

RECORD IMPOUNDED

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1090-22**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

P.M.,

Defendant-Appellant.

Submitted February 26, 2024 – Decided June 18, 2024

Before Judges Gilson and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 16-06-0776.

Jennifer Nicole Sellitti, Public Defender, attorney for appellant (Susan Brody, Designated Counsel, on the brief).

Mark Musella, Bergen County Prosecutor, attorney for respondent (William P. Miller, Assistant Prosecutor, of counsel and on the brief; Catherine A. Foddai, Legal Assistant, on the brief)

PER CURIAM

Defendant P.M. appeals from the October 7, 2022 order of the Law Division denying his petition for post-conviction relief (PCR) without an evidentiary hearing.¹ We affirm.

I.

In 2017, a jury convicted defendant of eleven counts arising from his repeated sexual abuse of his teenage stepdaughter, including one count of third-degree endangering the welfare of a child by possessing child pornography, N.J.S.A. 2C:24-4(b)(5)(b). The court sentenced defendant to an aggregate twenty-eight-year term of incarceration, eight years of which were subject to an eighty-five-percent period of parole ineligibility pursuant to the New Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

We affirmed defendant's convictions and sentence, except for the imposition of less restrictive, or flat, prison terms preceding more restrictive terms and the imposition of a penalty. State v. P.M., No. A-1686-17 (App. Div. Apr. 28, 2020). We remanded to permit the trial court to address those issues. Id. slip op. at 30. On remand, the trial court sentenced P.M. to the same

¹ We identify defendant by initials to protect the identity of the child victim of sexual assault. R. 1:38-3(b)(9).

aggregate term with the direction that any less restrictive terms were to run either concurrently or consecutively to the restrictive term subject to NERA.

P.M. subsequently filed a petition for PCR in the Law Division. Appointed counsel amended the petition to allege that P.M.'s trial counsel was ineffective because he failed to: (1) insist the trial court interview a juror who fell asleep during the trial; (2) proffer evidence establishing that encryption software found by investigators on defendant's tablet computer was installed at the direction of the United States Air Force (Air Force) because of his involvement in the Civil Air Patrol to counter the suggestion of an expert witness that encryption software is used to hide child pornography; and (3) provide meaningful representation at sentencing by conceding the aggravating factors outweighed the mitigating factors, not urging the court to find additional mitigating factors, and advocating for a shorter sentence based on the sentence given to another defendant in similar circumstances.

On October 7, 2022, the same judge who presided at the trial court issued an oral opinion denying defendant's petition without an evidentiary hearing. The PCR court found that defendant had not established a prima facie claim that trial counsel was ineffective with respect to the alleged sleeping juror because there is no evidence that the juror in question was asleep or inattentive during the trial.

The court found that during trial, defendant's counsel raised a concern regarding the inattentiveness of a juror. However, "[t]he [c]ourt made personal observations of that juror and found that the juror was not sleeping during testimony regarding non-critical evidence." Thus, the court concluded, a voir dire of the juror was not necessary and defendant's counsel could not have been ineffective for failing to insist that the juror be interviewed by the court.

The PCR court also found that defendant did not establish a prima facie claim that trial counsel was ineffective for not introducing evidence the Air Force required defendant to have encryption software on his tablet. This is so, the court found, because defendant did not deny he had digital images of his teenage stepdaughter's breasts and her teenage boyfriend's erect penis on his laptop. Defendant obtained those images from his stepdaughter's cellphone after spying on her from a bedroom closet when she engaged in "sexting" with her boyfriend. The court found defendant's conviction of possession of child pornography was based on the images on his laptop, not on anything on his tablet. Thus, the PCR court concluded, even if trial counsel had introduced evidence explaining the reason for the encryption software on defendant's tablet, that evidence would not have changed his conviction for possessing child pornography.

Finally, the PCR court found that defendant did not establish a prima facie claim of ineffective assistance of counsel at sentencing. The court found that by conceding the aggravating factors outweighed the mitigating factors and focusing instead on a request that the court sentence defendant to a term at the lower range for his convictions, as had been done for a defendant in an unrelated matter, counsel was appealing to the court's sense of fairness and consistency. In addition, the court concluded trial counsel was not ineffective for failing to argue additional mitigating factors were present, because any such argument would have been unsuccessful. The court found that defendant's remaining arguments regarding sentencing were considered and rejected on direct appeal.

An October 7, 2022 order memorializes the PCR court's decision.

This appeal followed. Defendant raises the following arguments

POINT I

[P.M.] IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT HIS ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY REFUSING THE TRIAL JUDGE'S INVITATION TO QUESTION THE JUROR WHOM HE HAD OBSERVED TO BE DOZING AND WHOM THE JUDGE HAD OBSERVED TO HAVE HER EYES CLOSED DURING PORTIONS OF THE TRIAL.

POINT II

[P.M.] IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT HIS TRIAL ATTORNEY WAS INEFFECTIVE IN FAILING TO PRODUCE EVIDENCE TO CONTRADICT AN ASSERTION BY THE STATE'S EXPERT WITNESS ABOUT THE REASON FOR P.M.'S ENCRYPTION SYSTEM ON HIS LAPTOP, AND IN FAILING TO OBJECT TO THE COURT'S PROPOSED CURATIVE INSTRUCTION.

POINT III

[P.M.] IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN ENTHUSIASTICALLY ENDORSING THE STATE'S CASE AT SENTENCING AND IN FAILING TO OFFER ANY ARGUMENT IN MITIGATION.

II.

"Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." State v. Preciose, 129 N.J. 451, 459 (1992). Under Rule 3:22-2(a), a defendant is entitled to post-conviction relief if there was a "'substantial denial in the conviction proceedings' of a defendant's state or federal constitutional rights." Ibid. "A petitioner must establish the right to such relief by a preponderance of the credible evidence." Ibid. (citing State v. Mitchell, 126 N.J. 565, 579 (1992)). "To sustain that burden, specific facts" that "provide

the court with an adequate basis on which to rest its decision" must be articulated. Mitchell, 126 N.J. at 579.

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee criminal defendants the right to the effective assistance of counsel. State v. O'Neil, 219 N.J. 598, 610 (2014) (citing Strickland v. Washington, 466 U.S. 668, 686 (1984); State v. Fritz, 105 N.J. 42, 58 (1987)). To succeed on a claim of ineffective assistance of counsel, the defendant must meet the two-part test established by Strickland, and adopted by our Supreme Court in Fritz. 466 U.S. at 687; 105 N.J. at 58.

Under Strickland, a defendant first must show that his or her attorney made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687. Counsel's performance is deficient if it "[falls] below an objective standard of reasonableness." Id. at 688.

A defendant also must show that counsel's "deficient performance prejudiced the defense[,]" id. at 687, because "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different[,]" id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. Ibid. "[A] court

need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Id. at 697; State v. Marshall, 148 N.J. 89, 261 (1997). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Strickland, 466 U.S. at 697.

We review a judge's decision to not hold a PCR evidentiary hearing for abuse of discretion. State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013) (citing Marshall, 148 N.J. at 157-58). A hearing is required only when: (1) a 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)).

Where a PCR court does not hold an evidentiary hearing, this court's standard of review is de novo as to both the factual inferences drawn by the trial

court from the record and the court's legal conclusions. State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016); see State v. Lawrence, 463 N.J. Super. 518, 522 (App. Div. 2020) (quoting State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014)).

"[T]o establish a prima facie claim, a petitioner must do more than make bald assertions that he was denied the effective assistance of counsel." Porter, 216 N.J. at 355 (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)). A PCR petition must be "accompanied by an affidavit or certification by defendant, or by others, setting forth with particularity[.]" State v. Jones, 219 N.J. 298, 312 (2014), "facts sufficient to demonstrate counsel's alleged substandard performance[.]" Porter, 216 N.J. at 355 (quoting Cummings, 321 N.J. Super. at 170); see also R. 3:22-10(c).

We have carefully reviewed the record in light of these principles and find no basis on which to disturb the PCR court's order denying defendant's petition. We begin with defendant's allegation relating to the sleeping juror.

During the testimony of an expert witness, defendant's counsel requested to speak with the court. The following exchange took place between the court, defendant's counsel (Counsel) and two Assistant Prosecutors (AP1 and AP2):

[The court]: Counsel . . . what is your other issue?

[Counsel]: Juror number four, I've noticed has been dozing off.

[AP1]: Oh. Which one's four?

[The court]: I wasn't sure. I – I noticed that she was closing her eyes, I'm not sure, but she kept opening them when I watched her, so I don't –

[Counsel]: Right.

[The court]: – think she's dozing off. I thought –

[Counsel]: Okay.

[The court]: – that's why I took a break.

[Counsel]: I did see the eyes close a couple of times.

[The court]: I saw her eyes close, too –

[Counsel]: Okay.

[The court]: – but her eyes opened again.

[Counsel]: Right.

[The court]: When I thought she might be asleep, she would open her eyes, so sometimes – I know that one of the jurors is looking down the entire time, and you may think that she's sleeping but she's not. I think sometimes – this is highly technical, and that's why I gave . . . everybody a break. I don't think she was sleeping.

[Counsel]: Okay.

[The court]: Counsel?

[Counsel]: Oh, no, we – me and my colleague were talking that since I raised it we might have to question the juror just to make sure she wasn't sleeping.

[The court]: I didn't think she was sleeping. I watched her.

[Counsel]: Okay.

[The court]: All right. She – when I looked over and I saw that her eyes were closed, I would look, her eyes were open. I don't think she was sleeping. Do you think I have to ask everybody if she was sleeping?

[Counsel]: No.

[The court]: Then what do you want me to do –

[AP1]: Counsel, do you have –

[The court]: – question the jury whether she was sleeping?

[AP1]: Question her personally if she dozed off or not.

[The court]: What's the State's position?

[AP2]: Judge, I did not observe any jurors that appeared to be fast asleep during –

[The court]: She closed her eyes. I looked to make sure she was sleeping, she opened her eyes. She'd close her eyes; she'd open her eyes.

[AP2]: Perhaps she was focusing, Judge I –

[The court]: Exactly.

[AP2]: – I'm just –

[The court]: I don't think she was sleeping or I would have done something or I would have intervened.

[Counsel]: Okay.

[The court]: So counsel, I don't think she was sleeping. Do you still want to question her?

[Counsel]: No, I'm fine. The State's fine, I'm fine, Your Honor.²

[The court]: Okay.

The trial court's determination, based on its observations of the juror, that the juror was not sleeping during the expert's testimony resolved the issue. As the Supreme Court explained in State v. Mohammed, 226 N.J. 71, 75 (2016),

[w]hen it is alleged that a juror was inattentive during a consequential part of the trial, if the trial court concludes, based on personal observations explained adequately on the record, that the juror was alert, the inquiry ends. If the judge did not observe the juror's attentiveness, the judge must conduct individual voir dire of the juror; if that voir dire leads to any conclusion other than that the juror was attentive and alert, the judge must take appropriate corrective action.

² Defendant suggests the transcript should read "If the State's fine, I'm fine, Your Honor." We do not view the alleged mistranscription as material to our analysis.

The record clearly establishes that the trial court, prior to the issue being raised by defendant's counsel, noticed that the juror was closing and opening her eyes. The court observed the juror and determined that she was not sleeping. After defendant's counsel raised the issue, the court set forth an adequate explanation of its observations of the juror and conclusion that she was not asleep during the expert's testimony.

As the PCR court correctly concluded, defendant's counsel was not ineffective for not insisting that the court voir dire the juror. Given the trial court's observations of the juror and conclusion that she was not sleeping, such insistence would not have required that the court voir dire the juror and would not have led to a different outcome with respect to the juror. We are not persuaded by defendant's argument that the trial court's failure to use the term "alert" when describing the juror is indicative that the trial court should have interviewed the juror. The record supports the trial court's determination that the juror was alert during the expert's testimony and any further objection by counsel would not have resulted in a voir dire of the juror.

We also agree with the PCR court's conclusion that defendant's counsel was not ineffective for failing to introduce evidence that the Air Force required defendant to install encryption software on his tablet. We addressed this issue

on defendant's direct appeal. We noted that the expert explained to the jury that he could not extract data from defendant's tablet because "full disk encryption" software had been downloaded to the device. When asked whether such software was commonly found on electronic devices, the expert said that such software was "uncommon" and "the times I saw it were in child pornography cases." Defendant moved for a mistrial based on the expert's testimony. The trial court denied the motion, but gave a curative instruction to which the defendant's counsel agreed.

On appeal, we concluded that although the expert's testimony concerning encryption was unnecessary,

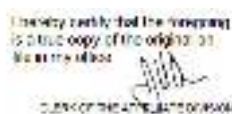
[t]he focus of the indictment's twelfth count, possession of less than one hundred items depicting the sexual exploitation or abuse of a child, centered on defendant's possession of the nude screen shots he took of [his stepdaughter] and her former boyfriend. [G]iven virtually irrefutable evidence defendant had downloaded the photographs from a cellular phone and maintained them on this laptop, any prejudice to defendant by [the expert's] reference to child pornography withered to little more than a harmless irrelevancy.

[State v. P.M., slip op. at 24.]

Evidence that defendant's tablet was encrypted because of his involvement in the Civil Air Patrol would not have changed the outcome of his child pornography conviction.³

Finally, we have reviewed the transcript of the sentencing hearing and agree with the PCR court's conclusion that defendant did not establish a prima facie case of ineffective assistance of counsel during that hearing. Defendant's counsel, accepting the jury verdict as he must, acknowledged the serious nature of defendant's crimes and appealed to the court's sense of fairness and proportionality by mentioning a relatively lenient sentence recently imposed in the vicinage on a defendant in similar circumstances. This was a reasonable approach in the circumstances. We disagree with defendant's argument that his sentence would likely have been shorter had his counsel mentioned that defendant had training in sociology and had worked as a paramedic. Those facts, even if considered to constitute mitigating factors, were unlikely to have changed defendant's sentence if mentioned to the court.

Affirmed.



³ To the extent that defendant argues his counsel was ineffective for not objecting to the curative instruction, we note that we upheld the adequacy of the curative instructions in the direct appeal, precluding defendant from recasting a challenge to the instructions in the guise of a claim of ineffective assistance of trial counsel. See R. 3:22-5; Marshall, 148 N.J. at 150.