

RECORD IMPOUNDED

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0871-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RICHARD BRIGGS, a/k/a
RICHARD BRIGGS, III,

Defendant-Appellant.

Submitted December 20, 2022 – Decided February 15, 2023

Before Judges Messano and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 16-10-0855.

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

Jennifer Webb-McRae, Cumberland County Prosecutor, attorney for respondent (Stephen C. Sayer, Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Richard Briggs appeals from an August 10, 2021 order denying his petition for post-conviction relief (PCR) following a limited hearing. We affirm.

I.

In July 2016, defendant was charged in a Cumberland County indictment with four offenses stemming from the sexual assault of his friend's nine-year-old daughter: first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1) (count one); second-degree sexual assault, N.J.S.A. 2C:14-2(b) (count two); third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(1) (count three); and fourth-degree lewdness, N.J.S.A. 2C:14-4(b)(1) (count four).

The trial court thereafter denied defendant's motion to dismiss count one. At the conclusion of the motion hearing on January 20, 2017, defendant's retained attorney advised he was "trying to locate an intoxication expert" to evaluate defendant and explore a voluntary intoxication defense. See N.J.S.A. 2C:2-8(a) (providing voluntary intoxication is only a defense if it negates an element of the offense charged). Accordingly, the court granted defendant's request for a two-month adjournment of the next status conference.

On April 7, 2017, defendant pled guilty to count two. During the plea proceeding, defendant testified he reviewed discovery with his attorney, discussed potential defenses and motions, discussed the probable outcome of a trial, reviewed the plea form and supplemental form for sexual offenses, and initialed and signed the forms where required. Defendant further stated he was satisfied with his attorney's services and was not forced or pressured to sign the plea forms.

At sentencing, defendant's attorney urged the court to impose a sentence in accordance with the plea agreement. In mitigation, counsel noted the psychological evaluation conducted by the Adult Diagnostic and Treatment Center (ADTC) indicated defendant "[wa]s not a repetitive, compulsive offender." The court found aggravating factors three (the risk defendant will commit another offense) and nine (general deterrence), N.J.S.A. 2C:44-1(a)(3) and (9), were in equipoise with mitigating factors six (defendant agreed to pay restitution) and seven (lack of prior criminal record), N.J.S.A. 2C:44-1(b)(6) and (7). Pursuant to the terms of the negotiated plea agreement, the court sentenced defendant to an eight-year prison term, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, and the reporting requirements under Megan's

Law, N.J.S.A. 2C:7-1 to -23, and dismissed the remaining charges. The judgment of conviction was issued on July 19, 2017.

On direct appeal, defendant only challenged his sentence, which this court heard on an excessive sentencing calendar pursuant to Rule 2:9-11. Rejecting defendant's contention that the court failed to properly weigh the aggravating and mitigating factors, we affirmed. State v. Briggs, No. A-3168-17 (App. Div. Dec. 3, 2018).

In December 2018, defendant filed a timely pro se petition for PCR, asserting plea counsel was ineffective for refusing to subpoena his text messages and those of the victim's mother, and failing to argue at sentencing for unspecified mitigating factors and "mention [his] ADTC tier report." In August 2019, defendant filed a pro se supplemental brief and appendix, asserting plea counsel failed to: keep him informed about the matter; interview the friend of the victim's mother; argue that defendant was "extremely intoxicated," thereby negating the purposeful and knowing elements of the offense; "consult with an intoxicant expert"; and challenge certain forensic reports. Defendant also claimed plea counsel discouraged defendant from exercising his right to trial.

With the assistance of appointed PCR counsel, defendant filed a supplemental brief, expounding upon defendant's contentions. PCR counsel

framed defendant's claims as the failure of plea counsel to: (1) move to withdraw defendant's guilty plea based on defendant's contention that his plea was contingent upon the consultation with an intoxication expert; (2) "argue mitigating factors at sentencing"; (3) "discuss trial strategy"; (4) "clearly explain and keep defendant promptly apprised of the status of the case"; and (5) "conduct an adequate investigation."

Immediately following oral argument, the PCR judge, who did not conduct the trial court proceedings, issued a decision from the bench. The judge denied all claims raised in defendant's petition without a hearing, except for defendant's assertion that his guilty plea was contingent upon his consultation with an intoxication expert.

On August 10, 2021, the PCR judge held a one-day evidentiary hearing. Defendant testified and presented the testimony of his former attorney. The State did not present any evidence.

Plea counsel, a certified criminal trial attorney, testified at length about the advice he rendered to defendant in this matter in view of the State's proofs and any possible defenses. Counsel explained he met with defendant and reviewed the indictment and discovery, including the victim's "very detailed account" of the incident. Noting the victim's prompt reporting and evidence of

"physical injuries . . . corroborated her allegation of anal and vaginal penetration," counsel "felt that the State had a very, very strong case." Moreover, defendant gave a statement to police, acknowledging he slept with and kissed the victim. Indeed, in his twenty-six years' experience as a prosecutor and twelve years' experience as a defense attorney, this matter was "one of the strongest child sexual assault cases" he had ever seen.

Because defendant said he only had two drinks the night of the incident, plea counsel thoroughly explained the law governing the voluntary intoxication defense. Shortly after the January 27, 2017 hearing, plea counsel located an intoxication expert, advised defendant that he could obtain an evaluation at his own cost, but expressed his "belief that [the defense] would not be successful." Counsel elaborated:

At that point in time, I had gotten the offer from twelve years' NERA to ten years' NERA down to eight years' NERA. I told [defendant] in my professional opinion, I didn't think the offer was going to get any better; and, that although he could be evaluated if he wanted to, before we resolved the case, I didn't think it would do any good.

Counsel told defendant that the victim's "recitation of what occurred was compelling evidence of purposeful or knowing conduct." Defendant "decided not to pursue any intoxication defense, not to be evaluated by an intoxication

expert, and to accept the State's offer . . . which meant he would have to serve six years, nine months, and [twenty-two] days, instead of serving twenty-five years" had he been convicted of first-degree aggravated sexual assault. See N.J.S.A. 2C:14-2(a)(1).

Denying he told defendant "he was free to change his mind," plea counsel testified they did not discuss withdrawing defendant's guilty plea. On cross-examination, counsel confirmed defendant never indicated "he was accepting the guilty plea contingent on the understanding that [counsel] would later file a motion to withdraw the guilty plea," and never asked counsel to do so.

Defendant's testimony was brief. Defendant claimed he had consumed "way more than two glasses of alcohol," and denied that plea counsel gave him "the name of an intoxication or toxicology expert." Although he acknowledged his "DNA was on the [victim's] underwear," defendant emphasized the tests performed on other samples were "unknown." On cross-examination, defendant stated he told the truth to the questions posed during the plea hearing.

At the conclusion of argument, the judge issued a cogent oral decision, thoroughly addressing defendant's contentions and the evidence adduced at the

hearing in view of the governing Strickland/Fritz framework.¹ Recounting plea counsel's testimony, which he found "extremely credible" in all respects, the PCR judge found plea counsel's trial strategy "was sound" and "the advice he gave was good."

Conversely, the judge discredited much of defendant's testimony about the advice plea counsel rendered. On the other hand, the judge noted on cross-examination defendant "indicated he told the truth at the plea hearing"; confirmed "he discussed the discovery in the case with his attorney"; and he "was aware of any motions that could have been made." Defendant further indicated "defenses were discussed"; "he was not forced to plead"; "his attorney answered all of his questions"; and "he was satisfied with the services of his attorney."

Based on that testimony, the PCR judge rejected defendant's contention that his guilty plea was not knowing and voluntary. Recognizing the plea offer in this case was "very favorable," the judge was convinced defendant would not

¹ Strickland v. Washington, 466 U.S. 668, 687 (1984) (recognizing to establish an ineffective assistance of counsel claim, a defendant must demonstrate: (1) "counsel's performance was deficient"; and (2) "the deficient performance prejudiced the defense"); State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the Strickland two-part test in New Jersey).

have rejected the offer. Because "there were no discussions at the time of the plea, or after" about defendant's desire to withdraw his guilty plea, the judge found no reason to determine "whether or not a Slater^[2] motion would have been granted." The judge entered a memorializing order denying PCR, and this appeal followed.

Defendant raises the following points for our consideration³:

POINT ONE

[DEFENDANT] IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT HIS ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO INVESTIGATE, REVIEW AND OBTAIN DISCOVERY, KEEP HIM INFORMED, AND DISCUSS HIS CASE AND DEFENSES WITH HIM, THEREBY PRESSURING HIM INTO A PLEA, AND ALSO BY FAILING TO ADVOCATE ADEQUATELY AT SENTENCING.

² State v. Slater, 198 N.J. 145, 157-58 (2009) (establishing four factors that the court should weigh in evaluating a motion to withdraw a guilty plea: "(1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant's reasons for withdrawal; (3) the existence of a plea bargain; and (4) whether withdrawal would result in unfair prejudice to the State or unfair advantage to the accused").

³ Defendant also filed a two-page "pro se supplemental brief," which is styled as a monologue to plea counsel, reiterating some of the grievances asserted in his PCR petition. Although defendant's brief failed to comply with Rule 2:6-2(a), we have nonetheless considered his contentions and conclude our disposition makes it unnecessary to address them separately, or they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

POINT TWO

[DEFENDANT] IS ENTITLED TO RELIEF ON HIS CLAIM THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY TELLING [DEFENDANT] THAT HIS PLEA WAS CONTINGENT ON THE REPORT OF AN INTOXICATION EXPERT AND THEN FAILING TO CONSULT WITH AN INTOXICATION EXPERT OR MOVING TO WITHDRAW HIS PLEA.

II.

A.

In his first point on appeal, defendant argues the PCR judge erroneously denied his petition without a hearing on his various claims for relief. Defendant's contentions are unavailing and require little comment.

Initially, defendant's assertion that plea counsel "fail[ed] to obtain text messages, toxicology reports, and interview witnesses who would have supported his defense," was wholly unsupported by the record, as the PCR judge found. See State v. Porter, 216 N.J. 343, 355 (2013) (recognizing a defendant's PCR petition must contain "specific facts and evidence supporting his allegations"); State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999) (holding when a defendant asserts his attorney has "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"); see also R. 1:6-6.

Secondly, although the PCR hearing was limited in scope, defendant's contention that plea counsel "fail[ed] to keep him informed and discuss his case and defenses with him, all of which pressured him into a plea he otherwise would not have taken" was thoroughly addressed at the evidentiary hearing. Plea counsel detailed his discussions with defendant, including the viability of any potential defenses, and the PCR judge credited counsel's testimony. Moreover, on cross-examination, defendant acknowledged that during his plea hearing he indicated he had "discussed with [counsel] any potential defenses or motions that could have been raised in [his] defense."

Nor are we persuaded by defendant's assertion that counsel's performance was deficient under State v. Hess, 207 N.J. 123, 154 (2012), for failing to address mitigating factors eight ("defendant's conduct was the result of circumstances unlikely to recur"); nine (defendant's character and attitude indicate the unlikelihood of committing another offense; and eleven (imprisonment would cause excessive hardship to defendant or defendant's dependents), N.J.S.A. 2C:44-1(b)(8), (9), and (11)). The PCR judge concluded defendant's argument was procedurally barred, having been raised on direct

appeal. See R. 3:22-5. However, the judge also considered the merits of defendant's argument and concluded he failed to demonstrate that his sentence would have been different. Strickland, 466 U.S. at 694.

While we part company with the PCR judge's reasoning that defendant's sentencing argument was procedurally barred,⁴ we discern no reason to disturb his decision. In this case, unlike in Hess, the plea agreement did not prohibit plea counsel from arguing the mitigating factors predominated or seeking a lesser sentence. 207 N.J. at 137-38. Here, the overall record reflects plea counsel was a zealous advocate for his client. He negotiated an extremely favorable plea bargain – despite the strength of the State's case – as noted by the PCR judge. Indeed, as part of the negotiated plea, the first-degree aggravated sexual assault charge was dismissed. Counsel also successfully convinced the State to reduce its offer to eight years' imprisonment, subject to NERA.

Because there was no prima facie showing of ineffective assistance of counsel on any of the claims asserted in point I, an evidentiary hearing was not

⁴ On direct appeal, we only considered whether the trial court erred in failing to properly weigh the aggravating and mitigating factors; we did not consider whether counsel's mitigation argument was ineffective. Thus, defendant's ineffective assistance of counsel claim is not procedurally barred pursuant to Rule 3:22-5; see also State v. McQuaid, 147 N.J. 464, 484 (1997) (recognizing "claims that differ from those asserted below will be heard on PCR").

necessary to resolve defendant's PCR claims. State v. Preciose, 129 N.J. 451, 462 (1992). We therefore discern no reason to disturb the judge's decision.

B.

Citing his own testimony at the hearing, defendant maintains he demonstrated plea counsel rendered ineffective assistance by advising defendant "his plea was contingent on the report of an intoxication expert and then failing to consult with such an expert." He therefore argues his plea was not made voluntarily, knowingly, and intelligently. Defendant also claims counsel was ineffective for failing to move to withdraw this guilty plea.

Having considered defendant's arguments in light of the applicable law, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). Given our deferential standard of review following an evidentiary hearing for PCR, State v. Nash, 212 N.J. 518, 540 (2013), we discern no reason to disturb the judge's findings, which were "supported by sufficient credible evidence in the record," State v. Pierre, 223 N.J. 560, 576 (2015). Indeed, the testimony adduced at the hearing fell far short of establishing the second Strickland prong. We therefore affirm substantially for the reasons stated by the PCR judge in his cogent oral opinion of August 10, 2021.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION