

**NOT FOR PUBLICATION WITHOUT THE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-0686-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL DANIELS,

Defendant-Appellant.

Submitted March 30, 2017 – Decided May 18, 2017

Before Judges Lihotz and Whipple.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No. 10-
03-0788.

Joseph E. Krakora, Public Defender, attorney
for appellant (Andrew J. Shaw, Designated
Counsel, on the brief).

Carolyn A. Murray, Acting Essex County
Prosecutor, attorney for respondent (Frank J.
Ducoat, Special Deputy Attorney
General/Acting Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

Defendant appeals the June 23, 2015 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

On January 17, 2012, after a jury trial, defendant was convicted of second-degree conspiracy to possess a controlled dangerous substance (CDS), N.J.S.A. 2C:5-2 and 2C:35-10(a)(1); third-degree possession of a CDS, N.J.S.A. 2C:35-10(a)(1); third-degree possession with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(3); third-degree distribution near school property, N.J.S.A. 2C:35-7; and second-degree possession within 500 feet of a public housing complex, N.J.S.A. 2C:2C:35-7.1. Defendant was sentenced to seven years with a three and a half year parole disqualifier. His conviction was affirmed on appeal. The underlying facts supporting his convictions are outlined in our per curiam opinion on direct appeal and need not be repeated here. State v. Daniels, No. A-3227-11 (App. Div. Dec. 31, 2012).

Defendant raised the denial of his motion for a mistrial in his direct appeal. We were not persuaded a mistrial was mandated because, even under the unusual circumstances, defendant was not deprived of the opportunity to testify because of the inaccurate judgment of conviction (JOC). Defendant also raised his trial counsel's failure to discover the error as ineffective assistance, an issue ordinarily preserved for PCR. We elected to consider the

claim because all the relevant facts necessary to consider the arguments were in the record. We recite the facts surrounding this issue.

After trial summations, but before the jury was instructed, defendant's attorney discovered the inaccuracy and moved for a mistrial, arguing defendant's election not to testify was based on the possibility the inaccurate JOC could be used to impeach him. The trial judge immediately offered to re-open the case to permit defendant to testify and proposed a jury instruction to mitigate any perceived confusion that the re-opening of the evidence might engender. Defendant rejected the offer. The judge thereafter denied the motion for a mistrial. The case was submitted to the jury, and following deliberations, defendant was convicted.

After reviewing the record, we were convinced defendant's trial attorney was not deficient because he had a right to rely on a certified judgment without double-checking it; therefore, his reliance did not fall below accepted standards. We also said, defendant suffered no prejudice because the trial judge approached the error very indulgently and proposed a reasonable solution to the problem, which defendant elected not to accept.

On September 18, 2013, defendant filed a timely pro se PCR petition. Counsel was assigned, and defendant filed an Amended

Verified Petition and Supplemental Certification. Defendant asserted his trial counsel was ineffective because he did not investigate the accuracy of defendant's prior criminal history as reported in an earlier JOC until after summation, thus depriving defendant of the opportunity to testify on his own behalf. Defendant argued his appellate counsel was ineffective for raising the same issue on direct appeal rather than preserving it for PCR.

After hearing oral argument, the PCR judge denied defendant's petition as procedurally barred by Rule 3:22-5, because defendant's claim of ineffective assistance of trial counsel had been adjudicated on the merits in the direct appeal. The PCR judge also determined defendant's claim of ineffective assistance of appellate counsel was without merit. This appeal followed.

A court reviewing a PCR petition based on claims of ineffective assistance of counsel should grant an evidentiary hearing if a defendant establishes a prima facie showing in support of the relief requested. State v. Preciose, 129 N.J. 451, 462 (1992). In order to establish a prima facie case of ineffective assistance of counsel, a defendant must demonstrate the reasonable likelihood that his claim will succeed on the merits. Id. at 464.

To prevail on a claim of ineffective assistance of counsel, defendant must meet a two-prong test. Defendant must first prove (1) counsel's performance was deficient, and he or she made errors

that were so egregious that counsel was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693, (1984); State v. Fritz, 105 N.J. 42, 52 (1987). The second prong requires defendant to show (2) the defect in performance prejudiced defendant's rights to a fair trial such that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698; Fritz, 105 N.J. 42, 52 (1987); Fritz, supra, 105 N.J. at 52-53.

Defendant argues he elected not to testify at trial because the State produced an inaccurate certified JOC indicating defendant had a conviction for third-degree possession of CDS, N.J.S.A. 2C:35-10(a)(1); however, his conviction was actually for a disorderly persons offense. Defendant discussed this inaccuracy with his trial counsel who did not investigate the issue. Defendant argues but for the inaccurate JOC he would have testified at trial.

Defendant raised the same issue regarding trial counsel in his PCR petition, and the PCR judge correctly considered the claim against trial counsel as fully adjudicated and procedurally barred under Rule 3:22-5. The judge also rejected defendant's alternative

argument his appellate counsel was ineffective because he raised trial counsel's alleged ineffective performance on direct appeal. Applying the Strickland-Fritz standard, the judge determined appellate counsel's strategy decision to raise the issue on direct appeal did not fall outside the range of competent legal representation; thus, defendant could not establish a prima facie claim of ineffective assistance of counsel. Having reviewed the record and the PCR judge's determinations, we discern no reason to disturb the court's determination to deny defendant's PCR petition and deny 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