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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1584-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WALTER F. JAMES, a/k/a
DEREK JAMES,

Defendant-Appellant.

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Submitted February 28, 2023 – Decided June 30, 2023

Before Judges Messano and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment Nos. 18-10-1409 and 18-10-1410.

Joseph E. Krakora, Public Defender, attorney for appellant (Karen A. Lodeserto, Designated Counsel, on the brief).

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (Nancy A. Hulett, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Walter F. James appeals from a denial of his post-conviction relief (PCR) petition, which was decided without an evidentiary hearing. He argues the PCR judge should have conducted a hearing regarding his trial counsel allegedly coercing him into pleading guilty and his ineffective representation at sentencing. He also asserts we should remand the case because the PCR judge did not address defendant's argument regarding his trial counsel's failure to file a direct appeal. We remand the case so the PCR judge can address defendant's direct-appeal argument but otherwise affirm.

In 2018, a grand jury issued an indictment charging defendant with fourth-degree possession of a controlled dangerous substance (CDS), specifically marijuana, in a quantity of over fifty grams without a lawful prescription from a licensed practitioner, N.J.S.A. 2C:35-10(a)(3); third-degree possession with intent to distribute marijuana in a quantity of more than one ounce but less than five pounds, N.J.S.A. 2C:35-5(a)(l) and 2C:35-5(b)(11); second-degree possession with intent to distribute CDS, specifically marijuana, in an amount greater than one ounce but less than five pounds, while within 500 feet of a park, N.J.S.A. 2C:35-7.1; second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); second-degree possession of a firearm while possessing CDS with intent to distribute, N.J.S.A. 2C:39-4.l(a); third-degree receiving stolen

property, N.J.S.A. 2C:20-7, 2C:20-2(b)(2)(b); and fourth-degree unlawful possession of handgun ammunition, N.J.S.A. 2C:58-3.3(b). The grand jury issued another indictment, charging defendant with second-degree certain persons not to have a weapon, N.J.S.A. 2C:39-7(b)(1). The State subsequently dismissed the charges for second-degree unlawful possession of a weapon and fourth-degree unlawful possession of handgun ammunition.

On July 10, 2019, after a jury had been empaneled but before counsel gave their opening statements, the State and defendant entered into a plea agreement. Defendant agreed to plead guilty to the charge of second-degree possession of a firearm while possessing CDS with the intent to distribute and to the second-degree certain-persons charge. In return, the State agreed to recommend a sentence of seven-years imprisonment with a five-year period of parole ineligibility on the certain-persons charge and a concurrent sentence of seven-years imprisonment with a three-and-a-half-year period of parole ineligibility on the firearm-possession charge.

During the plea hearing, in response to questions from the trial judge, defendant confirmed he had signed the plea form, had read and understood the plea form, had reviewed "everything" with his lawyer, was satisfied with his lawyer's advice, and was agreeable to resolving the case. The trial judge asked

defendant if he understood he had the right to a jury trial and that by pleading guilty he was waiving that right. Defendant answered, "Yes." The judge asked defendant again if he wanted to plead guilty, stating "it's your call. . . . if you're on the fence here we can keep going with the jury trial . . . ." Defendant told the judge he was "tired" and "done." The judge told him, "it's really important . . . I have to make sure that you're doing this freely, voluntarily . . . ." Defendant repeated twice that he was "doing it freely" and was "doing it voluntarily." The judge reminded defendant he did not have to plead guilty and he could proceed with the jury trial. Defendant confirmed his understanding of those rights.

As to the charges, defendant acknowledged his record of felony convictions. He stated the firearm at issue had not been on his person but admitted he had known where it was and was going to exercise control over it. He also admitted that at that same time he had possessed more than an ounce but less than five pounds of marijuana, which he intended to distribute.

After defendant made those admissions, thereby providing a factual basis for his plea, the judge noted he could see defendant was "wrestling with this" and again asked defendant if he wanted to plead guilty instead of continuing with the trial. Defendant responded that he had been "seeking a criminal attorney" and that "[a]t this point, the position on that, I move forward. I have

no choice but to accept what it is." The judge explained he had a choice: although it was too late to change lawyers, he could continue the trial with his current counsel or he could accept the proposed plea agreement. Defendant stated he wanted to accept the plea agreement. Before the judge excused the jury, defendant again confirmed he wanted to accept the plea agreement.

At the sentencing hearing, defendant told the judge he did not believe "the system [was] correct" and that he felt he had "no other choice but to take this plea." The judge asked defense counsel if defendant was moving to withdraw his plea, and counsel responded, "No." The judge asked defendant if he had been telling the truth when he pleaded guilty, and defendant answered, "Yes." In accordance with the plea agreement, the judge sentenced defendant to an aggregate term of seven years, with a five-year parole ineligibility period along with accompanying fines and penalties. Defendant did not appeal his sentence or convictions.

On December 31, 2020, defendant filed a pro se PCR petition, stating he was seeking "representation in filing an appeal for the motion to suppress evidence[] that [he] was denied by" the trial court judge. He asserted his trial counsel "was supposed to file the appeal but failed to do so" and that he had asked for his counsel to be replaced three times, but his requests had been denied

by the judge. He asserted "out of fear, [he] was put in a position that [he] had to accept the plea or risk being railroaded because of [his] priors."

Assigned counsel submitted a supporting brief, in which he argued defendant's trial counsel had rendered ineffective assistance by failing to take steps pre-trial, such as moving for a change in venue, to ensure defendant would receive a fair trial; to persuade the judge to apply mitigating factors in sentencing defendant, specifically with respect to the impact defendant's incarceration would have on his eight children; and to successfully file motions to dismiss or to suppress evidence. Among other things, PCR counsel also argued defendant's sentence was excessive and that defendant had established a prima facie case sufficient for an evidential hearing.

During argument, defendant's PCR counsel contended notes between defendant and his trial counsel indicated defendant had been "coerced into taking a guilty plea because . . . he did not believe that he was able to get a fair trial . . . ." According to defendant, in those notes, defendant wrote, "I will not get a fair trial," and his trial counsel replied, "You R right!!! This judge will do everything to find you guilty it's terrible." PCR counsel argued an evidentiary hearing was required to determine what defendant and his trial counsel had

discussed, why defendant was "being advised in that way," and whether his guilty plea was knowing and voluntary.

The PCR judge issued an order with an attached statement of reasons denying defendant's petition. The judge held defendant had not established a prima facie case of ineffective assistance of counsel warranting an evidentiary hearing. Regarding defendant's argument concerning the notes purportedly exchanged between defendant and his trial counsel, the judge concluded that "[r]egardless of whether trial counsel believed in the criminal justice system," she could not "find that [defendant's] decision to take the plea deal was due to coercion or force" based on the colloquy between the trial judge and defendant during the plea hearing. The judge rejected defendant's argument about the failure to move for a change of venue, finding he had not demonstrated that motion would have been successful or that a change of venue would have impacted the plea negotiation process. She also rejected his argument regarding motions to dismiss and to suppress, declining to second guess his trial counsel's strategy in withdrawing a motion to dismiss and noting his trial counsel had moved to suppress evidence, albeit unsuccessfully.

As for sentencing, the judge found the trial judge had correctly considered aggravating factors three, six, and nine and that the record did not support the

consideration of mitigating factor eleven because defendant's youngest child was seventeen-years old and he had arrears of $75,000 on his child-support obligations. See N.J.S.A. 2C:44-1(a)(3) ("The risk that the defendant will commit another offense"), -1(a)(6) ("The extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted"), -1(a)(9) ("The need for deterring the defendant and others from violating the law"), and -1(b)(11) ("The imprisonment of the defendant would entail excessive hardship to himself or his dependents"). She held defendant's sentence was neither excessive nor unconstitutional, considering he had received the negotiated sentence and the certain-persons charge to which he had pleaded guilty carried a minimum of five years imprisonment with a five-year parole disqualification period. The judge also noted defendant's potential exposure to a long period of incarceration had he been convicted, given his extensive criminal record and the possibility of consecutive sentences and a discretionary extended term.

On appeal, defendant contends he was entitled to an evidentiary hearing before the PCR judge and raises the following points for our consideration:

> POINT ONE
> THE PCR COURT ERRED IN DENYING [DEFENDANT] AN EVIDENTIARY HEARING AS TESTIMONY IS NEEDED FROM PRIOR COUNSEL

> REGARDING WHY HE WROTE NOTES TO [DEFENDANT] TELLING HIM HE WOULD NOT RECEIVE A FAIR TRIAL AND BE CONVICTED, THEREBY COERCING HIM TO FORGO HIS RIGHT TO TRIAL AND PLEAD GUILTY.
>
> POINT TWO
> THE PCR COURT ERRED IN DENYING [DEFENDANT] AN EVIDENTIARY HEARING AS TESTIMONY IS NEEDED FROM PRIOR COUNSEL REGARDING HIS FAILURE TO PROPERLY REPRESENT [DEFENDANT] AT SENTENCING.
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> POINT THREE
> A REMAND IS NEEDED BECAUSE THE PCR COURT FAILED TO RULE ON WHETHER PRIOR COUNSEL WAS INEFFECTIVE IN FAILING TO FILE A NOTICE OF APPEAL AS REQUESTED BY [DEFENDANT].

In response, the State agrees the PCR judge did not rule on defendant's direct-appeal argument and that the case should be remanded for consideration of that issue but argues the judge properly denied defendant's petition without conducting an evidentiary hearing in all other respects.

In the absence of an evidentiary hearing, we review de novo the factual inferences drawn from the record by the PCR judge as well as the judge's legal conclusions. State v. Aburoumi, 464 N.J. Super. 326, 338-39 (App. Div. 2020). We review a PCR judge's decision to deny a defendant's request for an

evidentiary hearing under an abuse-of-discretion standard. See State v. L.G.-M., 462 N.J. Super. 357, 365 (App. Div. 2020).

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. "With respect to both prongs of the Strickland test, a defendant asserting ineffective assistance of counsel on PCR bears the burden of proving his or her right to relief by a preponderance of the evidence." State v. Gaitan, 209 N.J. 339, 350 (2012). A failure to satisfy either prong of the Strickland test requires the denial of a PCR petition. Strickland, 466 U.S. at 700.

To meet the first prong of the Strickland test, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. at 687. Reviewing courts must make "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." Id. at 689; see also State v. Nash, 212 N.J. 518, 542 (2013).

The second prong of the Strickland test requires a defendant to show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. A defendant must show by a "reasonable probability" that the deficient performance affected the outcome. Fritz, 105 N.J. at 58. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Pierre, 223 N.J. 560, 583 (2015) (quoting Strickland, 466 U.S. at 694; Fritz, 105 N.J. at 52). "[A] conviction is more readily attributable to deficiencies in defense counsel's performance when the State has a relatively weak case than when the State has presented overwhelming evidence of guilt." State v. Gideon, 244 N.J. 538, 557 (2021).

A defendant's right to effective assistance of counsel extends to the plea-negotiation process. Lafler v. Cooper, 566 U.S. 156, 162 (2012); see also State v. Chau, 473 N.J. Super. 430, 445 (App. Div. 2022). When a defendant seeks "[t]o set aside a guilty plea based on ineffective assistance of counsel, a defendant must show . . . 'that there is a reasonable probability that, but for counsel's errors, [he or she] would not have pled guilty and would have insisted on going to trial.'" State v. Nunez-Valdez, 200 N.J. 129, 139 (2009) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994) (alterations in original)); Lafler, 566

U.S. at 163 (holding a defendant claiming ineffective assistance at the plea stage must show that "the outcome of the plea process would have been different with competent advice"). A defendant also "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); see also Aburoumi, 464 N.J. Super. at 339.

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"). Rule 3:22-10(b) provides a court should hold an evidentiary hearing on a PCR petition only if the petitioner 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)). 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)).

We agree the case must be remanded so the PCR judge can consider and address defendant's argument that his trial counsel "was supposed to file" a direct appeal but rendered ineffective assistance in failing to do so. See State v. Perkins, 449 N.J. Super. 309, 312-13 (App. Div. 2017) (holding "that where a PCR judge finds that an appeal was sought by [the] defendant and not filed due to counsel's ineffective assistance, the judge has the authority to afford [the] defendant a forty-five day period to file an appeal"). We otherwise perceive no abuse of discretion in the judge's decision to forego an evidentiary hearing and no error in her denial of the remaining aspects of defendant's petition.

Defendant's assertion he "had to accept the plea" or was coerced into the plea by his trial attorney is belied by his extensive colloquy with the trial judge and the statements he made under oath during the plea hearing, including his repeated confirmation that he understood he did not have to plead guilty and that he was pleading guilty "freely" and "voluntarily." As for sentencing, we agree with the PCR judge that the record did not support mitigating factor eleven. A failure to make an unsuccessful argument does not constitute ineffective assistance of counsel. State v. Echols, 199 N.J. 344, 365 (2009). Defendant

asserts the judge's finding was based on an incorrect understanding that he owed $75,000 in child support and contends he owed only $672, citing his presentence report. In fact, the presentence report shows defendant had two child-support obligations and was in arrears on both, one in the amount of $75,000 and one in the amount of $672. Finally, defendant did not state anywhere in his petition that but for his trial counsel's alleged deficient performance, he would not have pleaded guilty and, thus, has not demonstrated "a reasonable probability that, but for counsel's errors, [he or she] would not have pled guilty and would have insisted on going to trial." Nunez-Valdez, 200 N.J. at 139 (quoting DiFrisco, 137 N.J. at 457 (alterations in original)).

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

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

CLERK OF THE APPELLATE DIVISION