NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3775-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN C. VANNESS,
a/k/a JOHN C. VAN NESS,

Defendant-Appellant.

APPROVED FOR PUBLICATION
February 15, 2023
APPELLATE DIVISION

Submitted January 10, 2023 – Decided February 15, 2023

Before Judges Gilson, Rose and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment Nos. 13-01-0050 and 15-01-0057.

Joseph E. Krakora, Public Defender, attorney for appellant (Susan L. Romeo, Assistant Deputy Public Defender, of counsel and on the brief).

Raymond S. Santiago, Acting Monmouth County Prosecutor, attorney for respondent (Melinda A. Harrigan, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

The opinion of the court was delivered by

ROSE, J.A.D.

Defendant John C. Vanness appeals from a March 18, 2021 Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing, and a July 27, 2021 Law Division order denying his motion to reconsider the March 18, 2021 order.[1] On appeal, defendant raises the following points for our consideration:

POINT I

THE PCR COURT ABUSED ITS DISCRETION WHEN IT DENIED DEFENDANT'S PETITION WITHOUT AN EVIDENTIARY HEARING, BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON TRIAL COUNSEL'S MISINFORMATION IN AN OFF-THE-RECORD CONVERSATION DURING THE GUILTY PLEA PROCESS, AND BECAUSE TRIAL COUNSEL'S FAILURE TO RESPOND TO PCR COUNSEL'S LETTERS AND TELEPHONE CALLS REGARDING THE ALLEGATIONS REQUIRED THAT HIS TESTIMONY BE SECURED AT AN EVIDENTIARY HEARING.

POINT II

IN THE INTERESTS OF JUSTICE, THE PCR COURT SHOULD HAVE TREATED DEFENDANT'S UNTIMELY RECONSIDERATION MOTION AS A SECOND PETITION FOR [PCR], BECAUSE IT PRESENTED NEWLY DISCOVERED EVIDENCE THAT DEFENDANT HAD BEEN UNABLE TO SECURE PREVIOUSLY DESPITE PCR COUNSEL'S

[1] Defendant listed a March 29, 2021 order in his notice of appeal. We understand he meant the March 18, 2021 order.

DILIGENT ATTEMPTS, AND BECAUSE IT HAD BEEN FILED AFTER DEFENDANT HAD ALREADY FILED THE APPEAL OF THE PREVIOUS PCR DECISION.

POINT III

PCR COUNSEL WAS INEFFECTIVE FOR FILING AN UNTIMELY MOTION FOR RECONSIDERATION, RATHER THAN A SECOND PETITION FOR [PCR], AFTER HE RECEIVED TRIAL COUNSEL'S CERTIFICATION. (Not raised below).

At issue is whether defendant's guilty plea was premised on his attorney's "guarantee" that the trial court would sentence defendant to a time-served, three-year prison term without a parole-ineligibility period, pursuant to an alleged agreement reached in chambers. Citing the record evidence to the contrary, the PCR judge denied defendant's petition. Thereafter, PCR counsel moved for reconsideration, based on the newly acquired certification of plea counsel, supporting defendant's assertions. The PCR judge denied the motion as untimely and did not reach the merits of defendant's motion.

Because plea counsel's certification was belatedly provided to the PCR judge, we affirm the July 27, 2021 and March 18, 2021 orders. However, we conclude PCR counsel provided ineffective assistance following receipt of plea

counsel's certification. We therefore remand the matter for an evidentiary hearing.

I.

We set forth the procedural history in some detail to place the issues raised on appeal in context. On January 7, 2013, defendant and his brother, Frank Vanness, were charged in Monmouth County Indictment No. 13-01-0050 with various third-degree offenses involving a fraudulent check cashing scheme that spanned nearly two years. Later that month, on January 28, 2013, defendant was charged in Monmouth County Indictment No. 13-01-0208 with twelve third- and fourth-degree theft-related offenses committed on November 11, and 12, 2012. These offenses were tried by a jury in June 2014, while the offenses charged in Indictment No. 13-01-0050 remained pending. Defendant represented himself at trial. At some point, the State dismissed six counts of the indictment; the jury convicted defendant of the remaining six counts.

Defendant failed to appear at the September 15, 2014 sentencing hearing. He was later arrested and sentenced in November 2014. In January 2015, defendant was charged with third-degree bail jumping in Monmouth County

Indictment No. 15-01-0057, for failing to appear at the initial sentencing hearing.[2]

Defendant appealed from his convictions under 13-01-0208, and we reversed and remanded for a new trial. State v. Van Ness, 450 N.J. Super. 470, 496 (App. Div. 2017) (holding defendant was denied his right to counsel). On remand, in October 2018, another jury found defendant guilty of the same six offenses.

On December 14, 2018, defendant was sentenced to a five-year prison term with a two-and-one-half-year parole disqualifier. On the same day, the trial court held a plea-cutoff conference on Indictment No. 13-01-0050. According to the pretrial memorandum signed by both parties, the State offered a five-year prison term, to be imposed consecutively to Indictment No. 13-01-0208. Trial was scheduled for January 22, 2019.

Before trial commenced on January 22, the prosecutor memorialized his prior discussions with defense counsel. On an unspecified date in December 2019, the State had offered defendant time-served on the offenses charged in

[2] According to defendant's February 7, 2020 certification in support of PCR, in May 2015, he was transferred to Florida under the Interstate Agreement on Detainers Act, N.J.S.A. 2A:159A-1 to -15 to resolve outstanding charges in that state. Defendant was sentenced to a sixty-month prison term, to be served concurrently to any sentences imposed in New Jersey.

Indictment No. 13-01-0050, to be imposed concurrently to defendant's convictions under Indictment No. 13-01-0208, and dismissal of the bail-jumping offense charged in Indictment No. 15-01-0057.

On the trial date, however, the State changed its offer to an "open plea" to the offenses charged in Indictment No. 13-01-0050, with dismissal of Indictment No. 15-01-0057, and sentencing left to the court's discretion. In that context, the State noted the court had indicated it would "strongly consider[]" imposing "time-served." Defendant rejected the offer and the trial proceeded.

On January 29, 2019, during the middle of trial and after the State presented the testimony of six of its nine witnesses, defendant entered a guilty plea to all offenses charged in Indictment Nos. 13-01-0050 and 15-01-0057. At the outset of the hearing, the prosecutor set forth the terms of the open plea agreement, which were memorialized in the plea form. In essence, the State made no sentencing recommendation, and defendant would seek a three-year prison term, without parole ineligibility, to be imposed concurrently to the sentence he was serving on Indictment No. 13-01-0208.

The following exchange then occurred:

> PLEA COUNSEL: Your Honor, that is my understanding. This is an open plea. We have had a chance to discuss this in chambers, and the defense will

> be moving for a three flat concurrent to [defendant's convictions under Indictment No. 13-01-0208].
>
> PROSECUTOR: And Judge, if I could just respond to one thing. Just . . . I understand that defense is going to be moving for three flat, I just want to make sure that we are all very clear and I want to make sure this is as open as possible here that there is absolutely no agreement on behalf of the State, there's no agreement on behalf of the court, there's no agreement anywhere, and . . . the defense is seeking that. However, this is an open plea. I just want to make sure we are all very clear about that and there's no confusion.
>
> THE COURT: And you also have the right based on [defendant]'s prior record to move for a discretionary extended term.
>
> PROSECUTOR: That's correct, Judge, and I can say that we will be, and I will be, filing the appropriate paperwork with that once we leave.

Addressing plea counsel, the trial court asked, "[D]oes your client understand that?" Plea counsel did not respond; defendant answered, "Yes."

During the plea proceeding, defendant testified he was fifty-seven years old, had attended college, had signed the last page and initialed the bottom of each page of the plea agreement, had reviewed the agreement's terms with his attorney, and "read and underst[oo]d everything in the agreement." Defendant also acknowledged: the State made no sentencing recommendation; defense counsel would argue for "a three-year flat sentence on both of these indictments

concurrent to the time that [defendant was] currently serving"; and the State would oppose counsel's argument and could seek a discretionary extended term.

The following exchange ensued, in pertinent part:

> THE COURT: All right. And that means I'd have to make a decision based on everything . . . when you come up for sentencing. Do you understand that?
>
> DEFENDANT: Correct.
>
> THE COURT: All right. And do you understand that I have made no plea agreement, no promises into what I would give you?
>
> DEFENDANT: Correct.
>
> THE COURT: Okay, and do you understand that . . . since there is no plea agreement, I can sentence you to the maximum sentence permitted by law?
>
> DEFENDANT: Correct.
>
> THE COURT: Do you understand that . . . without a plea agreement, I can impose a minimum period of confinement before you would be eligible for . . . parole?
>
> DEFENDANT: Correct.
>
> THE COURT: Okay. All right. Now, there is no agreement between you and the State; right?
>
> DEFENDANT: Correct.

THE COURT: All right. And is that the agreement that you want me to accept, that there is no agreement? In other words, you're taking your chances with me?

DEFENDANT: Yeah, I'm taking my chances with you.

THE COURT: Okay. Has anyone made any threats or undisclosed promises to get you to sign this plea agreement?

DEFENDANT: No.

THE COURT: Are you pleading guilty of your own free will because you are in fact guilty?

DEFENDANT: Yes.

THE COURT: Has your attorney answered all of your questions, and are you satisfied with [his] representation?

DEFENDANT: Yes.

THE COURT: Do you need any additional time to speak to him?

DEFENDANT: I don't think so.

During the March 29, 2019 sentencing hearing, defendant apologized to the court for his criminal conduct and expressed some confusion about his jail credits, but with regard to his sentence, defendant stated: "I'm pleading [sic] open to you on . . . the two charges, and that's up to you. . . . whatever you feel

I should get, that I'm okay with." Defendant further stated: "I'm, at this point, at your mercy, Your Honor."

After granting the State's motion for an extended term, the court sentenced defendant to an aggregate prison term of nine years, with a four-year parole disqualifier on Indictment No. 13-01-0050. The sentence was imposed concurrently to a five-year prison term imposed on Indictment No. 15-01-0057 and the previously imposed sentence on Indictment No. 13-01-0208.

In April 2019, defendant filed a direct appeal of his sentence. While his appeal was pending, in May 2019, defendant filed a handwritten, pro se petition for PCR, asserting:

> I didn't want to open plea to the Judge. But . . . my lawyer guarantee[d] me that if I open plea that the Judge would give me a three[-]year flat sentence. I told him make sure that was true and go back in the judge's chambers to confirm this deal. He came back out a second time and guarantee[d] me that there was a back[]room deal from the Judge that he would sentence me to a three[-]year flat if I open plea at that time. At that point I agree[d] under those conditions only. I had no reason[] not to believe him, since he ha[d] been very honest with me the whole time I was with him.
>
> On April 9, 2019, I had a video conference with [plea counsel] on what happen[ed] to my deal in the back room. He said that the Judge either doesn't like him, or me, and or anyone that goes to tr[ia]l, but a deal was a deal. And that he would get on the stand and testify that the statements that I am making now are

> 100% the truth. And I am now filing a PCR for ineffective assistance of counsel.

The Criminal Division presiding judge dismissed defendant's petition without prejudice, pending disposition of his direct appeal. In December 2019, this court heard defendant's appeal on an excessive sentencing calendar pursuant to Rule 2:9-11, and we affirmed. State v. Vanness, No. A-03645-18 (App. Div. Dec. 2, 2019).

Thereafter, defendant's PCR petition was reinstated and defendant was assigned PCR counsel, who filed a brief on behalf of defendant.[3] In his supplemental certification, defendant reiterated plea counsel "informed him that a 'back[]room deal' for a three flat, with time served, was agreed upon."

On February 23, 2021, a different judge heard argument on defendant's PCR petition. PCR counsel informed the judge that plea counsel "refuse[d] to return [his] calls" or respond to his letters. Referencing defendant's statements during the plea hearing, PCR counsel argued: "I don't think [defendant] would be in a position to say, 'well, there's a side deal.'" Instead, defendant relied on the "conversations with his attorney," who "said to him, 'you're going to get a

[3] In its responding brief on appeal, the State references PCR counsel's brief, but it was not provided on appeal. Defendant's February 7, 2020 certification was included in his appellate appendix.

certain sentence, I guarantee that,' and his expectations certainly weren't met." PCR counsel also stated he was present at defendant's sentencing hearing, after which plea counsel said to him, "'you'll be back on a PCR on this.'"

Following argument, the PCR judge reserved decision and thereafter issued a written decision that accompanied the March 18, 2021 order. Relevant to the issues reprised on appeal, the court denied PCR without a hearing, concluding: "Defendant's argument [wa]s contrary to the record and his prior representations to the court. There is no evidence of ineffective assistance."[4]

On May 7, 2021, defendant appealed pro se from the March 18, 2021 order. Thereafter, PCR counsel received a May 5, 2021 certification of plea counsel, stating in pertinent part: "The parties discussed the matter in chambers"; following that discussion, plea counsel "indicated to [defendant] that if he ple[]d, he would receive a three-flat offer"; "I was under the impression that this was the result of an agreement discussed in chambers"; and because defendant was not sentenced accordingly, "I believe his decision to plead was

[4] The PCR judge also rejected defendant's contentions that plea counsel failed to investigate the matter; the court and plea counsel failed to advise of his maximum sentencing exposure; and the misapplication of jail credits rendered his sentence illegal. Defendant does not raise these issues on appeal.

not knowing and voluntary." Based on this certification, on May 12, 2021, PCR counsel filed a motion for reconsideration of the March 18, 2021 order.[5]

During oral argument on July 14, 2021, PCR counsel acknowledged the motion was untimely, but explained plea counsel contacted him "out of the blue" regarding the outcome of the PCR hearing after failing to return PCR counsel's calls "for whatever reason." PCR counsel explained he waited for plea counsel to provide his certification before filing the motion for reconsideration.

The PCR judge reserved decision and thereafter issued a written decision on July 27, 2021, denying defendant's reconsideration motion. Citing Rule 1:7-4(b) and Rule 4:49-2, the judge concluded the motion was untimely because it was "filed [forty-five] days after" the March 29, 2021 order denying PCR and not "within [twenty] days after the service of th[e] court's order" as required under both rules. The judge further found Rule 1:3-4(c) prohibited the court from relaxing the twenty-day requirement. This appeal followed.

II.

We review a judge's decision to deny a PCR petition without a hearing for abuse of discretion. State v. Brewster, 429 N.J. Super. 387, 401 (App. Div.

[5] On July 7, 2021, assigned appellate counsel withdrew defendant's appeal in view of the reconsideration motion pending in the Law Division. This court thereafter dismissed defendant's appeal without prejudice.

2013). "Where, as here, the PCR court has not conducted an evidentiary hearing, we review its legal and factual determinations de novo." State v. Aburoumi, 464 N.J. Super. 326, 338 (App. Div. 2020); see also State v. Nash, 212 N.J. 518, 540-41 (2013).

The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (1999). An evidentiary hearing on a PCR petition is required only when: (1) the defendant establishes a prima facie case in support of PCR; (2) the court determines that there are disputed issues of material fact that cannot be resolved by review of the existing record; and (3) the court determines that an evidentiary hearing is required to resolve the claims asserted. State v. Porter, 216 N.J. 343, 354 (2013) (citing R. 3:22-10(b)). "A prima facie case is established when a defendant demonstrates 'a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits.'" Id. at 355 (quoting R. 3:22-10(b)).

To establish an ineffective assistance of counsel claim, a defendant must demonstrate: (1) "counsel's performance was deficient"; and (2) "the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984); see also State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the

Strickland two-pronged analysis in New Jersey). "That is, the defendant must establish, first, that 'counsel's representation fell below an objective standard of reasonableness' and, second, that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" State v. Alvarez, 473 N.J. Super. 448, 455 (App. Div. 2022) (quoting Strickland, 466 U.S. at 688, 694).

"A 'guilty plea must be made voluntarily, knowingly, and intelligently.'" State v. J.J., 397 N.J. Super. 91, 98 (App. Div. 2007) (quoting State v. Howard, 110 N.J. 113, 122 (1988)). A defendant asserting plea counsel's assistance was ineffective may meet the first prong of the Strickland standard if the defendant can show counsel's representation fell short of the prevailing standards expected of criminal defense attorneys. Padilla v. Kentucky, 559 U.S. 356, 366-67 (2010). Plea counsel's performance will not be deemed deficient if counsel has provided the defendant "correct information concerning all of the relevant material consequences that flow from such a plea." State v. Agathis, 424 N.J. Super. 16, 22 (App. Div. 2012) (citing State v. Nuñez-Valdez, 200 N.J. 129, 138 (2009)). Stated another way, counsel must not "'provide misleading, material information that results in an uninformed plea.'" State v. Gaitan, 209 N.J. 339, 353 (2012) (quoting Nuñez-Valdez, 200 N.J. at 140).

Under the second Strickland prong, the defendant must establish a reasonable probability that he or she would not have pled guilty but for counsel's errors. Gaitan, 209 N.J. at 351. Thus, "a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." State v. O'Donnell, 435 N.J. Super. 351, 371 (App. Div. 2014) (quoting Padilla, 559 U.S. at 372). "The petitioner must ultimately establish the right to PCR by a preponderance of the evidence." O'Donnell, 435 N.J. Super. at 370 (citing State v. Preciose, 129 N.J. 451, 459 (1992)).

An "open plea" to an indictment neither "include[s] a recommendation from the State, nor a prior indication from the court, regarding sentence." State v. Kates, 426 N.J. Super. 32, 42 n.4 (App. Div. 2012). Thus "[w]hen a court gives an inclination of a sentence in a plea agreement, it is not an open plea to the indictment." State v. Ashley, 443 N.J. Super. 10, 22 (App. Div. 2015).

A.

Against that legal backdrop, we turn to defendant's contentions that the judge erroneously denied his PCR petition without a hearing. Although sworn, defendant's petition and supplemental certification were contradicted by his statements made under oath at the plea hearing. Further, notwithstanding PCR counsel's efforts, plea counsel failed to submit his supporting certification or

otherwise respond to petitioner's assertions prior to the February 23, 2021 argument on the PCR petition.

In view of the limited evidence presented to support defendant's claims, we discern no reason to disturb the court's March 18, 2021 order. We affirm substantially for the reasons stated by the PCR judge. See R. 2:11-3(e)(2).

B.

Nor are we persuaded by defendant's belated contentions that the PCR court failed, sua sponte, to consider defendant's untimely reconsideration motion as a second PCR petition. Defendant cites no authority to support his argument.

"A motion for reconsideration is meant to 'seek review of an order based on the evidence before the court on the initial motion . . . not to serve as a vehicle to introduce new evidence in order to cure an inadequacy in the motion record.'" Triffin v. SHS Grp., LLC, 466 N.J. Super. 460, 466 (App. Div. 2021) (quoting Cap. Fin. Co. of Del. Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div. 2008)). Although the Rules Governing Criminal Practice do not include a rule for reconsideration, the time limitations set forth in Rule 1:7-4(b) and Rule 4:49-2 have been applied in criminal matters. See State v. Irelan, 375 N.J. Super. 100, 105 n.1 (App. Div. 2005); State v. Fitzsimmons, 286 N.J. Super. 141, 147 (App. Div. 1996). Pursuant to both Rules, a party seeking

reconsideration of a final order must file a motion within twenty days of service of the order. R. 1:7-4(b); R. 4:49-2. Moreover, Rule 1:3-4(c) prohibits relaxation of the time limitation set forth in Rule 1:7-4.[6]

In the present matter, the PCR judge considered, at the very latest, the March 18, 2021 order was filed through eCourts on March 29, 2021. Having been filed forty-five days after March 29, 2021, the judge correctly determined defendant's May 12, 2021 motion was untimely. Because enlargement of the time specified in Rule 1:7-4 is prohibited under Rule 1:3-4(c), we discern no reason to disturb the July 27, 2021 order denying defendant's reconsideration motion as untimely. For the sake of completeness, we note PCR counsel's attempt to introduce the newly acquired certification of plea counsel failed to satisfy the criteria for reconsideration motions. See Triffin, 466 N.J. Super. at 466.

C.

We turn to defendant's claim that PCR counsel rendered ineffective assistance by filing an untimely motion for reconsideration instead of a second

[6] Nor is Rule 4:50-1 applicable here. The Criminal Rules expressly govern motions for a new trial on the basis of newly discovered evidence, see R. 3:20-2, and evidence acquired following denial of a PCR petition, see R. 3:22-12(a)(2)(B), as explained more fully in the next section.

PCR petition. In New Jersey, the right to the effective assistance of counsel extends to PCR counsel. See State v. Rue, 175 N.J. 1, 18-19 (2002). PCR counsel must "advance all of the legitimate arguments requested by the defendant that the record will support," R. 3:22-6(d), and "make the best available arguments in support of them," Rue, 175 N.J. at 19. The remedy for counsel's failure to meet the requirements imposed by Rule 3:22-6(d) is a new PCR proceeding. State v. Hicks, 411 N.J. Super. 370, 376 (App. Div. 2010) (citing Rue, 175 N.J. at 4).

A defendant's ineffective assistance of counsel claims against PCR counsel ordinarily should be raised in a second or subsequent PCR petition. See State v. Armour, 446 N.J. Super. 295, 317 (App. Div. 2016); see also R. 3:22-12(a)(2)(c). Similar to ineffective assistance of counsel claims against trial counsel, resolution of claims against PCR counsel generally involves matters outside the record. See Armour, 446 N.J. Super. at 317. Therefore, under most circumstances, they are better suited for a PCR petition. Ibid. Here, however, we are satisfied the record is sufficiently developed to consider defendant's contentions on the merits.

Pursuant to Rule 3:22-4(b):

> A second or subsequent petition for post-conviction relief shall be dismissed unless:

(1) it is timely under [Rule] 3:22-12(a)(2);[7] and (2) it alleges on its face either:

(A) that the petition relies on a new rule of constitutional law, made retroactive to defendant's petition by the United States Supreme Court or the Supreme Court of New Jersey, that was unavailable during the pendency of any prior proceedings; or
(B) that the factual predicate for the relief sought could not have been discovered earlier through the exercise of reasonable diligence, and the facts underlying the ground for relief, if proven and viewed in light of the evidence as a whole, would raise a reasonable probability that the relief sought would be granted; or

(C) that the petition alleges a prima facie case of ineffective assistance of counsel that represented the

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[7] Under Rule 3:22-12(a)(2), a second or subsequent petition for PCR must be filed within one year after the latest of:

(A) the date on which the constitutional right asserted was initially recognized by the United States Supreme Court or the Supreme Court of New Jersey, if that right has been newly recognized by either of those Courts and made retroactive by either of those Courts to cases on collateral review; or

(B) the date on which the factual predicate for the relief sought was discovered, if that factual predicate could not have been discovered earlier through the exercise of reasonable diligence; or

(C) the date of the denial of the first or subsequent application for post-conviction relief where ineffective assistance of counsel that represented the defendant on the first or subsequent application for post-conviction relief is being alleged.

> defendant on the first or subsequent application for post-conviction relief.

We begin by recognizing PCR counsel's efforts to contact plea counsel prior to the February 23, 2021 argument were accurately characterized in defendant's merits brief as "diligent attempts." Nonetheless, we are persuaded PCR counsel provided deficient representation when, upon receiving plea counsel's belated certification, PCR counsel filed an untimely reconsideration motion. Defendant contends PCR counsel should have filed a second petition for PCR under Rule 3:22-4(b)(2)(B), in lieu of an untimely reconsideration motion. However, therein lies the conundrum.

Upon the filing of defendant's appeal from the March 18, 2021 order, PCR counsel's obligation to defendant was discharged. Pursuant to Rule 3:22-6(b), an indigent defendant is not entitled to the assignment of counsel for a second or subsequent PCR petition. Indeed, "the matter shall be assigned to the Office of the Public Defender [(OPD)] only upon application therefor and showing of good cause." Ibid. Under the Rule, "good cause exists only when the court finds that a substantial issue of fact or law requires assignment of counsel and when a second or subsequent petition alleges on its face a basis to preclude dismissal under R[ule] 3.22-4."

Clearly, plea counsel's certification squarely bears upon defendant's "factual predicate for . . . relief," which PCR counsel claimed "could not have been discovered earlier through the exercise of reasonable diligence" under Rule 3:22-4(b)(2)(B). Despite PCR counsel's due diligence, however, plea counsel failed to provide a supporting certification until well after the time for reconsideration of the court's March 18, 2021 order had expired.

Moreover, plea counsel's certification echoes defendant's claims that his attorney "provide[d] misleading, material information that result[ed] in an uninformed plea" contrary to the Court's holding in Nuñez-Valdez, 200 N.J. at 139-40. Although we recognize defendant's answers to the trial court's questions during the plea hearing seemingly contradict the claims asserted in his PCR petition, at issue is whether his attorney misinformed him about the trial court's sentencing representation in chambers – not the court's representation in open court. We have repeatedly held the roles of the trial court and defense counsel are distinct. See Aburoumi, 464 N.J. Super. at 341; State v. L.G.-M., 462 N.J. Super. 357, 368 (2020); see also State v. Blake, 444 N.J. Super. 285, 297 (App. Div. 2016) (A "judge's statements may not be imputed to counsel. The judge is obliged to ascertain that a plea is entered voluntarily. . . . That obligation is

related to, but distinct from the attorney's obligation to render effective assistance").

Although PCR counsel neither was required nor authorized to file a second petition on defendant's behalf – and he was hamstrung by the timing of plea counsel's certification – PCR counsel nonetheless chose the wrong course by filing a belated reconsideration motion. Instead, PCR counsel had other available options that would have led to a timely-filed second PCR petition under Rule 3:22-12(a)(2)(B). PCR counsel could have sought authority from the OPD to file a second PCR petition on defendant's behalf, or he could have provided plea counsel's certification to defendant to file a pro se second petition.

Notwithstanding PCR counsel's overall efforts in this matter, we are nonetheless constrained to conclude following receipt of plea counsel's sworn statement, PCR counsel's representation was deficient. Accordingly, defendant is entitled a new PCR proceeding. Rue, 175 N.J. at 4; Hicks, 411 N.J. Super. at 376. Because defendant's assertions against plea counsel are now supported by the sworn statements of that same attorney, we further conclude defendant's claims cannot be resolved on the existing record and warrant an evidentiary hearing. See Porter, 216 N.J. at 354; R. 3:22-10(b).

We offer no view on the outcome of the remand proceedings. Nonetheless, we are cognizant that defendant faces a heavy burden on remand in view of his sworn statements – and his attorney's assertions – during the plea hearing. Those apparent contradictions, however, should be resolved on a full evidentiary record, giving the PCR judge an opportunity to assess the credibility of the testifying witnesses. Moreover, on remand, the PCR judge shall address the impact of the evidence adduced at the remand hearing on the second Strickland/Fritz prong, which requires defendant demonstrate he was prejudiced. Here, again we express no view on that issue; rather that decision is within the purview of the PCR judge following a full and fair consideration of the evidence adduced at the hearing.

Affirmed in part, but remanded for an evidentiary hearing. We do not retain jurisdiction.