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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3478-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMES EICHELE,

Defendant-Appellant.

Submitted July 18, 2017 — Decided December 28, 2017

Before Judges Ostrer and Leone.

On appeal from Superior Court of New Jersey,
Law Division, Ocean County, Indictment No. 08-
12-1851.

Joseph E. Krakora, Public Defender, attorney
for appellant (Jennifer Barr Swift, Designated
Counsel, on the brief).

Joseph D. Coronato, Ocean County Prosecutor,
attorney for respondent (Samuel Marzarella,
Chief Appellate Attorney, of counsel; Roberta
DiBiase, Supervising Assistant Prosecutor, on
the brief).

The opinion of the court was delivered by

OSTRER, J.A.D.

Defendant appeals from the trial court's denial, without an evidentiary hearing, of his petition for post-conviction relief (PCR). He does not challenge his conviction, nor the custodial portion of his sentence. Rather, he collaterally challenges the trial court's order that he pay \$37,071 in restitution – \$22,071 to E.G., and \$15,000 to L.I.¹ We affirm.

We reviewed the facts in our opinion on defendant's direct appeal. State v. Eichele, No. A-3954-09 (April 14, 2011). It suffices to note there were multiple residential burglaries in age-restricted senior developments that followed the same modus operandi (M.O.). Members of a law enforcement task force arrested defendant as he was about to burglarize a home following the same M.O. The police uncovered evidence that defendant had just burglarized another home in the same development. A subsequent search of defendant's home uncovered the fruits of multiple burglaries, including a pistol that belonged to E.G.

The six-count indictment charged defendant with: (1) third-degree attempted burglary of the home where he was arrested; (2) third-degree burglary of the nearby home; (3) third-degree theft of over \$500 in property from that nearby home; (4) third-degree

¹ Although the restitution order named a husband and wife, La.I. and Lo.I., the indictment named only the husband. For ease of reference, we will refer to them collectively as L.I.

receiving E.G.'s stolen firearm; (5) third-degree receiving stolen property of ten named victims, including L.I., but not E.G.; and (6) second-degree possession of a weapon by a convicted person. Defendant pleaded guilty to counts one, two, five, and six. Pursuant to the plea agreement, the State would argue for a twenty-year aggregate sentence, with a ten-year period of parole ineligibility, including a discretionary extended term because defendant was a persistent offender; and defense counsel would argue for a fifteen-year aggregate sentence, with a five-year period of parole ineligibility. Defendant acknowledged in his plea form that the court might require him to pay restitution. He stated on the record he read and understood the form.

At sentencing, the State presented victim impact statements of E.G. and L.I., setting forth in detail the uninsured losses they incurred in the burglaries of their homes. Defense counsel did not object to the amounts sought, nor did he contest defendant's ability to pay. Rather, he alluded to defendant's intention to make restitution in urging the court to find mitigating factor six,² and impose the lesser sentence of fifteen years, with five years of parole ineligibility.

² See N.J.S.A. 2C:44-1(b)(6) ("The defendant . . . will compensate the victim of his conduct for the damage or injury that he sustained").

[DEFENSE COUNSEL]: With regards to this matter, I would submit mitigating factor number 6. There are two amounts of restitution. We really can't dispute that amount, because we've looked at what they have, and -- but really they don't have any other evidence besides that. So with regards to the amounts of restitution, those are fixed.

With regard to the ability to pay, my client is 62 years old. Depending upon the sentence that your Honor imposes, there has to be a minimum parole stip of five years, so the guarantee will be 67. And if there's additional time, he probably won't get out until he's about 70 years old. I assume at that time, Judge, he still will be in good health and he would have the ability to make payments -- get work and make payments towards that. And he is also entitled to 510 days.

THE COURT: All right. [Defense Counsel], just before we move on, with regard to restitution, you've spoken with your client, and he agrees on the amounts, and he agrees he has the ability to pay once -- should he be released and becomes employed?

[DEFENSE COUNSEL]: Yes, that is correct, your Honor.

The court found aggravating factors three, nine, and to a lesser extent six, because the court relied on defendant's extensive prior record in granting the State's motion for an extended term.³ Yet, the court also found mitigating factor six,

³ See N.J.S.A. 2C:44-1(a)(3) ("[t]he risk that the defendant will commit another offense"); N.J.S.A. 2C:44-1(a)(6) ("[t]he extent of the defendant's prior criminal record and the seriousness of

observing defendant's willingness to pay restitution, and his ability to pay, at a rate set by the Division of Parole, upon his release:

I will indicate that I will find mitigating factor 6 and give minor weight to that given the defendant's recognition that he owes restitution to these victims, that he does not dispute the amount, and that he will have the ability to pay, should he be released from prison, and he could make payment on those amounts when he becomes employed and arrange for payments with parole once he is released, if he is released.

The court then imposed the lesser sentence requested by defense counsel – an aggregate fifteen-year term, with a five-year period of parole ineligibility – along with an order to pay \$22,071 in restitution to E.G., and \$15,000 to L.I.

In his pro se PCR petition, defendant, then still confined,⁴ asked that the court vacate the restitution order, order the refund of the payments he already made through his inmate account,⁵ and

the offenses of which he has been convicted"); N.J.S.A. 2C:44-1(a)(9) ("[t]he need for deterring the defendant and others from violating the law").

⁴ According to the Department of Corrections' website, defendant was released on parole in September 2017. State of New Jersey Department of Corrections, https://www20.state.nj.us/DOC_Inmate/details?x=1056183&n=0 (last visited Dec. 13, 2017).

⁵ See N.J.S.A. 30:4-92 (authorizing correctional institutions to withdraw up to one-third of an inmate's prison income to pay restitution).

remove E.G.'s and L.I.'s victim impact statements from his record. In support, defendant asserted that no evidence was ever presented to support a finding that he "stole, burgled, or, in any way possessed, any property listed" in E.G.'s or L.I.'s victim impact statements.⁶ Although defendant apparently filed a counseled brief (which is not in the record), we presume he did not submit a supplemental factual certification, as none was provided to us.

The trial court denied defendant's petition. The court held it was barred as defendant could have challenged the restitution award on direct appeal. The court also rejected PCR counsel's argument that plea counsel was ineffective by failing to object to the restitution award, noting that "defendant was, in fact, rewarded for agreeing to make restitution to these specific two individuals."

In his appeal, defendant presents the following points:

POINT I

THE PCR JUDGE BELOW ERRED IN DENYING AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A REASONABLE LIKELIHOOD THAT HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WOULD ULTIMATELY SUCCEED ON THE MERITS, AND A REMAND IS REQUIRED TO SUPPLEMENT THE RECORD.

⁶ Defendant also mentioned the impact statement of another victim, but the relevance of that statement is unclear, as the \$37,071 amount was based solely on E.G.'s and L.I.'s statements.

POINT II

THE PCR JUDGE BELOW ERRED IN DENYING DEFENDANT'S CLAIM THAT THE RESTITUTION PORTION OF HIS SENTENCE IS ILLEGAL.

POINT III

APPELLANT COUNSEL INEFFECTIVELY REPRESENTED DEFENDANT BY FAILING TO RAISE THESE ISSUES IN THE DIRECT APPEAL (NOT RAISED BELOW).

POINT IV

DEFENDANT WAS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIMS.

We turn first to defendant's claim of ineffective assistance of counsel. As did the trial court, see State v. Harris, 181 N.J. 391, 421 (2004) (stating appellate court conducts de novo review where PCR court does not hold an evidentiary hearing), we apply the two-pronged Strickland test and determine whether the record reveals that defendant's trial counsel was constitutionally deficient, and that defendant suffered resulting prejudice. See Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 58 (1987).

First, defendant has failed to establish that his plea counsel was ineffective. No doubt, as defendant now contends, his plea counsel could have sought a restitution hearing, to challenge the amounts sought and his ability to pay. That was his right. State v. Martinez, 392 N.J. Super. 307, 318-19 (App. Div. 2007). His

plea counsel also could have challenged the imposition of restitution to E.G., since defendant did not admit to any crime against E.G., except possession of E.G.'s stolen firearm. See State v. Krueger, 241 N.J. Super. 244, 253-54 (App. Div. 1990) (stating that, at the time of the plea, a defendant must provide a factual basis to support restitution for the dismissed offenses).

However, the availability of those avenues does not make it ineffective to bypass them. Defendant was obliged to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). "[T]he mere existence of alternative – even preferable or more effective – strategies does not satisfy the requirements of demonstrating ineffectiveness under Strickland.'" State v. Harris, 181 N.J. 391, 491 (2004) (quoting Marshall v. Hendricks, 307 F.3d 36, 86 (3d Cir. 2002), cert. denied, 538 U.S. 111 (2003)); see also Knowles v. Mirzayance, 556 U.S. 111, 123 (2009) ("The law does not require counsel to raise every available nonfrivolous defense.").

Rather than challenge restitution, plea counsel embraced it. Defense counsel withheld objection to restitution and instead contended his client willingly accepted responsibility to pay restitution, and thus should receive the benefit of mitigating

factor six.⁷ He did so to persuade the court that defendant, a career criminal, deserved some measure of leniency. That strategy succeeded. Plea counsel achieved the larger goal of shaving five years off the minimum period of incarceration for a man already in his sixties. Although defense counsel sacrificed any objection to restitution, it was a sacrifice reasonably made. The sentencing court anticipated that, upon defendant's release, the Parole Division would establish a payment plan consistent with his resources at that time. See State v. Newman, 132 N.J. 159, 172 (1993) (stating that if a defendant cannot afford to pay ordered restitution, the court cannot later change the amount, but upon default, the court can establish a "reasonable schedule for payment"). In sum, defendant has failed to establish a prima facie case of ineffective assistance, notwithstanding that defense counsel had a basis for challenging restitution.

Nor are we persuaded that, in the absence of a factual basis for restitution to E.G., the restitution award constituted an "illegal" sentence that must be set aside as a form of PCR. The

⁷ Notably, defendant says nothing in his petition regarding his consultations with plea counsel and the strategy counsel obviously pursued. PCR counsel argued, before the trial court, that plea counsel did not review with defendant the presentence report, which included the victim impact statements. However, defendant provides no competent evidence to support that claim. See R. 1:6-6; R. 3:22-10(c).

lack of an adequate factual basis for a plea of guilty does not automatically render a sentence "illegal."

Our procedural Rules do require a judge to elicit a factual basis for a guilty plea. R. 3:9-2. As long as a guilty plea is knowing and voluntary, however, a court's failure to elicit a factual basis for the plea is not necessarily of constitutional dimension and thus does not render illegal a sentence imposed without such a basis.

[State v. Mitchell, 126 N.J. 565, 577 (1992).]

Applying the same principles, the lack of a factual basis for the award of restitution does not render the sentence illegal, since defendant did not make a contemporaneous claim of innocence. See id. at 577-78. Therefore, PCR is not warranted.

To the extent not addressed, defendant's remaining arguments 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