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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-3106-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KRZYSZTOF A. JASTRZEBSKI,

Defendant-Appellant.

Submitted March 13, 2018 — Decided April 20, 2018

Before Judges Reisner and Hoffman.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Indictment No.
10-09-1523.

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

Dennis Calo, Acting Bergen County Prosecutor,
attorney for respondent (Justin M. Blasi,
Special Deputy Attorney General/Acting
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant Krzysztof A. Jastrzebski appeals from the November 29, 2016 Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

I

On September 2, 2010, a grand jury returned an eight-count indictment against defendant, charging him with second-degree burglary, N.J.S.A. 2C:18-2; third-degree theft, N.J.S.A. 2C:20-3; fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(4); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b); first-degree murder, N.J.S.A. 2C:11-3; first-degree felony murder, N.J.S.A. 2C:11-3(a)(3); first-degree robbery, N.J.S.A. 2C:15-1; and second-degree possession of a firearm for unlawful purposes, N.J.S.A. 2C:39-4(a).

On January 14, 2009, defendant broke into a home and stole a .380 Browning pistol. Ten days later, on January 24, 2009, defendant entered a delicatessen armed with the stolen gun and became involved in a confrontation with a deli employee. Defendant shot and killed the employee during the confrontation. Defendant admitted he fired the gun at the employee, but claims he intended only to frighten him. Defendant further admitted he knew firing the gun at someone was a reckless act.

In accordance with a plea agreement, on June 14, 2012, defendant pled guilty to second-degree burglary, N.J.S.A. 2C:18-

2, and first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1). In exchange, the State agreed to recommend a sentence not to exceed ten years for burglary, and thirty years for aggravated manslaughter with eighty-five percent parole ineligibility, to run concurrently. On September 6, 2012, the trial court sentenced defendant pursuant to the plea agreement. Specifically, the court sentenced defendant to thirty years in prison, subject to the No Early Release Act (NERA), for first-degree aggravated manslaughter, and a concurrent seven-year prison term for second-degree burglary.

On February 5, 2013, we heard oral argument on defendant's excessive sentencing claim. On February 6, 2013, we entered an order affirming the trial court's judgment. State v. Jastrzebski, No. A-0846-12 (App. Div. Feb. 6, 2013). On October 25, 2013, the Supreme Court denied defendant's petition for certification. State v. Jastrzebski, 216 N.J. 14 (2013).

On November 15, 2015, defendant filed the petition for PCR under review, arguing he received ineffective assistance from both trial counsel and appellate counsel. On November 28, 2016, the PCR court heard oral argument and denied defendant's petition without an evidentiary hearing. This appeal followed, with defendant presenting the following arguments for our consideration:

POINT I

AS PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, HE IS ENTITLED TO POST-CONVICTION RELIEF[.]

- (1) Plea counsel misled [d]efendant as to the penal consequences of entering a guilty plea.
- (2) Plea counsel failed to sufficiently review discovery with [d]efendant.
- (3) As [d]efendant was under the influence of anti-psychotic drugs when he entered a guilty plea, the plea was not voluntarily, knowingly and intelligently made.
- (4) The cumulative errors committed by plea counsel require post-conviction relief.

POINT II

APPELLATE COUNSEL FAILED TO CONSULT WITH DEFENDANT.

POINT III

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

Following our review of the record and the applicable law, we conclude defendant's appeal lacks merit. We therefore affirm.

II

Because the PCR court did not hold an evidentiary hearing on the claims defendant now raises on appeal, we "conduct a de novo review." State v. Harris, 181 N.J. 391, 421 (2004). To establish

a prima facie case of ineffective assistance of counsel, defendant must satisfy the two-prong test articulated in Strickland v. Washington, 466 U.S. 668, 687 (1984), which our Supreme Court adopted in State v. Fritz, 105 N.J. 42, 58 (1987). "First, the defendant must show . . . counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Fritz, 105 N.J. at 52 (quoting Strickland, 466 U.S. at 687). Defendant must then show counsel's deficient performance prejudiced the defense. Ibid. In that regard, a defendant seeking to set aside a guilty plea must demonstrate that counsel's assistance was not "within the range of competence demanded of attorneys in criminal cases," and "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. DiFrisco, 137 N.J. 434, 457, (1994) (alteration in original) (quoting Tollett v. Henderson, 411 U.S. 258, 266 (1973), and Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

"An attorney is entitled to 'a strong presumption' that he or she provided reasonably effective assistance, and a 'defendant must overcome the presumption that' the attorney's decisions followed a sound strategic approach to the case." State v. Pierre, 223 N.J. 560, 578-79 (2015) (quoting Strickland, 466 U.S. at 689). "[A] petitioner must do more than make bald assertions that he [or

she] was denied the effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). "[H]e [or she] 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." Ibid.

III

Defendant first argues trial counsel mislead him into believing the court would sentence him to significantly less than the thirty-year maximum imprisonment from the plea agreement. However, during the plea hearing, defendant acknowledged NERA required he complete eight-five percent of the thirty-year sentence. When the judge asked defendant how many years he expected the State to request, he replied, "Thirty years."

Defendant further contends he speaks limited English and used an interpreter during discovery review, but not during a review of the plea agreement. However, a review of the plea hearing indicates the judge specifically asked defendant if he used an interpreter to go through the plea agreement and he answered affirmatively. Defendant further confirmed he went through "each and every" question on the plea form and initialed the bottom of each page.

The record contains ample evidence defendant knew and understood he was subject to a thirty-year term in prison. Therefore, defendant failed to show trial counsel was deficient under the first prong of the Strickland test.

IV

Defendant next argues his trial counsel failed to review discovery with him sufficiently, causing him to enter an uninformed guilty plea. Defendant contends trial counsel reviewed "voluminous discovery" with him "in the county jail with a Polish-speaking interpreter for less than one hour." Defendant argues trial counsel did not adequately review the discovery nor did he "fully explain his legal options." However, the record does not support defendant's contention. During the plea hearing, the judge asked defendant, "[You are] pleading guilty because in fact you've reviewed the discovery and you've made the decision of your own free will to plead guilty. Is that correct?" Defendant replied, "Yes." Defendant also confirmed that some of the discovery documents were provided in Polish. Therefore, again, defendant failed to show trial counsel was deficient under the first prong of the Strickland test.

V

Next, defendant contends his guilty plea was not voluntary, knowing, and intelligent because he was under the influence of

anti-psychotic drugs. In the presentence report (PSR), the probation officer indicated "defendant displayed signs of someone who might be heavily medicated but he denied being on any medications." The State does not dispute defendant was prescribed medication at the time of the plea hearing. However, defendant failed to provide any legally competent evidence as to the effect his medications had on him at the time of the plea hearing. Furthermore, defendant testified during the plea hearing he was not "on any medication, prescription or otherwise, that would affect [his] ability to understand what's going [on] here today." Therefore, again, defendant failed to show trial counsel was deficient under the first prong of the Strickland test. Even assuming defendant lied under oath about not taking medications, defendant failed to establish the second prong of Strickland; by receiving a favorable plea agreement relative to his overall exposure, defendant failed to establish he suffered any prejudice.

VI

Next, defendant contends the cumulative effect of trial counsel's errors require PCR. Defendant cites State v. Jenewicz, 193 N.J. 440, 473 (2008), for the premise "that even when an individual error or series of errors does not rise to reversible error, when considered in combination, their cumulative effect can cast sufficient doubt on a verdict to require reversal." However,

when asserting an ineffective assistance of counsel claim, defendant must still establish both prongs of the Strickland test. Again, even assuming defendant could establish the first prong due to cumulative errors, defendant failed to establish the second prong of Strickland because he received a favorable plea agreement relative to his overall exposure, and therefore failed to establish he suffered any prejudice. Nor did defendant establish that it would have been rational to reject the plea agreement and go to trial. See State v. O'Donnell, 435 N.J. Super. 351, 371 (App. Div. 2014) (quoting Padilla v. Kentucky, 559 U.S. 356, 372 (2010)).

VII

Defendant next argues appellate counsel was ineffective in failing to consult with him. Defendant argues appellate counsel could have raised on direct appeal all of the issues raised by PCR counsel. However, we found each of those arguments meritless, therefore they would have failed on direct appeal as well. Accordingly, defendant failed to establish he suffered any prejudice.

Defendant also argues appellate counsel could have raised the issue of whether he was denied the right to counsel. However, defendant waived any right to a constitutional claim when he pled guilty. See State v. Crawley, 149 N.J. 310, 316 (1997) ("Generally, a defendant who pleads guilty is prohibited from


raising, on appeal, the contention that the State violated his constitutional rights prior to the plea."). Therefore, once again, defendant failed to establish he suffered any prejudice under the Strickland test.

VIII

Last, defendant contends the PCR court erred by ruling on his petition without an evidentiary hearing. However, this matter did not require a hearing because defendant failed to present a prima facie case of ineffective assistance of counsel. See R. 3:22-10(b); See also State v. Porter, 216 N.J. 343, 354 (2013) (citing 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