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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-0684-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSEPH FONTANEZ, a/k/a
MICHAEL FANTANEZ, DAVID FONTANEZ,
JOEJOE FONTANEZ, JO-JO FONTANEZ,
JOJO FONTANEZ and
JOSEPH M. FONTANEZ,

Defendant-Appellant.

Submitted April 26, 2017 – Decided August 25, 2017

Before Judges Carroll and Gooden Brown.

On appeal from the Superior Court of New
Jersey, Law Division, Cape May County,
Indictment Nos. 09-06-0493 and 12-05-0329.

Joseph E. Krakora, Public Defender, attorney
for appellant (Rasheedah R. Terry, Designated
Counsel, on the brief).

Robert L. Taylor, Cape May County Prosecutor,
attorney for respondent (Gretchen A.
Pickering, Assistant Prosecutor, of counsel
and on the brief).

PER CURIAM

Defendant appeals from the July 8, 2015 order of the trial court denying his petition for post-conviction (PCR) relief without granting an evidentiary hearing. We affirm but remand for resentencing.

Defendant was charged in Indictment No. 09-06-0493 with third-degree possession with intent to distribute a controlled dangerous substance (CDS), alprazolam, commonly known as Xanax, N.J.S.A. 2C:35-5(a)(1) (count one).¹ Defendant was also charged in Indictment No. 09-10-0798 with fourth-degree resisting arrest, N.J.S.A. 2C:29-2 (count one); third-degree possession of CDS, heroin, N.J.S.A. 2C:35-10(a)(1) (count two); fourth-degree hindering apprehension, N.J.S.A. 2C:29-3(b)(1) (count three); third-degree resisting arrest, N.J.S.A. 2C:29-2 (count four); and third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(5) (count five).

On January 28, 2010, with the assistance of his first plea counsel, defendant pled guilty to Indictment No. 09-06-0493 and counts three and five of Indictment No. 09-10-0798. In exchange, the State agreed to recommend the dismissal of the remaining counts of Indictment No. 09-10-0798. The State also agreed to recommend

¹ Defendant's girlfriend was charged in count two of the same indictment with third-degree possession of CDS, buprenorphine HCL, N.J.S.A. 2C:35-10(a)(1).

a four-year term of imprisonment on count five of Indictment No. 09-10-0798, a consecutive eighteen-month term on count three of Indictment No. 09-10-0798, and a concurrent four-year term on Indictment No. 09-06-0493.² The court accepted defendant's guilty plea after ensuring compliance with Rule 3:9-2. On April 16, 2010, defendant was sentenced in accordance with the plea agreement to an aggregate term of five-and-a-half years.

Subsequently, Indictment No. 09-10-0798 was dismissed with prejudice on the State's motion as a result of "record-keeping" irregularities by the arresting officer, Detective Christopher Lambert. The County Prosecutor's Office determined that Detective Lambert had violated protocol in connection with the recording of information related to confidential informants. Following the Office's review of those cases, the related charges were dismissed. Although Detective Lambert was involved in both of defendant's cases, it was determined that the "record-keeping" irregularities only impacted Indictment No. 09-10-0798.

On August 25, 2011, with the State's consent, defendant successfully moved to withdraw his guilty plea to Indictment No.

² The State also agreed to defendant's release from jail until sentencing with the condition that if defendant failed to appear for sentencing, the State would be free to seek an extended term sentence pursuant to N.J.S.A. 2C:44-3.

09-06-0493 on the ground that he would have gone to trial rather than plead guilty had he not been facing two indictments. With the assistance of his second plea counsel, on October 20, 2011, pursuant to a new plea agreement, defendant again pled guilty to Indictment No. 09-06-0493 after it was reinstated. During the plea allocution, defendant again admitted to unlawfully possessing six Xanax pills in his girlfriend's apartment, which he intended to sell. After ensuring compliance with Rule 3:9-2, the court accepted defendant's guilty plea. On November 18, 2011, in accordance with the plea agreement, defendant received a two-year suspended sentence, N.J.S.A. 2C:43-2(b), with jail credits for 585 days spent in custody.

The following year, defendant was charged in a twenty-count indictment, Indictment No. 12-05-0329, with first-degree kidnapping, N.J.S.A. 2C:13-1(a) (counts one and two); first-degree robbery, N.J.S.A. 2C:15-1 (counts three and four); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (counts five and six); second-degree burglary, N.J.S.A. 2C:18-2 (counts seven and eight); third-degree theft, N.J.S.A. 2C:20-3 (counts nine, ten and eleven); third-degree criminal mischief, N.J.S.A. 2C:17-3(a)(1) (count twelve); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count thirteen); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)

(counts fourteen, fifteen and sixteen); second-degree conspiracy, N.J.S.A. 2C:5-2 and 2C:15-1 (count seventeen); and second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7 (counts eighteen, nineteen and twenty).

On July 31, 2014, with the assistance of his third plea counsel, defendant pled guilty to count four as amended to second-degree robbery.³ In exchange, the State agreed to recommend an eight-year term of imprisonment, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, and a concurrent sentence on Indictment No. 09-06-0493. On September 5, 2014, defendant was sentenced in accordance with the plea agreement. On Indictment No. 09-06-0493, his suspended sentence was revoked and a concurrent two-year prison sentence was imposed.

On December 18, 2014, defendant filed a timely petition for PCR alleging that he was denied effective assistance of counsel in connection with Indictment No. 09-06-0493 because he was "misinformed" about the status of Detective Lambert and "forced . . . to take probation" by his attorney. According to defendant, Detective Lambert "was a corrupt cop . . . who was demoted,

³ At the plea allocution, defendant admitted threatening the use of force to rob the victim during a home invasion with three co-defendants. Defendant does not challenge the resolution of this case in this appeal.

suspended and now fired because he was doing illegal activities[.]"
Defendant asserted that his attorney was ineffective because he failed to further explore or investigate Detective Lambert's misconduct before urging him to plead guilty. Defendant was assigned PCR counsel who filed an amended petition, an accompanying brief, and two supporting certifications—an unsigned and undated certification by defendant⁴ and a certification by defendant's girlfriend dated April 28, 2015.

In the amended petition, defendant sought to have the conviction and sentence imposed on Indictment No. 09-06-0493 set aside and the matter set down for trial. Defendant asserted that his plea counsels were ineffective because they failed to file appropriate motions, specifically, a motion to suppress evidence obtained as a result of an illegal search and a motion to exclude statements made by defendant as a result of an unlawful interrogation. Defendant also asserted that his attorneys were ineffective for failing to file a motion to withdraw his guilty

⁴ At the PCR hearing, PCR counsel explained that in the course of assembling the brief, an unsigned copy of defendant's certification was inadvertently submitted. Although PCR counsel presented a signed copy of the certification to the PCR court, the unsigned and undated copy was submitted with this appeal.

plea⁵ to Indictment No. 09-06-0493 and to obtain all jail credits to which he was entitled.

In the certifications, defendant and his girlfriend certified that the CDS was seized from his girlfriend's apartment by Detective Lambert who unlawfully entered and searched the apartment while they were in the shower together. They averred that after the search, Detective Lambert coerced his girlfriend to sign a consent to search form or be charged. Defendant certified further that Detective Lambert obtained a statement from him at the apartment while he was "in custody, under the influence" and not advised of his "constitutional rights."

According to defendant, although he asked his attorneys to file the requisite motions, his first plea counsel "declined to file the appropriate motions, opting instead to pursue a comprehensive plea bargain that would have disposed of Indictment No. 09-06-0493 and Indictment [No.] 09-10-0798" and his second plea counsel "was not willing to file the motions and advised that the plea bargain was the best result [he] could obtain." In addition, defendant averred that his third plea counsel was ineffective because he failed to "secure an amendment to the

⁵ Because defendant's first guilty plea was successfully vacated, this assertion would only pertain to defendant's second guilty plea to Indictment No. 09-06-0493.

[j]udgment of [c]onviction [JOC] that would have reflected the court's determination" that he was entitled to 2373 days of jail credit, rather than the 883 days reflected on the JOC.⁶

Contrary to the certifications, Detective Lambert reported in his police report that he went to defendant's girlfriend's apartment where he believed defendant was staying in order to execute outstanding bench warrants against defendant. According to Detective Lambert, defendant's girlfriend voluntarily signed a consent to search form authorizing him to search the apartment resulting in the seizure of the six Xanax pills.

On June 30, 2015, following oral argument, Judge Patricia M. Wild rejected defendant's claims and denied his petition for PCR without an evidentiary hearing in a comprehensive oral decision from the bench. Judge Wild determined that defendant "fail[ed] to establish that there [was] a reasonable likelihood that any of his claims [would] succeed on the merits at an evidentiary hearing" because "the evidence, even in a light most favorable to [defendant]," indicated that "all of trial counsel's actions [could] be reasonably viewed as pre-trial tactical decisions."

⁶ Defendant filed a pro se motion seeking to aggregate jail credits from his 2009 conviction and apply the credits to his 2012 conviction. The motion was denied on April 21, 2015.

Regarding defendant's assertion that his attorneys were ineffective for failing to challenge the admissibility of his statement to police, Judge Wild referred to the transcript of the court proceeding after defendant successfully moved to withdraw his guilty plea to Indictment No. 09-06-0493 during which his first plea counsel advised the court:

Judge, just so the record is clear, . . . [p]rior to discussing his plea with him I reviewed the discovery with him. . . . And in the discovery was a digital recording of his statement that he gave the police admitting that he was selling prescription drugs. . . . And right on that digital recording there's a recitation of his Miranda⁷ rights, which he waived, and gave a voluntary statement, and it was that type of evidence that I discussed with him . . . [w]hich ultimately led to his decision to enter a guilty plea.

Evaluating defendant's claims under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), Judge Wild concluded that plea counsel "did adequately consider a [Miranda] motion and in his professional judgment believed it would be without merit. . . . Therefore, not even the first prong is satisfied in regard to the failure to file a [Miranda] motion[.]"

⁷ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Regarding the filing of a motion to suppress the CDS, Judge Wild noted that "[e]ven after raising issues regarding the search and claiming that Detective Lambert was crooked, which was well after his initial guilty plea, defendant then pled guilty again to the same charge after his amended plea agreement." The judge explained:

When counsel fails to file a suppression motion the defendant not only must satisfy both parts of Strickland, but must also prove that his Fourth Amendment claim was meritorious, and the [c]ourt does not find that there is such . . . proof here in this case.

Certification[s] from [defendant] and [his girlfriend] contest[] the facts in the police report. [Defendant]'s extensive criminal history would have given him great exposure to an extended prison sentence on all his charges had he gone to trial and been found guilty. It was completely reasonable for counsel to advise his client to take a plea deal. Considering that the search was authorized by a signed consent form, the motion to suppress would likely have been denied and, as a result, [defendant] would be in a weak position at trial. It further appears that [defendant]'s motion to suppress would not be successful. His only evidence is some record-keeping errors on the part of Detective Lambert. This is not evidence that Detective Lambert would do something so improper and inappropriate as to force a person to sign a consent form.

It was also not incumbent upon counsel to investigate these issues as counsel was not in . . . possession at that time of anything that could possibly suggest that Detective

Lambert forced [defendant's girlfriend] into signing that consent form. The actions of counsel were not deficient based upon the standard for deficiency set forth in Strickland, and petitioner fails to break the strong presumption under the case law that trial counsel provided the appropriate legal assistance.

The court also rejected defendant's claim that "he was cajoled into taking a plea[.]" The court reviewed the transcripts of the respective plea hearings during which both trial judges "went over the plea forms with [defendant] in a very detailed fashion, and [defendant] . . . indicated in his responses" that he "knew his plea deal" and was pleading guilty "voluntarily, knowingly, and intelligently." The court noted:

In both instances, the initial plea and the plea after the amended sentence, [defendant] indicated that he was not coerced in any way to making a guilty plea. [Defendant] again sets forth no evidence here to support his claim now that he was cajoled. It's highly unlikely that he was cajoled once, let alone twice. The second plea indicates that he was not cajoled in the first plea, but rather that he knew the seriousness of the charges he was facing and the sentence he would receive given his record. Again, counsel's advice to enter the plea deal was soundly reasonable considering the evidence against the [defendant] and the time he would have spent incarcerated had he gone to trial and been found guilty.

The court rejected defendant's contention that "his is a case where trial errors were so egregious the [c]ourt should presume

prejudice," concluding instead that defendant had "not set forth any . . . arguments that would qualify as being a complete denial of representation" and had "not set forth any argument that trial counsel committed . . . errors which our court[s] have already established presume prejudice." The court explained "this is not a case where prejudice can be presumed. The traditional two-prong Strickland/Fritz⁸ test is appropriate, and since the [defendant] was not successful in any of his arguments under [the] Strickland/Fritz test, . . . [defendant]'s PCR will be denied." The court issued a memorializing order on July 8, 2015. This appeal followed.

Defendant raises the following arguments for our consideration:

POINT I. THE PCR COURT'S ORDER THAT DENIED DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF MUST BE REVERSED BECAUSE DEFENDANT CLEARLY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN THE PROCEEDINGS BELOW.

A. DEFENSE COUNSEL FAILED TO FILE MERITORIOUS PRE-TRIAL MOTIONS.

. . . .

B. ORIGINAL AND SUBSEQUENT PLEA COUNSELS FAILED TO INVESTIGATE AND DISCOVER DETECTIVE LAMBERT'S HISTORY OF MISCONDUCT BEFORE URGING DEFENDANT TO PLEAD GUILTY.

⁸ State v. Fritz, 105 N.J. 42 (1987).

C. DEFENDANT'S SECOND PLEA COUNSEL
FAILED TO DISCLOSE CRITICAL
INFORMATION TO THE DEFENDANT PRIOR
TO THE TIME DEFENDANT PLED GUILTY.

POINT II. THE PCR COURT ABUSED ITS DISCRETION
WHEN IT DENIED DEFENDANT'S REQUEST FOR AN
EVIDENTIARY HEARING BECAUSE DEFENDANT
ESTABLISHED A PRIMA FACIE CASE FOR INEFFECTIVE
ASSISTANCE OF COUNSEL.

We review the PCR court's findings of fact under a clear error standard, and conclusions of law under a de novo standard. See State v. Harris, 181 N.J. 391, 420-21 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005). Where the PCR court's findings of fact are based on "live witness testimony" we review such findings to determine whether they are supported by sufficient credible evidence in the record. State v. Nash, 212 N.J. 518, 540 (2013). However, where, as in this case, "no evidentiary hearing has been held, we 'may exercise de novo review over the factual inferences drawn from the documentary record by the [PCR judge].'" State v. Reevey, 417 N.J. Super. 134, 146-47 (App. Div. 2010) (quoting Harris, supra, 181 N.J. at 421), certif. denied, 206 N.J. 64 (2011). While "[a]ssessing [ineffective assistance of counsel] claims involves matters of fact, . . . the ultimate determination is one of law[.]" Harris, supra, 181 N.J. at 419.

On appeal, defendant reiterates the arguments rejected by Judge Wild. Defendant argues that his attorney was ineffective for failing to file "a motion to suppress the evidence obtained after an illegal search of [his girlfriend's] apartment" on the ground that "Det. Lambert conducted an illegal search of the premises and later forced [his girlfriend] to sign a consent form." Defendant also argues that his attorney was ineffective for failing to file "a pre-trial motion to exclude his incriminating statements" on the ground that Detective Lambert "subjected him to custodial interrogation without a Miranda warning" and his intoxicated state raised "doubts as to whether he gave a voluntary statement or if he voluntarily waived his Miranda rights." According to defendant, because "Det. Lambert lacked credibility," he would have prevailed on the motions.

In addition, defendant argues that his first plea counsel was ineffective for failing to investigate Detective Lambert's history of misconduct to aid in mounting a defense, and his second plea counsel was ineffective for failing to "inform him that Det. Lambert [had been] fired by the police department[,]" thus undermining the efficacy of his guilty plea. Defendant asserts that his "factual allegations and legal arguments raised a prima facie case of ineffective assistance of trial counsel and therefore," Judge Wild erred in denying an evidentiary hearing "to

develop his claims[.]” We disagree and affirm substantially for the reasons set forth by Judge Wild in her well-reasoned opinion. We add only the following brief comments.

The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999). Rather, trial courts should grant evidentiary hearings only if the defendant has presented a prima facie claim of ineffective assistance, material issues of disputed fact lie outside the record, and resolution of the issues necessitate a hearing. R. 3:22-10(b); State v. Porter, 216 N.J. 343, 355 (2013), certif. denied, 228 N.J. 502 (2017). “Rule 3:22-10 recognizes judicial discretion to conduct such hearings.” State v. Preciose, 129 N.J. 451, 462 (1992).

A PCR court deciding whether to grant an evidentiary hearing “should view the facts in the light most favorable to a defendant to determine whether a defendant has established a prima facie claim.” Id. at 462-63. “To establish a prima facie claim of ineffective assistance of counsel, a defendant must demonstrate the reasonable likelihood of succeeding under the test set forth in [Strickland v. Washington, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698], and United States v. Cronin, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), which [our

Supreme Court] adopted in State v. Fritz, [supra, 105 N.J. at 58]." Id. at 463.

Under the Strickland standard, a defendant must make a two-part showing. A defendant must show that trial counsel's performance was both deficient and prejudicial. State v. Martini, 160 N.J. 248, 264 (1999). The performance of counsel is "deficient" if it falls "below an objective standard of reasonableness" measured by "prevailing professional norms." Strickland, supra, 466 U.S. at 687-88, 104 S. Ct. at 2064-65, 80 L. Ed. 2d at 693-94. This standard of "reasonable competence[,]" Fritz, supra, 105 N.J. at 60, "does not require the best of attorneys[.]" State v. Davis, 116 N.J. 341, 351 (1989).

A defendant must also show that the deficient performance prejudiced the defense. Under this prong, to set aside a guilty plea based on ineffective assistance of counsel, defendant must establish "'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.'" State v. DiFrisco, 137 N.J. 434, 457 (1994) (quoting Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985)), cert. denied, 497 U.S. 1011, 110 S. Ct. 3258, 111 L. Ed. 2d 767 (1990). However, to obtain relief, a defendant "'must convince the court that a decision to reject the plea bargain would have been rational under

the circumstances.'" State v. O'Donnell, 435 N.J. Super. 351, 371 (App. Div. 2014) (quoting Padilla v. Kentucky, 559 U.S. 356, 372, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284, 297 (2010)).

"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." Fritz, supra, 105 N.J. at 52 (quoting Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693). Defendant bears the burden of proving both prongs of an ineffective assistance of counsel claim by a preponderance of the evidence. State v. Gaitan, 209 N.J. 339, 350 (2012), cert. denied, 568 U.S. 1192, 133 S. Ct. 1454, 185 L. Ed. 2d 361 (2013). Only in circumstances involving "the complete denial of the right to counsel altogether, actual or constructive[,]" can prejudice be presumed and the presumption of ineffectiveness is warranted. Fritz, supra, 105 N.J. at 53.

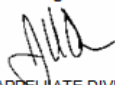
Where a defendant asserts his attorney was ineffective for failing to file a motion, he must establish that the motion is meritorious. State v. Goodwin, 173 N.J. 583, 597 (2002). "It is not ineffective assistance of counsel for defense counsel not to file a meritless motion[.]" State v. O'Neal, 190 N.J. 601, 619 (2007). "[W]hen a petitioner claims his trial attorney inadequately investigated his case, he must assert the facts that an investigation would have revealed, supported by affidavits or

certifications based on the personal knowledge of the affiant or the person making the certification.'" Porter, supra, 216 N.J. at 353 (quoting Cummings, supra, 321 N.J. Super. at 170).

Applying these principles, we are persuaded that Judge Wild properly declined to conduct an evidentiary hearing and properly denied defendant's petition for PCR. Defendant's challenge to the effectiveness of his first plea counsel is specious because defendant successfully withdrew his guilty plea after Indictment No. 09-10-0798 was dismissed. Defendant's challenge to the effectiveness of his second plea counsel is equally unavailing because his entry of a guilty plea after he prevailed on his withdrawal motion obviates a showing of prejudice. We do remand, however, for resentencing on Indictment No. 09-06-0493 because a two-year sentence of imprisonment is an illegal sentence as the minimum sentence for a third-degree crime is three years. See N.J.S.A. 2C:43-6(a)(3).

Affirmed, except for a limited remand for resentencing in conformity with this opinion. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION