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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-5595-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KEVIN K. GEROW,

Defendant-Appellant.

Argued January 24, 2018 — Decided April 6, 2018

Before Judges Currier and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Monmouth County, Indictment No.
03-06-0093.

Robert Carter Pierce argued the cause for
appellant.

Sarah E. Elsasser, Deputy Attorney General,
argued the cause for respondent (Gurbir S.
Grewal, Attorney General, attorney; Sarah E.
Elsasser, of counsel and on the brief).

PER CURIAM

Defendant Kevin K. Gerow appeals from the June 24, 2016 denial
of his petition for post-conviction relief (PCR) after an

evidentiary hearing. After a review of the arguments in light of the record and applicable principles of law, we affirm.

The facts relating to the charges, trial, and post-conviction proceedings are derived from our opinion in State v. Gerow, No. A-2097-13 (App. Div. Apr. 14, 2015) (slip op. at 1-9).

In furtherance of an ongoing racketeering investigation, the State Police executed a search warrant on the home of co-defendant Donald Cicetti in October 2002, and recovered weapons and evidence of illegal gambling and violation of criminal usury laws. Cicetti agreed to cooperate with the State in its investigation of a group of individuals known to be associated with an organized crime family and provide testimony implicating defendant and other individuals in the racketeering scheme.

On May 22, 2003, Cicetti entered into a plea agreement in which he pled guilty to second-degree conspiracy to commit racketeering, N.J.S.A. 2C:41-2(d) and N.J.S.A. 2C:5-2. In exchange for his plea, the State agreed to recommend a sentence as a third-degree offender with a prison term not to exceed five years. The sentencing would proceed after the resolution of the charges against the other co-defendants.

At his plea hearing, Cicetti testified that he had been employed as a Newark firefighter until October 2002, but was

currently on disability. He did not elaborate on the nature of his disability or whether he was receiving pension benefits.

On that same day, the State requested that the trial court seal Cicetti's guilty plea for his protection and transfer the matter to Monmouth County for sentencing. The court granted the State's requests.

On May 30, 2003, Cicetti testified before a state grand jury implicating defendant and others in a statewide racketeering ring. Detective John Pizzuro testified that no agreements or promises were made to Cicetti with respect to his cooperation other than he would be sentenced as a third-degree offender to a prison term not to exceed five years.

On June 10, 2003, the state grand jury returned Indictment Number 03-06-0093, charging defendant with second-degree conspiracy to commit criminal usury, N.J.S.A. 2C:5-2 (count one), N.J.S.A. 2C:21-19(a); second-degree business of criminal usury, N.J.S.A. 2C:21-19(b) (count two); and second-degree criminal usury, N.J.S.A. 2C:21-19(a) (count three). On March 1, 2004, defendant pled guilty to an amended version of count three, third-degree criminal usury. Defendant was sentenced on May 7, 2004, to a five-year term of probation conditioned upon serving 364 days in county jail. Prior to entering his guilty plea, defendant was provided the grand jury transcripts, which included Cicetti's

testimony against him and indicated that the only promise made by the State was to sentence Cicetti as a third-degree offender.

Sometime in 2010, after defendant had completed his sentence, he learned that Cicetti had been collecting a disability pension from the State Police and Firefighters Pension System since March 2003, despite having pled guilty to conspiracy to commit racketeering. Defendant also learned that Cicetti had never been sentenced following his 2003 guilty plea. In May 2010, defendant's father, who was also a Newark firefighter, notified the Division of Pension and Benefits (the Division) that Cicetti might be "perpetrating [a] fraud" upon the system in receiving mental health disability benefits. In June 2010, the Division requested information from the Attorney General's Office but did not receive a response. The Division subsequently suspended Cicetti's pension payments.

In April 2012, defendant filed a PCR petition seeking to reverse his conviction and for a new trial based upon the State's failure to disclose all of the terms of the plea agreement with Cicetti in violation of Brady v. Maryland, 373 U.S. 83 (1963)¹ and State v. Carter, 69 N.J. 420, 432-33 (1976). Defendant

¹ Pursuant to Brady, the State has a "constitutional obligation to provide criminal defendants with exculpatory evidence in the State's possession." State v. Marshall, 148 N.J. 89, 154 (1997).

alleged the State entered into an undisclosed side deal with Cicetti that allowed him to avoid being sentenced and to collect a mental health disability pension. Defendant certified that had the State informed him of the undisclosed promises made to Cicetti, he would not have pled guilty.

In February 2012, defendant filed a motion to compel discovery of Cicetti's criminal history and plea agreement; however, the State was unable to locate its file or any information on Cicetti. In August 2012, defendant filed a motion to compel Cicetti's deposition. The court denied the motion but suggested it might grant an evidentiary hearing.

In the following months, the State unsealed Cicetti's guilty plea and the court sentenced him on September 25, 2013. During Cicetti's sentencing, the State acknowledged that defendant's PCR petition alerted them to unseal Cicetti's file, reconstruct the file, and sentence Cicetti. The State claimed the delay in sentencing was an oversight and offered reasons contributing to the delay, including (1) the retirement of the deputy attorneys general who coordinated the investigation and indictments; (2) the failure of Mercer County to forward Cicetti's file to Monmouth County as required by the venue transfer order; and (3) Monmouth County's lack of awareness of Cicetti or his plea because the file was sealed. The State argued that the earliest date Cicetti could

have been sentenced was in November 2006, following the resolution of the last co-defendant's case. Therefore, the delay in sentencing was not as long as argued by defendant.

At the sentencing hearing, the State changed its recommendation from a custodial term to one year of probation in consideration of the passage of ten years, during which Cicetti remained law-abiding, and his failing health. The court imposed the State's recommended probationary sentence.

On November 21, 2013, during oral argument on the PCR petition, defendant contended that an evidentiary hearing was necessary to explore what the State knew about the status of Cicetti's mental health and his then-pending disability pension application at the time of defendant's 2004 plea. Defendant maintained that Cicetti's mental health may have affected his ability to perceive, recall, or relate facts during the grand jury hearing.

Despite the PCR judge's determination that defendant's petition was time-barred pursuant to Rule 3:22-12, he addressed defendant's substantive arguments. The judge rejected defendant's claim that he would not have pled guilty if the State had informed him that the charges against Cicetti would be dismissed, Cicetti would not receive a custodial prison term, and that Cicetti would be permitted to receive a pension.

The PCR judge denied defendant's petition. On appeal, defendant argued that he was entitled to an evidentiary hearing. We agreed, and therefore, reversed and remanded, instructing the trial court to conduct an evidentiary hearing on defendant's PCR petition. We stated:

Under the unique circumstances of this case, an evidentiary hearing is required to resolve the factual dispute as to what the State knew at the time of defendant's plea and whether it had advised defendant of all the terms of Cicetti's plea agreement, and his mental health issues. The court must also determine whether defendant's knowledge of all the facts would have led to a different result.

[Gerow, (slip op, at 11-12.)]

On remand, the trial court held an evidentiary hearing in May 2016, and subsequently denied defendant's PCR petition. Defendant argued that the State failed to disclose aspects of Cicetti's plea agreement and information regarding his mental status and pension. Cicetti, former Deputy Attorney General Mark Eliades, Lieutenant John Pizzuro, and defendant all testified at the evidentiary hearing.

Cicetti testified that he never informed the State that he was receiving disability pension benefits or treatment for psychiatric illnesses. He stated that he submitted his disability application prior to pleading guilty and he never informed the Division about the pending criminal investigation or guilty plea.

Both Eliades and Pizzuro testified that they did not know Cicetti was being treated for psychiatric illnesses or that he was receiving disability benefits.

Eliades further testified that the State never promised Cicetti as part of the plea agreement that it would recommend to the pension board that Cicetti keep his pension. Eliades explained that the Attorney General's Office did not have the necessary authority to implement a deal of that sort. Pizzuro also testified that no representative of the State made any promises to Cicetti with regard to his pension.

Judge Anthony J. Mellaci, Jr. issued a comprehensive written decision denying defendant's petition. The judge explained that defendant failed to satisfy the "threshold determination of prosecutorial knowledge[,]" State v. Carter, 85 N.J. 300, 313 (1981), necessary to establish a Brady claim. He also found that "the State did not make an undisclosed side-deal with Cicetti." Lastly, the judge concluded that defendant's decision to plead guilty would not have changed if he had known that Cicetti was suffering from depression and that he was receiving mental health disability benefits.

In so finding, Judge Mellaci explained that the uncontradicted testimony of Cicetti, Eliades, and Pizzuro refuted defendant's assertions that the State committed a Brady violation.

The judge found Cicetti, Eliades, and Pizzuro to be credible witnesses, while defendant "was less than candid . . . and lacked credibility." Judge Mellaci also noted that defendant did not present "any testimony or documentation that contradicts" the testimony of the State's three witnesses.

As all of the State's witnesses remained consistent in their testimony that Cicetti was not offered a side deal pertaining to his pension and that the State was unaware of his mental health disability, the judge determined that the State did not commit a Brady violation prior to offering defendant a plea deal.

Judge Mellaci also addressed the second prong of the remand order. He concluded that "rejection of the plea bargain would not have been rational" even if "defendant had been informed [that] Cicetti was suffering from depression and receiving a mental health disability." This conclusion, the judge explained, was "bolstered by defendant's acknowledgement that had he been found guilty at trial, he would have faced five to ten years in prison as opposed to the five years of probation conditioned upon serving 364 days in county jail" that was offered to him by the State.

Defendant presents the following issue in this appeal:

POINT I: THE PCR COURT ERRED BY NOT GRANTING MR. GEROW'S PCR BECAUSE MR. GEROW PROVED THE STATE VIOLATED BRADY V. MARYLAND AND THERE WAS A REASONABLE PROBABILITY THAT, BUT FOR THE STATE'S FAILURE TO DISCLOSE THE PROMISES MADE

TO CICETTI, MR. GEROW WOULD NOT HAVE PLEADED
GUILTY.

Our review of a PCR claim after a court has held an evidentiary hearing "is necessarily deferential to [the] PCR court's factual findings based on its review of live witness testimony." State v. Nash, 212 N.J. 518, 540 (2013); see also State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014) ("If a court has conducted an evidentiary hearing on a petition for PCR, we necessarily defer to the trial court's factual findings."). Where an evidentiary hearing has been held, we should not disturb "the PCR court's findings that are supported by sufficient credible evidence in the record." State v. Pierre, 223 N.J. 560, 576 (2015) (quoting Nash, 212 N.J. at 540). We review any legal conclusions of the trial court de novo. Nash, 212 N.J. at 540-41.

Applying this standard of review, we are not persuaded by defendant's arguments. We are satisfied that Judge Mellaci complied with the remand order and made appropriate findings of fact and credibility determinations. His conclusions are well supported by the credible evidence in the record. We, therefore, affirm the denial of the PCR petition substantially for the reasons expressed in Judge Mellaci's well-reasoned written opinion.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION