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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-1794-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSE TEPANECATLTEPALE,
a/k/a JOSE W. TEPALE,

Defendant-Appellant.

Submitted April 28, 2022 – Decided May 10, 2022

Before Judges Mawla and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 16-07-0592.

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

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Ali Y. Ozbek, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Jose Tepanecatltepale appeals from a May 19, 2020 order denying his post-conviction relief (PCR) petition without an evidentiary hearing. After careful review of the record and the governing legal principles, we affirm.

In the underlying offense, defendant was charged with stabbing his roommate. After a trial, a jury convicted defendant of first-degree attempted murder, N.J.S.A. 2C:5-1(a)(1) and N.J.S.A. 2C:11-3(a)(1) (count one); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (count two); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count three); and fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (count four). The factual record is detailed in our opinion affirming defendant's conviction and sentence. State v. Tepanecatltepale, No. A-4412-16 (App. Div. Feb. 19, 2019) (slip op. at 1-5).

On April 1, 2019, defendant filed a pro se petition for PCR, alleged ineffective assistance of counsel. On May 13, 2020, the parties appeared before the PCR judge on defendant's petition.¹ On May 19, 2020, the judge denied defendant's PCR in its entirety, without an evidentiary hearing, in an order and oral decision.

¹ At the PCR hearing, defendant was represented by private counsel.

On appeal, defendant presents the following arguments for our consideration:

POINT I

DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILING TO FILE A MOTION TO DISMISS THE INDICTMENT, AND FOR AFFIRMATIVE MISADVICE WHICH PREVENTED DEFENDANT FROM KNOWINGLY PARTICIPATING IN THE PLEA-BARGAINING PROCESS OF THE CRIMINAL PROCEEDINGS.²

A. [Applicable Law.]

B. [Counsel was Ineffective for not Filing a Motion to Dismiss the Indictment.]

C. [Defendant was Denied Effective Assistance of Counsel for Counsel's Misadvice to Reject a Plea Offer because the State would be Unable to Establish the Elements of the Crimes for which He was Charged.]

"[W]e review under the abuse of discretion standard the PCR court's determination to proceed without an evidentiary hearing." State v. Brewster,

² On appeal, defendant has abandoned his PCR arguments related to issues with the jury instructions and the prosecutor's opening statement as they were rejected on direct appeal and rejected by the PCR judge as being barred. See R. 3:22-5; see also Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) ("An issue not briefed on appeal is deemed waived.").

429 N.J. Super. 387, 401 (App. Div. 2013). "If the court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to post-conviction relief, . . . then an evidentiary hearing need not be granted." Ibid. (alteration in original) (quoting State v. Marshall, 148 N.J. 89, 158 (1997)). We review the denial of a PCR petition with "deference to the trial court's factual findings . . . 'when supported by adequate, substantial and credible evidence.'" State v. Harris, 181 N.J. 391, 415 (2004) (alteration in original) (quoting Toll Bros., v. Twp. of W. Windsor, 173 N.J. 502, 549 (2002)).

Where, as here, "no evidentiary hearing has been held, we 'may exercise de novo review over the factual inferences drawn from the documentary record by the [PCR judge].'" State v. Reevey, 417 N.J. Super. 134, 146-47 (App. Div. 2010) (alteration in original) (quoting Harris, 181 N.J. at 421). We also review de novo the legal conclusions of the PCR judge. Harris, 181 N.J. at 415-16 (citing Toll Bros., 173 N.J. at 549).

A defendant seeking PCR 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) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). 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).

Ineffective assistance of counsel claims must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984), which was also adopted by the New Jersey Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). Under the first prong, a "defendant must show that counsel's performance was deficient" and that counsel's errors were so egregious that he "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. The second prong requires a defendant to demonstrate that the alleged defects prejudiced his right to a fair trial to the extent "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694; Fritz, 105 N.J. at 60-61 (internal quotation marks omitted). 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).

Guided by these legal principles, we discern no abuse of discretion requiring reversal. As the judge set forth in his opinion, defendant's argument that trial counsel misadvised him about his plea is a bald assertion unsupported

by any competent evidence. See ibid. In fact, his claim is belied by the pre-trial transcripts. During the October 17, 2016 hearing defense counsel stated,

I visited [defendant] in the jail . . . in preparation for the status, giving him the time . . . for him to consider the five with [eighty-five]. And I told him the consequences of what he's facing if he rejects this offer and decides to go with trial.

. . . .

And I told him if . . . he rejects it and he decides to go to trial, it could be a lot worse and it could be better.

Defense counsel apparently recommended defendant accept the plea, as evidenced by his request that the plea stay open for five days for defendant to consider.

Further, during the October 21, 2016 hearing defendant made it abundantly clear that he thought he should get probation or a lesser sentence. He stated, "[s]omeone told me that because this is the first time that I have a felony that I could get time served or a program or probation, I don't know." Defendant's belief was confirmed by his attorney after a recess when defense counsel stated, "[m]y client believes that given that it's his first offense that he should be given something less than the five. And as such today . . . he has informed me, he's rejecting the plea offer[.]"

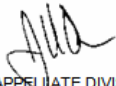
Based on the record, it is evident that defendant rejected the plea because he believed he was entitled to a lesser sentence. Although defendant alleges his counsel advised him, off record, that the State had a weak case, the record is devoid of such evidence. Defendant failed to provide a certification from his trial counsel or any other proof to support his argument. As the PCR judge found, defendant's argument has no merit and requires no further discussion.

Beyond this, defendant's claim with respect to the indictment is procedurally barred because it could have and should have been raised on his direct appeal. See R. 3:22-4. Defendant cannot now avoid the procedural bar by "attiring . . . the petition in ineffective assistance of counsel clothing." State v. Moore, 273 N.J. Super. 118, 125 (1994).

To the extent we have not addressed defendant's arguments, we find they lack sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(2).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION