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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3389-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ADENIYI W. BOB-GREY, a/k/a BOB GREY
and ADENIYI W. GREY,

Defendant-Appellant.

Submitted October 26, 2016 – Decided March 22, 2017

Before Judges Fuentes and Gooden Brown.

On appeal from the Superior Court of New
Jersey, Law Division, Camden County,
Indictment No. 11-02-0441.

Joseph E. Krakora, Public Defender, attorney
for appellant (John V. Molitor, Designated
Counsel, on the brief).

Mary Eva Colalillo, Camden County Prosecutor,
attorney for respondent (Robin A. Hamett,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant Adeniyi Boy-Grey appeals from a January 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 pled guilty to aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1), as a lesser included charge of murder. The victim was his stepmother. As part of the plea agreement, defendant agreed to waive psychiatric or psychological defenses to the charge under N.J.S.A. 2C:4-1. The State agreed to dismiss the remaining counts in the indictment and recommend a twenty-two year sentence of imprisonment subject to an eighty-five percent parole ineligibility period and five years of parole supervision following release from custody pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

In his plea allocution, defendant admitted choking his stepmother until she was unconscious and then cutting her throat with a knife, causing her to bleed to death, after a dispute in the family's home. After ensuring that there was an adequate factual basis for the plea, that defendant understood the nature of the charge and the consequences of the plea, and that the plea was made voluntarily and not as a result of any threats, promises or

inducements not disclosed on the record, the court accepted the plea in accordance with Rule 3:9-2.¹

When defendant appeared for sentencing on October 19, 2012, he indicated that he wanted to withdraw his guilty plea and proceed to trial, claiming that his attorney forced him to plead guilty and forced him to sign the plea forms. After applying the four-part test enunciated in State v. Slater, 198 N.J. 145 (2009), the court denied defendant's request to withdraw his guilty plea finding "no colorable claim of innocence" and finding defendant's assertions incredible. Immediately thereafter, the court sentenced defendant, consistent with the plea agreement, to a term of twenty-two years imprisonment subject to NERA. We affirmed defendant's sentence through the summary process provided under Rule 2:9-11. State v. Bob-Grey, No. A-3127-12 (App. Div. Sept. 25, 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 trial counsel was ineffective when he: (1) failed to apprise him of the five-year period of parole supervision following release from prison;

¹ The court also noted receiving the approval of the Criminal Presiding Judge to accept a guilty plea after the pretrial conference as required under Rule 3:9-3(g).

(2) coerced him to plead guilty; (3) failed to advocate for the withdrawal of his guilty plea; and (4) failed to raise defendant's mental health problems at the Miranda² hearing. Defendant also contended that his appellate counsel was ineffective when he failed to appeal the court's Miranda and Slater rulings. On January 16, 2015, following oral argument, the PCR court denied defendant's petition without an evidentiary hearing.

The PCR judge found:

Number one, the defendant did not allege in his original or amended PCR petition . . . that the trial counsel failed to tell him about the five year period of mandatory parole.

Also, the record from the plea proceeding clearly shows that the trial court told the defendant about that consequence of his NERA sentence and that the defendant reviewed with his attorney and signed the NERA plea form that discloses this consequence as well.

Finally, the defendant has made no showing . . . that he would have gone to trial rather than plead, had he known of the five year parole issue. So there's no basis for relief on that particular argument.

The second point regarding the alleged coercion. The same argument was made to the trial court at the time of the sentence and the trial court found that claim of coercion of the defendant by trial counsel to not be credible at all. The defendant . . . has presented no information in his . . . PCR

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

petition, other than a bald assertion that his attorney forced him to plead guilty. The same assertion that the trial court, who had numerous opportunities to observe the defendant's interactions with his attorney and to observe and communicate directly with the defendant during the plea colloquy, found to be not credible.

The defendant further argues that trial counsel should have advanced before the trial court the defendant's argument about coercion. It has been kind of modified here . . . to an argument that trial counsel should have asked for an adjournment to have another attorney appointed. However, it's clear from the fact that the trial court found the claim of coercion to not be credible at all, that the appointment of another counsel would not have affected the outcome of what happened at the trial court level.

. . . .

Finally, in his amended petition, the defendant claims that trial counsel was deficient, because he failed to raise the defendant's mental health problems at the Miranda hearing. There is no merit to that claim, because trial counsel, in fact, did raise those issues.

The PCR judge also rejected defendant's contentions regarding his appellate counsel:

At the appellate level, to prevail, the defendant must show more than that appellate counsel failed to pursue every argument that the defendant wanted pursued. There's no question that appellate counsel didn't. Appellate counsel has no such obligation. Rather, the obligation only is to present arguments that are reasoned and reasonable. Here, an argument challenging the Miranda

ruling would not have met that standard, because the defendant had waived his right to appeal that ruling as part of his guilty plea.

Moreover, the defendant advances no specific basis here in the papers or in oral argument as to any alleged reversible errors. There is a mention made here of an alleged invocation of a right to remain silent. That has not been . . . fully explored here, but this Court concludes that, based on a review of the transcript of the Miranda hearing, that the Court's ruling on that issue was correct and the issue of whether . . . appellate counsel, choosing to not argue the Miranda issue, actually not seeking to be allowed to argue that issue, despite the defendant's waiver of it, was not an unreasonable choice.

As to the issue of the attempted withdrawal of the guilty plea. Again, the defendant has not presented any basis to contend that an appellate court could have reasonably found that the trial court committed reversible error in denying his application to withdraw from his plea agreement. Most significantly, the defendant has to this day never asserted a colorable claim of innocence.

II.

On appeal, defendant presents the following issues for our consideration:

POINT I

THIS COURT SHOULD REVERSE THE LAW DIVISION'S DECISION TO DENY DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF AND ORDER A NEW TRIAL OR IN THE ALTERNATIVE ORDER AN EVIDENTIARY HEARING TO DISCOVER WHY THE OFFICE OF THE PUBLIC DEFENDER DID NOT HONOR THE DEFENDANT'S WISHES.

POINT II

THE DEFENDANT WAS CAJOLED INTO PLEADING
GUILTY.

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 his claim of ineffective assistance of counsel was improperly denied without an evidentiary hearing. 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 and make a determination on the merits 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, 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. These principles apply as well to a defendant's claim of ineffective assistance of appellate counsel. State v. Gaither, 396 N.J. Super. 508, 513 (App. Div. 2007), certif. denied, 194 N.J. 444 (2008).

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 second 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)). In challenging appellate counsel's ineffectiveness, the second prong is established when the defendant demonstrates a reasonable probability that but for counsel's unprofessional errors, the results of the appeal would have been different. Gaither, supra, 396 N.J. Super. at 512-14.

Defendant contends that his plea counsel was ineffective because he made his guilty plea conditional pursuant to Rule 3:9-3(d), which provides the prosecutor with the option to annul the plea agreement and restore the charges in the indictment in the event defendant files a timely appeal. We reject this argument

for two reasons. First, defendant is precluded from raising this issue on appeal because he did not raise the issue before the PCR court. Zaman v. Felton, 219 N.J. 199, 226-27 (2014). Second, the State did not seek to vitiate the plea agreement when defendant appealed the sentence imposed by the sentencing court under Rule 2:9-11. Thus, defendant was not legally prejudiced by the decision to plead guilty subject to the restrictions imposed by Rule 3:9-3(d).

Defendant also contends that his plea counsel was ineffective because he made promises that unfairly induced him to plead guilty. Defendant requests the opportunity to testify about these promises at an evidentiary hearing. This argument fails because defendant bears the burden of demonstrating a prima facie case, and defendant's bald assertion that his attorney made unspecified promises that unfairly induced him to plead guilty does not suffice.

We agree with the PCR court that defendant failed to present a prima facie case of ineffective assistance of counsel. Defendant's arguments attacking his appellate counsel's performance lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION