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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-0897-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EDWARD HUMPHREY, a/k/a LOU HUMPHREY,
EDWARD L. HUMPHREY, LEW J. HUMPHREY,
MICHAEL A. HUMPHREY, and EDWARD
L. HUMPHREYS,

Defendant-Appellant.

Submitted March 29, 2017 – Decided April 17, 2017

Before Judges Accurso and Manahan.

On appeal from Superior Court of New Jersey,
Law Division, Union County, Indictment No.
10-06-0080.

Joseph E. Krakora, Public Defender, attorney
for appellant (Alan I. Smith, Designated
Counsel, on the brief).

Christopher S. Porrino, Attorney General,
attorney for respondent (Sara E. Ross,
Deputy Attorney General, of counsel and on
the brief).

PER CURIAM

Defendant Edward Humphrey appeals from the dismissal of his petition for post-conviction relief (PCR), contending he established a prima facie case of ineffective assistance of counsel requiring an evidentiary hearing, and that the court abused its discretion in conducting argument on the petition in his absence. We affirm.

Defendant, a home improvement contractor, was indicted on a charge of second-degree theft by deception, N.J.S.A. 2C:20-4 and 2C:20-2b(1)(a), for taking deposits from several homeowners for work he never intended to perform. He pled guilty pursuant to a negotiated plea in exchange for the State's recommendation of a sentence in the third-degree range and restitution of \$188,000.

Prior to sentencing, defendant moved to withdraw his plea and dismiss the indictment. He withdrew both motions in favor of a renegotiated plea to a third-degree charge of theft from one victim in exchange for the State's recommendation of a time-served sentence and restitution of \$138,000. As part of the plea, defendant agreed the State could auction his possessions and apply the proceeds to the restitution amount. He was thereafter sentenced in accordance with the new plea agreement.

Defendant appealed his sentence, which we reviewed on a sentencing calendar, R. 2:9-11, and affirmed with a remand to adjust certain time credits as agreed by the State. Defendant

thereafter filed a petition for post-conviction relief claiming his plea counsel rendered ineffective assistance by failing to provide him with the discovery or prepare for trial, thus forcing him into a plea.

At the date appointed for oral argument, defendant was incarcerated in Pennsylvania, having been released to authorities in that State at the conclusion of his New Jersey sentence.¹ The judge explained he was without authority to command defendant's presence in New Jersey for the PCR proceeding and asked counsel whether defendant wished to proceed with his petition understanding he would forfeit his time-served sentence if successful. Counsel stated his belief that defendant "understands very well what's going on" and "wanted the PCR to proceed."

The judge consequently heard argument and denied the petition. In an oral opinion, the judge noted defendant's claim his counsel failed to review the discovery with him was belied by defendant's statements made under oath in the plea colloquies. As to the claim his second counsel was unprepared for trial, the judge noted that no trial date had been set at the time of the renegotiated plea, as the case was before the

¹ Defendant apparently also has a pending detainer out of Colorado.

court on motions. The judge further found "no indication at all that the outcome would have been different here" and thus that "the second prong is met as to either of these allegations." Accordingly, the judge found defendant could not establish ineffective assistance of his counsel in connection with his plea under the test established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987).

Although entering a final order denying the petition, the judge also advised counsel that if there was "a reason that [defendant] should have been here" or "there's something that he would have presented here and he wants to, in effect, have his day in court, himself You can always prepare a motion for reconsideration." No motion for reconsideration was made.

Defendant renews those arguments on appeal and adds that his petition should not have been argued without him or dismissed without an evidentiary hearing. He frames the issues as follows:

POINT I

THE PCR COURT MISAPPLIED ITS DISCRETION AND VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHTS TO CONFRONTATION AND TO EFFECTIVE ASSISTANCE OF PCR COUNSEL BY PRESIDING OVER DEFENDANT'S PETITION IN ABSENTIA.

POINT II

WHEN THE DEFENDANT ALLEGES THAT TRIAL COUNSEL FAILED TO MEET WITH HIM, FAILED TO REVIEW THE DISCOVERY WITH HIM, AND ENCOURAGED HIM TO PLEAD GUILTY WITHOUT CONSIDERATION AS TO THE EVIDENCE IN ORDER TO SECURE WHAT WAS PERCEIVED TO BE A FAVORABLE PLEA BARGAIN, AND THE STATE DOES NOT FIND IT APPROPRIATE TO SUBMIT A CERTIFICATION OR AFFIDAVIT FROM TRIAL COUNSEL CONTESTING THE ALLEGATIONS, A PRIMA FACIE SHOWING OF INEFFECTIVE ASSISTANCE OF COUNSEL WAS MADE.

POINT III

THE COURT'S RULING DENYING POST-CONVICTION RELIEF VIOLATED DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUJNSEL AS GUARNATEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Our review of the record convinces us that Judge Moynihan carefully considered defendant's claims. We agree defendant failed to demonstrate the performance of his counsel was substandard or that but for the alleged errors, he would not have pled guilty and instead would have insisted on going to trial. See State v. Nunez-Valdez, 200 N.J. 129, 142 (2009). Accordingly, we affirm substantially for the reasons expressed by Judge Moynihan in his carefully reasoned oral opinion.

We also reject defendant's argument that the judge should not have proceeded to hear oral argument without him and should have held an evidentiary hearing on the petition. Rule 3:22-

10(a) does not provide defendant a right to be present at the hearing when oral testimony is not being adduced. Instead, the matter is left to the trial court's sound discretion. Ibid. Likewise, the decision as to whether to hold an evidentiary hearing on a PCR petition alleging ineffective assistance of counsel is also discretionary. State v. Preciose, 129 N.J. 451, 462 (1992); R. 3:22-10(b). No hearing is required unless defendant has established a prima facie case, that is, a reasonable likelihood of success under Strickland. Preciose, supra, 129 N.J. at 462-63.

As it was clear the court could not compel Pennsylvania authorities to produce defendant, and his counsel expressed defendant's clear preference that the hearing on the petition proceed, we do not find the judge abused his discretion in conducting oral argument in defendant's absence. No evidentiary hearing was required because defendant failed to establish a prima facie case for relief.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION