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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-0064-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BRIAN M. YOHNNSON

Defendant-Appellant,

Submitted April 4, 2017 – Decided April 12, 2017

Before Judges Fisher and Vernoia.

On appeal from the Superior Court of New
Jersey, Law Division, Burlington County,
Indictment No. 04-12-1319.

Joseph E. Krakora, Public Defender, attorney
for appellant (Dianne Glenn, Designated
Counsel, on the brief).

Robert D. Bernardi, Burlington County
Prosecutor, attorney for respondent (Alexis R.
Agre, Assistant Prosecutor, of counsel and on
the brief).

PER CURIAM

Defendant Brian Yohnson appeals a Law Division order denying
his post-conviction relief (PCR) petition following an evidentiary
hearing. We affirm.

Defendant was charged in an indictment with four counts of first-degree robbery, N.J.S.A. 2C:15-1(a)(1) and (2). He filed a motion to suppress statements he made to the police, arguing his Miranda¹ rights were violated. Following denial of his motion, defendant pled guilty to two counts of first-degree robbery and two amended counts of second-degree robbery pursuant to a negotiated plea agreement. Defendant was sentenced to an aggregate fifteen-year custodial term, subject to the requirements of the No Early Release Act, N.J.S.A. 2C:43-7.2.

Defendant appealed the court's denial of his suppression motion. We vacated the order denying the suppression motion and remanded to the trial court to make further findings of fact. State v. Yohnnson, A-3406-05 (App. Div. Sept. 7, 2007) (slip op. at 12-14).

On remand, the trial court heard additional testimony, issued a written decision denying defendant's suppression motion, and entered an appropriate order. Defendant appealed. We reversed the court's denial of the suppression motion, vacated defendant's judgment of conviction, and remanded for a trial. State v. Yohnnson, A-5915-07 (App. Div. May 19, 2009) (slip op. at 39). The Supreme Court granted the State's petition for certification,

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

State v. Yohnnson, 201 N.J. 145 (2009), reversed our decision, and reinstated the trial court's order denying defendant's suppression motion and defendant's judgment of conviction, State v. Yohnnson, 204 N.J. 43, 65 (2010).

Defendant filed a PCR petition claiming his trial counsel was ineffective. Defendant alleged that following the denial of his suppression motion, his counsel failed to advise him that he could attack the voluntariness of his confession at trial and the jury could reject his confession on that basis. Defendant also alleged counsel did not inform him he could appeal the denial of his suppression motion if he was convicted.

The court denied the petition without an evidentiary hearing, and defendant appealed. On appeal, we noted that defendant claimed his trial counsel never told him he could challenge the interrogating "officer's credibility for the purpose of persuading the jury that the confession should be given no weight because it was produced by overbearing police conduct." State v. Yohnnson, A-0859-12 (App. Div. March 24, 2014) (slip op. at 6-7). We determined the court erred by relying on a certification of trial counsel that contradicted defendant's claim and, in doing so, incorrectly made credibility determinations without an evidentiary hearing. Id. at 5-8. We also concluded trial counsel's certification did not directly address "whether or not he and

defendant discussed the viability of a defense based on an attack on the investigating officer's credibility." Id. at 6. We reversed and remanded for an evidentiary hearing. Id. at 8.

On remand, Judge Jeanne T. Covert held an evidentiary hearing. Defendant and his trial counsel testified concerning their communications following the denial of defendant's suppression motion and prior to the entry of defendant's guilty pleas. Defendant also testified about his purported lack of understanding of the questions posed to him during his plea proceeding.

In a detailed written decision, Judge Covert found trial counsel's testimony credible and observed that, in significant respects, it was corroborated by defendant's testimony. Judge Covert rejected defendant's testimony that he did not understand his discussions with counsel and the questions posed during his plea proceeding. The judge found defendant's testimony during the evidentiary hearing was contradicted by his testimony at the plea proceeding and was otherwise not credible.

Based on her credibility determinations and findings of fact, Judge Covert denied defendant's PCR petition, concluding the evidence did not support defendant's ineffective assistance of counsel claim. She found the credible evidence showed that prior to defendant's plea proceeding, he was advised he could challenge his confession at trial and could appeal the court's denial of his

suppression motion if he was convicted. The judge also concluded there was no evidence supporting defendant's claim he did not understand the plea proceeding. The judge's order denying the PCR petition was incorporated in her written opinion. This appeal followed.

On appeal, defendant argues:

THE ORDER DENYING POST-CONVICTION RELIEF MUST BE REVERSED BECAUSE THE TESTIMONY AT THE EVIDENTIARY HEARING ESTABLISHED THAT AFTER THE DENIAL OF THE SUPPRESSION HEARING, AND BEFORE DEFENDANT ENTERED HIS GUILTY PLEA, TRIAL COUNSEL DID NOT DISCUSS THE POSSIBLE ADVANTAGES OF PROCEEDING TO TRIAL, INCLUDING THE OPPORTUNITY TO CROSS-EXAMINE WITNESSES, WHICH CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

Our review of a PCR claim after a court has held an evidentiary hearing "is necessarily deferential to [the] PCR court's factual findings based on its review of live witness testimony." State v. Nash, 212 N.J. 518, 540 (2013); see also State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014) ("If a court has conducted an evidentiary hearing on a petition for PCR, we necessarily defer to the trial court's factual findings."). Where an evidentiary hearing has been held, we should not disturb "the PCR court's findings that are supported by sufficient credible evidence in the record." State v. Pierre, 223 N.J. 560, 576 (2015) (quoting Nash, supra, 212 N.J. at 540). We review any legal

conclusions of the trial court de novo. Nash, supra, 212 N.J. at 540-41; State v. Harris, 181 N.J. 391, 419 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005).

"[A] defendant asserting ineffective assistance of counsel on PCR bears the burden of proving his or her right to relief by a preponderance of the evidence." State v. Gaitan, 209 N.J. 339, 350 (2012). A defendant must prove counsel's performance was deficient; it must be demonstrated that counsel's handling of the matter "fell below an objective standard of reasonableness" and that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); State v. Fritz, 105 N.J. 42, 58 (1987).

A defendant must also prove counsel's "deficient performance prejudiced the defense." Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693 (1984). Prejudice is established by showing a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. Thus, petitioner must establish that counsel's performance was deficient and petitioner suffered prejudice in order to obtain

a reversal of the challenged conviction. Id. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; Fritz, supra, 105 N.J. at 52.

Here, defendant alleged his counsel's performance was deficient because counsel failed to advise him that the reliability and voluntariness of his confession could be challenged at trial and did not inform defendant he could appeal the denial of his suppression motion after trial. The judge rejected defendant's claim because she found that counsel discussed the issues with defendant prior to the entry of his plea and therefore defendant's claim his counsel's performance was deficient was contradicted by the credible evidence. Defendant argues the court erred because the evidence does not support the court's findings.

We are convinced defendant's argument lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We add only the following comments.

Based on our review of the record, we are convinced Judge Covert's detailed factual findings are supported by sufficient credible evidence. Pierre, supra, 223 N.J. at 576; Nash, supra, 212 N.J. at 540. Defendant failed to prove trial counsel did not advise him that he could challenge his confession at trial and that he could appeal the denial of his suppression motion after trial. Accordingly, the court correctly determined defendant did not satisfy his burden of establishing his counsel's performance

was deficient. Strickland, supra, 466 U.S. at 687-88, 104 S. Ct.
at 2064, 80 L. Ed. 2d at 693.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION