

**NOT FOR PUBLICATION WITHOUT THE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-1833-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GRADY A. BLUE,

Defendant-Appellant.

Submitted January 30, 2023 – Decided February 14, 2023

Before Judges Smith and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Indictment Nos. 15-01-0129 and 15-02-0222.

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

Angelo J. Onofri, Mercer County Prosecutor, attorney for respondent (Laura Sunyak, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

After a plea, defendant Grady A. Blue was sentenced to a twelve-year term of incarceration for first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1), subject to parole ineligibility under the No Early Release Act, N.J.S.A. 2C:43-7.2. Defendant was also sentenced to a concurrent seven-year term of incarceration with three and one-half years parole ineligibility for second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(1). Defendant never filed a direct appeal, but he did file a petition for post-conviction relief (PCR), which was denied without a hearing on December 14, 2021.

Defendant appeals from the denial of his PCR application, contending trial counsel was ineffective for failing to raise defendant's youth as a mitigating factor at sentencing. Additionally, defendant argues that N.J.S.A. 2C:44-1(b)(14), which the Legislature adopted after defendant's sentencing date, should apply retroactively. We affirm.

I.

We briefly recount the salient facts and procedural history. Defendant pled guilty on September 30, 2016. At his plea allocution, defendant testified that on June 24, 2014, he fired a gun into a crowd of people in an apartment complex in Trenton. He admitted his conduct was reckless, and that it showed an extreme indifference to the value of human life. Defendant further

acknowledged that as a result of his conduct, the victim, Naquan Ellis, was struck by gunfire and later died of his injuries.

Defendant further admitted that on February 6, 2014, he was in possession and control of a black, semiautomatic handgun, which was in the trunk of his vehicle. Defendant acknowledged that the gun belonged to him and that he did not have a license to carry a firearm in the State of New Jersey.

At sentencing, the trial court found aggravating factors N.J.S.A. 2C:44-1(a)(3), the risk that defendant will commit another offense; N.J.S.A. 2C:44-1(a)(6), the extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted; and N.J.S.A. 2C:44-1(a)(9), the need for deterring defendant and others from violating the law. The court found the aggravating factors outweighed the non-existent mitigating factors and imposed the sentence.

In his PCR petition, defendant argued trial counsel was ineffective in failing to argue that defendant's youth¹ was a non-statutory mitigating factor, which should have resulted in a lesser term of incarceration.

¹ Defendant was twenty-two years, one month, and thirteen days old at the time he committed the crimes for which he was convicted.

The PCR court rejected defendant's motion without a hearing. It noted our courts are now statutorily required to consider age as a mitigating factor under N.J.S.A. 2C:44-1(b)(14), and that mitigating factor fourteen was not a factor mandated by the Legislature when defendant was sentenced. The PCR court rejected defendant's argument that State v. Rice, 425 N.J. Super. 375 (App. Div. 2012), required the sentencing court to consider non-statutory mitigating factors, and that trial counsel was ineffective for failing to raise defendant's youth. The PCR court concluded it could not find trial counsel ineffective under Strickland,² stating, "[g]oing to the heart of [p]etitioner's argument . . . [p]etitioner seemingly contends that trial counsel should have risen to a level of advocacy well beyond [their] peers by arguing not only statutorily provided mitigating factors but also possible mitigating factors outside codified law."

Defendant argues the following points on appeal:

POINT ONE - THE PCR COURT ERRED IN DENYING [DEFENDANT'S] PETITION FOR [PCR] WITHOUT GRANTING AN EVIDENTIARY HEARING AS PRIOR COUNSEL WAS INEFFECTIVE AT SENTENCING IN FAILING TO ARGUE [DEFENDANT'S] YOUTHFULNESS IN MITIGATION OF HIS ACTIONS.

POINT TWO - THIS COURT SHOULD REMAND FOR RE-SENTENCING TO THE TRIAL COURT TO

² Strickland v. Washington, 466 U.S. 668 (1984).

RECONSIDER DEFENDANT'S SENTENCE BASED ON THE NEW MITIGATING FACTOR, "THE DEFENDANT WAS UNDER [TWENTY-SIX] YEARS OF AGE AT THE TIME OF THE COMMISSION OF THE OFFENSE," N.J.S.A. 2C:44-1(B)(14), AND BECAUSE THE TRIAL COURT ERRED IN ITS FINDING AND WEIGHING OF AGGRAVATING AND MITIGATING FACTORS. (NOT RAISED BELOW)

[POINT THREE] - THE NEW YOUTH MITIGATING FACTOR LAW SHOULD BE GIVEN RETROACTIVE APPLICATION.³

II.

We use a de novo standard of review when a PCR court does not conduct an evidentiary hearing. State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016) (citing State v. Harris, 181 N.J. 391, 420-21 (2004)). When petitioning for PCR, a defendant must establish he is entitled "to PCR by a preponderance of the evidence." State v. O'Donnell, 435 N.J. Super. 351, 370 (App. Div. 2014) (citing State v. Preciose, 129 N.J. 451, 459 (1992)).

We analyze ineffective assistance of counsel claims using the two-prong test established by the Supreme Court in Strickland. See Preciose, 129 N.J. at 459; State v. Fritz, 105 N.J. 42, 58 (1987). The first prong of the Strickland test

³ Point three of defendant's argument on appeal was not raised below, but it was not identified as such in his merits brief, as required by Rule 2:10-2.

requires a defendant to establish counsel's performance was deficient. Preciose, 129 N.J. at 463. "The second, and far more difficult, prong of the Strickland . . . test is whether there exists 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 463-64 (quoting Strickland, 466 U.S. at 694).

There exists a strong presumption counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Further, because prejudice is not presumed, a defendant must demonstrate how specific errors by counsel undermined the reliability of the proceeding. State v. Drisco, 355 N.J. Super. 283, 289-90 (App. Div. 2002) (citing United States v. Cronin, 466 U.S. 648, 659 n.26 (1984)).

A defendant may not rely on "bald assertions that he was denied the effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). A court must reject a claim if it rests on allegations that "are too vague, conclusory, or speculative" State v. Porter, 216 N.J. 343, 355 (2013) (quoting State v. Marshall, 148 N.J. 89, 158 (1997)). The petition, therefore, must allege specific facts that are "sufficient to demonstrate counsel's alleged substandard performance." Cummings, 321 N.J. Super. at 170.

III.

In light of our well-settled jurisprudence and for the reasons substantially expressed by the PCR court, we conclude defendant failed to overcome the strong presumption counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. Hence, we are unpersuaded by defendant's first point. We briefly address defendant's remaining points.

Defendant's next contends we should remand to the sentencing court for it to consider defendant's youth under mitigating factor N.J.S.A. 2C:44-1(b)(14). This argument was not raised below. Although we may consider allegations of errors or omissions not brought to the court's attention if they meet the plain error standard under Rule 2:10-2, "we frequently decline to consider issues that were not presented at trial" State v. Walker, 385 N.J. Super. 388, 410 (App. Div. 2006). Generally, unless an issue goes to the jurisdiction of the trial court or concerns matters of substantial public interest, we will ordinarily not consider it. Ibid. Given the Supreme Court's recent decision in State v. Lane, we see no reason to do so here. 251 N.J. 84 (2022). Lane makes clear that N.J.S.A. 2C:44-1(b)(14) cannot be applied retroactively to a sentence imposed before the Legislature enacted it.

We note defendant argues N.J.S.A. 2C:44-1(b)(8) (the defendant's conduct was the result of circumstances unlikely to recur) and N.J.S.A. 2C:44-1(b)(9) (the character and attitude of the defendant indicate that the defendant is unlikely to commit another offense) should have been argued by trial counsel and considered by the sentencing court in the context of "the transient features of youthfulness." The record shows that at the time of his sentencing, defendant had two previous juvenile dispositions for disorderly conduct and had a pending bench warrant for drug and assault charges in municipal court. In finding no mitigating factors, the sentencing court did not violate the guidelines, and it had competent and credible evidence in the record to support such a finding. See State v. Bolvito, 217 N.J. 221, 228 (2014). Because we review the imposition of a sentence for abuse of discretion, State v. Torres, we find no error by the sentencing court, nor do we take issue with the PCR court's conclusion that trial counsel was not ineffective as it relates to advocacy for defendant at sentencing on mitigating factors eight and nine. 246 N.J. 246, 272 (2021).

Finally, as part of his argument for remand to consider the youth mitigating factor, defendant suggests without proof that there may have been a neurological basis for what the sentencing court characterized as defendant's "senseless and reckless" act of firing a gun into the crowd. Defendant states in

his merits brief that, "[r]esearch about child brain development has shown that 'the combination of reward-seeking, impulsivity, easily aroused emotions, and susceptibility to peer influence lead a large percentage of teens to occasionally behave in ways that could be the basis of criminal charges.'"⁴ We have already addressed the reasons mitigating factor fourteen will not apply here, and have no cause to delve further into the neuroscience argument on the record before us. Nonetheless, we observe that in future cases, mitigating factor fourteen neuroscience arguments supported by credible evidence in the record and testified to by a qualified expert may be given consideration by a sentencing court as it balances aggravating and mitigating factors.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION

⁴ Elizabeth S. Scott, et. al., Brain Dev., Soc. Context and Just. Pol'y, 57 Wash. U. J. L. & Pol'y 13, 16 (2018).