

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-3080-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALAN GLENN,

Defendant-Appellant.

Submitted November 2, 2022 – Decided November 28, 2022

Before Judges Vernoia and Firko.

On appeal from the Superior Court of New Jersey, Law
Division, Camden County, Indictment No. 17-01-0162.

Elliot M. Cohen, attorney for appellant.

Grace C. MacAulay, Camden County Prosecutor,
attorney for respondent (Jason Magid, Assistant
Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Alan Glenn pled guilty to third-degree endangering the welfare
of a child by a non-caretaker, N.J.S.A. 2C:24-4(a)(1), pursuant to a plea

agreement with the State. Defendant was sentenced in accordance with the plea agreement to a five-year probationary term, which the trial court transferred to Pennsylvania where he resides. Defendant was also subject to Megan's Law, N.J.S.A. 2C:7-1 to -23, parole supervision for life, N.J.S.A. 2C:43-6.4, and Nicole's Law, N.J.S.A. 2C:14-12 and 2C:44-8.

Defendant filed a post-conviction relief (PCR) petition asserting his plea counsel was ineffective by coaxing and cajoling him into pleading guilty because the risks of a significant prison sentence "were too heavy." He appeals from the May 27, 2021 order denying his petition without an evidentiary hearing. Unpersuaded by his contention the PCR court erred, we affirm.

I.

A grand jury charged defendant in an indictment with first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1) (count one); two counts of second-degree sexual assault, N.J.S.A. 2C:14-2(b) (counts two and three); and third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(1) (count four). Had defendant proceeded to trial and been convicted on the first three counts of the indictment, he would have faced substantial sentencing exposure, including up to twenty years on the first-degree charge, N.J.S.A. 2C:43-6(a)(1).

During his plea allocution, defendant testified that on August 13, 2016, he kissed a five-year-old female on the mouth in a manner that constituted sexual conduct. Defendant further testified that his conduct impaired or debauched the morals of the child. In addition, defendant testified he was not forced or threatened to plead guilty, he did so of his own free will, and he was "guilty" of the offense to which he pleaded. He further testified his attorney went through all of the questions on the plea and supplemental forms with him, and he had sufficient time to review them. Defendant advised the court he was pleased with the legal services rendered by his plea counsel. Several months later, defendant was sentenced.

Two-and-a-half years later, defendant filed his PCR petition. The record does not indicate whether defendant ever filed a direct appeal of his conviction and sentence. In his PCR petition, defendant claims he could not have committed the offense to which he pled guilty because he is a "lifelong homosexual" and "the thought of heterosexual contact, especially with a minor, [is] abhorrent to him."¹

¹ The record shows defendant's certification in support of his PCR petition was included in an appendix to one of his initial briefs and the appendix that was rejected by the clerk's office as deficient. We reviewed same nonetheless. Defendant's brief on appeal that was accepted for filing does not include an appendix in violation of Rule 2:6-1(a).

In his certification, defendant states he was accused of digitally penetrating the victim, he did not commit that act, and he is therefore innocent. Defendant also certified "he has never had relations of any kind with a . . . female." According to defendant, he was afraid of the victim's father who told him, "I got your address, know that." Defendant also asserted the kiss was "nothing more than a peck," but the victim's father "threatened and cursed at him."

The State countered that an investigation report detailed a phone call between defendant and the victim's father during which defendant admitted to kissing the victim on the mouth. Defendant, a family acquaintance, was babysitting the victim and her brother at the time of the incident. The report also indicated the victim referred to defendant as "grandpa." She told the investigator defendant "insert[ed] his fingers into her vagina," which made her feel "sad." Defendant told the victim he was "sorry." The victim told her mother that defendant "kissed and put his tongue inside her mouth, touched her breast area with his hands," and she explained how he digitally penetrated her in the mother's bedroom.

Following oral argument on the PCR petition, the court rejected defendant's claims, finding he did not sustain his burden of demonstrating plea

counsel's performance was deficient. The court found defendant failed to show or explain how being a homosexual would have altered plea counsel's advice as to his potential sentencing exposure.

The court also determined defendant failed to show any prejudice resulting from plea counsel's alleged errors. The PCR court, which was also the sentencing court, recalled going over the plea testimony at length and noted defendant's PCR petition contradicted his plea testimony. The court emphasized defendant's purported homosexuality does not in and of itself absolve him from criminal culpability for the charged offenses. The court further denied defendant's claim he was entitled to an evidentiary hearing on his ineffective assistance of counsel claims because he failed to establish a prima facie claim of ineffectiveness. A memorializing order was entered.

Defendant appeals from the order, and presents the following argument:

THE TRIAL COURT ERRED IN DENYING
[DEFENDANT] AN EVIDENTIARY HEARING ON
HIS [PCR] CLAIM.

II.

We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). The de novo standard of review applies

to mixed questions of fact and law. Id. at 420. Where an evidentiary hearing has not been held, it is within our authority "to conduct a de novo review of both the factual findings and legal conclusions of the PCR court." Id. at 421. We apply that standard here.

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee a defendant in a criminal proceeding the right to the assistance of counsel in his defense. The right to counsel includes "the right to the effective assistance of counsel." State v. Nash, 212 N.J. 518, 541 (2013) (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)).

In Strickland, the Supreme Court established a two-part standard to determine whether a defendant has been deprived of the effective assistance of counsel. 466 U.S. at 687. Under the first prong of the Strickland standard, a petitioner must show counsel's performance was deficient by demonstrating counsel's handling of the matter "fell below an objective standard of reasonableness" and "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687-88.

Under the second prong of the Strickland standard, a defendant "must show that the deficient performance prejudiced the defense." Id. at 687. There must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. In the context of a PCR petition challenging a guilty plea based on the ineffective assistance of counsel, the second prong is established when the defendant demonstrates a "reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial." State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009) (alteration in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)); see also State v. McDonald, 211 N.J. 4, 30 (2012). Additionally, the defendant must establish that a "decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010).

A petitioner must establish both prongs of the Strickland standard to obtain a reversal of the challenged conviction. Strickland, 466 U.S. at 687; Nash, 212 N.J. at 542; State v. Fritz, 105 N.J. 42, 52 (1987). A failure to satisfy either prong of the Strickland standard requires the denial of a petition for PCR. 466 U.S. at 700.

The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). When determining whether to grant an evidentiary hearing, the PCR court must consider the facts in the light most favorable to the defendant to determine if the defendant has established a prima facie claim. State v. Preciose, 129 N.J. 451, 462-63 (1992). It follows that a "defendant must allege specific facts and evidence supporting [their] allegations[,]" State v. Porter, 216 N.J. 343, 355 (2013), and "must do more than make bald assertions that [they were] denied the effective assistance of counsel[,]" Cummings, 321 N.J. Super. at 170. PCR petitions must be "accompanied by an affidavit or certification by defendant, or by others, setting forth with particularity the facts that [they] wished to present." State v. Jones, 219 N.J. 298, 312 (2014).

We are satisfied from our review of the record that defendant failed to make a prima facie showing of ineffectiveness of plea counsel under the Strickland-Fritz standard. Defendant's certification states he was accused of digitally penetrating the five-year-old victim, he did not commit that act, and he is therefore innocent. But, his certification does not address, and includes no denial of, the act—kissing the victim on the mouth in a sexual way—to which he pled guilty. Therefore, defendant's purported innocence claim is based on a


denial he committed an act—digital penetration—that he did not provide the factual basis for his plea. Saliently, defendant does not deny the act—kissing the victim—upon which his conviction is based for endangering the welfare of a child. Therefore, defendant's denial he digitally penetrated the victim is irrelevant to the disposition of his PCR claim.

Moreover, we are satisfied from our review of the record that the PCR court noted defendant's testimony during the plea allocution undermines his conclusory assertions claiming he was pressured into pleading guilty. Defendant failed to present any meritorious arguments he is innocent because he is homosexual, or that his plea counsel pressured him by advising to plead guilty in order to avoid a potentially lengthy prison term if convicted at trial. The record is devoid of any facts demonstrating how plea counsel's performance affected the plea process or the outcome of the case. Accordingly, the PCR court correctly concluded that an evidentiary hearing was not warranted. See Preciose, 129 N.J. at 462-63.

To the extent we have not specifically addressed arguments raised by defendant, we find them without sufficient merit to warrant discussion in a written opinion. 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