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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2253-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHRISTIAN G. RIVERA,
a/k/a JOEL RIVERA, JUELZ,
JOSHUA RIVERA, JUELZ
RIVERA, RODRIQUES RIVERA,
JOSHUA RODRIGUEZ, JOEL
RODRIGUEZ, and CHRISTIAN
J. RODRIGUEZ,

Defendant-Appellant.

Submitted January 19, 2023 – Decided February 2, 2023

Before Judges Mayer and Enright.

On appeal from the Superior Court of New Jersey, Law
Division, Morris County, Indictment No. 12-10-1056.

Joseph E. Krakora, Public Defender, attorney for
appellant (Steven J. Sloan, Designated Counsel, on the
brief).

Robert J. Carroll, Morris County Prosecutor, attorney for respondent (Paula Jordao, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Christian Rivera appeals from a January 15, 2021 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm, substantially for the reasons outlined by Judge Stephen J. Taylor in his thoughtful written opinion.

Defendant was indicted on three counts of first-degree robbery, N.J.S.A. 2C:15-1(a)(2) (counts one, three, and five), three counts of fourth-degree unlawful possession of an imitation firearm, N.J.S.A. 2C:39-4(e) (counts two, four, and seven), one count of third-degree terroristic threats, N.J.S.A. 2C:12-3(b) (count six), one count of third-degree receiving stolen property, N.J.S.A. 2C:20-7(a) (count eight), and fourth-degree tampering with evidence, N.J.S.A. 2C:28-6 (count nine). He later entered into a plea agreement to plead guilty to counts one, three and five, in exchange for the State's recommendation that he serve consecutive ten-year sentences on counts one and three and a concurrent ten-year term on count five. The State also agreed to recommend dismissal of defendant's remaining charges.

During his September 2015 plea colloquy, defendant testified he and his attorney discussed potential outcomes if his case had proceeded to trial, as well as "the consequences of entering [his] plea . . . to the three first-degree robbery charges." Additionally, he testified he understood he faced a maximum prison term of twenty years for each robbery offense. Defendant also stated he reviewed discovery, the plea agreement, and the supplemental plea form with counsel before signing the plea documents. Further, he testified he committed the robbery offenses referenced in the plea forms and was not forced or threatened to enter into the plea agreement. After defendant "provided a credible factual basis[] for all three robberies," Judge Taylor accepted defendant's guilty pleas, finding they were entered "knowingly, intelligently and voluntarily."

In December 2015, Judge Taylor sentenced defendant consistent with the plea agreement, imposing a ten-year prison sentence on count one; a consecutive ten-year term on count three; and a concurrent ten-year term on count five. Further, the judge found defendant was required to serve eighty-five percent of each sentence, pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, before he was parole eligible.

The first page of defendant's December 24, 2015 judgment of conviction (JOC) correctly reflected defendant would serve a five-year parole supervision

period for each robbery count, and that the sentence on count three would run consecutive to the sentence on count one. However, page two of the JOC mistakenly reflected defendant would be supervised on parole for only five years, not ten, upon his release, despite the consecutive nature of the sentences imposed on counts one and three. Less than three weeks after entry of the JOC, page two of the judgment was amended to correctly reflect defendant would be supervised for ten years on parole, based on the consecutive terms imposed.

Defendant filed a direct appeal, arguing he should not have received consecutive sentences on counts one and three. This court heard defendant's appeal on a sentencing calendar, pursuant to Rule 2:9-11, and affirmed his sentence, holding it was "not manifestly excessive or unduly punitive and [did] not constitute an abuse of discretion." State v. Rivera, No. A-2682-15 (App. Div. June 6, 2016).

In October 2019, defendant timely filed a pro se PCR petition and assigned counsel later supplemented the petition. Defendant argued his plea counsel was ineffective because she: failed to engage in meaningful discussions with him about his case and pressured him into pleading guilty to three robberies, even though he was "innocent of these offenses"; failed to advise him he would be subject to ten years of parole supervision upon his release from prison; and failed

to object to entry of the amended JOC, despite that it increased his parole supervision period by five years. The State opposed the petition, arguing defendant was procedurally barred from bringing his sentencing claims because they should have been advanced on direct appeal; and the State also contended plea counsel was not ineffective.

After hearing argument, Judge Taylor issued a cogent written opinion and conforming order on January 15, 2021, denying defendant's petition without an evidentiary hearing. In rejecting defendant's ineffective assistance of counsel (IAC) claims, Judge Taylor found defendant's "plea was entered knowingly, intelligently, and voluntarily." Further, he determined defendant's

bare assertions . . . plea counsel pressured him into pleading, failed to investigate defenses and advised him to falsely admit [he committed] the three robberies are belied by the plea colloquy where, among other things, he admitted to discussing defenses with counsel, discussing possible outcomes if the case had gone to trial and entering the plea voluntarily, without any undue pressure or threats.

The judge also found defendant's PCR arguments were "directly contradicted by his clear and unwavering answers during the plea hearing."

Similarly, the judge rejected defendant's contention plea counsel was ineffective for failing to apprise him of the length of his parole supervision, finding:

counsel clearly advised [defendant] in the [s]upplemental [p]lea [f]orm of the mandatory period of five years parole supervision on the crime of first-degree robbery. [Defendant] was well aware he faced mandatory parole supervision because of his plea to three counts of first-degree robbery and was clearly advised the State sought imposition of consecutive sentences.

The judge continued:

here it is clear . . . [defendant] was advised prior to the plea about imposition of NERA's fixed term of parole supervision for the offense of first-degree robbery as evidenced by the signed [s]upplemental [p]lea [f]orm. Since two of the counts of first-degree robbery were ultimately run consecutively, [defendant] was sentenced to five years parole supervision on each count, thereby mandating a ten-year period of parole supervision. While the [s]upplemental [p]lea [f]orm did not specifically advise [defendant] that he faced an aggregate term of ten years parole supervision, the plea form clearly advised [him] the State was seeking consecutive sentences on counts [one] and [three].

Additionally, the judge concluded even if plea counsel "neglected to tell [defendant] he faced consecutive terms of parole supervision, such a result was evident from the plea paperwork [defendant] acknowledged reviewing, signing and understanding."

Next, Judge Taylor observed defendant "provided both a recorded statement and unrecorded statements implicating himself in the robberies, which [another] judge found admissible at trial." The judge also found defendant

"faced a potential sentence of sixty years in prison, subject to NERA" and "significantly reduced [his] sentencing exposure by virtue of the plea agreement." Accordingly, the judge concluded defendant failed to demonstrate a "reasonable probability" that but for plea counsel's purported errors, defendant would not have pled guilty.

Moreover, Judge Taylor stated defendant's contention "he did not know he faced a potential ten-year term of parole supervision based on the State's request for consecutive terms is barred by Rule 3:22-4." The judge reasoned that when defendant appealed from the "imposition of consecutive sentences to the Appellate Division, [t]he issue regarding a ten-year term of parole supervision could readily have been raised during this appeal, as [defendant] was fully aware . . . he was sentenced to ten . . . years of parole supervision at the time of the appeal." The judge highlighted defendant's appeal was argued before this court on June 6, 2016, by which time the JOC was amended to "accurately show[] . . . [defendant] was ordered to serve a '[ten]-year term of parole supervision' by virtue of the consecutive sentences."

Lastly, the judge addressed defendant's argument that the bar under Rule 3:22-4 should be relaxed because its enforcement would "result in a fundamental injustice." The judge found this exception did "not apply to overcome the bar,"

explaining defendant's plea was entered "knowingly, intelligently, and voluntarily," and it was "apparent from both the plea form[s] and the plea colloquy that defendant understood the nature of the charges, the consequences of his plea and his right to trial." Accordingly, the judge denied defendant's PCR petition, finding defendant failed to establish a prima facie case of IAC and was not entitled to an evidentiary hearing.

On appeal, defendant raises the following arguments:

POINT I

THE PCR COURT MISAPPLIED THE LAW IN DENYING THE DEFENDANT'S PETITION FOR [PCR] RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION HE WAS PROVIDED WITH INADEQUATE ASSISTANCE OF COUNSEL.

1. PLEA COUNSEL WAS INEFFECTIVE FOR ADVISING DEFENDANT HE WOULD RECEIVE FIVE YEARS OF PAROLE SUPERVISION UPON RELEASE INSTEAD OF TEN YEARS OF PAROLE SUPERVISION AS REFLECTED IN THE AMENDED [JOC] AND FOR FAILING TO OBJECT WHEN THE TRIAL JUDGE INCREASED DEFENDANT'S PAROLE SUPERVISION FROM FIVE TO TEN YEARS.

2. PLEA COUNSEL WAS ALSO INEFFECTIVE FOR ADVISING DEFENDANT THAT DEFENDANT SHOULD PLEAD GUILTY IN SPITE OF HIS CONTENTION THAT HE WAS NOT

GUILTY AND FOR FAILING TO DISCUSS TRIAL
STRATEGY WITH DEFENDANT.

These arguments are unavailing.

"[W]here the [PCR] court does not hold an evidentiary hearing, we may exercise de novo review over the factual inferences the trial court has drawn from the documentary record." State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014) (citing State v. Harris, 181 N.J. 391, 420-21 (2004)). We review a PCR court's legal conclusions de novo. State v. Nash, 212 N.J. 518, 540-41 (2013) (citing Harris, 181 N.J. at 415-16). Further, we review a trial court's decision to deny a defendant's request for an evidentiary hearing under an abuse of discretion standard. State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000) (citing State v. Artis, 36 N.J. 538, 541 (1962)).

When petitioning for PCR, a defendant must establish he is entitled 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 defendant is not automatically entitled to an evidentiary hearing by simply raising a PCR claim. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). An evidentiary hearing is required only when: a defendant establishes a prima facie case in support of PCR; the court determines there are disputed issues of material fact that cannot be resolved by review of the existing record; and the court finds an

evidentiary hearing is required to resolve the claims asserted. State v. Porter, 216 N.J. 343, 354 (2013) (citing R. 3:22-10(b)).

To establish an IAC claim, a defendant must satisfy the two-part test under Strickland v. Washington, 466 U.S. 668, 687 (1984), and show: (1) "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[.]" and (2) "the deficient performance prejudiced the defense." Accord State v. Fritz, 105 N.J. 42, 57-58 (1987). Our Supreme Court has expressed a "general policy against entertaining [IAC] claims on direct appeal because such claims involve allegations and evidence that lie outside the trial record." Preciose, 129 N.J. at 460. However, a prima facie case of IAC must be demonstrated by legally competent evidence rather than mere "bald assertions." Cummings, 321 N.J. Super. at 170.

A defendant satisfies the first Strickland prong by showing counsel's representation fell short of the prevailing norms of the legal community. Padilla v. Kentucky, 559 U.S. 356, 366-67 (2010). The second component of Strickland is met by establishing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

A strong presumption exists that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. at 689. And because prejudice is not presumed, "defendant must demonstrate 'how specific errors of counsel undermined the reliability' of the proceeding." State v. Drisco, 355 N.J. Super. 283, 289-90 (App. Div. 2002) (citations omitted).

Additionally, a PCR claim is not a substitute for a direct appeal, and thus must overcome some time and procedural bars before it can be considered. R. 3:22-3. To that end, a defendant may not employ [PCR] to assert a new claim that could have been raised on direct appeal. R. 3:22-4.

Applying these principles, and for the reasons expressed in Judge Taylor's comprehensive opinion, we are convinced the judge properly concluded defendant was barred under Rule 3:22-4 from contesting the ten-year parole supervision period imposed on his consecutive sentences. We also agree with Judge Taylor that defendant failed to establish a prima facie case of IAC and therefore, 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