

**RECORD IMPOUNDED**

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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-0339-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

A.W.,

Defendant-Appellant.

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Submitted November 9, 2017 – Decided December 14, 2017

Before Judges Currier and Geiger.

On appeal from Superior Court of New Jersey,  
Law Division, Bergen County, Indictment No.  
10-07-1287.

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

Gurbir S. Grewal, Bergen County Prosecutor,  
attorney for respondent (Annmarie Cozzi,  
Senior Assistant Prosecutor, on the brief).

PER CURIAM

Defendant A.W. appeals a June 3, 2016 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

On July 21, 2010, a grand jury indicted defendant for second-degree aggravated sexual assault, N.J.S.A. 2C:14-2(c)(1), upon his minor daughter, T.B., who, at the time, was incapacitated due to injury and medication. Defendant went to trial, but the jury was unable to reach a unanimous verdict.

On October 28, 2013, defendant entered into a plea agreement, pleading guilty to an amended charge of third-degree aggravated criminal sexual contact, N.J.S.A. 2C:14-3(a). He also pled guilty to fourth-degree contempt of a judicial order, N.J.S.A. 2C:29-9(a), under a separate accusation. In exchange for the guilty pleas, the State agreed to dismiss Indictment No. 10-07-1295, which charged defendant with three counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1), and second-degree endangering the welfare of children, N.J.S.A. 2C:24-4(a)(1), upon his granddaughter, B.M. The State further agreed to recommend concurrent six-month terms of imprisonment, which defendant began serving on the date of his plea hearing. The plea agreement also required defendant to undergo a psychological evaluation to determine the applicability of the New Jersey Sex Offenders Act pursuant to N.J.S.A. 2C:47-1, register under Megan's Law, N.J.S.A. 2C:7-2, be subjected to community supervision for life, and pay appropriate fines, penalties, and assessments.

The defendant initialed and signed the supplemental plea forms for sexual offenses, which outlined the Megan's Law and community supervision for life requirements. During the plea hearing, defense counsel stated that defendant would be subjected to registration pursuant to Megan's Law and community supervision for life. Defense counsel went over the plea forms with defendant several days before the plea hearing. Defendant testified that he understood the Megan's Law and community supervision for life aspects of the sentence.

Defendant testified that he understood the charges he faced, had extensively reviewed the discovery in the sexual assault and contempt cases with trial counsel, pled freely and voluntarily without duress of any kind, reviewed each of the questions on the plea forms in detail with trial counsel, and understood the questions and his answers were true and accurate. Defendant further testified that he signed and initialed the plea forms, including two forms containing extensive additional questions for certain sexual offenses regarding Megan's Law registration, address verification, notification, and community supervision for life requirements. He also testified that he understood that he would have to register under Megan's Law. Finally, he testified that he did not have any questions for his attorney or the court.

Defendant gave a detailed factual basis for his plea to aggravated criminal sexual contact, admitting he had touched the victim's breast and inner thigh for the purpose of arousing himself while the victim was physically helpless and unable to resist his sexual advances. Defendant also gave a detailed factual basis for his plea to the contempt charge, admitting he had knowingly contacted the victim in violation of a bail condition that prohibited him from having contact with the victim in any way, either directly or through a third party.

The trial court accepted the guilty pleas, finding defendant had provided a sufficient factual basis for each plea and the pleas were given knowingly and voluntarily.

On March 18, 2014, defendant underwent the court-ordered psychological evaluation. The psychologist found that, although defendant's "criminal sexual behavior was repetitive, there was insufficient psychological evidence to conclude that he felt irresistibly compelled to sexually assault his daughter." Accordingly, the psychologist concluded that defendant was not eligible for sentencing under the Sex Offenders Act, and the case was returned to the trial court for sentencing pursuant to N.J.S.A. 2C:47-3(d).

On April 28, 2014, defendant appeared for sentencing. He did not raise any issue concerning his pleas or the recommended

sentence. The court sentenced defendant in accordance with the terms of the plea agreement, imposing a concurrent sentence of time served (275 days) on the aggravated criminal sexual conduct and contempt of a judicial order. The court ordered defendant to register under Megan's Law and prohibited him from having any contact with T.B. and any family members residing with her. The court also imposed appropriate fines, penalties, and assessments.

On May 9, 2014, the court entered an amended judgment of conviction, which included community supervision for life monitored through the New Jersey Parole Board.

Defendant did not file a motion to withdraw his guilty pleas either before or after sentencing. Nor did he take a direct appeal from his convictions or sentence.

On February 6, 2015, defendant timely filed a pro se PCR petition alleging ineffective assistance of trial counsel. Counsel was assigned to represent him. Defendant claims inadequate assistance of counsel when he pled guilty, asserting he was unaware of the terms of the recommended sentence and the applicability of Megan's Law. He further claimed that his trial counsel told him to "answer yes to the statements read to [him] at the plea hearing," despite "not understand[ing] what [he] was saying yes to." He also contends that he was under the influence of prescription medications that affected his judgment when he

entered his plea. He contends he would not have "taken the plea" if he had been properly informed of the Megan's Law requirements and had not been under the influence of his medication.

On June 1, 2016, the PCR judge heard oral argument, took the matter under advisement, and issued a June 3, 2016 order and nine-page written opinion denying defendant's petition, finding defendant had not satisfied the Strickland test.<sup>1</sup> The PCR judge also found the decision to plead guilty amounted to sound trial strategy given the criminal exposure defendant faced under the pending indictments. This appeal followed.

On appeal, defendant raises the following argument for consideration:

POINT ONE

[A.W.] IS ENTITLED TO AN EVIDENTIARY HEARING  
ON HIS CLAIM THAT HIS ATTORNEY RENDERED  
INEFFECTIVE ASSISTANCE OF COUNSEL

The applicable legal principles that guide our review of this PCR appeal involving claims of trial counsel's ineffectiveness are well-established. Under the Sixth Amendment of the United States Constitution, a criminal defendant is guaranteed the effective assistance of legal counsel in his defense. Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. To

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<sup>1</sup> Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984).

establish a deprivation of that right, a convicted defendant must satisfy the two-part test enunciated in Strickland by demonstrating that: (1) counsel's performance was deficient; and (2) the deficient performance actually prejudiced the accused's defense. Ibid.; accord State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the Strickland two-part test in New Jersey).

"Judicial scrutiny of counsel's performance must be highly deferential." Strickland, supra, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694. In applying the Strickland-Fritz test, there is a strong presumption that counsel's performance fell within the wide range of reasonable representation. Id. at 690, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695; State v. Pierre, 223 N.J. 560, 578-79 (2015); State v. Hess, 207 N.J. 123, 147 (2011).

When defendants establish a prima facie claim of ineffective assistance of counsel, they are ordinarily entitled to an evidentiary hearing on their claims. State v. Preciose, 129 N.J. 451, 462 (1992); R. 3:22-10(b). However, PCR petitioners are not automatically entitled to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999). Rather:

A defendant shall be entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of post-conviction relief, a determination by the court that there are material issues of

disputed fact that cannot be resolved by reference to the existing record, and a determination that an evidentiary hearing is necessary to resolve the claims for relief. To establish a prima facie case, defendant must demonstrate 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.

[R. 3:22-10(b).]

"A court shall not grant an evidentiary hearing . . . if the defendant's allegations are too vague, conclusory or speculative[.]" R. 3:22-10(e)(2); see State v. Marshall, 148 N.J. 89, 158, cert. denied, 522 U.S. 850, 118 S. Ct. 140, 139 L. Ed. 2d 88 (1997). "Rather, defendant must allege specific facts and evidence supporting his allegations." State v. Porter, 216 N.J. 343, 355 (2013). As we explained in Cummings, "in order to establish a prima facie claim, a petitioner must do more than make bald assertions that he was denied the effective assistance of counsel." Supra, 321 N.J. Super. at 170. He must allege facts sufficient to demonstrate his claims. Ibid.

Applying these standards, we affirm the PCR court's conclusion that defendant did not establish a prima facie case of ineffective assistance of counsel, and that his claims were without merit.

The record establishes defendant's pleas were given knowingly, voluntarily, and with full understanding of the



sentencing consequences. The record further establishes defendant gave a detailed factual basis for his pleas to aggravated criminal sexual contact and contempt of a judicial order, admitting wrongful conduct satisfying each element of those offenses.

Noticeably absent from the plea hearing is any indication that defendant encountered difficulty understanding the questions posed to him or formulating his answers. Questions did not have to be repeated and the record does not indicate any unresponsive, garbled, incoherent, or otherwise suspect answers.

In support of his claim, defendant presented a list of his medications, his physician's business cards, and several medical reports prepared by his medical providers. Of particular interest is a report dated March 19, 2013, prepared by Neurology Group of Bergen County, P.A. The report states that defendant's "remote memory, fund of knowledge, language function and speech were normal." His dementia was described as "mild." He was described as being independent for self-care and his driving was not restricted.

Defendant also submitted medical reports from the Center for Pain Management that related to an examination that occurred long after the date of his plea hearing. The report indicates that defendant had been prescribed OxyCotin for thirty days beginning October 8, 2013. The report further states that "while he was

incarcerated the physician there did not provide him any pain medications except for Tylenol."

During his court-ordered psychological evaluation, defendant told the psychologist: "My family and my lawyer convinced me to take this plea because you can't predict what a jury will do." The psychologist further concluded: "His speech was relevant and coherent. Though he said he has been diagnosed with dementia, there was no indication of significant memory impairment. Thought processes, as measured by speech, seemed to be adequately organized." This evaluation occurred after the dosage of OxyCotin prescribed for defendant had been increased.

Defendant did not submit any reports or other evidence regarding the effect of the medication on his cognitive ability to understand the terms of the plea agreement or to enter into the agreement knowingly and voluntarily. Defendant did not present any argument during the PCR hearing regarding trial counsel's alleged failure to inform him of the Megan's Law consequences of the plea.

We further note that defendant benefited from an extremely favorable plea agreement. He avoided retrial of a second-degree aggravated sexual assault charge. Three counts of first-degree aggravated sexual assault and one count of second-degree endangering the welfare of children were dismissed. Defendant

avoided the risk of much more serious convictions and was sentenced to time served of only 275 days. Defendant would have had to successfully defend each of the more serious charges to obtain a better result.

We defer to the PCR court's factual findings. Pierre, supra, 223 N.J. at 579. We review a judge's decision to deny a PCR petition without an evidentiary hearing for abuse of discretion. Preciose, supra, 129 N.J. at 462. We discern no such abuse of discretion by the PCR court. The judge correctly concluded that defendant did not establish a prima facie case of ineffective assistance of counsel. Accordingly, the judge properly denied defendant's petition without conducting an evidentiary hearing.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION