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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-3974-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CECILIO DAVILA,

Defendant-Appellant.

Submitted May 16, 2018 — Decided June 1, 2018

Before Judges Koblitiz and Manahan.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Indictment
Nos. 11-03-0394 and 11-03-0398.

Joseph E. Krakora, Public Defender, attorney
for appellant (Mark Zavotsky, Designated
Counsel and on the brief).

Andrew C. Carey, Middlesex County Prosecutor,
attorney for respondent (David M. Liston,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant appeals from the April 3, 2017 order denying his
petition for post-conviction relief (PCR) without an evidentiary

hearing, arguing that his lawyer was ineffective because he did not file a motion on behalf of defendant to withdraw his guilty plea to counts in two indictments. Defendant himself filed such a motion, which was denied by the court prior to sentencing. Pursuant to the plea agreement, defendant was sentenced to fifteen years in prison with a seven and one-half year period of parole ineligibility. We affirmed on direct appeal, State v. Davila, 443 N.J. Super. 577 (App. Div. 2016), and now affirm the denial of defendant's PCR application.

In our opinion on direct appeal, we summed up the evidence presented to the grand jury as follows:

The grand jury heard testimony from a New Brunswick police sergeant, who testified that he was involved in an investigation prompted by reports that defendant sold heroin and cocaine. The investigation involved three separate locations and six "controlled buys." The sergeant explained that a "controlled buy" occurs when an informant is searched and given funds to purchase drugs. The police then observe the informant interacting with the suspect, after which the informant returns to the officers where the drugs are relinquished and tested. During the controlled buys, defendant involved two men in the delivery of the drugs. Through wiretapped conversations, the police discovered that drug purchasers contacted defendant and defendant directed the purchasers to one of the two men to obtain drugs. On other occasions, defendant's girlfriend drove him in her car to make drug deliveries. Pursuant to search warrants, one of which involved the search of the home of defendant's sister, the police found illicit

drugs, a .177 pellet pistol, drug distribution paraphernalia, and cash. Subsequently, in a taped interview, defendant gave an incriminating statement to the police admitting that he sells approximately 1000 to 2000 bags of heroin per week.

[Davila, 443 N.J. Super. at 582-83.]

During jury selection, defendant pled guilty to third-degree possession of heroin with intent to distribute, N.J.S.A. 2C:35-5(a)(1), N.J.S.A. 2C:35-5(b)(3), third-degree maintaining a fortified structure for drug distribution activity, N.J.S.A. 2C:35-4.1(c), and second-degree possession of a BB gun for an unlawful purpose, N.J.S.A. 2C:39-4.1. He also pled guilty to the second-degree crime of certain persons not to possess weapons, N.J.S.A. 2C:39-7(a), from a second indictment. The first-degree crime of being a leader of a narcotics trafficking network, N.J.S.A. 2C:35-3 (the Leader count), was dismissed, as were other drug-related crimes. Related charges against his sister and girlfriend were also dismissed. On direct appeal defendant argued only that his motion to dismiss the Leader count should have been granted. He did not argue that his motion to withdraw his appeal should have been granted. Davila, 443 N.J. Super. at 583.

For the first time in his PCR petition, defendant argues that his lawyer should have filed a motion to withdraw his plea for him and should not have informed the court that in his pro se filing

defendant did not deny his guilt of any of the counts to which he had pled guilty. Prior to this representation, defendant had filed a complaint against his defense counsel with the District VIII Ethics Committee, and counsel had unsuccessfully sought to be relieved.

On this appeal, defendant argues:

POINT I: DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL FOR COUNSEL'S REFUSAL TO FILE A MOTION TO WITHDRAW HIS PLEA THEREBY ENTITLING HIM TO POST CONVICTION RELIEF AND AN EVIDENTIARY HEARING.

"Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." State v. Preciose, 129 N.J. 451, 459 (1992). Under Rule 3:22-2(a), a criminal defendant is entitled to post-conviction relief if there was a "[s]ubstantial denial in the conviction proceedings of defendant's rights under the Constitution of the United States or the Constitution or laws of the State of New Jersey" "A petitioner must establish the right to such relief by a preponderance of the credible evidence." Preciose, 129 N.J. at 459 (citations omitted). "To sustain that burden, specific facts" that "provide the court with an adequate basis on which to rest its decision" must be articulated. State v. Mitchell, 126 N.J. 565, 579 (1992).

Claims of constitutionally ineffective assistance of counsel are well suited for post-conviction review. See R. 3:22-4(a)(2);

Preciose, 129 N.J. at 460. In determining whether a defendant is entitled to relief on the basis of ineffective assistance of counsel, New Jersey courts apply the two-prong test articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687 (1984), and United States v. Cronic, 466 U.S. 648, 658-60 (1984). Preciose, 129 N.J. at 463; see State v. Fritz, 105 N.J. 42, 49-50 (1987).

Under the first prong of the Strickland test, a "defendant must show that [defense] counsel's performance was deficient." Strickland, 466 U.S. at 687. Under the second prong, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

An issue may not be raised in a PCR petition if it could have been raised on direct appeal but was not. R. 3:22-4(1); State v. McQuaid, 147 N.J. 464, 483 (1997). Here, defendant did not appeal the denial of his motion to withdraw his guilty plea, yet he now maintains that had his lawyer filed the motion and argued it vigorously, the motion would have been granted. He also argues he was entitled to an evidentiary hearing regarding whether he was coerced into pleading guilty to allow his codefendants' charges to be dismissed, because he was inaccurately told a conviction

would result in the deportation of his girlfriend and child. He presents no information disputing the likelihood of deportation.

He argues that because he filed an ethics complaint against his attorney and his attorney was not relieved, defendant was deprived of effective counsel. He does not allege that he was innocent of the charges for which he pled guilty. See State v. Slater, 198 N.J. 145, 158 (2009) (requiring a defendant to assert a "colorable claim of innocence" before being allowed to withdraw a guilty plea). A PCR evidentiary hearing was not necessary under these circumstances. See Preciose, 129 N.J. at 462 (holding evidentiary hearings are necessary only "if a defendant has presented a prima facie claim in support of post-conviction belief").

Defendant has not demonstrated the second prong of Strickland: a reasonable probability that a different result would have occurred had his counsel behaved differently.

Affirmed.

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


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