

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3438-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MITCHELL D. YASUK,

Defendant-Appellant.

Submitted September 12, 2017 — Decided October 13, 2017

Before Judges Reisner and Gilson.

On appeal from Superior Court of New Jersey,
Law Division, Ocean County, Indictment No. 09-
07-1274.

Joseph E. Krakora, Public Defender, attorney
for appellant (Lee March Grayson, Designated
Counsel, on the brief).

Joseph D. Coronato, Ocean County Prosecutor,
attorney for respondent (Samuel Marzarella,
Chief Appellate Attorney, of counsel; Shiraz
Imran Deen, Assistant Prosecutor, of counsel
and on the brief).

PER CURIAM

Defendant Mitchell D. Yasuk appeals from a December 21, 2015 order denying his petition for post-conviction relief (PCR) following an evidentiary hearing. We affirm.

I.

In January 2009, defendant was indicted and charged with two crimes: second-degree luring, N.J.S.A. 2C:13-6, and fourth-degree lewdness, N.J.S.A. 2C:14-4(b)(1). The charges against defendant arose out of reports by several witnesses that defendant had lured and attempted to lure a child into his apartment and then exposed his penis to the child. Defendant had previously been convicted of two counts of fourth-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a).

When arrested in 2008, he was living in an apartment that was part of a three family home. Tenants in the other apartments reported that on several occasions defendant attempted to lure their children into his apartment when he was naked or when his penis was exposed.

In July 2009, defendant pled guilty to second-degree luring, N.J.S.A. 2C:13-6, and third-degree attempting to endanger the welfare of a child, N.J.S.A. 2C:5-1 and 2C:24-4(a). In pleading guilty, defendant testified that in July 2008, he brought a puppy into his apartment to purposefully lure a child into his apartment so that he could expose his private parts to the child to arouse

his own sexual desire. Defendant also admitted that the child had followed him into the apartment, defendant was naked, and defendant's purpose was to attempt to endanger the morals of the child.

At the time of his guilty plea, defendant signed two supplemental plea forms concerning additional questions for certain sex offenders. Those forms expressly informed defendant that, given the crimes to which he was pleading guilty, he could be subject to civil commitment following the completion of his sentence. Those forms were then reviewed with defendant during his plea.

Consistent with the negotiated plea agreement, on the conviction for luring defendant was sentenced to six years in prison with five years of parole ineligibility. On the conviction for attempting to endanger the welfare of a child, he was sentenced to a concurrent term of five years in prison. In accordance with Megan's Law, N.J.S.A. 2C:7-1 to -11, defendant was also sentenced to parole supervision for life.

Defendant did not appeal his conviction or sentence. Instead, in August 2013, defendant filed this petition for PCR. The PCR court held an evidentiary hearing and heard testimony from defendant and defendant's trial counsel. In connection with the hearing, the PCR court denied defendant's request to present expert

and factual testimony from an attorney on the issue of ineffective assistance of counsel.

Following the hearing, the court denied defendant's PCR petition and issued a written decision explaining the ruling. The PCR judge reviewed defendant's contention that his trial counsel had been ineffective in failing properly to investigate the case and in not explaining to defendant that he could be subject to civil commitment after he served his sentence.

With regard to the failure to investigate, the court reviewed two certifications from proposed defense witnesses, but found that the proffered testimony was not material. Specifically, the court found that the two witnesses would have testified about defendant's physical condition and a dispute concerning rent with the tenants. The PCR judge found that the proposed testimony concerning the rent dispute was inadmissible hearsay, and that trial counsel was aware of defendant's physical conditions.

Turning to the question of whether defendant was aware of the possibility of civil commitment, the judge found that defendant was well aware of that possibility. Specifically, the judge pointed out that in the plea forms and during the plea colloquy, defendant had been informed that he was subject to possible civil commitment. The court also found defendant's claim that he was not aware of the potential for civil commitment to be incredible.

Turning to the proffer of testimony from the attorney who was offered as an expert and fact witness, the court found that there was no reason to allow the testimony because expert testimony was not necessary and, as to the facts, the expert was only offering hearsay.

II.

On appeal, defendant makes five arguments, which he articulates as follows:

POINT I — POST-CONVICTION RELIEF SHOULD BE GRANTED AND THE DEFENDANT'S CONVICTION REVERSED BECAUSE TRIAL COUNSEL WAS DEFICIENT BY NOT PROVIDING ADVICE TO THE DEFENDANT ABOUT THE RISK OF CIVIL COMMITMENT UPON COMPLETION OF INCARCERATION, PURSUANT TO THE SEXUALLY VIOLENT PREDATOR ACT (SVPA), IN VIOLATION OF THE UNITED STATES AND NEW JERSEY CONSTITUTIONS.

POINT II — POST-CONVICTION RELIEF SHOULD BE GRANTED AND THE DEFENDANT'S CONVICTION REVERSED BECAUSE TRIAL COUNSEL DID NOT CONDUCT AN ADEQUATE INVESTIGATION, FAILED TO CONTACT KEY DEFENSE WITNESSES AND NEGLECTED TO OBTAIN THE DEFENDANT'S MEDICAL RECORDS, WHICH WOULD HAVE REVEALED A VIABLE DEFENSE, DUE TO HIS MEDICAL PROBLEMS, AND DEMONSTRATED THAT THE TENANTS HAD A MOTIVE TO FABRICATE A STORY TO AVOID EVICTION.

POINT III — POST-CONVICTION RELIEF SHOULD BE GRANTED AND THE DEFENDANT'S CONVICTION REVERSED BECAUSE THE DEFENDANT HAS DEMONSTRATED A COLORABLE CLAIM OF INNOCENCE AND SATISFIED THE SLATER CRITERA.

POINT IV — THE PCR COURT ERRED BY BARRING REBUTTAL TESTIMONY FROM ATTORNEY JOAN VAN PELT

WHO WAS RETAINED AS AN EXPERT WITNESS FOR THE DEFENDANT IN HIS PETITION AND TO WHOM DEFENSE COUNSEL ADMITTED THAT NO INVESTIGATION WAS CONDUCTED IN PREPARATION FOR TRIAL OR ADVICE GIVEN REGARDING THE RISK OF CIVL COMMITMENT IF THE PLEA OFFER TO THE ACCUSATION WAS ACCEPTED.

POINT V — THE PCR COURT ERRED BY BARRING EXPERT TESTIMONY FROM ATTORNEY VAN PELT ON THE ISSUE OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL BECAUSE SHE POSSESSED SPECIALIZED KNOWLEDGE REGARDING POLICY AND TRAINING AT THE PUBLIC DEFENDER'S OFFICE PERTAINING TO THE DEFENSE OF SEX CRIME CASES AND SVPA THAT WOULD HAVE ASSISTED THE TRIER OF FACT TO UNDERSTAND THE EVIDENCE

The record and law do not support any of these arguments. We will briefly address each argument.

A. The Possibility of Civil Commitment

When defendant pled guilty, he expressly affirmed that he understood that he could be civilly committed for up to life if, after a hearing, the court found that defendant was in need of involuntary civil commitment. That risk was disclosed both in the plea forms and in the colloquy with the plea judge. Moreover, at the PCR hearing, defendant's trial counsel testified that he discussed the possibility of civil commitment with defendant and that defendant affirmed that he understood that possibility. The PCR judge found that testimony to be credible. We discern no basis to disturb the judge's credibility determination. See State

v. Nash, 212 N.J. 518, 540 (2013) (recognizing the deference due to a credibility finding made by a PCR judge after a hearing).

B. Defendant's Claim That Trial Counsel Was Ineffective

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel rendered inadequate representation and that the deficient performance caused defendant prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); State v. Fritz, 105 N.J. 42, 52 (1987). In that regard, a defendant seeking to set aside a guilty plea must demonstrate that counsel's assistance was not "within the range of competence demanded of attorneys in criminal cases," and "that there is a reasonable probability that, but for counsel's errors, defendant would not have pled guilty and would have insisted on going to trial." See State v. DiFrisco, 137 N.J. 434, 457 (1994) (quoting Tollett v. Henderson, 411 U.S. 258, 266, 93 S. Ct. 1602, 1608, 36 L. Ed. 2d 235, 243 (1973), and Hill v. Lockhart, 474 U.S. 52, 60, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985)).

Here, defendant contends that his trial counsel was deficient for two reasons. First, he claims that counsel failed to investigate his case. Second, he claims that counsel failed to inform him of the possibility of civil commitment. We have already

upheld the PCR judge's finding that defendant was informed of the possibility of civil commitment and, thus, that claim fails.

In support of his claim that his trial counsel failed to investigate the case, defendant submitted affidavits from two witnesses. As already summarized, those witnesses claim that they had spoken to defendant about a rental dispute with the parents of the child who was the subject of the luring. The PCR court correctly found that such testimony would have been inadmissible hearsay. N.J.R.E. 801(c). The witnesses also proposed to testify about defendant's weak physical condition. The PCR judge found that trial counsel was well aware of defendant's limited physical condition and considered that fact in connection with discussing the guilty plea with defendant. That finding is supported by substantial credible evidence in the record and we find no basis to disagree with that finding.

C. Defendant's Request To Withdraw His Guilty Plea

Defendant also claims that he is innocent and should be allowed to withdraw his guilty plea. Courts evaluate four factors in assessing whether a defendant has demonstrated a valid basis for withdrawing a guilty plea. State v. Slater, 198 N.J. 145, 157-58 (2009). Those factors are (1) whether defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant's reason 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. Id. Evaluating those Slater factors in light of the record in this case, defendant has not established a basis to withdraw his guilty plea.

First, defendant has failed to demonstrate a colorable claim of innocence. He has pointed to nothing in the record to support his assertion of innocence. Second, defendant has not demonstrated that the reasons for his request for withdrawal are strong. In that regard, he relies on his arguments concerning the ineffective assistance of counsel. We have already analyzed those arguments and they do not have merit. Third, there was a negotiated plea agreement. Had defendant gone to trial, he could have been sentenced to over eleven years in prison. Under the plea bargain, he received an aggregate sentence of six years. Finally, the interests of justice do not support vacating defendant's guilty plea.

D. The PCR Court's Decision Not To Allow Testimony
From A Proposed Attorney Expert Witness


As already noted, the PCR judge did not allow defendant to call an attorney as a proposed expert and fact witness. That attorney had interviewed trial counsel and planned to offer expert testimony related to the claim of ineffective assistance of

counsel. The attorney also proposed to offer testimony about what trial counsel had told her.

The PCR judge did not abuse his discretion in determining that he did not need to hear from an expert concerning the question of ineffective assistance of counsel. N.J.R.E. 702; see State v. Martini, 160 N.J. 248, 263 (1999) (affirming a PCR court's decision to not allow expert testimony because it would not assist the trier of fact), cert. denied, 543 U.S. 1025, 125 S. Ct. 662, 160 L. Ed. 2d 503 (2004). Moreover, we find no abuse of discretion in the court's decision not to hear any factual testimony the expert might have offered because it would not have changed the result of the PCR decision.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION