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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0430-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DEVON A. JACKSON,

Defendant-Appellant.

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Submitted March 21, 2023 – Decided April 3, 2023

Before Judges Sumners and Geiger.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment Nos: 13-01-0094, 13-03-0837, 15-02-0279, 15-02-0338, and 15-03-0582, and Accusation No. 16-01-0016.

Joseph E. Krakora, Public Defender, attorney for appellant (Monique Moyse, Designated Counsel, on the brief).

William E. Reynolds, Atlantic County Prosecutor, attorney for respondent (Katrina M. Koerner, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Devon A. Jackson appeals from the denial of his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm substantially for the reasons expressed by Judge Sara Beth Johnson in her comprehensive letter opinion.

Defendant was charged with numerous offenses in five indictments and one accusation. Judge Johnson provided the following summary of the underlying undisputed facts in each of those matters:

Indictment No. 13-01-0094: On October 23, 2012, Atlantic City police ("ACPD") patrolling the "Back Maryland" section of the city observed a black Mazda with an expired inspection sticker. Police recognized [defendant] and another passenger from previous interactions, and they observed what they believed to be suspicious movement inside the vehicle. Police conducted a motor vehicle stop and smelled burned marijuana when the driver opened the vehicle. A crowd began to form, and the police removed all occupants from the vehicle, including [defendant]. [Defendant] admitted to smoking marijuana to the police, and they obtained consent from the driver to search the vehicle. Police recovered [controlled dangerous substances (CDS)] from the search of the vehicle, and all four occupants were arrested. At the station, [defendant] was found to be in possession of cocaine, he was charged on a summons, and released.

Indictment No. 13-03-0837: On January 1, 2013, Tropicana Hotel and Casino security officers reported to a physical altercation in which [defendant] was involved. As [defendant] was pulled out of the fight by security, a handgun fell from his waistband. It was

picked up by a bystander, who then gave it to a security officer, and [defendant] engaged in a struggle with the officer to take back the gun. The gun was ultimately recovered by the officer, and [defendant] was taken into custody by casino security. ACPD arrested [defendant], and he was later transferred to the Atlantic County Justice Facility from which he was eventually released on bail.

Indictment No. 15-02-0279: On September 30, 2014, New Jersey State Police officers were returning stolen property to a store in Atlantic City when they noticed a taxi van in the McDonald's parking lot occupied by individuals they believed were acting suspiciously. After moving to obtain a better view of the inside of the taxi, officers observed a black male hand a small plastic bag to a white male. The white male exited the taxi, and the officers stopped both him and the taxi. The white [male] admitted to purchasing narcotics from the taxi occupant, who was identified as [defendant]. Both men were charged on summonses in connection with the suspected narcotics transaction.

Indictment No. 15-02-0338: On September 12, 2014, ACPD police reported to a residence on Baltic Avenue where they believed they could find [defendant], who was wanted in connection with a shooting. [Defendant] was located at the residence, and officers searched the apartment after obtaining consent from the legal occupant. The search revealed suspected marijuana and a loaded [.45-caliber] semi-automatic handgun, which had been reported as stolen out of Connecticut. [Defendant] was charged and held on bail.

Indictment Number 15-03-0582: On August 11, 2014, ACPD responded to a shot spotter call, which revealed two female victims who had been shot in the legs. The victims described the incident as a drive-by shooting

from a burgundy-colored vehicle. The victims were interviewed the next day at the hospital and could not identify the shooter. There was a third shooting victim, A.A., who was interviewed by police and provided no information.

A confidential informant (CI) witnessed the shooting and identified [defendant] as the shooter. Several surveillance cameras placed the dark burgundy vehicle in the area at the time of the shooting. Another CI reported [defendant] was boasting about shooting A.A., as well as the bystanders, and a warrant was issued for the [defendant's] arrest. As set forth above, he was arrested approximately one month later.

Accusation No.16-01-0016: On July 2, 2015, 17-year-old T.S. contacted the ACPD Criminal Investigation Section and reported that her ex-boyfriend, [defendant], had video recorded them engaged in consensual intercourse without her permission. T.S. denied giving [defendant] permission to record her or to post the video on social media. She advised police she had seen the video, but it had been removed from the [defendant's] Twitter account. Based on T.S.'s statements, a warrant was issued and executed on July 9, 2015.

[(footnote omitted).]

Defendant waived his right to a grand jury presentment of the charges alleged in the accusation. Pursuant to a negotiated plea agreement, defendant pleaded guilty to the following ten offenses:

- Indictment No. 13-01-0094: third-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(3);

- Indictment No. 13-03-0837: second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b);
- Indictment No. 15-02-0279: third-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(b)(3);
- Indictment No. 15-02-0338: second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b);
- Indictment No. 15-03-0582: three counts of second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1), and one count of second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); and
- Accusation No. 16-01-0016: third-degree invasion of privacy-recording sex act without consent, N.J.S.A. 2C:14-9(b), and invasion of privacy-disclosure of image of a sex act without consent, N.J.S.A. 2C:14-9(c).

At the plea hearing, defendant acknowledged he was pleading guilty because he was guilty, was doing so voluntarily without being forced or threatened, and that he read and understood the plea forms and his answers on those forms were truthful. Both Judge Johnson and the plea hearing judge found that defendant provided a factual basis for each of the charges he pled guilty to. Following a lengthy colloquy regarding the terms of the plea agreement, the plea judge found that defendant entered the plea knowingly, intelligently, and voluntarily.

On April 15, 2016, defendant was sentenced in accordance with the plea agreement to an aggregate seven-year term, subject to the mandatory periods of parole ineligibility and parole supervision imposed by 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). All terms ran concurrently. The remaining charges were dismissed. Defendant did not file a direct appeal from his convictions or sentence.

On March 25, 2019, defendant filed a timely uncounseled PCR petition. Counsel was appointed to represent him and filed a certification of defendant, brief, and appendix. Defendant alleged trial counsel was ineffective during the plea negotiation process by failing to: (1) effectively communicate with defendant; (2) investigate the charges; (3) file motions to suppress defendant's statements and physical evidence; and (4) failing to argue applicable mitigating factors at sentencing. Defendant also claimed that trial counsel's cumulative errors constituted ineffective assistance of counsel. He claimed that his decision to enter a plea or go to trial was uninformed and based on trial counsel's deficient performance.

Following oral argument on February 11, 2021,<sup>1</sup> Judge Johnson issued a letter opinion denying the petition without an evidentiary hearing.<sup>2</sup> In her letter opinion, Judge Johnson reasoned that because defendant "ha[d] not articulated

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<sup>1</sup> As we discuss infra, the record does not include a transcript of the oral argument.

<sup>2</sup> The record does not include an order denying the petition.

sufficient facts supporting a prima facie claim of ineffective assistance of counsel, or asserted any material disputes supporting such claims, he [was]not entitled to either [PCR] or an evidentiary hearing." The judge rejected each of the arguments raised by defendant.

Regarding his claim that trial counsel failed to meet and consult with defendant to review and thoroughly discuss the merits of the charges brought against him, leaving him "ill advised as to whether or not to plea or go to trial," the judge found defendant

ha[d] not supported this argument with an affidavit, certification, or any other competent evidence establishing a reasonable probability that trial counsel failed to discuss these matters with [defendant]. And he has not offered anything showing that, but for that alleged failure, [defendant] would not have entered the multiple guilty pleas. As such, [defendant] has failed to meet the standard for relief required by Strickland, Fritz, and Preciose.<sup>3</sup> Considering this record, this court cannot find that trial counsel's pretrial communications with [defendant] failed to meet the standard of "reasonable competence;" nor can the court find that [defendant] was prejudiced by anything trial counsel did in this regard.

As to defendant's claim that trial counsel failed to conduct a thorough pretrial investigation, the judge explained:

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<sup>3</sup> Strickland v. Washington, 466 U.S. 668 (1984); State v. Fritz, 105 N.J. 42 (1987); State v. Preciose, 129 N.J. 451 (1992).

Trial counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary[.]" and the failure to do so may "render the lawyer's performance deficient." However, there is nothing before this court on which it could make such determination.

Specifically, [defendant] has set forth no specific facts – sworn in an affidavit or certification or otherwise – explaining the nature of the investigation that was purportedly neglected, let alone how such investigation would have affected the [defendant's] ultimate decision to plead guilty to ten different [second- and third-degree]-charges. Rather, [defendant] relies solely on what is properly characterized as a "bald assertion" of ineffective assistance of counsel, and he cannot meet his burden under the applicable standard. Accordingly, this argument does not warrant post-conviction relief.

[(citations omitted).]

Regarding defendant's claim that trial counsel's decision not to file suppression motions constituted ineffective assistance of counsel, the judge noted defendant must "establish that he was entitled to suppression of the evidence in question." Defendant contended that trial counsel should have filed motions to suppress a statement during a car stop, to suppress physical evidence (gun and CDS) seized by police, and to reveal the identity of a CI. Defendant asserted that trial counsel did not challenge the constitutionality of the traffic stop, identification, or the recovery of physical evidence. Defendant's counseled



brief did not discuss the grounds for suppressing the evidence or the need to identify the CI. Nor did his supporting certification.

After surveying the applicable Fourth Amendment legal principles for reviewing warrantless searches and the waiver of the Fifth Amendment right to remain silent, the judge reasoned:

Here, [defendant] asserts that there are multiple motions trial counsel could have filed, including motions to suppress statements and physical evidence, given the range of circumstances under which [defendant] was charged and arrested for various, serious offenses. [Defendant] complains that trial counsel "did not challenge the constitutionality of the traffic stop, identification, or the recovery of physical evidence," and he argues that "pursuing and prevailing on pre-trial motions could have significantly impacted the disposition of this matter, . . . in a manner much more favorable to [defendant]."

However, as with the other disputes raised here, [defendant] has provided no specific facts or detailed legal argument explaining (1) the precise number and nature of the motions that trial counsel failed to file on each of the charges, (2) the basis on which each of those motions could have been resolved in favor [of defendant], or (3) how such motions would have affected the [defendant's] ultimate decision to plead guilty. Thus, [defendant] has failed to meet the standard for relief required by Strickland, Fritz, Preciose, and [State v. Fisher, 156 N.J. 494 (1998)].

Moreover, as the New Jersey Supreme Court has noted, "[i]t is not ineffective assistance of counsel for

defense not to file a meritless motion," State v. O'Neal, 190 N.J. 601, 619 (2007).

This court reaches a similar determination, finding no basis to conclude that trial counsel's decision not to file one or more pre-trial motions failed to meet the standard of "reasonable competence." Nor does the court find that, under the circumstances, [defendant] was prejudiced by trial counsel's conduct in this regard.

As to defendant's claim that trial counsel's failure to argue mitigating factors at sentencing, particularly mitigating factor seven (no history of prior delinquency or criminal activity), N.J.S.A. 2C:44-1(b)(7), resulted in an excessive sentence, the judge first noted this argument was barred by Rule 3:22-5 because defendant did not take a direct appeal of his sentence. The judge then provided the following additional analysis:

Nevertheless, [the sentencing judge] followed the sentence recommendation offered by the State in connection with the plea agreement. Accordingly, this court cannot find that trial counsel's alleged failure to request the application of any [m]itigating [f]actor at sentencing would have resulted in the imposition of any sentence other than what the parties negotiated and agreed upon.

Furthermore, a review of the [defendant's] relevant Adult Presentence Report indicates that [defendant] was [twenty-one] years old at the time of his sentencing to [ten] separate indictable convictions and that he had been adjudicated delinquent [four] times prior thereto. In light of the [d]efendant's history, this court cannot find that trial counsel's decision not to

assert [m]itigating [f]actor [seven] at sentencing failed to meet the standard of "reasonable competence."

This argument does not warrant post-conviction relief.

[(footnote omitted).]

The judge also noted that effective October 19, 2020, the Legislature added mitigating factor fourteen, N.J.S.A. 2C:44-1(b)(14), applicable to youthful offenders "under [twenty-six] years of age at the time of the commission of the offense." Because defendant was sentenced on April 15, 2016, the judge concluded that resentencing was not required.

Lastly, the judge addressed defendant's "cumulative errors" argument. Defendant claimed that because of trial counsel's cumulative errors, he was "denied . . . his right to effectively participate in proceedings and make intelligent, voluntary, informed pre-trial decisions." Defendant contended this "left [him] without sound legal counsel and guidance." The judge rejected this argument, stating:

Again, [defendant] provides no evidence supporting this argument. Nevertheless, this court does not find that any of trial counsel's conduct complained about by [defendant] failed to meet the standard of "reasonable competence," and it does not find that [defendant] was prejudiced by his attorney's decisions or conduct in connection with his representation of [defendant] in the various matters.

For the reasons previously stated, this final argument is also without merit and does not support the extraordinary relief sought by [defendant].

The court further noted that during the plea hearing, defendant "expressly acknowledged satisfaction with his trial counsel's consultation and waived all potential defenses." This appeal followed.

Defendant raises the following points for our consideration:

I. THIS MATTER MUST BE REMANDED FOR ORAL ARGUMENT.

II. IN THE ALTERNATIVE, [DEFENDANT] IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT HIS ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO COMMUNICATE, INVESTIGATE, FILE PRETRIAL MOTIONS, AND ADVOCATE ADEQUATELY AT SENTENCING.

A.

We first address defendant's argument that we must remand for the PCR court to conduct oral argument, which he contends did not occur. We disagree.

"Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." State v. Afanador, 151 N.J. 41, 49 (1997) (citing State v. Preciose, 129 N.J. 451, 459 (1992)). "It is a safeguard to ensure that a defendant was not unjustly convicted." Ibid. (citing State v. McQuaid, 147 N.J. 464, 482

(1997)). It provides a final opportunity for a defendant to raise a legal error or constitutional issue, including violation of the right to the effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution, that may have caused an unjust result. State v. Hess, 207 N.J. 123, 144-46 (2011); see also Afanador, 151 N.J. at 49 ("Ordinarily, PCR enables a defendant to challenge the legality of a sentence or final judgment of conviction by presenting contentions that could not have been raised on direct appeal." (citing McQuaid, 147 N.J. at 482-83)).

We recognize that the decision "whether oral argument is granted on a petition for post-conviction relief remains within the sound discretion of the [PCR] court." State v. Mayron, 344 N.J. Super. 382, 387 (App. Div. 2001). Nevertheless, there is a strong presumption in favor of oral argument on an initial PCR petition. See State v. Parker, 212 N.J. 269, 282-83 (2012); Mayron, 344 N.J. Super. at 387-88. The presumption arises even if the submissions do not contain a specific request for oral argument. Parker, 212 N.J. at 283. which Oral argument should be allowed except in clearly meritless cases. Pressler & Verniero, Current N.J. Court Rules, cmt. 3 on R. 3:22-10 (2023).

When determining whether to grant oral argument, a PCR court should consider "the apparent merits and complexity of the issues raised . . . , whether argument of counsel [would] add to the written positions . . . , and in general, whether the goals and purposes of the post-conviction procedure are furthered by oral argument." Mayron, 344 N.J. Super. at 387. These factors should be assessed through a "generous lens" with "the view that oral argument should be granted." Parker, 212 N.J. at 282. If the PCR court determines that oral argument is unwarranted, it should "provide a statement of reasons that is tailored to the particular application, stating why the judge considers oral argument unnecessary." Ibid.

The judge noted that she heard oral argument on February 11, 2021. Inquiry reveals there was a virtual hearing on that date. Whether due to malfunctioning recording equipment, inadvertent deletion of the recording, or some other unknown reason, a transcript of the hearing is not available.

Importantly, there is no indication that the February 11, 2021 hearing involved testimony. Defendant has not submitted a certification stating there was no oral argument on that date. Nor has he submitted a certification of PCR counsel averring that additional or augmented arguments beyond those presented in the briefs were either made or intended to be made during the

hearing, much less submitting a certification supporting any such claim. Additionally, defendant has not submitted a statement of proceedings in lieu of transcript pursuant to Rule 2:5-3(f).

Defendant's petition, counseled brief, and supporting certification were submitted to the PCR court well in advance of the hearing date. "The petition shall be verified by defendant and shall set forth with specificity the facts upon which the claim for relief is based, the legal grounds of complaint asserted, and the particular relief sought." R. 3:22-8. "Counsel should advance all of the legitimate arguments requested by the defendant that the record will support." R. 3:22-6(d). Defendant did not submit an amended petition or post-hearing supplemental briefing raising any new or expanded claims. The judge considered each argument raised and briefed by defendant, made detailed findings of fact, and reached conclusions of law by applying the applicable legal principles to those facts. On appeal, defendant does not allege PCR counsel was ineffective. No new ineffective assistance of counsel claim is raised on appeal.

The issues raised by defendant in his supporting certification were fully briefed by PCR counsel in his eighteen-page brief. Under these circumstances, we discern no need to remand for oral argument or to reconstruct the record. See In re Guardianship of Dotson, 72 N.J. 112, 117 (1976) (recognizing that

"verbatim reconstruction of [an] entire record is not [always] necessary for full and complete appellate review.").

B.

We next address the merits of defendant's PCR arguments. We affirm the denial of defendant's petition substantially for the reasons expressed by Judge Johnson in her well-reasoned letter opinion. We add the following comments.

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee a defendant in a criminal proceeding "the right to the effective assistance of counsel." State v. Nash, 212 N.J. 518, 541 (2013) (quoting Strickland, 466 U.S. at 686). The two-prong Strickland/Fritz test is used to determine whether a defendant has been deprived of the effective assistance of counsel.

To satisfy the first prong, the defendant must show counsel's performance was deficient by demonstrating 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 the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687-88.

To satisfy the second prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of



the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Gideon, 244 N.J. 538, 550-51 (2021) (alteration in original) (quoting Strickland, 466 U.S. at 694). "Prejudice is not to be presumed." Id. at 551 (citing Fritz, 105 N.J. at 52). "The defendant must 'affirmatively prove prejudice.'" Ibid. (quoting Strickland, 466 U.S. at 693).

When a guilty plea is involved, a defendant must show "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. Nuñez-Valdéz, 200 N.J. 129, 139 (2009) (alteration in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)). "In other words, 'a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.'" State v. Aburoumi, 464 N.J. Super. 326, 339 (App. Div. 2020) (quoting State v. O'Donnell, 435 N.J. Super. 351, 371 (App. Div. 2014)). "The petitioner must ultimately establish the right to PCR by a preponderance of the evidence." O'Donnell, 435 N.J. Super. at 370.

We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004). The de novo standard of review also applies to mixed questions of fact and law. Id. at 420. "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 338-39 (citing State v. Jackson, 454 N.J. Super. 284, 291 (App. Div. 2018)); accord State v. Alvarez, 473 N.J. Super. 448, 455 (App. Div. 2022) (citing Harris, 181 N.J. at 421).

The mere filing of a PCR petition does not automatically entitle a defendant to an evidentiary hearing. Instead, Rule 3:22-10(b) provides:

A defendant shall be entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of post-conviction relief, a determination by the court that there are material issues of disputed fact that cannot be resolved by reference to the existing record, and a determination that an evidentiary hearing is necessary to resolve the claims for relief. To establish a prima facie case, defendant must demonstrate 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.

Consequently, if "an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to post-conviction relief" or "the defendant's allegations are too vague, conclusory, or speculative . . . an evidentiary hearing need not be granted." State v. Marshall, 148 N.J. 89, 158 (1997).

Based on our careful review of the record, we conclude that the judge's factual findings are fully supported by the record and her legal conclusions are

consonant with applicable legal principles. Our careful review of the record likewise reveals that defendant's arguments lack merit.

Notably, at no point has defendant set forth the grounds for the suppression of the statement he made or the gun and CDS seized during the car stop, much less demonstrated that suppression of that evidence would have been granted had a suppression motion been filed. Similarly, defendant has not shown the need for revealing the identity of CI or that a motion to reveal his or her identity would have been successful. Regarding mitigating factor seven, defendant had a 2014 municipal court conviction for threatening violence and four adjudications of juvenile delinquency for simple assault, theft by unlawful taking, and two counts of unlawful possession of a firearm. He violated juvenile probation five times. He was only twenty-one years old when sentenced. Any argument that mitigating factor seven applied would have been unsuccessful.

We find no basis to disturb the denial of PCR. Judge Johnson correctly determined that defendant failed to establish a prima facie case of ineffective assistance of trial counsel and that an evidentiary hearing was unwarranted.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION