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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-1758-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HARRY CAVER,

Defendant-Appellant.

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Submitted October 18, 2016 – Decided April 26, 2017

Before Judges Koblitz and Summers.

On appeal from Superior Court of New Jersey,  
Law Division, Union County, Indictment No.  
09-12-1132.

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

Grace H. Park, Acting Union County  
Prosecutor, attorney for respondent (Leonard  
V. Jones, Special Deputy Attorney General/  
Acting Assistant Prosecutor, of counsel and  
on the brief).

PER CURIAM

Defendant Harry Caver appeals the October 20, 2014 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. Before us, defendant raises one issue:

POINT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL SINCE, AS A RESULT OF COUNSEL'S FAILURE TO PROPERLY AND ACCURATELY INFORM HIM WITH RESPECT TO THE STATE'S PLEA OFFER, HE WAS UNABLE TO ACCEPT THE PLEA RECOMMENDATION AND INSTEAD WAS FORCED TO PROCEED TO TRIAL, SUBSEQUENTLY RECEIVING A SENTENCE SIGNIFICANTLY GREATER THAN THAT EMBODIED IN THE PLEA OFFER.

For the reasons that follow, we reverse and remand for an evidentiary hearing.

Defendant was indicted for various offenses<sup>1</sup> arising from the sale of controlled dangerous substances (CDS) on August 5, 2009. According to the pre-trial memorandum<sup>2</sup> dated May 24, 2010,

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<sup>1</sup> Specifically, third-degree distribution of a controlled dangerous substances (CDS), N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(3) (count one); second-degree distribution of a CDS within 500 feet of public housing, N.J.S.A. 2C:35-7.1 (count two); third-degree hindering apprehension or prosecution, N.J.S.A. 2C:29-3(b)(1) (count three); and fourth-degree obstructing the administration of law or other governmental function, N.J.S.A. 2C:29-1 (count four).

<sup>2</sup> The memorandum was not originally contained in the record but was subsequently provided at our request. It was signed in  
(continued)

defendant rejected the State's offer that he plead guilty to third-degree distribution of CDS in exchange for the State's recommended dismissal of the other charges and a recommended prison term of eight years with forty-two months of parole ineligibility. The memorandum also states that defendant qualifies for an extended term sentence, and that rejection of the plea offer could result in a more severe sentence up to the maximum allowed if convicted after trial. The trial was scheduled for November 3, 2010. Presumably, the pretrial memorandum was reviewed on the record with defendant in open court in compliance with Rule 3:9-1(e), however, no transcript of that proceeding was provided.

After the initial trial date was adjourned, trial was scheduled for March 21, 2011. Despite appearing in court for trial call, defendant was tried in absentia when he failed to appear for trial when it was held on March 23 and 24. The jury found him guilty of all charges. He was subsequently sentenced to a discretionary extended aggregate term of twenty years as a

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accordance with then Rule 3:9-1(e), which in amendments effective September 1, 2016, the former paragraph (e) was redesignated as paragraph (f).

persistent offender pursuant to N.J.S.A. 2C:44-3(a), with a ten-year parole disqualifier under N.J.S.A. 2C:43-7(b).

After defendant's direct appeal was denied, State v. Caver, No. A-2852-11 (App. Div. February 27, 2013), certif. denied 216 N.J. 4 (2013), he filed a timely PCR petition alleging numerous claims of ineffective assistance of trial counsel. On October 20, 2014, the PCR judge, who also presided over the trial and sentenced defendant, issued an order and written decision denying PCR without an evidentiary hearing.

On the only issue raised on appeal, the PCR judge found that defendant was not entitled to an evidentiary hearing concerning counsel's advice regarding rejection of the State's five-year plea offer. The judge determined that defendant failed to establish a prima facie case as required by Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), because he only offered "his bald assertions" which were "too vague, conclusory, or speculative." The judge rejected the claim defendant told counsel that if counsel could not negotiate a better deal with the State, he would accept the offered plea. In support, the judge pointed out that when the parties were not able to reach a plea agreement, defendant signed a pre-trial memorandum, which terminated further plea negotiations unless there was a showing

of material change. The judge further found that defendant "not only has [] made no showing of the existence of an alternative plea offer, but he also fails to demonstrate that the [c]ourt would have accepted the new plea offer after he had signed the [pre-]trial memorandum." Although defendant argued there was a plea offer of five-years "flat," - a prison term without a period of parole ineligibility - which is also the plea offer reflected in the judge's decision, the pre-trial memorandum reveals that defendant rejected the State's offer of a recommended sentence of eight years with forty-two months of parole ineligibility. Defendant's brief on appeal asserts in its statement of facts that he received a five-year plea offer and the State accepted the defense statement of facts as true. Thus, the judge's reasoning, that defendant offered no evidence of a more favorable plea offer after the pre-trial memorandum was signed, is flawed.

Defendant contends that he is entitled to an evidentiary hearing to establish trial counsel's ineffective assistance due to counsel's failure to explain that by rejecting the State's plea offer he would not be able to re-negotiate another plea or accept a five-year flat offer. His PCR petition is supported by his certified hand-written statement that trial counsel did not tell him the five-year offer would expire if he did not accept

it. Defendant states that when he appeared for trial call on March 21, 2011, he was informed that the prosecutor intended to proceed to trial. According to defendant, after he told counsel he wanted to accept the five-year offer, counsel then for the first time explained that his only option was to plead guilty to the indictment without the State recommending a sentence. Defendant contends that although he signed the "open plea agreement" that day, he did not return for trial. He asserts that by not accepting the State's offer timely, because his lawyer did not tell him of the deadline, a trial took place, which resulted in a much harsher sentence. These contentions are somewhat supported by the PCR judge's finding that defendant turned down a five-year offer and the appellate agreed-upon statement of facts.

New Jersey's PCR is analogous to the federal writ of habeas corpus. State v. Jones, 219 N.J. 298, 310 (2014). 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. The right of counsel includes the right of effective counsel. State v. Cottle, 194 N.J. 449, 466 (2008). To establish a prima facie claim of ineffective assistance of counsel, the defendant must satisfy the two-prong test from Strickland, supra, 466 U.S. at

687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693, as adopted by New Jersey in State v. Fritz, 105 N.J. 42, 58 (1987). The test requires a showing that trial counsel's performance was deficient and, but for the deficient performance, the result would have been different. Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

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). Such a hearing is required if facts outside the trial record pertain to a material disputed fact. State v. Porter, 216 N.J. 343, 347 (2013) (reversing the affirmance of a PCR denial without an evidentiary hearing where defendant alleged a failure to investigate an alibi defense), certif. denied, \_\_\_\_ N.J. \_\_\_\_ (2017).

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) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). 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 court must view the facts alleged in a light most favorable to the petitioner. Cummings, supra, 321 N.J. Super. at 170.

A defendant is entitled to effective assistance of counsel in the process of plea negotiation. Missouri v. Frye, 566 U.S. 134, 144, 132 S. Ct. 1399, 1407-08, 182 L. Ed. 2d 379, 390 (2012). "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).

As our Supreme Court has said, when a defendant presents "a close but credible prima facie case of ineffective assistance" he or she is entitled to an evidentiary hearing. Jones, supra, 219 N.J. at 311. Here, the issue involves what discussions took place between defense counsel and his client. The record is sufficiently muddled that an evidentiary hearing is needed to clear up the sequence of events and to allow the PCR judge to determine if defendant's claim is valid.

Reversed and remanded for an evidentiary hearing. 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