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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2077-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FAUSTINO E. ACOSTA-
JAQUEZ,

Defendant-Appellant.

Submitted November 30, 2022 – Decided July 19, 2023

Before Judges Gooden Brown and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law
Division, Passaic County, Indictment No. 18-02-0141.

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

Camelia M. Valdes, Passaic County Prosecutor,
attorney for respondent (Leandra Cilindrello, Assistant
Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Faustino Acosta-Jaquez appeals from the May 7, 2021 order of the Law Division denying his motion to withdraw his guilty plea to second-degree conspiracy to distribute heroin prior to sentencing. We affirm.

I.

In 2017, after an extensive drug investigation that included surveillance and intercepted telephone calls, defendant and several others were arrested. In 2018, a grand jury indicted defendant for his possession, production, and intent to distribute heroin. The indictment charged him with: (1) third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1); (2) third-degree possession of a CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3); (3) third-degree possession of a CDS with intent to distribute within 1,000 feet of school property, N.J.S.A. 2C:35-7(a) and N.J.S.A. 2C:35-5(a); (4) third-degree conspiracy to distribute a CDS, N.J.S.A. 2C:5-2, N.J.S.A. 2C:35-5(a)(1), and N.J.S.A. 2C:35-5(b)(2); (5) third-degree possession of a CDS, N.J.S.A. 2C:35-10(a)(1); (6) second-degree possession of a CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(2); (7) third-degree conspiracy to distribute a CDS, N.J.S.A. 2C:5-2, N.J.S.A. 2C:35-5(a)(1), and N.J.S.A. 2C:35-5(b)(2); (8) third-degree possession of a CDS, N.J.S.A. 2C:35-10(a)(1); (9) first-degree possession of a CDS with

intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(1); (10) third-degree possession of a CDS with intent to distribute within 1,000 feet of school property, N.J.S.A. 2C:35-7(a) and N.J.S.A. 2C:35-5(a); (11) second-degree conspiracy to distribute a CDS, N.J.S.A. 2C:5-2, N.J.S.A. 2C:35-5(a)(1), and N.J.S.A. 2C:35-5(b)(1); (12) first-degree operating a CDS production facility, N.J.S.A. 2C:35-4; (13) second-degree conspiracy to distribute a CDS, N.J.S.A. 2C:5-2(a)(1), N.J.S.A. 2C:35-5(a)(1), and N.J.S.A. 2C:35-5(b)(1); and (14) third-degree conspiracy to distribute a CDS, N.J.S.A. 2C:5-2, N.J.S.A. 2C:35-5(a)(1), and N.J.S.A. 2C:35-5(b)(2).

On January 4, 2019, defendant pled guilty to count eleven of the indictment, second-degree conspiracy to distribute a CDS. In exchange for the guilty plea, the State agreed to recommend a six-year term of imprisonment, with a three-year period of parole ineligibility, and to move to dismiss the remaining counts of the indictment. The State acknowledged at the plea hearing that defendant would be eligible for deportation because of his conviction.

John Somohano represented defendant during the plea negotiations and at the plea hearing. At the start of the hearing, the court had the following exchange with defendant:

Court: You're going to plead guilty to this conspiracy charge –

Defendant: Yes.

Court: Conspiracy to distribute a [CDS]. As a result, the Prosecutor will recommend you be sentenced to a term of six years New Jersey State Prison with three years of parole ineligibility. Your attorney will argue for a lower sentence, however, there is no guarantee that you're going to get a lower sentence other than six years with three years before parole eligibility. Do you understand all of that?

Defendant: Yes.

Court: Knowing that, do you wish to plead guilty?

Defendant: Yes.

There was no mention during this exchange of defendant's counsel making an application for defendant's acceptance to Recovery Court in lieu of a prison term prior to sentencing.¹

Defendant subsequently admitted that he was recorded by investigators conspiring with others to sell heroin in Paterson. He also admitted that the weight of the heroin he agreed to sell was in the second-degree range.

After his admissions, defendant and the court had the following exchange:

Court: Do you understand that by pleading guilty here today, you are admitting that you committed the crime charged in count 11 of [the] indictment . . . , that being second[-]degree conspiracy to distribute [CDS]?

¹ At the time of defendant's plea, Recovery Court was referred to as Drug Court.

Defendant: Yes.

Court: And sir, do you understand that your maximum sentencing exposure for that offense would be ten years in State Prison?

Defendant: Yes.

Court: And do you understand that under the terms of this plea agreement, the State will recommend a sentence of six years New Jersey State Prison with three years before parole eligibility . . . ?

Defendant: Yes.

. . . .

Court: And have any promises or representation been made to you by anyone in connection with your guilty plea, other than the ones we have discussed in open court?

Defendant: No.

Again, there was no mention of defendant's counsel making an application for defendant's admission to Recovery Court in lieu of prison prior to sentencing.

Notably, the court and counsel discussed defendant's counsel making an inquiry prior to sentencing with respect to the status of a pending civil forfeiture proceeding involving a car defendant used as part of the conspiracy. In addition, defendant's counsel stated that he would attempt to resolve prior to sentencing the consequences of defendant's violation of pretrial intervention with respect to

another matter. There was, however, no discussion of defendant's counsel applying for defendant's admission to Recovery Court in lieu of prison prior to sentencing.

Prior to sentencing, defendant relieved Somohano as his counsel. Also prior to sentencing, defendant moved to withdraw his guilty plea. He submitted an affidavit contending he believed that after the plea, but before sentencing, Somohano would apply for defendant's admission to Recovery Court in lieu of a prison sentence. Defendant also stated that he believed that he would be admitted to Recovery Court instead of receiving a prison sentence. According to defendant, this belief was supported by the court's acknowledgement at the plea hearing that Somohano could seek a lower sentence than that recommended by the State. Defendant asserted that he would not have pled guilty if he knew that he was going to be sentenced to prison.

The trial court held an evidentiary hearing on defendant's motion. Somohano testified, as did the mother of defendant's children. After the hearing, the court issued an oral opinion denying defendant's motion. The court noted that it reviewed the transcripts of eight conferences the court held with the parties prior to entry of defendant's guilty plea. The court found that in August 2018, Somohano stated on the record that defendant was asking for a second-

degree departure in order to allow him to apply for Recovery Court because the first-degree charges defendant was facing rendered him ineligible for Recovery Court. See N.J.S.A. 2C:35-14(b)(1). Somohano also stated that the State "flatly rejected" that proposal. He noted that while the State might agree to a second-degree departure for sentencing purposes, he was asking that the State recommend a flat sentence to State prison, because the State refused to agree to the departure for purposes of defendant applying to Recovery Court.

The court also found that the State's then-pending offer was an eight-year prison term, with a four-year period of parole ineligibility. After a series of negotiations, the court found, the State informed the court that it was offering to allow defendant to plea to a second-degree charge with the State recommending a State prison sentence of six years, with a three-year period of parole ineligibility. At the next conference, Somohano informed the court that defendant would be accepting the State's offer, but wished to speak to an immigration attorney about the immigration consequences of his plea.

At the following conference, the court found, Somohano informed the court that defendant was not satisfied with his representation and would perhaps be seeking another legal opinion. At that conference, the State pointed out that several of defendant's co-defendants had entered guilty pleas and had agreed to

cooperate against defendant. The State also informed the court that it was firm in its offer and would not be making a lower plea offer, regardless of who was hired to represent defendant. At a subsequent conference a short time later, the court found, the parties informed the court that the matter had been resolved.

The court also noted that at the plea hearing the court pointed out to defendant two times that the State would be seeking a six-year prison sentence. In addition, the court found that there was no mention at the plea hearing of an application for defendant's admission to Recovery Court in lieu of a prison sentence.

The court found credible Somohano's testimony that he never informed defendant that he would apply for his admission to Recovery Court in lieu of a prison sentence after the plea as part of his plea agreement. To the contrary, the court found that Somohano was aware that the State was firmly against defendant's admission to Recovery Court and that its agreement to accept a second-degree departure was expressly not for the purpose of permitting defendant to make a Recovery Court application. Thus, an application for defendant's admission to Recovery Court after his plea, but prior to sentencing, would have been a violation of the plea agreement.

The court found incredible the testimony of the mother of defendant's children that Somohano had assured her defendant would be admitted to a probationary program in lieu of a prison sentence. The court found that her testimony was contrary to what transpired at numerous court conferences that preceded the plea hearing and to Somohano's credible testimony.

Applying the factors established in State v. Slater, 198 N.J. 145 (2009), the court found insufficient grounds to grant the motion because: (1) defendant had not made a credible showing of innocence and, in fact, did not deny his guilt; (2) defendant did not establish a strong reason to permit withdrawal of his plea, given that he was aware of the consequences of his plea as clearly established at the plea hearing, and there is "no support in the record" that he was made any promises that he would be considered for Recovery Court in lieu of a prison sentence; (3) the plea was entered pursuant to a negotiated plea agreement; and (4) given the age of the case, the State would suffer prejudice, including the potential loss of witnesses, if the plea was withdrawn and the State proceeded to trial.² A May 7, 2021 order memorializes the court's decision.

² If defendant's motion had been granted and the plea withdrawn, first-degree charges against defendant would have been reinstated, rendering him ineligible for Recovery Court. See N.J.S.A. 2C:35-14(b)(1).

The court subsequently sentenced defendant in accordance with the plea agreement to a six-year term of imprisonment, with a three-year period of parole ineligibility.

This appeal followed. Defendant makes the following argument.

DEFENDANT SHOULD HAVE BEEN ALLOWED TO WITHDRAW FROM HIS GUILTY PLEA PURSUANT TO STATE V. SLATER, 198 N.J. 145 (2009), BECAUSE THERE WERE "FAIR AND JUST" REASONS SUPPORTING WITHDRAWAL.

A. Defendant Satisfied The Second Slater Factor, Warranting Plea Withdrawal.

B. Defendant Received Ineffective Assistance of Counsel In Connection With the Guilty Plea.

II.

"[A] guilty plea voluntarily entered may not be withdrawn except pursuant to leave granted in the exercise of the trial judge's discretion." State v. Huntley, 129 N.J. Super. 13, 16 (App. Div. 1974). "However, where before sentence the defendant asserts his innocence and seeks to withdraw his plea and proceed to trial, the courts in our State, in practice, generally exercise their discretion liberally to enable withdrawal of the plea and a trial on the merits" State v. Deutsch, 34 N.J. 190, 198 (1961). "[A] plea may only be set aside in the exercise of the court's discretion." Slater, 198 N.J. at 156. The court considers

four factors to determine if withdrawal of a guilty plea is warranted: "(1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant's reasons for withdrawal; (3) the existence of a plea bargain; and (4) whether withdrawal would result in unfair prejudice to the State or unfair advantage to the accused." Id. at 157-58. "No factor is mandatory; if one is missing, that does not automatically disqualify or dictate relief." Id. at 162.

"[T]he trial court's denial of defendant's request to withdraw his guilty plea will be reversed on appeal only if there was an abuse of discretion which renders the lower court's decision clearly erroneous." State v. Simon, 161 N.J. 416, 444 (1999); State v. O'Donnell, 435 N.J. Super. 351, 372 (App. Div. 2014).

We have carefully reviewed the record in light of these legal principles and have identified no basis on which to disturb the trial court's opinion. There is ample support in the record for the trial court's finding that the State was opposed to defendant's admission to Recovery Court and agreed to allow him to plead guilty to a second-degree offense for purposes of determining the length of his sentence to State prison and not for the purpose of permitting him to apply to Recovery Court. This finding is supported by the numerous pretrial conferences held prior to entry of defendant's guilty plea and the transcript of

the plea hearing, where defendant acknowledged that the State would be seeking a prison sentence. There was no mention at the hearing of a post-plea, pre-sentencing application for admission to Recovery Court.

There is also support in the record for the trial court's finding that defendant could not have reasonably interpreted the State's agreement that his counsel could argue for a lesser sentence than that recommended by the State to encompass an application for defendant's admission to Recovery Court in lieu of a prison term. There is nothing in the record suggesting that the State agreed to dismiss thirteen counts, including first-degree charges, arising from a sophisticated heroin distribution operation in order to permit defendant to apply for Recovery Court in lieu of a prison sentence.

We do not address defendant's claims that he was denied effective assistance of trial counsel, which are more appropriate for resolution in a petition for post-conviction relief.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION