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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1863-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ORDANNY GERMAN,

Defendant-Appellant.

Submitted February 3, 2022 – Decided May 17, 2022

Before Judges Haas and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 18-08-0867.

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

Mark Musella, Bergen County Prosecutor, attorney for respondent (William P. Miller, Assistant Prosecutor, of counsel; Catherine A. Foddai, Legal Assistant, on the brief).

PER CURIAM

Defendant Ordanny German appeals from an August 3, 2020 order denying his post-conviction relief (PCR) petition without an evidentiary hearing. After a careful review of the record and the governing legal principles, we affirm, substantially for the reasons set forth in Judge Gary N. Wilcox's thorough and thoughtful written opinion. We add the following remarks.

On March 1, 2018, defendant was pulled over for speeding. After defendant consented to a search of his vehicle, the police found more than one ounce of fentanyl in the spare tire, which defendant intended to distribute.

On August 30, 2018, a Bergen County grand jury returned Indictment No. 18-08-0867, charging defendant with second-degree possession of a controlled dangerous substance, fentanyl, with the intent to distribute it, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(4) (count one); and third-degree possession of fentanyl, N.J.S.A. 2C:35-10(a)(1) (count two).

On April 30, 2019, defendant pled guilty to second-degree possession of fentanyl with the intent to distribute it (count one). Pursuant to the plea agreement, the State agreed to a five-year drug court sentence under track 1. If defendant was unsuccessfully terminated from drug court, he would face an alternate sentence of three to five years in state prison for a third-degree offense.

In his sworn testimony at the plea hearing, defendant confirmed that after discussing the immigration consequences of his plea with two immigration attorneys, he was made aware his guilty plea would most likely result in his deportation. Defendant was advised that if he was not ready to proceed, he could postpone the plea hearing to have another opportunity to discuss the consequences of his plea with an immigration attorney. Defendant stated he did not want to postpone and wished to plead guilty, being fully aware of the immigration consequences. He understood that by virtue of his plea, he was waiving his right to trial. He twice stated he was satisfied with the advice he received from his trial attorney.

On May 14, 2019, the judge imposed the agreed upon sentence of five years in drug court under track 1. The judge also imposed mandatory fines, awarded jail credit, and required defendant to provide a DNA sample. As a result of his conviction, the U.S. Immigration and Customs Enforcement detained defendant and placed him in its facilities located within the Essex County Jail on February 2, 2020.

On March 5, 2020, defendant filed a pro se petition for PCR, arguing he was denied effective assistance of counsel during the plea stage because but for counsel's misadvice regarding drug court, he would not have pled guilty,

especially given the immigration consequences. On March 26, 2020, defendant's designated counsel filed a supplemental letter brief. On May 27, 2020, the parties appeared before Judge Wilcox. On August 3, 2020, the judge denied defendant's PCR in its entirety, without an evidentiary hearing, in an order and written decision.

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

POINT I

[DEFENDANT] IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT HIS ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO ADVISE HIM ADEQUATELY DURING PLEA NEGOTIATIONS ABOUT DRUG COURT, AND THEREFORE HIS PLEA WAS NOT KNOWING OR VOLUNTARY.

"[W]e review under the abuse of discretion standard the PCR court's determination to proceed without an evidentiary hearing." State v. Brewster, 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 Judge Wilcox explained, defendant "was not guaranteed to enter into drug court had he proceeded to trial and was convicted" because pursuant to the December 7, 2017 New Jersey Courts' memorandum "the Preliminary Screening Tool 'is not a final determination of Drug Court eligibility, which occurs at sentencing.'[]" In other words, the sentencing judge can disregard the findings of Screening Tool and find defendant ineligible for Drug Court." The judge further explained that going to trial might have uncovered unfavorable facts that could have affected defendant's eligibility for

drug court. Additionally, defendant's claims are contradicted by the transcripts of defendant's sworn testimony at the plea hearings, at which he acknowledged his understanding of the plea agreement and the immigration consequences, expressed satisfaction with counsel, and understood that in accepting the plea he was waiving his right to pursue trial. As such, the judge correctly found defendant failed to establish counsel's deficient performance and that the results of his proceedings would have been different on any of his claims. See Strickland, 466 U.S. at 687, 694; see also State v. Gaitan, 209 N.J. 339, 374 (2012) (finding that when counsel provides advice on immigration consequences pursuant to Padilla v. Kentucky, 559 U.S. 356 (2010), a petitioner must "present[] a claim showing that he was provided with false and affirmatively misleading advice when entering his plea[.]").

To the extent we have not addressed defendant's remaining 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.



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