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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3423-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL D. GIBSON,

Defendant-Appellant.

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Submitted December 12, 2022 — Decided December 20, 2022

Before Judges Mawla and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 15-11-2211.

Joseph E. Krakora, Public Defender, attorney for appellant (Anderson D. Harkov, Designated Counsel, on the brief).

Bradley D. Billhimer, Ocean County Prosecutor, attorney for respondent (Samuel Marzarella, Chief Appellate Attorney, of counsel; Dina R. Khajezadeh, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Michael D. Gibson appeals from an April 20, 2021 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

We recounted the facts underlying defendant's conviction for first-degree robbery, N.J.S.A. 2C:15-1, and fourth-degree possession of an imitation firearm, N.J.S.A. 2C:39-4(e), in State v. Gibson, No. A-2871-16 (App. Div. July 16, 2019) (slip op. at 1-5). In that appeal, defendant alleged: The trial court erred when it did not charge the jury on attempted theft as a lesser-included offense to the robbery; the court's instruction regarding the robbery was confusing, incomplete, and incorrect; and his sentence was excessive, and he should have received a ten-year term. Id. at 1-3. We rejected these arguments and upheld the convictions and defendant's sentence to eleven years of prison subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, for the robbery offense and a concurrent one-year term on the firearm offense. Id. at 11-12.

In 2020, defendant filed a PCR petition, re-asserting the grounds raised in the prior appeal. His petition also asserted trial counsel was ineffective for failing to: Participate in plea negotiations; file a motion to dismiss the robbery count of the indictment and a motion to suppress; and failing to argue

aggravating and mitigating factors at sentencing. He claimed these cumulative errors warranted granting the petition.

Judge Guy P. Ryan heard the PCR petition and issued a detailed written opinion. The judge noted we addressed and rejected the arguments related to the jury charges and the sentence, and defendant was procedurally barred from reasserting these arguments. Citing State v. Acevedo, 205 N.J. 40 (2011), the judge noted the sentencing argument was not cognizable as a PCR claim because he was not sentenced to a term exceeding the maximum penalty allowed by the Criminal Code for his offenses. N.J.S.A. 2C:43-6(a)(1) provides a sentencing range between ten and twenty years for first-degree offenses.

The judge found defendant's claims of ineffective assistance of trial counsel were bald assertions because he failed to "provide the court with the pretrial conference transcript or any certifications or affidavits to support [his] contention[s]." The judge noted defendant met with trial counsel and "agreed to continue to trial with his appointed counsel." Further, although defendant did not provide the pre-trial memorandum, the judge located it, provided it to the parties, and noted it reflected "the State tendered a plea offer on the record." The judge found "[d]efendant . . . failed to show he would have accepted the plea offer and would not have proceeded to trial, . . . nor has he certified he

requested his trial counsel to make any counteroffers to the State." Notwithstanding whether a counteroffer existed, the judge noted the State's offer was "a [twelve]-year sentence and defendant . . . received an [eleven-]year sentence after proceeding to trial, just one year above the minimum sentence . . . ."

Judge Ryan also noted defendant was indicted for another first-degree armed robbery charge under a separate indictment and "was facing significant exposure, including potential consecutive sentences on two robberies, committed on separate dates against separate victims." Therefore, his assertion trial counsel was ineffective because the matter was "ripe" for plea negotiations was "belied by the record given the gravity of the charges pending against him at the time . . . ." The State's plea offer disproved defendant's contention he had no alternative but to try his case. Defendant "failed to supply transcripts of the arraignment conference or any other status conferences where plea offers may have been placed [on] the record in [his] presence." The judge noted he afforded defendant more time to submit additional documents and transcripts regarding this contention, and defendant did not do so.

The judge rejected defendant's assertion trial counsel was ineffective for not pursuing a motion to dismiss the indictment on the robbery offense because

he failed to show how such a motion had merit, given the "abundant probable cause for the charges and more than sufficient evidence for the grand jury to return the indictment." Likewise, a suppression motion<sup>1</sup> would not have been meritorious because

[d]efendant entered a bank armed with a handgun. A customer watched him leave the bank, still armed, and enter a vehicle. The customer called police while following . . . defendant's vehicle. Police responded and stopped the vehicle. During a pat-down of defendant's companion, which was certainly justified, the companion told police a handgun was located . . . "under the mat in the back seat."

The judge rejected the sentencing arguments raised in the PCR petition, noting "[t]he sentencing transcript reveals defense counsel made an impassioned plea for leniency and fully apprised the judge of the information necessary to find mitigating factors." Counsel presented defendant's mother and aunt, who also argued for leniency. The trial court found mitigating factor two, N.J.S.A. 2C:44-1(b)(2), based on trial counsel's argument. Judge Ryan noted

[c]ounsel's argument for . . . mitigating factor two was extremely effective as that factor was not necessarily self-evident from the record. . . . Further, counsel convinced the judge to sentence defendant towards the

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<sup>1</sup> Aside from the suppression motion defendant argued counsel should have filed, trial counsel did file a motion to suppress defendant's video recorded statement to the police following his arrest, which the trial court denied.

low end of the range, despite the [S]tate's argument for [fifteen] years and the final plea offer of [twelve] years.

Defendant benefitted by trying the case and "[t]rial counsel also negotiated a concurrent and downgraded resolution of the second armed robbery indictment."

The judge rejected other arguments raised in the PCR petition, which are not pertinent to this appeal. He concluded because defendant had not established a prima facie case for PCR, no evidentiary hearing was necessary.

Defendant raises the following points on this appeal:

POINT ONE DEFENDANT'S PETITION FOR [PCR] SHOULD BE REMANDED WITH INSTRUCTIONS TO THE PCR COURT TO ORDER THE OFFICE OF THE PUBLIC DEFENDER TO APPOINT NEW PCR COUNSEL WHO WILL FULFILL HIS OR HER OBLIGATION TO PROVIDE DEFENDANT WITH THE EFFECTIVE ASSISTANCE OF COUNSEL (NOT RAISED BELOW).

POINT TWO THE PCR COURT ERRED WHEN IT FAILED TO GRANT DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT'S CONTENTION THAT TRIAL COUNSEL FAILED TO ENGAGE IN MEANINGFUL PLEA NEGOTIATIONS, WHICH RESULTED IN DEFENDANT BEING EXPOSED TO A SENTENCE I THE FIRST[-]DEGREE RANGE, WAS NOT CONTRADICTED BY THE RECORD BELOW AND WAS NOT REFUTED BY THE STATE.

POINT THREE THE FAILURE OF TRIAL COUNSEL TO ENGAGE IN MEANINGFUL PLEA

NEGOTIATIONS WITH THE GOAL OF REDUCING DEFENDANT'S SENTENCING EXPOSURE TO THE SECOND[-]DEGREE RANGE RESULTED IN DEFENDANT BEING SENTENCED TO A FIRST[-]DEGREE SENTENCE OF ELEVEN YEARS INSTEAD OF A SECOND[-]DEGREE SENTENCE OF BETWEEN FIVE AND TEN YEARS, THUS DEPRIVING DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

POINT FOUR TRIAL COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO REQUEST THE TRIAL COURT INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSES OF ATTEMPTED ROBBERY AND ATTEMPTED THEFT, NOT ONLY DEPRIVING THE JURY OF THE OPPORTUNITY TO FIND DEFENDANT GUILTY OF A LESSER-INCLUDED OFFENSE, BUT DEPRIVING DEFENDANT OF THE LOWER THRESHOLD OF APPELLATE REVIEW CONSISTENT WITH A REQUEST TO CHARGE AS OPPOSED TO PLAIN ERROR.

I.

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, 415-16 (2004) (alteration in original) (quoting Toll Bros., Inc. v. Twp. of W. Windsor, 173 N.J. 502, 549 (2002)). "If the court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to [PCR], . . . then an evidentiary

hearing need not be granted." State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013) (second alteration in original) (quoting State v. Marshall, 148 N.J. 89, 158 (1997)). 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 415-16 (citing Toll Bros., 173 N.J. at 549).

Ineffective assistance of counsel claims must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687-88 (1984), and adopted by the Supreme Court of New Jersey in State v. Fritz, 105 N.J. 42, 57-58 (1987). Under the first prong, a "defendant must show that counsel's performance was deficient" and counsel's errors were so egregious that they were "not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. The second prong requires a defendant to demonstrate the alleged defects prejudiced his right to a fair trial to the extent "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694; Fritz, 105 N.J. at 60-61 (internal quotation marks omitted).



A defendant seeking PCR must establish "by a preponderance of the credible evidence" they are entitled to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). They must allege and articulate specific facts, which "provide the court with an adequate basis on which to rest its decision . . . ." State v. Pennington, 418 N.J. Super. 548, 553 (App. Div. 2011) (citing State v. Mitchell, 126 N.J. 565, 579 (1992)). A defendant "must do more than make bald assertions that he was denied the effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

Guided by these legal principles, we affirm substantially for the reasons set forth in Judge Ryan's opinion. We add the following comments to address the arguments raised in Point One of defendant's brief, which were not contained in the PCR petition.

## II.

In Point One, defendant argues PCR counsel was ineffective for failing "to obtain a copy of the pretrial memorandum, the transcript of the pretrial conference, and the original trial file to determine if there were any plea negotiations conducted by trial counsel." He contends PCR counsel failed to investigate his contentions and, as a result, "had no chance of convincing" the

PCR judge trial counsel was ineffective for failing to engage in plea negotiations because the PCR petition "was not accompanied by a certification from PCR counsel that he examined the file and there was no evidence . . . ." Defendant seeks a remand, so new PCR counsel can be appointed for him.

"[W]hen counsel's decision to limit an investigation is supported by 'reasonable professional judgments,' [the reviewing court] will not find deficient performance." State v. Martini, 160 N.J. 248, 266 (1999) (citing Burger v. Kemp, 483 U.S. 776, 794 (1987)). If a "defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." Ibid. "[W]hen a petitioner claims his trial attorney inadequately investigated his 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." State v. Porter, 216 N.J. 343, 353 (2013) (alteration in original) (quoting Cummings, 321 N.J. Super. at 170).

We decline to find fault in PCR counsel's presentation of the petition because it is self-evident from the record that plea negotiations took place. Indeed, the record shows the State extended a plea offer greater than the ultimate

sentence imposition. The transcript of the pre-trial conference reveals trial counsel and the trial court reviewed the State's offer with defendant, and defendant acknowledged his potential exposure by proceeding to trial. When the trial court asked defendant if he understood that following the conference "all plea recommendations, any promises and things of that nature . . . [would be] off the table," defendant responded: "Yes[,] I do." These facts, including defendant's sentence to a term one year greater than the minimum sentence on the first-degree robbery offense, convinces us his claims of ineffective PCR counsel lack merit.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION