SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3150-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PHYLLIS L. KOCHERAN,

Defendant-Appellant.

Submitted January 19, 2023 – Decided February 22, 2023

Before Judges Vernoia and Firko.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Accusation Number 18-08-0660.

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

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (Patrick F. Galdieri, II, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Phyllis Kocheran appeals from the June 23, 2021 order denying her petition for post-conviction relief (PCR) without an evidentiary hearing. She claims the court erred, and the matter has to be remanded for an evidentiary hearing because she established a prima facie case of counsel's ineffectiveness for failing to argue for certain mitigating factors and against aggravating factors at sentencing and for not seeking a one-degree reduction of the sentencing range. After hearing oral argument, Judge Michael A. Toto issued a written opinion and found defendant had not established a prima facie case of ineffective assistance warranting an evidentiary hearing. We affirm Judge Toto's order substantially for the reasons set forth in his thorough opinion.

Defendant was charged in a one-count accusation with second-degree vehicular homicide, N.J.S.A. 2C:11-5(a). Her blood alcohol content at the time of the incident was .205%. She pled guilty to the charge as well as to a charge of driving while intoxicated, N.J.S.A. 39:4-50. In accordance with a negotiated plea agreement, Judge Toto sentenced defendant to six years' imprisonment subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, and dismissed three motor vehicle summonses. An Excessive Sentence Oral Argument panel affirmed the sentence on defendant's direct appeal. State v. Kocheran, No. A-2380-18 (App. Div. Oct. 22, 2019).

Defendant timely filed a petition for PCR, claiming her trial counsel failed to present mitigating factors two, three, four, seven, eight, nine, ten, eleven, and twelve under N.J.S.A. 2C:44-1(b) at the sentencing hearing. As to mitigating factors two and three, defendant claimed she "did not contemplate that her actions would cause or threaten serious harm," given the "slow speed" of her vehicle when she struck and killed the victim. Defendant asserts she was "distraught" over the incident, administered CPR[1] to the victim until the paramedics arrived, and cooperated with the investigation.

With regard to mitigating factor four, defendant asserts she was battling alcoholism. Relatedly, as to mitigating factors eight, nine, and ten, defendant argues she has "attempted to combat her disease" through "subsequent programs," such as Alcoholics Anonymous and New Hope's Open Door program. Defendant sold her vehicle and has not driven since the day of the incident. She is "full of guilt, sadness, and remorse."

Defendant also contends counsel was ineffective for not arguing that aggravating factor three is inapplicable because she has no prior criminal record and has made "robust contributions to the community and her family."

[1] Cardiopulmonary resuscitation.

Defendant also claims her counsel was ineffective for failing to argue for a sentence in the third-degree range under N.J.S.A. 2C:44-1(f)(2).

Judge Toto rejected those claims following oral argument in an eleven-page written opinion concluding that defendant had failed to establish any deficiencies in the performance of her counsel and could not show she was prejudiced in any fashion by his representation. The judge noted defendant's "trial counsel did not fail to address the factors that her current counsel alleges he failed to do; he expressly addressed those factors in his brief, while the court addressed those factors at sentencing."

Judge Toto—who was also the sentencing judge—noted trial counsel "did not address" mitigating factors two, three, and four; however, "application of those factors would have been improper in this case." The judge explained defendant's alcoholism is "inapplicable as a matter of law," and only applies to "acts of the victim, not mental compulsions of the defendant[,]" citing State v. Jasuilewicz, 205 N.J. Super. 558, 576 (App. Div. 1985) and State v. Ghertler, 114 N.J. 383, 389-90 (1989) (holding that drug dependency does not excuse the defendant's conduct under this provision).

Judge Toto also found defendant did not satisfy her burden under the second prong of Strickland[2] because the court could not reduce her sentence one-degree lower. The judge made this determination based upon our Supreme Court's holding in State v. Megargel, 143 N.J. 484-505 (1996). The Court held the trial court must be "'clearly convinced' that the mitigating factors 'substantially' outweigh the aggravating ones, and second, the court must find that the 'interest of justice' demands that the sentence be downgraded." Ibid. And, the reasons justifying a downgrade must be "compelling," and "in addition to and separate from the mitigating factors that substantially outweigh the aggravating factors." Ibid.

The judge explained that he, not defendant's trial counsel, made "detailed findings on [the] evaluation of the mitigating and aggravating factors." The judge found "the mitigating factors slightly outweigh the aggravating factors," and therefore, defendant's sentence could not be lowered under Megargel.

Defendant appeals, reprising her arguments about the ineffectiveness of trial counsel in the following point:

> [DEFENDANT] IS ENTITLED TO AN EVIDENTIARY HEARING ON HER CLAIM THAT HER ATTORNEY RENDERED INEFFECTIVE

[2] Strickland v. Washington, 466 U.S. 668, 694-95 (1984).

ASSISTANCE OF COUNSEL FOR FAILING TO ADVOCATE FOR HER AT SENTENCING.

Our review of the record convinces us Judge Toto conscientiously considered all of defendant's claims and appropriately denied her relief. We agree defendant failed to establish a prima facie case of counsel's ineffectiveness at the sentencing hearing. We are unpersuaded trial counsel's statements to the judge at the sentencing hearing that "aggravating factors [three] and [nine] apply" and "this was a horrific incident" resulted in the sentence imposed and not a sentence for a crime one-degree lower under Megargel.

As Judge Toto noted, whether or not trial counsel advocated for mitigating factor two in his brief or at the sentencing hearing, the court considered whether defendant's "conduct would cause or threaten serious harm." As to mitigating factor two, the judge concluded it was inapplicable, "even if expressly argued by counsel." Mitigating factor four is inapplicable because as Judge Toto found, "self-induced intoxication does not excuse the conduct." And, the judge found mitigating factor eight inapplicable because of defendant's "history of alcohol use" and risk of "recurrence."

The judge found mitigating factor ten did not apply because this is a "second-degree offense subject to . . . NERA" and defendant did not "meet the criteria to sentence a degree lower." Factor eleven was not applicable here

because defendant did not present evidence that she would suffer excessive hardship if imprisoned. Contrary to defendant's assertions, the judge found she "did not cooperate with law enforcement" and mitigating factor twelve was properly not applied.

Defendant failed to establish that the performance of her counsel was substandard, or but for any of the alleged errors, the result would have been different. See Strickland, 466 U.S. at 687-88. Moreover, an evidentiary hearing is necessary only if a petitioner presents sufficient facts to make out a prima facie claim of ineffective assistance of counsel. State v. Preciose, 129 N.J. 451, 462-63 (1992); R. 3:22-10(b).

Judge Toto correctly determined an evidentiary hearing was unwarranted. We have nothing to add to the judge's thorough analysis. Accordingly, we affirm substantially for the reasons expressed in Judge Toto's opinion of June 23, 2021.

Affirmed.