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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3164-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RAHIYM R. WASHINGTON,
a/k/a RAHIYM WASHINGTON,
and RAHIYM R. WASHINGTON, JR.,

Defendant-Appellant.

Submitted May 16, 2022 – Decided May 26, 2022

Before Judges Fasciale and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment Nos. 17-08-2216, 17-08-2253 and 17-12-3417.

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

Theodore N. Stephens II, Acting Essex County Prosecutor, attorney for respondent (Hannah F. Kurt, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Rahiym Washington appeals from an order entered following a plenary hearing denying his petition for post-conviction relief (PCR) and motion in the alternative to vacate his guilty plea to third-degree terroristic threats. We have considered the record presented and defendant's arguments under the applicable legal principles. Unpersuaded, we affirm.

I.

In 2017, defendant was charged with five criminal offenses in three indictments arising from three separate incidents. The first indictment charged defendant with second-degree robbery, N.J.S.A. 2C:15-1(a)(1). The second indictment charged defendant with third-degree burglary, N.J.S.A. 2C:18-2(a)(1), third-degree attempted theft, N.J.S.A. 2C:5-1(a)(1) and N.J.S.A. 2C:20-3(a), and third-degree criminal mischief, N.J.S.A. 2C:17-3(a)(1). The third indictment charged third-degree terroristic threats, N.J.S.A. 2C:12-3(b).

In February 2018, defendant entered into a plea agreement with the State resolving the charges in the three indictments. Pursuant to the terms of the agreement, the second-degree robbery charge in the first indictment was amended to third-degree theft, N.J.S.A. 2C:20-3(a), and defendant pleaded guilty to the amended charge. He also pleaded guilty to the burglary and

criminal mischief charges in the second indictment, and to the terroristic threats charge in the third indictment. The State agreed to dismiss the remaining charge—attempted theft in the second indictment—and recommend defendant receive an aggregate five-year prison term, make restitution, and have no contact with the victims.

In pertinent part, during his plea proceeding defendant provided a factual basis supporting his guilty plea to terroristic threats. He testified that during a June 27, 2017 telephone call with the victim, he threatened her with the "intention . . . to place her in imminent fear of her safety." When asked about the threat he made, defendant testified, "I told her I was going to kill her."

Defendant also provided factual bases for the other offenses to which he pleaded. Based on defendant's testimony, the court found he committed the offenses and he pleaded knowingly, intelligently, and voluntarily after receiving the advice of competent counsel.

The court released defendant from custody pending sentencing but advised him that his release was conditioned on not "pick[ing] up any new charges" prior to sentencing. The court explained that if defendant was arrested while released pending sentencing, it could impose any sentence authorized by

law without regard to the limitations in the plea agreement. Defendant testified he understood those conditions of his release.

In April 2018, six weeks after his plea proceeding and while he was released pending sentencing, defendant was arrested for two counts of first-degree attempted murder, two counts of second-degree aggravated assault, one count of second-degree unlawful possession of a weapon, one count of second-degree possession of a weapon for an unlawful purpose, and one count of second-degree possession of a firearm during the commission of a controlled dangerous substance offense.¹

At defendant's September 2018 sentencing for the crimes to which he pleaded guilty, his counsel requested that the court impose the flat five-year sentence provided in the plea agreement even though counsel acknowledged defendant's arrest on new charges subjected him "to a sentence other than that which was agreed upon." The court considered the arguments of defendant and the State, made findings concerning the aggravating and mitigating factors under N.J.S.A. 2C:44-1, and noted defendant's arrest on other charges following the

¹ Following a jury trial on those charges, on January 17, 2020, the court sentenced defendant to a twenty-year prison term on his convictions for second-degree aggravated assault and second-degree possession of a firearm during a controlled dangerous substance offense.

acceptance of his plea allowed imposition of sentence not limited by the terms of the plea agreement. See State v. Subin, 222 N.J. Super. 227, 238-39 (App. Div. 1988).

The court imposed concurrent five-year sentences with two-and-one-half-year periods of parole ineligibility on the burglary and the amended theft charges. The court imposed a flat five-year concurrent sentence on defendant's conviction for terroristic threats. The court also directed that defendant make restitution and ordered the payment of mandatory fines and penalties. Defendant did not appeal from his convictions or sentence.

Defendant filed a timely pro se verified PCR petition and was assigned counsel. Defendant alleged his plea counsel was ineffective by failing to obtain a transcript of the June 27, 2017 phone call between himself and the alleged victim during which he allegedly committed the terroristic threats offense to which he pleaded guilty. Defendant claimed he was incarcerated at the time of the call and the transcript shows he did not threaten the alleged victim. He asserted that had his plea counsel obtained the transcript, he would not have pleaded guilty to the terroristic threats offense because the transcript demonstrated the State could not prove the elements of the charged offense. His

verified petition also suggested an allegation that his plea counsel coerced him into pleading guilty to the terroristic threats charge.

The court held an evidentiary hearing on defendant's ineffective assistance of counsel claim. Defendant's plea counsel was the only witness. The court subsequently entered an order denying defendant's PCR petition and his request in the alternative to vacate his guilty plea to terroristic threats.

In a written decision accompanying the order, the court first considered defendant's claim he is entitled to PCR because his plea counsel was ineffective. The court noted defendant claimed his counsel was ineffective: by failing to obtain, provide to him, and review with him a transcript of the telephone call during which he allegedly committed the terroristic threats offense charged in the third indictment, and to which he pleaded guilty; and by pressuring him to plead.

The court rejected defendant's claim his counsel was ineffective by failing to obtain and supply him with a transcript of the telephone call. The court noted plea counsel's testimony that she requested an audio recording of the call from the State, but she had not obtained it prior to defendant's agreement to plead. The court found plea counsel was not ineffective by not obtaining the transcript prior to defendant's plea because she spoke to defendant about the call,

defendant was therefore aware of what occurred during the call without a transcript or recording, and defendant did not deny he threatened the victim during the call. The court determined defendant failed to establish his plea counsel's performance was deficient, finding counsel made a reasonable strategic decision that obtaining the transcript of the telephone call, upon which the terroristic threats charge was founded, was unnecessary under the circumstances presented. The court concluded defendant did not establish his plea counsel was constitutionally ineffective, and it denied his PCR petition.

The court also considered and denied defendant's request to withdraw his guilty plea to terroristic threats under the four-factor standard established in State v. Slater, 198 N.J. 145 (2009). First, the court found defendant failed to assert a colorable claim of innocence and presented no competent evidence supporting a colorable claim of innocence. Second, the court concluded defendant's putative reasons for the withdrawal of his plea—that he was coerced by his counsel into pleading and was not provided with a transcript of the telephone call during which he allegedly committed the terroristic threats offense—"are anemic, self-serving, and vastly embroidered to serve his studied purpose." Third, the court noted defendant entered the plea pursuant to a negotiated agreement that provided a favorable resolution of all charges in the

three indictments. Last, the court found only minimal prejudice would accrue to the State if the plea was vacated. The court concluded that a weighing of the factors, all of which favored the State, required rejection of defendant's motion to withdraw his plea.

The court also found the transcript of defendant's plea proceeding, from which the court extensively quoted, established defendant entered his plea knowingly, voluntarily, and free of any coercion from his counsel. Defendant did not dispute his testimony during the plea proceeding established a factual basis supporting his guilty plea to terroristic threats, and the court found defendant "delivered a detailed and wholly satisfactory factual basis" for his plea to each of the offenses.

The court entered an order denying defendant's PCR petition and request to withdraw his guilty plea. Defendant appealed from the court's order, and presents the following arguments for our consideration:

POINT I

BECAUSE [DEFENDANT] RECEIVED
INEFFECTIVE ASSISTANCE OF COUNSEL, THE
PCR COURT ERRED IN DENYING
[DEFENDANT]'S PETITION FOR PCR.

A. Legal Standards Governing Applications For Post-
Conviction Relief[.]

B. Defense Counsel was Ineffective For Among Other Reasons In Failing to Obtain Discovery of the Jail Call and Failing to Provide that Discovery to Defendant.

C. Defense [C]ounsel was Ineffective in this Matter and Provided Inadequate Legal Representation in Violation of Defendant's Rights Guaranteed by the United States Constitution Amend. VI and the New Jersey Constitution.

POINT II

BECAUSE DEFENDANT DID NOT MAKE A KNOWING, INTELLIGENT, AND VOLUNTARY PLEA, THE PCR COURT ERRED IN DENYING DEFENDANT'S PETITION FOR PCR.

A. Legal Standards Governing Applications for Post-Conviction Relief.

B. Defendant Did Not Make a Knowing, Intelligent, and Voluntary Guilty Plea.

II.

Our review of a PCR claim after a court has held an evidentiary hearing "is necessarily deferential to [the] court's factual findings based on its review of live witness testimony." State v. Nash, 212 N.J. 518, 540 (2013); see also State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014) ("If a court has conducted an evidentiary hearing on a petition for PCR, we necessarily defer to the trial court's factual findings."). We review any legal conclusions of the trial court de novo. Nash, 212 N.J. at 540-41; 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 also applies to mixed questions of fact and law. Harris, 181 N.J. at 420.

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

In Strickland, the Court established a two-part standard, later found by our Supreme Court applicable under the New Jersey Constitution in State v. Fritz, 105 N.J. 42, 58 (1987), to determine whether a defendant was deprived of the effective assistance of counsel. Strickland, 466 U.S. at 687. Under the first prong of the Strickland standard, a petitioner must show counsel's performance was deficient. It must be demonstrated 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 . . . by the Sixth Amendment." Ibid.

Under the second prong of the Strickland standard, a defendant "must show that the deficient performance prejudiced the defense." Ibid. It must be

established there is 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)), and 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 a challenged conviction. Strickland, 466 U.S. at 687; Nash, 212 N.J. at 542; Fritz, 105 N.J. at 52. A failure to satisfy either prong of the Strickland standard requires the denial of a petition for PCR. Id. at 700.

Defendant's claim the PCR court erred by rejecting his assertion his plea counsel was ineffective is founded on a leap of logic premised on a putative transcript of the telephone call between himself and the alleged victim of the terroristic threats offense to which he pleaded. Defendant was charged with terroristic threats by threatening the victim during a June 27, 2017 phone call

defendant had with the victim while he was incarcerated. At the hearing on the PCR claim, plea counsel testified she requested a recording of the call from the State but had not received the recording prior to defendant's acceptance of the State's plea offer and entry of his guilty plea to the terroristic threats' offense. Defendant claims a transcript of a telephone call between himself and the victim he obtained during a separate and subsequent criminal proceeding against him shows he never threatened the victim during the call. Thus, defendant contends his plea counsel was ineffective by failing to obtain a transcript of the call prior to permitting him to plea to the terroristic threats charge because the transcript establishes the State could not have proven the charge against him.

Our difficulty with defendant's argument, and the reason we are compelled to reject it, is it is premised on purported facts that are wholly unsupported by any competent evidence. During the evidentiary hearing, defendant offered the purported transcript of the call upon which his PCR claim rests, and the court sustained the State's objection to its admission because defendant did not present any evidence the transcript is of the conversation between himself and the alleged victim during which he made the terroristic threats upon which the charge against him is based.

Indeed, when the PCR court inquired about the foundation for the requested admission of the transcript, defendant's counsel offered no evidence establishing the proffered transcript was of the call during which defendant allegedly communicated the threat for which he was charged in the indictment. Instead, counsel mustered only an argument, stating "if I'm correct that this is the jail call that is the subject of the indictment, which [defendant] pled to," it shows defendant did not threaten the victim. In other words, other than the hopeful surmise of PCR counsel, defendant produced no evidence the transcript upon which he relies is of the telephone call upon which the terroristic threats charge is based.

Additionally, defendant's sworn testimony provides compelling evidence the proffered transcript is not of the call upon which the terroristic threats charge is based. Defendant testified under oath at his plea hearing that he committed the crime of terroristic threats charged in the indictment by threatening to kill the victim, but the transcript defendant proffered includes no such threat. Thus, unless defendant falsely testified under oath at his plea hearing—a conclusion we have no basis to draw based on the evidence presented during the PCR hearing—it must be concluded the proffered transcript upon which defendant

relies is not of the telephone conversation during which defendant made the terroristic threat to which he pleaded.

"To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must present evidence sufficient to support a finding that the item is what its proponent claims." N.J.R.E. 901. Here, defendant argues the proffered transcript demonstrates he did not threaten the victim during the telephone call upon which the terroristic threats charge is based, but the record is bereft of any evidence that is the case. In addition, the PCR court could not properly consider the transcript because it determined the transcript was inadmissible, and defendant does not challenge the court's ruling on appeal.

Defendant had the burden of demonstrating by a preponderance of the evidence his plea counsel's performance was deficient and there is a reasonable probability that but for his counsel's alleged errors, the result of the proceeding would have been different. State v. Gaitan, 209 N.J. 339, 350 (2012). As our Supreme Court has explained, "[a]lthough a demonstration of prejudice constitutes the second part of the Strickland analysis, courts are permitted leeway to choose to examine first whether a defendant has been prejudiced, and if not, to dismiss the claim without determining whether counsel's performance

was constitutionally deficient." Id. at 350 (citation omitted). We choose first to consider the prejudice prong of the Strickland standard here.

Even assuming plea counsel's performance was deficient by opting not to obtain a recording or transcript of the telephone call between defendant and the victim during which defendant allegedly committed the terroristic threats offense charged in the indictment, defendant did not sustain his burden of establishing there is a reasonable probability that but for counsel's alleged error, the result of the plea proceeding would have been different, Gaitan, 209 N.J. at 350, or that it would have been rational for him to reject the plea offer and proceed to trial, Padilla, 559 U.S. at 372. That is because he makes no showing a recording or transcript of the telephone call upon which the terroristic threats charge was based would have established he did not threaten the victim or would have supported a defense to the terroristic threats charge.

As noted, defendant relied before the PCR court, and relies on appeal, solely on a transcript that was correctly deemed inadmissible by the PCR court. He does not otherwise cite to any other evidence supporting his claim that had his counsel obtained a transcript or recording of the call during which he allegedly committed the terroristic threats offense it would have made a difference in the proceeding before the plea court or in his decision to plead

guilty to terroristic threats. The record is therefore bereft of any evidence supporting a finding that had plea counsel obtained the transcript or recording of the call, there is a reasonable probability it would have been rational for defendant to have turned down the favorable plea offer and proceed to trial on the terroristic threats charge and the charges in the other two indictments. Padilla, 559 U.S. at 372; Nuñez-Valdéz, 200 N.J. at 139. Defendant's failure to sustain his burden under Strickland's prejudice prong alone required denial of his PCR petition.

Defendant also argues the court erred by denying his motion to vacate his guilty plea to terroristic threats. We will reverse a trial court's decision denying a "defendant's request to withdraw his [or her] guilty plea . . . only if there was an abuse of discretion which renders the lower court's decision clearly erroneous." State v. Lipa, 219 N.J. 323, 332 (2014) (quoting State v. Simon, 161 N.J. 416, 444 (1999)). "A denial of a motion to vacate a plea is 'clearly erroneous' if the evidence presented on the motion, considered in light of the controlling legal standards, warrants a grant of that relief." O'Donnell, 435 N.J. Super. at 372 (quoting State v. Mustaro, 411 N.J. Super. 91, 99 (App Div. 2009)).

Where, as here, a defendant moves to withdraw a guilty plea after sentencing, it must be demonstrated withdrawal is necessary to correct a manifest injustice. R. 3:21-1. In considering whether a withdrawal motion satisfies that standard, a court must consider and weigh the following four factors identified in Slater: "(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 whether withdrawal would result in unfair prejudice to the State or unfair advantage to the accused." 198 N.J. at 157-58 . "In all cases . . . 'the burden rests on the defendant, in the first instance, to present some plausible basis for his [or her] request, and his [or her] good faith in asserting a defense on the merits.'" Id. at 156 (quoting State v. Smullen, 118 N.J. 408, 416 (1990)).

The record supports the court's determination that none of the Slater factor's supports defendant's post-sentencing request to withdraw his guilty plea to the terroristic threats charge. In the first instance, defendant did not assert a colorable claim of innocence and, as a matter of fact, did not proclaim innocence at all. Instead, he argues only the inadmissible transcript of a purported telephone call between himself and the victim established he did not commit the offense charged in the indictment, and he therefore had a defense to the

terroristic threats charge. Again, and as noted, the transcript upon which he exclusively relies was not admitted in evidence, could not be properly considered by the PCR court or on appeal, and does not support his claim because he failed to demonstrate it is of the call during which he made the terroristic threat charged in the indictment.

For the same reason, the second Slater factor—the nature and strength of the reason for withdrawal—weighs against defendant's motion to withdraw his guilty plea. The only reason offered for the plea withdrawal motion is that the proffered transcript establishes he did not commit the charged offense, but the transcript was deemed inadmissible and is not part of the evidentiary record. Stated differently, there is no evidence that any transcript, including the one defendant proffered at the evidentiary hearing, shows defendant did not commit the terroristic threats offense charged in the indictment and to which he pleaded guilty. Thus, defendant failed to present any "fair and just reasons for the withdrawal." Slater, 198 N.J. at 159.

Although the third Slater factor—that the defendant pleaded guilty pursuant to a plea agreement—is not typically "given great weight in the balancing process," it also weighs against his plea withdrawal request. Slater, 198 N.J. at 160-61. Defendant pleaded guilty to terroristic threats as part of a

plea agreement that resolved three other charges in two other indictments as well.

The motion court found the fourth Slater factor—prejudice to the State—based on the passage of time affecting the State's ability to prosecute the matter. However, we note "[t]he State [was] not required to show prejudice" where, as here, "defendant fail[ed] to offer prove of other factors in support of the withdrawal of a plea." Id. at 162.

Based on our review of the record, and because none of the Slater factors supports defendant's request to withdraw his plea, we discern no basis to conclude the court abused its discretion in its finding and balancing of the Slater factors and in its denial of defendant's withdrawal motion.² We affirm the court's denial of defendant's request to withdraw his guilty plea.

² Defendant also suggests the court erred by denying his request to withdraw his plea because "there was no real factual basis for [his] plea to terroristic threats, because the jail call transcript clearly demonstrates that [he] did not threaten to kill [the victim] during the phone call on June 27, 2017." We reject the claim because the transcript upon which he relies was not admitted in evidence; he failed to present any evidence the transcript was of the call during which he communicated the threat charged in the indictment and to which he pleaded; and there was a factual basis for his guilty plea—he testified he threatened to kill the victim.

To the extent we have not expressly addressed any of defendant's remaining arguments, we are convinced they are 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