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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2390-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DIM AKOPIAN,

Defendant-Appellant.

Submitted May 8, 2023 – Decided May 31, 2023

Before Judges Whipple, Mawla and Walcott-Henderson.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 14-09-1386.

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

Mark Musella, Bergen County Prosecutor, attorney for respondent (K. Charles Deutsch, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Dim Akopian appeals from a March 28, 2022 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. Defendant was convicted of drug and weapons offenses and sentenced to consecutive terms, totaling fourteen years of imprisonment. We affirm the PCR court's decision for the reasons expressed by Judge Frances A. McGrogan in her well-reasoned oral opinion.

We previously discussed the underlying facts and procedural history of defendant's case when we affirmed his convictions and sentence in State v. Akopian, No. A-0534-15 (App. Div. Feb. 22, 2017) (slip op. at 14). Those facts are specifically incorporated here and thus only a brief summary is included for purposes of addressing defendant's arguments.

Defendant was charged with twenty-seven counts related to controlled dangerous substances (CDS) and weapons offenses after an officer witnessed what was believed to be a drug transaction. Officers conducted a search of defendant's apartment and vehicle and recovered large sums of cash; small bundles of prescription pills; narcotics; drug paraphernalia; firearms; and a stun gun. Prior to trial, defendant filed a motion to suppress evidence, which was denied by court.

Defendant was tried and convicted of two counts of second-degree possession with intent to distribute, N.J.S.A. 2C:35-5.3(a); four counts of third-degree drug possession and possession with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and -5(b); second-degree possession of a firearm in the course of committing a drug crime, N.J.S.A. 2C:39-4.1; fourth-degree possession with intent to distribute drug paraphernalia, N.J.S.A. 2C:36-3; and fourth-degree possession of a stun gun, N.J.S.A. 2C:39-3(h). On August 28, 2015, he was sentenced to consecutive terms totaling fourteen years of imprisonment.

On December 20, 2020, defendant filed an untimely¹ PCR petition, although the court found his petition was not time barred and reviewed it on the merits. The PCR judge concluded defendant's trial and appellate counsel were not constitutionally deficient, and defendant failed to satisfy the first prong of Strickland.² Even when viewing the evidence in a light most favorable to defendant, the PCR judge noted the record reflected nothing more than unsupported speculation and denied the petition without an evidentiary hearing. Defendant appeals and argues ineffective assistance of counsel, including that

¹ Defendant's judgment of conviction was entered on August 28, 2015, and his first PCR petition was not filed until December 30, 2020. The petition was filed four months after the five year deadline set forth in Rule 3:22-12(a)(1).

² Strickland v. Washington, 466 U.S. 668 (1984).

counsel failed to inform him of the State's plea offer; did not inform him of the ramifications of proceeding to trial; advised him that certain evidence would not be admitted; and that he would be exonerated or there would be a mistrial.

I.

The Sixth Amendment to the United States Constitution and Article 1, Paragraph 10 of the New Jersey Constitution both guarantee the accused in criminal proceedings "the right to the effective assistance of counsel." State v. Nash, 212 N.J. 518, 541 (2013). In Strickland, the United States Supreme Court established the standard for "determining whether an attorney's inadequacy deprived a defendant of the level of assistance guaranteed by the Constitution." State v. Gideon, 244 N.J. 538, 550 (2021). New Jersey courts have "applied the Strickland standard to claims of ineffective assistance brought under Article I, Paragraph 10 of the New Jersey Constitution." Ibid. (citing State v. Fritz, 105 N.J. 42, 58 (1987) (adopting Strickland)). Our law recognizes that "[i]neffective-assistance-of-counsel claims are particularly suited for post-conviction review because they often cannot reasonably be raised in a prior proceeding." State v. Hess, 207 N.J. 123, 145 (2011) (quoting State v. Preciose, 129 N.J. 451, 460 (1992)).

Claims of ineffective assistance of counsel in the plea bargain context are also reviewed under the Strickland two-part test. Missouri v. Frye, 566 U.S. 134, 140 (2012) (citing Hill v. Lockhart, 474 U.S. 52, 57 (1985)). Both prongs of Strickland must be satisfied for a defendant to be successful on an ineffective assistance of counsel claim. State v. Parker, 212 N.J. 269, 279-80 (2012).

The first prong requires a convicted defendant to "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Strickland, 466 U.S. at 690. It is the court's responsibility to then, considering the totality of the circumstances, determine if the identified acts or omissions were so unreasonable as to fall "outside the wide range of professionally competent assistance." Ibid. Courts must do so "recogniz[ing] that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Ibid. However, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id. at 691.

The second prong requires a defendant to establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. When having to stand trial

is the prejudice alleged—following the denial of a plea offer, as in the instant case—a defendant must show "but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court[, meaning] the defendant would have accepted the plea" Lafler v. Cooper, 566 U.S. 156, 164 (2012); see also Frye, 566 U.S. at 148.

In reviewing defendant's claims, we discern no support in the record for his argument that he was not properly advised of the State's plea offer. In fact, this argument is contradicted by the colloquy from the pre-trial status conference held on February 23, 2015, wherein the trial court advised him of the possibility of multiple mandatory sentences related to CDS and gun charges if he rejected the plea offer and was found guilty. In that same proceeding, defendant acknowledged both the final plea offer—an aggregate seven years with a forty-two-month mandatory period of incarceration—and that the court did not have to give him a concurrent sentence. The transcript of this proceeding provides in relevant part as follows:

The Court:	The final plea offer?
[Prosecutor]:	The aggregate seven with a [forty-two].
The Court:	Seven with a [forty-two]. You understand that you have two cases that require mandatory periods of

incarceration? Do you understand that?

Defendant: Absolutely.

The Court: The first one is [a] Graves Act³ offense because it involves a weapon, a firearm. It requires a [period of parole ineligibility]. It is seven with [forty-two] months. The other one involves drug offenses. It is a case that involves a mandatory period of parole ineligibility. The plea offer is seven with [forty-two] months. Is it true you're rejecting that plea offer?

Defendant: I can't hear you.

The Court: It is true you're rejecting that plea offer?

Defendant: Yes, absolutely.

The Court: Do you understand if you go to trial, they don't have to give you a concurrent sentence; that the judge on the first count can give you the sentence of up to ten years, on the second count up to five years, and on the third count up to an additional ten years? That would be [twenty-five] plus years.

Defendant: Yes.

³ Graves Act, N.J.S.A. 2C:43-6(b).

. . . .

The Court: I'm going to give you a trial date. I'm going to give you March 30. You understand your trial is scheduled for March 30. If you fail to appear on that date, your trial will go forward in your absence. Do you understand that?

Defendant: Yes.

Defendant maintains that "[d]espite the warnings given to [him] by the trial court . . . he understandably relied on the advi[c]e o[f] his attorney whom he trusted." However, even this argument is unpersuasive as it only serves to undermine his claim that counsel failed to advise him of the plea offer and sentencing exposure.

It is axiomatic that in the context of this criminal proceeding, not all conversations between defendant and counsel will be part of any written record. Regardless, the transcript of the pre-trial status conference unequivocally shows that defendant was advised of the State's plea offer and specifically rejected same contrary to his assertions. Considering this record, defendant cannot establish the first prong of Strickland because he cannot demonstrate any deficiency in counsel's performance related to the State's plea offer. In the

absence of satisfying the first prong, defendant's claims of prejudice by counsel's alleged deficient performance cannot be sustained.

We therefore reject the argument raised by defendant that he was not properly advised of the State's plea offer prior to trial. Moreover, defendant's remaining arguments, including that trial counsel failed to explain the ramifications of the denial of his motion to suppress; the admissibility of evidence at trial; and that he would be exonerated are bald assertions without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

II.


Defendant also argues that the court erred by not granting him an evidentiary hearing on his claims of ineffective assistance of counsel. A judge's decision "to deny a PCR petition without [an evidentiary] hearing[.]" is reviewed under the abuse of discretion standard. State v. Vanness, 474 N.J. Super. 609, 623 (App. Div. 2023) (citing State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013)). Under New Jersey law, evidentiary hearings are warranted if a defendant has presented a prima facie case in support of PCR and must demonstrate "a reasonable likelihood that his . . . claim will ultimately succeed on the merits." State v. Marshall, 148 N.J. 89, 158 (1997). "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 (App. Div. 2020) (citing State v. Jackson, 454 N.J. Super. 284, 291 (App. Div. 2018)). "We are not bound by, and owe no deference to, the trial court's legal conclusions" in our review of the record. State v. Alvarez, 473 N.J. Super. 448, 455 (App. Div. 2022) (citing State v. Harris, 181 N.J. 391, 415 (2004)).

As previously discussed, defendant has not demonstrated a prima facie case in support of PCR based upon ineffective assistance of counsel. Accordingly, the PCR judge's decision denying an evidentiary hearing was not an abuse of discretion.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION