SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3006-22

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KEN GUNTER,
a/k/a KEN CARTER,
SAL ANDERSON,
KEN ANDERSON, and
KENNETH GUNTHER,

Defendant-Appellant.

———————————————

Submitted May 14, 2024 – Decided May 31, 2024

Before Judges Enright and Paganelli.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 17-03-0629.

Jennifer Nicole Sellitti, Public Defender, attorney for appellant (Phuong Vinh Dao, Designated Counsel, on the brief).

Theodore N. Stephens, II, Essex County Prosecutor, attorney for respondent (Matthew E. Hanley, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Ken Gunter appeals from an April 19, 2023 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

We derive the facts and procedural history from the PCR record. In August 2016, while fleeing from the police in an automobile, defendant struck and killed a pedestrian and injured another. At the time, he had "at least a half of an ounce or more of heroin that was packed into ten bricks" in the automobile.

In February 2017, under unrelated indictments, defendant's counsel filed a motion to withdraw from representing defendant. Counsel certified he had "not received . . . payment for fees incurred under the retainer." Therefore, counsel sought permission to withdraw from those matters because he was "unable to represent [d]efendant." Counsel stated "[t]he attorney client relationship ha[d] been irreparably harmed because of the [d]efendant's lack of cooperation and failure to respond to requests for payment for legal services sought."

In March 2017, defendant was indicted for the August 2016 incident. An Essex County grand jury returned a nine-count indictment—No. 2017-629—charging defendant with the following offenses: (1) first-degree aggravated

manslaughter, N.J.S.A. 2C:11-4(a)(1); (2) first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a)(2); (3) second-degree reckless vehicular homicide, N.J.S.A. 2C:11-5(a); (4) second-degree resisting arrest and eluding, N.J.S.A. 2C:29-2(b); (5) second-degree aggravated assault with bodily injury while eluding, N.J.S.A. 2C:12-1(b)(6); (6) third-degree possession of controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1); (7) second-degree manufacturing and distributing CDS, N.J.S.A. 2C:35-5(a)(1); (8) third-degree resisting arrest and threat of force, N.J.S.A. 2C:29-2(a); and (9) fourth-degree resisting arrest and flight prevents arrest, N.J.S.A 2C:-29-2(a)(2).

At his arraignment, defendant was represented by the Office of the Public Defender. In April 2017, defendant's counsel filed a substitution of attorney form to represent defendant in this matter.

Counsel appeared in court on behalf of defendant on May 22, June 12 and 26, 2017. On July 6, 2017, counsel filed a motion to withdraw from representing defendant in this matter. Again, counsel "asserted he was not getting paid." Nonetheless, he appeared on behalf of defendant in court on July 13, 2017.

In August 2017, defendant and counsel appeared in court for defendant to enter a guilty plea. Defendant was placed under oath. He stated he understood he had "an obligation to tell the truth throughout the entire proceeding." In

addition, he stated he understood "if he were not to tell the truth, [he] could be charged with false swearing or perjury . . . punishable by up to five years in [s]tate[] [p]rison."

As to his relationship with counsel, the transcript reveals the following exchange between defendant and the trial court:

> THE COURT: Alright. Now, are you satisfied with the services of your [counsel]?
>
> [DEFENDANT]: Yes.
>
> THE COURT: Have you had enough time to discuss your case with him?
>
> [DEFENDANT]: (Pause). Yes.
>
> THE COURT: Do you need any more time with him?
>
> [DEFENDANT]: (Pause). No.
>
> THE COURT: Well, first of all, has he answered - - has he answered all of your questions?
>
> [DEFENDANT]: (Pause). Yes.
>
> THE COURT: Well, are there any questions he hasn't answered for you?
>
> DEFENDANT: (Pause). No.
>
> THE COURT: I am not really clear on the hesitation. Either, . . . you have had enough time to discuss your case with him or you haven't. I mean if you haven't had enough time, I'm not going to force you to go forward

today. . . . [I]f you have more questions for [counsel], I'm certainly going to permit you to ask any and all questions you want of your attorney.

So . . . when I'm asking these questions, I want to make sure that you've had that time to meet with [counsel] and ask him whatever you want to ask him, go over whatever you want to go over with him until you feel that you're ready to proceed.

. . . [I]n this case, you're in the process of pleading guilty, . . . presumably that's what you want to do . . . . Is it your desire . . . to enter a plea of guilty? And no one has forced you, or threatened you, or coerced you to do so. So, I'm a little [un]clear on why you were hesitating before.

DEFENDANT: (Pause). Nervous.

THE COURT: Okay. . . . Do you feel like you need a moment or two with [counsel]? I mean . . . would you like another moment or two to speak to [counsel]?

[DEFENDANT]: (Pause). No.

THE COURT: You feel like you're good?

[DEFENDANT]: (Pause). Yeah.

THE COURT: You sure? (Pause). Yeah?

[DEFENDANT]: Yeah.

THE COURT: Okay. Alright. . . . again, are there any questions you feel that you haven't asked [counsel] that you want to ask [counsel]?

[DEFENDANT]: No.

> THE COURT: Alright. And, again, do you feel you need any additional time with [counsel] before you continue?
>
> [DEFENDANT]: No.

Thereafter, the State advised the judge that defendant agreed to withdraw his not guilty plea and would plead guilty to the second, third, fourth, fifth and seventh counts of the indictment. In exchange for the plea, the State recommended dismissal of the remaining four counts of the indictment and agreed to "recommend any custodial sentence not to exceed [twelve] years in [a] New Jersey [s]tate [p]rison with defendant to serve [eighty-five] percent pursuant to the No Early Release Act."[1]

The judge explained the maximum prison sentences, for the counts defendant was pleading guilty to, were thirty years for the second count and ten years for each of the other four counts. Defendant stated he went over "each and every" question on the plea form with his attorney. Also, on the plea form defendant stated he was "satisfied with the advice [he] received from [his] lawyer."

In September 2017, the matter returned to court for sentencing. Again, counsel appeared in court with defendant. Counsel stated he reviewed the

[1] N.J.S.A. 2C:43-7.2.

presentence investigation report and was "well aware of the information because [he had] been on this case . . . for almost a year." Counsel argued for the judge to impose the sentence agreed upon between the State and defendant.

The judge imposed the sentence negotiated in the plea agreement, sentencing defendant to twelve years on count two of the indictment and eight years on each of the remaining counts of the indictment to which defendant pleaded guilty. The judge imposed concurrent sentences and ordered that defendant was not eligible for parole until eighty-five percent of the second count's sentence was served. On the same day, the judge executed an order denying counsel's motion to withdraw as moot.

Defendant subsequently filed a petition for PCR. As relevant to this appeal, defendant argued: (1) "counsel provided ineffective assistance when he continued to represent [defendant] even though the attorney client relationship had been irreparably broken"; and (2) he "provided prima facie proof he suffered ineffective assistance of counsel and therefore an evidentiary hearing [wa]s warranted."

Defendant urged the trial court to consider: (1) counsel's certification, in support of the motions to withdraw, that the attorney client relationship had been "irreparably broken"; (2) defendant's plea colloquy when he "hesitate[d]" to

provide answers; (3) the trial court's "belated" denial of the motion to withdraw; and (4) defendant's assertions that counsel only saw him once and did not review materials with him. Defendant contended "[r]easonably competent counsel would never have continued to represent a client when the attorney-client relationship had been broken."

In addition, defendant argued an evidentiary hearing was required because "there [wa]s a strong appearance, from counsel's own words, that counsel pressured [defendant] into accepting a plea because counsel did[not] think he had been paid enough, while the attorney-client relationship was in the words of the counsel 'irreparably harmed.'"

On April 19, 2023, following argument on the petition, the judge entered an order and issued a written opinion, denying PCR without an evidentiary hearing. The judge found: (1) the motion to be relieved was moot "because of [defendant]'s willingness to plead guilty"; (2) "counsel remained in the case after filing the motion to be relieved and did, in fact remain as counsel until [defendant] was sentenced"; (3) counsel appeared on defendant's behalf on May 22, June 12 and 26, and July 13, 2017; (4) there was "nothing in the [c]ourt's files to indicate [defendant] was not satisfied with his . . . counsel or wished to be represented by another attorney, or any discussion regarding [counsel's]

motion to be relieved"; (5) after counsel "filed the motion to be relieved, he still appeared before th[e] [c]ourt on behalf of [defendant], therefore resolving any alleged circumstances made in his motion"; (6) counsel's representation of defendant was not raised at any one of the several status conferences; (7) had defendant "been unsatisfied with the efforts put forth by the attorney he chose, he could have fired him at any moment or told th[e] [c]ourt that he was not satisfied with the services of his attorney"; (8) in defendant's plea colloquy, defendant stated he was "satisfied with the services of his attorney," had enough time to discuss the case with the attorney, did not need more time with the attorney, the attorney answered all his questions, and he did not have any questions that he had not asked the attorney; (9) he took "extra safeguards during the plea hearing" to be sure defendant "did not want to speak with . . . counsel again and was ready and willing to plead guilty"; and (10) counsel "did not assert before or during the plea hearing that he did not want to represent [defendant] or that there was irreparable harm to their relationship."

Therefore, the judge found defendant "failed to demonstrate that 'counsel's assistance was not within the range of competence demanded of attorneys in criminal cases' or that . . . counsel acted inappropriately for his continuous

representation."[2] Further, the judge found defendant "failed to establish a 'reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.'"[3]

In addition, the judge determined defendant had "not establish[ed] a prima facie claim that a hearing [wa]s required." The judge found "[t]he transcripts of the plea hearing and sentencing did not elucidate any issues that could not have been determined through the submitted certifications and briefs."[4]

On appeal, defendant raises the following arguments for our consideration:

> POINT I
>
> DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.
>
> (a) Trial counsel acknowledged that the attorney and client [relationship] was irreparably harmed, and yet he continue[d] to represent [d]efendant and negotiated an unfavorable plea deal.
>
> POINT II
>
> DEFENDANT . . . MADE A PRIMA FACIE SHOWING OF INEFFECTIVE ASSISTANCE OF

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[2] Citing State v. DiFrisco, 137 N.J. 434, 457 (1994).

[3] Citing Strickland v. Washington, 466 U.S. 668, 694 (1984).

[4] Citing State v. Flores, 228 N.J. Super. 586, 589-90 (App. Div. 1988).

COUNSEL, AND THUS, THE PCR COURT ERRED IN NOT GRANTING AN EVIDENTIARY HEARING.

More specifically, defendant argues "reasonable competent counsel [would have] at least stop[ped] representing [him] as soon as the motion [to withdraw] was filed or [once] the motion [wa]s heard and decided by the . . . court." Moreover, he contends "[t]he breakdown of attorney client relationship was clearly evident during the plea colloquy when [d]efendant hesitated and paused when questioned about trial counsel's representation" and later when he certified that "counsel had only spoken to him once while incarcerated" and "stopped communicating with him."

We begin our discussion with a review of the principles governing our analysis. "[PCR] is New Jersey's analogue to the federal writ of habeas corpus." State v. Pierre, 223 N.J. 560, 576 (2015) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). "[PCR] provide[s] a built-in 'safeguard that ensures that a defendant [is] not unjustly convicted.'" State v. Nash, 212 N.J. 518, 540 (2013) (quoting State v. McQuaid, 147 N.J. 464, 482 (1997)).

"A petitioner must establish the right to [PCR] by a preponderance of the credible evidence." Preciose, 129 N.J. at 459 (citing State v. Mitchell, 126 N.J. 565, 579 (1992)). "[T]rial courts ordinarily should grant evidentiary hearings to resolve ineffective-assistance-of-counsel claims if a defendant has presented a

prima facie claim in support of [PCR]." Id. at 462. "[C]ourts should view the facts in the light most favorable to a defendant to determine whether a defendant has established a prima facie claim." Id. 462-63.

"Our standard of review is necessarily deferential to a PCR court's factual findings." Nash, 212 N.J. at 540. However, "we need not defer to a PCR court's interpretation of the law; a legal conclusion is reviewed de novo." Id. at 540-41.

"A petition for [PCR] is cognizable if based upon . . . [a s]ubstantial denial in the conviction proceedings of defendant's rights under the Constitution of the United States or the Constitution or laws of the State of New Jersey." R. 3:22-2(a).

"Those accused in criminal proceedings are guaranteed the right to counsel to assist in their defense." State v. Gideon, 244 N.J. 538, 549 (2021) (citing U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10). "It is not enough '[t]hat a person who happens to be a lawyer is present at trial alongside the accused,' rather, the right to counsel has been interpreted by the United States Supreme Court and [the New Jersey Supreme] Court as 'the right to the effective assistance of counsel.'" Id. at 550 (first alteration in original) (quoting Strickland, 466 U.S. at 685-86).

To establish a prima facie claim for ineffective assistance of counsel, a defendant must satisfy the two-prong test established in Strickland:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.
>
> [Id. at 687.]

"The United States Supreme Court has applied the Strickland test to challenges of guilty pleas based on ineffective assistance of counsel." DiFrisco, 137 N.J. at 456; see also Hill v. Lockhart, 474 U.S. 52, 58 (1958).

> To set aside a guilty plea based on ineffective assistance of counsel, a defendant must show that (i) counsel's assistance was not "within the range of competence demanded of attorneys in criminal cases"; and (ii) "that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial."
>
> [Id. at 457 (alteration in original) (first quoting Tollett v. Henderson, 411 U.S. 258, 266 (1973); and then quoting Hill, 474 U.S. at 59).]

"[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." Ibid. (quoting Strickland, 466 U.S. at 689).

When a guilty plea is contested, counsel's performance is not deficient if "a defendant considering whether or not to plead guilty to an offense receives 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. Nunez-Valdez, 200 N.J. 129, 138 (2009)).

Moreover, "[p]rejudice is not to be presumed." Gideon, 244 N.J. at 551 (quoting State v. Fritz, 105 N.J. 42, 52 (1987)). "[A] petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." State v. Aburoumi, 464 N.J. Super. 326, 339 (App. Div. 2020) (quoting Padilla v. Kentucky, 559 U.S. 356, 372 (2010)). A defendant's mere "bald assertion that he [or she] would not have pled" guilty is insufficient. State v. Gaitan, 209 N.J. 339, 376 (2012).

Applying the applicable legal standards and having reviewed the record on appeal, we are convinced defendant failed to establish a prima facie right to an evidentiary hearing or PCR. First, we conclude there is no merit to defendant's argument that "reasonable competent counsel should [have] at least

stop[ped] representing [d]efendant as soon as the motion [to withdraw] was filed or until the motion [wa]s heard and decided by the . . . court."

In accord with Rule 1:11-2(a), absent "the filing of the client's written consent" or compliance with the procedures for "a substitution of attorney," an attorney may not withdraw their representation of the client "without leave of court." "Without such formal withdrawal, defendant's responsibility continue[s] until the expiration of the time to appeal from the final judgment or order entered in the cause." Strauss v. Fost, 209 N.J. Super. 490, 494 (App. Div. 1986) (citing R. 1:11-3). Therefore, defendant's argument that counsel should have ceased his representation of defendant, merely because he filed a motion to withdraw, has no support under our rules or case law.

Moreover, defendant's contention that his relationship with counsel was "clearly" broken because during his plea colloquy he "hesitated and paused when questioned about trial counsel's representation" and he certified "counsel had only spoken to him once while incarcerated" and "stopped communicating with him" is belied by the record. When the court noted defendant's hesitancy, defendant did not express a concern with his relationship with counsel, but instead blamed being "nervous." In addition, defendant stated, under oath: (1) counsel had answered all of his questions; (2) he had enough time to discuss his

case with counsel; and (3) had no further questions of counsel. A "[d]efendant may not create a genuine issue of fact, warranting an evidentiary hearing, by contradicting his [or her] prior statements without explanation." State v. Blake, 444 N.J. Super. 285, 299 (App. Div. 2016) (citing Shelcusky v. Garjulio, 172 N.J. 185, 201-02 (2002) (discussing the "sham affidavit" doctrine)).

Therefore, we conclude defendant failed to establish the right to relief under the Strickland standard. There is no evidence counsel's representation was deficient. Nor, considering defendant's exposure to a prison sentence substantially longer than provided in the plea agreement, is there evidence that rejecting the plea would have been rational under the circumstances. Therefore, there is no prejudice.

Further, even "view[ing] the facts in the light most favorable to . . . defendant" he failed to "present[] a prima facie claim in support of [PCR]." Preciose, 129 N.J. at 462-63. Therefore, the judge did not err in concluding no evidentiary hearing was warranted.

To the extent we have not addressed any of defendant's remaining arguments, we concluded the lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.