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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-1834-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KEYON D. POWELL,

Defendant-Appellant.

Submitted May 23, 2023 – Decided July 27, 2023

Before Judges Gilson and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 13-07-0904.

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

Matthew J. Platkin, Attorney General, attorney for respondent (Ashlea D. Newman, Deputy Attorney General, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Keyon Powell appeals from a January 10, 2022 order denying his petition for post-conviction relief (PCR) following oral argument but without an evidentiary hearing. In rejecting defendant's PCR petition, the PCR judge, Judge Janetta D. Marbrey, issued a written opinion addressing defendant's arguments, which he largely repeats in this appeal. We affirm substantially for the reasons set forth in Judge Marbrey's thorough opinion.

I.

Defendant was indicted for first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); and second-degree possession of a firearm while committing an offense involving controlled dangerous substances, N.J.S.A. 2C:39-4.1(a).

In pretrial proceedings, defendant informed the court that he did not want to accept the State's plea offer and wanted to proceed to trial. Defendant also informed the court that he wanted a new attorney, expressing that request in written letters sent to the court and the Public Defender's Office. He was informed that the Public Defender's Office would not assign new counsel.

As the case was approaching trial, the State offered to allow defendant to plead to an amended charge of aggravated manslaughter with a recommended

sentence of nineteen years in prison subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

In January 2015, defendant, with counsel, appeared at a pretrial conference. Defendant initially informed the court that he wanted to proceed to trial. Defendant then consulted with a second lawyer and ultimately agreed to plead guilty to an amended charge of first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a). In pleading guilty, defendant confirmed under oath that he was doing so freely and voluntarily and that no one had forced or threatened him to sign the plea forms or give up his right to proceed to trial. He also acknowledged that he was satisfied with his attorneys' advice, that they had answered all his questions, and that he did not require additional time to speak with them before proceeding to plead guilty. Defendant then admitted that on February 3, 2013, while in Ewing Township, he had been inside a vehicle with several other individuals when an incident occurred that caused him to exit that vehicle. He admitted that he had then pulled out a firearm and shot at the vehicle, which caused the death of the victim. He acknowledged that he had acted in a reckless manner and had shown extreme indifference to human life. The court accepted defendant's guilty plea, finding that defendant had entered

the plea after consulting with his attorneys and after acknowledging that he was satisfied with his attorneys' advice.

Shortly after pleading guilty, defendant moved to withdraw his guilty plea. The court heard argument and denied the motion. Thereafter, the court sentenced defendant in accordance with the plea agreement to nineteen years in prison subject to NERA.

Defendant filed an appeal contending that his sentence was excessive and challenging the denial of his motion to withdraw his guilty plea. On an excessive-sentencing calendar, we rejected defendant's arguments regarding withdrawal of his guilty plea and affirmed his sentence. State v. Powell, No. A-0205-15 (App. Div. Jan. 12, 2016). The Supreme Court denied defendant's petition for certification. 230 N.J. 621 (2017).

In October 2019, defendant filed a petition for PCR. He was assigned counsel, and counsel filed a brief in support of defendant's petition. Judge Marbrey heard argument on defendant's petition on January 3, 2022. On January 10, 2022, the judge issued a written opinion and order denying defendant's petition.

II.

On this appeal, defendant, through his counsel, makes two arguments which he articulates as follows:

POINT ONE – MR. POWELL IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIMS THAT HIS ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO CONDUCT AN ADEQUATE PRETRIAL INVESTIGATION, DISCOVERY REVIEW, AND CASE DISCUSSION, AND BY PRESSURING HIM INTO A PLEA.

POINT TWO – MR. POWELL'S CLAIM THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE AT SENTENCING MUST BE REMANDED FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Defendant also filed a brief he had prepared, in which he argued that his sentencing counsel should have argued for additional mitigating factors.

We review the denial of defendant's petition de novo because there was no PCR evidentiary hearing. State v. Harris, 181 N.J. 391, 419 (2004); State v. Lawrence, 463 N.J. Super. 518, 522 (App. Div. 2020). A PCR court's decision to proceed without an evidentiary hearing is reviewed for an abuse of discretion. State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013).

The arguments presented by defendant's counsel are essentially the same arguments that were presented to the PCR court. Having conducted a de novo

review, we affirm substantially for the reasons explained by Judge Marbrey. In short, defendant's arguments lack merit because he did not establish a prima facie showing of ineffective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 58 (1987).

Defendant's counsel, as well as defendant in his supplemental brief, also argue that defense counsel was ineffective during sentencing. We reject those arguments because they are procedurally barred by our prior affirmance of the sentence. See State v. Echols, 199 N.J. 344, 357 (2009) (citing R. 3:22-5) (explaining that a PCR petition is procedurally barred if the issue was previously decided on the direct appeal or could have been raised on that direct appeal). Moreover, the arguments concerning counsel's failure to argue for additional mitigating factors lack substantive merit and do not warrant discussion in a written 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