SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3412-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALEX COLON, a/k/a
ALEXIS COLON,

Defendant-Appellant.

Submitted December 12, 2022 – Decided January 30, 2023

Before Judges Whipple and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 17-04-0384.

Joseph E. Krakora, Public Defender, attorney for appellant (Brian D. Driscoll, Designated Counsel, on the brief).

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Marc A. Festa, Chief Assistant Prosecutor, of counsel and on the brief; Luke D. Hertzel, appearing pursuant to Rule 1:21-3(b), on the brief).

PER CURIAM

Defendant Alex Colon appeals a May 13, 2021 order denying his post-conviction relief (PCR) petition in which he argued his counsel was ineffective at sentencing.

During a robbery in 2017, defendant shot and killed a gas station attendant. He agreed to plead guilty to aggravated manslaughter and robbery, and in exchange the State agreed to recommend twenty years of imprisonment for both counts.

One week before the sentencing hearing, defendant's counsel submitted a letter to the court summarizing defendant's difficult childhood. It briefly told of the removal and separation from his mother, his time in group homes and foster care, and his treatment for mental health. It also mentioned defendant had been diagnosed with bipolar disorder, attention deficit hyperactivity disorder, and attention deficit disorder.

At sentencing, defendant's counsel reiterated what was in the letter and argued for the lesser possible sentence of eighteen years, but he did not argue in favor of any specific mitigating factor. The sentencing judge said he could not place the information about defendant's childhood in any mitigating factor, but assured counsel he considered it in his imposition of the sentence. The court

then sentenced defendant to the full twenty years contemplated by the plea agreement. Defendant appealed his sentence, arguing it was excessive because the sentencing court failed to find a mitigating factor based on defendant's history of trauma and mental illness. In March 2018, we found the sentence was not manifestly excessive or unduly punitive and did not constitute an abuse of discretion. State v. Colon, No. A-1469-17 (App. Div. March 28, 2018).

Defendant petitioned for PCR in August 2020, arguing in part his childhood medical records[1] should have been submitted to the court at sentencing. The PCR judge, who was also the sentencing judge, denied his petition, finding that even if it had been deficient performance to omit the medical records, the omission would not have impacted the sentence. This appeal followed.

Defendant raises the following issues on appeal:

POINT I:

[1] These fifteen documents include defendant's psychological evaluations from ages five to seventeen and his diagnoses and medications. They reveal defendant had, over the course of his childhood, been prescribed Benadryl and Mellaril (for agitation), Wellbutrin, Zyprexa, Depakote, Adderall, and Thorazine. An early document described defendant as having "[o]verall [b]orderline intelligence." Another document from when defendant was seventeen years old placed his "intellectual functions in the normal to low-normal range." Another evaluation performed around the same time put him in the "low average range."

THE COURT ERRED IN FINDING TRIAL COUNSEL NOT INEFFECTIVE FOR FAILURE TO ARGUE MITIGATING CIRCUMSTANCES TWO AND FOUR PURSUANT TO N.J.S.A. 2C:44-1(b) (2) AND (4) AT SENTENCING AND FAILURE TO PRESENT THE COURT WITH DEFENDANT'S MENTAL HEALTH RECORDS.

POINT II:
THE COURT ERRED IN FINDING THAT THE CLAIMS OF INEFFECTIVE ASSISTANCE DID NOT PREJUDICE DEFENDANT AND WOULD NOT HAVE CHANGED THE RESULT OF THE SENTENCING.

Defendant asks us to focus on his counsel's failure to submit the medical records and argue in favor of mitigating factors two and four. In State v. Hess, 207 N.J. 123 (2011), our Supreme Court held that counsel's failure to offer mitigating evidence and argue in favor of mitigating factors at sentencing constituted ineffective assistance of counsel. The medical records at issue here provided details which were not included in defendant's counsel's letter to the court. They laid out defendant's history of mental health issues and impulse control, as well as medications prescribed to him for those issues. The records also included assessments of his intellectual functioning. These facts may have allowed defendant's counsel to argue in favor of a mitigating factor.

Defendant also alleges he was not taking medication at the time of the offense. If this is true and counsel knew it, then this information could have been used to argue in favor of a mitigating factor.

Because we conclude there are some facts at issue, namely whether defendant's counsel had the medical records and whether he had evidence or knowledge that defendant was not taking medication at the time, we remand for an evidentiary hearing.

Vacated and Remanded. We do not retain jurisdiction.