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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2188-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RICKY BRYANT,

Defendant-Appellant.

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Submitted October 25, 2022 – Decided December 29, 2022

Before Judges Messano and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment Nos. 18-03-0492, 18-03-0493, 18-03-0494, 16-05-0815.

Joseph E. Krakora, Public Defender, attorney for appellant (Karen A. Lodeserto, Designated Counsel, on the brief).

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (Nancy A. Hulett, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Ricky Bryant appeals from an order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. Having reviewed the record and applicable legal standards, we are unpersuaded by defendant's arguments and affirm.

Charged with a total of nineteen crimes in four indictments, defendant pleaded guilty to first-degree robbery, N.J.S.A. 2C:15-1(a)(2); second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7b(1); and two counts of third-degree burglary, N.J.S.A. 2C:18-2(a)(1). Pursuant to the parties' plea agreement, the State recommended dismissing the remaining charges.

During the plea allocution, defendant admitted to the factual predicates of the crimes to which he was pleading guilty and advised the judge: he understood everything that had been discussed, "the entire plea deal," and everything in the plea form; counsel had reviewed the entire plea form with him; he had had enough time to speak with his counsel; counsel had answered his questions; he was satisfied with counsel's services; and his answers on the plea form were true. When the judge asked defendant, "[d]o you know that you don't have to plead guilty," he responded, "[y]es, ma'am." The judge confirmed defendant understood that by pleading guilty, he was waiving his right to a trial.

At the sentencing, defendant expressed regret about what he had done to a robbery victim and attributed his behavior to his drug addiction. Consistent with the recommendations in the plea agreement, the judge sentenced defendant to an aggregate term of imprisonment of thirteen years subject to the No Early Release Act, N.J.S.A. 2C:43-7.2.

Defendant did not appeal his convictions or sentences and did not move to withdraw his guilty pleas. Instead, he filed a pro se petition for PCR, contending trial counsel had provided ineffective assistance and listing counsel's deficiencies as "no investigation," "lack of communication," "no pretrial motions were filed," and "forcible plea agreement." In a counseled brief, defendant faulted his trial counsel for failing to (1) conduct an independent investigation, (2) provide defendant with full discovery, (3) meet with defendant to discuss trial strategy, and (4) file motions regarding identification and probable cause. In addition to the brief, defendant submitted in support of his petition copies of two letters he had addressed to his trial counsel and two letters he had addressed to the public defender. The record does not contain any affidavit or certification by defendant or anyone else in support of his petition.

When a defendant claims ineffective assistance of counsel as the basis for relief, he must satisfy the two-pronged test formulated in Strickland v.

Washington, 466 U.S. 668, 687 (1984), which was adopted by our Court in State v. Fritz, 105 N.J. 42, 58 (1987). "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687.

To meet the first prong of the Strickland test, a defendant must show "that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment." Ibid. Reviewing courts must make "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." Id. at 689; see also State v. Nash, 212 N.J. 518, 542 (2013) (same).

The second prong of the Strickland test requires a defendant to show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687. A defendant must show by a "reasonable probability" that the deficient performance affected the outcome. Fritz, 105 N.J. at 58. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Pierre, 223 N.J. 560, 583 (2015) (quoting Strickland, 466 U.S. at 694; Fritz, 105 N.J. at 52). "[A] conviction is more readily attributable to deficiencies in defense counsel's performance when

the State has a relatively weak case than when the State has presented overwhelming evidence of guilt." State v. Gideon, 244 N.J. 538, 557 (2021).

A defendant's right to effective assistance of counsel extends to the plea-negotiation process. Lafler v. Cooper, 566 U.S. 156, 162 (2012); see also State v. Chau, 473 N.J. Super. 430, 445 (App. Div. 2022). When a defendant seeks "[t]o set aside a guilty plea based on ineffective assistance of counsel, a defendant must show . . . 'that there is a reasonable probability that, but for counsel's errors, [he or she] would not have pled guilty and would have insisted on going to trial.'" State v. Nunez-Valdez, 200 N.J. 129, 139 (2009) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994) (alterations in original)); Lafler, 566 U.S. at 163 (holding a defendant claiming ineffective assistance at the plea stage must show that "the outcome of the plea process would have been different with competent advice"). A defendant also "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010); see also State v. Aburoumi, 464 N.J. Super. 326, 339 (App. Div. 2020).

"With respect to both prongs of the Strickland test, a defendant asserting ineffective assistance of counsel on PCR bears the burden of proving his or her right to relief by a preponderance of the evidence." State v. Gaitan, 209 N.J.

339, 350 (2012). A failure to satisfy either prong of the Strickland test requires the denial of a PCR petition. 466 U.S. at 700.

The PCR judge, who was not the trial or sentencing judge, heard argument and subsequently issued a written decision and order denying defendant's petition without an evidentiary hearing. The judge described the evidence against defendant, which included a videotape of defendant attacking a robbery victim with a gun, as "overwhelming." The judge found defendant's allegations of ineffective assistance to be unsupported by or "at odds" with the record evidence or to be "vague[,] conclusory[,] or speculative." The judge held defendant had failed to establish the first prong of the Strickland test because he had not provided any evidence that trial counsel's performance was deficient. The judge concluded trial counsel had not engaged in frivolous motion practice and had negotiated "a very favorable plea" on defendant's behalf. The judge held defendant had failed to establish the second Strickland prong because he had not demonstrated a reasonable probability that but for trial counsel's purported errors, he would not have pleaded guilty and would have insisted on going to trial. Accordingly, the judge denied defendant's petition without conducting an evidentiary hearing.

On appeal, defendant contends he was entitled to an evidentiary hearing before the PCR judge because he had demonstrated a prima facie case of ineffective assistance of counsel. Defendant raises the following points for our consideration:

POINT I

THE PCR COURT ERRED IN DENYING MR. BRYANT AN EVIDENTIARY HEARING AS TESTIMONY IS NEEDED FROM PRIOR COUNSEL REGARDING HIS FAILURE TO INVESTIGATE HIS MATTER AND DISCUSS TRIAL STRATEGY, FILE MOTIONS, AND PROVIDE HIM WITH DISCOVERY.

POINT II

THE PCR COURT ERRED IN DENYING MR. BRYANT AN EVIDENTIARY HEARING AS TESTIMONY IS NEEDED FROM PRIOR COUNSEL REGARDING HIS EFFORTS TO FORCIBLY PURSUE A PLEA AGREEMENT WITH MR. BRYANT.

In the absence of an evidentiary hearing, we review de novo both the factual inferences drawn from the record by the PCR judge and the judge's legal conclusions. State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016).

We discern no abuse of discretion in the PCR judge's decision to forego an evidentiary hearing. See State v. L.G.-M., 462 N.J. Super. 357, 365 (App. Div. 2020) (holding "[w]e review a trial court's decision to grant or deny a

defendant's request for a hearing under an abuse of discretion standard"). A petitioner is not automatically entitled to an evidentiary hearing. State v. Porter, 216 N.J. 343, 355 (2013); see also State v. Peoples, 446 N.J. Super. 245, 254 (App. Div. 2016) (holding "[t]he mere raising of a claim of [ineffective assistance of counsel] does not entitle the defendant to an evidentiary hearing").

A court should hold an evidentiary hearing on a PCR petition only if the defendant establishes a prima facie case in support of PCR, "there are material issues of disputed fact that cannot be resolved by reference to the existing record," and "an evidentiary hearing is necessary to resolve the claims for relief." R. 3:22-10(b); see also Porter, 216 N.J. at 354 (same); State v. Bringhurst, 401 N.J. Super. 421, 436-37 (App. Div. 2008) (holding a "[d]efendant must demonstrate a prima facie case for relief before an evidentiary hearing is required, and the court is not obligated to conduct an evidentiary hearing to allow defendant to establish a prima facie case not contained within the allegations in his PCR petition"). "A prima facie case is established when a defendant demonstrates 'a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits.'" Porter, 216 N.J. at 355 (quoting R. 3:22-10(b)).



"[T]o establish a prima facie claim, a defendant must do more than make bald assertions that he was denied effective assistance of counsel." Ibid. (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)). PCR petitions must be "accompanied by an affidavit or certification by defendant, or by others, setting forth with particularity[.]" State v. Jones, 219 N.J. 298, 312 (2014), "facts sufficient to demonstrate counsel's alleged substandard performance," Cummings, 321 N.J. Super. at 170. "[F]actual assertions in a [PCR must] be made by affidavit or certification in order to secure an evidentiary hearing." Jones, 219 N.J. at 312 (citing R. 3:22-10(c)). Defendant did not submit any affidavit or certification in support of his petition. Instead, defendant relies on arguments made in his "submissions" or before the PCR judge, but an assertion contained in a brief or made during argument is not the same thing as a sworn statement in an affidavit or on the record.

In support of his argument that trial counsel should have conducted a more-thorough investigation, defendant suggests trial counsel could have obtained better quality surveillance footage and assumes that footage would have exculpated him. When a defendant claims his attorney failed to adequately investigate the case, "he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal

knowledge of the affiant or the person making the certification." Porter, 216 N.J. at 355 (quoting Cummings, 321 N.J. Super. at 170). Defendant's pure speculation about the existence of better surveillance footage and its contents fails to meet that standard.

Defendant's arguments regarding counsel's purported failure to discuss trial strategy with him, provide discovery, or engage in useful motion practice are similarly speculative and unsupported. During the plea colloquy, defendant stated under oath that trial counsel had answered all his questions and he was satisfied with counsel's representation. "Defendant may not create a genuine issue of fact, warranting an evidentiary hearing, by contradicting his prior statements without explanation." Blake, 444 N.J. Super. at 299. Moreover, defendant has not proffered "specific facts and evidence supporting his allegations." Porter, 216 N.J. at 355. He has not divulged what defense counsel failed to discuss or provide to him. He has not identified what strategies counsel should have employed at a trial. He has not explained how any discussions, discovery, or strategy would have impacted the outcome of the trial or his decision to forgo a trial and plead guilty.

Defendant faults counsel for not moving to suppress evidence or to challenge probable cause and identifications made of him but has not

demonstrated those motions would have been successful and not, as the PCR Judge found, "frivolous" motions that would have "escalate[d]" the plea-bargain offers. A failure to make an unsuccessful argument does not constitute ineffective assistance of counsel. State v. Echols, 199 N.J. 344, 365 (2009).

Defendant's assertion of a "forced plea agreement" is not supported by an affidavit or certification from him and is belied by the statements he made under oath during the plea allocution, including his confirmation that he understood he did not have to plead guilty. Defendant has not demonstrated "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985); see also DiFrisco, 137 N.J. at 457.

Allegations of ineffective assistance that are unsupported or are "too vague, conclusory, or speculative" do not merit an evidentiary hearing. State v. Marshall, 148 N.J. 89, 158 (1997). With his unsupported, bald assertions, defendant failed to demonstrate a prima facie case in support of his petition. Accordingly, the PCR judge did not abuse his discretion by deciding and denying the petition without an evidentiary hearing.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION