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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2940-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SIMONE LINDSEY, a/k/a
SIMONE L. LINDSEY,
SIMONE L. JACKSON,
SIMONE L. SIMMONS, and
SIMONE JACKSON,

Defendant-Appellant.

Submitted April 19, 2023 – Decided May 2, 2023

Before Judges Mayer and Enright.

On appeal from the Superior Court of New Jersey,
Law Division, Camden County, Indictment No. 16-06-
1828.

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

Grace C. MacAulay, Camden County Prosecutor,
attorney for respondent (Natalie A. Schmid

Drummond, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Simone Lindsey appeals from the June 19, 2020 order denying her petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

I.

In June 2016, defendant was indicted on charges of first-degree murder, N.J.S.A. 2C:11-3(a)(1), (2) (count one); first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a) (count two); and third-degree abandonment, neglect of an elderly or disabled adult, N.J.S.A. 2C:24-8(a) (count three). Defendant's victim was her developmentally delayed adult stepdaughter, Lenyse.

Defendant's charges arose as a result of her January 26, 2016 decision not to bring Lenyse to an emergency room for immediate treatment after being told by an urgent care physician to do so. That same day, Lenyse's doctor documented that Lenyse had a "potentially life[-]threatening condition" and instructed defendant to take Lenyse to an emergency room "NOW for further evaluation and treatment." The document also stated Lenyse was "not well cared for and need[ed] further evaluation and hospital admission." Despite the instruction defendant received from Lenyse's doctor, defendant waited three

more days to take Lenyse to the hospital, by which time Lenyse had fallen into a semi-conscious state. Lenyse died later that day.

In May 2017, defendant pleaded guilty to first-degree aggravated manslaughter, in exchange for the State's recommendation of a twenty-year prison term, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, and the dismissal of the remaining charges. During her plea colloquy, defendant testified she chose to plead guilty to the first-degree offense because she was guilty, her counsel reviewed the plea form with her, and she was "pleased" with his services. Defendant also stated she understood that by pleading guilty, she was waiving her right to trial and had she proceeded to trial and been convicted, she faced up to thirty years in prison on the aggravated manslaughter charge. She also testified she understood she was "facing life" in prison if convicted "on the entire indictment." Further, defendant stated she was aware she would serve a twenty-year NERA term if the judge sentenced her in accordance with the plea agreement.

During her plea colloquy, defendant admitted Lenyse's urgent care doctor told her on January 26, 2016 that defendant should "[g]o to the emergency room now" with Lenyse and by "failing to take [Lenyse] to the hospital on January 26[], when that was recommended by the doctor, . . .

[defendant] evidenced extreme indifference to the value of human life." Defendant also admitted she did not take Lenyse to the emergency room until three days after she was instructed to do so. Defendant's counsel also stated during the plea hearing that "the record should reflect . . . that according to the medical examiner, Lenyse . . . died from starvation."¹

At defendant's June 2017 sentencing, defendant chose not to speak on her own behalf. Defense counsel did not argue in favor of any mitigating factors. However, the judge independently conducted an aggravating and mitigating factor analysis and found aggravating factors one (the offense was committed in an especially heinous, cruel, or depraved manner), three (risk of reoffense), six (criminal history), and nine (need to deter), N.J.S.A. 2C:44-1(a)(1), (3), (6) and (9). She also analyzed and discussed various mitigating factors before finding none applied.

In addressing mitigating factor two, N.J.S.A. 2C:44-1(b)(2), (defendant did not contemplate the offending conduct would cause or threaten serious harm), the judge concluded "there[is] no indication that the defendant did not contemplate that she would cause serious harm." Additionally, the judge

¹ According to the State, Lenyse was five feet tall and weighed only sixty-two pounds when she died.

found mitigating factor four, N.J.S.A. 2C:44-1(b)(4), (substantial grounds existed tending to excuse or justify the defendant's conduct, though failing to establish a defense), did not apply, stating, "[t]here's no grounds, let alone, substantial grounds for excusing or justifying the defendant's actions." Before imposing a twenty-year NERA sentence consistent with the plea agreement, the judge also found the aggravating factors "clearly and convincingly substantially outweigh[ed] the lack of mitigating factors."

In January 2018, defendant appealed from her sentence, arguing "the judge erred . . . in finding aggravating factor [three]." We heard her appeal on a sentencing calendar, pursuant to Rule 2:9-11, and affirmed the sentence, holding it was "not manifestly excessive or unduly punitive and [did] not constitute an abuse of discretion." State v. Lindsey, No. A-0379-17 (App. Div. Jan. 9, 2018).

Defendant sought PCR relief in March 2018, but her application was dismissed without prejudice, pending resolution of her petition for certification before the Supreme Court. In April 2019, after the Supreme Court denied certification, defendant refiled her PCR petition, arguing, in part, plea counsel was ineffective for failing to argue in favor of mitigating factors two and four at sentencing.

The same judge who presided over defendant's plea and sentencing hearings heard argument on defendant's PCR petition on June 19, 2020. She denied the petition the same day, finding defendant failed to establish a prima facie case of ineffective assistance of counsel and was not entitled to an evidentiary hearing.

The judge explained that "[e]ven if defense counsel at sentencing had argued for mitigating factors two and four[,] . . . this court would not have found such mitigating factors." She added, "[i]n fact, this court specifically rejected all mitigating factors, including mitigating factors two and four." Further, the judge stated that had plea counsel argued in favor of mitigating factors two and four, it would not "have changed [her] mind as to whether or not the defendant should be sentenced in accordance with the plea agreement." Moreover, the judge found defendant provided "an adequate factual basis" for her plea, the plea agreement was fair, defendant was sentenced "in accordance with the plea agreement," and the "sentence was upheld by the Appellate Division."

II.

On appeal, defendant raises the following contention:

POINT ONE

[DEFENDANT] IS ENTITLED TO AN EVIDENTIARY HEARING ON HER CLAIM THAT HER ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO ADVOCATE ADEQUATELY AT SENTENCING.

This argument is unavailing.

We review the legal conclusions of a PCR court de novo, but generally defer to its factual findings when those findings are "supported by adequate, substantial and credible evidence." State v. Harris, 181 N.J. 391, 415 (2004) (citations omitted). When an evidentiary hearing has not been held, we may conduct a "de novo review of both the factual findings and legal conclusions of the PCR court." Id. at 421. However, we review a trial court's decision to deny a PCR petition without an evidentiary hearing for an abuse of discretion. State v. Preciose, 129 N.J. 451, 462 (1992).

To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test enunciated in Strickland v. Washington, 466 U.S. 668, 687 (1984).² Under the first Strickland prong, a defendant must show counsel's performance "fell below an objective standard of reasonableness" and "counsel made errors so serious that counsel was not

² Our Supreme Court adopted the Strickland test in State v. Fritz, 105 N.J. 42, 58 (1987).

functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687-88. When analyzing the quality of an attorney's representation, it cannot "fairly be assessed by focusing on a handful of issues, while ignoring the totality of counsel's performance in the context of the State's compelling evidence of defendant's guilt." State v. Marshall, 123 N.J. 1, 165 (1991).

To satisfy the second Strickland prong, a defendant "must show that the deficient performance prejudiced the defense." 466 U.S. at 687. Accordingly, there must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. Because prejudice is not presumed, a 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, where a PCR petition alleges a guilty plea was based on plea counsel's ineffective assistance, the second Strickland prong is established when the defendant demonstrates 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-Valdéz, 200 N.J. 129, 139 (2009) (alteration in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994));

see also State v. McDonald, 211 N.J. 4, 30 (2012). Stated differently, the defendant must establish that a "decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010).

The right to effective counsel extends to sentencing. See State v. Hess, 207 N.J. 123, 153 (2011). Thus, defense counsel retains and has the obligation to exercise the "unfettered right to argue in favor of a lesser sentence than that contemplated by [a] negotiated plea agreement." State v. Briggs, 349 N.J. Super. 496, 501 (App. Div. 2002). "It is at the critical stage of sentencing that counsel can make 'a vigorous argument regarding mitigating and other circumstances, hoping to personalize defendant in order to justify the least severe sentence under the Criminal Code.'" Hess, 207 N.J. at 152 (quoting Briggs, 349 N.J. Super. at 501). Further, it is well established that "where mitigating factors are amply based in the record before the sentencing judge, they must be found." State v. Dalziel, 182 N.J. 494, 504 (2005).

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). To obtain an evidentiary hearing, a defendant must "demonstrate 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. Peoples, 446 N.J. Super. 245, 254 (App. Div. 2016) (quoting R. 3:22-10(b)). The petitioner's claims "must be supported by 'specific facts and evidence supporting [the] allegations.'" Ibid. (citation omitted).

"If the [PCR] court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to [PCR], . . . then an evidentiary hearing need not be granted." State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013) (quoting State v. Marshall, 148 N.J. 89, 158 (1997)). Also, if defendant's "allegations are too vague, conclusory, or speculative[,]" they are not entitled to an evidentiary hearing. State v. Porter, 216 N.J. 342, 355 (2013) (quoting Marshall, 148 N.J. at 158). A defendant "must do more than make bald assertions that [the defendant] was denied the effective assistance of counsel." Ibid. (quoting Cummings, 321 N.J. Super. at 170).

Here, defendant argues she "presented a prima facie case of ineffective assistance of counsel . . . and her claim was dependent for its resolution on evidence outside the trial record." Therefore, she contends she was entitled to an evidentiary hearing. We are not convinced.

While we agree with defendant that plea counsel's performance was deficient for failing to argue in favor of any mitigating factors at sentencing, the record makes clear she was not prejudiced by this deficiency. That is because at defendant's sentencing, the judge independently assessed and rejected numerous statutory mitigating factors, including the two mitigating factors now raised by defendant in her PCR appeal.

Indeed, at defendant's sentencing, when the judge concluded no mitigating factors applied, she specifically excluded mitigating factor two, stating defendant's "conduct did cause and threaten serious harm" to her victim, "[t]he victim died because of what the defendant did" and "[t]here's no indication that . . . defendant did not contemplate that she would cause serious harm" to her victim. Additionally, at sentencing, the judge explicitly declined to find mitigating factor four, stating, "[t]here's no grounds, let alone, substantial grounds for excusing or justifying . . . defendant's actions."

During argument on defendant's PCR petition, the judge referred to these findings, noting she "evaluated each mitigating factor before finding that it was not applicable to this defendant." Significantly, the judge also stated that "[e]ven if defense counsel at sentencing had argued for mitigating factors two and four[,] . . . this court would not have found such mitigating factors."

Accordingly, because defendant did not show she was prejudiced by plea counsel's deficient performance at sentencing, we are satisfied the PCR judge correctly determined defendant failed to establish a prima facie case of ineffective assistance of counsel under Strickland. Therefore, defendant 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