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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0823-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PAWEL S. PIECHACZEK,
a/k/a PAUL PIECHACZEK,

Defendant-Appellant.

Submitted December 20, 2022 – Decided January 23, 2023

Before Judges Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law
Division, Bergen County, Indictment No. 18-06-0568.

Joseph E. Krakora, Public Defender, attorney for
appellant (Frank J. Pugliese, Designated Counsel, on
the briefs).

Mark Musella, Bergen County Prosecutor, attorney for
respondent (Edward F. Ray, Assistant Prosecutor, on
the brief).

PER CURIAM

Defendant Pawel S. Piechaczek appeals from a Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

The judge made the following findings. While at the home of his former girlfriend and co-parent, J.B., defendant produced a taser and pointed it at J.B. during an argument. J.B. called for her sister, who entered the room. Defendant then pointed an unloaded, CO2 powered pellet rifle at the two women and pulled the trigger. J.B. called the police. As defendant was exiting the residence, he fired the taser, deploying the taser barbs. Neither woman was struck.

Shortly thereafter, police located defendant in the area. He was carrying a CO2 powered pellet rifle and possessed two CO2 powered pellet handguns, a taser (without barbs), a taser stun gun, two box cutters, pellet gun ammunition, and numerous carbon-dioxide cartridges. A search of defendant's home revealed numerous other weapons, including several additional CO2 powered pellet guns, which were seized.

Defendant was initially charged on a complaint-warrant. On May 3, 2018, he appeared at a pre-indictment conference in Early Disposition Court (EDC). The State offered to recommend a five year-term, subject to a 42-month period of parole ineligibility, pursuant to the Graves Act, N.J.S.A. 2C:43-6(c), in

exchange for a guilty plea to second-degree possession of a firearm for an unlawful purpose. Defendant followed defense counsel's recommendation to reject the offer.

On June 13, 2018, a grand jury returned a twenty-count indictment charging defendant with: third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count one), second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count two); third-degree terroristic threats, N.J.S.A. 2C:12-3(a) (count three); fourth-degree aggravated assault by pointing a firearm, N.J.S.A. 2C:12-1(b)(4) (count four); third-degree unlawful possession of a firearm, N.J.S.A. 2C:39-5(c)(1) (count five); two counts of third-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(2) (counts six and seven); and thirteen counts of second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b) (counts eight to twenty).

On July 2, 2018, defendant, represented by different counsel, was arraigned on the indictment. The State extended a revised plea offer of a five-year term, subject to a 42-month period of parole ineligibility on count two and a concurrent five-year term, subject to a five-year period of parole ineligibility on count nine. At the next conference, defense counsel mentioned a

counteroffer. The State responded by stating its plea "offer will go up [on] the next date if defendant doesn't take it."

At the final disposition conference on September 7, 2018, defendant's third attorney proposed that defendant plead to "a straight gun charge" rather than a certain persons offense and be sentenced to a five-year term with a 42-month period of parole ineligibility. The State rejected the proposal.

At a subsequent status conference, defense counsel mentioned that a Miranda¹ motion may be filed and was warned by the State that its plea offer would be rescinded if any motions were filed. The rejection of defendant's application to Drug Court was also discussed.

On February 15, 2019, defendant entered a guilty plea to counts one and nine in exchange for a recommended five-year term on count one and concurrent five-year term, subject to a five-year period of parole ineligibility, on count nine, with the other eighteen counts to be dismissed at sentencing. During the plea hearing, defense counsel stated defendant

didn't think these types of [CO2 powered] guns came under certain persons but we showed him the law and unfortunately for him he accepts that and you know the law now that you do qualify under the law -- even this type of weapon, a pellet gun, not a traditional pistol or

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

anything like that, we showed you, we've gone through the law thoroughly, right Pawel?

Defendant: Yes.

In response to a question by the court, defendant indicated that he was satisfied with counsel's services. At the conclusion of defendant's testimony, the court found that he had entered his plea "voluntarily, knowingly, intelligently" and that defendant was satisfied with his attorney's services.

On March 29, 2019, defense counsel was relieved as counsel by the court. A fourth defense counsel appeared for defendant and reported to the court that she had discussed the matter with the assigned assistant prosecutor and that "[t]he State is not willing to remove the certain persons charge, so therefore, the five with five is as low as we can get." Counsel then asked for an adjournment of sentencing as defendant sought to explore an application to withdraw his plea. During an appearance on May 6, 2019, counsel reported that defendant wanted to withdraw his plea and that she would be filing a motion to do so. Counsel also candidly indicated to the court that she did not see a meritorious basis for the motion but would comply with defendant's wishes. Two days later, counsel filed a motion to withdraw defendant's guilty plea.

On May 13, 2019, defendant decided not to withdraw his guilty plea. The following colloquy took place:

Court: You did file a motion to vacate your plea. It's my understanding you want to withdraw that motion today and proceed with sentence, is that correct?

Defendant: Yes, your Honor.

Court: And is that based on your conversation with Ms. Lowe?

Defendant: It is, yes.

Court: All right. Just so we're clear, do you understand if I granted your motion that doesn't end the case, it means that you'd have to answer all these charges and you could be found guilty and sentenced to a lot more, do you understand all that?

Defendant: I do.

The court found defendant's decision to withdraw his motion to vacate his plea was made "knowingly and voluntarily, . . . based on consultation with new counsel, Ms. Lowe." The motion was dismissed, and the court proceeded with sentencing. Ms. Lowe's remarked:

Judge, as Your Honor knows, I wasn't the attorney who negotiated this plea, [defendant] had a private attorney initially, but we have spoken, he and I, many times, [defendant] and I in the jail, in the circle and I've done my best to just explain to him all his options and the potential consequences of those options and I do believe that he finally made a decision that is in his best interest and I believe that he's comfortable with that decision.

Defendant did not address the court further during sentencing. The court found aggravating factors three (risk defendant will commit another offense), six (extent of defendant's prior criminal record), and nine (need for deterrence). N.J.S.A. 2C:44-1(a)(3), (6), and (9). The court also found mitigating factor eleven (imprisonment would entail excessive hardship), N.J.S.A. 2C:44-1(b)(11), and that the aggravating factors outweighed the mitigating factor. Defendant was sentenced in accordance with the plea agreement to a five-year term, subject to a five-year period of parole ineligibility on count nine and a concurrent five-year term on count one.

Defendant appealed his sentence, claiming it was excessive. The appeal was considered on a sentencing calendar pursuant to Rule 2:9-11. We affirmed the sentence, concluding "the sentence [was] not manifestly excessive or unduly punitive and [did] not constitute an abuse of discretion."

On July 23, 2020, defendant filed a timely PCR petition that alleged ineffective assistance of counsel. Counsel was appointed to represent defendant. Counsel filed an amended PCR petition, defendant's certifications, and a supplemental brief on behalf of defendant.

Defendant argued that plea counsel's assistance was ineffective primarily due to his pressuring defendant to plead guilty, failing to develop any defenses

and not negotiating for a lower sentence. Secondly, defendant argued that counsel at sentencing advised him to withdraw his motion to withdraw his plea and proceed to sentence and failed to argue mitigating or aggravating factors at sentencing.

Following oral argument, Judge Carol N. Catuogno issued an order and seventeen-page opinion dated September 16, 2021, denying PCR without an evidentiary hearing. Based on her detailed findings, the judge found defendant did not satisfy either prong of the test for PCR adopted in Strickland v. Washington, 466 U.S. 668, 687 (1984) and State v. Fritz, 105 N.J. 42, 58 (1987).

The judge found defendant's allegations were "too vague, conclusory, or speculative to warrant an evidentiary hearing." State v. Marshall, 148 N.J. 89, 158 (1997). The judge noted that defendant testified that no one forced, threatened, or twisted his arm to make him plead guilty. The judge elaborated that defendant's certifications "contain a series of contradictory allegations."

For example, the judge noted:

[defendant's] initial handwritten certification in support of this petition, he states that at EDC, the deputy assistant public defender representing him told [defendant] that the "first offer of 5 years with a 42 month stip was high and I don't have to take it." In [defendant's] second certification, [he] claims counsel "advised me to decline." [Defendant] originally certifies that sentence counsel "told me that it would be

difficult to withdraw my plea and if I actually did the prosecutor would try for 15 years." In his subsequent certification, [defendant] states that sentence counsel "told me to withdraw my motion."

The judge found there were "no credible facts in dispute, merely bald assertions of ineffectiveness." Thus, an evidentiary hearing was not warranted. The court explained that nothing supported the claim that defendant was pressured to accept the plea offer. The judge further found that defense counsel advised defendant to accept the plea offer, but did not pressure him to do so. And this advice, did not fall "below the objective standard of reasonableness" given the charges and sentencing exposure defendant was facing.

The judge also found that defendant's claim that counsel had no meaningful conversations with him was "belied by his own testimony at the plea hearing affirming that he and plea counsel went 'through the law thoroughly.'" Regarding the certain persons offenses, the judge noted defendant failed to even allege what a defense might be. Moreover, motion practice would further escalate the plea offer. The judge further found defendant failed "to credibly establish that sentence counsel pressured him in any way to withdraw the plea." Finally, the judge found the failure to argue the aggravating and mitigating factors did not render counsel ineffective because defendant was sentenced

pursuant to a plea agreement to the minimum mandatory sentence on the certain persons offense and a concurrent term on count one.

As to the prejudice prong, the court found defendant did not suffer any prejudice since counsel was not ineffective. Moreover, defendant "failed to even allege 'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' Hill [v. Lockhart], 474 U.S. 52, 59 (1985)]."

This appeal followed. Defendant argues the PCR court erred in denying an evidentiary hearing since he presented a prima facie case of ineffective assistance of EDC counsel, plea counsel, and sentencing counsel, both individually and cumulatively, and there were material issues of disputed facts lying outside the record that necessitated an evidentiary hearing.

Both the amended petition and defendant's merits brief make clear that defendant is not seeking to vacate his pleas and go to trial. He merely seeks to "accept the State's initial plea offer" that was rejected during the EDC appearance. He claims that the State's initial plea "offer was declined due to counsel's ineffectiveness" and "fundamental fairness dictates that his convictions and sentence be vacated and that he be allowed to accept the State's

initial plea offer of [five] years with a 42-month parole bar in exchange for a plea of guilty to second-degree possession of a firearm for an unlawful purpose."

Defendant raises the following points for our consideration:

I. DEFENDANT PRESENTED A PRIMA FACIE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT EARLY DISPOSITION COURT. [DEFENDANT'S] CLAIM IS SUPPORTED BY MATERIAL ISSUES OF DISPUTED FACTS LYING OUTSIDE THE RECORD. THE RESOLUTION OF THE DISPUTED FACTS NECESSITATED AN EVIDENTIARY HEARING. THE PCR COURT ERRED IN FAILING TO CONDUCT SUCH A HEARING.

II. THE BAR OF [RULE] 3:22-4 CONCERNING THE OPPORTUNITY TO RAISE CERTAIN ISSUES PREVIOUSLY DOES NOT APPLY TO DEFENDANT'S CASE.

A. The Issue Concerning the Ineffectiveness of Counsel at Early Disposition Court Could Not Have Been Raised on Direct Appeal.

B. Applying the time Bar Contained in [Rule] 3:22-4 Would Result in a Fundamental Injustice and Would Be Contrary to the Constitutions of the United States and the State of New Jersey.

III. THE PCR COURT ERRED IN DENYING AN EVIDENTIARY HEARING AND POST-CONVICTION RELIEF BECAUSE DEFENDANT'S PLEA COUNSEL AND SENTENCING COUNSEL INDIVIDUALLY AND CUMULATIVELY RENDERED INEFFECTIVE ASSISTANCE.

We affirm substantially for the reasons expressed by Judge Catuogno in her comprehensive written 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. Strickland, 466 U.S. at 687.

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." Id. 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." Marshall, 148 N.J. at 158.

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.

Defendant seeks to enforce the initial plea offer made by the State in EDC. He argues that but for EDC counsel's ineffectiveness, he would have accepted the offer. We find no factual or legal merit in that contention.

A plea offer is not enforceable if withdrawn before it is accepted. See State v. Williams, 277 N.J. Super. 40, 47 (App. Div. 1994) ("[T]he State is free to withdraw from a plea agreement before the agreement is accepted by the court."). Moreover, "[u]nder standard contract law principles, a defendant's rejection of a plea offer operates as a termination of the defendant's right to accept the offer." Ibid. Consequently, "a defendant has no right to require the prosecutor to re-offer a plea which was rejected by the defendant." Ibid.

The record demonstrates that defendant was not improperly pressured or coerced into rejecting the initial plea offer and that he knowingly and voluntarily accepted the escalated plea offer extended by the State after he was indicted. We find no basis to set aside his plea or to enforce the initial plea offer.

We further note that defendant was indicted on twenty counts, including several second-degree offenses. The plea agreement imposed the mandatory minimum on count nine and his sentence on count one runs concurrently. The other eighteen counts were dismissed. If convicted at trial, he faced exposure to longer, consecutive terms. Given the circumstances, including the favorable terms of the plea offer he accepted, defendant has not demonstrated he "would not have pled guilty and would have insisted on going to trial." Nuñez-Valdéz,

200 N.J. at 139 (quoting DiFrisco, 137 N.J. at 457). Indeed, defendant does not even seek to proceed to trial.


Defendant also contends his sentence was excessive. Defendant challenged his sentence on direct appeal. As noted, we affirmed the sentence, concluding "the sentence [was] not manifestly excessive or unduly punitive and [did] not constitute an abuse of discretion." Defendant cannot relitigate that issue already decided on the merits in his direct appeal in this PCR proceeding. See R. 3:22-5 ("A prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any post-conviction proceeding brought pursuant to this rule or prior to the adoption thereof, or in any appeal taken from such proceedings.").

For these reasons, we find no basis to disturb the denial of PCR. The judge correctly determined that defendant failed to satisfy either prong of the Strickland/Fritz test and that an evidentiary hearing was unwarranted.

To the extent we have not addressed them, any remaining arguments made by defendant lack sufficient merit to warrant discussion in this 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