SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1864-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANGELO CUCULINO, a/k/a
ANGELO CUCLINO,

Defendant-Appellant.

Submitted June 6, 2023 – Decided June 14, 2023

Before Judges Sumners and Geiger.

On appeal from the Superior Court of New Jersey, Law Division, Cape May County, Indictment No. 15-01-0028.

Joseph E. Krakora, Public Defender, attorney for appellant (Andrew R. Burroughs, Designated Counsel, on the brief).

Jeffrey H. Sutherland, Cape May County Prosecutor, attorney for respondent (Gretchen A. Pickering, Senior Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Angelo Cuculino appeals from the denial of his petition for post-conviction relief (PCR), without an evidentiary hearing. We affirm substantially for the reasons expressed by Judge J. Christopher Gibson in his comprehensive written opinion.

Defendant entered an open unconditional guilty plea to all five counts of an indictment on the eighth day of a jury trial after the State had rested. Among the charges defendant pleaded guilty to were two counts of third-degree distribution of the controlled dangerous substance (CDS) alpha-pyrrolidinopentiophenone (alpha-PVP),[1] N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(13).

On direct appeal, defendant challenged his conviction and sentence, contending the trial court erred by: (1) denying his motion to dismiss counts one and two of the indictment because alpha-PVP was not a controlled dangerous substance (CDS) under New Jersey law on the dates he distributed it to an undercover detective; (2) denying his motion to dismiss counts one through

[1] "Alpha-PVP is a designer drug that produces a powerful stimulant effect in its users." United States v. Moreno, 870 F.3d 643, 644 (7th Cir. 2017). Alpha-PVP is commonly known as "flakka" or "flocka." Cannel, N.J. Criminal Code Annotated, cmts. on N.J.S.A. 2C:35-5.3(a) & N.J.S.A. 2C:35-10.3(a) (2023).

four of the indictment because the grand jury presentation was irrevocably flawed; (3) denying his motion to suppress physical evidence; (4) denying trial counsel of his choice; (5) denying his motion to withdraw his guilty plea; and (6) imposing an excessive sentence that included three non-mandatory consecutive prison terms. State v. Cuculino, No. A-0516-16 (App. Div. Nov. 22, 2019) (slip op. at 2-3), certif. denied, 244 N.J. 386 (2020). We affirmed the convictions but remanded for resentencing. Id. at 3.

The underlying facts and procedural history are set forth in detail in our unpublished opinion on direct appeal. Because the facts and procedural history are relevant to the issues defendant raises in this appeal, we set recount them at length rather than merely incorporating them by reference.

> A narcotics investigation was initiated by a Cape May County Prosecutor's Office's Task Force based on information it received about defendant from a confidential informant (CI). The investigation led to two undercover buys from defendant and the seizure of other contraband.
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> More specifically, on September 26, 2014, Detective Ashlee Lucariello, acting as an undercover officer, traveled to Upper Township to meet with defendant for the purpose of purchasing a CDS known

as "Mollie."[2] Lucariello arrived at a location on South Shore Road in Marmora,[3] entered defendant's Jeep,[4] and tendered $80 in prerecorded currency in exchange for a clear Ziploc bag of an off-white, rock-like substance that later tested positive for alpha-PVP, a bath salt. After completing the sale, defendant was observed as he traveled directly to and entered his residence in Marmora.[5] On September 30, 2014, Lucariello identified defendant as the individual who sold her the drugs from a double-blind photo array.

On October 9, 2014, Lucariello performed another undercover buy from defendant. Once again, Lucariello traveled to a location on South Shore Road in Marmora, entered defendant's Jeep, and exchanged $80 for one clear Ziploc bag of an off-white, rock-like substance that later tested positive for alpha-PVP.

Based on these events, the Prosecutor's Office applied for a search warrant for defendant's person, vehicle, and residence based on the fourteen-page affidavit of Task Force Officer Christopher Vivarelli. The affidavit set forth Vivarelli's law enforcement experience and specialized training. The search warrant was sought based on evidence defendant engaged in the distribution, possession, and use of CDS, including alpha-PVP, and possession of paraphernalia. The affidavit detailed information

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[2] Also known as MDMA, "mollie" is a street name for methylenedioxymethamphetamine. It is the primary component of the CDS commonly known as Ecstasy.

[3] Marmora is part of Upper Township.

[4] Motor vehicle records identified defendant as the owner of the Jeep.

[5] The location of the residence matched defendant's motor vehicle records.

learned from the CI during the month of September 2014 regarding a CDS distribution scheme in Cape May County. The affidavit also set forth the previous reliability of the CI.

The CI provided information that defendant was actively distributing "Mollie" and marijuana in Cape May County, including Ocean City and Upper Township. The CI identified defendant from a photograph. The CI also provided defendant's cellular telephone number.

The affidavit further related Lucariello's two undercover buys of CDS from defendant in considerable detail. It also set forth defendant's criminal history, which included a prior CDS conviction.

The search warrant was granted by a Superior Court judge and executed on October 16, 2014. Defendant was stopped while driving and arrested. A search incident to arrest revealed $2,896 in his pant's pockets. The search warrant was then executed on defendant's residence. A search of the northeast bedroom revealed: a 1000-gram digital scale; a clear Ziploc bag containing an off-white, rock-like substance that tested positive for Methylone, a bath-salt-type Schedule I CDS; a .22 caliber handgun with one empty magazine; 100 rounds of .22 caliber bullets; and $16,073. The search also revealed: a clear plastic bag containing brownish-green vegetation in the second floor hallway closet; numerous Ziploc baggies with "Heavy D" girl stamps in the first floor living room; and a 12-gauge shotgun and a rifle behind the first-floor furnace. A search of defendant's Jeep revealed five cell phones and $256.

A Cape May County Grand Jury returned a five-count indictment against defendant, charging him with: two counts of third-degree distribution of CDS or its analogue (alpha-PVP), N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(13) (counts one and two); third-degree possession with intent to distribute CDS (Methylone), N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(13) (count three); second-degree unlawful possession of firearms while committing a CDS crime, N.J.S.A. 2C:39-4.1 (count four); and second-degree certain persons not to possess firearms, N.J.S.A. 2C:39-7 (count five). Counts one and two were based on sales of alpha-PVP to an undercover officer on September 26 and October 9, 2014, respectively. Counts three, four, and five were based on evidence seized during the search of defendant's residence. The indictment was based on the testimony of Detective Sergeant Daniel Holt of the Cape May County Prosecutor's Office. The grand jury presentation included testimony that the bath salts could not be used for bathing, and none of the seized firearms were registered.

In early 2015, defendant retained private counsel. Defendant moved to suppress the evidence seized during the execution of the search warrant and to dismiss the indictment. Defendant argued the search warrant was not based on sufficient probable cause. He also argued the indictment should be dismissed because alpha-PVP was not illegal in New Jersey during the time period in question. The trial court denied both motions.

By mid-August 2015, defendant retained new private counsel. Defendant moved for reconsideration of the denial of his motions to dismiss the indictment and to suppress the physical evidence seized during the search of his car and house. He also moved: (1) for change of venue; (2) to reveal the identity of a

confidential informant and/or in camera review of confidential information; and (3) to suppress the chain of custody. The trial court denied the motions.

Trial was scheduled for mid-May 2016. The State moved in limine to declare that alpha-PVP was a scheduled CDS in New Jersey at the time of the two undercover buys. The trial court conducted a N.J.R.E. 104 hearing during which Matthew Wetzel, the Assistant Deputy Director of the Division of Consumer Affairs of the Department of Law and Public Safety (the Division), was the sole witness.

Wetzel testified regarding the process by which alpha-PVP became a CDS in New Jersey. He explained that on January 28, 2014, the Federal Drug Enforcement Agency (DEA) published a notice of intent in the Federal Register to place alpha-PVP on a CDS schedule. On March 7, 2014, the DEA issued and published an order in the Federal Register placing alpha-PVP as a Schedule I CDS. The order became effective as of the date it was published.

Wetzel testified that pursuant to N.J.A.C. 13:45H[-1.7] and -8.2, alpha-PVP became a Schedule I CDS in New Jersey thirty days later on April 6, 2014, because the Director of the Division did not object to it being scheduled as a CDS. Wetzel confirmed that alpha-PVP was a Schedule I CDS in September and October 2014 and remained so.

While the Division maintains a CDS master list that is updated over time after the administrative procedure is finalized, it refers inquiring parties to the DEA's "website which clearly lists all Schedule I through Schedule V controlled substances." Wetzel noted that a substance becomes scheduled in New

Jersey – even if not identified on the master list – when identified as CDS on a federal CDS schedule.

The trial court found Wetzel was "familiar with the legislative process, the administrative process, as well as scheduling of items pursuant to the Administrative Code and [N.J.S.A.] 24:21-3." It deemed Wetzel's testimony to be candid, credible, and internally consistent. The court noted alpha-PVP was still listed as a scheduled CDS on the federal website. It found that any individual who wanted to check if a substance was a CDS could do so without difficulty. The court determined alpha-PVP became a CDS in New Jersey as of April 6, 2014, and "barr[ed] any reference by either side raising the issue that alpha-PVP is not a Schedule I controlled dangerous substance." The trial court denied defendant's request for a stay pending appeal.

Defendant then sought emergent review, leave to appeal, and a stay of the trial court's rulings from this court in applications prepared by trial counsel and appellate counsel. We denied the applications.

The jury trial was delayed because defendant was admitted to the hospital on May 19, 2016. The trial began four days later. Defendant sought to further adjourn the trial due to alleged medical issues. He presented a note dated May 19, 2016, and letter dated May 24, 2016, from Wayne R. Schneider, M.D. The letter stated that on May 19, 2016, defendant was placed on medical leave for one month following his hospital admission and that he "requires absolute non-stressful situations and activity i.e. home rest due to the possible complications of not having timely and necessary cardiac testing. Stress of any kind could induce an acute coronary syndrome. At this point he is unable to focus due to his condition." Defendant

claimed he was not physically or mentally competent to stand trial based on his medical condition. The trial court refused to delay the trial unless Dr. Schneider testified in court that a further adjournment of the trial was medically necessary. That did not occur.

Defendant also sought to adjourn the trial to retain new trial counsel. He claimed trial counsel informed him that he had not properly prepared a defense, had not hired any experts, had not subpoenaed any witnesses, and had not examined the evidence until two days before trial. The trial court declined adjourning the trial.

The trial commenced on May 23, 2016. After the State rested, defendant moved for a judgment of acquittal on counts three and four pursuant to State v. Reyes, 50 N.J. 454 (1967). Before the court rendered a decision, defendant indicated his intent to enter an unconditional open guilty plea to all five counts after the State secured permission to plead the case off the trial list. Because it was an open plea, there was no recommended sentence.

The trial court conducted a thorough plea hearing. The court noted it had "given no indication as to what the maximum sentence would be." Counsel confirmed it was an open unconditional plea to all five counts. The court and the prosecutor stated they had made no sentencing promises. The prosecutor confirmed that the State was not making any sentencing recommendations.

During his sworn testimony, defendant confirmed he was fifty years old and had completed high school. He stated he had taken aspirin and a nitroglycerin pill that day. He did not think the medication affected his ability to think clearly. He

stated he was under medical treatment but it did not impair his judgment. He confirmed that he understood what he was doing by pleading guilty.

Defendant confirmed he reviewed each question on the plea forms with his attorney, understood the questions, and answered each question truthfully. He stated he was entering an open plea "settling this matter now," after the State had rested.

Defendant confirmed that he was satisfied with his attorney and the advice he received. He acknowledged reviewing all of the discovery and each of the counts of the indictment. When asked if he had any defense to the charges he was pleading to he answered in the negative. He confirmed that he was pleading guilty because he was guilty of the offenses.

Defendant also confirmed he was pleading guilty voluntarily and that no one forced, threatened, pressured, or coerced him to enter the open plea. He further confirmed that no promises had been made to him by the State or the court. Defendant acknowledged the rights he was giving up by pleading guilty and still wished to do so. He acknowledged this was not the first time he had pleaded guilty to a crime.

Defendant provided a detailed factual basis for his plea to each count. He admitted to unlawfully selling alpha-PVP to an undercover officer on two dates and possessing Methylone, which the police found in his bedroom, with intent to distribute it. He also admitted knowing that alpha-PVP and Methylone were CDSs at the time the respective offenses were committed and that it was unlawful to distribute or possess those substances.

As to the weapons offenses, defendant admitted that a pistol, 12-gauge shotgun, and bolt action rifle were seized from his residence. He admitted unlawfully possessing the three firearms while committing the crime of possession of CDS with intent to distribute it. When asked if the firearms were his, defendant twice answered, "Yes." When asked if he knew the firearms were in his home, defendant twice answered, "Yes." Defendant specifically admitted to being in possession of the three firearms. He further admitted being designated a person not to possess firearms due to his 1995 conviction for endangering the welfare of a child.

Defendant confirmed he had no questions about the statutory maximum sentence for each count. He acknowledged that each third-degree offense carried a maximum sentence of five years and the second-degree offenses carried a ten-year maximum term, yielding an aggregate thirty-five-year term if the terms ran consecutively.

The court made the following findings:

> I find you've had the advice of competent counsel with whom you are satisfied. You've entered this plea to these charges freely and voluntarily. You knowingly, intelligently, and freely waived your rights to a trial of the evidence, the continuation of the trial of the evidence, to confront any further witnesses or call your witnesses and to remain silent or testify as you so choose with your attorney's advice. I find that you are neither intoxicated, nor infirmed, and I make that based on your testimony that you've given me, as well as my observations. . . . I find you have not been

> threatened or coerced to enter into the open plea unconditionally. No promise has been made to you outside the record. I find that you understand the range of the sentence that may [be] imposed and that's been displayed on the – the top of the plea forms.

The court also found defendant provided an adequate factual basis for the pleas. The court accepted the open plea and scheduled sentencing for August 19, 2016. Defendant then withdrew his pending Reyes motion.

On July 22, 2016, defendant's fourth counsel replaced trial counsel and moved to amend the electronic monitoring pending sentencing. The trial court denied the motion.

Prior to sentencing, defendant moved to withdraw his guilty plea, arguing he always maintained his innocence, his trial attorney was unprepared, and he did not plead voluntarily. Defendant claimed two other men were responsible for the first CDS sale and the second CDS sale did not occur as the State alleged. Counsel noted there was no independent objective evidence of either sale, such as videotapes, audio recordings, or photographs.

As to the weapons charges, defendant claimed he was unaware that the firearms were in his house. Defendant asserted he was prepared to have witnesses testify that the firearms were brought to his house by somebody else. He maintained that he provided the names, addresses, and phone numbers of those witnesses to trial counsel.

Defendant contended his trial counsel was completely unprepared, had not reviewed all of the

discovery, did not understand the chemistry of the lab tests, had not subpoenaed any witnesses, and had not complied with Rule 3:13-3 by providing a summary of each witnesses expected testimony. Defendant further contended trial counsel told him he had no choice but to plead guilty because he has no witnesses, and if he did have witnesses, they would not be believable, and he could not testify because nobody is going to believe him. Defendant claimed he wanted to testify. Defendant also pointed out that his attempt to obtain a new attorney was denied by the court because it was too late to do so. Finally, defendant contended withdrawal of the pleas would not be unfair to the State or give defendant an unfair advantage.

Conversely, the State argued that trial counsel was prepared and had met with prosecutors on numerous occasions. The prosecutor noted this was not a post-conviction relief hearing. The prosecutor pointed to defendant's pretrial motion practice and interlocutory appeals. Trial counsel cross-examined all of the State's witnesses. Moreover, the issue of whether alpha-PVP was a scheduled CDS was determined pretrial. The prosecutor also informed the court that defendant consulted with both trial counsel and another criminal defense attorney who had not yet entered an appearance, before entering the open plea.

The State contended defendant entered his open plea voluntarily and knowingly. It argued it would be prejudiced if defendant were permitted to withdraw his plea after it had rested. Finally, it asserted defendant did not express a colorable claim of innocence.

The trial court issued an oral decision denying the motion. It analyzed the four factors adopted by the Court in State v. Slater, 198 N.J. 145, 157-58 (2009).

The court recounted defendant's unequivocal testimony during the "painstakingly detailed" plea hearing, including being satisfied with his attorney and the advice he had received. Based on defendant's testimony during the plea hearing, the court rendered its decision without hearing additional testimony, finding it unnecessary.

The court deemed defendant "very much in control of his defense." The court concluded "certain things happened at trial and that [the] plea would not have happened unless [defendant] wanted it to happen." It noted there were two sales to undercover officers, a valid search warrant, and trial counsel had submitted a proposed witness list.

The court stated the maximum aggregate sentencing exposure if the terms ran consecutively was addressed during the plea hearing and understood by defendant. The court further noted that mandatory consecutive sentence requirement for unlawful possession of a firearm while committing a CDS crime was addressed in the pretrial memorandum that was completed with the assistance of counsel.

The court noted the determination that alpha-PVP was a CDS was made after conducting a hearing before the trial commenced. The court rejected defendant's claim that a hearsay document from the Governor's Office presented a colorable claim of innocence. The court discussed the strength of the State's case as to the distribution of alpha-PVP to undercover Detective Lucariello, whose "unequivocal" testimony was "clear, concise, [and] direct."

The court noted defendant clearly indicated he was satisfied with trial counsel during the plea

> colloquy. The court concluded that an open plea should be given even more weight than a negotiated plea.
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> As to prejudice to the State, the court noted defendant had the opportunity to listen to all of the State's witnesses, which allowed him to assess the strength of the State's case. The court concluded withdrawal of the guilty plea would prejudice the State, in part due to the additional passage of time that would result in further fading of memories.
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> The court then proceeded to sentencing. During his allocution, defendant again argued to withdraw his guilty plea. The trial court found aggravating factors three, six, and nine and no mitigating factors. The court sentenced defendant to four-year terms on counts one, two, and three; a six-year term on count four, and a six-year term with a mandatory five-year period of parole ineligibility on count five. . . .
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> The court ordered each term to run consecutively, yielding an aggregate twenty-four-year prison term subject to a five-year period of parole ineligibility. Defendant acknowledges that the sentence on count four is mandatorily consecutive pursuant to N.J.S.A. 2C:39-4.1(d), and the five-year period of parole ineligibility on count five is mandatory pursuant to N.J.S.A. 2C:39-7(b)(1).
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> [Cuculino, slip op. at 3-18.]

We recounted the amendments to N.J.S.A. 2C:35-5.3a(a) and N.J.S.A. 2C:35-10a(a), effective August 7, 2017, more than two years after the undercover buys relating to counts one and two. The amendments expressly

criminalized distribution, possession with intent to distribute, and possession of substances containing alpha-PVP. Id. at 18-19.

Defendant raised numerous issues on direct appeal. In his counseled brief, defendant argued: (1) alpha-PVP was not a controlled dangerous substance at the time of the undercover buys or when he pled guilty; (2) counts one through four should have been dismissed because the grand jury presentation was irrevocably flawed in several respects; (3) the search warrant improperly authorized police to search his residence; (4) defendant was denied counsel of his choice; (5) defendant should have been permitted to withdraw his guilty plea; and (6) defendant's sentence was excessive due to three consecutive terms. In a supplemental brief, defendant raised six additional arguments, including that the court erred in denying his request for a trial continuance.

We rejected defendant's primary argument that alpha-PVP was not a Schedule I CDS at the time of the undercover buys, adopting the reasoning in State v. Nicolas, 461 N.J. Super. 207 (App. Div. 2019), which applied with equal force to the facts in this case. We found that alpha-PVP was a Schedule I CDS under both federal and New Jersey law at the time defendant distributed it to an undercover officer on September 26 and October 9, 2014. Cuculino, slip op. at 26. We explained that Nicholas was not a departure from State v. Metcalf, 168

N.J. Super. 375, 379-80 (App. Div. 1979), in which we held constructive publication in the New Jersey Register is sufficient to alert the public that a substance listed by the DEA as a Schedule III CDS became a controlled dangerous substance in New Jersey. Cuculino, slip op. at 27.

We further explained:

> Here, defendant testified during the plea hearing that he knew at the time he distributed alpha-PVP to an undercover officer on September 26 and October 9, 2014, it was unlawful to do so because it was a Schedule I CDS. He does not claim that he relied on any publication or the absence of such publication to determine if alpha-PVP was classified as a CDS. Indeed, the clandestine nature of the sales to the undercover officer bespeaks knowing it was unlawful to possess or distribute alpha-PVP.
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> [Id. at 27.]

In rejecting defendant's argument that the August 2017 amendments demonstrated that alpha-PVP was not a CDS when the undercover buys occurred, we reasoned:

> First, the amendments to N.J.S.A. 2C:35-5.3a(a) and N.J.S.A. 2C:35-10.3a(a) were not retrospective and did not need to be for defendant to be convicted of distribution of alpha-PVP on September 26 and October 9, 2014. As we have already discussed, alpha-PVP was a Schedule I CDS under both federal and New Jersey law as of April 6, 2014, and remained so thereafter. Nicolas, 461 N.J. Super. at 212. The regulatory scheme afforded defendant adequate notice that alpha-PVP was

> a CDS when he distributed it to Detective Lucariello. In fact, defendant admitted he knew it was illegal to do so at the time the crime was committed. Even if he did not know alpha-PVP was a CDS, "ignorance of the law is no defense." State v. Lisa, 391 N.J. Super. 556, 579 (App. Div. 2007) (citing State v. W. Union Tel. Co., 12 N.J. 468, 493-94 (1953)).
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> Second, defendant was not charged with or convicted for violating N.J.S.A. 2C:35-5.3(a)(1) or N.J.S.A. 2C:35-10.3a(a). He was charged with and convicted for violating N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(13). Distribution of the quantity of alpha-PVP sold to the undercover detective was already a third-degree crime on the dates of the two sales. Accordingly, defendant was not subjected to a greater penalty as a result of the subsequent amendments to N.J.S.A. 2C:35-5.3a(a) or N.J.S.A. 2C:35-10.3a(a).
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> [Id. at 28-29.]

As to defendant's argument that counts one through four should have been dismissed because the grand jury indictment was flawed, we held that defendant waived any objection to the indictment because he entered an open and unconditional guilty plea to all the charges. Id. at 31. We explained that the three exceptions to the general rule of waiver did not apply to non-jurisdictional defects in grand jury proceedings. Id. at 32 (citing State v. Marolda, 394 N.J. Super. 430, 435 (App. Div. 2007)). Moreover, the issue concerning the denial of his motion to dismiss the indictment was not preserved under Rule 3:9-3(f). Id. at 32-33.

We found that "[d]efendant's claim he was medically unfit to stand trial [was] refuted by the trial record and the transcript of the plea hearing." Id. at 34. We also rejected defendant's claim that the trial court violated his Sixth Amendment right to counsel by insisting the trial proceed without further delay. Id. at 35-38. We noted that trial counsel was defendant's third attorney and was "an experienced attorney." Id. at 37. We further noted:

> Defendant consulted with an additional attorney, John Morris, during the discussion of pleading open. The court also identified another member of the defense team. The assembled defense team apparently consulted with defendant during the State's case-in-chief, the open plea discussions, and the plea hearing. He then obtained new counsel for the motion to withdraw the guilty plea and sentencing.
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> [Id. at 37-38.]

We likewise rejected defendant's argument that the search warrant did not establish probable cause to search his residence as it ignored the totality of the circumstances. Id. at 41. We noted the affidavit explained the undercover operation, which involved surveillance and undercover buys from defendant. Ibid. Defendant was observed driving to and from the undercover buys in a Jeep, registered in his name at his residence. Ibid. He was observed returning to his residence after the September 2014 undercover buy. Id. at 41-42. Investigators verified defendant's address through both motor vehicle and parole

records. Id. at 42. The search warrant affidavit explained "it was common for drug dealers to conduct transactions at a pre-arranged location and store their drugs and cash at home or in their vehicle." Ibid.

As to sentencing, we found resentencing was required because the trial court did not discuss or weigh several of the factors enumerated in State v. Yarbough, 100 N.J. 627, 644 (1985), specifically factors 3(b), 3(c), 3(d), 3(e), and 5. Id. at 46. We directed that on remand, "the trial court shall consider those factors and provide reasons for the imposition of five consecutive sentences and the same sentence on counts one and two." Ibid. We noted the court should focus "on the fairness of the overall sentence." Ibid. (quoting State v. Abdullah, 184 N.J. 497, 515 (2005)).

We also rejected defendant's remaining arguments, which we found lacked sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

On February 24, 2020, defendant filed a pro se PCR petition and supporting certification claiming ineffective assistance of trial and appellate counsel. Counsel was appointed to represent defendant and filed a brief claiming trial counsel was ineffective: (1) by advising defendant to plead open to all counts of the indictment, as there was no strategic advantage for doing so;

(2) by being unprepared for trial; (3) by failing to advise defendant of the mandatory sentencing requirements imposed by the Graves Act and N.J.S.A. 2C:30-4.1(a); (4) by failing to pursue an entrapment or mistake of law defense. Defendant also claimed appellate counsel was ineffective by failing to argue that defendant was entitled to an additional eighty-six days of jail credit, arguing the electronic monitoring was the equivalent of house arrest.

In his pro se submissions to the PCR court, defendant raised the following ineffective assistance of trial counsel issues: (1) failure to subpoena/contact witnesses; (2) failure to subpoena doctor to testify regarding his medical condition; (3) failure to hire chemical expert to dispute legality of substances; (4) failure to prepare for trial; (5) failure to present evidence of lawful means of acquiring alleged CDS proceeds; (6) failure to challenge operability and ownership of firearms; (7) wrong information provided by defense counsel/coercion to plead guilty; (8) defective and missing plea forms; (9) parole ineligibility and consecutive sentence not disclosed; (10) trial court erred in denying motion for withdrawal of plea; (11) denial of counsel of choice; (12) violation of New Jersey Constitution and separation of powers; (13) ineffectiveness of appellate counsel by failing to review discovery; (14) police misconduct by staging crime scene and destroying evidence; (15) denial of

counsel of choice; (16) lack of probable cause to search; (17) alpha-PVP was not criminalized at the time; (18) denial of due process and plea withdrawal; (19) defective indictments; (20) excessive sentence; (21) judicial bias; (22) conflict of interest; (23) lack of any "victim"; and (24) false evidence.

In his letter opinion, Judge Gibson engaged in a thorough review and analysis of each of the points raised by PCR counsel and defendant. Because the parties are familiar with the contents of his letter opinion, we incorporate that aspect of his letter opinion by reference rather than recounting it at length. Instead, we briefly note the following aspects of the opinion.

Regarding the failure to investigate possible defense, the judge noted defendant did not submit certifications of the three witnesses he named regarding an entrapment defense. Instead, defendant made bald assertions in his own certification. The judge concluded that an entrapment defense would not have been meritorious. The judge found the police did not induce defendant into committing the crimes he was charged with.

As to the alleged failure to pursue a mistake of law defense, the judge noted methylone has been classified as a Class I CDS since August 22, 2021. The judge further noted that defendant believed what he was selling to the undercover detective was a CDS. The fact that the substance turned out to be a

different CDS than he thought was not a defense. Similarly, the judge stated even if defendant did not know alpha-PVP was an illegal CDS, "ignorance of the law is not a defense." The judge noted we had decisively ruled against defendant on this issue on direct appeal.

Regarding trial counsel's failure to hire a chemical expert, the judge noted defendant did not submit a certification stating what the expert would have opined had the expert testified. The trial judge noted defendant was "very much in control of his defense," often conferring with his defense team. Judge Gibson rejected defendant's contention that trial counsel was unprepared for trial, noting "trial counsel filed and opposed motions and competently cross-examined the State's witnesses throughout [the] trial."

As to the claim that defendant was coerced into pleading guilty because of trial counsel substandard performance, and had he been properly informed of the mandatory consecutive sentence, he would not have pled guilty, the judge found the record showed otherwise. The judge explained that on direct appeal, we found trial counsel was an experienced attorney, and "[t]he assembled defense team consulted with defendant during the State's case in chief, the open plea discussion, and the plea hearing." Cuculino, slip op. at 37-38. The judge found defendant did not show there was a reasonable possibility that but for

these alleged errors, defendant would not have pled guilty and would have insisted on completing the trial.

Regarding ineffectiveness of counsel surrounding sentencing, the judge noted the last plea offer extended to defendant was an aggregate twelve-year term, subject to a five-year period of parole ineligibility. Although initially accepted by defendant, he later rejected it, affirmed he was going to trial, and knew he could later only plea open.[6] Judge Gibson also recounted the discussions at the pretrial conference held on December 10, 2015. The judge noted the trial judge "explicitly addressed the sentencing maximums for all charges. Defendant was advised that there was a mandatory period of parole ineligibility of five years as to the certain persons offense and if also convicted of the possession of firearm during CDS offense charge, would be required to serve his sentence consecutively." The judge found these facts showed defendant was aware of the severity of his sentencing exposure. Thus, the judge found defendant failed to show he did not understand the sentencing implications of the open plea.

[6] On open plea is a guilty plea to all of the pending charges, made after the plea cut-off , without the prosecutor agreeing to recommend a sentence less than the maximum sentence.

As to defendant's claim that appellate counsel was ineffective by not challenging whether the open plea was knowing and voluntary and not arguing defendant was entitled to eighty-six days of jail while on electronic monitoring following his plea, the court found defendant's claims were not supported by the record. The trial judge flatly rejected the jail credit claim raised by trial counsel. The claim was again rejected during resentencing. The judge found defendant did not show the jail credit claim was meritorious and, therefore, appellate counsel was not ineffective for not raising the issue.

The judge found the remaining issues raised by defendant in his pro se submissions were procedurally barred by Rule 3:22-4 or Rule 3:22-5, were not sufficiently supported to be considered, and did not merit discussion.

Finally, prior to filing his PCR petition, defendant filed two pro se motions to correct an illegal sentence. Defendant contended he was unlawfully sentenced on the second-degree certain persons statute, N.J.S.A. 2C:39-7, because he was not previously convicted of the required predicate offense. The judge rejected defendant's argument, explaining that defendant had been convicted of endangering the welfare of a child, N.J.S.A. 2C:24-4, under Accusation No. 94-11-660, making him eligible to be sentenced as a second-degree offender on the certain person count.

Based on these findings, the judge entered an order denying PCR. This appeal followed.

Defendant raises the following points in his counseled brief:

> I. AS DEFENDANT HAD SHOWN THAT HE RECEIVED INEFFECTIVE OF ASSISTANCE OF COUNSEL, THE PCR COURT ERRED BY DENYING DEFENDANT'S PCR PETITION.
>
> > (1) As defendant was not properly advised by his attorney as to penal consequences of entering an open guilty plea, his decision to do so was not voluntarily, knowingly, and intelligently made.
> >
> > (2) As trial counsel had failed to investigate certain viable defenses, defendant did not make an informed decision when he entered an open guilty plea.
> >
> > > (A) Mistake of fact/ignorance defense.
> > >
> > > (B) Trial counsel failed to investigate an entrapment defense.
> >
> > (3) Trial counsel's cumulative errors denied defendant effective legal representation. (Not raised below).
>
> II. APPELATE COUNSEL WAS INEFFECTIVE BY FAILING TO ARGUE ON DIRECT APPEAL THAT DEFENDANT'S GUILTY PLEA WAS NOT VOLUNTARILY, INTELLIGENTLY AND KNOWINGLY MADE.
>
> III, AS THERE WAS A GENUINE ISSUE OF MATERIAL FACT IN DISPUTE, THE PCR COURT

ERRED WHEN IT DENIED DEFENDANT'S PCR PETITION WITHOUT AN EVIDENTIARY HEARING.

Defendant raises the following points in a supplemental pro se brief:

I. THE PCR COURT ERRED IN DENYING DEFENDANT['S] MOTION FOR INEFFECTIVE COUNSEL AND REVERSAL OF HIS PLEA. DEFENDANT WAS NOT INFORMED AT THE PLEA HEARING, PRIOR TO ENTRY OF THE PLEA THAT DEFENDANT WAS SUBJECT TO "MANDATORY PAROLE INELIGIBILITY[,]" "MANDATORY MINIMUM TERM OF [FIVE] YEARS[,]" "MANDATORY CONSECUTIVE SENTENCES AND BEING SENTENCED UNDER THE GRAVES'S ACT.["] THIS IS IN VIOLATION OF [RULE] 3:9-2, AND STRICKLAND v. WASHINGTON, 466 U.S. 668, 694 (1984). ALSO THE JUDGE DID NOT INFORM DEFENDANT [OF] THE REAL TIME TO BE SERVED AT SENTENCING VIOLATING [RULE] 3:21-4(J) AND N.J.S.A. 2C:44-1.

II-A. THE PCR COURT ERRED IN RULING DEFENDANT'S POINT [REGARDING] ALPHA-PVP WAS BARRED UNDER [RULE] 3:22-2. THE STATE CONTENDS A MERE REFERENCE TO THE FEDERAL LIST OF CDS IN THE ADMINISTRATIVE CODE WAS ENOUGH TO CRIMINALIZE ALPHA-PVP UNDER [NEW JERSEY] LAW. THE COURTS INTERPRETATION OF N.J.S.A. 24:21-3(c) IS INCORRECT, THIS VIOLATES THE NEW JERSEY CONSTITUTION ART-4, SEC-7 F-5, F-8 AND THE DUE PROCESS CLAUSE OF BOTH CONSTITUTIONS. THE ABOVE IS CLEARLY A CONSTITUTIONAL VIOLATION AND FALLS UNDER [RULE] 3:22-2

(a) & (b) AND THUS IS PERMITTED TO BE HEARD.

II-B. THE ABOVE ALSO VIOLATES THE NON-DELEGATION DOCTRINE, THE SEPARATION OF POWERS DOCTRINE, N.J.S.A. 1:1-1, N.J.S.A. 2C:1-2(a), (4), (6), N.J.S.A. 2C:1-5(a), N.J.S.A. 2C:35-2, N.J.S.A. 2C:24-21-2 [sic], N.J.S.A. 24:21-3(c), (d), [AND] N.J.S.A 24:21-31(b)(1), (2), (3) WARRANTING DISMISSAL OF THE INDICTMENT.

III-A. THE PCR COURT ERRED WHEN IT AFFIRMED THE TRIAL AND APPELLATE COURTS['] DECISION[S] DENYING DEFENDANT'S MOTION FOR A CONTINUANCE, AND THE SUBSTITUTION OF PAID COUNSEL OF CHOICE. THIS IS A DIRECT CONTRADICTION TO THE SUPREME COURT RULING IN STATE v. KATES, 426 N.J. SUPER. 32, 42 ([APP. Div.] 2012) [and] STATE v. KATES, 216 N.J. 393, 395 (2014) VIOLATING THE U.S. CONST. 6th AMENDMENT [AND] N.J. CONST. ART. I, 10.

III-B. THE PCR COURT ERRED IN DENYING DEFENDANT'S POINT FOR PAID APPELLATE COUNSEL OF CHOICE [AND] INEFFECTIVE APPELLATE COUNSEL AS APPELLATE COUNSEL FAILED TO PROCEED WITH THE APPEAL, ALLOWED THE APPEAL TO BE DISMISSED, THEN HIRED ANOTHER ATTORNEY WITHOUT DEFENDANT'S KNOWLEDGE OR PERMISSION TO PROCEED WITH THE APPEAL. THIS IS A DIRECT CONTRADICTION TO THE SUPREME COURT RULING IN STATE v. KATES, 426 N.J. SUPER. 32, 42 ([APP. DIV.] 2012) [AND] STATE v. KATES, 216 N.J. 393, 395 (2014) VIOLATING THE U.S. CONST. 6th AMENDMENT

[AND] N.J. CONST., ART. I, 10 AND STRICKLAND v. WASHINGTON, 466 U.S. 668, 694 (1984).

We affirm the denial of defendant's PCR petition substantially for the reasons expressed by Judge Gibson in his well-reasoned, comprehensive twenty-eight-page, single-spaced opinion. Based upon our careful review of the record, we are convinced that Judge Gibson's findings and legal conclusions are amply supported by the record and legally correct. We add the following comments.

"Where, as here, the PCR court has not conducted an evidentiary hearing, we review its legal and factual determinations de novo." State v. Aburoumi, 464 N.J. Super. 326, 338-39 (App. Div. 2020) (citing State v. Jackson, 454 N.J. Super. 284, 291 (App. Div. 2018)). To establish an ineffective assistance of counsel claim, "a defendant must demonstrate: (1) counsel's performance was deficient; and (2) the deficient performance actually prejudiced the petitioner's defense." Id. at 339 (citing Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 58 (1987)). "That is, the defendant must establish, first, that 'counsel's representation fell below an objective standard of reasonableness' and, second, that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" State v. Alvarez, 473 N.J. Super. 448, 455 (App. Div. 2022) (quoting Strickland, 466 U.S. at 688, 694).

When a guilty plea is involved, "a defendant must show that (i) counsel's assistance was not 'within the range of competence demanded of attorneys in criminal cases'[] and (ii) 'that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial.'" State v. Nuñez-Valdez, 200 N.J. 129, 139 (2009) (second alteration in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)). "In other words, 'a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.'" Aburoumi, 464 N.J. Super. at 339 (quoting State v. O'Donnell, 435 N.J. Super. 351, 371 (App. Div. 2014)). "The petitioner must ultimately establish the right to PCR by a preponderance of the evidence." O'Donnell, 435 N.J. Super. at 370 (citing State v. Preciose, 129 N.J. 451, 459 (1992)).

A guilty plea must be entered "knowingly, intelligently and voluntarily." State v. J.J., 397 N.J. Super. 91, 98-99 (App. Div. 2007). Counsel must not "provide misleading, material information that results in an uninformed plea." Nuñez-Valdez, 200 N.J. at 139-40, 143. Here, there is no basis to conclude that trial counsel provided misleading information or that defendant was uninformed. Defendant's own answers and testimony during the plea hearing indicate otherwise.

A defendant has the right to "effective assistance of counsel on a first appeal as of right." State v. Morrison, 215 N.J. Super. 540, 545 (App. Div. 1987) (citing Evitts v. Lucey, 469 U.S. 387 (1985)). The Strickland standard for ineffectiveness applies to appellate counsel. Id. at 546. "[I]n applying the Strickland standard to assess a claim of ineffective assistance of appellate counsel, defendant must show not only that his attorney's representation fell below an objective standard, but also that he was prejudiced, i.e., but for counsel's unprofessional errors, the result would have been different." Ibid. "Counsel should advance all of the legitimate arguments requested by the defendant that the record will support." R. 3:22-6(d). However, appellate counsel is not required to advance every conceivable argument the defendant urges. Jones v. Barnes, 463 U.S. 745, 751 (1983); State v. Gaither, 396 N.J. Super. 508, 515 (App. Div. 2013). Appellate counsel need not advance meritless arguments. See Gaither, 396 N.J. Super. at 515 (explaining that "R. 3:22-6(d), which requires PCR 'counsel [to] advance any grounds insisted upon by defendant notwithstanding that counsel deems them without merit' . . . does not apply to appellate counsel." (alteration in original)).

Defendant attempts to relitigate issues already decided on direct appeal. Specifically, defendant contends the PCR court erred in ruling that his argument

that Alpha-PVP was not an illegal CDS was barred. We disagree. That issue was raised and decided before the trial court and on direct appeal. On direct appeal, held that "alpha-PVP was a Schedule I CDS under both federal and New Jersey law at the time defendant distributed it to an undercover officer on September 26 and October 9, 2014." Cuculino, slip op. at 26. Moreover, "defendant testified during the plea hearing that he knew at the time he distributed alpha-PVP to an undercover officer on September 26 and October 9, 2014, it was unlawful to do so because it was a Schedule I CDS." Id. at 27. "A prior adjudication upon the merits of any ground for relief is conclusive whether made in proceedings resulting in the conviction or in any . . . appeal taken from such proceedings." R. 3:22-5. Judge Gibson correctly ruled the claim was procedurally barred in this PCR proceeding. Cuculino, slip op. at 18-19.

Defendant's claim that the PCR judge erred when he affirmed the trial and appellate courts' denial of his motion for a trial continuance and substitution of counsel is similarly barred by Rule 3:22-5. Those issues were likewise raised and rejected by the trial court and on direct appeal. We stated: "Defendant's claim he was medically unfit to stand trial is refuted by the trial record and the transcript of the plea hearing." Id. at 34. "We discern[ed] no abuse of discretion by the trial court in in denying defendant's request to further adjourn the trial."

Id. at 35. As to defendant's argument that the trial court violated his Sixth Amendment right to counsel of his choice by insisting the trial proceed without delay, considering the facts and circumstances, we held "that the trial court did not mistakenly exercise its discretion by denying defendant's request for a trial adjournment and did not violate his Sixth Amendment rights." Id. at 37.

Regarding defendant's claim that he was not informed of the sentencing implications of his guilty plea either prior to or during the plea hearing, we noted on direct appeal that during the plea hearing, "[d]efendant confirmed he reviewed each question on the plea forms with his attorney, understood the questions, and answered each question truthfully." Id. at 11. Defendant further "confirmed he had no questions about the statutory maximum sentence for each count. He acknowledged that each third-degree offense carried a maximum sentence of five years[,] and the second-degree offenses carried a ten-year maximum term, yielding an aggregate thirty-five-year term if the terms ran consecutively." Id. at 12-13. Additionally, the plea form stated the sentencing exposure for each count, noted it was an open plea with no recommended sentence, noted defendant he was pleading guilty to a charge with a minimum mandatory period of parole ineligibility of five years, and that defendant's total sentence exposure was thirty-five years. Notably, the plea form did not state

that any of the counts would run concurrently. And, as noted by the trial and PCR judges, the mandatory consecutive sentence for the unlawful possession of a firearm during a CDS offense was addressed in the pretrial memorandum, which was completed with the assistance of defense counsel. For these reasons, we discern no merit in defendant's argument that he was not properly informed of the sentencing implications of his open plea.

For these reasons, Judge Gibson properly rejected defendant's claims that appellate counsel was ineffective for not challenging whether the open plea was knowing and voluntary. The record demonstrates defendant was not uninformed of the sentencing implications of the open plea. Defendant has not shown that had the plea been challenged on direct appeal, the result would have been different. Thus, appellate counsel was not ineffective by not raising this issue.

Defendant claims he was entitled to eighty-six days of jail credit while on electronic monitoring following his plea. We disagree. Defendant was not entitled to jail credit for time spent participating in an electronic monitoring program as a condition of release. See State v. Mastapeter, 290 N.J. Super. 56, 62-63 (App. Div. 1996) (rejecting jail credit for the time the defendant was on release on a wristlet monitoring program); United States v. Wickman, 955 F.2d 592, 593 (8th Cir. 1992) (time spent "under pre-trial house arrest" as a condition

for pretrial release does not constitute "official detention" entitling the defendant to jail credit); Cf. R. 3:21-8(a) ("The defendant shall receive credit on the term of a custodial sentence for any time served in custody in jail or in a state hospital between arrest and the imposition of sentence."). Appellate counsel was not ineffective by not raising this meritless claim.

Lastly, we address defendant's argument that the PCR judge improperly denied his request for an evidentiary hearing. "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 Preciose, 129 N.J. at 462).

Rule 3:22-10(b), which governs evidentiary hearings, 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.

"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.'" State v. Porter, 216 N.J. 343, 355 (2013) (quoting R. 3:22-10(b)). A defendant "must

do more than make bald assertions that he was denied the effective assistance of counsel." Ibid. (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)). Rather, defendant's claim must be supported by "specific facts and evidence." Ibid. "[A] defendant is not entitled to an evidentiary hearing if the 'allegations are too vague, conclusory, or speculative . . . .'" Ibid. (quoting State v. Marshall, 148 N.J. 89, 158 (1997)). Here, the PCR judge correctly found that defendant did not establish a prima case for PCR. Moreover, as we have explained, defendant's proffered arguments lack merit. As a result, an evidentiary hearing was unnecessary and properly denied.

Defendant's remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.