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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-0090-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WARREN STEPHENSON,

Defendant-Appellant.

Submitted March 21, 2023 – Decided July 13, 2023

Before Judges Sumners and Geiger.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Accusation No. 18-11-1168.

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

Carmelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Leandra L. Cilindrello, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Warren Stephenson pled guilty to an accusation charging him with three counts of first-degree robbery and, in accordance with the terms of the plea agreement, was sentenced in the second-degree range to three concurrent eight-year prison terms subject to the No Early Release Act, N.J.S.A. 2C:43-7.2. Defendant did not appeal his conviction or sentence, nor move to vacate his guilty pleas. Instead, he filed a petition for post-conviction relief (PCR), claiming his trial counsel was ineffective for: failing to seek a Wade¹ hearing to contest his photo lineup identification by the three robbery victims and an eyewitness; misrepresenting that his juvenile record would be considered at trial and his sentence would be five years; and forcing him to plead guilty. Defendant also sought an evidentiary hearing to prove his allegations.

Applying the two-prong test established in Strickland v. Washington, 466 U.S. 668, 687 (1984), that defendant must establish counsel's performance was deficient and the deficiency prejudiced defendant, the PCR judge entered an order and issued a written decision denying defendant's petition without an evidentiary hearing. The judge determined a Wade motion would not have been successful because the record did not indicate the photo lineup identifications were improper. The judge found the record did not support defendant's claim

¹ United States v. Wade, 388 U.S. 218 (1967).

that a Wade hearing was needed based on a "single photo show up." The judge pointed out "the affidavit of probable cause attached to the complaint indicates that . . . [the] victims and witness[] identified . . . defendant as the perpetrator through 'photo lineups.'" (Emphasis added). The judge thus ruled "counsel acted reasonably by not requesting a Wade Hearing" and securing a favorable plea offer due to "the general practice for prosecutors to escalate plea offers as the case is investigated and time goes on." And, relying on State v. Porter, 216 N.J. 343, 355 (2013), the judge found the claim was a bald assertion and defendant was not prejudiced.

Addressing defendant's claims that trial counsel was ineffective regarding his sentence, the PCR judge found them "speculative and conclusory." The judge noted there is no indication trial counsel incorrectly advised defendant of his sentencing exposure, and there is no affidavit supporting such claim. The judge found there was no indication counsel acted unreasonably in having defendant reach a plea agreement in which the prosecutor recommended an aggregate eight-year prison term, given defendant's plea colloquy demonstrated he understood the charges, the plea agreement, and the sentence exposure if he was found guilty. Citing State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009), the judge was "satisfied that any deficient performance by trial counsel in advising

. . . defendant of his sentencing exposure did not force . . . defendant to plead guilty."

Defendant appeals, contending:

POINT ONE

THE PCR COURT ERRED WHEN IT FAILED TO GRANT DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING BECAUSE THE INEXPLICABLE FAILURE OF PLEA COUNSEL TO INSIST THE STATE PROVIDE DISCOVERY OF THE OUT-OF-COURT IDENTIFICATION PROCEDURES SO HE COULD REVIEW THAT DOCUMENTATION WITH DEFENDANT AND DETERMINE IF THOSE PROCEDURES WERE IMPERMISSIBLY SUGGESTIVE AND SHOULD BE CHALLENGED IN A PRETRIAL MOTION, COULD ONLY BE EXPLORED IN AN EVIDENTIARY HEARING, ESPECIALLY BECAUSE THE LIMITED DISCOVERY AVAILABLE REVEALED EVIDENCE THAT THE IDENTIFICATION PROCEDURES CONDUCTED WERE SINGLE PHOTO SHOW-UPS.

POINT TWO

THE FAILURE OF PLEA COUNSEL TO DEMAND COMPLETE DISCOVERY OF THE OUT-OF-COURT IDENTIFICATIONS CONDUCTED BY LAW ENFORCEMENT IN ORDER TO DETERMINE WHETHER THE IDENTIFICATIONS WERE IMPERMISSIBLY SUGGESTIVE RESULTED IN DEFENDANT PLEADING GUILTY, AT THE URGING OF PLEA COUNSEL, WITHOUT A FULL UNDERSTANDING OF THE EVIDENCE AGAINST HIM, DEPRIVING DEFENDANT OF HIS

CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

We disagree and affirm substantially for the reasons set forth in the PCR's judge's written decision denying relief to defendant. We add the following comments.

When a claim of ineffective assistance of counsel is based on the failure to file a Wade motion, the defendant must prove the out-of-court identifications are inadmissible and would result in a successful motion. See State v. Fisher, 156 N.J. 494, 501 (1998) ("[W]hen counsel fails to file a suppression motion, the defendant not only must satisfy both parts of the Strickland test but also must prove that his Fourth Amendment claim is meritorious." (citing Kimmelman v. Morrison, 477 U.S. 365, 375 (1986))); State v. Roper, 378 N.J. Super. 236, 237-238 (App. Div. 2005) (inadequacy not shown where counsel failed to file a meritless suppression motion). Defendant has not shown the out-of-court identifications by the victims and eyewitness were impermissibly suggestive. Defendant argues trial counsel failed to obtain discovery supporting the affidavit of probable cause that photo lineups had been conducted. However, defendant failed to show that a Wade motion would have been successful because he did not show what discovery would have revealed.

When a claim of ineffective assistance of counsel relates to a guilty plea, a defendant must satisfy two criteria to set aside the plea based on ineffective assistance of counsel. Núñez-Valdéz, 200 N.J. at 139. The defendant must demonstrate: "(i) counsel's assistance was not 'within the range of competence demanded of attorneys in criminal cases'; and (ii) 'that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial.'" Ibid. (alteration in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)). "A reasonable probability is a probability sufficient to undermine the confidence in the outcome." Strickland, 466 U.S. at 694. The defendant must also show that doing so "would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010). Accord Núñez-Valdéz, 200 N.J. at 139.

Defendant has not demonstrated a Wade motion would have been successful or that he was impermissibly coerced or pressured to plead guilty to render his plea involuntary. Thus, his claim is without merit.

Finally, because defendant failed to establish a prime facie case of ineffective assistance of counsel, the PCR judge did not abuse his discretion in rejecting defendant's request for an evidentiary hearing. See State v. Preciose, 129 N.J. 451, 462 (1992) (ruling a court reviewing a PCR petition based on

claims of ineffective assistance has the discretion to grant an evidentiary hearing if a defendant establishes a prima facie showing in support of the requested relief.); R. 3:22-10(b) ("[a] defendant shall be entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of [PCR]"). Moreover, there were no disputed issues as to material facts regarding defendant's entitlement to PCR that could not be resolved based on the existing record. See Porter, 216 N.J. at 354.

Affirmed.

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



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