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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-5393-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SCOTT CAIN a/k/a  
SCOTT M. CAIN,

Defendant-Appellant.

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Submitted February 7, 2017 – Decided March 29, 2017

Before Judges Espinosa and Suter.

On appeal from Superior Court of New Jersey,  
Law Division, Bergen County, Indictment No.  
03-05-0194.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Alan I. Smith, Designated  
Counsel, on the brief).

Gurbir S. Grewal, Bergen County Prosecutor,  
attorney for respondent (Elizabeth R.  
Rebein, Assistant Prosecutor, of counsel and  
on the brief).

PER CURIAM

Defendant Scott Cain appeals the denial of his petition for post-conviction relief (PCR) on grounds of ineffective assistance of counsel. For the reasons that follow, we affirm.

Defendant pled guilty on April 11, 2005 to fourth-degree possession of drug paraphernalia with intent to distribute, N.J.S.A. 2C:36-3,<sup>1</sup> having distributed a package containing narcotic paraphernalia to an undercover police officer. Defendant was sentenced to eighteen months of incarceration to run concurrently with a sentence defendant was serving on an unrelated violation of parole. Defendant did not file a direct appeal of his 2005 conviction or sentence.

In 2011, defendant was convicted, among other things, of second-degree possession of cocaine with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(2). The State requested an extended term of imprisonment. Defendant was sentenced pursuant to N.J.S.A. 2C:43-6(f) to an extended term of sixteen years with an eight year period of parole ineligibility.<sup>2</sup>

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<sup>1</sup> The judgment of conviction erroneously reflected fourth-degree distribution of controlled dangerous substance, cocaine, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3).

<sup>2</sup> Defendant was sentenced to concurrent terms of imprisonment for five other charges. Defendant's convictions have since been reversed. See State v. Cain, 224 N.J. 410 (2016) (overruling State v. Odom, 116 N.J. 65, 80-81 (1989), and holding that in a drug case, an expert witness "may not opine on defendant's state of

Defendant filed a PCR petition on June 9, 2014, claiming he was deprived of the effective assistance of counsel because his trial attorney failed to advise him his guilty plea in 2005 "would make him extended term eligible on future convictions." Defendant also alleged his trial counsel failed to file a pre-trial speedy trial motion or a notice of appeal for the 2005 conviction.<sup>3</sup>

The PCR court denied defendant's petition on May 18, 2015, finding trial counsel had no duty to advise defendant about extended term eligibility he might face if he were to violate the law in the future. The PCR court noted that defendant was extended term eligible irrespective of the 2005 conviction because in 1998, defendant was convicted of distribution of cocaine in a school zone, N.J.S.A. 2C:35-5(a) and N.J.S.A. 2C:35-7. The PCR court found defendant's PCR petition was time-barred under Rule 3:22-12(a) because it was filed more than five years after his 2005 judgment of conviction, and defendant had not shown excusable neglect for the late filing because he was aware as early as 2005 of his extended term eligibility based on his record. The PCR

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mind." ). Following remand, on April 4, 2016, defendant entered a guilty plea to one count of third-degree possession of cocaine, N.J.S.A. 2C:35-5(a)(1); N.J.S.A. 2C:35-5(b)(3), and was sentenced to time served.

<sup>3</sup> Those issues were not advanced by defendant in this appeal.

court rejected defendant's other claims about the failure by his counsel to file a motion for a speedy trial or a direct appeal. The PCR court found defendant was not prejudiced by his 2005 guilty plea because he served no additional jail time as part of the plea, and three other drug related charges were dismissed. Because the PCR court found defendant had not made a prima facie showing of ineffective assistance of counsel, it denied defendant's request for an evidentiary hearing. See State v. Preciose, 129 N.J. 451, 459 (1992).

Defendant presents the following issues for our consideration in his appeal:

POINT I —THE ORDER DENYING POST-CONVICTION RELIEF SHOULD BE REVERSED AND DEFENDANT'S GUILTY PLEA VACATED, OR IN THE ALTERNATIVE, THE MATTER REMANDED FOR AN EVIDENTIARY HEARING BECAUSE, REGARDLESS OF WHETHER TRIAL COUNSEL WAS INEFFECTIVE UNDER THE STRICKLAND<sup>4</sup> TEST, THE EX POST FACTO EFFECT OF TRIAL COUNSEL'S FAILURE TO INFORM DEFENDANT OF THE ENHANCED SENTENCING CONSEQUENCES OF HIS GUILTY PLEA VIOLATED DEFENDANT'S "DUE PROCESS" RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

POINT II —THE ORDER DENYING POST-CONVICTION RELIEF SHOULD BE REVERSED BECAUSE IT VIOLATED DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS

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<sup>4</sup> The reference is to Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

GUARANTEED BY THE SIXTH AMENDMENT TO  
THE UNITED STATES CONSTITUTION.

POINT III—THE ORDER DENYING POST-CONVICTION  
RELIEF SHOULD BE REVERSED BECAUSE  
THE PCR COURT MISAPPLIED THE  
PROCEDURAL BAR OF R. 3:22-12.

The standard for determining whether counsel's performance was ineffective for purposes of the Sixth Amendment was formulated in Strickland, supra, 466 U.S. at 668, 104 S. Ct. at 2052, 80 L. Ed. 2d at 674, and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42 (1987). In order to prevail on an ineffective assistance of counsel claim, defendant must meet a two-prong test by establishing that: (1) counsel's performance was deficient and he or she made errors that were so egregious that counsel was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution; and (2) the defect in performance prejudiced defendant's rights to a fair trial such that there exists 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 687, 694, 104 S. Ct. at 2064, 2068, 80 L. Ed. 2d at 693, 698.

In the plea bargain context, "a defendant must prove that there is a reasonable probability that, but for counsel's errors, [he or she] would not have pled guilty and would have insisted on going to trial." State v. Gaitan, 209 N.J. 339, 351 (2012)

(alteration in original) (internal quotation marks and citations omitted), cert. denied, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1454, 185 L. Ed. 2d 361 (2013), and that "a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284, 297 (2010).

We perceive no error by the PCR court in rejecting defendant's petition. Defendant was aware when he pled guilty in 2005 based on a colloquy with the judge that because of his prior record, there was a possibility for an extended term sentence of five years of incarceration instead of the eighteen months to which he was sentenced. Thus, the premise of defendant's PCR petition, that he was not informed by his counsel about extended term eligibility, is flawed; he was already aware that he had such exposure.

We agree with the PCR court that the petition was untimely filed. Under Rule 3:22-12(a)(1), defendant had five years "after the date of entry . . . of the judgment of conviction" to file a PCR petition. Defendant's PCR petition was filed on June 9, 2014, more than five years after he pled guilty on April 11, 2005. As the PCR court observed, defendant did not show "the delay . . . was due to defendant's excusable neglect." See ibid. Defendant was sentenced to an extended term on February 18, 2011. He did

not file a PCR petition for another three years nor did he explain this delay.

Even if the PCR petition were timely, defendant was eligible for an extended term under N.J.S.A. 2C:43-6(f) because of his 1998 conviction for distribution of cocaine in a school zone, N.J.S.A. 2C:35-5(a) and N.J.S.A. 2C:35-7.<sup>5</sup> The 2005 guilty plea to fourth-degree distribution of paraphernalia, contrary to N.J.S.A. 2C:36-3, should not have been a basis under N.J.S.A. 2C:43-6(f) for an extended term. As the PCR court concluded, trial counsel did not err because the guilty plea in 2005 did not expose defendant to an extended term sentence.<sup>6</sup>

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<sup>5</sup> Under N.J.S.A. 2C:43-6(f),

[a] person convicted . . . under [N.J.S.A.] 2C:35-5 . . . who has been previously convicted of manufacturing, distributing, dispensing or possession with intent to distribute a controlled dangerous substance or controlled substance analog, shall upon application of the prosecuting attorney be sentenced by the court to an extended term as authorized by subsection c of [N.J.S.A.] 2C:43-7, notwithstanding that extended terms are ordinarily discretionary with the court.

[N.J.S.A. 2C:43-6(f).]

<sup>6</sup> Indeed, because the 2005 guilty plea simply does not expose defendant to extended term sentencing pursuant to N.J.S.A. 2C:43-6(f), we could consider this matter to be moot. "An issue is 'moot' when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy." Greenfield

Defendant contends his trial counsel was constitutionally ineffective because he had a duty to advise him about the potential for an extended term sentence when he pled guilty in 2005. Defendant relies upon Padilla, supra, 559 U.S. at 372, 130 S. Ct. at 1485, 176 L. Ed. 2d at 297, which requires criminal defense attorneys to inform clients whether a guilty plea has the risk of deportation. Defendant argues the effect of not advising him about the extended term consequences of his guilty plea was an ex post facto increase in the 2005 sentence.

We reject the notion that the Ex Post Facto Clause, U.S. Const. art. 1, § 10, c. 1.1, was triggered in this context because his sentence of eighteen months based upon the guilty plea did not become more burdensome after the plea. See Collins v. Youngblood, 497 U.S. 37, 41-43, 110 S. Ct. 2715, 2718-19, 111 L. Ed. 2d 30, 38-39 (1990).

Furthermore, we previously held that there is "no constitutional requirement that a defense attorney must advise a client or defendant that if he or she commits future criminal offenses that there may be adverse consequences by way of enhancement of the penalty" in connection with a plea agreement.

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v. N.J. Dep't of Corr., 382 N.J. Super. 254, 257-58 (App. Div. 2006) (quoting N.Y. Susquehanna & W. Ry. Corp. v. State Dep't of Treasury, Div. of Taxation, 6 N.J. Tax 575, 582 (Tax 1984), aff'd, 204 N.J. Super. 630 (App. Div. 1985)).



See State v. Wilkerson, 321 N.J. Super. 219, 223 (App. Div.), certif. denied, 162 N.J. 128 (1999). Wilkerson recognized "the great weight of authority in other jurisdictions has rejected" the argument of "ineffective assistance of counsel for a defense attorney's failure to advise a defendant in connection with a plea agreement of the consequences of a conviction in the event that a defendant commits a future crime." Ibid. We noted, "generally individuals should be aware as a matter of common sense that a continuing course of antisocial or criminal conduct may lead to increased penalties." Ibid.

We have no cause to reexamine Wilkerson in light of Padilla. In the immigration context, a defendant can be deported as a consequence of his plea or conviction without any other action on his part. That is not the case here. Extended term sentencing is based upon the commission of a subsequent crime and a criminal conviction. Counsel have no constitutional duty to predict that their clients will engage in future criminal conduct and to advise of the potential for an extended term. The PCR court was correct to reject defendant's PCR petition because defendant's trial counsel did not fail in any constitutional duty to defendant by not advising him of potential exposure to enhanced sentencing should he continue to commit certain types of criminal offenses.

We discern no error in the PCR court's finding that defendant was not prejudiced by pleading guilty in 2005. Defendant's PCR petition never asserted he was prejudiced. Defendant's counsel made the argument that defendant would not have pled guilty had he been aware of the enhanced sentencing possibility. Defendant certified that he would have filed a PCR petition earlier if he were aware of the enhanced sentencing issue. Thus, defendant's PCR petition did not meet the standard that "but for counsel's errors, [he or she] would not have pled guilty and would have insisted on going to trial." Gaitan, supra, 209 N.J. at 351 (alteration in original) (internal quotation marks and citations omitted). Also, his counsel was able to negotiate a plea that avoided any additional jail time and resulted in the dismissal of three other charges.


Because there was no showing of deficient performance by trial counsel or prejudice to defendant, the PCR court was correct to deny defendant's PCR petition without an evidentiary hearing. See Preciose, supra, 129 N.J. at 462.

We do not address any issues in defendant's PCR petition that were not advanced on appeal. Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) ("An issue not briefed on appeal is deemed waived." (citations omitted)). We conclude that defendant's

further arguments are without sufficient merit to warrant discussion in a written opinion. 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