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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-3011-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JESSICA LEVINE,

Defendant-Appellant.

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Submitted February 15, 2018 – Decided April 18, 2018

Before Judges Haas and Rothstadt.

On appeal from Superior Court of New Jersey,  
Law Division, Camden County, Indictment No.  
13-01-0106.

Richard Sparaco, attorney for appellant.

Mary Eva Colalillo, Camden County Prosecutor,  
attorney for respondent (Kevin J. Hein,  
Assistant Prosecutor, of counsel and on the  
brief).

PER CURIAM

Defendant Jessica Levine appeals from the denial of her petition for post-conviction relief (PCR) without an evidentiary hearing. For the reasons that follow, we affirm.

Defendant pled guilty to fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d). The court sentenced defendant in accordance with her plea agreement to a one-year period of non-custodial probation. Defendant did not file a direct appeal from her conviction and sentence.

The charges against defendant arose from an argument she and her boyfriend Edgardo Flores had on September 22, 2012, that he reported to the police. On that date, the responding police officer spoke with defendant who denied possessing a knife and using it to threaten Flores. According to the officer, Flores told police that defendant "threatened to kill him as she stabbed the kitchen table with a knife several times." When defendant pled guilty on April 15, 2013, she confirmed while giving her factual basis that she had a knife in her possession that night "with the purpose of using it in circumstances that were not manifestly appropriate." Defendant also confirmed that she understood the charges against her and that she was pleading guilty because she was "in fact" guilty of the offense. The court accepted her plea and later imposed its sentence.<sup>1</sup>

Defendant filed a PCR petition on June 22, 2016, in which she argued that trial counsel "failed to investigate possible defenses

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<sup>1</sup> At the time of her sentencing, defendant was living at home with Flores and their three children.

[and] fail[ed] to interview readily available defense witnesses." In addition, she contended that counsel did not properly advise her about "the offense to which she" had pled to, and did not "establish an adequate factual basis for the plea." Finally, she claimed that "[b]ecause of the cumulative effect" of counsel's error she was entitled to relief.

In support of her PCR petition, defendant did not file her own certification. Instead, she filed a certification from Flores. In the certification, he described the events that led to defendant's arrest, and stated that defendant grabbed a knife to use to remove a battery from her cell phone that Flores broke that night while they argued. According to Flores, defendant "got frustrated with the phone and [their] argument and stabbed the table with [the] knife." At no time did defendant direct the knife toward Flores or threaten him with any harm. When their argument escalated, defendant demanded that he leave the home and, out of concern for his own well-being, Flores contacted the police and claimed that defendant threatened him with the knife. As a result of that statement, the police arrested defendant. Flores claimed that he later told prosecutors that he had lied and "wanted to withdraw the charges." The prosecutor would not comply, and thereafter Flores attended each of defendant's court appearances. According to Flores, defendant's trial counsel never spoke to him.

Moreover, Flores confirmed that had he been asked to testify, he would have stated that what he told the police was a lie.

Judge Richard F. Wells denied defendant's petition by order dated March 20, 2017, after considering oral argument on March 17, 2017 and placing his reasons on the record that day. The judge initially reviewed the applicable law, and in so doing, cited to State v. O'Donnell, 435 N.J. Super. 351, 371 (App. Div. 2014), stating that even if trial counsel erred, a defendant whose petition challenges a conviction after a guilty plea must establish that counsel erred, and that "but for counsel's errors, [defendant] would not have pleaded guilty and would have insisted on going to trial." In addition, any allegation that counsel failed to investigate must be supported with "the facts that an investigation would have revealed, supported by affidavits or certifications. . . ."

Judge Wells turned his attention to defendant's plea and citing to State v. Lee, 96 N.J. 156, 163 (1984) and State v. Wright, 96 N.J. 170, 172-73 (1984), he rejected her argument that relief was warranted because her factual basis did not include an expression of any intent or threat to cause harm. According to Judge Wells, "intent is irrelevant" and he found no issue with the contents of defendant's factual basis after analyzing it in light of N.J.S.A. 2C:39-5(d). He concluded defendant's plea colloquy

met the elements of the offense, and that there was no indication that defendant did not understand the charge to which she was voluntarily pleading guilty.

The judge next addressed defendant's claim that trial counsel failed to investigate, specifically not speaking with Flores and having him testify at a trial. After considering Flores' certification, the judge was satisfied that defendant did not establish that counsel erred and, even if she did, that defendant would have rejected the plea offer of non-custodial probation and would have exposed herself to eighteen months in prison by going to trial and relying solely upon Flores' recantation of his original statement. Judge Wells also noted Flores maintained that defendant possessed the knife and stabbed the table several times while in an argument with Flores, and observed that at her plea hearing, defendant confirmed she was in fact guilty of the crime charged. This appeal followed.

Defendant presents the following issues for our consideration in her appeal.

POINT I

DEFENDANT WAS ENTITLED TO AN EVIDENTIARY HEARING WHERE SHE PRESENTED A PRIMA FACIE CASE OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED UPON TRIAL COUNSEL'S FAILURE TO INTERVIEW THE ALLEGED VICTIM.

POINT II

IN LIGHT OF THE RECENT UNITED STATES SUPREME COURT DECISION IN LEE V. UNITED STATES, THE PCR COURT ERRED IN HOLDING THAT RELIEF SHOULD BE DENIED BECAUSE OF THE LIKELIHOOD OF CONVICTION.

We are not persuaded by these arguments and affirm.

The standard for determining whether counsel's performance was ineffective for purposes of the Sixth Amendment was formulated in Strickland v. Washington, 466 U.S. 668, 687 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 49 (1987). In order to prevail on a claim of ineffective assistance of counsel, defendant must meet the two-prong test of establishing both 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, 466 U.S. at 687, 694.

This two-prong analysis applies equally to convictions after a trial or after a defendant pleads guilty. In the context of a PCR petition challenging a guilty plea, the first Strickland prong

is satisfied when a defendant establishes a reasonable probability he or she would not have pled guilty but for counsel's errors. State v. Gaitan, 209 N.J. 339, 351 (2012). The second prong is met when a defendant establishes a reasonable probability he or she would have insisted on going to trial. Ibid. "When a defendant has entered into a plea agreement, a deficiency is prejudicial if there is a reasonable probability that, but for counsel's errors, the defendant would not have decided to forego the plea agreement and would have gone to trial." State v. McDonald, 211 N.J. 4, 30 (2012) (citing Hill v. Lockhart, 474 U.S. 52, 59 (1985); State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009)).

We conclude that defendant failed to make a prima facie showing of ineffectiveness of counsel within the Strickland-Fritz test. We find her arguments to the contrary to be without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(2). Suffice it to say, there is nothing in the record to indicate that defendant was not aware of Flores' recantation<sup>2</sup> before she pled guilty, which is established by the fact that he supported defendant and attended each of her court

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<sup>2</sup> As we have previously observed, even if newly discovered, recantations are perceived as an inherently suspect and unreliable form of evidence. State v. Hogan, 144 N.J. 216, 239 (1996). See also State v. Carter, 85 N.J. 300, 314 (1981) (addressing test for determining when the discovery of such evidence warrants a new trial).

appearances. Even if she was not aware of the recantation, the record does not contain any assertion by defendant that she would not have pled guilty if she had known about it. We therefore affirm substantially for the reason expressed by Judge Wells' cogent decision and agree that an evidentiary hearing was not warranted. See State v. Preciose, 129 N.J. 451, 462-63 (1992).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION