

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3499-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TIMOTHY RANDALL,

Defendant-Appellant.

Submitted May 23, 2017 – Decided August 1, 2017

Before Judges Yannotti and Sapp-Peterson.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 12-07-1894.

Joseph E. Krakora, Public Defender, attorney for appellant (Alan I. Smith, Designated Counsel, on the brief).

Carolyn A. Murray, Acting Essex County Prosecutor, attorney for respondent (Stephen A. Pogany, Special Deputy Attorney General/Acting Assistant Prosecutor, on the brief).

PER CURIAM

Defendant appeals from a February 1, 2016 order denying his petition for post-conviction relief (PCR), which defendant filed following his civil commitment to the Special Treatment Unit, pursuant to the Sexually Violent Predator Act (SVPA), N.J.S.A. 30:4-27.24 to -27.38. We affirm.

An Essex County Grand Jury returned a six-count indictment against defendant, charging him with first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1) (count one); second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a) (counts two, four, and six); and second-degree sexual assault, N.J.S.A. 2C:14-2(b) (counts three and five).¹ Defendant entered into a negotiated plea agreement in which he agreed to plead guilty to two counts of endangering the welfare of a minor (counts two and four). In exchange, the State agreed to recommend a three-year flat sentence and to dismiss the more serious charges in the indictment. During the plea colloquy, the Assistant Prosecutor indicated that as part of the agreement,

[T]he Essex County Prosecutor's Office will also not refer this defendant [] for civil commitment. However, the decision whether a person is civilly committed falls under the Attorney General's Office and I cannot bind

¹ In a separate indictment defendant was charged with additional offenses, which are unrelated to this appeal.

the Attorney General's Office for whatever they choose to do on their own, as well as the Department of Corrections, who would make that -- who can possibly make that referral, but no referral will come from the Essex County Prosecutor's Office.

When questioned by the court as to whether defendant understood everything the Assistant Prosecutor placed on the record up to that point regarding the plea agreement, defendant requested an opportunity to speak to his lawyer. He then asked the court about a provision on the plea form regarding violation of community supervision for life, but, had no questions about the fact that the Essex County Prosecutor would not refer him for civil commitment, the Attorney General or Department of Corrections could make such referral. Defendant then advised the court that he understood the terms of the plea agreement, had an opportunity to confer with his attorney regarding the plea agreement, and was consenting to the terms of the agreement.

When the court reviewed each of the terms of the plea agreement directly with defendant, it reiterated that "as part of this agreement, [the Essex County Prosecutor's Office] ha[s] agreed not make a referral for a civil commitment, to have you civilly committed." Defendant indicated that he understood. The court then stated:

However, do you also understand that the decision of the Essex County Prosecutor not

to make a request or recommendation for civil commitment does not, in any way, affect the Attorney General's Office or the Department of Corrections from making that referral, if they believe it's necessary or proper?

Defendant responded that he understood, but asked the court, "[A]re you saying that they can -- they can-- they can do that if they want to?" In response the court stated:

All I'm saying is that the prosecutor's decision not to make that recommendation doesn't, in any way, affect the possibility or the Attorney General making that application of recommendation or the Department of Corrections if, at some point in time, they think it's appropriate. Do you understand that?

Defendant once again advised the court that he understood and had no further questions. Before concluding the plea colloquy with defendant, the court, on three separate occasions, asked defendant whether he had any other questions and twice explained to defendant that "[n]ow is the time to ask questions." The only additional question defendant posed to the court was whether the court could change its mind regarding the plea agreement. Finally, in response to the court's question regarding his legal representation, defendant advised the court that he was satisfied with the services rendered on his behalf by his attorney.

The court subsequently sentenced defendant, in accordance with the plea agreement, to a three-year flat term, together with

finer, penalties, and community supervision for life. At the time of sentencing, defendant had approximately 873 days of jail credits. As such, he was slated for parole several months later.

Prior to defendant's release, the Attorney General's Office filed a petition for defendant's civil commitment pursuant to the SVPA. The court granted the petition. On December 9, 2014, defendant filed a pro se petition, seeking post-conviction relief. Following appointment of assigned counsel, the court conducted oral argument on February 1, 2016. On that same date, the court rendered an oral decision denying the petition.

In reaching its decision, the court reviewed the plea colloquy transcript of March 11, 2014, and quoted extensively from the transcript of those proceedings. In particular, the court focused on the questions posed to defendant and his responses, as well as questions posed to the court by defendant and the court's responses. The court was satisfied the record established that defendant was repeatedly advised of the consequences of pleading guilty, including the "potential for civil commitment," based upon an application by the Attorney General or Department of Corrections. The court concluded defendant failed to offer any credible evidence demonstrating that his counsel's performance fell below the objective standard of reasonableness.

Because the court determined that petitioner failed to establish a prima facie case that his attorney's performance fell below the objective standard of reasonableness, it acknowledged that it was unnecessary to determine whether defendant had established a prima facie case that but for counsel's deficient performance there would have been a different outcome regarding the plea proceedings. Nonetheless, the court elected to consider the merits of defendant's petition. The court observed that if convicted of the charges, at a minimum, defendant faced up to twenty years imprisonment on the first count of the indictment charging him with aggravated sexual assault, as well as the possibility of an extended term, based upon the nature of the underlying offenses as well defendant's prior record of convictions.

The court found that "defendant knowingly and voluntarily elected to assume the risk of possible civil commitment referral by either the Attorney General's Office or the Department of Corrections in return for the extremely generous and favorable offer of a three-year custodial sentence," and in doing so, "also avoid[ed] the embarrassment . . . of hearing his three children testify in court to these horrendous, horrendous acts he allegedly committed upon them." Finally, the court found that because defendant failed to establish a prima facie case of ineffective

assistance of counsel, he was not entitled to an evidentiary hearing. The present appeal followed.

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

POINT I

THE ORDER DENYING [PCR] SHOULD BE REVERSED BECAUSE DEFENDANT ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE THAT HIS CIVIL COMMITMENT AS A SEXUALLY VIOLENT PREDATOR VIOLATED HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHTS TO BE PROTECTED FROM ENTERING INTO AN ILLUSORY PLEA BARGAIN IN WHICH THE COUNTY PROSECUTOR'S PLEA PROMISES MAY BE NEGATED BY THE STATE ATTORNEY GENERAL.

POINT II

THE ORDER DENYING [PCR] SHOULD BE REVERSED AND THE MATTER REMANDED FOR AN EVIDENTIARY HEARING BECAUSE TRIAL COUNSEL'S FAILURE TO ADVISE DEFENDANT THAT HE COULD BE SUBJECT TO A CIVIL COMMITMENT AS A SEXUALLY VIOLENT PREDATOR EVEN THOUGH HE [PLED] GUILTY TO NON-SEXUAL OFFENSES SATISFIED [RULE] 3:22-2 INEFFECTIVE ASSISTANCE OF COUNSEL CRITERIA.

We have considered the arguments advanced by defendant in light of the record and applicable legal principles. We conclude defendant's arguments are without sufficient merit to warrant extensive discussion in a written opinion. R. 2:11-3(e)(2). We affirm substantially for the reasons expressed by Judge Ciffelli in his comprehensive February 1, 2016 oral opinion. We add the following comments.

For defendant to obtain relief based on ineffective assistance grounds, he was obliged to show not only the particular manner in which counsel's performance was deficient, but also that the deficiency prejudiced his right to a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); accord State v. Fritz, 105 N.J. 42, 58 (1987). Both the United States Supreme Court and the New Jersey Supreme Court have extended the Strickland test to challenges to guilty pleas based on ineffective assistance of counsel. Lafler v. Cooper, 566 U.S. 156, 162-63, 132 S. Ct. 1376, 1384-85, 182 L. Ed. 2d 398, 406-07 (2012); Missouri v. Frye, 566 U.S. 134, 140, 132 S. Ct. 1399, 1405, 182 L. Ed. 2d 379, 387 (2012); State v. DiFrisco, 137 N.J. 434, 456-57 (1994). Defendant failed to meet the standards for post-conviction relief.

Defendant's contention that his plea bargain was "illusory" is without merit. The representation of the Assistant Prosecutor that the Essex County Prosecutor's Office would not refer the matter for defendant's civil commitment could only be viewed as "illusory" and "misleading" if the Assistant Prosecutor made this representation knowing that the Essex County Prosecutor was without authority to independently seek civil commitment of a defendant. Under the SVPA, the Attorney General may delegate authority to a county prosecutor to see relief under the SVPA.

See N.J.S.A. 30:4-27.26 (expressly stating that the definition of Attorney General includes "a county prosecutor to whom the Attorney General has delegated authority under [the SVPA]"). Although no such delegation occurred in this matter, the prosecutor was not precluded from seeking such a delegation, but, as part of the plea agreement declined to do so.

Further, the plea colloquy clearly establishes defendant's understanding of the terms of the plea agreement and, in particular, the fact that the Essex County Prosecutor's decision not to refer defendant for a civil commitment under the SVPA, did not bind the Attorney General or the Department of Corrections from seeking such relief.

Moreover, even if the court were to have accepted defendant's contention that his attorney failed to advise him that he potentially faced civil commitment pursuant to the SVPA, notwithstanding the Essex County Prosecutor's representation that it would not seek such relief, defendant could not satisfy the second requirement for post-conviction relief, namely, but for counsel's deficient performance, there would have been a different outcome in the plea proceedings. The record establishes that both the Assistant Prosecutor and the court separately placed on the record that the Essex County Prosecutor's decision not to pursue a civil commitment was not binding upon the Attorney General or

the Department of Corrections. The defendant, more than once during the proceedings, expressed his understanding of this fact.

Thus, to the extent this fact was not made clear to defendant by his attorney, such an omission had no prejudicial impact upon defendant sufficient to warrant post-conviction relief.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION