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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3894-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAVIEL TORO,

Defendant-Appellant.

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Submitted October 3, 2017 – Decided November 27, 2017

Before Judges Carroll and Mawla.

On appeal from Superior Court of New Jersey,  
Law Division, Atlantic County, Indictment No.  
08-10-2524.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Adam W. Toraya, Designated  
Counsel, on the brief).

Damon G. Tyner, Atlantic County Prosecutor,  
attorney for respondent (Brett Yore, Assistant  
Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Javiel Toro appeals from a March 31, 2016 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

The following facts are taken from the record. An Atlantic County Grand Jury indicted defendant on six counts of second-degree sexual assault of a fifteen-year-old girl in violation of N.J.S.A. 2C:14-2(c). On January 27, 2009, defendant pled guilty to count one of the indictment. He appeared with plea counsel and after providing a factual basis for the plea, engaged in a colloquy with counsel confirming the knowing and voluntary nature of the plea. Specifically, defendant confirmed that he had reviewed all of the discovery provided in the case and understood it. He answered questions confirming he understood the plea forms and had initialed and signed them. Defendant answered questions acknowledging the potential prison sentence that could be imposed as a result of his conviction. He acknowledged the plea agreement would subject him to a five-year prison term with no parole disqualifier.

During the plea hearing, defendant also responded to questions from the court. Specifically, he acknowledged he would be subject to an evaluation, pursuant to N.J.S.A. 2C:47-1, which required a psychological evaluation to determine whether he was a compulsive and repetitive sex offender. Defendant testified he understood the sentence would include a no-contact-with-the-victim provision, registration under Megan's Law, N.J.S.A. 2C:7-1 to -23, and monetary penalties.

The court took a brief recess during defendant's plea hearing because the Megan's Law plea form and the parole supervision form had not been completed. The judge returned to the bench to ask whether defendant understood and completed the forms. Defendant testified he reviewed, understood, and had provided truthful answers to questions on the forms. He stated that he understood he would be subject to parole supervision for life.

Defendant further confirmed he was satisfied with the terms and conditions of his plea, and the performance of his counsel. He also stated that he understood the rights he was relinquishing by entering into a plea, the presumption of innocence, the right to confront and produce witnesses, and the State's burden of proof.

Defendant's sentencing hearing took place on August 14, 2009. Defendant appeared with new counsel who advised the court he had reviewed the discovery and understood the possible sentence exposure to defendant if he proceeded to trial. Counsel also informed the court defendant wished to withdraw his guilty plea. Counsel told the court he saw no basis to file a motion to withdraw the plea. Defendant was sentenced in accordance with the plea agreement to five-years in prison with no parole disqualifier.

On June 30, 2015, defendant filed a petition for PCR. In his petition he asserted he received ineffective assistance of counsel when his first counsel failed to advise him he would be subject

to parole supervision for life. Defendant also argued his second counsel was ineffective for failing to file a motion to withdraw the guilty plea before sentencing, and for subsequently failing to appeal the sentence.

The PCR court denied defendant's petition on March 31, 2016. The court found the petition was barred by Rule 3:22-12(a)(1) because it was filed more than five-years after the judgment of conviction, and defendant had not presented excusable neglect for the late filing. Notwithstanding the time bar, the PCR court addressed the merits of defendant's petition. The court found defendant had not presented a prima facie case of ineffective assistance of counsel given the thoroughness of the plea colloquy and the record made at the sentencing hearing. Consequently, the PCR court denied an evidentiary hearing.

On appeal, defendant raises the following arguments:

POINT ONE - THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION AT THE TRIAL LEVEL.

POINT TWO - THE COURT MISAPPLIED ITS DISCRETION IN APPLYING R. 3:22-12 BECAUSE THE SIGNIFICANCE OF THE ISSUES RAISED, AND THEIR IMPACT ON THE INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM, WARRANTED A RELAXATION OF THE FIVE-YEAR TIME BAR.

I.

Defendant asserts the PCR court should have granted him an evidentiary hearing to address his claim that he did not understand he would be on parole supervision for life. We disagree.

Rule 3:22-10(b) provides:

A defendant shall be entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of post-conviction relief, a determination by the court that there are material issues of disputed fact that cannot be resolved by reference to the existing record, and a determination that an evidentiary hearing is necessary to resolve the claims for relief. To establish a prima facie case, defendant must demonstrate a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits.

Furthermore, Rule 3:22-10(e) provides the court shall not grant an evidentiary hearing if: (1) it "will not aid [in] the court's analysis of the defendant's entitlement to post-conviction relief;" (2) "the defendant's allegations are too vague, conclusory or speculative;" or (3) the defendant is attempting to use the hearing to explore or investigate other possible unsubstantiated PCR claims.

The decision of whether to hold an evidentiary hearing on a PCR petition is committed to the sound discretion of the PCR judge. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). The

judge should grant an evidentiary hearing and make a determination on the merits of a defendant's claim only if the defendant has presented a prima facie claim of ineffective assistance. State v. Preciose, 129 N.J. 451, 462 (1992).

In determining whether a prima facie claim has been established, the facts should be viewed "in the light most favorable to a defendant." Id. at 462-63. Additionally, "[a] petitioner must establish the right to such relief by a preponderance of the credible evidence." Id. at 459. "To sustain that burden, specific facts must be alleged and articulated" to "provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

To establish ineffective assistance of counsel, defendant must satisfy a two-prong test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

[Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 52 (1987) (quoting Strickland, 466 U.S. at 687).]

Counsel's performance is evaluated 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, 466 U.S. at 688-89). "To rebut that strong presumption, a [petitioner] must establish [] trial counsel's actions did not equate to 'sound trial strategy.'" State v. Castagna, 187 N.J. 293, 314 (2005) (quoting Strickland, 466 U.S. at 689). "Mere dissatisfaction with a 'counsel's exercise of judgment' is insufficient to warrant overturning a conviction." State v. Nash, 212 N.J. 518, 542 (2013) (quoting State v. Echols, 199 N.J. 344, 358 (2009)).

To demonstrate prejudice, "'actual ineffectiveness' . . . must [generally] be proved." Fritz, 105 N.J. at 52. Petitioner must show the existence of "a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" State v. Savage, 120 N.J. 594, 614 (1990) (quoting Strickland, 466 U.S. at 694). Indeed,

[i]t is not enough for [a] defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually

every act or omission of counsel would meet that test and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

[Strickland, 466 U.S. at 693 (citation omitted).]

There is no evidence to support defendant's assertion his first counsel did not inform him he would be subject to parole supervision for life or explain the consequences of the lifetime supervision to defendant. First, as we previously noted, during the plea colloquy, the trial court stopped the proceeding to note defendant had not completed the form, which addressed among other things, parole supervision for life. The court then took a recess to enable defendant to review and complete the form. Second, the form completed by defendant asked for a yes or no answer to the following question:

Do you understand that being sentenced to parole supervision for life means that upon release from incarceration or immediately upon imposition of a suspended sentence you will be supervised by the Division of Parole for at least [fifteen] years and will be subject to provisions and considerations of parole, including conditions appropriate to protect the public and foster rehabilitation, such as but not limited to, counseling, Internet access or use, and other restrictions which may include restrictions on where you can live, work, travel or persons you can contact?

Defendant responded "yes" to this question.



Third, the trial court inquired whether defendant had reviewed the form bearing the lifetime parole supervision question. The following colloquy ensued:

THE COURT: Let me just clarify that you have reviewed . . . the four page form known as the New Jersey Judicial Additional Questions For Certain Sexual Offenses. Did you review all of those to your satisfaction with [defense counsel]?

THE DEFENDANT: Yes.

THE COURT: Understanding all of those, did you provide truthful answers to all of the questions on them?

THE DEFENDANT: Yes.

THE COURT: And you initialed and/or signed these documents?

THE DEFENDANT: Yes.

THE COURT: Is there anything at all which appeared on these pages or was asked of you or any term, condition, et cetera, of this plea agreement that you feel you don't fully and completely understand?

THE DEFENDANT: No.

Recounting this record, the PCR court found:

Counsel was not ineffective for failing to advise the defendant of [the] full consequences of how parole supervision for life would affect him because the record shows that he was clearly advised of such.

The record clearly shows defendant was advised multiple times of the consequences of his plea [] when the plea was entered.

We agree. Although defendant claims he was "blind-sided" by his first counsel's failure to advise him about the parole supervision terms and forms, the record does not support that claim. The record lacks prima facie evidence of ineffective assistance of counsel at the plea stage.

Defendant also argues that his second counsel was ineffective at the sentencing because he failed to file a motion to withdraw the plea. He argues his second counsel was ineffective because he summarily concluded filing such a motion would be a "fruitless pursuit." Defendant argues the PCR court should not have relied on counsel's statement to deny his petition because "[t]he question of whether or not the pursuit would be fruitless rests entirely upon whether first counsel properly advised him during the off the record discussions."

Defense counsel addressed defendant's request to withdraw the plea during the sentencing hearing.

[DEFENSE COUNSEL]: I'm putting it all on the record. I know we met briefly. I did explain to him all the options and my understanding of the law and I told him that I saw no basis to make a motion. There's nothing that he was under the influence. He answered your Honor's questions. Your Honor questioned him about the facts of the case and his attorney questioned him about the facts of the case and his understanding with all of the additional forms because half way through the plea, your Honor, indicated that all the forms had not

been filed and you took a recess and you came back and so I went over everything with him.

So I'm ready to proceed with sentencing, your Honor. I don't know if my client wants to make an application, but I have no application with the Court to make a motion to withdraw because there's no basis that I can find. He didn't suffer from any mental problems. He wasn't under the influence of drugs or alcohol at the time and although in some letters he indicated he was coerced by [prior defense counsel], I think the word coercion wasn't that he was forced to do it, but he's indicating that he thought that she could get a better deal for him which she didn't get.

Defendant's second counsel thoroughly explained the substantive discussions he had with defendant surrounding potential withdrawal of the plea. Counsel explained defendant's reasons for wanting to withdraw the plea and why it was fruitless to proceed with such a motion.

The sentencing judge agreed there was no basis for a motion to withdraw the plea. He stated:

I concur with [defense counsel's] analysis of the plea that was put on the record on January 27. I think it was very carefully done. I had to interrupt [ ] [c]ounsel and make certain that all of the proper paperwork was filled out and completed and reviewed and understood by [defendant]. I came back out on the bench and made doubly certain of that fact that this wasn't rushed through or something that he didn't want to do. I asked him if he was satisfied with his attorney and satisfied with the work she did for him and he indicated that he was. There was absolutely no ground under

Slater<sup>[1]</sup> or any of the cases that preceded Slater, although Slater arguably created new guidelines, if you will, courtesy of the Supreme Court, with regard to the withdrawal of guilty pleas[.]

The PCR court found:

The Judge's position to this Court's review seems well supported. There's no colorable claim of innocence, as the petitioner seems to have confessed to the sexual assaults. Thus, Factor 1 of the Slater factors does not support allowing the withdrawal. The petitioner's only reason for seeking the withdrawal was because he felt the plea offer was too high, and this is supported [by] the transcript. . . .

Thus, Factor 2 does not support his position. The plea was the result of a plea bargain. Thus, Factor 3 weighs against the petitioner. The only factor that weighs in favor of allowing a withdrawal is Factor 4, as there would not be undue prejudice to the State. The case was less than two years old when the defendant sought to withdraw his plea.

On balance, the factors weigh heavily against allowing the withdrawal. Thus, even if [defense counsel] had filed the defendant's

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<sup>1</sup> In State v. Slater, 198 N.J. 145, 157-58 (2009), the Supreme Court stated:

We hold that trial judges are to consider and balance four factors in evaluating motions to withdraw a guilty plea: (1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant's reasons 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.

application, it would not have been granted . . . and would not have changed the results of the proceeding.

We conclude the PCR court correctly found that defendant had not presented a prima facie case of ineffective assistance of counsel. Therefore, the court correctly found that an evidentiary hearing was not required.

## II.

Defendant argues the PCR court abused its discretion by concluding defendant's petition was time-barred. Again, we disagree.

Rule 3:22-12(a)(1) states:

[N]o petition shall be filed pursuant to this rule more than [five] years after the date of entry . . . of the judgment of conviction that is being challenged unless:

(A) it alleges facts showing that the delay beyond said time was due to defendant's excusable neglect and that there is a reasonable probability that if the defendant's factual assertions were found to be true enforcement of the time bar would result in a fundamental injustice[.]

The burden rests with defendant to establish excusable neglect.

State v. Milne, 178 N.J. 486, 492 (2004).

"The New Jersey Supreme Court has required a showing of 'compelling, extenuating circumstances' or, alternatively, 'exceptional circumstances,' to relax the time limitation for a

PCR petition." State v. Brewster, 429 N.J. Super. 387, 400 (App. Div. 2013) (quoting Milne, 178 N.J. at 492). The Court has explained the decision to relax the time bar should only occur under exceptional circumstances and the court should consider: (1) "the extent and cause of the delay"; (2) "the prejudice to the State"; and (3) "the importance of the petitioner's claim in determining whether there has been an 'injustice' sufficient to relax the time limits." State v. Afanador, 151 N.J. 41, 52 (1997) (quoting Mitchell, 126 N.J. at 580).

Defendant argues his petition for PCR is not time-barred because adherence to the time bar would result in an injustice. Defendant claims he "only understood the additional penalties he actually faced when he was incarcerated in 2015." He argues he was "unaware that he even had the right to file a PCR," and after becoming aware filed his petition.

The judgment of conviction is dated August 14, 2009, and defendant did not file his PCR petition until June 30, 2015, nearly six years later. The PCR court found defendant had not established excusable neglect for the late filing. The court stated:

[I]gnorance of the alphabet in these cases is not sufficient to constitute excusable neglect, let alone ignorance of the law. Citizens of the State are charged with knowing the laws of New Jersey. Those who remain uninformed do so at their own peril.


As such, the defendant's supposed ignorance should not be considered excusable neglect, and the petition is denied on this basis.

We agree with the PCR court's determination. A "[d]efendant's assertion that he lacks sophistication in the law does not [constitute] exceptional circumstances." State v. Murray, 162 N.J. 240, 246 (2000). Therefore, pursuant to Rule 3:22-12(a)(1), defendant's PCR petition should have been filed by August 14, 2014, and thus, was time-barred.

Moreover, defendant does not meet the criteria outlined in Afanador, 151 N.J. at 52, to relax the time bar. He has not provided an adequate reason for the delay in filing the PCR petition, and has not demonstrated that enforcement of the time-bar would result in a fundamental injustice. Therefore, we conclude the PCR court correctly found defendant's petition was time-barred.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION