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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3025-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JARRET J. HOUSTON a/k/a
JARRETT J. HOUSTON,

Defendant-Appellant.

Submitted March 15, 2017 – Decided July 21, 2017

Before Judges Carroll and Gooden Brown.

On appeal from the Superior Court of New
Jersey, Law Division, Burlington County,
Indictment No. 10-06-0653.

Joseph E. Krakora, Public Defender, attorney
for appellant (Abby P. Schwartz, Designated
Counsel, on the brief).

Robert D. Bernardi, Burlington County
Prosecutor, attorney for respondent (Jennifer
Paszkiewicz, Assistant Prosecutor, of
counsel; Boris Moczula, Legal Assistant, on
the brief).

PER CURIAM

Defendant appeals from the January 28, 2015 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

On April 25, 2011, defendant pled guilty to count one of Burlington County Indictment No. 10-06-0653, charging second-degree robbery, N.J.S.A. 2C:15-1(a)(1). In exchange, the State recommended dismissal of the remaining two counts of the indictment¹ and that defendant be sentenced in the third-degree range, N.J.S.A. 2C:44-1(f)(2), to a term of three years imprisonment subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

The charge stemmed from defendant, an admitted drug dealer, concocting a scheme in which he and a co-defendant would sell fake crack cocaine in order to recover money they were owed from prior drug sales. During the pre-arranged transaction, defendant assaulted one of the two buyers once he realized they paid less money for the counterfeit drugs than had been agreed. At his plea allocution, defendant admitted that "in the course of committing a theft," he "purposely and knowingly" "inflicted bodily injury" on the victim "which resulted in her hospitalization[.]" After determining that there was an adequate factual basis for the plea

¹ Each of the remaining two counts charged third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(7).

"and that the plea [was] made voluntarily, not as a result of any threats or of any promises or inducements not disclosed on the record, and with an understanding of the nature of the charge and the consequences of the plea[,]" R. 3:9-2, the court accepted defendant's guilty plea.

Prior to sentencing, defendant notified his attorney in writing that he wanted to withdraw his guilty plea because he felt he "had inadequate [counsel]" who was not "prepared for trial." After consulting with his supervisor who agreed that there was "no legal basis" for a withdrawal motion, defendant's attorney notified defendant in writing that

[t]here is no legal or factual basis for filing the [m]otion to [v]acate the [g]uilty [p]lea so I will not be filing that motion.

You will recall you were under oath when you gave answers to the [c]ourt[']s questions. You also indicated that you understood that once the plea was entered you could not change your mind. You also indicated that you were entering the plea freely and voluntarily and with full knowledge of the results of the plea.

On July 8, 2011, when defendant appeared for sentencing, his attorney advised the court "[w]hen we were here the last time my client was thinking about filing a motion to vacate. He's not going to do that." When the court gave defendant an opportunity to speak at sentencing, he declined. Thereafter, defendant was

sentenced in accordance with the terms of the plea agreement. Defendant appealed his sentence, which we considered on our Excessive Sentence Oral Argument (ESOA) calendar pursuant to Rule 2:9-11, and affirmed. State v. Houston, No. A-3047-11 (App. Div. Sept. 27, 2012).

Defendant filed a timely PCR petition, and was assigned counsel who submitted a brief supported by defendant's four-page certification dated July 28, 2014. Defendant argued to the PCR court that his attorney was ineffective for (1) allowing him to plead guilty to second-degree robbery because the facts and evidence do not support a conviction for that offense; and (2) failing to file a motion to withdraw his guilty plea because the factual basis for the plea was legally inadequate to constitute second-degree robbery.

In his certification, defendant admitted that while he led the victim "to believe that [he and his co-defendant] were going to sell them drugs[,]" he planned "to sell [her] fake drugs in order to try and get the money [he] was owed." According to defendant, "[t]he fake drugs were soap shavings which look[ed] like crack cocaine." Defendant certified that when he realized that the money paid "was not the agreed upon amount for the deal[,]" he "confronted" the victim, "[t]he situation quickly

escalated and the [victim was] assaulted." Defendant denied that he or his co-defendant took any money after the assault.²

Defendant certified that he wished to withdraw his guilty plea because he did not "steal anything" from the victim and he "did not rob" the victim but was pressured to plead guilty to robbery by his family and his attorney, who explained that he "was facing a very long prison sentence if [he] was convicted at trial." According to defendant, at sentencing, when his attorney refuse[d] "to ask the court to withdraw [his] guilty plea[,] [he] did not feel like there was anything else [he] could do." Defendant also certified that neither his attorney nor the court explained "all of the conditions of mandatory supervision after release from custody" and "[h]ad [he] been aware of all of the conditions that went along with mandatory supervision, [he] would not have accepted the plea."

The court determined that defendant failed to establish a prima facie case of ineffectiveness and was therefore not entitled to an evidentiary hearing. Specifically, the court determined that defendant "entered into his plea agreement with knowledge of the terms, freely, and was not under the influence of any substance

² In an incriminating statement to police during a custodial interrogation, defendant admitted that the buyers gave his co-defendant \$25 for the "beat bags" prior to the assault.

or pressure when he plead." Further, according to the court, defendant's factual basis adequately supported the second-degree robbery conviction because defendant "admitted that he inflicted serious bodily injury on one of the victims in an attempt to receive money from her." The court determined further that "it was within the attorney's discretion not to file a motion to withdraw [defendant's] guilty [plea]" since there was no legal basis for such a motion.

In addition, treating defendant's PCR petition as a belated motion to withdraw his guilty plea, the court determined that there was no basis for relief under State v. Slater, 198 N.J. 145 (2009). The court concluded that defendant had no colorable claim of innocence, and received a favorable plea bargain and the lowest legal sentence he could have received for the offense charged. Further, the court noted that considering the age of the case, allowing defendant to withdraw from his guilty plea would hamper the State's ability to effectively prosecute the case.

This appeal followed. On appeal, defendant raises the following points for our consideration:

POINT I

COUNSEL'S FAILURE TO FILE A MOTION TO WITHDRAW
[DEFENDANT'S] GUILTY PLEA WITHOUT ANY
DISCUSSION WITH [DEFENDANT], WAS INEFFECTIVE
ASSISTANCE OF COUNSEL, IN VIOLATION OF

[DEFENDANT'S] RIGHTS TO A FAIR TRIAL AND TO DUE PROCESS.

POINT II

[DEFENDANT] SHOULD BE PERMITTED TO WITHDRAW HIS GUILTY PLEA . . . IN COMPLIANCE WITH HIS RIGHTS TO A FAIR TRIAL AND DUE PROCESS.

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). Where the PCR court's findings of fact are based on "live witness testimony" we review such findings to determine whether they are supported by sufficient credible evidence in the record. State v. Nash, 212 N.J. 518, 540 (2013). 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). While "[a]ssessing [ineffective assistance of counsel] claims involves matters of fact, . . . the ultimate determination is one of law[.]" Harris, supra, 181 N.J. at 419.

Defendant argues that the PCR court erred in denying his PCR petition and an evidentiary hearing on his claims of ineffective

assistance of trial counsel. Defendant contends that his attorney was ineffective because he dismissed defendant's request to withdraw his guilty plea without any input from defendant. Defendant argues further that once he communicated his displeasure with his attorney's performance and his belief that he was pressured to accept the plea offer, "a conflict of interest arose" and a new attorney "should have been assigned" to file a motion to withdraw his guilty plea. According to defendant, he was prejudiced by counsel's deficient performance because "had the motion been filed, there is more than a slight chance that it would have been granted" and "[t]hen he could have plead guilty to the assault which he indicated that he had committed or if there was no such offer, gone to trial on the charge of robbery." In the alternative, defendant asserts that this matter "should be remanded for a hearing on the four factors of Slater." We disagree.

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), cert. denied, 228 N.J. 502 (2017). "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, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)], 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 defendant must make a two-part showing. A defendant must show that trial 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. This standard of "reasonable competence,"

Fritz, supra, 105 N.J. at 60, "does not require the best of attorneys[.]" State v. Davis, 116 N.J. 341, 351 (1989).

A defendant must also show that the deficient performance prejudiced the defense. Under this prong, to set aside a guilty plea based on ineffective assistance of counsel, defendant must establish "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. DiFrisco, 137 N.J. 434, 457 (1994) (quoting Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985)), cert. denied, 516 U.S. 1129, 116 S. Ct. 949, 133 L. Ed. 2d 873 (1996). 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)).

"Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." Fritz, supra, 105 N.J. at 52 (quoting Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693). Defendant bears the burden of proving both prongs of an ineffective assistance of counsel claim by a preponderance of the evidence. State v. Gaitan,

209 N.J. 339, 350 (2012), cert. denied, ___ U.S. ___, 133 S. Ct. 1454, 185 L. Ed. 2d 361 (2013).

Where a defendant asserts his or her attorney was ineffective for failing to file a motion, he or she must establish that the motion would have been successful. "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). We acknowledge that the better course would have been for plea counsel to withdraw, and for new counsel to have been retained or appointed to evaluate and, if appropriate, advocate for defendant's motion to withdraw his guilty plea. The failure to implement such a procedure can result in prejudice to a defendant. See State v. Barlow, 419 N.J. Super. 527, 535 (App. Div. 2011) (noting that R.P.C. 1.2(a) implicitly requires "that counsel abide by a client's determination, after a plea of guilty has been entered, to seek its withdrawal."). Nonetheless, under the particular facts of this case, we are satisfied that plea counsel's failure to file a motion to withdraw defendant's guilty plea, which is the gravamen of defendant's contention, did not result in any prejudice to defendant under the second prong of Strickland.

In all plea withdrawal cases, whether evaluated under the "interests of justice" standard of Rule 3:9-3(e), or the "correct a manifest injustice" standard of Rule 3:21-1, "the burden rests

on the defendant, in the first instance, to present some plausible basis for his request, and his good faith in asserting a defense on the merits.'" Slater, supra, 198 N.J. at 156 (quoting State v. Smullen, 118 N.J. 408, 416 (1990)). "Generally, representations made by a defendant at plea hearings concerning the voluntariness of the decision to plead, as well as any findings made by the trial court when accepting the plea, constitute a 'formidable barrier' which defendant must overcome before he will be allowed to withdraw his plea." State v. Simon, 161 N.J. 416, 444 (1999) (quoting Blackledge v. Allison, 431 U.S. 63, 74, 97 S. Ct. 1621, 1629, 52 L. Ed. 2d 136, 147 (1977)).

A trial court must consider and balance four factors when evaluating a motion to withdraw a guilty plea: "(1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant's reasons for withdrawal; (3) the existence of a plea bargain; and (4) whether withdrawal would result in unfair prejudice to the State or unfair advantage to the accused." State v. Munroe, 210 N.J. 429, 442 (2012) (quoting Slater, supra, 198 N.J. at 157-58). "No single Slater factor is dispositive; 'if one is missing, that does not automatically disqualify or dictate relief.'" State v. McDonald, 211 N.J. 4, 16-17 (2012) (quoting Slater, supra, 198 N.J. at 162).

While we are certainly cognizant of all the Slater factors, importantly, defendant has not asserted a colorable claim of innocence. Rather, in his July 28, 2014 certification and his earlier confession to law enforcement, he admits assaulting the victim in the course of committing what amounts to a theft by deception. Such conduct bespeaks the very conduct that supports a second-degree robbery conviction and does not thereby establish a "colorable claim of innocence[.]" Slater, supra, 198 N.J. at 158.

Under N.J.S.A. 2C:15-1, "[a] person is guilty of robbery if, in the course of committing a theft, he . . . inflicts bodily injury or uses force upon another[.]" N.J.S.A. 2C:15-1(a)(1). "An act shall be deemed to be included in the phrase 'in the course of committing a theft' if it occurs in an attempt to commit theft or in immediate flight after the attempt or commission." N.J.S.A. 2C:15-1(a). "A person is guilty of theft if he violates any of the substantive sections of Chapter 20 of the Code, N.J.S.A. 2C:20-1 to -22. One of those substantive provisions, N.J.S.A. 2C:20-4, defines theft by deception." State v. Talley, 94 N.J. 385, 390 (1983).

Under N.J.S.A. 2C:20-4, "[a] person is guilty of theft if he purposely obtains property of another by deception. A person deceives if he purposely . . . [c]reates or reinforces a false

impression . . . as to law, value, intention or other state of mind[.]" N.J.S.A. 2C:20-4(a). In Talley, supra, 94 N.J. at 393, our Supreme Court determined that "any conduct denominated as theft is within the four corners of a robbery indictment." Here, the mere fact that the theft was accomplished by deception rather than an unlawful taking, as contemplated in N.J.S.A. 2C:20-3(a), does not relieve defendant of culpability for robbery. Cf. Talley, supra (holding that a defendant indicted for armed robbery could be convicted of theft by deception predicated on the victims' account that defendant forced them at gunpoint to surrender their wallets, but defendant testified at trial that he sold the victims herbal tea instead of marijuana).

Applying these principles, we are persuaded that the PCR court properly declined to conduct an evidentiary hearing and properly denied defendant's petition for PCR. We further conclude that the PCR court "correctly viewed defendant's application as both a motion to withdraw [his] plea, and a petition for PCR based on ineffective assistance of counsel." O'Donnell, supra, 435 N.J. Super. at 368. Therefore, we discern no abuse of discretion in the PCR court's denial of defendant's motion to withdraw his guilty plea.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION