

RECORD IMPOUNDED

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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-2053-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROBERT R. BALL,

Defendant-Appellant.

Submitted April 25, 2022 – Decided May 27, 2022

Before Judges Rose and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Accusation No. 16-08-0449.

Joseph E. Krakora, Public Defender, attorney for appellant (John V. Molitor, Designated Counsel, on the brief).

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (Joie D. Piderit, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Robert R. Ball appeals from the July 14, 2020 denial of his petition for post-conviction relief (PCR) without an evidentiary hearing. We reverse and remand for further proceedings.

I.

In 2016, defendant pled guilty to second-degree sexual assault, N.J.S.A. 2C:14-2(b). Pursuant to the plea agreement, the State recommended defendant serve an eight-year prison term, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2. The trial court imposed the recommended sentence after finding aggravating factors three (risk of reoffense), four (defendant took advantage of a position of trust or confidence to commit the offense), and nine (need to deter), N.J.S.A. 2C:44-1(a)(3), (4), and (9), applied; the court found no mitigating factors.

Although defendant did not appeal from his conviction or sentence, he filed a timely PCR petition in 2019. He alleged that despite having lived a "law-abiding life for a substantial period of time" prior to his offense, his trial attorney failed to "effectively advocate for a shorter term of incarceration, and did not present and argue mitigating evidence at sentencing." PCR counsel filed a supplemental brief, arguing defendant's trial counsel "undermined the plea process . . . by not giving [defendant] complete information on the possible plea

and consequences of a sentence once convicted." Additionally, PCR counsel contended trial counsel "made some cursory remarks but did not advocate more aggressively for a lower sentence as he had promised defendant." It is undisputed PCR counsel did not provide the PCR judge with the transcripts from defendant's plea hearing or sentencing.

On July 14, 2020, the PCR judge, who had accepted defendant's guilty plea and imposed sentence, heard argument on defendant's petition and issued an oral decision. The judge stated, "absent a transcript of the sentencing hearing, this court is unable to ascertain whether or not trial counsel . . . argued for [mitigating] factor [seven, N.J.S.A. 2C:44-1(b)(7),] or any other mitigating factors" "only for the court to find that they did not apply." The judge continued, "without more of a record, it's also unknown whether petitioner's trial counsel chose not to argue certain mitigating factors at the sentencing hearing because he advocated for them within a sentencing memorandum."

Noting defendant received a sentence consistent with his plea agreement, the judge determined defendant failed to show how his trial attorney's performance "was in any way unreasonable or deficient." Further, the judge stated it "appear[ed] unlikely that the sentencing court would have necessarily concluded that [mitigating] factor [seven] by itself outweighed the aggravating

factors the court found where [it] opined that [aggravating] factors [three, four, and nine] applied." Finally, the judge concluded there was "nothing in this record indicat[ing] that the defendant would have chosen to go to trial instead of accepting the . . . plea he received." Accordingly, the judge determined defendant failed to establish a prima facie case of ineffective assistance of counsel, so no evidentiary hearing was warranted. The judge issued a conforming order that day.

II.

On appeal, defendant raises the following arguments:

POINT I

DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS PETITION FOR [PCR] DUE TO INEFFECTIVE ASSISTANCE OF PCR COUNSEL. (NOT RAISED BELOW).

POINT II

THIS COURT SHOULD REVERSE THE TRIAL COURT'S DECISION TO DENY THE DEFENDANT'S PETITION FOR [PCR] WITHOUT AN EVIDENTIARY HEARING.

We agree with defendant's first argument and reverse and remand for assignment of new PCR counsel. Accordingly, we do not reach his second argument.

We recognize that

in an initiative unique among our sister-jurisdictions, [our Rules] state that every defendant is entitled to be represented by counsel on a first PCR petition; that if a defendant is indigent, counsel will be assigned; that assigned counsel may not withdraw based on the ground of "lack of merit" of the petition; and that "counsel should advance any grounds insisted on by defendant notwithstanding that counsel deems them without merit."

[State v. Rue, 175 N.J. 1, 13 (2002) (quoting R. 3:22-6).]

The Court has since made clear what is required of PCR counsel: "PCR counsel must communicate with the client, investigate the claims urged by the client, and determine whether there are additional claims that should be brought forward. Thereafter, counsel should advance all of the legitimate arguments that the record will support." State v. Webster, 187 N.J. 254, 257 (2006). Of course, PCR counsel is not required to bolster claims raised by a defendant that are without foundation. Ibid.

When PCR counsel fails to meet these standards, the appropriate remedy is a remand for a new PCR hearing. State v. Hicks, 411 N.J. Super. 370, 376 (App. Div. 2010) (citing Rue, 175 N.J. at 4). "This relief is not predicated upon a finding of ineffective assistance of counsel under the relevant constitutional standard. Rule 3:22-6(d) imposes an independent standard of professional

conduct upon an attorney representing a defendant in a PCR proceeding." Ibid. (citing Strickland v. Washington, 466 U.S. 668 (1984); State v. Fritz, 105 N.J. 42 (1987)).

In Hicks, PCR counsel failed to file any brief, although he advanced arguments contained in the defendant's pro se PCR petition and brief. Id. at 373. Under the circumstances, we noted that the record failed to include "any indication that counsel personally and independently reviewed defendant's file to ascertain the availability of any other grounds for relief." Ibid. We also observed in Hicks that reviewing a defendant's pro se submission was "a mere starting point" for counsel's efforts, and PCR counsel was required to "certify" his or her satisfaction "that no further argument or elaboration is required." Id. at 377. Absent such a certification, "a reviewing court must presume that counsel did not make a meaningful effort to comply with the requirements of Rule 3:22-6(d)." Ibid.

Mindful of these standards, we note although defendant argued trial counsel was ineffective during plea negotiations and at sentencing, PCR counsel failed to provide the PCR judge with transcripts from these proceedings. Nor did PCR counsel file a certification as required under Hicks. Accordingly, we

are satisfied PCR counsel failed to meet the minimum standards under Rue and Webster.

We hasten to add that, without leave of this court, appellate counsel provided the sentencing transcript to us and the State cites to it in its merits brief. Because the transcripts were not presented to the PCR court for consideration, they are inappropriate for consideration on appeal. See Zaman v. Felton, 219 N.J. 199, 226-27 (2014). PCR counsel should have supplied the pertinent transcripts to the PCR judge so the judge could have properly assessed defendant's petition.

Finally, our opinion in no way implies any criticism of the PCR judge. The correctness of his analysis on the record before him cannot be questioned. However, defendant was entitled to be represented by PCR counsel who met the minimal standards required by our case law. Accordingly, we reverse and remand the matter to the Law Division for a new hearing with assignment of new PCR counsel. The court shall afford defendant's successor counsel the opportunity to supplement the record and file another brief, and permit the State to respond.

Reversed and remanded. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION