

RECORD IMPOUNDED

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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-4550-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PAUL CIEGO, a/k/a JABOVA
FLOURNOY, PAUL J. CIEGO,
PAUL JOSEPH CIEGO AND
ROBERT VAZQUEZ,

Defendant-Appellant.

Submitted March 8, 2017 — Decided March 29, 2017

Before Judges Fuentes and Simonelli.

On appeal from the Superior Court of New
Jersey, Law Division, Union County, Indictment
No. 10-03-0314.

Joseph E. Krakora, Public Defender, attorney
for appellant (Anderson D. Harkov, Designated
Counsel, on the brief).

Grace H. Park, Acting Union County Prosecutor,
attorney for respondent (Bryan S. Tiscia,
Special Deputy Attorney General/Acting
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant Paul Ciego appeals from the April 6, 2015 Law Division order, which denied his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

We derive the following facts from the record. During 2007, defendant was living with K.G. and her three children, L.Y., E.Y., and R.E. L.Y. turned thirteen in April 2007; defendant turned twenty-five in August 2007. K.G. died on November 5, 2007. After her death, defendant had sexual intercourse with L.Y. in December 2007, and L.Y. became pregnant as a result.

Defendant applied for temporary custody of L.Y. and E.Y. On January 15, 2008, the court entered an order, based on defendant's testimony, continuing defendant's temporary custody of the children. The order also stated that the biological father's whereabouts were unknown, and K.G. had passed away and gave defendant care and custody of the two children.

On August 18, 2008, the court entered an order awarding legal and residential custody of L.Y. and E.Y. to their biological father based on defendant's consent. L.Y. gave birth in September 2008. DNA testing confirmed that defendant was the child's biological father.

A grand jury indicted defendant for first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(2)(c); second-degree sexual assault, N.J.S.A. 2C:14-2(c)(1); second-degree sexual assault, N.J.S.A. 2C:14-2(c)(4); and second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a). Defendant agreed to plead guilty to first-degree aggravated sexual assault under N.J.S.A. 2C:14-2(a)(2)(c), which provides as follows, in pertinent part:

An actor is guilty of aggravated sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances:

. . . .

The victim is at least 13 but less than 16 years old; and

. . . .

The actor is a resource family parent, a guardian, or stands in loco parentis within the household[.]

In exchange for defendant's guilty plea, the State agreed to dismiss the remaining counts and recommend an eleven-year term of imprisonment subject to an eighty-five percent period of parole ineligibility and a five-year term of parole supervision pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2, Megan's Law, and parole supervision for life.

Defendant testified at the plea hearing that he began caring for L.Y. after K.G. died; committed an act of aggravated sexual

assault on L.Y. while he was in the position of guardian or supervisor; had sexual intercourse with L.Y. when she was at least thirteen years old but less than sixteen years old; and impregnated her. Judge Scott J. Moynihan accepted the plea, and subsequently sentenced defendant in accordance with the plea agreement.

Defendant did not file a motion pursuant to State v. Slater, 198 N.J. 145 (2009) to withdraw his guilty plea based on an insufficient factual basis. Instead, he appealed his sentence. We heard the appeal on our Excessive Sentence Oral Argument calendar, and affirmed. State v. Ciego, No. A-5191-11 (App. Div. Sept. 27, 2012).

Defendant then filed a PCR petition, contending, in pertinent part, that plea counsel rendered ineffective assistance by allowing him to plead guilty to first-degree aggravated sexual assault under N.J.S.A. 2C:14-2(a)(2)(c) without a proper factual basis as to his status. Defendant argued that he was not L.Y.'s legal guardian at the time of the last act of sexual intercourse in December 2007, and his mere presence in the home did not establish he had an in loco parentis relationship with her. In his certification, he admitted that he lived with L.Y. beginning in August 2007, but denied he acted as a parent toward her or the other children. He stated that K.G. was L.Y.'s primary parent figure until she died in November 2007, and his mother, Margaret

Flournoy, who the children called "Aunt Margaret," also looked after their welfare. He admitted, however, that Flournoy had moved to North Carolina in April 2007; did not return to New Jersey until after K.G. died; and could not apply for temporary custody because she had to return to North Carolina, and thus, advised him to make the application.

In her certification, Flournoy claimed that at no time did defendant act as a parent for K.G.'s children, and other than K.G., she always was the children's main and primary parental figure. She admitted, however, that she had moved to North Carolina in late April 2007. She also admitted that defendant began living with K.G. and the children in the summer of 2007; she did not return to New Jersey until November 2007, after K.G. died; and she did not apply for temporary custody of the children because she had to return to North Carolina.

In her certification, defendant's then-girlfriend, Najlaa Dukes, stated that she began staying with defendant, K.G., and the children in August 2007, and spent most of her time there. She confirmed that she continued living with defendant and the children after K.G. died; however, she did not say that she or Flournoy cared for the children.

In an oral opinion rendered on April 6, 2015, Judge Moynihan determined that defendant could satisfy the status element of

N.J.S.A. 2C:14-2(a)(2)(c) absent a court order making him L.Y.'s legal guardian, and a court order was not necessary for defendant to be guilty under the statute. The judge relied on defendant's admissions during the plea hearing and in his certification to find that he stood in loco parentis with L.Y. at the time of the sexual assault in December 2007. The judge noted that Flournoy's return to North Carolina and advice to defendant to obtain custody of the children indicated there was no one else to care for the children after she left. The judge also noted that Dukes was in the home most, but not all of the time, and concluded there were periods when no one else besides defendant was in the home caring for the children, including L.Y. The judge denied the petition without an evidentiary hearing.

On appeal, defendant raises the following contentions:

POINT ONE THE PCR COURT ERRED WHEN IT FAILED TO GRANT DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING.

POINT TWO THE FAILURE OF TRIAL COUNSEL TO ASSURE THERE WAS A FACTUAL BASIS FOR THE CRIME DEFENDANT WAS PLEADING GUILTY TO, DESPITE THE FACT COUNSEL HIMSELF ATTEMPTED TO ELICIT THE FACTUAL BASIS, DEPRIVED DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999).

Rather, trial courts should grant evidentiary hearings and make a determination on the merits only if the defendant has presented a prima facie claim of ineffective assistance of counsel, material issues of disputed fact lie outside the record, and resolution of the issues necessitates a hearing. R. 3:22-10(b); State v. Porter, 216 N.J. 343, 355 (2013). To establish a prima facie claim of ineffective assistance of counsel, the defendant

must satisfy two prongs. First, he must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. An attorney's representation is deficient when it [falls] below an objective standard of reasonableness.

Second, a defendant must show that the deficient performance prejudiced the defense. A defendant will be prejudiced when counsel's errors are sufficiently serious to deny him a fair trial. The prejudice standard is met if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability simply means a probability sufficient to undermine confidence in the outcome of the proceeding.

[State v. O'Neil, 219 N.J. 598, 611 (2014) (alteration in original) (citations omitted).]

With respect to a guilty plea, our Supreme Court has explained that

[t]o set aside a guilty plea based on ineffective assistance of counsel, a defendant must show that (i) counsel's assistance was

not within the range of competence demanded of attorneys in criminal cases; and (ii) that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial.

[State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009) (alterations in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)).]

We review a judge's decision to deny a PCR petition without an evidentiary hearing for abuse of discretion. See R. 3:22-10; State v. Preciose, 129 N.J. 451, 462 (1992). We discern no abuse of discretion here.

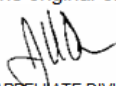
"In loco parentis literally translated means 'in the place of a parent'" and is further described as "relating to, or acting as a temporary guardian or caregiver of a child, taking on all or some of the responsibilities of a parent." Hardwicke v. Am. Boychoir Sch., 188 N.J. 69, 91 (2006) (quoting Black's Law Dictionary, 803 (8th ed. 2004)). "An in loco parental relationship occurs when a person acts as a temporary guardian or caregiver of a child, taking on all or some of the responsibilities of a parent." Model Jury Charge (Criminal), "Aggravated Sexual Assault Victim At Least 13 But Less Than 16 (N.J.S.A. 2C:14-(2)(a)(2))" (2008); see also Hardwicke, supra, 188 N.J. at 91. "Characteristics of that relationship include the responsibility to maintain, rear and educate the child, as well as the duties of

supervision, care and rehabilitation." Hardwicke, supra, 188 N.J.
at 91 (citations omitted).

Defendant did not establish that plea counsel's representation was deficient. An order granting defendant legal guardianship of L.Y. was not necessary to establish his status under N.J.S.A. 2C:14-2(a)(2)(c). Defendant acted as L.Y.'s temporary guardian or caregiver beginning in November 2007, after K.G. died, and continuing until he sexually penetrated her in December 2007, when she was thirteen years old. The evidence in this case clearly established that defendant stood in loco parentis with L.Y. when he sexually assaulted her. Defendant's arguments to the contrary are without sufficient merit to warrant further discussion. 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