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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2966-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DINO ACCARIA, a/k/a
MARK ACCARIA, DINO BOCCHINO
and JOSEPH J. ACCARIA,¹

Defendant-Appellant.

Submitted December 21, 2016 – Decided March 1, 2017

Before Judges Carroll and Gooden Brown.

On appeal from the Superior Court of New
Jersey, Law Division, Monmouth County,
Indictment No. 08-02-0453.

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

Christopher J. Gramiccioni, Monmouth County
Prosecutor, attorney for respondent (Mary R.
Juliano, Assistant Prosecutor, of counsel and
on the brief; Kristen M. Pridgen, Assistant
Prosecutor, on the brief).

¹ Referenced in the record also as Dino P. Accaria, Dina Accaria
and Dina P. Accaria.

PER CURIAM

Defendant appeals from an October 31, 2014 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 third-degree possession of a controlled dangerous substance, N.J.S.A. 2C:35-10(a)(1) (Count One); second-degree possession of a controlled dangerous substance with intent to distribute, N.J.S.A. 2C:35-5(b)(2) (Count Two); and second degree possession of a controlled dangerous substance with intent to distribute within 500 feet of a public park, N.J.S.A. 2C:35-7.1 (Count Three).

Pursuant to a negotiated plea agreement, defendant pled guilty to counts two and three as amended to second-degree conspiracy to possess a controlled dangerous substance with intent to distribute, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:35-5(b)(2), and second-degree conspiracy to possess a controlled dangerous substance with intent to distribute within 500 feet of a public park, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:35-7.1, respectively. In return, the State agreed to dismiss the remaining count and recommend a four-and-a-half year prison term. However, if defendant failed to appear for sentencing, the State would

recommend concurrent ten-year terms of imprisonment with a five-year period of parole ineligibility. The State also agreed to refrain from seeking an extended term.²

On the scheduled sentencing date, defendant failed to appear and a bench warrant was issued. Defendant was subsequently apprehended and filed a motion to withdraw his guilty plea on the grounds that it was neither knowing nor voluntary, and that count three lacked a sufficient factual basis because the location of the public park, in relation to defendant's residence where the offense was committed, was never established. Defendant's sentencing was postponed pending the outcome of his plea withdrawal motion.

On January 9, 2009, the trial court determined that defendant's plea was both knowing and voluntary. In addition, the court permitted the State to elicit testimony from the arresting Sheriff's Officer and introduce a map, which was marked for identification, in order to establish that the offense was committed within 500 feet of a public park. Thereafter, the court found an adequate factual basis for the plea and no valid reason to permit its withdrawal. The court then sentenced defendant to

² The plea was contingent on co-defendant Charles Zajac also pleading guilty; a condition that was met with Zajac's entry of a guilty plea following defendant's.

a ten-year term of imprisonment with a five-year period of parole ineligibility on each count, to run concurrent with each other.

Through the summary process provided under Rule 2:9-11, we affirmed the judgment on count two but vacated the judgment on count three and remanded the matter for trial. State v. Dino Accaria, No. A-5440-08 (App. Div. February 4, 2011). After considering defendant's contention that the court erred in denying his motion to withdraw his guilty plea and that the sentence was excessive, we determined that:

By hearing testimony and receiving evidence on a necessary element of count three - - in the face of defendant's insistence on withdrawing his guilty plea - - the judge's nonjury findings on the location of the offense violated defendant's right to have such a fact proved to a jury beyond a reasonable doubt. In short, the factual basis for count three was defective and that defect could not be cured without defendant's consent, which clearly was not provided.

. . . .

There is, however, no similar defect in the factual basis for defendant's guilty plea to count two, and we find no abuse of discretion in the judge's denial of defendant's motion to withdraw his guilty plea on that count. In considering the record and argument of counsel and it appearing that the remaining issues on appeal concerning count two relate solely to the sentence imposed, we are satisfied that the sentence on that count is not manifestly excessive or unduly punitive and does not constitute an abuse of discretion.

[Ibid. (citations omitted).]³

On remand, the court granted the State's motion to dismiss count three and entered an amended judgment of conviction reflecting the dismissal on January 15, 2013. Thereafter, defendant filed a timely pro se petition for PCR and was later assigned counsel who filed an amended petition. In his petition, defendant contended that his plea counsel was ineffective for: failing to pursue a speedy trial; failing to adequately investigate the case; failing to properly explain the sentencing enhancement if he failed to appear for sentencing; and failing to properly elicit an adequate factual basis for his guilty plea and advocate for its withdrawal. Defendant again sought to withdraw his guilty plea and asserted that his sentence was illegal.

Applying Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the PCR court addressed defendant's ineffectiveness claims sequentially. First, the court concluded that defendant failed to establish "that plea counsel's choice to not pursue a speedy trial motion fell outside the range of professionally competent assistance." Further, according to the court, defendant failed to establish prejudice because "even had plea counsel filed this motion, the motion would be denied as the

³ We denied defendant's motion for reconsideration on March 7, 2011.

thirteen month delay does not amount to a denial of defendant's constitutional right to a speedy trial pursuant to [Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 115 (1972)]."

Next, the court rejected defendant's claim that plea counsel failed to adequately investigate the case by failing "to interview co-defendant Zajac about his possession of the [drugs] found in defendant's home[.]" In recounting the factual history of the case, the court noted that law enforcement officers went to a residence on Center Street in Union Beach to serve a warrant on co-defendant Zajac. When they knocked on the door and identified themselves, they were invited inside the residence. Once inside, defendant identified himself as the owner of the house but denied Zajac's presence. At that point, Zajac emerged from a bedroom where the officers observed a white rock-like substance believed to be cocaine and drug paraphernalia in plain view. Defendant admitted that the bedroom was his but refused to consent to a search. All six occupants of the residence were arrested and a search warrant was later obtained and executed.

In rejecting defendant's claim that plea counsel's failure to interview co-defendant Zajac was outside the range of professionally competent assistance or would have changed the outcome of the case, the court explained that

defendant did have the information that co-defendant Zajac stated he possessed some prohibited drugs. Defendant took the plea agreement knowing that co-defendant Zajac said that some of the drugs were his. Also, a condition of this defendant's plea was that co-defendant Zajac had to also plead guilty to possession of CDS. . . . [T]here was no additional exculpatory information to be gathered from interviewing Zajac. . . . Additionally, defendant cannot establish that the result of his proceeding would have been different had plea counsel interviewed Zajac, as this defendant pled guilty knowing that Zajac also pled guilty.

The court also agreed with the State that "co-defendant Zajac's claim that the drugs were his [was] not dispositive . . . because defendant pled guilty to conspiracy, and [was] still legally liable under the theory of constructive possession, as the drugs were found in defendant's apartment, over which he had immediate control." Additionally, "the theory of vicarious liability as a co-conspirator inculcates this defendant."

Next, the court rejected defendant's contention that plea counsel was ineffective by failing to properly explain the sentencing enhancement if defendant failed to appear for sentencing. The court found that "[a]lthough defendant claims he was confused by the addition of the condition to ensure his appearance at sentencing, defendant did not inquire about this condition" and "[d]efendant stated in his certification that his attorney told him about the condition."

Further, the court found "no evidence in the record to establish defendant was not aware of this condition." The court found that the clear intent of the plea agreement was that, although defendant was pleading guilty to second-degree crimes, they would be treated as third degree crimes pursuant to N.J.S.A. 2C:44-1(b)(2) for sentencing purposes. However, defendant would receive "[t]he benefit of the third degree sentencing" only "if he appeared for his original sentencing date." Otherwise, defendant would be sentenced in the second-degree range. According to the PCR court, the enhanced sentence was properly imposed by the sentencing court because defendant failed to comply with the condition requiring his appearance at sentencing.⁴

The court explained:

Defendant's contention is wholly unsupported by the record. Defendant was told that the State would include this provision for failure to appear at the plea hearing. Defendant then signed his name next to the provision that was placed in writing in the plea form. Finally, the plea instructed defendant of this provision, and asked defendant if he had any questions of his attorney, of the prosecutor, or of the court regarding the plea. Defendant responded that he did not. There is no evidence set forth in this petition that establishes that

⁴ While the PCR court criticized the prosecutor for failing to clearly specify the precise terms of the plea agreement, contrary to defendant's assertion, the criticism did not undermine the court's ultimate conclusion that plea counsel was not ineffective in this regard.

defendant did not know the penal consequences of his failure to appear for his sentencing. Defendant has never offered any explanation as to his failure to appear. This sentence was not unbeknownst to defendant. The plea judge sentenced this defendant in accordance with what he knew could happen if he did not appear at sentencing. Further, the sentence was linked to the sentencing criteria. The trial court balanced the aggravating and mitigating factors, and found aggravating factors 3, 6, 9 and found no mitigating factors. Defendant was sentenced to ten years with a period of five years parole ineligibility based on the balancing of aggravating and mitigating factors, as well as the fact that defendant failed to appear.

. . . .

Defendant chose to ignore the condition requiring his appearance, and therefore, was subject to [the] known penal consequence of ten years in prison with a period of five years parole ineligibility.

. . . .

[H]is plea counsel had absolutely nothing to do with defendant's own failure to appear at his sentencing date.

. . . .

[T]here is no proof that, had defendant elected to go to trial, he would have been acquitted, or if he had gone to trial, would have received a lesser sentence. Based upon his extensive prior criminal record, which could have most likely resulted in an extended term up to 20 years in prison, the plea judge correctly stated at sentence that this defendant received a "terrific deal." Accordingly, defendant has suffered no prejudice as a result of this plea agreement

and the sentence he received in accordance with that plea.

The criminal history contained in the pre-sentence investigation report correctly notes that this defendant had 13 prior municipal court convictions and 19 prior Superior Court convictions from 1978 to 1991 as well as 8 prior felony convictions in federal court. Thus, defendant can establish no prejudice.

Regarding defendant's contention that plea counsel was ineffective in failing to properly elicit an adequate factual basis for his guilty plea, the court determined that defendant's argument was procedurally barred pursuant to Rule 3:22-5.⁵ The court recounted that on direct appeal, the Appellate Division found "an adequate factual basis as to count two" and affirmed on that count but vacated count three because "no adequate factual basis had been established as to the location of the public park in relation to defendant's apartment."

Guided by State v. O'Donnell, 435 N.J. Super. 351 (App. Div. 2014), the court viewed defendant's application as both a motion to withdraw his plea and a petition for PCR based on ineffective assistance of counsel, but determined that our decision on the

⁵ Rule 3:22-5 provides that "[a] prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any post-conviction proceeding brought pursuant to this rule or prior to the adoption thereof, or in any appeal taken from such proceedings."

former issue was "the law of the case" under State v. Hale, 127 N.J. Super. 407, 410 (App. Div. 1974). The court also dismissed defendant's argument that the issue should be revisited because the trial court did not evaluate his plea withdrawal motion under the factors enunciated in State v. Slater, 198 N.J. 145 (2009), which was decided a month after his motion was adjudicated.

Additionally, the court rejected as belied by the record defendant's assertion that his sentence was illegal. The court also found that defendant's illegal sentence claim "could have been raised in the motion to withdraw his plea or raised on appeal[.]" The court reasoned that, pursuant to Rule 3:22-4,⁶ the claim "is now barred as a PCR proceeding is not a device to raise for the first time issues that could have been raised by direct appeal based upon the record."

This appeal followed. Defendant presents the following point and sub-point for our consideration:

POINT ONE

⁶ Rule 3:22-4(a) bars any ground for relief not raised in a prior proceeding unless the court 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 . . . would result in fundamental injustice; or (3) that denial of relief would be contrary to a new rule . . . under either the Constitution of the United States or the State of New Jersey.

DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING BECAUSE HIS PLEA ATTORNEY WAS INEFFECTIVE IN FAILING TO ADVISE HIM OF THE TERMS OF HIS PLEA AGREEMENT AND SENTENCE EXPOSURE.

A. DEFENDANT'S PLEA WAS NOT KNOWINGLY, VOLUNTARILY OR INTELLIGENTLY GIVEN.

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) (alteration in original) (quoting Harris, supra, 181 N.J. at 421), certif. denied, 206 N.J. 64 (2011).

Defendant argues that "his plea attorney did not properly advise him of the terms of his plea offer and sentence exposure, namely that if he failed to appear at his sentence hearing, he would be subjected to concurrent ten year prison terms, with a five year parole disqualifier." According to defendant, because he "presented a prima facie case of ineffective assistance of

counsel under [Strickland, supra,] . . . the trial court erred in dismissing his petition without a hearing." We disagree and affirm substantially for the reasons expressed in Judge Ronald Lee Reisner's 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. 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 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 v. Washington, 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.

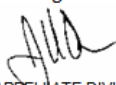
Under the Strickland standard, a petitioner must show counsel's performance was both deficient and prejudicial. State v. Martini, 160 N.J. 248, 264 (1999). Counsel's performance is deficient if it falls "below an objective standard of reasonableness" measured by "prevailing professional norms." Strickland, 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, 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) (alteration in original) (quoting State v. DiFrisco, 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." O'Donnell, supra, 435 N.J. Super. at 371 (quoting Padilla v. Kentucky, 559 U.S. 356, 372, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284, 297 (2010)). Applying these principles, we are persuaded that Judge Reisner properly declined to conduct an evidentiary hearing and properly denied defendant's petition for PCR.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION