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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2664-13T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

O'SHEA CLARKE,

Defendant-Appellant.

Submitted December 9, 2015 – Remanded January 20, 2017
Resubmitted September 21, 2017 - Decided September 28, 2017

Before Judges Ostrer and Manahan.

On appeal from the Superior Court of New
Jersey, Law Division, Somerset County,
Indictment No. 04-10-0757.

Joseph E. Krakora, Public Defender, attorney
for appellant (William Donegan, Assistant
Deputy Public Defender of counsel; Peter B.
Meadow, Designated Counsel, on the brief).

Michael H. Robertson, Somerset County
Prosecutor, attorney for respondent (Matthew
Murphy, Assistant Prosecutor, of counsel;
James L. McConnell, Assistant Prosecutor, on
the brief).

PER CURIAM

This matter returns to us after a remand to the Law Division for oral argument or an evidentiary hearing on the petition for post-conviction relief (PCR). State v. Clarke, No. A-2664-13 (App. Div. January 20, 2016) (slip op. at 5). Upon remand, the court conducted oral argument and denied the PCR without an evidentiary hearing. On appeal, Clarke argues that the PCR judge erred in denying his petition without oral argument, now moot, or an evidentiary hearing. Having considered the record, we affirm for the reasons stated in the comprehensive written opinion of Judge John H. Pursel. We add only the following.

The operative facts and procedural history are set forth in our prior opinion and need not be restated herein. In essence, Clarke claims he was unaware of the nature of the plea agreement relative to his exposure to an extended term sentence as he was not informed by his plea counsel. As Judge Pursel found, and we agree, the record clearly refutes that claim. Clarke executed the plea form, which stated that the State would move for the imposition of a discretionary extended term of imprisonment. Further, Clarke was advised during the plea process of the consequences of his plea, which he acknowledged both on the record and in the executed plea form.

"Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." State v. Preciose, 129 N.J. 451,

459 (1992). Under Rule 3:22-2(a), a criminal defendant is entitled to post-conviction relief if there was a "[s]ubstantial denial in the conviction proceedings of defendant's rights under the Constitution of the United States or the Constitution or laws of the State of New Jersey." "A petitioner must establish the right to such relief by a preponderance of the credible evidence." Preciose, supra, 129 N.J. at 459 (citations omitted). "To sustain that burden, specific facts" that "provide the court with an adequate basis on which to rest its decision" must be articulated. State v. Mitchell, 126 N.J. 565, 579 (1992).

Claims of constitutionally ineffective assistance of counsel are well suited for post-conviction review. See R. 3:22-4(a)(2); Preciose, supra, 129 N.J. at 460. In determining whether a defendant is entitled to relief on the basis of ineffective assistance of counsel, New Jersey courts apply the two-prong test articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 2064, 2068, 80 L. Ed. 2d 674, 693, 698 (1984), and United States v. Cronin, 466 U.S. 648, 658-60, 104 S. Ct. 2039, 2046-47, 80 L. Ed. 2d 657, 667-68 (1984). Preciose, supra, 129 N.J. at 463; State v. Fritz, 105 N.J. 42, 49-50 (1987).

Under the first prong of the Strickland test, a "defendant must show that [defense] counsel's performance was deficient."

Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. Under the second prong, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

The United States Supreme Court has applied 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, 162-63, 132 S. Ct. 1376, 1384-85, 182 L. Ed. 2d 398, 406-07 (2012); Missouri v. Frye, 566 U.S. 134, 142-43, 132 S. Ct. 1399, 1407-08, 182 L. Ed. 2d 379, 390 (2012). A defendant must demonstrate with "reasonable probability" that the result would have been different had he received proper advice from his trial attorney. Lafler, supra, 566 U.S. at 163, 132 S. Ct. at 1384, 182 L. Ed. 2d at 407 (citing Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698).

Here, defense counsel's alleged failure to advise Clarke regarding the consequences of the plea deal is supported only by self-serving assertions and bare allegations. See State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.) ("[A] petitioner must do more than make bald assertions that he was denied the effective assistance of counsel."), certif. denied, 162 N.J. 199 (1999). We note that "[a]dequate assistance of an attorney is

measured according to whether the counsel has professional skills comparable to other practitioners in the field." State v. Davis, 116 N.J. 341, 351 (1989). "The test is not whether defense counsel could have done better, but whether he [or she] met the constitutional threshold for effectiveness." State v. Nash, 212 N.J. 518, 543 (2013). Here, we find counsel's performance with respect to his representation of defendant was well within the minimum standard of effective assistance of counsel. More importantly, we find nothing in the record to support defendant's assertion that he was "misled" with respect to the consequences of his plea. Therefore, we conclude defendant has not made out a prima facie case of ineffective assistance of counsel. Preciose, supra, 129 N.J. at 463.

Notwithstanding our determination as to the failure to establish counsel's performance was deficient, we briefly address the second Strickland prong. We hold with respect to the second prong, that defendant has failed to demonstrate how any alleged deficiency resulted in a prejudice 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, supra, 105 N.J. at 52 (citation omitted).

Finally, we reject defendant's argument the court erred in denying his petition without an evidentiary hearing. "An

evidentiary hearing . . . is required only where the defendant has shown a prima facie case and the facts on which he relies are not already of record." Pressler & Verniero, Current N.J. Court Rules, comment 2 on R. 3:22-10 (2015). The mere raising of a claim for PCR does not entitle defendant to an evidentiary hearing. Cummings, supra, 321 N.J. Super. at 170. As defendant failed to establish a prima facie case of ineffective assistance of counsel, no evidentiary hearing was required.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION