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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-5227-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TERRENCE HOUSER,

Defendant-Appellant.

Submitted September 6, 2017 — Decided October 3, 2017

Before Judges Alvarez and Gooden Brown.

On appeal from the Superior Court of New
Jersey, Law Division, Essex County, Indictment
No. 11-06-1159.

Dmitriy Shakhnevich, attorney for appellant.

Robert D. Laurino, Acting Essex County
Prosecutor, attorney for respondent (Tiffany
M. Russo, Special Deputy Attorney General/
Acting Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant appeals a Law Division order denying post-
conviction relief (PCR). We affirm.

On June 26, 2012, defendant entered a guilty plea to second-
degree aggravated assault, N.J.S.A. 2C:12-1B(1). The second count

of the indictment, charging him with third-degree endangering a helpless person, N.J.S.A. 2C:12-1.2, was dismissed at sentencing.

Defendant decided to plead guilty after being informed that his co-defendant had pled guilty, and agreed to testify at trial. The court rejected his factual basis on his first attempt, however, because defendant's statements, which included describing kicking and "stomping" the victim while he lay prostrate on the ground, raised the issue of self-defense. Defendant said he believed the victim was carrying a handgun.

After rejecting the plea, the court proceeded to address defendant's Wade¹ application in anticipation of trial. After hearing the arguments and considering the evidence, the judge found the photo arrays shown to the witnesses were not impermissibly suggestive even though the background color of defendant's photograph was lighter than the background color of the other photographs. The judge observed that it was a "minimal" difference. Accordingly, the judge denied the motion.

At that point, the court was advised by defendant's attorney that his client wished to address the judge. The judge responded:

[t]his is the way it is; all right? I'm not here to get you to plead guilty. That's not what I'm here for. I'm not here to accept a guilty plea if you have a valid claim of self-

¹ United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

defense. That's not what I'm here for. That's not what I signed up for, and that's what I'm not interested in. All right?

So we're prepared to go to trial. If you want your right to a jury trial, I'll give it to you, and . . . I'll try the case as fair as I can. That's . . . what I'll do.

The judge then asked defendant if he wanted to again attempt to establish a factual basis for the guilty plea, to which he responded "[y]es." The judge next asked whether it was "a decision you're making of your own free will[.]" The defendant responded, "[y]es."

This time, defendant acknowledged that he continued to punch and kick the victim even after he lay defenseless on the ground. As defendant put it, he "went a little overboard." Defendant admitted that he could have walked away and acknowledged that he actually did so. He returned a few seconds later, once more punching and kicking the victim as he lay on the ground. Defendant agreed that the assault continued even after the victim was clearly no longer a threat. This time, the judge found defendant's sworn statements satisfied the statutory elements, and that the statements did not raise the issue of self-defense.

Defendant was given a sentencing date of September 14, 2012, and was warned regarding his obligation to return to court. See State v. Subin, 222 N.J. Super. 227, 237-40 (App. Div. 1988)

certif. denied, 111 N.J. 580 (1988). Specifically, the judge told defendant that if he failed to appear at sentencing, he could be sentenced to the maximum for a second-degree offense, a ten-year custodial term, instead of the seven years per the plea agreement.

Defendant failed to appear. His attorney represented to the court that defendant was in North Carolina, where his daughter was undergoing surgery. Counsel further stated that he asked defendant to document the claim, and that defendant had agreed to do so. The State nonetheless requested a bench warrant, indicating that if provided appropriate documentation, it would request rescission of the bench warrant.²

Defendant was apprehended in Georgia on the bench warrant. On April 28, 2014, new counsel filed an application to withdraw defendant's guilty plea on the grounds that the factual basis was inadequate as it raised the issue of self-defense. The trial judge reminded counsel of the fact that the video from the liquor

² In rendering his PCR decision, the judge said that the medical documentation defendant provided did not demonstrate "an immediate medical emergency that would preclude the defendant from being present at trial -- or at sentencing." The judge also indicated he had received a letter from defendant after his arrest on the bench warrant. He wrote that he was afraid to go to prison and "made a mistake" by failing to appear at sentencing. In that letter, defendant claimed that the birth of his third child was the factor that caused him to make the decision not to come to court because he was "scared senseless." Defendant further stated he wanted to withdraw his guilty plea and be assigned new counsel.

store in which the incident occurred depicted defendant and his co-defendant pummeling and stomping the victim as he lay on the ground. Nonetheless, counsel argued that defendant felt he was being threatened by the victim; that he was only trying to defend himself; and that at worst, defendant was guilty of a simple assault.

In opposition to the motion, the prosecutor played the video in court. After watching it, the judge observed that the victim was leaving the liquor store when defendant walked quickly in front of him and struck him in the face, and that he continued to attack. After that initial blow, the victim lay on the ground motionless while defendant repeatedly kicked him in the head.

Referring to State v. Slater, 198 N.J. 145 (2009), the judge found that defendant's claim of innocence had no merit. The video and defendant's sworn statements when the guilty plea was entered, contradicted defendant's claim that the victim was threatening patrons in the liquor store. The judge observed that had defendant been genuinely concerned that the victim was armed, he would not have turned his back on him. Furthermore, the video showed that while the victim lay motionless on the sidewalk in front of the store, defendant went back into the store to retrieve his gloves and struck the victim again as he walked by him. Defendant's conduct was intentional and not engaged in self-defense. The

judge stated that defendant "would have an uphill battle in getting [self-defense] submitted to the jury based upon that evidence."

The judge who decided the PCR motion, who was also the judge who accepted defendant's plea and sentenced him, remembered defendant stating that his guilty plea was being made voluntarily.

During the sentencing proceeding that followed denial of the motion to withdraw the guilty plea, defendant told the judge that he did not return to court because his mother, who also spoke at the sentencing and corroborated this narrative, told him she had checked his case on a website and that it showed his case had been dismissed. Defendant also said that his trial attorney compelled him to enter the guilty plea, and that he was not provided a full packet of discovery although he had seen the video. He denied that the victim suffered severe injuries because of anything he did, insisting that the victim was put into a drug-induced coma only to treat minor scrapes and injuries.

When he sentenced defendant, the judge detailed the victim's injuries – which included bleeding to the brain and multiple facial fractures, including a fracture of the cribriform plate, which caused air to enter into the victim's brain cavity. He was in a medically induced coma on a ventilator for a period of time and was diagnosed with traumatic brain injury resulting exclusively from the assault. Defendant interrupted the judge, insisting that

the victim's brain injury was not referred to in the discovery he had been given.

At sentencing, the prosecutor recalled waiting for defendant to appear on September 14, 2012, the original sentencing date, with defendant's first attorney. As they waited, defense counsel told the prosecutor that his client had called and said that he was not coming. After the call, counsel put on the record defendant's first reason for his non-appearance, his daughter's alleged surgery. The prosecutor thus argued that it was clear defendant simply decided to take his chances as a fugitive. He urged the court to find at least aggravating factors two, three, six, and nine. See N.J.S.A. 2C:44-1a(2), (3), (6), (9). Defendant, in addition to assaulting a helpless victim, had a record of arrests dating back to the year 2000 as a juvenile. The assault in this case was defendant's fourth indictable conviction, he had a history of violating probation, and four disorderly persons convictions.

The judge imposed the ten-year prison sentence as permitted by the terms of the plea agreement. He found aggravating factors two, three, six, and nine and no mitigating factors. See N.J.S.A. 2A:44-1b. Accordingly, the judge sentenced defendant to ten years imprisonment, subject to eighty-five percent parole ineligibility pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2.

Defendant appealed his sentence by way of the excessive sentence oral argument calendar. See R. 2:9-11. He contended that he should have received the initial custodial term agreed to in the plea agreement, or seven as opposed to ten years. We did not agree because the trial judge gave detailed reasons for his decisions, the record supported the aggravating factors, and the sentence was imposed in accordance with the plea agreement. An order denying relief was entered April 15, 2015. State v. Houser, App. Div., A-0331-14 (April 15, 2015). Defendant's petition for certification was denied on October 9, 2015. State v. Houser, 223 N.J. 283 (2015).

In his pro se certification submitted in support of his original petition for PCR, defendant alleged that his attorney failed to properly investigate, only "representing defendant one time [which] was the day he plead guilty[;]" failed to provide him with discovery; failed to properly communicate the consequences were he to take the matter to trial; and failed to explain to the court that the reason defendant failed to appear on the date of trial was that his daughter was in the hospital awaiting surgery. He further certified that his trial attorney "cajoled" him into pleading guilty.

When he denied defendant's PCR application, the judge began by reiterating his recollection of the liquor store video that

captured the incident and the grave injuries suffered by the victim. The judge also recalled in detail the process that ultimately led to defendant's sentence. He concluded that Rule 3:22-4(a) barred relief based on alleged shortcomings in the factual basis for the plea, as the issue was suitable for direct appeal. No evidentiary hearing was warranted. See R. 3:22-10. Furthermore, defendant had entirely failed to show any prejudice resulting from counsel's representation. Nothing in the record demonstrated that defendant would have proceeded to trial but for ineffective assistance of counsel.

Defendant raises the following points for our consideration:

POINT ONE

POST-CONVICTION RELIEF IS THE PROPER FORUM TO REVIEW CONSTITUTIONAL ISSUES SURROUNDING THE POTENTIAL INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS, AS THOSE CLAIMS GENERALLY COULD NOT HAVE BEEN RAISED IN PRIOR PROCEEDINGS.

POINT TWO

THE LOWER COURT ERRED IN DENYING DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF BECAUSE DEFENDANT'S COUNSEL WAS INEFFECTIVE IN REPRESENTING DEFENDANT IN COURT ONLY ONCE, ON THE DAY OF THE GUILTY PLEA, AND CONFERRING WITH DEFENDANT ONLY ONCE PRIOR TO THE ACCEPTANCE OF SAID PLEA.

POINT THREE

THE LOWER COURT ERRED IN DENYING DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF BECAUSE DEFENDANT'S COUNSEL WAS INEFFECTIVE IN FAILING

TO PERFORM RESEARCH, INVESTIGATING AND INTERVIEWING WITNESSES, DISCUSSING FACTUAL DEFENSES WITH DEFENDANT, PROPERLY REVIEWING DISCOVERY AND MAKING INSUFFICIENT ARGUMENTS AT SENTENCING.

POINT FOUR

THE LOWER COURT ERRED IN DENYING DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF BECAUSE DEFENDANT'S COUNSEL PRESSURED DEFENDANT TO PROCLAIM GUILT IN CONTRADICTION OF DEFENDANT'S CLAIMS OF INNOCENCE AND INTENTIONALLY MISLED DEFENDANT.

POINT FIVE

THE LOWER COURT ERRED IN DENYING DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF BECAUSE THE FACTUAL BASIS SUPPORTING DEFENDANT'S PLEA WAS INADEQUATE AND INSUFFICIENT TO ALLOW DEFENDANT TO PLEAD GUILTY IN THIS CASE.

POINT SIX

DEFENDANT REASSERTS ALL OTHER ISSUES RAISED IN DEFENDANT'S PRO SE PETITION FOR POST-CONVICTION RELIEF AND IN PCR COUNSEL'S BRIEF IN SUPPORT OF POST-CONVICTION RELIEF.

In order to establish a prima facie claim of ineffective assistance of counsel at trial, a defendant must, pursuant to the familiar standard, demonstrate that counsel made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2nd 674, 693 (1984); State v. Fritz, 105 N.J. 42, 52 (1987). An attorney's representation is deficient when it "[falls] below an

objective standard of reasonableness." Strickland, supra, 466 U.S. at 688, 104 S. Ct. at 2064, 80 L. Ed. 2nd at 693; Fritz, supra, 105 N.J. at 58.

Additionally, a defendant "must show that the deficient performance prejudiced the defense." Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2nd at 693; Fritz, supra, 105 N.J. at 52. 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." Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2nd at 698; Fritz, supra, 105 N.J. at 52. A reasonable probability is one that undermines confidence in the outcome. Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2nd at 698; Fritz, supra, 105 N.J. at 52.

The standard is essentially the same with regard to the entry of guilty pleas. A defendant must establish first that the representation was deficient. Secondly, a defendant must demonstrate that, but for counsel's errors, defendant would not have entered into a plea agreement with the State and would have proceeded to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 203, 210 (1985). Prejudice is not presumed except in cases exemplified by egregious shortcomings in the

professional performance of counsel. Fritz, supra, 105 N.J. at 61.

In this case, defendant's substantive points two through five, are based on uncorroborated bare assertions that conflict with the record made available to us. He alleges, for example, that his attorney only met with him on the day that the plea was entered. In light of the fact that the matter was listed for trial the day the Wade motion was heard, that claim lacks credibility. Among other things, Rule 3:9-1(f) requires that before a case is given a trial date, a pre-trial conference must be conducted on the record. At that time, a defendant is asked if he or she understands "the salient facts and anticipated proofs." Ibid. That conference would only have been conducted in defendant's presence.

Furthermore, it was defendant who initiated the entry of his guilty plea, not his attorney. See State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999), certif. denied, 162 N.J. 199 (1999) (stating "in order to establish a prima facie claim, a petitioner must do more than make bald assertions that he was denied ineffective assistance of counsel.")

Defendant's argument regarding the allegedly insufficient factual basis, with which we do not agree on the merits, is barred

by Rule 3:22-4(a). This argument should have been made on direct appeal and was not.

Finally, defendant under the authority of State v. Rue, 175 N.J. 1 (2002), urges us to consider all the arguments raised by PCR counsel and defendant pro se not included in the points we have addressed. None warrant discussion on the merits. See R. 2:11-3(e)(2).

Ultimately, this was an extended term eligible defendant, whose unprovoked attack was captured on film, and resulted in a serious brain injury inflicted upon a total stranger. See N.J.S.A. 2C:43-7a(3) and 2C:44-3a. Once having negotiated a favorable guilty plea, defendant then failed to appear for sentencing and gave at least three different justifications for his non-appearance, none of which were supported by the record. It appears to us that he was represented by competent counsel who did a creditable job in negotiating a favorable plea in light of the State's overwhelming proofs. The representation was not deficient. Since counsel was not ineffective, defendant's decision to waive his right to a trial and enter a guilty plea was not a result of counsel's errors.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION