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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-0398-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL K. DUBERSON,

Defendant-Appellant.

Submitted November 16, 2022 – Decided November 28, 2022

Before Judges Haas and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 14-11-0864.

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

Jennifer Webb-McRae, Cumberland County Prosecutor, attorney for respondent (Kaila L. Diodati, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Michael K. Duberson appeals from the Law Division's August 23, 2021 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

Defendant pled guilty to an amended charge of first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a), in return for the State's agreement to dismiss seven other charges pending against him and to recommend a sentence of thirty years in prison, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. At sentencing, defendant's attorney asked the trial judge to sentence defendant in accordance with the terms of his negotiated plea. After reviewing defendant's presentence report, the judge found several aggravating factors and no mitigating factors, and sentenced defendant to a thirty-year term, subject to NERA.

Defendant appealed his sentence. We heard the appeal on our Excessive Sentence Oral Argument schedule pursuant to Rule 2:9-11, and affirmed defendant's sentence. State v. Duberson, No. A-5575-18 (App. Div. Oct. 28, 2020). In so ruling, we found that the trial court's "findings of fact regarding aggravating and mitigating factors were based on competent and credible evidence in the record, that the court correctly applied the sentencing guidelines

enunciated in the Code, and that the court did not abuse its discretion in imposing the sentence."

Defendant then filed a timely petition for PCR. Among other things, defendant asserted his trial attorney provided him with ineffective assistance because he did not argue for the imposition of "a lower sentence" for defendant at the time of sentencing.

Following oral argument, the PCR judge rendered a thorough oral decision concluding that defendant did not satisfy the two-prong test of Strickland v. Washington, 466 U.S. 668, 687 (1984), which requires a showing that trial counsel's performance was deficient and that, but for the deficient performance, the result would have been different. The judge stated:

[A]fter a careful review of the record and all the documentation provided by both parties, the [c]ourt agrees with the State that there was no error on the part of previous trial counsel that would rise to the level so serious that counsel was no longer functioning as effective counsel. [Defendant] in this matter was facing serious charges and negotiated a plea on behalf of [defendant] for him to plead guilty to an aggravated manslaughter instead of first[-]degree murder. There's nothing in the record that would support the assertion that a lesser negotiated sentence would have been accepted by the State given the nature of the charges [defendant] was facing, and what [defendant] ultimately pled to on the record, it supports the notion that previous trial counsel was effective in helping

[defendant] get the best possible deal given the facts and the situation.

On appeal, defendant raises the same arguments he unsuccessfully presented to the PCR judge. Defendant contends:

- I. DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT HIS SENTENCING HEARING.
- II. THE PCR COURT ERRED IN NOT GRANTING DEFENDANT AN EVIDENTIARY HEARING.

When petitioning for PCR, the defendant must establish, by a preponderance of the credible evidence, that he is entitled to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013); State v. Preciose, 129 N.J. 451, 459 (1992). To sustain that burden, the defendant must allege and articulate specific facts that "provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing and the defendant "must do more than make bald assertions that he was denied the effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). Rather, trial courts should grant evidentiary hearings and make a determination on the merits only if the defendant has presented a prima facie claim of ineffective assistance, material

issues of disputed facts lie outside the record, and resolution of the issues necessitates a hearing. R. 3:22-10(b); State v. Porter, 216 N.J. 343, 355 (2013). We review a judge's decision to deny a PCR petition without an evidentiary hearing for abuse of discretion. Preciose, 129 N.J. at 462.

To establish a prima facie claim of ineffective assistance of counsel, the defendant is obliged to show not only the particular manner in which counsel's performance was deficient, but also that the deficiency prejudiced his right to a fair trial. Strickland, 466 U.S. at 687; State v. Fritz, 105 N.J. 42, 58 (1987). There is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. Further, because prejudice is not presumed, Fritz, 105 N.J. at 52, the defendant must demonstrate "how specific errors of counsel undermined the reliability" of the proceeding. United States v. Cronin, 466 U.S. 648, 659 n.26 (1984).

Having considered defendant's contentions in light of the record and the applicable law, we affirm the denial of defendant's PCR petition substantially for the reasons detailed in the PCR judge's oral opinion. As we found in our decision on defendant's direct appeal, the trial judge properly considered all applicable aggravating and mitigating factors, correctly applied the sentencing

guidelines, and did not abuse its discretion in imposing the sentence. Therefore, defendant failed to demonstrate that the result of the sentencing proceeding would have been any different had his attorney argued the matter differently.

Under these circumstances, we discern no abuse of discretion in the judge's consideration of the issues, or in his decision to deny the petition without an evidentiary hearing. We are satisfied that the trial attorney's performance was not deficient, and defendant provided nothing more than bald assertions to the contrary.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION