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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-0693-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MELVIN J. COLLINS,

Defendant-Appellant.

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Submitted March 28, 2017 – Decided May 5, 2017

Before Judges Fasciale and Sapp-Peterson.

On appeal from Superior Court of New Jersey,  
Law Division, Monmouth County, Indictment No.  
10-06-1061.

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

Christopher J. Gramiccioni, Monmouth County  
Prosecutor, attorney for respondent (Kathleen  
S. Bycsek, Assistant Prosecutor, of counsel  
and on the brief).

PER CURIAM

Defendant appeals from the August 14, 2015 order denying his first petition for post-conviction relief (PCR), without first affording him an evidentiary hearing. We affirm.

A Monmouth County grand jury indicted defendant on one count of third-degree burglary, N.J.S.A. 2C:18-2 (Count One) and one count of third-degree theft of movable property, N.J.S.A. 2C:20-3(a) (Count Two). Following plea negotiations, he entered a guilty plea to Count One on May 9, 2011. In exchange, the State agreed to dismiss the theft charge and to recommend that defendant be sentenced to a five-year prison sentence with a one-year period of parole ineligibility.

Although sentencing was scheduled for September 16, 2011, it was adjourned after the court learned that defendant had retained new counsel and wanted to withdraw his guilty plea. The matter was thereafter adjourned three additional times, during which defendant failed to file a motion to withdraw his plea. The motion was not filed until May 3, 2012.

The court conducted oral argument on the motion on July 6, 2012, during which defendant argued that his plea had not been entered knowingly and voluntarily. His newly-retained defense counsel also indicated that at the time defendant entered his guilty plea, it was contemplated and agreed that the sentence imposed on the burglary charge would run concurrent to any sentence

imposed on the then-pending matters out of Bergen County. Counsel advised that since the time defendant had entered his plea, a decision had been made to go to trial on the Bergen County matters. Consequently, defense counsel urged that "to accept a plea running concurrent with . . . a sentence that may never come down, doesn't seem to fit under a . . . knowing and voluntary standard." In addition, although not contesting a DNA swab taken from defendant, defense counsel requested that defendant's own expert "be allowed to perform the same test."

The motion court denied defendant's motion. It found that "the plea allocution was conducted in accordance with [Rule] 3:9-2", defendant confirmed that he was satisfied with his attorney's representation and that his attorney had answered all of his questions, and that there was an adequate factual basis placed on the record for the burglary offense. The court next considered whether the standards for withdrawal of his guilty plea under State v. Slater, 198 N.J. 145 (2009), had been met and concluded that "[d]efendant failed to show any proof of any of the factors outlined in [Slater]."

On August 8, 2012, the court sentenced defendant in accordance with the negotiated plea agreement, along with imposing fines and penalties. On October 9, 2013, defendant filed a motion to amend the Judgment of Conviction to reflect that the sentence imposed

on the Monmouth County conviction was to run concurrent to the sentences he received on the Bergen County matters that had been resolved. That motion, however, was later withdrawn.

In February 24, 2014, defendant filed a pro se PCR petition alleging ineffective assistance of counsel by both his initial attorney with whom he entered his guilty plea and his subsequent attorney with whom he sought to withdraw his guilty plea. Defendant also alleged that he was serving an illegal sentence because the plea bargain had been "illusory" and he had been subjected to a sentence greater than that previously agreed to in the plea negotiations with the State. Thereafter, PCR counsel filed an amended petition and supporting brief, which incorporated defendant's pro se arguments with further elaboration.

The court conducted a hearing on defendant's petition, after which it rendered an oral decision without finding the necessity to conduct an evidentiary hearing. Based upon its review of the record, the court found that defendant's claim regarding the DNA evidence was procedurally barred by Rule 3:22-5, noting that defendant had "raised the identical argument during his motion to withdraw his guilty plea[,] " which the court, at the time, characterized as "totally outrageous and specious in light of the fact that it was the defendant himself who didn't want the buccal swab done and wouldn't consent to it."

Next, the court rejected defendant's contention that his sentence was illegal. The court observed that the record of his guilty plea made clear that the court did not intend to indefinitely delay sentencing on the burglary charge until defendant's pending charges in Bergen had been resolved and that defendant acknowledged that he fully understood this fact. Additionally, the court characterized the correspondence between the Monmouth and Bergen County Prosecutors Offices as "strictly informational" regarding the pending matters and what the court made clear to defendant in 2011.

Likewise, the court pointed out that it was the court, not his defense counsel, which dictated the sentencing date. The court had decided to schedule defendant's sentencing because it had been pending for fifteen months. Consequently, the court reasoned that even assuming his attorney was not authorized to make any representation regarding the sentencing date in correspondence to the prosecutor's office, defendant failed to present any evidence that "the outcome of [his] case would have been any different.

The court similarly rejected defendant's claim that his attorney was ineffective for failing to seek interlocutory relief when the court denied his motion to withdraw his guilty plea. Citing Florida v. Nixon, 543 U.S. 175, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004), the court observed "that there [was] no evidence

in any of the transcripts or in the defendant's brief which would indicate that the defendant ever instructed [his attorney] to file an interlocutory appeal on his behalf." The court further observed that defendant had not alleged in his brief that his attorney "failed to consult with him about appealing this Court's denial of the defendant's motion to withdraw his guilty plea." In short, the court characterized defendant's assertions in this regard as simply "b[a]ld assert[ions] of innocence."

With regard to additional claims of ineffective assistance of counsel, the court noted that defendant never filed a direct appeal, despite being advised of his appeal rights and the process during his sentencing, and presented no evidence that had his own expert analyzed the alleged DNA evidence "the result of the proceedings would have been different."

Based upon all of its findings the court concluded that there was no basis to order an evidentiary hearing and denied the petition. The present appeal followed.

On appeal, defendant raises one point, namely, that he was entitled to an evidentiary hearing prior to the court's disposition of his claim of ineffective assistance of both trial and PCR counsel. We disagree and affirm substantially for the reasons expressed by Judge Anthony J. Mellaci, Jr., in his comprehensive

oral opinion rendered on August 14, 2015. We add the following brief comments.

Post-conviction relief constitutes "New Jersey's analogue to the federal writ of habeas corpus." State v. Preciose, 129 N.J. 451, 459 (1992). "Ineffective-assistance-of-counsel claims are particularly suited for post-conviction review because they often cannot reasonably be raised in a prior proceeding." Id. at 460.

Both the United States Constitution and New Jersey Constitution guarantee the right of assistance of counsel to every person accused of a crime. U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10. This right to assistance of counsel "encompasses the right to effective counsel." State v. Norman, 151 N.J. 5, 23 (1997).

Claims of ineffective assistance of counsel must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), as adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). The test requires a showing of deficient performance by counsel, and "that the deficient performance prejudiced the defense." Id. at 52 (quoting Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693).

This standard also applies in the context of guilty pleas, where attorney competence is required and the prejudice prong

"focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985); see also State v. DiFrisco, 137 N.J. 434, 457 (1994) (requiring a reasonable probability that defendant would have refused to plead guilty and insisted on trial), cert. denied, 516 U.S. 1129, 116 S. Ct. 949, 133 L. Ed. 2d 873 (1996). "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." Lafler v. Cooper, 566 U.S. 156, 168, 132 S. Ct. 1376, 1387, 182 L. Ed. 2d 398, 410 (2012); see also State v. Agathis, 424 N.J. Super. 16, 19 (App. Div. 2012).

In considering the first prong, we give great deference to counsel's professional performance, and evaluate the decisions made, not with hindsight, but in light of counsel's state of mind at the time. State v. Petrozelli, 351 N.J. Super. 14, 21-22 (App. Div. 2002). A petitioner must establish the right to relief by a preponderance of the evidence. Preciose, supra, 129 N.J. at 459. "[B]ald assertions" of ineffective assistance are not enough. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999). A petitioner "must allege facts sufficient to demonstrate counsel's alleged substandard



performance[,]" and the court must view the facts alleged in the light most favorable to the petitioner. Ibid.

An evidentiary hearing to review a defendant's post-conviction relief allegations is required only when a defendant establishes a prima facie case and the court determines "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." R. 3:22-10(b); Preciose, supra, 129 N.J. at 462-63. A defendant will not be entitled to an evidentiary hearing simply because relief is requested. State v. Jones, 219 N.J. 298, 311 (2013); Cummings, supra, 321 N.J. Super. at 169-70.

Having considered defendant's contentions in light of the record and the applicable legal principles, we are satisfied defendant's contentions are without sufficient merit to warrant extended discussion. R. 2:11-3(e)(2). We add only the following comments.

Here, Judge Mellaci not only presided over the PCR proceedings, but presided over the guilty plea proceedings as well. In that regard, the judge had the opportunity to observe defendant's responses, under oath, during the plea allocution in order to determine whether the guilty plea had been entered knowingly and voluntarily. His findings in this regard are


entitled to our deference. State v. Nash, 212 N.J. 518, 540 (2013). Moreover, in seeking to withdraw his guilty plea, the issue raised was not defendant's lack of understanding of the offense to which he was pleading guilty, the consequences of the guilty plea, or the voluntariness of the plea.

Rather, as his second attorney represented to the court during the plea withdrawal motion, the application was motivated primarily by defendant's decision to proceed to trial on the Bergen County matters and the belief that it would not be prudent to enter into an agreement calling for concurrent sentences when a sentence on the Bergen County may never occur.

Hence, having presided over all of the proceedings leading up to the PCR hearing, Judge Mellaci was in the best position to assess whether defendant's purported proofs established a prima facie case of ineffective assistance of counsel necessitating an evidentiary hearing. We discern no basis on this record to disturb those findings.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION