

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

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-3973-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANTONIO J. PRATTS, a/k/a VINCENT A.
KINCY, RENEN ORTIZ, TONY PINGALO,
TONY PINGNALO, ANTONIO PRATT,
TONY PRATTS, ANTONION J. PINGOLO,
and ANTHONY PRATTS,

Defendant-Appellant.

Submitted May 1, 2018 - Decided May 25, 2018

Before Judges Gilson and Mitterhoff.

On Appeal from Superior Court of New Jersey,
Law Division, Atlantic County, Indictment No.
15-07-1732.

Joseph E. Krakora, Public Defender, attorney
for appellant (David J. Reich, Designated
Counsel, on the brief).

Damon G. Tyner, Atlantic County Prosecutor,
attorney for respondent (John J. Santoliquido,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant Antonio Pratts appeals the trial court's May 3, 2017 order denying his petition for post-conviction relief (PCR). We affirm.

On July 7, 2015, defendant was indicted of two counts of failing to register as a sex offender. The first count alleged that defendant provided false information or failed to verify his address as required annually in contravention of N.J.S.A. 2C:7-2e. The second count alleged that defendant failed to register a change of address with local law enforcement contrary to the provisions of N.J.S.A. 2C:7-2(a) and N.J.S.A. 2C:7-2(d)(1). Both counts involved crimes of the third degree.

As part of a negotiated plea agreement, defendant pled guilty to the first count of the indictment, failing to register a change of address. The plea agreement provided that the prosecution would recommend four years in prison without prejudice to the defense's right to argue at sentencing that imprisonment would not be in the interests of justice. In addition, the plea agreement specified that defendant would be subject to parole supervision for life.¹ In exchange, the State agreed to dismiss the second count of the indictment.

¹ On July 7, 2016, the Judgment of Conviction was amended to remove the provision placing defendant on parole supervision for life.

At defendant's May 2, 2016 plea hearing, the judge questioned defendant about his understanding of the terms of the plea agreement and whether his guilty plea was knowing and voluntary.

Court: As you stand before the Court, Mr. Pratts, are you under the influence of any type of drug, alcohol or medication that would impair your ability to make an intelligent decision?

Pratts: No.

Court: And before you is a plea form, did you go over that with your lawyer?

Pratts: Yes.

Court: Do you understand that form?

Pratts: Yes.

Court: Did you initial each page?

Pratts: (No audible response).

Court: Yes?

Pratts: Yes I did.

Court: And did you sign the last page?

Pratts: Yes, I did.

The plea form in question established that defendant was aware that the prosecutor's recommended sentence was four years in New Jersey State Prison. The plea form also established that defense counsel would be permitted to argue at sentencing that imprisonment was not in the interest of justice. The foregoing terms of the plea agreement were placed on the record at defendant's plea hearing.

At the conclusion of the hearing, the court accepted the plea, finding that defendant's plea was knowing and voluntary, that defendant was not under any infirmity or intoxication, and that the agreement was not the product of any threats, promises

or coercion. The matter was set for sentencing on a later date. The court closed by requesting defense counsel to provide a letter brief addressing sentencing factors; however, defense counsel failed to supply the requested brief.

At sentencing, another attorney from the Public Defender's office substituted as defense counsel. Sentencing counsel argued for the imposition of a suspended sentence, urging the court to find mitigating factor eleven (imprisonment would cause excessive hardship) due to defendant's age of sixty-seven years and his ill health. Defendant was allowed to testify about his medical problems.

Pratts: Your Honor, my medical problems are --- consists of I have an artificial joint replacement in my right shoulder, I have an artificial joint replacement on my right knee. I am diabetic, Type 2. I have asthma, I have degenerative joint disease. Right now I'm waiting for --- I have postponed these medical procedures because of the bracelet. I wanted to at least keep some of my dignity when I go to get a colonoscopy, I have to get surgery on my --- on my left knee and my left shoulder.

The sentencing judge held that defendant failed to establish mitigating factor eleven (excessive hardship because of a medical condition), N.J.S.A. 2C:44-1. The judge noted that:

The hardships asserted by defendant are not supported by the record and, even if they were, they do not amount to a 'serious injustice that overrides the need to deter others.' See State v. Jabbour, 118 N.J. 1, 7

(1990). Moreover, the defendant failed to establish that any of his medical needs could not be addressed in a prison setting. See, e.g., State v. Kelly, 97 N.J. 178, 220 (1984).

The court further observed that, over the State's objection, it had allowed defendant to go on the HEDS bracelet program in order to deal with his alleged medical problems; yet throughout the pretrial process defendant did not pursue any medical treatment.

The court found aggravating factor three (risk of reoffending), N.J.S.A. 2C:44-1(a)(3), aggravating factor six (prior criminal record), N.J.S.A. 2C:44-1(a)(6), and aggravating factor nine (need for deterrence), N.J.S.A. 2C:44-1(a)9. The court's findings as to the aggravating factors were based on defendant's extensive criminal history, which included thirteen prior indictable convictions and nine prior disorderly persons offenses. Defendant's prior record included convictions for contributing to the delinquency of a minor, theft, burglary, robbery, armed robbery, weapons offenses, receiving stolen property, forgery, aggravated sexual assault, sexual assault, criminal sexual contact, kidnapping, failure to register and criminal restraint. The court concluded that the aggravating factors substantially outweighed the lack of mitigating factors, and sentenced defendant in accordance with the plea agreement to four years in prison.

On August 26, 2016, defendant filed a petition for post-conviction relief, claiming he had received inadequate assistance of counsel in connection with the plea hearing. At the PCR hearing, defendant argued that his trial counsel failed to make a motion to dismiss the indictment. In that regard, defendant argued that there was some evidence that he resided at the registered address, including the fact that his driver's license and prescription ledger reflected the registered address. In addition, defendant argued that his counsel failed to submit a written sentencing memorandum concerning defendant's medical conditions. Finally, defendant claimed that defense counsel allegedly assured him that he would receive time served as a sentence.

On March 3, 2017, the PCR judge issued an order and a written opinion denying defendant's petition. This appeal ensued.

On appeal, defendant asserts the following issues.

POINT I

THE TRIAL COURT ERRED IN DENYING PRATTS AN EVIDENTIARY HEARING CONCERNING HIS CLAIM HIS COUNSEL INADEQUATELY PREPARED FOR THE SENTENCING HEARING

POINT II

THE TRIAL COURT ERRED IN DENYING PRATTS AN EVIDENTIARY HEARING CONCERNING HIS CLAIM THAT HE RECEIVED INADEQUATE ADVICE CONCERNING HIS GUILTY PLEA

POINT III

PRATTS IS ENTITLED TO RELIEF CONCERNING HIS
PLEA BECAUSE IT WAS NOT GIVEN WITH AN
UNDERSTANDING OF ITS CONSEQUENCES

We are constrained to uphold a trial court's findings on a PCR application "if they could reasonably have been reached on sufficient credible evidence in the record." State v. Nunez-Valdez, 200 N.J. 129, 141 (2008).

To establish a prima facie case of ineffective assistance of counsel, a petitioner must show: (1) counsel's performance was objectively deficient; and (2) counsel's deficient performance prejudiced the defendant to the extent that he was deprived of his right to a fair trial. State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the United States Supreme Court's two-prong test from Strickland v. Washington, 466 U.S. 668, 687 (1984)). Prejudice means "a reasonable probability" the deficient performance "materially contributed to defendant's conviction." Ibid.

In this case, the trial court's conclusion that defendant failed to establish a prima facie case of ineffective assistance of counsel is amply supported by the credible evidence in the record. Regarding the first element of the prima facie test, the PCR judge rejected defendant's claim that his trial counsel was ineffective because he failed to submit a presentencing memorandum. The court found that although a sentencing memorandum to substantiate defendant's health issues would have been helpful

to the sentencing judge, a careful review of the sentencing transcript showed that the court was well aware of the defendant's claimed health ailments. The PCR judge noted that the sentencing judge's finding that defendant never sought medical treatment throughout the pretrial process despite being released on the HEDS bracelet program in order to deal with some of his claimed medical issues severely undercut the credibility of his alleged medical condition. The PCR judge also noted that defendant testified at sentencing that he "postponed these procedures because of the bracelet" and that he "wanted to at least keep some dignity when [he went to] get a colonoscopy." This, the PCR judge found, showed that defendant's health issues were not as urgent as he claimed.

Defendant's contention that he was advised by trial counsel that he would be sentenced to time served is not supported by the record and belied by his signed plea agreement and the transcript of the plea hearing.

Defendant cannot argue that his trial counsel was ineffective for failing to file a motion to dismiss the indictment as he expressly waived that argument by virtue of his plea agreement.

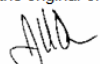
Finally, having failed to file a motion to withdraw his plea before sentencing, defendant cannot seek to void his plea in a PCR proceeding. A motion to withdraw a plea, R. 3:21-1, is separate and distinct from post-conviction relief, R. 3:22. Thus, a

withdrawal of plea requires a separate and distinct motion made before sentencing, unless the court determines that the movant has demonstrated a "manifest injustice." R. 3:21-1. See also, State v. O'Donnell, 435 N.J. Super. 351 (App. Div. 2014). There is no manifest injustice demonstrated in this case. The trial court's finding that defendant's plea was knowing and voluntary is supported by both the signed plea agreement and defendant's testimony at the plea hearing.

Even if we were to consider defendant's arguments concerning the withdrawal of his guilty plea, they have no merit. In assessing whether a guilty plea can be withdrawn, courts consider four factors: "(1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant's reasons for withdrawal; (3) the existence of a plea bargain; and (4) whether withdrawal would result in unfair prejudice to the State or unfair advantage to the accused." State v. Slater, 198 N.J. 145, 150 (2009). See also R. 3:9-3. Here, defendant has not satisfied the factors for withdrawal of a guilty plea because he has not presented any colorable claim of innocence, has not presented a strong reason for withdrawal, there was a plea bargain, and it would unfairly prejudice the State to allow defendant to withdraw his guilty plea at this time.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION