

RECORD IMPOUNDED

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

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-1577-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ERIC KIM,

Defendant-Appellant.

Submitted January 31, 2023 – Decided March 24, 2023

Before Judges Gilson and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 16-06-0755.

Joseph E. Krakora, Public Defender, attorney for appellant (Anthony J. Vecchio, Designated Counsel, on the brief).

Mark Musella, Bergen County Prosecutor, attorney for respondent (William P. Miller, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Eric Kim appeals the denial of his post-conviction relief (PCR) petition without an evidentiary hearing. Perceiving no abuse of discretion in Judge James X. Sattely's decision not to conduct an evidentiary hearing and agreeing with his finding that defendant did not establish a prima facie case of ineffective assistance of counsel, we affirm.

Defendant was indicted for crimes related to a robbery and sexual assault. A jury convicted him of second-degree robbery, N.J.S.A. 2C:15-1(a)(1); fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b), as a lesser-included offense of second-degree sexual assault; and disorderly persons simple assault, N.J.S.A. 2C:12-1(a)(1), as a lesser-included offense of third-degree aggravated assault. The jury found defendant not guilty of first-degree sexual assault during a robbery, N.J.S.A. 2C:14-2(a)(3).

On the robbery conviction, defendant was sentenced to an extended term of thirteen years in prison with parole ineligibility and supervision as prescribed by the No Early Release Act, N.J.S.A. 2C:43-7.2. He was sentenced to a concurrent term of eighteen months in prison for the criminal sexual contact conviction and a consecutive term of four months in prison for the disorderly persons conviction.

Defendant appealed his convictions and sentence, and we affirmed. State v. Kim, No. A-0552-17 (App. Div. Apr. 9, 2019). The Supreme Court denied defendant's petition for certification. State v. Kim, 240 N.J. 143 (2019).

In 2020, defendant filed pro se a PCR petition. His appointed counsel subsequently filed an amended verified petition. After hearing oral argument, Judge Sattely denied defendant's PCR petition in a twenty-one page decision and corresponding order.

Defendant raises the following arguments on appeal:

I. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CONDUCT AN ADEQUATE PRE-TRIAL INVESTIGATION.

II. TRIAL COUNSEL WAS INEFFECTIVE FOR PRESSURING DEFENDANT TO NOT TESTIFY.

III. THE PCR COURT ERRED IN NOT GRANTING DEFENDANT AN EVIDENTIARY HEARING.

We review the PCR court's legal and factual determinations de novo because it rendered its decision without an evidentiary hearing. State v. Harris, 181 N.J. 391, 419 (2004); State v. Aburoumi, 464 N.J. Super. 326, 338-39 (App. Div. 2020). As directed by our Supreme Court, we "view the facts in the light most favorable to the defendant." State v. Jones, 219 N.J. 298, 311 (2014); see also State v. Pak L. Chau, 473 N.J. Super. 430, 443 n.7 (App. Div. 2022).

When a defendant claims ineffective assistance of counsel as the basis for relief, he must satisfy the two-pronged test formulated in Strickland v. Washington, 466 U.S. 668, 687 (1984), which was adopted by our Court in State v. Fritz, 105 N.J. 42, 58 (1987). "First, the defendant must show that counsel's performance was deficient Second, the defendant must show that the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687. Bare assertions are "insufficient to support a prima facie case of ineffectiveness." State v. Blake, 444 N.J. Super. 285, 299 (App. Div. 2016) (quoting State v. Cummings, 321 N.J. Super. 154, 171 (App. Div. 1999)).

A petitioner is not automatically entitled to an evidentiary hearing. State v. Porter, 216 N.J. 343, 355 (2013); see also State v. Peoples, 446 N.J. Super. 245, 254 (App. Div. 2016) (holding "[t]he mere raising of a claim of [ineffective assistance of counsel] does not entitle the defendant to an evidentiary hearing"). We review under an abuse-of-discretion standard the PCR court's decision to proceed without an evidentiary hearing. State v. L.G.-M., 462 N.J. Super. 357, 365 (App. Div. 2020). Rule 3:22-10(b) provides a court should hold an evidentiary hearing on a PCR petition only if the defendant establishes a prima facie case in support of PCR, "there are material issues of disputed fact that cannot be resolved by reference to the existing record," and "an evidentiary

hearing is necessary to resolve the claims for relief." See also Porter, 216 N.J. at 354. "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.'" Id. at 355 (quoting R. 3:22-10(b)).

We affirm the order denying defendant's PCR petition substantially for the reasons set forth in Judge Sattely's comprehensive, written decision. Defendant contends the judge erred in rejecting his argument that his trial counsel was ineffective in that he failed to interview "key" witnesses who had provided statements to police on the scene. As Judge Sattely found, the statements provided by the witnesses were formal recorded interviews, which were accessible by trial counsel. Defendant did not even assert that additional interviews with the witnesses would have changed his trial strategy or altered the ultimate outcome of the trial. A blanket statement that counsel failed to do something is not enough to demonstrate entitlement to PCR.


Defendant argues the judge erred in failing to grant him PCR based on the pressure trial counsel purportedly placed on him not to testify and for failing to advise him about whether to testify. As Judge Sattely found, the trial record does not support defendant's argument. Defense counsel advised the trial court

he had discussed with defendant whether he wanted to testify. Defense counsel asked for additional time to discuss with defendant the decision whether to testify, and the court granted that request. After defendant met with counsel, the court explained to him his options regarding whether to testify. Defendant advised the court he had discussed those options with his counsel. The court asked defendant, "and what is your choice?"; defendant informed the court he had decided not to testify.

Finally, defendant contends the PCR judge erred in not granting him an evidentiary hearing. Given that defendant had failed to establish a prima facie showing of ineffective assistance of counsel or any other basis to support the holding of a hearing, Judge Sattely correctly held he was not entitled to an evidentiary hearing.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION