

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2546-22**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TATIANA COLE, a/k/a
TATIANA S. COLE,

Defendant-Appellant.

Submitted May 14, 2024 – Decided May 31, 2024

Before Judges Mayer and Enright.

On appeal from the Superior Court of New Jersey,
Law Division, Mercer County, Indictment No. 17-01-
0030.

Jennifer Nicole Sellitti, Public Defender, attorney for
appellant (Abby P. Schwartz, Designated Counsel, on
the brief).

Matthew J. Platkin, Attorney General, attorney for
respondent (Frank Muroski, Deputy Attorney General,
of counsel and on the brief).

PER CURIAM

Defendant appeals from the February 27, 2023 order denying her petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

I.

In January 2017, a Mercer County Grand Jury indicted defendant and her two co-defendants on the following charges: second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2(a)(1) and N.J.S.A. 2C:15-1(a)(1); first-degree robbery, N.J.S.A. 2C:15-1(a); first-degree murder, N.J.S.A. 2C:11-3(a)(1); first-degree felony murder, N.J.S.A. 2C:11-3(a)(3); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b); and second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) and N.J.S.A. 2C:2-6.

In March 2018, defendant pled guilty to first-degree robbery in exchange for the State's recommendation that she serve a ten-year prison term, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, and that her remaining charges be dismissed. Her plea agreement also stated she would testify truthfully at the co-defendants' trials if the State subpoenaed her.

During her plea hearing, defendant testified she: understood the terms of the plea agreement; had enough time to speak with her attorney about its

terms; and was satisfied with her attorney's services. In providing a factual basis for her plea, defendant testified she and her co-defendants planned "to rob or steal money from" the victim, and that after they entered the victim's home, she "figured out where the cash was, and told [her co-defendant] where that was." Further, she testified she heard gunshots during the robbery and "knew force had been inflicted upon" the victim after seeing his corpse. Additionally, defendant admitted she "took a bag that contained approximately \$35,000 in cash" from the victim's home, and later split those proceeds with her co-defendants. The judge found her plea was knowing, intelligent, and voluntary.

At defendant's sentencing in November 2019, the assistant prosecutor anticipated plea counsel might "argue for a departure from the first-degree [sentencing] range" contemplated under the plea agreement. However, the assistant prosecutor contended a sentence "in the first[-]degree range . . . remain[ed] appropriate."

After confirming defendant sought "a downward departure from [a sentence in] the first-degree range," plea counsel asked "to present some evidence in mitigation" to support defendant's request. He explained:

we understand that that's a heavy lift given the circumstances, . . . there is a victim decedent in this

case, but I can assure the [c]ourt that my client is ready to pay her penalty to society. She has been remorseful since day one when we first met in the county facility.

Plea counsel also informed the judge that defendant remained offense free after she was "released [from jail] on a bracelet," and that in the "year and seven months since [defendant was] out on the street" and awaiting trial, she continued to raise her young child, traveled out of state periodically to care for her grandmother, "and by all accounts[,] did everything she was required to do . . . to show the [c]ourt that she was genuinely a law[-]abiding citizen but for this tremendous error in judgment . . . with respect to the crime" she committed. Moreover, plea counsel stated, "[i]f you . . . just carve this incident out of her life, which is impossible to do, but if you did that and looked at her life otherwise, . . . you would never believe that this woman was involved in this kind of incident."

Next, plea counsel produced defendant's grandmother, mother, and sister to speak on defendant's behalf "in mitigation." Each of these witnesses attested to defendant's positive attributes.

Defendant also spoke at sentencing. First, she "apologize[d] to the victim's family" and stated she "never imagined that . . . was going to happen." Additionally, defendant claimed she "really d[id not] have any malicious bone

in [her] body," and "[t]here was no malicious intent" on her part when she participated in the robbery. However, she conceded she "forgot all [her] morals" and "everything that [her] mother instilled in [her]" when committing the offense.

In seeking leniency from the court, defendant also stated she "learned [her] lesson, and . . . c[a]me [before the court] with so much remorse." She acknowledged that initially, her "charges were a lot worse," so she wanted to thank the judge, "the prosecutor," her attorney, and "everyone looking at [her] . . . as an individual that made an honest mistake."

In applying the aggravating and mitigating factors, the judge found aggravating factors three (risk of re-offense) and nine (need to deter). N.J.S.A. 2C:44-1(a)(3) and (9). He also noted defendant "had some contacts with the criminal [justice] system" before committing the robbery, but had no prior convictions. Further, the judge found mitigating factors seven (no criminal history), nine (character and attitude) and twelve (cooperation with law enforcement). N.J.S.A. 2C:44-1(b)(7), (9) and (12).

The judge concluded aggravating factor three was "partially applicable based upon [defendant's] testimony here today," adding, "[i]t's clear . . . that she is regretful [for] having become associated with an individual with whom

she claimed she loved and that that love caused her to follow [him] and ultimately . . . generated the death of [the victim]." Moreover, the judge found mitigating factor nine was "partially applicable based upon the remorse . . . [defendant] expressed . . . in court." He added:

[i]t appears to this [c]ourt, based upon the letters that were submitted in support of [defendant,] as well as the individuals who testified today, including [defendant], that this particular event was an aberration for [defendant]. However, an individual died as a result of this particular event. [Defendant also] . . . cooperate[d] to a significant degree with law enforcement once she was identified through various . . . phone records.

After finding the aggravating and mitigating factors were "in balance," the judge stated it was "fair and in the interest of justice" to "impose the recommended sentence in accordance with the plea agreement." Thus, he denied defendant's request for a downgraded sentence but noted the recommended sentence under the plea agreement was "at the low end of the range for a first[-]degree offense and essentially would be at the high end of a second[-]degree offense even if there was a downgrade." Accordingly, the judge sentenced defendant to a ten-year NERA term for the robbery offense and dismissed her remaining charges, consistent with the plea agreement. Defendant did not appeal from her conviction or sentence.

In November 2021, defendant filed a pro se PCR petition, claiming plea counsel was ineffective and that her sentence should be "reduced to reflect the appropriate weight and consideration from balancing [certain] aggravating and mitigating factors that were omitted from [the sentencing judge's] quantitative and qualitative analysis." Defendant argued "there were substantial grounds tending to excuse or justify . . . [her] conduct[,] though failing to establish a defense" for the robbery, and that she was entitled to the benefit of mitigating factor fourteen, N.J.S.A. 2C:44-1(b)(14),¹ because she committed the robbery while under the age of twenty-six.

In August 2022, assigned counsel filed a supplemental letter brief in support of defendant's PCR petition. PCR counsel contended plea counsel "was ineffective for failing to file a direct appeal on [defendant's] behalf" and defendant was entitled to a resentencing based on the enactment of N.J.S.A. 2C:44-1(b)(14).

On February 7, 2023, the parties appeared for argument on the PCR petition. At the outset of the hearing, PCR counsel withdrew defendant's claim

¹ N.J.S.A. 2C:44-1(b)(14), which became effective on October 19, 2020, is a mitigating factor to be considered by the sentencing court if "[t]he defendant was under [twenty-six] years of age at the time of the commission of the offense." Pursuant to State v. Lane, 251 N.J. 84, 96-97 (2022), this mitigating factor is to be given prospective application only.

that plea counsel was ineffective for failing to file a direct appeal. PCR counsel explained that defendant only recently disclosed "she d[id not] remember asking [plea counsel] . . . to file an appeal." PCR counsel also renewed her argument that defendant should be resentenced based on N.J.S.A. 2C:44-1(b)(14) because defendant was under the age of twenty-six when she committed the robbery.

In a February 27, 2023 order, the PCR judge denied defendant's petition without an evidentiary hearing. In the judge's accompanying written opinion, she noted defendant withdrew her claim that plea counsel was ineffective for failing to file a direct appeal. Next, the judge disagreed defendant was entitled to be resentenced based on N.J.S.A. 2C:44-(1)(b)(14). The judge reasoned that although defendant was under the age of twenty-six when she committed the robbery, defendant was not entitled to this mitigating factor because her sentencing occurred before N.J.S.A. 2C:44-1(b)(14) became effective. Citing our Supreme Court's recent holding in Lane, the judge aptly noted defendant "was sentenced in 2019," but "[t]he new mitigating factor went into effect on October 19, 2020," and "the legislature enacted this amendment to apply prospectively, not retroactively."

The PCR judge also found that "even if mitigating factor [fourteen] . . . applied, it would likely have little to no impact on the amount of years [defendant] would or should have been sentenced[,], as it would not have necessitated downgrading her [sentence on] her first-degree robbery charge." Citing N.J.S.A. 2C:44-1(f)(2),² the judge acknowledged a trial court could "sentence a [d]efendant to a term appropriate to a crime of one degree lower . . . if the court [wa]s 'clearly convinced that the mitigating factors substantially outweigh[ed] the aggravating factors, and the interest of justice demand[ed]' a reduction in sentence." But the PCR judge found "there [wa]s nothing [in the record] to suggest . . . there should or would have been a downgraded term [by] adding mitigating factor [fourteen]." She also concluded that even if mitigating factor fourteen applied, it "would not have

² N.J.S.A. 2C:44-1(f)(2) provides, in part:

In cases of convictions for crimes of the first- or second-degree where the court is clearly convinced that the mitigating factors substantially outweigh the aggravating factors and where the interest of justice demands, the court may sentence the defendant to a term appropriate to a crime of one degree lower than that of the crime for which the defendant was convicted.

caused the mitigating factors to substantially outweigh the aggravating factors, nor would the interest of justice [have] demand[ed] a reduction."

Further, the PCR judge found defendant "was sentenced to the least amount of years possible [after] pleading guilty to a first-degree robbery," and that "adding . . . mitigating factor [fourteen] would not have changed the years [defendant] would have received" at sentencing. Accordingly, the judge determined defendant was not entitled to PCR.

II.

On appeal, defendant raises the following argument:

POINT I

BOTH TRIAL AND PCR COUNSEL WERE INEFFECTIVE IN FAILING TO ARGUE MITIGATING FACTORS THAT APPLIED TO DEFENDANT'S CASE AND, AS SUCH, DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HER RIGHT TO A FAIR TRIAL AND DUE PROCESS.

"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, 338-39 (App. Div. 2020) (citing State v. Jackson, 454 N.J. Super. 284, 291 (App. Div. 2018)). However, we review a

judge's decision to deny a PCR petition without an evidentiary hearing for an abuse of discretion. State v. Preciose, 129 N.J. 451, 462 (1992).

To establish an ineffective assistance of counsel (IAC) claim, a defendant must satisfy the two-prong test under Strickland v. Washington, 466 U.S. 668, 687 (1984), adopted by New Jersey in State v. Fritz, 105 N.J. 42, 58 (1987). First, the defendant must show counsel's performance "fell below an objective standard of reasonableness" and was therefore deficient. Strickland, 466 U.S. at 687-88. Next, the defendant "must show . . . 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" State v. Hess, 207 N.J. 123, 146 (2011) (quoting Strickland, 466 U.S. at 694). The failure to raise non-meritorious arguments does not constitute IAC. State v. Worlock, 117 N.J. 596, 625 (1990).

"With respect to both prongs of the Strickland test, a defendant asserting [IAC] on PCR bears the burden of proving [the] right to relief by a preponderance of the evidence." State v. Gaitan, 209 N.J. 339, 350 (2012). A failure to satisfy either Strickland prong requires the denial of a PCR petition. Fritz, 105 N.J. at 52.

Where a defendant alleges IAC in connection with a guilty plea, the second Strickland prong is established when the defendant demonstrates a "reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial." State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009) (alteration in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)). A defendant also must show "a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010).

It is well settled that a plea agreement does not prevent "a defense attorney from presenting or arguing mitigating evidence to the sentencing court," as such a restriction would "deprive[] the court of the information it needs to faithfully carry out its unfettered obligation to identify and weigh the appropriate sentencing factors." Hess, 207 N.J. at 153; see also State v. Briggs, 349 N.J. Super. 496, 501 (App. Div. 2002) ("[A] defense attorney must have an unfettered right to argue in favor of a lesser sentence than that contemplated by the negotiated plea agreement."). A "failure to present mitigating evidence or argue for mitigating factors . . . even within the confines of [a] plea agreement" may rise to the level of IAC. Hess, 207 N.J. at 154.

"[T]he right to the effective assistance of counsel extends to PCR counsel." State v. Vanness, 474 N.J. Super. 609, 626 (App. Div. 2023) (citing State v. Rue, 175 N.J. 1, 18-19 (2002)). Rule 3:22-6(d) requires PCR counsel to "advance all of the legitimate arguments requested by the defendant that the record will support." Moreover, "[i]f [a] defendant insists upon the assertion of any grounds for relief that counsel deems to be without merit, [PCR] counsel shall list such claims in the petition . . . or incorporate them by reference. Pro se briefs can also be submitted." R. 3:22-6(d).

Rule 3:22-6(d) requires PCR counsel to "communicate with [their] client," "investigate the claims," and "then . . . 'fashion the most effective arguments possible.'" Rue, 175 N.J. at 18 (quoting State v. Velez, 325 N.J. Super. 128, 133 (App. Div. 2000)). "The remedy for counsel's failure to meet the requirements imposed by Rule 3:22-6(d) is a new PCR proceeding." Vanness, 474 N.J. Super. at 626-27 (citing State v. Hicks, 411 N.J. Super. 370, 376 (App. Div. 2010)). Such a new proceeding is predicated solely on the Rule, not on IAC. Hicks, 411 N.J. Super. at 376.

A defendant is not automatically entitled to an evidentiary hearing by simply raising a PCR claim. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). To obtain an evidentiary hearing, a defendant must

establish, by a preponderance of the evidence, "a prima facie case" for relief, "material issues of disputed fact," and show "that an evidentiary hearing is necessary to resolve the claims." R. 3:22-10(b). Therefore, a defendant's IAC claims "must be supported by 'specific facts and evidence supporting [the IAC] allegations.'" State v. Peoples, 446 N.J. Super. 245, 254 (App. Div. 2016) (quoting State v. Porter, 216 N.J. 343, 355 (2013)).

"If the [PCR] court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to [PCR], . . . then an evidentiary hearing need not be granted." State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013) (omission in original) (quoting State v. Marshall, 148 N.J. 89, 158 (1997)). Also, if a defendant's "allegations are too vague, conclusory, or speculative[,]" the defendant is not entitled to an evidentiary hearing. Porter, 216 N.J. at 355 (quoting Marshall, 148 N.J. at 158). A defendant "must do more than make bald assertions [A defendant] must allege facts sufficient to demonstrate counsel's alleged substandard performance." Ibid. (quoting Cummings, 321 N.J. Super. at 170).

We also recognize "[a] sentencing court may downgrade a first- or second-degree offense to one degree less for sentencing purposes." State v. Locane, 454 N.J. Super. 98, 121 (App. Div. 2018) (citing N.J.S.A. 2C:44-

1(f)(2)). However, "the standard governing the downgrading of a defendant's sentence . . . is high." State v. Megargel, 143 N.J. 484, 500 (1996). To warrant a downgrade, the court must find: (1) it is "clearly convinced that the mitigating factors substantially outweigh the aggravating factors," N.J.S.A. 2C:44-1(f)(2); and (2) "there are compelling reasons in addition to, and separate from, the mitigating factors, which require the downgrade in the interest of justice," Locane, 454 N.J. Super. at 121 (quoting State v. Jones, 197 N.J. Super. 604, 607 (App. Div. 1984)) (internal quotation marks omitted). In applying this test, "the severity of the crime" is "the most . . . important factor." Megargel, 143 N.J. at 500.

Governed by these standards, we have no reason to disturb the February 27, 2023 order, nor do we discern a basis to remand for a new PCR hearing.

Here, defendant contends plea and PCR counsel were ineffective because they "failed to go through mitigating factors when arguing [for a lesser] sentence." Defendant also contends PCR counsel mistakenly argued that N.J.S.A. 2C:44-1(b)(14) applied, even though "this new factor was to be applied prospectively only." But defendant does not argue before us, as she did in her PCR petition, that the sentencing judge should have found mitigating factor four, N.J.S.A. 2C:44-1(b)(4) (there were substantial grounds

tending to excuse or justify the defendant's conduct though failing to establish a defense).³ Instead, she newly argues plea and PCR counsel were ineffective because neither argued in favor of mitigating factor two (defendant did not contemplate her conduct would cause or threaten serious harm) and eight (defendant's conduct was the result of circumstances unlikely to recur), N.J.S.A. 2C:44(1)(b)(2) and (8).

"We generally 'decline to consider questions or issues not properly presented to the trial court . . . unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" State v. Marrocelli, 448 N.J. Super. 349, 373 (App. Div. 2017) (omission in original) (quoting State v. Robinson, 200 N.J. 1, 20 (2009)). Because neither of these exceptions applies to this case, we need not consider defendant's newly minted contentions. However, to the extent the record is developed, we consider defendant's arguments on the merits.

As a threshold matter, we agree with defendant that PCR counsel's argument that defendant was entitled to the benefit of mitigating factor fourteen lacked merit. However, because defendant raised this identical

³ See Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2024) ("It is, of course, clear that an issue not briefed is deemed waived.").

argument in her pro se PCR petition, the PCR judge properly addressed and rejected it. Thus, we decline to conclude PCR counsel's error in advancing defendant's meritless argument as to N.J.S.A. 2C:44-1(b)(14) prejudiced defendant.

We also are not persuaded defendant established a prima facie case of IAC, notwithstanding plea counsel's failure to specifically reference mitigating factors two and eight at sentencing. In fact, plea counsel zealously argued in favor of a downgraded sentence and presented mitigating evidence to support that application. And, although he did not mention mitigating factors two and eight by name, plea counsel presented statements from defendant, as well as defendant's mother, sister, and grandmother, to support these mitigating factors.

For example, as to mitigating factor two, defendant apologized to the victim's family during sentencing, telling them she "never imagined . . . that was going to happen," she had "no malicious intent" on the day of the robbery, and she "really d[id not] have a[] malicious bone in [her] body." (Emphasis added). As to mitigating factor eight, plea counsel stated defendant was "remorseful since day one," and that if the court "carve[d] this incident out of her life, . . . and looked at her life otherwise, . . . [the judge] would never

believe that this woman was involved in this kind of incident." Additionally, plea counsel stated that in the "year and seven months since [defendant was] out on the street," she "behaved properly" and "did everything she was required to do . . . to show the [c]ourt that she was genuinely a law[-]abiding citizen but for this tremendous error in judgment" leading to her conviction. Defendant also expressed that "this situation got people out of [her] life that [she] was[not] strong enough to get . . . out of [her] life," and she now had "learned [her] lesson."

Similarly, defendant's mother, sister, and grandmother extolled defendant's virtues in seeking leniency for her at sentencing. Defendant's mother informed the judge that defendant "was a true go-getter, . . . and . . . the life and love of everyone she came in contact with," and even though defendant's life "took a . . . different turn," defendant's mother had "much confidence" that defendant would "come out [of prison] as a better person, find her old self again," and "continue to be a productive citizen . . . if given the opportunity."

Defendant's grandmother similarly asked the judge to "have mercy on" defendant, claiming defendant was now "doing better," "ha[d] good morals," and was "very remorseful of . . . her actions." Additionally, defendant's sister

spoke about defendant being "a role model in [her] life," adding that defendant "ha[d] grown as a person[,] . . . not just physically but mentally as well."

The record reflects the judge considered this mitigating evidence. In fact, he stated:

[i]t appears to this [c]ourt, based upon the letters that were submitted in support of [defendant,] as well as the individuals who testified today, including [defendant], that this particular event was an aberration for [defendant]. . . . [Defendant also] . . . cooperate[d] to a significant degree with law enforcement once she was identified through various . . . phone records

. . . It's clear . . . that she is regretful [for] having become associated with an individual with whom she claimed she loved and that that love caused her to follow [him] and ultimately . . . generated the death of [the victim].

[(Emphasis added).]

Given these findings and the significant evidence plea counsel presented in mitigation at sentencing, including that defendant "never imagined" the robbery would be fatal, she was remorseful, she remained offense free while awaiting trial, and her offense was, as the judge found, "an aberration," defendant fails to demonstrate prejudice resulted from of plea counsel's failure to address mitigating factors two and eight by name. Our determination is bolstered by the fact the sentencing judge imposed a term at the lowest end of

the first-degree range and what would have been the higher end of the second-degree range had defendant satisfied the stringent standards set forth in N.J.S.A. 2C:44-1(f)(2), which she did not.


Defendant also fails to establish her PCR attorney violated Rule 3:22-6(d). She provided no certification detailing her discussions with PCR counsel. Moreover, defendant failed to submit any competent evidence that PCR counsel did not investigate her claims, failed to communicate with her, or that PCR counsel failed to "advance all of the legitimate arguments" defendant requested "that the record w[ould] support." Ibid.

Finally, because defendant failed to establish a prima facie case of IAC against plea counsel, she was not entitled to an evidentiary hearing. See Preciose, 129 N.J. at 462. Further, for the reasons we stated, we cannot conclude on this deficient record that a new PCR proceeding is warranted based on a violation of Rule 3:22-6(d).

To the extent we have not specifically addressed defendant's remaining arguments, they lack sufficient merit to warrant discussion. 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