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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0255-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN MADERA,

Defendant-Appellant.

Submitted November 10, 2022 – Decided February 10, 2023

Before Judges Gooden Brown and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law
Division, Essex County, Indictment No. 18-04-1066.

Joseph E. Krakora, Public Defender, attorney for
appellant (James D. O'Kelly, Designated Counsel, on
the briefs).

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

PER CURIAM

Defendant appeals from the June 1, 2021 Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm in part and remand for further proceedings consistent with this opinion.

I.

We glean these facts from the record. Defendant and his brother were charged in an Essex County indictment with second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2 and 2C:15-1 (count one); two counts of first-degree robbery, N.J.S.A. 2C:15-1 (counts two and seven); first-degree felony murder, N.J.S.A. 2C:11-3(a)(3) (count three); first-degree murder, N.J.S.A. 2C:11-3(a)(1) to (2) (count four); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b) (count five); and two counts of second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a) (counts six and eight). The charges stemmed from defendant's involvement in the armed robbery of two individuals in Newark on August 25, 2016, during which one of the victims was fatally shot.

On April 12, 2018, defendant entered a negotiated guilty plea to count two (armed robbery), count four as amended to charge first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1), and count five (unlawful possession of a handgun). During the plea colloquy, defendant admitted to fatally shooting the

victim in the chest during the August 25, 2016 robbery. Additionally, at the plea hearing, the trial judge reviewed the plea agreement with defendant, verified that defendant had completed the plea forms truthfully, explained what rights defendant waived by pleading guilty, confirmed defendant was not coerced into pleading guilty, and ensured that defendant was satisfied with his attorney's services. After determining that the requirements of Rule 3:9-2 governing the acceptance of guilty pleas were satisfied, the judge accepted the pleas. Subsequently, on June 4, 2018, the judge sentenced defendant in accordance with the plea agreement to an aggregate term of twenty years of imprisonment, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, and the Graves Act, N.J.S.A. 2C:43-6(c), and dismissed the remaining counts of the indictment on the State's motion. Although defendant was notified of his right to appeal during the sentencing, no appeal was filed.

Thereafter, on September 26, 2019, defendant filed a timely pro se petition for PCR, alleging he received ineffective assistance of counsel (IAC). In a supporting memorandum, defendant averred defense counsel, an Assistant Deputy Public Defender, "failed to provide adequate consultation and [pre-trial] investigation;" "failed to file any pretrial motions;" "[f]ailed to secure discovery of the lab and ballistic reports;" failed to "procure the appearance of an alibi

witness;" provided only "a cursory reading of his presentence report;" and provided "inaccurate information" about the timing of the return of the indictment.

Defendant also alleged defense counsel ignored his two requests to file a direct appeal—one request made in person and the other in writing. In support, defendant attached a copy of a letter addressed to defense counsel dated June 14, 2018, in which defendant "request[ed] that [counsel] file an appeal on [his] behalf." Defendant also submitted copies of earlier letters he had sent to the trial judge and the Office of the Public Defender (OPD) in which he complained that defense counsel was neglecting his case and discouraging him from going to trial despite his claim of innocence. Additionally, defendant submitted a letter from Nelson Rodriguez, a codefendant, in which Rodriguez recanted prior statements implicating defendant in the crimes. Previously, on December 7, 2017, Rodriguez had entered a negotiated guilty plea to second-degree conspiracy to commit robbery and had agreed to testify truthfully against defendant and his brother.

After the assignment of PCR counsel, defendant submitted an amended verified petition, a supplemental certification, and a counseled brief. In the supplemental certification, defendant averred that he told defense counsel he

was with his mother when the crimes occurred, but counsel refused "to take a statement from her . . . to provide an alibi and a possible defense at trial." Defendant also certified that his attorney "avoided all conversations" about Rodriguez's recantation letter "and pressured [him] into accepting a guilty plea" despite his "complaints to the [OPD]" expressing his desire "to go to trial." The counseled brief rebuffed any procedural bars to defendant's petition, requested an evidentiary hearing, and reiterated defendant's IAC arguments regarding trial counsel pressuring defendant to plead guilty, failing to investigate the alibi witness and the Rodriguez recantation letter, and failing to review discovery with defendant. The brief also incorporated by reference defendant's initial prose "claims and arguments" in accordance with State v. Webster, 187 N.J. 254 (2006). To further support defendant's petition, PCR counsel submitted a report from an investigator stating that defendant's mother confirmed she was with defendant in Newark from 2:00 pm to 3:00 pm on the day of the crimes attending "[defendant's] son[']s sixth birthday party."

The State submitted an opposing brief, arguing defendant's claims were procedurally and substantively barred. In support, the State submitted Rodriguez's December 7, 2017 plea transcript in which he disavowed his recantation letter while under oath. Additionally, the State asserted the crimes

occurred between 5:00 p.m. and 5:40 p.m. and submitted surveillance photos of defendant fleeing the scene at approximately 5:35 p.m., thereby debunking defendant's purported alibi defense. The State also argued "[i]t [was] . . . defendant's fault an appeal was never filed and no one else['s]." Apparently under the misperception that defense counsel was privately retained, the State asserted:

There was never any indication on the record during the plea or at sentencing that trial counsel would be filing an appeal on behalf of . . . defendant. . . . [D]efendant has not produced any retainer agreement in his PCR submission that trial counsel agreed to represent him during the appeal. If trial counsel was not retained to represent . . . defendant for the appeal, he cannot be ineffective for failing to file an appeal. The defendant had to file with the [OPD], not send a letter directly to trial counsel. . . . If trial counsel did not answer . . . defendant's letter, then . . . defendant should have attempted to find another lawyer or apply directly to the [OPD].

During oral argument, conducted on June 1, 2021, PCR counsel relied on his brief and defendant's pro se submissions, emphasizing the points raised in his brief. The State relied exclusively on its written submission. Thereafter, the PCR judge denied defendant's petition and request for an evidentiary hearing. In an oral opinion from the bench, the judge determined that defendant's IAC claims focused on four alleged deficiencies of defense counsel: (1) failure to

investigate and present a feasible alibi defense; (2) failure to investigate and present Rodriguez's recantation; (3) failure to thoroughly review discovery with defendant; and (4) pressuring defendant to plead guilty. Critically, the judge did not address defense counsel's failure to file an appeal or any of defendant's remaining pro se IAC arguments.

In rejecting the IAC claim regarding the alibi defense, the judge observed defendant offered no "competent evidence" that the crimes "took place . . . between 2 p.m. and 3 p.m. on August 25[, 2016,]" when he was purportedly with his mother, while "the State present[ed] almost overwhelming evidence in the police reports" that the crimes occurred between 5:00 p.m. and 5:40 p.m. The judge also rejected PCR counsel's suggestion that the 2:00 p.m. to 3:00 p.m. timeframe was "slightly off" and concluded defendant's alibi-related arguments were "specious."

Likewise, the judge rejected defendant's IAC claim regarding Rodriguez's recantation letter. The judge noted that during "[Rodriguez's] plea colloquy," Rodriguez had "disavowed his original recantation" and averred the recantation was "extracted through threats to harm his family." The judge also stated defendant did not submit any evidence regarding the likely content of any

"further recantation" by Rodriguez or any basis for holding an evidentiary hearing on the recantation issue.

The judge similarly rejected defendant's argument regarding defense counsel's alleged "failure to review discovery with him," noting defendant "d[id] not identify any [overlooked] discovery" or explain how the failure to review the same "prejudiced him." As further support, the judge pointed to defendant's "plea allocution" during which defendant testified under oath that he had no questions and was satisfied with defense counsel's representation.

Likewise, the judge concluded defendant's contention that defense counsel pressured him into pleading guilty was based only on his own "vague and bald assertions," which were also belied by the plea allocution. Citing State v. Nuñez-Valdéz, 200 N.J. 129 (2009), the judge emphasized that to establish IAC following a guilty plea, a defendant must show that counsel's performance was deficient and that, but for the deficient performance, he would not have pleaded guilty. Although the judge concluded defense counsel's performance was not deficient, he reasoned that even if defense counsel had pressured defendant into accepting the plea bargain, defendant did not demonstrate that it would have been rational to reject the State's offer, given the State's agreement to reduce the murder charge to aggravated manslaughter and defendant's resulting "avoidance

of a sentenc[ing] exposure of life [imprisonment]."¹ The judge entered a memorializing order and this appeal followed.

On appeal, defendant raises the following points for our consideration:

POINT I

TRIAL COUNSEL'S FAILURE TO FILE A DIRECT APPEAL AS REQUESTED BY DEFENDANT REQUIRES AN ORDER AUTHORIZING DEFENDANT TO FILE AN OUT-OF-TIME NOTICE OF APPEAL.

POINT II

THE PCR JUDGE'S FAILURE TO ADJUDICATE ALL OF DEFENDANT'S PCR CLAIMS REQUIRES A REMAND.

POINT III

AS DEFENDANT HAS SHOWN THAT TRIAL COUNSEL PROVIDED INEFFECTIVE LEGAL REPRESENTATION, HE WAS ENTITLED TO POST-CONVICTION RELIEF

(1) PCR Counsel's Claim That Trial Counsel Was Ineffective For Failing To Investigate A Letter Written By Co-Defendant Rodriguez Which Stated That

¹ Although defendant did not move to withdraw his guilty plea as part of the requested relief, the PCR judge considered the factors governing plea withdrawal motions articulated in State v. Slater, 198 N.J. 145, 150 (2009), and determined the factors weighed against defendant. See State v. O'Donnell, 435 N.J. Super. 351, 368-72 (App. Div. 2014) (distinguishing a motion to withdraw a guilty plea from a PCR petition based on IAC).

Defendant Was Innocent And That The State Had Forced Him To Make A False Statement.

(2) PCR Counsel's Claim That Trial Counsel Was Ineffective For Failing To Investigate An Alibi Witness.

(3) PCR Counsel's Claim That Trial Counsel Was Ineffective For Failing To Sufficiently Review The Case Discovery With Defendant.

(4) PCR Counsel's Claim That Trial Counsel Was Ineffective For Pressuring Defendant To Plead Guilty.

II.

In Point I, citing Roe v. Flores-Ortega, 528 U.S. 470 (2000), defendant argues that defense counsel's failure to abide by his request to file a direct appeal "must result in an order authorizing defendant to file an out-of-time notice of appeal." Additionally, defendant points to this court's precedents, including State v. Perkins, 449 N.J. Super. 309, 311 (App. Div. 2017), where we held that a defense attorney's "failure to file a direct appeal when requested by the defendant is presumed prejudicial and constitutes [IAC]." Defendant asserts that although "[t]he PCR judge did not address or resolve this specific claim," he raised the argument in his pro se petition, which was incorporated in PCR counsel's supplemental brief. Defendant also points out that during the PCR

proceedings, the State did not dispute that he had requested defense counsel to file a direct appeal.

In Flores-Ortega, the United States Supreme Court held that IAC claims involving counsel's failure to file a notice of appeal are evaluated under the two-part test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Flores-Ortega, 528 U.S. at 476-77. Under that standard, "[a] defendant claiming [IAC] must show (1) that counsel's representation 'fell below an objective standard of reasonableness,' and (2) that counsel's deficient performance prejudiced the defendant." Ibid. (citation omitted) (quoting Strickland, 466 U.S. at 688, 694). Applying that standard to a defense attorney's failure to file an appeal, the Court held that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable," id. at 477, and "when 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," id. at 484. See also Peguero v. United States, 526 U.S. 23, 28 (1999) ("[W]hen counsel fails to file a requested appeal, a defendant is entitled . . . to an appeal without showing that his appeal would likely have had merit." (citing Rodriguez v. United States, 395 U.S. 327, 329-30 (1969))).

In State v. Carson, 227 N.J. 353, 354 (2016), observing that Flores-Ortega "is controlling case law," our Supreme Court remanded a case where a defendant's appointed counsel had ignored his request to file an appeal. Ibid. In overturning the trial court's and this court's conclusion "that defendant could not demonstrate prejudice because he could not show that the result would have been any different had he appealed," the Court determined that "defense counsel's deficient performance deprived [the] defendant of his right to appeal." Ibid. The Court therefore ordered that the defendant be permitted to "file an appeal of his conviction and sentence as within time" within forty-five days of the order. Id. at 355.

Similarly, in State v. Jones, 446 N.J. Super. 28 (App. Div. 2016), we "reverse[d] the denial of post-conviction relief and exercise[d] original jurisdiction in permitting [a] defendant the right to file a notice of appeal" because "the PCR judge did not apply the principles enunciated in Flores-Ortega." Jones, 446 N.J. Super. at 37-38 (footnote omitted). We held that the "[d]efendant's sworn statement that he directed his attorney to file an appeal was undisputed and, in that circumstance, prejudice is presumed." Id. at 30. We elaborated:

[I]t is only when a defendant has not conveyed his wishes regarding the filing of an appeal that we

consider "whether counsel's assistance was reasonable considering all the circumstances," and whether counsel's deficient performance "actually cause[d] the forfeiture of the defendant's appeal[.]" Because the prosecution did not dispute that defendant directed his attorney to file an appeal and because the PCR judge did not apply Flores-Ortega's presumption of prejudice in light of that undisputed fact, we reverse.

[Id. at 33-34 (first alteration in original) (citations omitted) (quoting Flores-Ortega, 528 U.S. at 478, 484).]

In Perkins, we addressed whether a PCR judge who found a defense attorney's performance deficient for not filing an appeal could "authorize the filing of an untimely notice of appeal." 449 N.J. Super. at 312. We held "that where a PCR judge finds that an appeal was sought by defendant and not filed due to counsel's ineffective assistance, the judge has the authority to afford defendant a forty-five[-]day period to file an appeal." Id. at 312-13.

Here, defendant certified in his pro se PCR petition that he requested that defense counsel file an appeal and that counsel failed to do so. He also submitted a copy of his written request to counsel to file an appeal. Although the State now contends "it is unclear whether . . . defendant instructed his attorney to file an appeal," the State did not dispute that defendant had made the request during the PCR proceedings. Instead, the State had argued that defendant did not offer evidence to show that defense counsel was obligated to file an appeal. Under

these circumstances, we are satisfied that defense counsel's performance in failing to file an appeal as requested by defendant was deficient and defendant was presumptively prejudiced by counsel's failure to file an appeal. See Jones, 446 N.J. Super. at 30.

It is unclear why the PCR judge did not consider this aspect of defendant's IAC claim. Nonetheless, because defendant's certification regarding defense counsel's failure to file an appeal was undisputed, the PCR judge should have granted the petition and afforded defendant forty-five days to file a direct appeal. See Perkins, 449 N.J. Super. at 312-13.

It is equally unclear why the PCR judge failed to consider defendant's remaining pro se IAC claims. In Point II, defendant asserts that the judge's failure in this regard violates the principles enunciated in Webster, 187 N.J. at 257-58. In Webster, the Court held that a PCR counsel's brief "must advance the arguments that can be made in support of the petition and include defendant's remaining claims, either by listing them or incorporating them by reference so that the judge may consider them." 187 N.J. at 257. The Webster Court noted that "the brief filed by the Public Defender did not refer to or incorporate the arguments contained in [the] defendant's pro se petition" and that "the [PCR] judge did not comment in any way on [the] defendant's remaining claims." Id.

at 258. Because it was "not clear . . . that [the judge], in fact, considered" all of the defendant's arguments, the Court remanded the matter for a new PCR hearing. Ibid.

Here, PCR counsel's brief incorporated by reference the arguments in defendant's pro se petition. Therefore, the judge was obligated to consider defendant's pro se IAC arguments, including defense counsel's failure to file a direct appeal. However, the judge's oral opinion and memorializing order show that he did not do so. That oversight provides additional grounds for a remand. See ibid.

In Point III, defendant renews his IAC claims that were squarely rejected by the PCR judge, arguing that defense counsel "was ineffective for failing to investigate a letter written by co-defendant Rodriguez, failing to investigate an alibi defense, failing to sufficiently review the case discovery with defendant and pressuring defendant to plead guilty."

Under the two-part Strickland test, which was adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987),

to set aside a plea based on IAC, "a defendant must show that (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."

[State v. Aburoumi, 464 N.J. Super. 326, 339 (App. Div. 2020) (alteration in original) (quoting Nuñez-Valdéz, 200 N.J. at 139).]

"Moreover, to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010).

"Where, as here, the PCR court has not conducted an evidentiary hearing, we review its legal and factual determinations de novo." Aburoumi, 464 N.J. Super. at 338. As a matter of procedure, the mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing; rather, it is within the PCR court's discretion to conduct such a hearing, State v. Preciose, 129 N.J. 451, 462 (1992) (citing R. 3:22-10), and we review that decision for abuse of discretion, State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013). Trial courts should grant evidentiary hearings and make a determination on the merits only if the defendant has presented a prima facie claim of IAC, material issues of disputed fact lie outside the record, and resolution of the defendant's claims necessitates a hearing. R. 3:22-10(b). "A prima facie case is established when a defendant demonstrates 'a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately

succeed on the merits.'" State v. Porter, 216 N.J. 343, 355 (2013) (quoting R. 3:22-10(b)).

Here, we reject defendant's claims and affirm substantially for the reasons stated by the PCR judge in his oral opinion. The judge correctly determined that defendant failed to establish a prima facie claim of IAC under the two-part Strickland test and that an evidentiary hearing was unwarranted. In sum, we affirm the judge's denial of PCR and an evidentiary hearing based on defendant's claims that his attorney was ineffective in connection with the recantation letter, the alibi defense, reviewing the case discovery, and pressuring defendant to plead guilty.

However, we remand the matter for the PCR judge to evaluate defendant's pro se IAC claims that were not previously considered, with the exception of the claim that defense counsel was ineffective for failing to file an appeal as defendant had requested. Because an appeal was sought by defendant and not filed due to counsel's ineffective assistance, following the conclusion of the remand proceedings, the judge is directed to afford defendant a forty-five-day period to file a direct appeal from the underlying convictions and sentence. We express no opinion as to the merit or lack of merit of any of the pro se claims to be considered by the judge.

Affirmed in part; remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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

A handwritten signature in black ink, appearing to be 'JWA', is written over the typed name of the clerk.

CLERK OF THE APPELLATE DIVISION