SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2002-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NAJEE A. MARSHALL,
a/k/a KAWYN HILL,

Defendant-Appellant.

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Submitted March 16, 2022 – Decided April 20, 2022

Before Judges Rose and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment Nos. 12-12-2837 and 18-06-1005.

Edward Crisonino, attorney for appellant.

Cary Shill, Acting Atlantic County Prosecutor, attorney for respondent (Kristen Pulkstenis, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Najee A. Marshall appeals from the March 18, 2021 order denying his motion to withdraw his guilty plea. We affirm.

I.

In June 2018, defendant pled guilty to first-degree attempted murder, N.J.S.A. 2C:5-1, and first-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(j), pursuant to a negotiated plea bargain. In exchange for his guilty pleas, the State recommended concurrent twelve-year prison terms on both counts, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, and dismissal of the remaining counts. Relevant here, the plea agreement reflected defendant would "request all applicable jail credits" and had been "incarcerated since" September 29, 2014.

During the plea hearing, defense counsel presented the terms of the plea deal, stating, "[a]t the time of sentencing, the defense will request all applicable jail credits." The judge asked the assistant prosecutor if defense counsel's recitation of the plea offer was accurate. Significantly, the assistant prosecutor responded, "It is Judge. And just to clarify, there ha[ve] been no promises by the [S]tate as to jail credits." The following exchange occurred:

> THE COURT: Okay. Very good. . . . [Defense counsel], is your client back in State Prison on [a] parole hit?

> DEFENSE COUNSEL: Yes. He's currently in Southwood State Prison. He is aware of the parole considerations. And his parole date, I believe, is February 2019.
>
> [(Emphasis added).]

At the plea hearing, defendant testified he understood the terms of the plea agreement and "had plenty of time" to review same with counsel. Further, he acknowledged he had "asked for all applicable jail credits" and had "been incarcerated since September of 2014." The judge advised defendant she would consider "all applicable jail credits" and directly asked him if he was "incarcerated on . . . a parole hit." Defendant responded he was incarcerated "both . . . [on a] violation" as well as his pending charges. The judge reiterated she would "consider, to the extent that [she could] all of the applicable jail credits," and again asked defendant if he understood this. Defendant answered affirmatively. He also admitted he was not forced to accept a plea agreement and that, in fact, the State accepted his "own offer through [his] attorney."

After defendant provided a factual basis for his guilty pleas, he asked his attorney a question, prompting the following exchange:

> DEFENSE COUNSEL: Judge, his question is concerning the jail credits issue.
>
> THE COURT: Right.

> DEFENSE COUNSEL: I did advise [defendant] when we conferenced this matter that there'll be a pre-sentence report conducted –
>
> THE COURT: Yes.
>
> DEFENSE COUNSEL: And Your Honor doesn't have any idea of the jail credits until Your Honor sees the –
>
> THE COURT: Right.
>
> DEFENSE COUNSEL: – pre-sentence report.

The judge spoke directly to defendant at that point, stating:

> THE COURT: The Probation Department, Sir, that prepares the pre-sentence report will have all that information about your jail credits. And any applicable jail credits will be applied to your sentence. Do you understand that, Sir?
>
> DEFENDANT: Yes.

Asked by the judge if he had any further questions, defendant answered, "No."

Defendant returned to court on August 10, 2018, for sentencing. At the outset of the proceeding, defense counsel informed the judge he reviewed the presentence report with defendant and noticed the presentence report reflected defendant was "only entitled to one jail credit." Counsel asked for an award of "approximately 1,411 credits" and stated, "[w]e are aware of the law regarding his incarceration on this matter, as well as his parole detainer, Judge. We are

asking the [c]ourt, in the [c]ourt's discretion, to award these discretionary jail credits, as that was considered as part of the plea agreement."

The assistant prosecutor "object[ed] to any discretionary credits" and argued, "[i]t wasn't part of the plea." He clarified that only defendant's "request was part of the plea but there was no agreement by the State . . . as to any discretionary credits." Defense counsel responded to the objection, stating defendant "would like to withdraw his plea based upon the credit issue."

The judge denied defendant's oral application to withdraw his plea, finding the plea agreement simply allowed for defendant to request "all applicable jail credits" to which he was legally entitled. The judge concluded, "frankly, what he's entitled to, legally, is one day, because he was on parole and served that time [since September 2014] on parole."

Once his motion was denied, defendant stated he felt he was "being railroaded" and "was not coppin' out to no [twelve] years." Additionally, he told the judge, "I would like to retract my plea and face this life sentence . . . [b]ecause if this was the case, I would've never copped out to that sent[ence]." When the judge reminded defendant she had "already denied" his attorney's application, defendant grew more incensed, unleashed a series of epithets and was escorted from the courtroom at the judge's request. Defendant was

sentenced in absentia. Consistent with the terms of the plea agreement, the judge imposed two concurrent twelve-year prison terms, subject to NERA, plus the appropriate fines and penalties for defendant's offenses.

We considered defendant's appeal from his sentence on the excessive sentencing oral calendar, per Rule 2:9-11, and remanded the matter, directing the judge to reconsider defendant's motion to withdraw his guilty plea. State v. Marshall, No. A-0773-18 (App. Div. Oct. 22, 2019). On remand, the judge conducted a hearing, analyzed the appropriate factors under State v. Slater, 198 N.J. 145, 157-58 (2009),[1] and also considered defendant's argument that his guilty pleas were not knowing and voluntary. The judge issued an order on March 18, 2021, again denying defendant's motion to withdraw his guilty plea.

II.

On appeal, defendant raises the following arguments:

POINT I

> [DEFENDANT'S] GUILTY PLEA SHOULD BE WITHDRAWN BECAUSE THE PLEA AGREEMENT WAS NOT KNOWINGLY ENTERED INTO AND

[1] The four Slater factors are: "(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 [will] result in unfair prejudice to the State or unfair advantage to the accused." 198 N.J. at 157-58.

THE PENAL CONSEQUENCES OF THE PLEA WERE NOT UNDERSTOOD.

POINT II

THE TRIAL COURT ERRED IN RELYING ON THE SLATER FACTORS IN THEIR [SIC] DECISION BECAUSE [DEFENDANT'S] GUILTY PLEA WAS NEVER VALID TO BEGIN WITH.

POINT III

[DEFENDANT'S] FORMER COUNSEL WAS INEFFECTIVE IN ADVISING [DEFENDANT] LEADING UP TO AND REGARDING [DEFENDANT'S] GUILTY PLEA RESULTING IN [DEFENDANT'S] LACK OF KNOWLEDGE OF PENAL CONSEQUENCES.

POINT IV

THE TIMING OF [DEFENDANT'S] ATTEMPTED WITHDRRAWL [SIC] OF [THE] GUILTY PLEA SUPPORTS GRANTING THE MOTION TO WITHDRAW [HIS] PLEA BECAUSE [DEFENDANT'S] ATTEMPTED WITHDRAWL [SIC] AS SOON AS HE LEARNED OF CONSEQUENCES OF [THE] PLEA AT THE TIME OF SENTENCING.

Having reviewed the record and considered the appropriate legal principles, we are satisfied the contentions raised in Points I, II, and IV lack merit, Rule 2:11-3(e)(2), and that we need only briefly address Point III. We add the following comments.

Before a court can accept a defendant's guilty plea, it first must be convinced that (1) the defendant has provided an adequate factual basis for the plea; (2) the plea is made voluntarily; and (3) the plea is made knowingly. R. 3:9-2. "[W]hen a voluntary and knowing plea bargain has been entered into simultaneously with the guilty plea, defendant's burden of presenting a plausible basis for his [or her] request to withdraw his [or her] guilty plea is heavier." State v. Huntley, 129 N.J. Super. 13, 18 (App. Div. 1974).

Once it is established that a guilty plea was made voluntarily, it may only be withdrawn at the discretion of the trial court. State v. Simon, 161 N.J. 416, 444 (1999) (citations omitted). A trial judge's finding that a plea was voluntarily and knowingly entered is entitled to appellate deference so long as that determination is supported by sufficient credible evidence in the record. State v. McCoy, 222 N.J. Super. 626, 629 (App. Div. 1988), aff'd, 116 N.J. 293 (1989) (citing State v. Johnson, 42 N.J. 146, 162 (1964)). We also evaluate a trial court's decision on a Slater motion for an abuse of discretion "because the trial court is making qualitative assessments about the nature of a defendant's reasons for moving to withdraw his plea and the strength of his case and because the court is sometimes making credibility determinations about witness testimony." State v. Tate, 220 N.J. 393, 404 (2015).

"A more relaxed standard applies to plea-withdrawal motions made before sentencing" than after sentencing. State v. Munroe, 210 N.J. 429, 441 (2012). "Before sentencing, a 'defendant shall be permitted to withdraw' a guilty plea if 'the interests of justice would not be served by effectuating the [plea] agreement.'" Ibid. (alteration in original) (quoting R. 3:9-3(e)). "In such cases, 'courts are to exercise their discretion liberally to allow plea withdrawals,'" and "[i]n a close case, the 'scales should usually tip in favor of defendant.'" Ibid. (alteration in original) (quoting Slater, 198 N.J. at 156). "However, '[l]iberality in exercising discretion does not mean an abdication of all discretion.'" Id. at 441-42 (alteration in original) (quoting Slater, 198 N.J. at 157).

"In moving to withdraw a guilty plea, under Slater, the defendant bears the burden of presenting a 'plausible basis for his [or her] request' and a good-faith basis for 'asserting a defense on the merits.'" Id. at 442 (quoting Slater, 198 N.J. at 156). In turn, in deciding a plea withdrawal motion, "courts should 'consider and balance'" the four factors identified in Slater. Ibid. (quoting Slater, 198 N.J. at 157-58).

As to the first Slater factor, "[a] colorable claim of innocence is one that rests on 'particular, plausible facts' that, if proven in court, would lead a

reasonable factfinder to determine the claim is meritorious." Ibid. (quoting Slater, 198 N.J. at 158-59). While "[i]t is more than '[a] bare assertion of innocence,' the motion judge need not be convinced that it is a winning argument because, in the end, legitimate factual disputes must be resolved by the jury." Ibid. (quoting Slater, 198 N.J. at 158). However, the trial judge must still distinguish between "a colorable claim of innocence" and a "bald assertion." State v. Lipa, 219 N.J. 323, 333-34 (2014). Doing so requires a judge to engage in some weighing of evidence to determine whether facts are "credible" or "plausible." Ibid.

As to the second Slater factor, "[t]he nature and strength of a defendant's reasons for withdrawal of a plea will necessarily depend on the circumstances peculiar to the case." Munroe, 210 N.J. at 442. "A defendant will likely satisfy this factor if he [or she] can make a 'plausible showing of a valid defense against the charges' and credibly explain why an otherwise legitimate defense was overlooked during the plea colloquy." Id. at 443 (quoting Slater, 198 N.J. at 159-60).

> A court should evaluate the validity of the reasons given for a plea withdrawal with realism, understanding that some defendants will be attempting to game the system, but not with skepticism, for the ultimate goal is to ensure that legitimate disputes about the guilt or innocence of a criminal defendant are decided by a jury.

[Ibid. (citing Slater, 198 N.J. at 160).]

The third Slater factor "receives the least weight in the overall analysis." Ibid. "Although this factor should not be discounted, for our system 'rests on the advantages both sides receive from' the plea-bargaining process, '[courts] recognize that the vast majority of criminal cases are resolved through plea bargains.'" Ibid. (quoting Slater, 198 N.J. at 161).

The critical inquiry in evaluating the fourth and final Slater factor "is whether the passage of time has hampered the State's ability to present important evidence." Ibid. (quoting Slater, 198 N.J. at 161). "Thus, the trial court must consider the delay to the State in presenting its case to the jury because of the plea-withdrawal motion." Ibid.

Pertinent to this appeal our Supreme Court recently considered a defendant's bid to withdraw his guilty plea based on an alleged misrepresentation of the jail credits he would receive at sentencing. State v. McNeal, 237 N.J. 494, 498 (2019). The Court rejected defendant's contention, holding he could not "credibly argue that he relied on a belief that [the credits he sought] would be applied to his term of parole ineligibility[,]" considering the "effective steps taken by the plea court" to ensure he did not count on such credits to be awarded. Id. at 500. Still, the Court observed:

> "A defendant has the right not to be 'misinformed' about a material element of a plea agreement and to have his or her 'reasonable expectations' fulfilled." State v. Bellamy, 178 N.J. 127, 134 (2003) (citing State v. Howard, 110 N.J. 113, 122 (1988); State v. Nichols, 71 N.J. 358, 361 (1976)). "Generally, a defendant seeking to vacate a plea must show that he or she was misinformed of the terms of the agreement or that his or her reasonable expectations were violated." [Bellamy,] 178 N.J. at 134-35. "Defendant is also entitled to withdraw a guilty plea if the court imposes a harsher sentence than that contemplated by the plea agreement." Id. at 135.
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> Jail credits are a means for avoiding double punishment and safeguarding equal protection and fundamental fairness. State v. Hernandez, 208 N.J. 24, 36 (2011). An incorrect calculation of a defendant's jail credits may impact the voluntariness of the guilty plea. See Sheil v. State Parole Bd., 244 N.J. Super. 521, 528 (App. Div. 1990) (remanding for a hearing where defendant reasonably may have expected his period of parole ineligibility could be reduced by gap-time credits); State v. Alevras, 213 N.J. Super. 331, 338 (App. Div. 1986) ("[I]n certain circumstances, a defendant's misunderstanding of credits may affect his understanding of the maximum exposure. Hence, a guilty plea based on this misunderstanding may fail to satisfy the constitutional requirement that a plea be voluntarily, intelligently and knowingly entered . . . .").
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> [Id. at 499 (omission in original).]

Guided by the analysis in McNeal and the standards we have discussed, we perceive no basis to second-guess the judge's denial of defendant's motion to

withdraw his pleas. In fact, her finding that defendant's pleas were entered knowingly and voluntarily is amply supported by the record.

Moreover, we see no reason to disturb the judge's analysis of the Slater factors. As she noted under the first Slater factor, the "defense [didn't] attempt to argue that defendant is innocent of the charges to which he ple[d] guilty" so "this factor [did] not weigh in favor of the defendant . . . be[ing] permitted to withdraw his plea." Nor does defendant argue this factor on appeal.

Regarding the second Slater factor, "the nature and strength of defendant's reasons for withdrawal," we also are persuaded the judge properly found "this prong weigh[ed] in favor of the State." Before making this finding, the judge quoted extensively from the plea hearing transcript. She observed that during the plea proceeding, defense counsel spoke with defendant after defendant expressed a concern about jail credits. Further, the judge noted counsel represented defendant "was aware of his parole detainer," and defendant understood the judge would not "have any idea of the jail credits" due to him until the presentence report was completed. Also, the judge found her "commitment to [defendant at the plea hearing] was that the court would consider to the extent that it [could] all the applicable jail credits." Accordingly,

the judge concluded, "I cannot find . . . there [was] a misunderstanding of the jail credits."

We perceive no abuse of discretion in this regard. Indeed, despite defendant's contention he was misled by counsel relative to jail credits, nowhere in the plea agreement or in the transcript from the plea colloquy was a promise made to defendant that he would receive a certain number of jail credits at sentencing. Instead, his counsel confirmed defendant would request "all applicable jail credits" and the judge told defendant she would "consider, to the extent [she could], all of the applicable jail credits." And as we have noted, before defendant pled guilty, the State highlighted that "no promises" were made to him regarding the jail credits he would receive. Under these circumstances, there is no basis for us to conclude the judge erred in assessing the second Slater factor.

Similarly, we see no reason to disturb the judge's finding that the third Slater factor weighed in the State's favor. In fact, it is uncontroverted defendant executed a plea agreement to resolve his pending charges. In doing so, he testified he understood he faced up to forty years in prison on the first-degree attempted murder and weapons charges alone, and the State accepted his offer to recommend that instead, he serve two concurrent prison sentences of twelve

years, subject to NERA. Thus, in addressing the third Slater factor, the judge found defendant "received a very . . . favorable and beneficial plea bargain at the time the plea[s were] entered."

Regarding the fourth Slater factor, we also agree with the judge's finding that the State was "not required to show prejudice if the defendant fail[ed] to offer proof of other factors that would support withdrawal of [his] plea." See Slater, 198 N.J. at 162. Accordingly, we decline to determine the judge abused her discretion in denying defendant's motion to withdraw his plea, even under the more liberal "interests of justice" standard applicable to motions made before sentencing. See R. 3:9-3(e); Slater, 198 N.J. at 156.

Finally, we need not comment extensively on defendant's remaining contention under Point III. As is evident from our discussion, defendant's reason for seeking to withdraw his plea rested on his argument that plea counsel was ineffective in providing advice to him about jail credits he would receive at sentencing. But on the record before us, we cannot conclude he established a prima facie claim of ineffective assistance of counsel. Our ruling is without prejudice to a post-conviction relief proceeding. See State v. Preciose, 129 N.J. 451, 460 (1992) (noting the appropriateness of deferring ineffective assistance

of counsel claims to post-conviction relief proceedings when such claims involve allegations and evidence outside the trial record).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION