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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2617-21**

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

KRISTINE MACRAE,

Defendant-Respondent.

Argued January 11, 2023 – Decided January 26, 2023

Before Judges Haas and Mitterhoff.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 16-08-0643.

Ali Y. Ozbek, Assistant Prosecutor, argued the cause for appellant (Camelia M. Valdes, Passaic County Prosecutor, attorney; Ali Y. Ozbek, of counsel and on the briefs).

Nicolette G. DeSimone argued the cause for respondent (N. DeSimone Law and Bio & Laracca, PC, attorneys; Marco A. Laracca, of counsel and on the brief).

PER CURIAM

The State of New Jersey (the "State") appeals the Law Division's November 30, 2021 order, which granted defendant Kristine MacRae's petition for post-conviction relief ("PCR") and her motion to withdraw her guilty plea pursuant to Rule 3:21-1. We affirm, substantially for the reasons set forth in Judge Sohail Mohammed's well-reasoned opinion.

We will not recite the factual antecedents of this matter in detail as they have already been discussed by this court at length.¹ Instead, we incorporate by reference the factual findings contained in Judge Mohammed's November 30, 2021 written decision.

On August 2, 2016, a Passaic County Grand Jury returned Indictment No. 16-08-0643, charging defendant on seven counts, which consisted of the following charges: (1) possession of a controlled dangerous substance ("CDS") with intent to distribute in the fourth degree, contrary to N.J.S.A. 2C:35-5(a)(1), N.J.S.A. 2C:35-5(b)(12), and N.J.S.A. 2C:2-6; (2) possession of CDS in the third degree, contrary to N.J.S.A. 2C:35-10(a)(1) and N.J.S.A. 2C:2-6; (3) possession of CDS with intent to distribute in the third degree, contrary to N.J.S.A. 2C:35-5(a)(1), N.J.S.A. 2C:35-5(b)(3), and N.J.S.A. 2C:2-6; (4)

¹ See State v. MacRae, No. A-1303-18 (App. Div. Oct. 6, 2020) (slip op. at 1-9).

possession of CDS in the third degree, contrary to N.J.S.A. 2C:35-10(a)(1) and N.J.S.A. 2C:2-6; (5) possession of CDS with intent to distribute in the third degree, contrary to N.J.S.A. 2C:35-5(a)(1), N.J.S.A. 2C:35-5(b)(13), and N.J.S.A. 2C:2-6; (6) possession of a weapon while committing certain CDS offenses in the second degree, contrary to N.J.S.A. 2C:39-4.1(a) and N.J.S.A. 2C:2-6; and (7) unlawful possession of a weapon in the second degree, contrary to N.J.S.A. 2C:39-5(b)(1) and N.J.S.A. 2C:2-6.

On November 30, 2017, defendant's motion to suppress evidence seized from her vehicle during her arrest was denied by the trial court. Subsequently, on August 27, 2018, defendant entered a guilty plea to unlawful possession of a weapon. In exchange, the State motioned for a reduction in mandatory Graves Act sentencing, which the court granted on November 14, 2018, and dismissed the remaining counts.

On November 16, 2018, defendant was sentenced. Upon balancing the applicable aggravating and mitigating factors,² the trial judge found them to be in "equipoise" and, as such, decided to honor the plea agreement reached by the

² As for mitigating factors, the sentencing judge considered defendant's lack of criminal history, solid employment history, continued schooling, and the fact that she was a single mother of two minor children. As for aggravating factors, the sentencing judge found that these same facts rendered defendant a necessary candidate for specific deterrence.

parties. Ultimately, a judgment of conviction was entered against defendant, finding her guilty of unlawful possession of a handgun without a permit, and defendant was sentenced under the downward departure of the Graves Act waiver to three years' imprisonment with one year of parole ineligibility.

On defendant's motion, and with consent of the State, the court stayed defendant's sentence pending her appeal of the trial court's suppression denial. On October 6, 2020, this court rejected defendant's argument and affirmed the conviction. MacRae, slip op. at 2.

On February 19, 2021, defendant petitioned for PCR and moved to withdraw her guilty plea. By consent of the State, defendant's stay of sentencing pending appeal was extended to a stay pending resolution of the PCR petition.

Defendant's PCR petition was rooted in an ineffective assistance of counsel claim. Specifically, defendant claimed that her former defense counsel never explained to her what Pre-Trial Intervention ("PTI") was, whether she could apply, whether her application was likely to be accepted, or if she could appeal any denial of her application. Defendant further asserted that defense

counsel's failure to present mitigating materials for the Graves Act departure motion constituted ineffective assistance of counsel.³

As for defendant's motion to withdraw her guilty plea, defendant argued that she pleaded guilty as a result of her being unaware of the option to apply for PTI, as well as the option to reconsider the Graves Act departure motion due to ineffective assistance of counsel.

On July 8, 2021, Judge Mohammed held a testimonial hearing. Defense counsel was the only witness. The attorney testified as to his representation of defendant with respect to the 2016 CDS and weapons charges and the extensive plea negotiations that he engaged in with the State. On direct examination, defense counsel testified regarding an April 30, 2018 letter that he sent to the State "indicating everything that was positive about [defendant] and asking [it] to consider resolving [the matter] in a way that did not involve incarceration." His letter did not specifically request probation or PTI; however, it did indicate his desire for a noncustodial resolution. Defense counsel then testified as to the contents of a July 18, 2018 response letter from the State, which was "rather extensive." In that letter, the State outlined the seventeen criteria for PTI

³ Although the State moved for waiver to a one-year parole ineligibility, in her PCR petition, defendant argued that trial counsel was ineffective for not arguing for a further waiver to a probationary sentence.

admission articulated in N.J.S.A. 2C:43-12, objected to defendant's potential application to the PTI program, and rejected defense counsel's application for noncustodial probation.

On cross-examination, defense counsel testified that he believed that defendant "got copies of anything that went out," which would include the State's July 18, 2018 response letter. Additionally, defense counsel admitted that there was no hearing regarding the Graves Act waiver and, therefore, no opportunity to submit mitigating factors to the waiver judge on the defendant's behalf.

On re-direct, defense counsel testified as to a notation that his paralegal left on the State's July 18, 2018 response letter, which was dated July 19, 2018 and read "emailed to Kristine." However, when specifically asked if he discussed PTI or noncustodial probation with the defendant, defense counsel stated that he had "no recollection either way" and that "[i]f it's her position we didn't discuss it . . . she's probably accurate."

On November 30, 2021, Judge Mohammed granted both defendant's PCR petition and her motion to withdraw her guilty plea. In so doing, the judge rendered a written opinion whereby he addressed each of defendant's contentions and the reasons for granting the relief sought.

As for defendant's first ineffective assistance of counsel claim, Judge Mohammed found that defense counsel failed to inform defendant about the PTI program. The judge reasoned that defense counsel's failure resulted in defendant accepting a plea and being sentenced to three years in prison with one year of parole ineligibility and that, had defendant been given the opportunity to apply to the PTI program, her decision to reject the plea deal would have been rational under the circumstances. Defense counsel's failure, therefore, amounted to ineffective assistance of counsel.

Next, Judge Mohammed addressed defendant's second ineffective assistance of counsel claim, ultimately finding that defense counsel's failure to present mitigating materials to the Graves Act departure motion also violated the Sixth Amendment. In so finding, the judge relied on defense counsel's testimony indicating there was no Graves Act waiver hearing and that he did not submit any mitigating factors to the judge. The judge further concluded that, since there was a presumption against defendant's admission into the PTI program, defense counsel's failure to collect such mitigating factors was even more consequential given the burden of proof placed on defendant.⁴ Therefore,

⁴ Pursuant to N.J.S.A. 2C:44-1(d), the presumption of imprisonment applies "unless, having regard to the character and condition of the defendant, [the
(continued)

the judge accepted defendant's assertion that defense counsel failed to request personal, mitigating factors from defendant that may have been relevant to the court's consideration of the Graves Act departure motion.

As for defendant's motion to withdraw her guilty plea, Judge Mohammed applied the four-factor Slater test, see Slater v. Slater, 198 N.J. 145, 156-58 (2009), and ultimately granted defendant's application in the interests of justice. This appeal followed.

On appeal, the State raises the following arguments:

POINT I

THE PCR COURT IMPROPERLY DISREGARDED EVIDENCE IN THE RECORD AND THE SECOND FACTOR IN DETERMINING INEFFECTIVE ASSISTANCE OF COUNSEL.

POINT II

THE PCR COURT DID NOT PROPERLY CONSIDER THE QUESTION OF ARGUING MITIGATING FACTORS IN THE EFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

POINT III

THE PCR COURT IMPROPERLY GRANTED DEFENDANT'S MOTION TO WITHDRAW HER GUILTY PLEA.

court] is of the opinion that the defendant's imprisonment would be a serious injustice which overrides the need to deter such conduct by others."

Our review of a PCR claim after a court has held an evidentiary hearing is "necessarily deferential[.]" State v. Nash, 212 N.J. 518, 540 (2013). We "defer to the PCR court's factual findings, given its opportunity to hear live witness testimony, and ' . . . uphold the PCR court's findings that are supported by sufficient credible evidence in the record.'" State v. Gideon, 244 N.J. 538, 551 (2021) (quoting Nash, 212 N.J. at 540). Therefore, "[w]hen the reviewing court is satisfied that the findings and result meet this criterion, its task is complete, and it should not disturb the result, even though it has the feeling it might have reached a different conclusion were it the trial tribunal." State v. Johnson, 42 N.J. 146, 162 (1964). A PCR court's interpretation of the law, however, is reviewed de novo. Nash, 212 N.J. at 540-41.

A defendant's right to effective assistance of counsel extends to the plea-negotiation process. Lafler v. Cooper, 556 U.S. 156, 168 (2012); see also State v. Chau, 473 N.J. Super. 430, 445 (App. Div. 2022). To justify relief after a guilty plea, a defendant must satisfy a modified Strickland standard, which requires a showing 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) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)) (alteration in original); see Lafler, 556 U.S. at 163 (holding that a defendant claiming ineffective assistance at the plea stage must show that "the outcome of the plea process would have been different with competent advice"). A criminal defendant must also "convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010); see also State v. Aburoumi, 464 N.J. Super. 326, 339 (App. Div. 2020).

In this case, after listening to defense counsel's testimony and considering the relevant evidence, Judge Mohammed determined that defense counsel never explained to defendant what PTI was, whether she could apply, whether her application was likely to be accepted, or if she could appeal any denial of her application. In the judge's opinion, defendant's decision to reject the plea deal would have been rational under the circumstances.

Deferring to the PCR court's factual finding as we must, we see no reason to question the court's determination that counsel's failure to inform defendant of the PTI process essentially deprived her of the opportunity to apply to the program. We have held that, although a presumption of PTI ineligibility may apply to individuals charged under the Graves Act, "this does not mean that such

defendants can be denied the opportunity to apply in the first place." See State v. Green, 407 N.J. Super. 95, 98 (App. Div. 2009). In fact, "[t]he PTI Guidelines explicitly provide that all defendants must be permitted to apply, and the Criminal Division Manager must consider the merits of the application[.]" Ibid. (citing Rule 3:29, Guideline 2).

Because defendant never had an opportunity to apply for PTI, the State's July 18, 2018 letter preemptively objecting to defendant's admission into the PTI program did not constitute a formal rejection. This fact is of importance because a prosecutor's decision to accept or reject a PTI application may be overruled "when the circumstances 'clearly and convincingly establish that the prosecutor's refusal to sanction admission into the program was based on a patent and gross abuse of . . . discretion.'" State v. Roseman, 221 N.J. 611, 624-25 (2015) (quoting State v. Wallace, 146 N.J. 576, 582 (1996)). Without a formal rejection, defendant was unable to contest the prosecutor's determination under the gross abuse of discretion standard.

Because we find that defense counsel's failure to advise defendant resulted in an uninformed guilty plea, defendant's plea is void. See Nuñez-Valdez, 200 N.J. at 139-40 (finding ineffective assistance of counsel where counsel "provid[ed] misleading, material information [to defendant] that result[ed] in an

uninformed plea"). Therefore, there is no need to reach the merits of the State's other arguments.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION