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This opinion shall not "constitute precedent or be binding upon any court."  
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-2556-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ZAHIER K. CROSELL,

Defendant-Appellant.

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Submitted January 25, 2018 – Decided February 15, 2018

Before Judges Simonelli and Gooden Brown.

On appeal from Superior Court of New Jersey,  
Law Division, Cumberland County, Indictment  
No. 14-05-0387.

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

Jennifer Webb-McRae, Cumberland County  
Prosecutor, attorney for respondent (Kim L.  
Barfield, Assistant Prosecutor, of counsel and  
on the brief).

PER CURIAM

Defendant Zahier Crosell appeals from the December 1, 2016 Law Division order, which denied his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

We derive the following facts from the evidence presented at the motion to suppress a handgun found during a warrantless search of defendant's car. According to New Jersey State Trooper Andrew Menzoni, at approximately 10:00 p.m. on January 17, 2014, he and State Trooper Staub saw a car stopped in the lane of travel on Highway 49 in Bridgeton, with the driver, later identified as defendant, speaking to a pedestrian on the side of the roadway. Menzoni and Staub activated the overhead lights of their patrol cars as they followed defendant's car into a nearby parking lot, and stopped the car after defendant made an evasive maneuver. Staub approached the driver's side of defendant's car and spoke to defendant, who had no identification. Menzoni called in the stop to dispatch and then exited his patrol car and went to the passenger side of defendant's car. Menzoni illuminated his flashlight into the passenger side and saw the grip of a gun sticking out from under the front passenger seat. Menzoni went to the driver's side, asked defendant to exit his car, placed him under arrest, and administered his Miranda<sup>1</sup> rights. Menzoni then

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

returned to the passenger side, opened the door, bent down, reached into the car, immediately retrieved the handgun, and secured it in the trunk of his patrol car. Neither Trooper looked any further into defendant's car. The stop was recorded on the motor vehicle recording (MVR) device in Menzoni's patrol car. The handgun was tested and found to be operable and capable of being discharged.

A grand jury indicted defendant for second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (count one), and third-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b)(3) (count two).<sup>2</sup> In denying defendant's motion to suppress the handgun, Judge Robert G. Malestein viewed the MVR recording and found Menzoni's testimony credible. The judge determined the stop was lawful based on Menzoni's reasonable and articulable belief that defendant committed a motor vehicle violation, and the plain view exception applied to the warrantless search of defendant's car and seizure of the handgun. Defendant then pled guilty to count one and two counts of violation of probation, and was sentenced to a five-year term of imprisonment with a forty-two month period of parole ineligibility.

Defendant did not appeal his conviction or sentence. Instead, he filed a pro se PCR petition, arguing that defense counsel

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<sup>2</sup> Defendant was also charged with several motor vehicle offenses.

rendered ineffective assistance by failing to investigate how and where the handgun was found and pursue a defense under the Gun Amnesty Law, L. 2013, c. 117. With no supporting certification, defendant asserted in his pro se PCR brief, as he does in his merits brief on appeal, that he told defense counsel "he was on his way to turn the . . . weapon in, in accordance with [the Gun Amnesty Law,]" but counsel failed to investigate the law and advised him not to mention it because "the Judge would not buy it." Assigned PCR counsel submitted a brief, adding that defense counsel was ineffective for failing to file a motion to suppress, and if counsel did file a motion, the court improperly denied it because the elements of the plain view doctrine were not met.

In a written opinion, Judge Malestein found that defense counsel filed a motion to suppress and vigorously cross-examined Menzoni, the motion was properly denied, and defendant did not allege any deficiencies in defense counsel's performance on the motion. The judge also found defendant provided no proof that an investigation would have revealed anything different than the evidence presented at the motion to suppress, and that based on the MVR recording, there was no need for a further investigation as to how and where the gun was found. The judge also determined that defendant failed to comply with the notice requirements of N.J.S.A. 2C:39-12, as required by the Gun Amnesty Law. Lastly,

the judge found there was no competent evidence that defendant was intending to voluntarily surrender his handgun, as the gun "was not disabled or locked away, but just out in the open under the seat ready for use and not stored for transport."

On appeal, defendant reiterates the arguments made to Judge Malestein. Defendant adds that PCR counsel rendered ineffective assistance by arguing, incorrectly, that defense counsel did not file a motion to suppress.

We review a judge's decision to deny a PCR petition without an evidentiary hearing for abuse of discretion. State v. Preciose, 129 N.J. 451, 462 (1992). Where "no evidentiary hearing was conducted, we may review the factual inferences the court has drawn from the documentary record de novo." State v. Blake, 444 N.J. Super. 285, 294 (App. Div.), certif. denied, 226 N.J. 213 (2016). Applying these standards, we discern no reason to disturb Judge Malestein's decision.

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) (alteration in original) (quoting Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984)).]

"[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." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). The defendant must establish, by a preponderance of the credible evidence, that he is entitled to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013). "[W]hen a petitioner claims his trial attorney inadequately investigated his case, he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." State v. Porter, 216 N.J. at 343, 353 (2013) (alteration in original) (quoting Cummings, 321 N.J. Super. at 170).

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, 139 (2009) (second alteration in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994).]

The defendant must also show "a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010); see also State v. Maldon, 422 N.J. Super. 475, 486 (App. Div. 2011). "Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." Lee v. United States, 582 U.S. \_\_\_, 137 S. Ct. 1958, 1967 (2017).

Defendant did not establish a prima facie case of ineffective assistance of PCR counsel. Despite PCR counsel's erroneous argument that defense counsel failed to file a motion to suppress, defendant failed to show PCR counsel's error prejudiced him.

Defendant does not argue that PCR counsel failed to raise arguments he requested or otherwise performed deficiently in pursuing the arguments raised.

We have considered defendant's contentions with respect to defense counsel in light of the record and applicable legal principles and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We affirm substantially for the reasons Judge Malestein expressed in his written opinion. However, we make the following brief comments.

The Gun Amnesty Law provides that

[a]ny person who has in his possession a handgun in violation of [N.J.S.A. 2C:39-5(b)] or a rifle or shotgun in violation of [N.J.S.A. 2C:39-5(c)] on the effective date of this act may retain possession of that handgun, rifle, or shotgun for a period of not more than 180 days after the effective date of this act. During that time period, the possessor of that handgun, rifle, or shotgun shall:

- (1) transfer that firearm to any person lawfully entitled to own or possess it; or
- (2) voluntarily surrender that firearm pursuant to the provisions of [N.J.S.A. 2C:39-12].

[L. 2013, c. 117, § 1.]



The amnesty provision became effective on August 8, 2013, and was set to "expire on the 181st day after enactment[,]" or February 4, 2014. L. 2013, c. 117, § 3.

As our Supreme Court stated:

[T]he amnesty law did not afford defendants blanket immunity for the entire amnesty period. . . .

Instead, the law created a period of no more than six months during which people could dispose of weapons they illegally possessed without being prosecuted. The provision affords a defense to those who attempted to comply with its terms.

[State v. Harper, 229 N.J. 228, 232 (2017).]

"A defendant charged under [N.J.S.A. 2C:39-6(b) with unlawful] possession [of a weapon] during the amnesty period may raise the amnesty law as an affirmative defense." Id. at 241.

To do so, a defendant must show two things: (1) that he possessed a handgun in violation of [N.J.S.A.] 2C:39-5(b) or (c) 'on the effective date of this act'. . . and (2) that he took steps to transfer the firearm or voluntarily surrender it during the 180-day period beginning on August 8, 2013, consistent with [N.J.S.A.] 2C:39-12 -- that is, before authorities brought any charges or began to investigate his unlawful possession.

[Ibid. (emphasis added) (citing L. 2013, c. 117; N.J.S.A. 2C:39-12).]

N.J.S.A. 2C:39-12 provides that

[n]o person shall be convicted of an offense under this chapter for possessing any


firearms, weapons, destructive devices, silencers or explosives, if after giving written notice of his intention to do so, including the proposed date and time of surrender, he voluntarily surrendered the weapon, device, instrument or substance in question to the superintendent or to the chief of police in the municipality in which he resides, provided that the required notice is received by the superintendent or chief of police before any charges have been made or complaints filed against such person for the unlawful possession of the weapon, device, instrument or substance in question and before any investigation has been commenced by any law enforcement agency concerning the unlawful possession.

[(Emphasis added).]

Defendant did not comply with N.J.S.A. 2C:39-12. He gave no written notice to law enforcement of his intention to voluntarily surrender his handgun and did not voluntarily surrender it before he was arrested and charged under N.J.S.A. 2C:39-5(b) with unlawful possession of a weapon. Accordingly, because defendant was not entitled to the protection of the Gun Amnesty Law, defense counsel committed no error in failing to raise the defense.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION