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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-0744-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CALVIN LITTLE,

Defendant-Appellant.

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Submitted February 6, 2017 – Decided February 24, 2017

Before Judges Sabatino and Haas.

On appeal from Superior Court of New Jersey,  
Law Division, Mercer County, Indictment No.  
11-08-0865.

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

Angelo J. Onofri, Mercer County Prosecutor,  
attorney for respondent (Laura Sunyak,  
Assistant Prosecutor, of counsel and on the  
brief).

PER CURIAM

Appellant Calvin Little appeals from the July 21, 2015 Law  
Division order denying his petition for post-conviction relief  
("PCR") without an evidentiary hearing. We affirm.

Pursuant to a plea agreement reached by the parties with the input of Judge Pedro Jimenez, Jr. pursuant to Rule 3:9-3(c),<sup>1</sup> defendant pled guilty to first-degree kidnapping, N.J.S.A. 2C:13-1(b).<sup>2</sup> Judge Jimenez sentenced defendant to fourteen years in prison, subject to an 85% period of parole ineligibility pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2.

Defendant filed an excessive sentence appeal and we affirmed the sentence imposed. State v. Little, No. A-3160-13 (App. Div. June 3, 2014). The Supreme Court denied certification. State v. Little, 219 N.J. 629 (2014).

Defendant then filed his petition for PCR. Defendant argued that his trial counsel<sup>3</sup> rendered ineffective assistance by failing

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<sup>1</sup> At the time of defendant's plea, the parties had not reached an agreement on the recommended length of the sentence. The State sought a fifteen-year prison term, while defendant argued for a fourteen-year term. Pursuant to Rule 3:9-3(c), Judge Jimenez reviewed the parties' respective positions and advised that he planned to impose no more than a fourteen-year term, subject to his review of the presentence report prior to sentencing.

<sup>2</sup> In addition to kidnapping, the indictment charged defendant with first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(3); first-degree carjacking, N.J.S.A. 2C:15-2; and fourth-degree contempt, N.J.S.A. 2C:29-9(b). The State agreed to dismiss all three of these charges in return for defendant's guilty plea to the kidnapping charge.

<sup>3</sup> Defendant was represented by two different attorneys from the Office of Public Defender prior to his plea. The first attorney handled defendant's case until the end of the pretrial conference on January 28, 2013. At that conference, defendant's attorney

to: (1) raise a diminished capacity defense based upon defendant's alleged mental illness and intoxication; (2) properly investigate his case; (3) advise him of all of the elements of kidnapping; and (4) present appropriate mitigating factors at the time of sentencing.

In a thorough written opinion, Judge Jimenez considered each of these contentions and denied defendant's petition. The judge concluded that defendant failed to satisfy the two-prong test of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), which requires a showing that trial counsel's performance was deficient and that, but for the deficient performance, the result would have been different.

Taking defendant's contentions in turn, Judge Jimenez first found that defendant failed to "produce[] any evidence of diminished capacity due to mental illness or intoxication" other than his bald assertion that he suffered from either or both of

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advised the court that the last time she had "communications" with defendant about the State's plea offer, there was "a breakdown" and, therefore, she did not know whether defendant had changed his position on accepting the State's offer. Defendant then told Judge Jimenez that he had decided to reject the offer. Because defendant's attorney was going on maternity leave, she stated that her replacement attorney, who was also in court that day, would meet with defendant that afternoon and complete the pretrial memorandum with him. Three days later, however, defendant agreed to plead guilty after Judge Jimenez stated he would impose no more than a fourteen-year prison term. The second attorney represented defendant at the plea hearing and at sentencing.

these conditions. Because defendant's petition for PCR did not contain "one iota of documentation" supporting a diminished capacity claim, the judge concluded that defendant's "trial counsel [could not] be found to be ineffective for failing to introduce a bald assertion of diminished capacity, unsupported by any actual evidence."

Judge Jimenez next rejected defendant's contention that his attorneys failed to adequately investigate his case and the possible defenses available to him. The judge noted that defendant had "not proffered any valid issues that could have been raised at trial, but were ignored by trial counsel, such as potential witnesses, exculpatory evidence[,] or any valid defenses." Instead, defendant's contention was once again nothing more than a bald assertion without any factual basis.

In addition, the judge observed that defendant faced a thirty-year sentence on the kidnapping charge, and an aggregate sentence of over fifty years if he were also convicted of the three charges the State agreed to dismiss as part of the plea agreement. However, defendant's attorneys were able to negotiate a plea with the judge's assistance pursuant to R. 3:9-3(c) for a maximum sentence of fourteen years. Under these circumstances, Judge Jimenez concluded that it would not have been rational for

defendant to refuse to accept the favorable terms of the plea agreement and insist on going to trial.

In his PCR petition, defendant complained that his first trial attorney left the case after she had a "communication breakdown" with him and that the second attorney only represented him for three days before defendant decided to accept the plea agreement. However, Judge Jimenez found that the first attorney had to leave the case because she was going on maternity leave and not because of any dispute with defendant. Her replacement attorney was a public defender in the same office and the first attorney "fully advised" the new attorney "of the aspects of the case, the progress of the case and all plea discussions." In addition, defendant again failed to identify any exculpatory information or witnesses that either attorney should have discovered, but did not. Therefore, the judge found that defendant failed to meet either Strickland prong.

Turning to defendant's third argument, Judge Jimenez found there was no support in the record for defendant's contention that his attorneys failed to advise him of the elements of the kidnapping charge. Indeed, the defendant provided a factual basis in support of his plea to this charge in response to his attorney's questions that clearly incorporated all of the elements of the offense.

Defendant next asserted that the attorney who represented him at sentencing was ineffective because he did not raise certain mitigating factors. However, after carefully reviewing each of these factors, Judge Jimenez concluded that none of them were applicable and, therefore, defendant's attorney was not ineffective by failing to assert them.

Moreover, on direct appeal, defendant unsuccessfully argued that his sentence was excessive because Judge Jimenez erred by failing to find these same mitigating factors at the time of sentencing. Thus, even if the attorney were ineffective because he did not specifically raise these factors, the judge concluded that defendant still failed to meet the second prong of Strickland because the result would not have been different had he done so.

Finally, Judge Jimenez determined that because defendant failed to present a prima facie case of ineffective assistance of counsel, a plenary hearing was not required under State v. Preciose, 129 N.J. 451, 462 (1992). This appeal followed.

On appeal, defendant raises the following contentions:

POINT ONE

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

POINT TWO

IN THE ALTERNATIVE, THIS CASE MUST BE REMANDED FOR A NEW NON-EVIDENTIARY HEARING, WITH A NEW PCR JUDGE, BECAUSE THE PCR COURT FAILED TO CONDUCT A FULL AND FAIR HEARING AND DENIED [DEFENDANT] HIS RIGHT TO DUE PROCESS.

When petitioning for PCR, the defendant must establish, by a preponderance of the credible evidence, that he or she is entitled to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013); Preciose, supra, 129 N.J. at 459. To sustain that burden, the defendant must allege and articulate specific facts that "provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing and the defendant "must do more than make bald assertions that he was denied the effective assistance of counsel." 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 and make a determination on the merits only if the defendant has presented a prima facie claim of ineffective assistance. Preciose, supra, 129 N.J. at 462.

To establish a prima facie claim of ineffective assistance of counsel, the defendant is obliged to show not only the particular manner in which counsel's performance was deficient,

but also that the deficiency prejudiced his right to a fair trial. Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d 674 at 693 (1984); State v. Fritz, 105 N.J. 42, 58 (1987). The United States Supreme Court has extended these principles to a criminal defense attorney's representation of an accused in connection with a plea negotiation. Lafler v. Cooper, 566 U.S. 156, 163, 132 S. Ct. 1376, 1384-85, 182 L. Ed. 2d 398, 406-07 (2012); Missouri v. Frye, 566 U.S. 134, 144, 132 S. Ct. 1399, 1407-08, 182 L. Ed. 2d 379, 390 (2012).

There is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, supra, 466 U.S. at 690, 104 S. Ct. at 2066; 80 L. Ed. 2d at 695. Further, because prejudice is not presumed, Fritz, supra, 105 N.J. at 52, the defendant must demonstrate "how specific errors of counsel undermined the reliability" of the proceeding. United States v. Cronin, 466 U.S. 648, 659 n.26, 104 S. Ct. 2039, 2047 n.26, 80 L. Ed. 2d 657, 668 n.26 (1984).


We have considered defendant's contentions in light of the record and applicable legal principles and conclude that they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We affirm substantially for the reasons expressed by Judge Jimenez in his well-reasoned written opinion.



We are also satisfied that contrary to defendant's contention in Point II of his brief, there was no evidence of bias or any other reasons requiring the assignment of a different trial judge to consider defendant's petition for PCR.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION