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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3365-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL A. KINSELLA,

Defendant-Appellant.

Submitted December 5, 2022 – Decided May 5, 2023

Before Judges Mawla and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Indictment No. 15-02-0113.

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

Robert J. Carroll, Morris County Prosecutor, attorney for respondent (Tiffany M. Russo, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Michael Kinsella appeals from the June 1, 2021 order denying his petition for post-conviction relief (PCR) following an evidentiary hearing. The crux of defendant's contention on appeal is that plea counsel was ineffective during plea negotiations concerning defendant's eligibility for Recovery Court,¹ which resulted in defendant losing an opportunity to accept the initial—more favorable—plea offer prior to his indictment. We disagree and affirm substantially for the reasons set forth in Judge David H. Ironson's comprehensive written decision.

I.

On September 9, 2014, defendant entered a Morristown gas station and pressed a box cutter against the clerk's stomach while demanding money. He took eighty-five dollars and left the gas station. Defendant argues he was drug-addicted and "dope sick" at the time of the offense. Defendant was arrested shortly thereafter and admitted to police he committed the robbery. Defendant was charged with first-degree robbery, N.J.S.A. 2C:15-1(a)(2) (count one); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d)

¹ As of January 1, 2022, New Jersey's Statewide Drug Court was renamed New Jersey Statewide Recovery Court. We will refer to Drug Court as Recovery Court in this opinion.

(count two); and fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (count three).

The State extended a pre-indictment offer for defendant to plead guilty to first-degree robbery, and in exchange the State would recommend a sentence in the second-degree range of five-to-seven years, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Defendant did not accept the plea offer and was subsequently indicted on all three counts.

Following his indictment, the State's offer escalated to a sentence of ten years subject to NERA. On September 2, 2015, defendant entered a guilty plea pursuant to a plea agreement to first-degree robbery. On December 1, 2015, defendant was sentenced to a ten-year term of imprisonment with an eighty-five percent parole disqualifier pursuant to NERA.²

On November 16, 2017, defendant filed a PCR petition, which the first PCR court denied without conducting an evidentiary hearing. We reversed and remanded for an evidentiary hearing. State v. Kinsella, No. A-5051-17 (App.

² Defendant filed a direct appeal arguing his sentence was excessive. We affirmed the sentence. State v. Kinsella, A-1862-15 (App. Div. May 4, 2016).

Div. Jan. 8, 2020). Following the hearing, the judge issued a written opinion denying defendant's application.

II.

Defendant raises the following point on appeal:

POINT I

DEFENDANT'S CONVICTION AND SENTENCE MUST BE VACATED BECAUSE . . . DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA NEGOTIATIONS[,] WHICH WOULD HAVE LIKELY RESULTED IN DEFENDANT NOT PLEADING GUILTY PURSUANT TO A PLEA AGREEMENT CALLING FOR A RECOMMENDATION OF TEN YEARS IN PRISON WITH [EIGHTY-FIVE PERCENT] PAROLE INELIGIBILITY.

More particularly, defendant argues the PCR court did not "meticulously analyze and weigh [defendant's] factual allegations." Defendant further asserts his testimony was uncontroverted that he was counseled to reject the initial plea offer because he was advised he could get into Recovery Court. He further asserts his guilty plea was not informed because he did not receive proper advice from his attorney. We are unpersuaded.

III.

Our review of a PCR claim after a court has held an evidentiary hearing "is necessarily deferential to [the] PCR court's factual findings based on its

review of live witness testimony." State v. Nash, 212 N.J. 518, 540 (2013); see also State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014) ("If a court has conducted an evidentiary hearing on a petition for PCR, we necessarily defer to the trial court's factual findings."). "An appellate court's reading of a cold record is a pale substitute for a trial judge's assessment of the credibility of a witness he has observed firsthand." Nash, 212 N.J. at 540. Thus, where an evidentiary hearing has been held, we should not disturb "the PCR court's findings that are supported by sufficient credible evidence in the record." State v. Pierre, 223 N.J. 560, 576 (2015) (quoting Nash, 212 N.J. at 540). "When 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). However, "we need not defer to a PCR court's interpretation of the law," which we review de novo. Nash, 212 N.J. at 540-41; see also State v. Harris, 181 N.J. 391, 415-16 (2004).

"Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." Pierre, 223 N.J. at 576 (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). PCR provides "a built-in 'safeguard that ensures that a defendant was not unjustly convicted.'" Nash, 212 N.J. at 540 (quoting State v. McQuaid,

147 N.J. 464, 482 (1997)). A petition for PCR is not a substitute for a direct appeal. State v. Mitchell, 126 N.J. 565, 583-84 (1992), rev'd on other grounds, State v. Tate, 220 N.J. 393 (2015) (citing State v. Cerbo, 78 N.J. 595, 605 (1979)).

In seeking PCR, a defendant must prove counsel was ineffective by a preponderance of the evidence. State v. Gaitan, 209 N.J. 339, 350 (2012). To establish a prima facie claim of ineffective assistance of counsel, a defendant must show: (1) counsel's performance was deficient; and (2) the deficiency prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 52 (1987) (adopting Strickland).

In State v. Taccetta, 351 N.J. Super. 196 (App. Div. 2002), we noted that an attorney's improper advice to a defendant regarding incarceration exposure—which leads to a rejection of a plea—was ineffective assistance of counsel. We specifically observed, "an attorney's gross misadvice of sentencing exposure that prevents defendant from making a fair evaluation of a plea offer and induces him to reject a plea agreement he otherwise would have likely accepted constitutes remediable ineffective assistance." Id. at 200.

On remand, Judge Ironson correctly framed the issue as whether defendant's attorney improperly advised defendant to reject the first plea offer

based on representations he would be eligible to get into the Recovery Court program. The court noted during defendant's plea colloquy he stated he was satisfied with his attorney, knew the court would not believe him if he were to later make a claim to the contrary, understood the consequences of his guilty plea, and was not promised something that was not set forth on the record or on the plea agreement form. The court also noted defendant made unsolicited remarks praising his attorney, stating she was "a very good representative," and he respected her "a lot." Defendant never expressed any dissatisfaction with her representation.

Notably, the judge found at the time of the plea hearing, defendant possessed the same knowledge he had during the PCR evidentiary hearing. Further, he knew the second-degree counteroffer was rejected, and the first offer was for first-degree robbery with a sentence to be in the second-degree range. He also understood the charge had to be at most second-degree to qualify for Recovery Court. Despite having this knowledge, he still indicated he was satisfied with his attorney at the plea colloquy and sentencing.

Significantly, the judge observed defendant never indicated at the plea or sentencing hearings he rejected the first plea offer because his counsel advised him she could get him into Recovery Court. The court found it to be illogical

defendant would have failed to contemporaneously raise this critical issue if he had in fact received such advice, which resulted in him receiving a longer sentence as a result of the escalating plea offer. The judge also found it difficult to believe defendant would express satisfaction with counsel's representation during the plea colloquy and sentencing if she had in fact misadvised him about his chances of receiving a second-degree plea offer or getting into Recovery Court. Furthermore, the court referenced defendant's testimony wherein defense counsel advised him that the qualifications for Recovery Court were "second-degree."

The court acknowledged defense counsel's recollection of details surrounding the plea negotiations were vague, and she could not specifically recall whether she instructed defendant to reject the pre-indictment offer. Nevertheless, the court concluded the credible evidence suggested defense counsel did not advise defendant to reject the first plea offer based on representations she could get him into Recovery Court.³ The judge noted, "[a]t no time during the plea colloquy or sentencing did . . . [d]efendant express any

³ Further, the court found it is "incredible to believe that [defense counsel], an experienced [p]ublic [d]efender who has handled 'thousands' of criminal matters, would advise her client that she could get him into [Recovery] Court where the State's offer was for him to plead to a first-degree charge."

dissatisfaction with [defense counsel's] representation of him. In fact, he expressed the opposite."⁴ Again he commented, "[m]oreover, it is difficult for the [c]ourt to believe [d]efendant would express satisfaction with [defense counsel's] representation during the plea colloquy and sentencing, if she had in fact misadvised him about his chances of receiving a second-degree plea offer or getting into [Recovery] Court." The judge concluded, "[g]iven the inconsistency in [d]efendant's statements, as well as his failure to claim that his attorney gave him misadvice concerning [Recovery] Court prior to this petition, . . . [d]efendant's testimony is [deemed] not credible."

We initially remanded this matter because there were fact issues that had to be resolved by way of an evidentiary hearing. We are satisfied the court properly addressed these issues in rendering its decision. Having considered

⁴ Judge Ironson further observed:

The trial judge . . . told [d]efendant that once he accepted the plea it would be difficult for [d]efendant to try to withdraw it. Specifically, the trial judge advised [d]efendant that if he came back to [c]ourt and claimed that he was "unhappy" with his attorney's services, that he didn't understand some consequence of his guilty plea, or that someone promised him something not set forth on the record or contained in the plea form, the [c]ourt would have "great difficulty" believing him. Defendant indicated he understood.

defendant's contentions in light of the record and applicable law, we affirm substantially for the reasons set forth in Judge Ironson's opinion, which is amply supported by the record. In short, we discern no basis to disturb his findings.

Finally, to the extent we have not addressed any of defendant's remaining arguments, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION