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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3071-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

XAVIER Z. GEISINGER,
a/k/a GEISINGER XAVIER,

Defendant-Appellant.

Submitted September 12, 2023 – Decided October 3, 2023

Before Judges Rose and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Cape May County, Indictment Nos. 14-01-0057, 14-06-1226, 14-07-0511 and 15-03-0258.

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

Matthew J. Platkin, Attorney General, attorney for respondent (Deborah Bartolomey, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Xavier Geisinger appeals from an April 25, 2022 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. Because the record supports the PCR judge's decision, we affirm.

I.

Between January 2014 and March 2015, defendant was charged in four Cape May County indictments, as follows:

(1) Indictment No. 14-01-0057

- third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1).

(2) Indictment No. 14-06-1226

- fourth-degree obstructing the administration of law, N.J.S.A. 2C:29-1;
- third-degree resisting arrest, N.J.S.A. 2C:29-2(a)(3)(b);
- two counts of second-degree possession with the intent to distribute CDS within 500 feet of a public property, N.J.S.A. 2C:35-7.1;
- second-degree possession of a knife while possessing with the intent to distribute CDS, N.J.S.A. 2C:39-4.1;
- two counts of third-degree possession of CDS, N.J.S.A. 2C:35-10(a)(1);
- two counts of third-degree possession of CDS with the intent to distribute, N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(13); and
- fourth-degree unlawful possession of a knife, N.J.S.A. 2C:39-5(d).

(3) Indictment No. 14-07-0511

- third-degree resisting arrest, N.J.S.A. 2C:29-2(a)(3)(a);
- third-degree possession of CDS with the intent to distribute, N.J.S.A. 2C:35-5(a)(1) and (b)(1); and
- fourth-degree aggravated assault on a police officer, N.J.S.A. 2C:12-1(b)(5).

(4) Indictment No. 15-03-0258

- first-degree murder, N.J.S.A. 2C:11-3(a)(1);
- second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a);
- second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b);
- third-degree hindering his own apprehension, N.J.S.A. 2C:29-3(b); and
- third-degree endangering an injured victim, N.J.S.A. 2C:12-1.2.

Thereafter, defendant's retained counsel negotiated a plea agreement with the State, resolving all four indictments. On July 30, 2015, defendant entered guilty pleas to one count of each indictment, as follows: (1) third-degree possession of cocaine on November 2, 2013, in Middle Township; (2) third-degree possession of CDS with the intent to distribute on January 28, 2014, in Atlantic City; (3) third-degree resisting arrest on May 22, 2014, in Dennis Township; and (4) first-degree aggravated manslaughter, as amended from murder, for the shooting death of his stepfather, Damian Fashaw, on October 9,

2014, in Woodbine. Pursuant to the terms of the plea agreement, defendant waived his right to appeal.

In exchange, the State agreed to recommend a twenty-two-year prison term, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, on the aggravated manslaughter offense, and concurrent three-year prison terms on the remaining three offenses. The State also agreed to recommend dismissal of all remaining offenses charged in all four indictments.

At sentencing, defendant's attorney urged the court to impose a sentence in accordance with the plea agreement. Focusing on the aggravated manslaughter offense, plea counsel stated:

[T]his is a very unique set of circumstances, and it's very tragic for both families. Both families are intertwined . . . the decedent in this matter is the defendant's stepfather. This has been a very emotional journey for both families, and again . . . they co-exist with one another, they all know one another. And . . . it's very sad.

In getting to know this defendant and getting to know his grandparents who are present in court, what I've learned from Xavier is that he's very remorseful for what happened with respect to his stepfather. He's indicated to me that it shouldn't have happened, that things between them got way out of control. And I know that he regrets what happened, and I know that he's extremely remorseful.

His grandparents, who are present in court with their pastor, are very religious people and the pastor who is present in court is someone who[m] I've encountered in the Atlantic County Jail, visiting with Xavier.

This is a family that has had several tragedies on their side, and I know that they understand and are extremely sympathetic to the Fashaw family for what they are going through. . . . [T]here's really not much else that I can say about this other than that it absolutely was a tragedy.

This is a young man who is twenty-one years old and, Your Honor, had accumulated a significant criminal history during this time frame, that's why we ultimately put together four indictments by way of this plea. And I think it's safe to say that Xavier, at that time, was spiraling out of control, and this is what brought him here.

He does have a very strong support system, and given his age, Your Honor, it is my hope that the time that he will spend in New Jersey State Prison, he can reflect and atone for what he's done, and emerge and lead a law abiding and productive life with . . . what remaining years he has.

In mitigation of sentence, plea counsel urged the court to consider defendant's "age, his remorse, and his lack of prior criminal convictions in fashioning the appropriate sentence." Addressing Fashaw's family, defendant apologized, stating: "You all knew me, and you knew I wouldn't go out the way to harm anybody or anything like that. Things just got crazy that night, so I just

want to take the time to apologize to all of you." Plea counsel also submitted letters from defendant's grandmother and a family friend.

Emphasizing the strength of the State's case, the prosecutor explained the State's recommendation would have been more severe had Fashaw's family not requested "mercy" on defendant's behalf. Fashaw's mother spoke at sentencing and read a letter written by "Tiffany" – the victim's wife and defendant's mother – recounting the "nightmare" the entire family experienced as a result of the shooting. Fashaw's teenage daughter similarly described the impact defendant's actions had on the family.

The court considered defendant's "first arrest was at age thirteen"; he was twice violated while serving a probationary sentence as a juvenile; and the present offenses constituted defendant's first four indictable convictions. Although the court "canvassed all the mitigating factors," it found none applied "under the circumstances" presented here. Persuaded aggravating factors three (the risk defendant will commit another offense); and nine (general and specific deterrence), N.J.S.A. 2C:44-1(a)(3) and (9), substantially outweighed the non-existent mitigating factors, the court imposed sentence in accordance with the

terms of the parties' agreement. Defendant did not appeal from the October 2015 judgments of conviction.¹

In September 2020, defendant filed a timely pro se petition for PCR, which generally asserted he "want[ed] to proceed with [his] PCR rights" and requested assignment of counsel. Thereafter, with the assistance of appointed PCR counsel, defendant filed an amended petition for PCR. The amended petition was accompanied by certifications of defendant and his biological father, Derick L. Fitzpatrick. Defendant limited his argument to plea counsel's ineffectiveness at sentencing; he did not seek to withdraw any of his four guilty pleas.

In his amended PCR petition, defendant asserted throughout his life he was physically abused by Fashaw – apparently after a DNA test revealed Fashaw was not defendant's biological father. Although defendant lived with his grandparents after the age of three, the families lived "in close proximity to each other." Accordingly, defendant "r[a]n into Mr. Fashaw constantly." Defendant

¹ Defendant neither challenged the appeal-waiver provision on direct appeal nor PCR. See State v. Sainz, 107 N.J. 283, 294 (1987). In Sainz, the Court acknowledged the propriety of such waiver provisions, but noted: "The effect of the defendant's appeal in such a case would be to rescind the negotiated agreement. The State would then be free to reinstate charges it had dropped as its part of the agreement." Id. at 294 n.6 (citing State v. Gibson, 68 N.J. 499, 511-12 (1975)).

stated the physical assaults continued; Fashaw had a reputation in the community for violence; and Fashaw habitually abused phencyclidine (PCP). Defendant stated around four months before the incident in June 2014, Fashaw was high on PCP when he approached defendant and demanded money at gunpoint; "[f]ive days before the shooting," Fashaw attempted to assault defendant; and earlier in the evening on the day of the shooting, Fashaw "pointed a gun at [defendant's] face" and threatened to shoot him.

Just prior to the shooting, defendant was traveling in a car with three other people, when they saw Fashaw "standing next to his Jeep." Fashaw pursued the car. At some point, Fashaw "tapp[ed] on the window with a gun and point[ed] it at [defendant]." Defendant exited the car. He noticed Fashaw was under the influence of PCP and "had a handgun in his waistband." Fashaw then "reached for his waistband and grabbed [defendant] by the neck and choked [him]." Defendant claimed he then shot Fashaw because he "fear[ed] for [his] life."

Noting Fashaw's post-mortem toxicology report disclosed a PCP "level of .164 mg. per liter," defendant claimed he "now" learned that level indicated a "high level of intoxication," and "PCP intoxication causes violent and aggressive behavior." Defendant also asserted Fashaw was a much larger man than he, weighing about 100 pounds more and standing around ten inches taller. In his

certification, Fitzpatrick corroborated his son's account, asserting Fashaw "was a very aggressive man, especially when he took PCP."

Against those assertions, defendant claimed plea counsel was ineffective for failing to: investigate his self-defense claim by retaining a toxicology expert to explain the effects of PCP; and obtain Fashaw's extensive criminal history report, which included assault convictions. Defendant also claimed that information supported the application of three mitigating factors. He thus argued plea counsel failed to seek mitigating factors three ("defendant acted under a strong provocation"); four ("substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense"); and five (the victim "induced or facilitated" the commission of the crime); N.J.S.A. 2C:44-1(b)(3) to (5).

Following oral argument, the PCR judge, who did not conduct the trial court proceedings, reserved decision and thereafter issued a written opinion that accompanied the April 25, 2022 order. In his decision, the PCR judge summarized the State's allegations concerning the homicide as reflected in the police reports, lay witness statements, and defendant's confession; the parties'

contentions; and the governing Strickland/Fritz² framework. Citing plea counsel's successful negotiations that resulted in the amendment of the murder charge to aggravated manslaughter, the PCR judge was persuaded "the amendment [wa]s consistent with the self-defense argument and mitigating factors" and, as such, defendant failed to satisfy the first Strickland prong. The judge nonetheless considered the second Strickland prong. The judge found: "Even if [plea] counsel argued every raised mitigating factor, there is nothing to suggest the outcome would have been different." Accordingly, the judge denied PCR without an evidentiary hearing. This appeal followed.

On appeal, defendant reprises his contention that plea counsel failed to investigate a self-defense claim and failed to argue mitigating factors three, four, and five at sentencing. More particularly, defendant raises the following point and subpoints for our consideration:

POINT I

DEFENDANT RECEIVED INEFFECTIVE
ASSISTANCE OF [PLEA] COUNSEL FOR
COUNSEL'S FAILURE TO ADEQUATELY
INVESTIGATE A DEFENSE OF SELF-

² Strickland v. Washington, 466 U.S. 668, 687 (1984) (recognizing to establish an ineffective assistance of counsel claim, a defendant must demonstrate: (1) "counsel's performance was deficient"; and (2) "the deficient performance prejudiced the defense"); State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the Strickland two-part test in New Jersey).

PROTECTION, AND FOR FAILING TO ARGUE
MITIGATING FACTORS AT SENTENCING.

(A) APPLICABLE LAW [WARRANTED AN
EVIDENTIARY HEARING].

(B) DEFENDANT RECEIVED INEFFECTIVE
ASSISTANCE FOR COUNSEL'S FAILURE TO
CONDUCT A MINIMALLY ADEQUATE
INVESTIGATION INTO A CLAIM OF SELF-
PROTECTION.

(C) DEFENDANT RECEIVED INEFFECTIVE
ASSISTANCE FOR COUNSEL'S FAILURE TO
ARGUE MITIGATING FACTORS DURING HIS
SENTENCE.

For the first time on appeal defendant also argues had he been "properly advised that his case lent itself to a defense of self-protection, as the facts suggest[ed], he would not have accepted a plea of aggravated manslaughter."

Having considered defendant's renewed contentions in view of the governing legal principles, we conclude they lack sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(2). We affirm substantially for the reasons stated by the PCR judge, adding the following brief comments to give context to his decision.

Defendant pled guilty to four offenses that occurred over a period of less than one year, escalating from possession of CDS to aggravated manslaughter. Defendant faced life imprisonment with a mandatory minimum prison term of

thirty years on the murder count, alone, had he gone to trial. However, plea counsel successfully negotiated an amended charge of aggravated manslaughter and resolved all four indictments for an aggregate prison term of twenty-two years. Plea counsel did not remain silent at sentencing or simply rely on the negotiated plea agreement. Instead, plea counsel urged the sentencing court to consider defendant's "age, his remorse, and his lack of prior criminal convictions in fashioning the appropriate sentence."

Moreover, the certifications of defendant and his father presented on PCR do not demonstrate that the sentencing judge would have deviated from the negotiated plea agreement and sentenced defendant to a lower term. A negotiated sentence is presumed reasonable. See State v. Sainz, 107 N.J. 283, 294 (1987); see also State v. S.C., 289 N.J. Super. 61, 71 (App. Div. 1996). We are satisfied, based on the evidence presented in the record before us, that the PCR judge correctly determined plea counsel negotiated the amended homicide charge in view of all the circumstances, which the judge found were "consistent with imperfect self-defense." Thus, having correctly determined defendant failed to establish a prima facie claim of ineffective assistance of counsel, the PCR judge correctly concluded there was no need for an evidentiary hearing. See State v. Preciose, 129 N.J. 451, 462-64 (1992).

We decline to consider defendant's belated contention that his guilty plea to aggravated manslaughter should be vacated. "For sound jurisprudential reasons, with few exceptions, '[we] will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available.'" State v. Witt, 223 N.J. 409, 419 (2015) (quoting State v. Robinson, 200 N.J. 1, 20 (2009)). Indeed, our Supreme Court has long held appellate courts do not "consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959)); see also State v. Galicia, 210 N.J. 364, 383 (2012) ("Generally, an appellate court will not consider issues, even constitutional ones, which were not raised below.").

Defendant's newly-minted argument in the present matter neither is jurisdictional in nature nor substantially implicates a public interest. Because our task on this appeal is to review the PCR court's rulings in view of the record before us, we decline to consider defendant's belated contentions.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION