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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3733-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN D. JOHNSON,

Defendant-Appellant.

Submitted October 12, 2023 – Decided October 24, 2023

Before Judges Firko and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment Nos. 18-03-0909, 18-06-1976, and 19-09-2623.

Joseph E. Krakora, Public Defender, attorney for appellant (Abby P. Schwartz, Designated Counsel, on the brief).

Theodore N. Stephens, II, Acting Essex County Prosecutor, attorney for respondent (Barbara A. Rosenkrans, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant John D. Johnson appeals from a June 30, 2022 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. Defendant contends his plea counsel rendered ineffective assistance. Judge Mayra V. Tarantino thoroughly considered defendant's contentions and rendered a comprehensive written opinion, with which we substantially agree. We affirm.

Defendant was previously convicted of unlawful possession of a handgun under Indictment No 17-02-0466. In 2018, defendant was charged with second-degree unlawful possession of a handgun and fourth-degree possession of a defaced firearm under Indictment No. 18-03-0909; one count of third-degree possession of a controlled dangerous substance under Indictment No. 18-01-0203; and one count of fourth-degree contempt under Indictment No. 18-08-0908.

On April 18, 2018, defendant entered into a plea agreement, which included all three indictments. He pled guilty to second-degree unlawful possession of a handgun, and in exchange for his guilty plea, the State agreed to dismiss the remaining counts of the three indictments and to recommend a five-year term of imprisonment with a forty-two-month period of ineligibility

pursuant to the Graves Act,¹ to be served concurrently with any term of imprisonment imposed on his violation of probation under his prior indictment. Defendant entered his guilty plea and admitted to possessing an operable, unloaded handgun. Pursuant to State v. Subi, the sentencing court advised defendant that the State could apply to increase his sentence if he failed to appear at the sentencing hearing or re-offended. 222 N.J. Super. 227, 238-39 (App. Div. 1988).

Defendant re-offended and was charged with drug-related offenses and contempt resulting in three more indictments: Nos. 18-06-1975, 18-06-1976, and 19-09-2613. On November 4, 2019, defendant entered into a second plea agreement. He pled guilty to possession of cocaine and marijuana with intent to distribute. In exchange, the State agreed to recommend a seven-year term of imprisonment to run concurrently with defendant's five-year sentence and forty-two-month parole bar under his first plea agreement. On December 19, 2019, Judge Tarantino sentenced defendant on a modified plea agreement under Indictment Nos. 18-03-0909, 18-06-1976, and 19-09-2623, to seven years' imprisonment on the gun charge subject to a forty-two-month period of

¹ Relevant here, the Graves Act mandates a term of imprisonment of at least forty-two months during which the defendant is ineligible for parole. N.J.S.A. 2C:43-6(c).

ineligibility and a maximum of five years' imprisonment on the drug-related charges instead of seven years.

The judge found aggravating factors three (the risk that defendant will commit another offense); six (the extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted); and nine (the need for deterring the defendant and others from violating the law) applicable. N.J.S.A. 2C:44-1(a)(3), (6), and (9). Defense counsel did not argue any mitigating factors applied, and the judge found none. The judge sentenced defendant in accordance with the second plea agreement. We affirmed defendant's convictions. A Sentence Oral Argument panel affirmed the sentence on defendant's direct appeal. State v. Johnson, No. A-1962-19 (App. Div. Feb. 8, 2021).

Defendant timely filed a petition for PCR, claiming his plea counsel was ineffective because he asked the judge to sentence him in accordance with the second plea agreement and by failing to argue for mitigating factors one (the defendant's conduct neither caused nor threatened serious harm); two (the defendant did not contemplate that the defendant's conduct would cause or threaten serious harm); three (the defendant acted under a strong provocation);

and twelve (the willingness of the defendant to cooperate with law enforcement authorities). N.J.S.A. 2C:44-1(b)(1), (2), (3), and (12).

As to mitigating factors one and two, defendant claimed the gun he was holding was not loaded, and he had no intention of using it. Defendant argued at the PCR hearing that he possessed the gun with the intention of selling it to obtain money to buy drugs. Regarding mitigating factor three, defendant argued he was under strong provocation due to his longstanding drug addiction. As to mitigating factor twelve, defendant contended he cooperated with law enforcement by providing a statement about what happened and identified a co-defendant, who was arrested.

Judge Tarantino rejected those claims in her written opinion and concluded that defendant had failed to establish any deficiencies in plea counsel's representation and could not show he was prejudiced. The judge noted "[e]ven if [plea] counsel argued in favor of mitigating factors one, two, three, and [twelve], the result of the sentencing hearing would not have been different."

The judge emphasized with respect to mitigating factors one and two, defendant was already serving a probationary term for unlawful possession of a handgun when he committed his second Graves Act offense, which undermined any claim "he did not contemplate his conduct would cause or threaten serious

harm." In analyzing mitigating factor three, the judge found defendant's "struggle with drug addiction d[id] not qualify as provocation" because mitigating factor three "contemplates provocation by the victim." As to mitigating factor twelve, the judge determined there was no evidence to support defendant's assertion that another individual asked him to hold the gun. The judge explained there was no basis for plea counsel to argue any of the mitigating factors advanced by defendant since such efforts would have been "unsuccessful" based upon our Supreme Court's holding in State v. Worlock, 117 N.J. 596, 625 (1990).

The judge concluded defendant did not satisfy his burden under the first and second prongs of Strickland.² Under the first prong, the judge noted plea counsel was not ineffective and had counsel argued the mitigating factors posited by defendant, the judge would have rejected them. Judge Tarantino also found defendant did not satisfy his burden under the second Strickland prong because the sentence would not have been impacted if any mitigating factors were presented.

Defendant appeals, reprising his arguments about the ineffectiveness of plea counsel in the following point:

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

DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING AS COUNSEL FAILED TO ADVOCATE ON HIS BEHALF BY NOT RAISING ANY APPLICABLE MITIGATING FACTORS, IN VIOLATION OF U.S. CONST., AMENDS VI, XIV; N.J. CONST. ART. I, PAR. 10.

A. Counsel Should Have Argued That Mitigating Factors [One] [A]nd [Two] Applied.

B. Counsel Should Have Argued That Defendant Was Acting Under Strong Provocation.

C. Counsel Should Have Argued That Defendant Cooperated With Law Enforcement.

Our review of the record convinces us Judge Tarantino conscientiously considered all of defendant's claims and appropriately denied him relief. We agree defendant failed to establish a prima facie case of plea counsel's ineffectiveness at the sentencing hearing. We are unpersuaded that defendant would have received a shorter base sentence had he argued for additional mitigating factors.

As Judge Tarantino noted, whether or not counsel advocated for mitigating factors one, two, three, and twelve at the sentencing hearing was irrelevant because such efforts would have been unsuccessful. Moreover, the judge did consider mitigating factors one, two, three, and twelve under the second Strickland prong and found "none of those mitigating factors apply to

[defendant's] circumstances." We agree with Judge Tarantino that counsel is not ineffective for failing to make frivolous or futile arguments at sentencing. Worlock, 117 N.J. at 625. We agree that any efforts by plea counsel to argue those mitigating factors would have been unsuccessful.

Defendant failed to establish that the performance of his 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 Tarantino correctly determined an evidentiary hearing was unwarranted. Accordingly, we affirm substantially for the reasons expressed in Judge Tarantino's opinion of June 30, 2022.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION