that

[t]o set aside a guilty plea based on ineffective assistance of counsel, a defendant must show that (i) counsel's assistance was not within the range of competence demanded of attorneys in criminal cases; and (ii) that 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.

[State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)) (internal quotation marks omitted).]

See also State v. Parker, 212 N.J. 269, 279 (2012). We review a judge's decision to deny a PCR petition without an evidentiary hearing for abuse of discretion. See Preciose, *supra*, 129 N.J. at 462; R. 3:22-10. We discern no abuse of discretion here.

Defendant did not allege any facts in his PCR petition demonstrating trial counsel's alleged substandard performance. He merely made a bald assertion that trial counsel rendered ineffective assistance that is not supported by the record. There is no evidence that defendant was promised ISP in exchange for this guilty plea.


In any event, defendant was not automatically ineligible for ISP by virtue of the crime to which he pled guilty. The offenses cited under Chapter 24 of the New Jersey Criminal Code do not constitute automatic bars to admission into ISP, nor does ISP list Chapter 7 as an automatic bar to admission into the program. To the contrary, individuals admitted into ISP are required to register under Megan's Law if they were previously incarcerated for one of the offenses listed in that provision. See State v.

S.R., 175 N.J. 23, 29-30 (2002). Accordingly, trial counsel's statement at the sentencing hearing that defendant might be a candidate for ISP was correct. Accordingly, defendant failed to prove that trial counsel committed any error.

Even assuming that trial counsel's performance was deficient, defendant failed to prove there was a reasonable probability that but for counsel's error, he would not have pled guilty and would have insisted on going to trial. Defendant was charged with three counts of second-degree endangering the welfare of a child by knowingly distributing an item depicting the sexual exploitation or abuse of a child. He faced consecutive sentences in light of the fact that he distributed child pornography through a peer-to-peer network on three different dates. He received the minimum term of five years for a second-degree crime with no period of parole ineligibility, thus making him eligible for parole after completing one-third of the sentence imposed. Defendant began his sentence on November 6, 2013, was paroled approximately thirteen months later on December 1, 2014, and was not subject to the more onerous demands of ISP. See State v. Cannon, 128 N.J. 546, 556 (1992).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION