

RECORD IMPOUNDED

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1837-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALAN P. CARRINO,

Defendant-Appellant.

Submitted July 18, 2023 – Decided July 24, 2023

Before Judges Whipple and Mayer.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 17-06-0733.

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

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

PER CURIAM

Defendant Alan P. Carrino appeals from a February 8, 2022 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

In 2017, defendant was charged with several sexual offenses, including two counts of first-degree aggravated sexual assault of a victim less than thirteen years old, N.J.S.A. 2C:14-2(a)(1); one count of second-degree sexual assault of a victim less than thirteen years old, N.J.S.A. 2C:14-2(b); and one count of second-degree sexual assault of a victim at least thirteen years old but less than sixteen years old, N.J.S.A. 2C:14-2(c)(4).

On December 8, 2017, defendant agreed to plead guilty to one count of first-degree aggravated sexual assault of a victim at least thirteen years old but less than sixteen years old. In return, the State agreed to recommend a sentence of seven years in prison subject to a period of parole ineligibility under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, and dismissal of all remaining charges.

During the plea colloquy, defendant established the factual basis for his plea. In addition, defendant stated he understood the plea agreement, reviewed the information on the plea forms with his attorney, initialed each page of the plea documents, and signed the final page of the plea agreement.

Defendant also testified he understood everything in the plea agreement, including the document entitled, "Additional Questions for Certain Sexual Offenses." Paragraph 4(b) of that document referenced parole supervision for life (PSL). The offense to which defendant agreed to plead guilty required imposition of PSL, which defendant acknowledged by circling "yes" next to each question listed under Paragraph 4(b).

At the sentencing hearing on March 16, 2018, defense counsel argued for a seven-year sentence in accordance with the negotiated plea. In support of the mitigating factors, defendant's attorney asserted that PSL provided "significant oversight of individuals who are sentenced to crimes like this, that, quite frankly, an argument really should be made or could be made that these very long jail sentences really don't do . . . as much to prevent new victims as the PSL oversight does to prevent new victims." At sentencing, defense counsel also argued "society is protected, particularly with the PSL provision after [defendant's] lengthy jail sentence."

The judge sentenced defendant to prison for seven years subject to NERA. At the sentencing hearing and in the judgment of conviction, the judge noted defendant was subject to PSL.

Defendant did not file a direct appeal. Instead, defendant filed a pro se PCR petition. In his May 14, 2021 PCR submission, defendant argued he was "treated unfairly" when the judge imposed PSL. Defendant asked the PCR judge to review the PSL condition included in his judgment of conviction.

Four months later, PCR counsel filed a September 24, 2021 certification from defendant. In defendant's second certification, he asserted he "should not be subject to PSL as [he did] not pose a risk for sexually reoffending. My attorney should have argued PSL was not applicable to my case." However, defendant also certified that he "[did] not wish to disturb [his] guilty plea and go to trial."

On February 8, 2022, the PCR judge heard argument on the PCR petition. Defendant's PCR attorney argued her client did not understand PSL at the time he entered a guilty plea and his trial attorney failed to explain the consequences of PSL. Further, PCR counsel asserted defendant's trial attorney should have argued against PSL at sentencing based on defendant's risk assessment identifying a below average risk for sexually reoffending.

When the judge asked PCR counsel about N.J.S.A. 2C:43-6.4, the law compelling PSL for defendants who are convicted of aggravated sexual assault, counsel explained "my client thinks [plea counsel] could have argued against

it." PCR counsel reiterated that defendant "[did] not want to disturb his plea. He is just asking that PSL not apply to [his] case." Despite understanding the law requiring PSL for persons convicted of certain sexual offenses, PCR counsel told the judge, "I'm left to make the arguments . . . that my client[] wants me to make"

In a decision placed on the record on February 8, 2022, the judge denied defendant's PCR petition. He found defendant did not receive ineffective assistance of counsel during the plea hearing or at sentencing. The judge concluded defendant's ineffective assistance of counsel arguments failed to satisfy both prongs under Strickland v. Washington, 466 U.S. 668 (1984), and State v. Fritz, 105 N.J. 42 (1987).

Citing N.J.S.A. 2C:43-6.4, the judge explained "a person who has been convicted of aggravated sexual assault, as in this case, shall include, in addition to any other sentence authorized by the [C]ode, a special sentence of parole supervision for life." Because defendant was convicted of aggravated sexual assault and "[did] not wish to disturb his guilty plea," the judge found defendant "must be sentenced to PSL." The judge rejected defendant's argument "that his lawyer should have argued [against PSL] anyway contrary to the law."

In reviewing the sentencing hearing transcript, the judge also noted defense counsel, when arguing the aggravating and mitigating factors, stated defendant "would be at low risk of reoffending because he was placed on PSL." As the judge explained, "[i]t was defense counsel's arguments related to PSL that afforded the [d]efendant the opportunity to have such a minimal sentence for a first[-]degree aggravated sexual assault crime."

The PCR judge further found "[d]efendant testified . . . he completed the [plea] form, he answered all the questions. He acknowledged having discussed his constitutional rights with his attorney and acknowledged understanding all of the questions on all of the plea forms." Further, because defendant did not wish to disturb his guilty plea, the judge concluded the outcome would not have been different if defense counsel had argued against PSL.

On appeal, defendant raises the following argument:

THIS MATTER MUST BE REMANDED FOR AN
EVIDENTIARY HEARING ON [DEFENDANT]'S
CLAIM THAT COUNSEL RENDERED
INEFFECTIVE ASSISTANCE BY FAILING TO
ADVISE HIM ADEQUATELY ABOUT THE PSL
CONSEQUENCES OF HIS PLEA.

"We review a judge's decision to deny a PCR petition without an evidentiary hearing for abuse of discretion." State v. Peoples, 446 N.J. Super. 245, 255 (App. Div. 2016) (citing State v. Preciose, 129 N.J. 451, 462 (1992)).

A petition asserting a claim of ineffective assistance of counsel does not automatically entitle a defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). Rule 3:22-10(b), governing evidentiary hearings in PCR proceedings, provides:

A defendant shall be entitled to an evidentiary hearing only upon [1] the establishment of a prima facie case in support of post-conviction relief, [2] a determination by the court that there are material issues of disputed fact that cannot be resolved by reference to the existing record, and [3] a determination that an evidentiary hearing is necessary to resolve the claims for relief.

To establish a prima facie ineffective assistance of counsel claim, a defendant must demonstrate by a preponderance of the credible evidence that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687; Fritz, 105 N.J. at 58. In reviewing ineffective assistance of counsel claims, "[j]udicial scrutiny of counsel's performance must be highly deferential," and courts "must indulge a strong presumption" that counsel's performance was reasonable. Strickland, 466 U.S. at 689.

Defendant contends that his plea counsel was ineffective because he failed to explain the consequences of PSL. In addition, defendant claims his attorney

should have argued against imposition of PSL at the sentencing hearing. We reject these arguments.

We agree with the PCR judge that defendant failed to establish a prima facie case of ineffective assistance of counsel by his trial attorney. First, defendant did not show defense counsel's performance was deficient. To the contrary, defendant could have received a sentence between ten to twenty years in prison if he had gone to trial on all counts. Based on defense counsel's negotiation of an extremely favorable plea agreement, defendant received only a seven-year prison term.

Additionally, defendant's certifications in support of PCR never stated that he would have rejected the plea and proceeded to trial if he knew the conditions of PSL. In fact, quite the opposite, defendant expressly certified he did "not wish to disturb [his] guilty plea."

Defendant also ignores that PSL is mandated under N.J.S.A. 2C:43-6.4 for defendants who are convicted of certain sexual crimes, including aggravated sexual assault. We agree with the PCR judge that defense counsel's failure to raise a meritless argument in direct conflict with an express statutory mandate did not, and could not, constitute ineffective assistance of counsel. See State v.

Worlock, 117 N.J. 596, 625 (1990) ("The failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel.").

Because defendant failed to establish a prima facie case in support of PCR, defendant 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