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Although it is posted on the internet, this opinion is binding only on the
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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4983-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

STEPHEN E. MULLINS, JR.,

Defendant-Appellant.

Submitted June 7, 2017 – Decided July 6, 2017

Before Judges Simonelli and Gooden Brown.

On appeal from the Superior Court of New
Jersey, Law Division, Cumberland County,
Indictment Nos. 12-08-0804 and 13-01-0044.

Joseph E. Krakora, Public Defender, attorney
for appellant (John V. Molitor, Designated
Counsel, on the brief).

Jennifer Webb-McRae, Cumberland County
Prosecutor, attorney for respondent (Stephen
C. Sayer, Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant Stephen Mullins appeals from the denial of his petition for post-conviction relief (PCR) without an evidentiary hearing. For the following reasons, we affirm.

I.

In 2012, a grand jury indicted defendant under Indictment No. 12-08-0804 for first-degree attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3 (count one);¹ second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (count two); fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(4) (count three); third-degree terroristic threats, N.J.S.A. 2C:12-3(b) (count four); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count five); fourth-degree unlawful possession of a defaced firearm, N.J.S.A. 2C:39-3(d) (count six); and tampering with a witness/bribery of a witness, N.J.S.A. 2C:28-5(a) and (d) (count seven) (the 2012 Indictment). Defendant was also charged with several disorderly persons offenses.

In 2013, a grand jury indicted defendant under Indictment No. 13-01-0044 for third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2) (count one); third-degree terroristic threats, N.J.S.A. 2C:12-3(b) (count two); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-4(a) (count three); and fourth-degree

¹ The court subsequently dismissed this charge.

contempt, N.J.S.A. 2C:29-9(b) (count four). Defendant was also charged with several disorderly persons offenses (the 2013 Indictment).

The charges in the 2012 Indictment stemmed from a domestic violence incident where defendant placed a trash bag over his girlfriend's head in an attempt to suffocate her; threatened her with a handgun; assaulted her; and locked her in their home before she was able to escape through a window and notify the police.² When New Jersey State Troopers arrived, defendant eventually surrendered and was placed in the back of a patrol car while the Troopers conducted a protective sweep of the premises, during which they discovered a handgun that was subsequently seized pursuant to a search warrant. Defendant filed a motion to suppress the handgun, arguing that the Troopers obtained the search warrant after they had seized the weapon.

Following the denial the motion, defendant agreed to plead guilty under count five of the 2012 Indictment to an amended charge of second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5, and under count three of the 2013 Indictment to an amended charge of third-degree unlawful possession of a shotgun, N.J.S.A. 2:39-5(c)(1). In exchange, the State agreed to dismiss all

² The charges in the 2013 Indictment also stemmed from a domestic violence incident between defendant and his girlfriend.

remaining charges in both indictments, as well as the charges in an unrelated indictment, and to recommend concurrent five-year terms of imprisonment with a one-year period of parole ineligibility, which was a departure from the Graves Act, N.J.S.A. 2C:43-6(1). The State also agreed to recommend that the sentence would run concurrent to any disposition of another unrelated indictment. The terms of the agreement were explained to defendant at the plea and sentencing hearings.

Defendant did not appeal his conviction or sentence. Instead, he filed a PCR petition, contending that defense counsel rendered ineffective assistance by failing to obtain a motor vehicle recording (MVR) from the patrol car. Defendant claimed that as he sat in the patrol car, he observed the MVR operating. He argued that the handgun would have been suppressed because the MVR would have recorded the Troopers seizing the handgun before they obtained the search warrant.

At the court's direction, the State requested a copy of the MVR from the State Police. The State subsequently represented to the court that an MVR did not exist and never existed. Defendant presented no evidence to the contrary, or evidence that defense counsel never requested the MVR.

Defendant also argued that counsel inaccurately advised him that he would be eligible for parole almost immediately and

released from custody quickly if he pled guilty. Defendant asserted that but for this inaccurate advice, he would not have pled guilty and would have gone to trial.

In a May 31, 2016 written opinion, Judge Robert G. Malestein denied the petition without an evidentiary hearing. The judge found that since the MVR did not exist and never existed, whether or not defense counsel requested it was immaterial because it would not have changed the ultimate outcome. The judge determined that defendant's argument that the handgun would have been suppressed based on the MVR was mere speculation and conjecture, and his claim that defense counsel never requested the MVR was a bald assertion unsupported by any certification.

Judge Malestein also found that the terms of defendant's sentence were explained during the plea and sentencing hearings, and defendant could not demonstrate he would not have pled guilty given the favorable plea agreement he received. The judge noted that defendant was facing three separate indictments, two of which involved gun charges that were subject to the mandatory sentencing provisions of the Graves Act. The judge emphasized that if convicted, defendant faced a sentence of up to twenty years with a ten-year period of parole ineligibility and a minimum sentence of five-years with three years of parole ineligibility for each indictment, and these sentences likely would have run

consecutively. The judge concluded that defendant obtained the benefit of a very favorable plea agreement, and the record did not support his argument that counsel rendered ineffective assistance with respect to the guilty plea.

On appeal, defendant raises the following contention:

POINT I

THIS COURT SHOULD REVERSE THE TRIAL
COURT'S DECISION TO DENY
DEFENDANT'S PETITION FOR [PCR] AND
REMAND THE MATTER FOR AN EVIDENTIARY
HEARING

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, 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) (citations omitted).]

"[I]n order to establish a prima facie claim, [the defendant] must do more than make bald assertions that he was denied the effective assistance of counsel. He must allege facts sufficient to demonstrate counsel's alleged substandard performance." Cummings, supra, 321 N.J. Super. at 170. The defendant must establish, by a preponderance of the credible evidence, that he or she is entitled to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013).

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, 138-39 (2009) (alterations in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)).]

We have considered defendant's contention in light of the record and applicable legal principles and conclude it is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We affirm substantially for the reasons set forth in Judge Malestein's well-reasoned written opinion.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION