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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3153-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RANDY CLAY, a/k/a  
COMPLETE, RANDY L.  
CLAY, RANDY MORGAN,  
KENNETH MURRAY, and  
KENNETH M. MURRAY,

Defendant-Appellant.

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Submitted November 14, 2022 – Decided December 14, 2022

Before Judges Mawla and Marczyk.

On appeal from the Superior Court of New Jersey, Law  
Division, Passaic County, Indictment Nos. 14-09-0783  
and 15-07-0598.

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

Camelia M. Valdes, Passaic County Prosecutor,  
attorney for respondent (Marc A. Festa, Senior  
Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

#### PER CURIAM

Defendant Randy Clay appeals from a March 18, 2021 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. After careful review of the record and the governing legal principles, we affirm in part, and vacate and remand in part for an evidentiary hearing.

In 2016, defendant was indicted and pled guilty to two counts of first-degree robbery, N.J.S.A. 2C:15-1(a)(1)(2); one count of second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); and one count of third-degree burglary, N.J.S.A. 2C:18-2, stemming from the robbery of two gas stations at gunpoint and stealing items from a local mini-mart.

Defendant was sentenced to an aggregate term of eighteen years in state prison, subject to an eighty-five percent parole ineligibility term under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. He was informed of his right

to appeal and signed a notice of appeal rights form. Defendant did not, however, file an appeal.<sup>1</sup>

Defendant subsequently filed a PCR application and raised several issues.<sup>2</sup> The PCR court conducted oral argument on March 18, 2021, and rendered an oral decision on the same date. The PCR application was denied, and this appeal followed.

Defendant raises the following points on appeal:

POINT ONE

THE PCR COURT ERRED IN DENYING [DEFENDANT] AN EVIDENTIARY HEARING AS TESTIMONY IS NEEDED FROM PRIOR COUNSEL EXPLAINING WHY HE FAILED TO EXPLAIN THE TERMS OF THE PLEA OFFER TO [DEFENDANT] AND WHY HE PRESSURED [DEFENDANT] TO

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<sup>1</sup> As noted below, defendant claims he asked his attorney to file an appeal, but no appeal was ever filed.

<sup>2</sup> Specifically, defendant argued: trial counsel did not investigate his case or interview witnesses to discern the validity of their statements; trial counsel failed to challenge the photo lineup identification evidence; trial counsel failed to file an appeal after being instructed to do so; trial counsel violated the attorney-client privilege; trial counsel coerced defendant into pleading guilty by promising a reduced sentence; the sentence was excessive; trial counsel only briefly met with defendant; defendant was never given Miranda warnings; trial counsel represented to defendant the judge would sentence him to no more than twelve years; and, trial counsel should have filed a motion to suppress the statements defendant made to police. 384 U.S. 436 (1966).

PLEAD GUILTY, THEREBY MAKING HIS PLEA  
UNKNOWNLY AND INVOLUNTARILY GIVEN.

POINT TWO

THE PCR COURT ERRED IN DENYING  
[DEFENDANT] AN EVIDENTIARY HEARING AS  
TESTIMONY IS NEEDED FROM PRIOR COUNSEL  
EXPLAINING WHY HE FAILED TO ACCURATELY  
RELAY THE TERMS OF THE PLEA OFFER TO  
[DEFENDANT].

POINT THREE

THE PCR COURT ERRED IN DENYING  
[DEFENDANT] AN EVIDENTIARY HEARING AS  
TESTIMONY IS NEEDED FROM PRIOR COUNSEL  
EXPLAINING WHY HE FAILED TO FILE A  
DIRECT APPEAL AS REQUESTED BY  
[DEFENDANT].

Defendant filed a supplemental pro se brief. We glean from it that defendant contends trial counsel failed to conduct a proper investigation concerning his identification as the suspect who committed the criminal offenses. He further claims defense counsel promised a reduced term at sentencing. He also alleges a violation of the attorney-client privilege and that he received an excessive sentence.

To succeed on a claim of ineffective assistance of counsel, defendant must establish, first, that "counsel's representation fell below an objective standard of reasonableness" and, second, "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984); see also State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the Strickland two-part test in New Jersey). When petitioning for PCR, a defendant must establish he is entitled to "PCR by a preponderance of the evidence." State v. O'Donnell, 435 N.J. Super. 351, 370 (App. Div. 2014) (citing State v. Preciose, 129 N.J. 451, 459 (1992)).

To establish a prima facie case of ineffective assistance of counsel, a defendant must present legally competent evidence rather than "bald assertions." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). The petition must allege specific facts sufficient to support a prima facie claim. Ibid. It must also present such facts in the form of admissible evidence. In short, the defendant must show the relevant facts through "affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." Ibid.; see also R. 3:22-10(c).

Simply advancing a PCR claim does not entitle a defendant to an evidentiary hearing. See Cummings, 321 N.J. Super. at 170 (citing Preciose, 129 N.J. at 462). Rather, an evidentiary hearing is required only when a defendant establishes a prima facie case in support of PCR; the court determines

there are disputed issues of material fact that cannot be resolved by review of the existing record; and the court determines an evidentiary hearing is required to resolve the claims asserted. State v. Porter, 216 N.J. 343, 354 (2013) (citing R. 3:22-10(b)).

"[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). 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) (quoting Toll Bros., Inc. 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. Guided by these standards, we address defendant's arguments.

We are not persuaded trial counsel failed to explain the terms of the plea offer, failed to accurately relay the terms of the plea offer, or improperly

pressured defendant into pleading guilty. An evidentiary hearing is not required on these issues.

Guilty pleas must be "voluntarily, knowingly, and intelligently" entered by defendants. R. 3:9-2. Here, defendant first argues prior counsel failed to adequately explain the terms of the plea offer, and, therefore, he could not enter the plea in compliance with this required standard. He also alleges his counsel led him to believe that by accepting the deal without moving forward with a motion to suppress, the judge would further reduce his sentence to a term of twelve to fifteen years, instead of the maximum eighteen years he received under the deal. Neither allegation is supported by the record.

During his plea hearing, the following exchange occurred between defendant and counsel:

Q. You understand that [the State] is asking that the judge[,] at the time of your sentence[,] sentence you to [eighteen] years in State Prison, [eighty-five] percent of which must be served before parole eligibility. Do you understand that?

A. Yes.

. . . .

Q. And you understand that if the judge was to impose an [eighteen]-year prison sentence according to the [eighty-five] percent chart you would serve [fifteen]

years, [three] months, and [nineteen] days before you're eligible for parole. Do you understand that?

A. Yes.

Defendant further testified he entered the plea voluntarily, without coercion or threat, and that he discussed the plea deal with counsel numerous times. Additionally, counsel clarified:

Q. . . . [Y]ou understand that there's been no representations made to you by either myself, the [c]ourt, or the prosecutor to go less than [eighteen] years. Do you understand that?

A. Yes.

Additionally, question twenty-one of the plea form indicates no other promises were made, and defendant executed this agreement. In short, the record directly contradicts defendant's claim. The PCR court correctly found that no prima facie case has been established, and an evidentiary hearing is not needed on these issues. This does not, however, end our inquiry.

We determine an evidentiary hearing should have been held regarding the issue of why prior counsel did not file an appeal. Defendant asserts he directed his former counsel to file a direct appeal, but no appeal was ever filed.

The failure to file a requested appeal constitutes ineffective assistance of counsel. Roe v. Flores-Ortega, 528 U.S. 470, 484 (2000) ("[W]hen counsel's



constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal."); State v. Perkins, 449 N.J. Super. 309, 311 (App. Div. 2017). When uncontradicted evidence—such as a certification that a defendant instructed counsel to file an appeal—is presented to the PCR court, the defendant has succeeded in establishing a prima facie claim of ineffective counsel. State v. Jones, 446 N.J. Super. 28, 34 (App. Div. 2016) (citing Flores-Ortega, 628 U.S. at 485).

Jones is particularly instructive here. In that matter, the defendant pled guilty to first-degree armed robbery and unlawful possession of a weapon, and was sentenced to a fifteen-year prison term with eighty-five percent parole ineligibility. Id. at 31. No appeal was taken. Ibid. Defendant subsequently filed a pro se PCR petition claiming ineffective assistance of counsel, in part based on his allegation he "told his attorney he wanted to file an appeal," but the attorney never filed an appeal. Ibid.

We rejected the PCR court's reasoning that, without an evidentiary hearing, Jones' claim was insufficient because he had not identified a claim that would have been "meritorious" on appeal. Id. at 32-34. We further held, in the context of failure to file a requested appeal, the PCR court was the improper

forum to apply the second prong of Strickland—whether counsel's deficiency actually prejudiced defendant. Ibid.

Here, the PCR court denied defendant's claim because at the time of sentencing, defendant received and signed his notice of appeal rights. The PCR court further determined defendant's argument that he should have been sentenced in the twelve-to-fifteen-year range "would not have been successful."

Although defendant complained of the sentence in his PCR application, there is no indication this was the only issue he wished to raise on appeal. We further observe under Jones and Flores-Ortega, the PCR court's reasoning is not sufficient to undo defendant's prima facie claim of ineffective assistance. Simply because defendant received information about his right to appeal is not dispositive of this issue. Rather, if defendant's allegation is truthful that his prior counsel failed to file an appeal when defendant requested that an appeal be filed, it would be ineffective assistance of counsel. Of course, this statement may not be accurate, which is why an evidentiary hearing is necessary because there is a fact issue that needs to be resolved.

Finally, to the extent we have not otherwise addressed defendant's arguments, they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed in part, and vacated and remanded in part for an evidentiary hearing. 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