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Although it is posted on the internet, this opinion is binding only on the
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-2371-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAVID J. PECK,

Defendant-Appellant.

Submitted January 31, 2018 – Decided April 30, 2018

Before Judges Fuentes and Manahan.

On appeal from Superior Court of New Jersey,
Law Division, Atlantic County, Indictment No.
13-03-0830.

Joseph E. Krakora, Public Defender, attorney
for appellant (William Welaj, Designated
Counsel, on the brief).

Gurbir S. Grewal, Attorney General, attorney
for respondent (John J. Santoliquido, Special
Deputy Attorney General, of counsel and on the
brief).

PER CURIAM

Defendant David J. Peck appeals from an order denying his
petition for post-conviction relief (PCR). As we conclude that

the PCR raised issues of material fact whether defendant received ineffective assistance of counsel, we reverse and remand for an evidentiary hearing.

We derive the following facts from our decision affirming defendant's conviction after a jury trial:

On November 14, 2012, Lieutenant Rodney R. Ruark was conducting an undercover operation near Renaissance Plaza in Atlantic City, New Jersey. Prior to that date, police received numerous complaints about open-air drug dealing in that area. Ruark was approached by defendant. Defendant engaged Ruark and stated, "I can get you some heroin." Ruark responded he wanted pills, but was interested in heroin. Defendant directed Ruark to sit at a table outside of a nearby Kentucky Fried Chicken and Taco Bell.

Moments thereafter, defendant and another male, later identified as Preston Harmon, approached Ruark. Defendant directed Ruark to follow him and Harmon to the bathroom of the Taco Bell. Defendant waited outside the bathroom door while Ruark and Harmon went inside to complete the deal. Inside the bathroom, Ruark said he "wanted a bundle" of heroin. Harmon responded saying he only had "seven bags" for \$70. Nonetheless, they completed the transaction.

Ruark and Harmon then exited the bathroom. Thereupon defendant asked Ruark to "take care of him (defendant) for arranging the drug deal." Ruark gave defendant \$20. Defendant and Harmon left in the direction of the back of the plaza Ruark told backup officers to stop defendant. Defendant was identified and searched but not arrested.

On a later date, defendant and Harmon were arrested and charged with third-degree distribution of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3), second-degree possession of CDS with intent to distribute within 500 feet of a school zone, N.J.S.A. 2C:35-7.1(a), and third-degree conspiracy to distribute CDS, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:35-5(b)(3).

. . . .

[After trial], the jury found defendant guilty of third-degree distribution of CDS and third-degree conspiracy to distribute CDS. The remaining charges were dismissed. Defendant was sentenced to a mandatory extended term of eight years' imprisonment with a four-year period of parole ineligibility on the distribution conviction.

[State v. Peck, No. A-1792-13 (App. Div. May 15, 2015)(slip op. at 1-3).]

On appeal, defendant raises the following argument:

POINT I

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.

A. THE PREVAILING LEGAL PRINCIPLES REGARDING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, EVIDENTIARY HEARINGS AND PETITIONS FOR POST CONVICTION RELIEF.

B. TRIAL COUNSEL DID NOT ADEQUATELY REPRESENT THE DEFENDANT ARISING OUT OF HIS FAILURE TO THOROUGHLY DISCUSS

WITH HIS CLIENT ALL RELEVANT RAMIFICATIONS ASSOCIATED WITH THE DECISION WHETHER OR NOT TO TESTIFY, AS A RESULT OF WHICH HE CONVINCED THE DEFENDANT NOT TO TESTIFY IN HIS OWN DEFENSE.

C. THE DEFENDANT DID NOT RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL SINCE, AS A RESULT OF COUNSEL'S FAILURE TO PROPERLY AND RESPONSIBLY ADVISE HIM WITH RESPECT TO THE STATE'S PLEA OFFER, HE REJECTED THE PLEA RECOMMENDATION AND INSTEAD PROCEEDED TO TRIAL, SUBSEQUENTLY RECEIVING A SENTENCE SIGNIFICANTLY GREATER THAN THAT EMBODIED IN THE PLEA OFFER.

"Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." State v. Preciose, 129 N.J. 451, 459 (1992). Under Rule 3:22-2(a), a criminal defendant is entitled to post-conviction relief if there was a "[s]ubstantial denial in the conviction proceedings of defendant's rights under the Constitution of the United States or the Constitution or laws of the State of New Jersey[.]" "A petitioner must establish the right to such relief by a preponderance of the credible evidence." Preciose, 129 N.J. at 459 (citations omitted). "To sustain that burden, specific facts" that "provide the court with an adequate basis on which to rest its decision" must be articulated. State v. Mitchell, 126 N.J. 565, 579 (1992).

Claims of constitutionally ineffective assistance of counsel are well suited for post-conviction review. See R. 3:22-4(a)(2); Preciose, 129 N.J. at 460. In determining whether a defendant is entitled to relief on the basis of ineffective assistance of counsel, New Jersey courts apply the two-prong test articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687 (1984), and United States v. Cronin, 466 U.S. 648, 658-60 (1984). Preciose, 129 N.J. at 463; State v. Fritz, 105 N.J. 42, 49-50 (1987).

Under the first prong of the Strickland test, a "defendant must show that [defense] counsel's performance was deficient." Strickland, 466 U.S. at 687.

Our review of an order granting or denying PCR contains consideration of mixed questions of law and fact. State v. Harris, 181 N.J. 391, 415-16 (2004). "[W]here the court does not hold an evidentiary hearing, we may exercise de novo review over the factual inferences the trial court has drawn from the documentary record." State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014) (citing Harris, 181 N.J. at 420-421). A PCR court's interpretations of law are provided no deference and are reviewed de novo. State v. Nash, 212 N.J. 518, 540-41 (2013).

An evidentiary hearing is ordinarily granted if the facts, viewed "in the light most favorable to the defendant," would

warrant PCR. State v. Jones, 219 N.J. 298, 311 (2014). Thus, whether a defendant receives an evidentiary hearing depends on the defendant's "establishment of a prima facie case in support of post-conviction relief" R. 3:22-10(b). This requires "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." Ibid.

Defendant provided a certification with his PCR in which he certified that his defense counsel advised him to reject the State's plea offer of a three-year prison sentence with a one-year period of parole ineligibility. According to defendant, his counsel assured him of acquittal and that the acquittal was "in the bag." The PCR judge found this to be, in effect, a bald allegation and denied defendant an evidentiary hearing.

Here, the veracity of defendant's claim cannot be resolved by reference to the record, since the alleged advice by counsel to reject the plea offer and go to trial was not part of the record. As such, the determination whether counsel provided the advice and, if so, whether such advice constituted ineffective assistance must abide an evidentiary hearing. R. 3:22-10(b). We add that in reaching our decision, we express no view on the outcome of the hearing.

Reversed and remanded. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION