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Although it is posted on the internet, this opinion is binding only on the  
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3638-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ERIC GRIFFIN,

Defendant-Appellant.

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Submitted February 28, 2017 – Decided March 13, 2017

Before Judges Yannotti and Gilson.

On appeal from Superior Court of New Jersey,  
Law Division, Burlington County, Indictment  
No. 11-05-0596.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Emily A. Kline, Designated  
Counsel, on the brief).

Robert D. Bernardi, Burlington County  
Prosecutor, attorney for respondent (Alexis R.  
Agre, Assistant Prosecutor, of counsel and on  
the brief).

PER CURIAM

Defendant Eric Griffin appeals from a February 24, 2016 order denying his petition for post-conviction relief (PCR) following an evidentiary hearing. Having considered the briefs, record, and

law, we affirm essentially for the reasons explained by Judge Philip E. Haines in his written opinion issued on February 24, 2016.

The charges against defendant arose out of the death of his infant son. Responding to a 911 call, police found the unresponsive infant lying on a bed. Police interviewed several family members, including defendant who was supposed to be caring for the child at the time of his death. During defendant's interview, he made several admissions concerning the death of the child.

Defendant was indicted for first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2), and second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a). Thereafter, defendant pled guilty to an amended charge of first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a). In pleading guilty, defendant admitted that he placed a pillow over the face of his infant son, recognizing that his son probably could not breathe and, therefore, could die.

As part of the plea agreement, defendant agreed to waive his right to appeal and the State agreed to recommend a sentence of twelve years in prison subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, with the understanding that defendant would argue for ten years in prison. The State also agreed to recommend that all of the other charges against defendant be dismissed.

Defendant was sentenced on February 17, 2012. At his sentencing hearing, defendant's counsel presented several character witnesses, and urged the court to impose a ten-year sentence. The sentencing judge found aggravating factors two, N.J.S.A. 2C:44-1(a)(2) (gravity of harm), three, N.J.S.A. 2C:44-1(a)(3) (risk of another offense), six, N.J.S.A. 2C:44-1(a)(6) (prior criminal record), and nine, N.J.S.A. 2C:44-1(a)(9) (need to deter). The court found no mitigating factors. After considering the statements of defendant's witnesses and the circumstances of the crime, the court sentenced defendant in accordance with the plea agreement to twelve years in prison, with a period of parole ineligibility as prescribed by NERA.

Defendant did not file a direct appeal. On January 14, 2015, defendant filed a petition for PCR, arguing that his trial counsel was ineffective for failing to file a motion to suppress his statements to the police and for failing to present various mitigating factors at sentencing.

Defendant was assigned counsel and the court granted defendant's request for an evidentiary hearing. At the evidentiary hearing, defendant and his trial counsel testified. Defendant's trial counsel testified that he spoke with defendant and defendant's character witnesses about the facts that a sentencing court would consider. He also explained that it was not his

practice to direct witnesses to testify about any specific mitigating factor, nor did he generally argue for specific mitigating factors. Instead, counsel explained that his approach was to present the justifications and facts in terms that are more general.

At the conclusion of the testimony, defendant withdrew his argument that his trial counsel should have filed a motion to suppress his statement. Thus, the only argument that defendant made for PCR was that his counsel had been ineffective in failing to argue for certain mitigating factors at his sentencing.

The PCR judge, Judge Haines, rejected that argument and issued a thorough written opinion explaining why defendant's petition was denied. Based on the testimony of trial counsel, Judge Haines concluded that counsel's sentencing strategy was a sound strategy and did not constitute ineffective assistance. Judge Haines also found that defendant failed to show any prejudice because the sentencing court had imposed the recommended sentence after considering all relevant factors.

On this appeal, defendant argues that his trial counsel provided ineffective assistance at sentencing. Specifically, defendant articulates his arguments as follows:

- I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S PETITION FOR POST CONVICTION RELIEF BECAUSE DEFENDANT'S COUNSEL

PROVIDED INEFFECTIVE ASSISTANCE AT SENTENCING. []

- A. Counsel's failure to investigate and present mitigating circumstances at sentencing was patently deficient []
- B. The court below erred because it upheld the sentencing court's improper finding of two aggravating factors and no mitigating factors, resulting in prejudice to Mr. Griffin []

Normally, arguments concerning sentencing and, in particular, the consideration of aggravating and mitigating factors are "not cognizable claims on post-conviction relief" because they relate to the excessiveness of the sentence, rather than to its legality. State v. Acevedo, 205 N.J. 40, 46-47 (2011) (citing State v. Flores, 228 N.J. Super. 586, 596-97 (App. Div. 1988), certif. denied, 115 N.J. 78 (1989)). Thus, such arguments usually must be raised on direct appeal. Id. at 46. Here, however, because defendant waived his right to appeal as part of his plea, we will consider the substance of his arguments. See State v. Gibson, 68 N.J. 499, 513 (1975) ("[A]t the time of approval by the court of a plea agreement involving a waiver of appeal and when sentence is pronounced [a defendant should] be explicitly informed that notwithstanding his agreement not to appeal the conviction he may nevertheless file a timely appeal . . . .").

To establish a constitutional violation, a criminal 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). We agree with Judge Haines that defendant did not satisfy either prong of the Strickland test.

After conducting a hearing, Judge Haines found that defendant's trial counsel used an acceptable sentencing strategy in not arguing for specific mitigating factors. We see no basis to disagree with that finding. Moreover, Judge Haines also found that defendant had failed to show any prejudice. It is important to note that defendant is not claiming innocence nor is he trying to withdraw his plea.

Instead, defendant is arguing for a shorter sentence. The mitigating factors that he now identifies were all factors that were known to the sentencing judge. The sentencing judge, however, found that no mitigating factors applied, and sentenced the defendant in accordance with the plea agreement. Moreover, the aggravating factors found by the sentencing judge were based on facts in the record. Thus, defendant has shown no prejudice.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION