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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0983-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

AMGAD A. HESSEIN,

Defendant-Appellant.

Argued February 9, 2022 – Decided April 26, 2022

Before Judges Sumners and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 11-08-0812.

Edward C. Bertuccio argued the cause for appellant (Kalavruzos, Mumola, Hartman, Lento & Duff, LLC, attorneys; Edward C. Bertuccio, of counsel and on the brief).

Meredith L. Balo, Assistant Prosecutor, argued the cause for respondent (William A. Daniel, Union County Prosecutor, attorney; Meredith L. Balo, of counsel and on the brief).

PER CURIAM

In September 2016, defendant Amgad A. Hessein, a physician facing a thirty-eight-count indictment alleging billing fraud related to his medical practice, was on the verge starting his trial after completion of jury selection when he pled guilty to second-degree theft by deception, N.J.S.A. 2C:20-4(a), and second-degree health care insurance claims fraud, N.J.S.A. 2C:21-4.3(a). As part of the plea agreement, the remaining thirty-six counts were dismissed, and defendant entered into a consent order requiring forfeiture of \$2,000,000 and directing that he pay restitution in the amount \$235,093.75. Prior to sentencing defendant to an aggregate eight-year prison term and ordering forfeiture of funds and restitution, Judge John M. Deitch denied defendant's motion to withdraw his guilty pleas.

We found no merit to defendant's direct appeal—among various contentions he claimed the judge erred in denying his motion to withdraw his guilty pleas—and affirmed his convictions and sentence. State v. Hessein, No. A-1693-16 (App. Div. Oct. 1, 2018). Our Supreme Court denied defendant's petition for certification. State v. Hessein, 237 N.J. 315 (2019).

In March 2020, defendant filed another motion to withdraw his guilty pleas and vacate his sentence. Before the motion was heard, defendant filed a verified petition for post-conviction relief (PCR) alleging trial counsel was

ineffective by permitting him to enter guilty pleas including "an illegal civil consent order . . . forfeit[ing] property and money without . . . a restitution hearing," and by allowing him to plead guilty "to second[-]degree health[]care insurance fraud instead of proceeding on a theory third[-]degree reckless health[]care insurance fraud." Defendant also made claims against appellate counsel, contending ineffective assistance of counsel by not challenging: the legality of the forfeiture consent order and the lack of a restitution hearing; and the factual basis of the guilty plea to second-degree health care insurance fraud. On November 12, Judge Deitch issued an order denying defendant's motion and his PCR petition without an evidentiary hearing. The judge's reasoning was set forth in a written decision.

On appeal, defendant argues

POINT I

THE MOTION TO WITHDRAW THE GUILTY PLEA
SHOULD HAVE BEEN GRANTED.

POINT II

A POST[-]CONVICTION EVIDENTIARY HEARING
SHOULD HAVE BEEN ORDERED BY THE TRIAL
COURT.

We are unpersuaded and affirm substantially for the reasons cogently expressed by Judge Deitch in his written decision.

I

To withdraw a guilty plea after sentencing, Rule 3:21-1 requires a defendant to establish vacation is necessary to correct a manifest injustice. In considering whether relief is appropriate, the motion judge must weigh the four factors identified in State v. Slater, 198 N.J. 145, 157-58 (2009): "(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." Applying Slater, Judge Deitch properly exercised his discretion in determining that these factors did not weigh in defendant's favor and thus denied defendant's motion because there was no showing of a manifest injustice. See State v. Lipa, 219 N.J. 323, 332 (2014) (holding an appellate court reviews a trial court's decision on a motion to withdraw a guilty plea on an abuse of discretion standard).

As for the first factor, the judge held that defendant—as the judge did in denying defendant's previous motion to withdraw guilty pleas affirmed by this court on direct appeal—failed to set forth any colorable claim of innocence. Accordingly, the factor weighed against defendant.

As for the second factor, the judge rejected defendant's argument that there was a strong reason for plea withdrawal under State v. Masce, 452 N.J. Super. 347 (App. Div. 2017), and that the court's forfeiture order was illegal because it was based on a "civil consent judgment" used by the State to gain an unfair upper hand in criminal plea negotiations. The judge held the order "was a criminal consent order of forfeiture and the money was seized properly under N.J.S.A. 2C:64-1(a)[(2)-(4)]."¹ Defendant's consent order addressed both

¹ N.J.S.A. 2C:64-1(a), in pertinent part, provides:

Any interest in the following shall be subject to forfeiture and no property right shall exist in them:

. . . .

(2) All property which has been, or is intended to be, utilized in furtherance of an unlawful activity, including, but not limited to, conveyances intended to facilitate the perpetration of illegal acts, or buildings or premises maintained for the purpose of committing offenses against the State.

(3) Property which has become or is intended to become an integral part of illegal activity, including, but not limited to, money which is earmarked for use as financing for an illegal gambling enterprise.

(4) Proceeds of illegal activities, including, but not limited to, property or money obtained as a result of the sale of prima facie contraband as defined by subsection

restitution and forfeiture of defendant's property in the context of criminal proceedings, and there was no reference in the order to a civil judgment "or any judgment being entered against . . . [d]efendant." Masce is distinguishable because there the State sought to enter a civil consent order for restitution, which we held the trial judge lacked the authority to enter. 452 N.J. Super. at 358. Thus, the factor weighed against defendant.

As for the third factor, the judge noted that defendant reached a plea agreement, which typically isn't "given great weight in the balancing process," and highlighted that defendant had the "heavier burden in seeking to withdraw pleas entered as a part of a plea bargain." Slater, 198 N.J. at 160-161. The factor therefore weighed against defendant.

As for the fourth factor, citing State v. Smullen, 118 N.J. 408, 417 (1990), the judge explained that "when there are colorable reasons for withdrawal, coupled with an appropriate assertion of innocence, 'arguments against permitting withdrawal of a plea prior to sentencing weaken considerably' absent unfair prejudice or advantage." The judge held that was the situation here, as defendant did not offer proof of the other three factors to support withdrawal of

a. (1), proceeds of illegal gambling, prostitution, bribery and extortion.

his plea, and the State showed it would be prejudiced if a withdrawal was granted because "many of [its] witnesses [were] elderly or infirm and could no longer be available at trial." Hence, the factor weighed against defendant.

Like our previous opinion affirming the denial of defendant's first motion to withdraw his guilty pleas, we conclude Judge Deitch did not abuse his discretion in denying defendant's second motion to withdraw his guilty plea. The latest motion was merely a repackaged attempt to withdraw his guilty plea lacking in factual and legal support.

II

In denying defendant's PCR petition, the judge held that the contentions regarding trial counsel's errors concerning the illegality of his plea and sentencing "due to the existence of a purported civil consent order could have been raised upon direct appeal and are therefore precluded by R[ule] 3:22-4(a) and precedent." The judge, however, addressed the merits of defendant's other contentions against appellate counsel because they could not be addressed on direct appeal, and found they were without merit.

We agree with the judge that claims against trial counsel were procedurally barred under Rule 3:22-4(a)² because they could have been raised

² Rule 3:22-4(a) provides:

First Petition for Post-Conviction Relief. Any ground for relief not raised in the proceedings resulting in the conviction, or in a post-conviction proceeding brought and decided prior to the adoption of this rule, or in any appeal taken in any such proceedings is barred from assertion in a proceeding under this rule unless the court on motion or at the hearing finds:

(1) that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; or

(2) that enforcement of the bar to preclude claims, including one for ineffective assistance of counsel, would result in fundamental injustice; or

(3) that denial of relief would be contrary to a new rule of constitutional law under either the Constitution of the United States or the State of New Jersey.

A ground could not reasonably have been raised in a prior proceeding only if defendant shows that the factual predicate for that ground could not have been discovered earlier through the exercise of reasonable diligence.

A denial of relief would be contrary to a new rule of constitutional law only if the defendant shows that the claim relies on a new rule of constitutional law, made retroactive to defendant's petition by the United States

on direct appeal. See State v. Szemple, 247 N.J. 82, 98 (2021) ("Rule 3:22-4(a) bars petitions that rely on grounds that could reasonably have been—but were not—raised during direct appeal, unless an exception applies."); State v. McQuaid, 147 N.J. 464, 483 (1997) (determining a defendant "may not use post-conviction relief to assert a new claim that could have been raised on direct appeal"). Conversely, the contentions that appellate counsel was ineffective because he should have argued the consent order was illegal and defendant should not have pled guilty are not procedurally deficient PCR claims. However, they were correctly rejected by Judge Deitch.

To succeed on a PCR claim, a defendant must demonstrate: (1) counsel's performance was deficient, and (2) the deficient performance actually prejudiced the accused's defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); see also State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the two-part Strickland test in New Jersey). A PCR judge should grant evidentiary hearings and decide claims on the merits only if the defendant has presented a prima facie claim of ineffective assistance, material issues of disputed facts lie outside the

Supreme Court or the Supreme Court of New Jersey,
that was unavailable during the pendency of any prior
proceedings.

record, and resolution of the issues necessitates a hearing. R. 3:22-10(b); State v. Porter, 216 N.J. 343, 354 (2013). These principles apply as well to a defendant's claim of ineffective assistance of appellate counsel. State v. Gaither, 396 N.J. Super. 508, 513 (App. Div. 2007).

There was no deficient performance by trial counsel which prejudiced defendant, therefore appellant counsel was not ineffective for failing to raise an issue that would not have constituted reversible error on direct appeal. See State v. Echols, 199 N.J. 344, 361 (2009). As noted, defendant's criminal consent order requiring the forfeiture of money was legal. The judge aptly reasoned that since "there was no illegal plea bargain to warn [d]efendant against accepting," trial counsel was not ineffective, and thus "there was no issue for appellate counsel to raise."

Regarding appellate counsel's alleged failure to argue that trial counsel erred in permitting defendant to plead guilty to second-degree health care insurance fraud rather than advancing a theory of third-degree reckless health care insurance fraud, the judge properly noted defendant "knowingly and intelligently pled guilty to second[-]degree health care [insurance] claims fraud," as evidenced in the trial record. The judge further commented that the factual sufficiency of defendant's plea was raised and rejected on direct appeal.

See Hessein, No. A-1693-16, slip op. at 10-11. We agree with the judge that defendant failed to demonstrate there was any evidence supporting a third-degree reckless health care insurance claim fraud instead of a second-degree offense.

Finally, Judge Deitch did not abuse his discretion in not conducting an evidentiary hearing. See State v. Preciose, 129 N.J. 451, 462 (1992). There were no disputed facts regarding entitlement to PCR that could not be resolved based on the existing record, see Porter, 216 N.J. at 354, and defendant failed to set forth a prima facie case of ineffective assistance of counsel, see Preciose, 129 N.J. at 462.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION