SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3190-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAVID ARISTE,

Defendant-Appellant.

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Submitted October 31, 2022 – Decided February 28, 2023

Before Judges Enright and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 06-01-0072.

Jardim, Meisner & Susser, PC, attorneys for appellant (Michael V. Gilberti, on the briefs).

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Ali Y. Ozbek, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant David Ariste appeals from the Law Division's January 19, 2021 order denying his second petition for conviction relief (PCR) without an evidentiary hearing and alternatively, denying his motion for a new trial. After a review of the arguments in light of the record and applicable principles of law, we affirm.

I.

A jury convicted defendant of first-degree murder, N.J.S.A. 2C:11-3(a)(1) and N.J.S.A. 2C:11-3(a)(2) (count one); third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (count two); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (counts three and five); and first-degree attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3 (count four). The details of defendant's offenses are recounted thoroughly in our unpublished opinion affirming defendant's convictions and sentence on direct appeal which need not be repeated here. State v. Ariste, No. A-3318-09 (App. Div. June 16, 2011) (slip op. at 1-9).

We affirmed the denial of defendant's first PCR petition without an evidentiary hearing. State v. Ariste, No. A-1892-15 (App. Div. Apr. 12, 2017) (slip op. at 16). In his petition, defendant alleged trial counsel was ineffective because counsel failed to "thoroughly and comprehensively review" the

proposed plea agreement and the relative strength of the State's proofs, which caused him to reject the plea agreement, proceed to trial, and receive a sentence greater than the plea agreement.

We concluded "[d]efendant had not presented a prima facie case for relief, there were no disputed issues of fact that could not be resolved by reference to the existing record, and a hearing was not required to address the claims." Ibid. Accordingly, an evidentiary hearing was not required. In reaching the determination, we stated:

> As the PCR court determined, the record does not support defendant's claim that his attorney did not properly advise him concerning the State's plea offer, or the consequences of rejecting the offer and proceeding to trial on the charges. Indeed, the record shows that defendant's attorney repeatedly explained the State's offer, discussed the strengths of the State's case with defendant and his father, and pointed out the sentences to which defendant would be exposed if he went to trial and was convicted of murder and attempted murder. Defendant's claim to the contrary rests on bald assertions, unsupported by any evidence in the record.
>
> [Ibid.]

In view of our decision, we did not reach defendant's argument that the first PCR court erred by finding his claims were barred by Rule 3:22-4. Ibid.

On October 17, 2019, defendant filed a second PCR petition contending he was entitled to a new trial based on newly discovered evidence. Defendant essentially refashioned the first PCR petition and contended trial counsel: (1) was "constitutionally ineffective;" (2) failed to properly advise his [other] clients before, during, and after trial;" (3) "lied" to them about their cases; and (4) "failed to communicate plea and settlement offers" to other clients which was "nearly identical" to defendant's case. Defendant argued he "did not learn the full extent of [trial counsel's] ethical problems until well after his trial." Assigned PCR counsel filed a brief on September 24, 2020. Successor PCR counsel filed a supplemental brief setting forth several new arguments and incorporating the arguments from defendant's pro se petition and predecessor PCR counsel's brief.

On January 19, 2021, the PCR judge denied defendant's second PCR petition without an evidentiary hearing. Initially, the PCR judge found defendant's petition was "properly characterized as a second PCR" petition and deemed it "procedurally barred because it argue[d] issues that were already argued [and] found to be . . . without merit . . . by [the trial] court and by the Appellate Division." Next, the judge considered defendant's petition as if it were "a motion for a new trial based on newly discovered evidence" and stated:

> the fact [defendant] learned about . . . the ethics problems [of trial counsel] after the fact is irrelevant . . . . [T]he speculative notion that somehow those ethics problems . . . must have distracted counsel and made him not provide an adequate defense. . . .[t]hat's . . . a sheerly speculative argument[. T]here's nothing whatsoever here that suggests [trial counsel] did anything other than an excellent job.

Additionally, the judge referred to our 2017 unpublished opinion to support his determination that trial counsel made "sure that [defendant] understood the strength of the State's case, the [sentencing] exposure" and that pretrial, defendant "still had [an] offer of 22 [years] on the table [and] could get 21 [years] from" the trial judge.

The judge further stated, "there was no merit to [defendant's] first PCR. There's less merit to this as a PCR. And it is absolutely baseless as a motion" for a new trial because "there [was] absolutely nothing in the record to suggest, . . . or to establish that, . . . there was ineffective assistance of counsel whatsoever. The circumstances here [did] not in any way, shape, or form justify an evidentiary hearing."

On appeal, defendant presents the following arguments for our consideration:

POINT I

THE LAW DIVISION ERRED AS A MATTER OF LAW IN NOT APPLYING THE LAFLER CRITERIA AND IN DENYING RELIEF BASED ON ITS STATED REASONS.

A. The Applicable Legal Standard: Ineffective Assistance of Counsel Extends to Plea Negotiations.

B. The Standard for Newly[]Discovered Evidence.

C. [Trial Counsel's] Representation was Constitutionally []Ineffective.

D. The Court Erred in Not Ordering an Evidentiary Hearing on these Matters.

We are not persuaded by defendant's contentions.

II.

We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). The de novo standard also applies to mixed questions of law and fact. Id. at 419. Where an evidentiary hearing has not been held, we "conduct a de novo review of both the factual findings and legal conclusions of the PCR court . . . ." Id. at 421 (emphasis in original). Additionally, we review the denial of a PCR petition without an evidentiary

hearing for abuse of discretion. State v. Peoples, 446 N.J. Super. 245, 255 (App. Div. 2016) (citing State v Preciose, 129 N.J. 451, 462 (1992)). We apply these standards here. Harris, 181 N.J. at 421.

To succeed on a claim of ineffective assistance of counsel, a defendant must establish both prongs of the test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984) and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987), by a preponderance of the evidence. State v. Gaitan, 209 N.J. 339, 350 (2012). First, they must show that "counsel's performance was deficient." Strickland, 466 U.S. at 687. This requires demonstrating that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Ibid. The Constitution requires "reasonably effective assistance," so an attorney's performance may not be attacked unless they did not act "within the range of competence demanded of attorneys in criminal cases" and instead "fell below an objective standard of reasonableness." Id. at 687-688.

When assessing the first Strickland prong, "[j]udicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight." Id. at 689. "Merely because a trial strategy fails does not mean that counsel was ineffective." State v. Bey, 161

N.J. 233, 251 (1999). Thus, a reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and "the defendant must overcome the presumption that, under the circumstances, the challenged action [by counsel] 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). Further, the court must not focus on the defendant's dissatisfaction with counsel's "exercise of judgment during the trial," "while ignoring the totality of counsel's performance in the context of the State's evidence of [the] defendant's guilt." State v. Castagna, 187 N.J. 293, 314 (2006).

For the second prong of the Strickland test, the defendant must show that "the deficient performance prejudiced the defense." 466 U.S. at 687. This means that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Ibid. Pertinent here, in the context of plea offers, "a defendant must show the outcome of the plea process would have been different with competent advice." Lafler v. Cooper, 566 U.S. 156, 163 (2012).

"[I]n order to establish a prima facie claim, a petitioner must do more than make bald assertions that he was denied effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154, 170 (1999). "[R]ather, the defendant must

allege facts sufficient to demonstrate counsel's alleged substandard performance." State v. Jones, 219 N.J. 298, 312 (2014) (citations omitted) (quoting State v. Porter, 216 N.J. 343, 355 (2013)). Where a "court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to post-conviction relief or that the defendant's allegations are too vague, conclusory, or speculative to warrant an evidentiary hearing, then an evidentiary hearing need not be granted." State v. Marshall, 148 N.J. 89, 158 (1997) (citations omitted); see R. 3:22-10(e)(1)-(2).

"[A] prior adjudication on the merits ordinarily constitutes a procedural bar to the reassertion of the same ground as a basis for post-conviction review." Preciose, 129 N.J. at 476 (citing R. 3:22-5; State v. Mitchell, 126 N.J. 565, 575-83 (1992)). A PCR claim is based upon the "same ground" as a claim already raised by direct appeal when "the issue is identical or substantially equivalent" to the issue previously adjudicated on the merits. State v. McQuaid, 147 N.J. 464, 484 (1997) (quoting Picard v. Connor, 404 U.S. 270, 276-77 (1971)).

Additionally, a defendant is precluded from raising an issue in a PCR petition that could have been raised on direct appeal. Id. at 483; see also R. 3:22-4.

Under Rule 3:22-4, a defendant is barred from raising any issue in a second PCR petition that could have been raised on direct appeal or in the first PCR petition unless one of three exceptions apply. The petition must "allege[ ] on its face" one of the three criteria: (1) it "relies on a new rule of constitutional law . . . that was unavailable during the pendency of any prior proceedings[,]" (2) "the factual predicate for the relief sought could not have been discovered earlier through the exercise of reasonable diligence," or (3) the "petition alleges a prima facie case of ineffective assistance of counsel" of prior PCR counsel. R. 3:22-4(b)(2)(A)-(C). None of those exceptions apply here.

Rule 3:22-5 provides that "[a] prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any post-conviction proceeding . . . or in any appeal taken from such proceedings." A PCR petition is not "an opportunity to relitigate a claim already decided on the merits." McQuaid, 147 N.J. at 483.

Applying these principles, we are persuaded the judge correctly determined that defendant's second PCR petition claims were previously raised in his first PCR petition, and therefore barred under Rule 3:22-4. As the judge noted, defendant's ineffective assistance of counsel arguments were presented

in the first PCR proceeding and "found to be without merit both by this [c]ourt and by the Appellate Division."

Additionally, we are satisfied the second PCR judge appropriately concluded defendant's petition was "baseless as a motion" for a new trial on the grounds of newly discovered evidence. A defendant seeking a new trial on the basis of newly discovered evidence must demonstrate "the newly discovered evidence: (1) was discovered after the trial and was not discoverable by reasonable diligence at the time of trial; (2) is material to the issue and not merely cumulative, impeaching or contradictory; and (3) would probably change the jury's verdict (if a new trial were granted)." State v. Behn, 375 N.J. Super. 409, 427 (2005).

"[A] motion for a new trial is addressed to the sound discretion of the trial judge, and the exercise of that discretion will not be interfered with on appeal unless a clear abuse has been shown." State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000). Here, we are satisfied the second PCR judge did not abuse his discretion in denying the motion for a new trial. Indeed, we are persuaded the judge properly concluded defendant presented no evidence that his post-trial discovery of trial counsel's "ethics problems," demonstrated trial counsel's performance during defendant's trial was deficient or that trial counsel "did

anything other than an excellent job" on defendant's behalf during trial counsel's representation. Therefore, defendant failed to establish the newly discovered evidence would likely change the jury's verdict if he were granted a new trial.

Finally, we discern no abuse of discretion in the second PCR judge's denial of defendant's request for an evidentiary hearing on his ineffective assistance of counsel claims. As discussed, these claims were procedurally barred, so no evidentiary hearing was warranted. See Preciose, 129 N.J. at 462-63.

To the extent we have not addressed defendant's remaining arguments, we are satisfied they lack sufficient merit. R. 2:11-3(e)(2).

Affirmed.