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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-2429-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHRISTOPHER RADFORD,

Defendant-Appellant.

Submitted January 22, 2018 – Decided February 5, 2018

Before Judges Sabatino and Ostrer.

On appeal from Superior Court of New Jersey,
Law Division, Cumberland County, Indictment
No. 14-11-0850.

Joseph E. Krakora, Public Defender, attorney
for appellant (Andrew R. Burroughs, Designated
Counsel, on the brief).

Jennifer Webb-McRae, Cumberland County
Prosecutor, attorney for respondent (Danielle
R. Pennino, Assistant Prosecutor, of counsel
and on the brief).

PER CURIAM

Defendant Christopher Radford appeals the trial court's
October 21, 2016 denial of his petition for post-conviction relief
("PCR"). We affirm that denial in all but one respect, remanding

the matter for an evidentiary hearing confined to the sole question of whether defendant's trial counsel provided him with adequate advice concerning the "gap time" consequences of his guilty plea and whether defendant suffered any real prejudice from the alleged lack of such proper advice.

In 2014, defendant was charged in a multi-count indictment with three armed robberies and other serious offenses. The State negotiated with defense counsel a very generous plea agreement in which defendant pled guilty to second-degree bank robbery, N.J.S.A. 2C:15-1(a)(1) and (2), with the State recommending a five-year custodial sentence subject to the parole ineligibility terms of the No Early Release Act ("NERA"), N.J.S.A. 2C:43-7.2. By agreement, all other charges were dismissed.

At sentencing, defendant received the five-year NERA sentence consistent with his agreement. The court awarded defendant seventy-one days of jail credit and 363 days of gap time credit. Defendant did not appeal his sentence.

After sentencing, defendant moved to withdraw his guilty plea, contending that one of the witnesses at the robbery described the robber as being six feet tall, whereas defendant is seven inches shorter than that. The trial court rejected that asserted basis for withdrawal because defendant's trial counsel had not

supplied that discovery to the court in connection with the application.

In his ensuing petition for PCR, defendant contends his trial counsel was ineffective in several respects. Among other things, he contends that counsel failed to investigate a potential alibi witness; failed to explain to him the difference between jail credits and gap time credits; and failed to provide discovery to the court to support a colorable claim of innocence at the time he requested to withdraw his guilty plea.

The PCR judge, who was the same judge who had taken defendant's guilty plea and who had imposed the sentence, denied the petition in all respects. The judge found no reason to conduct an evidentiary hearing.

In his brief on the present appeal, defendant raises the following points for our consideration:

POINT I

DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF
PLEA COUNSEL.

POINT II

AS PLEA COUNSEL MISINFORMED DEFENDANT ABOUT
THE PENAL CONSEQUENCES, DEFENDANT'S GUILTY
PLEA WAS NOT VOLUNTARILY, KNOWINGLY, AND
INTELLIGENTLY MADE.

POINT III

DEFENDANT'S ATTORNEY FAILED TO PROPERLY INVESTIGATE THE CASE.

POINT IV

AS DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF BOTH MOTION AND PCR COUNSEL, A REMAND IS REQUIRED.

POINT V

AS THERE ARE GENUINE ISSUES OF MATERIAL FACTS IN DISPUTE, AN EVIDENTIARY HEARING WAS REQUIRED.

With the exception of the credits issue, we reject these points and affirm the trial court substantially for the reasons expressed in the court's October 21, 2016 oral decision.

Under the Sixth Amendment of the United States Constitution, a person accused of crimes is guaranteed the effective assistance of legal counsel in his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). To establish a deprivation of that right, a convicted defendant must satisfy the two-part test enunciated in Strickland by demonstrating that: (1) counsel's performance was deficient, and (2) the deficient performance actually prejudiced the accused's defense. Ibid.; see also State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the Strickland two-part test in New Jersey). In reviewing such claims, courts apply a strong presumption that defense counsel "rendered adequate assistance and

made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690.

The United States Supreme Court has extended these principles to the representation provided by a criminal defense attorney to an accused in connection with a plea negotiation. Lafler v. Cooper, 566 U.S. 156, 162-63 (2012); Missouri v. Frye, 566 U.S. 134, 144 (2012). Defendant has not shown with "reasonable probability" that the result would have been different had he received proper advice from his trial attorney. Lafler, 566 U.S. at 163 (citing Strickland, 466 U.S. at 694); see also Lee v. United States, 582 U.S. ___, ___, 137 S. Ct. 1958, 1965 (2017) (holding that, when a defendant pled guilty prior to trial based on incorrect advice from counsel about deportation consequences, the court must determine "whether the defendant was prejudiced by the 'denial of the entire judicial proceeding . . . to which he had a right.'" (quoting Roe v. Flores-Ortega, 528 U.S. 470, 483 (2000))); Hill v. Lockhart, 474 U.S. 52, 58 (1985) (holding that "the two-part Strickland v. Washington test applies to challenges to guilty pleas based on ineffective assistance of counsel").

Defendant certifies that he was not made aware by counsel at the time of his guilty plea that jail credits are applied to the "front end" of a custodial sentence, whereas gap time credits only come off the "back end." See R. 3:21-8(a) and N.J.S.A. 2C:43-2(f)

(regarding jail credits) and N.J.S.A. 2C:44-5(b)(2) (regarding gap time credits); See also State v. Joe, 228 N.J. 125, 132-35 (2017) (explaining the difference between the two). That technical distinction sometimes is not easily known or understood by criminal defendants.

In the present case, the 363-day period of applicable gap time is nearly a full year and not an insignificant number. Because it is possible, albeit unlikely, that defendant would have rejected or attempted to further negotiate the State's plea offer had he been advised of the gap time consequences, we conclude the best course of action on this issue is to remand for an evidentiary hearing. See State v. Preciose, 129 N.J. 451, 462-63 (1992). At such a hearing the trial court will explore (1) whether, in fact, trial counsel provided materially inaccurate or insufficient advice to defendant about the credits impact of the plea; and (2) whether any lack of such proper advice actually prejudiced defendant or conversely was insignificant in light of the favorable agreement made with the State. We presume the court will make associated credibility findings on these matters, after hearing any witnesses presented on remand.

The balance of defendant's arguments are unpersuasive. Under the plea withdrawal factors of State v. Slater, 198 N.J. 145, 157-58 (2009), whether defendant had a "colorable claim of innocence"

stemming from the one lay witness's height estimate of the robber is not dispositive. The video of the robbery is likely to have been key counterproof for the State on that issue. Moreover, the remaining Slater factors do not manifestly weigh in defendant's favor to meet his heavy burden to withdraw a guilty plea after sentencing. Ibid.

We do not discern any necessity to remand on the alibi claim. Defendant provided no certification from the supposed alibi witness. "Bald assertions" of fact are insufficient to support a prima facie claim for PCR. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999) (noting that PCR relief requires more than "bald assertions" by a defendant); see also R. 3:22-10(b); State v. Porter, 216 N.J. 343, 356-57 (2013) (reaffirming these principles in evaluating which of a defendant's various PCR claims warranted an evidentiary hearing).

No other points raised by defendant warrant discussion here, there being clearly no merit to them. 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