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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-3221-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ABRAHAM L. BERGER,

Defendant-Appellant.

Submitted April 4, 2017 – Decided April 26, 2017

Before Judges Koblitz and Summers.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Indictment No.
11-05-0793.

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

Esther Suarez, Hudson County Prosecutor,
attorney for respondent (Eric P. Knowles,
Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Abraham L. Berger appeals from an October 20, 2015
order denying his petition for post-conviction relief (PCR)

without an evidentiary hearing. Pursuant to a plea agreement, defendant pled guilty to second-degree trafficking in personal identifying information by fraudulently possessing ten or more items containing personal information pertaining to five or more persons, N.J.S.A. 2C:21-17.3(b)(2),¹ and was sentenced on May 30, 2014, to five years in prison. He did not file a direct appeal, but in January 2015 filed a PCR petition claiming that his attorney was ineffective for not filing a motion to disclose the confidential informant (CI) and not providing him with a copy of the State's discovery. We affirm the order on appeal. We remand, however, for the limited purpose of correcting a typographical error in the judgment of conviction.

Defendant was charged with being the ringleader, while in federal prison, of a scheme to obtain stolen credit card numbers and use the information to buy and then sell merchandise. Another member of the operation, the CI, participated in telephone conversations monitored by law enforcement, which led to defendant's arrest. Defendant admitted guilt to the possession of ten or more credit card numbers belonging to five or more people. Prior to pleading guilty, defendant acknowledged on the record that he was withdrawing his motion to dismiss the indictment

¹ The judgment of conviction mistakenly refers to a conviction for N.J.S.A. 2C:21-17.3(b)(1), a third-degree crime.

because he was pleading guilty. In return for defendant's guilty plea, the State dismissed four other counts of the indictment and promised to recommend a sentence of not more than six years in prison with no mandatory minimum term.

Defendant raises the following issues on appeal:

POINT I: THE COURT'S FINDINGS DENYING POST-CONVICTION RELIEF SHOULD BE REVERSED AND THE MATTER REMANDED FOR AN EVIDENTIARY HEARING BECAUSE TRIAL COUNSEL'S FAILURE TO PROVIDE DEFENDANT WITH DISCOVERY, AND TRIAL COUNSEL'S FAILURE TO FILE A MOTION TO COMPEL THE STATE TO DISCLOSE THE IDENTITY OF THE CONFIDENTIAL INFORMANT, SATISFIED PRIMA FACIE INEFFECTIVE ASSISTANCE OF COUNSEL STANDARDS AS IT RESULTED IN THE DEFENDANT'S INABILITY TO PROPERLY ASSESS THE STRENGTH OF THE STATE'S CASE AND THE PROPRIETY OF PLEADING GUILTY.

POINT II: THE COURT'S RULING DENYING POST-CONVICTION RELIEF VIOLATED DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Evidentiary hearings are not required in all PCR proceedings. State v. Marshall, 148 N.J. 89, 157-58, cert. denied, 522 U.S. 850, 118 S. Ct. 140, 139 L. Ed. 2d 88 (1997). Whether to conduct an evidentiary hearing rests in the discretion of the court, R. 3:22-10, and is necessary only when it would "aid the court's analysis of whether the defendant is entitled to post-conviction relief" and "the defendant's allegations are [not] too vague, conclusory, or speculative to warrant an evidentiary hearing." Marshall, supra, 148 N.J. at 158 (citations omitted). A PCR court

deciding whether to grant an evidentiary hearing "should view the facts in the light most favorable to a defendant to determine whether a defendant has established a prima facie claim." State v. Preciose, 129 N.J. 451, 462-63 (1992). "To establish a prima facie claim of ineffective assistance of counsel, a defendant must demonstrate the reasonable likelihood of succeeding under the test set forth in Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984), and United States v. Cronin, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), which [our Supreme Court] adopted in State v. Fritz, 105 N.J. 42, 58 (1987)." Id. at 463.

Under the Strickland standard, a petitioner must show counsel's performance was both deficient and prejudicial. State v. Martini, 160 N.J. 248, 264 (1999). The performance of counsel is deficient if it falls "below an objective standard of reasonableness" measured by "prevailing professional norms." Strickland, supra, 466 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694. In evaluating deficiency, counsel's performance must be reviewed with "extreme deference . . . requiring 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]'" Fritz, supra, 105 N.J. at 52 (quoting Strickland, supra, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694).

In the context of a PCR petition challenging a guilty plea based on the ineffective assistance of plea counsel, the prejudice prong is established when the defendant demonstrates a "reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial." State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)). To obtain relief, a defendant "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." State v. O'Donnell, 435 N.J. Super. 351, 371 (App. Div. 2014) (quoting Padilla v. Kentucky, 559 U.S. 356, 372, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284, 297 (2010)).

At the time defendant entered his guilty plea, the judge asked defense counsel if he had "fully reviewed discovery with [his] client." After counsel indicated he had reviewed discovery with defendant, the following exchange took place:

THE COURT: Mr. Berger, have you gone over this case with your lawyer and reviewed what the State would have proven against you had you gone to trial?

MR. BERGER: Yes, Your Honor.

THE COURT: Are you satisfied with your attorney's advice?

MR. BERGER: Yes.

Thus, defendant agreed, under oath, that he had reviewed the evidence with his attorney. Defendant's bald assertion to the contrary in his PCR petition is not sufficient to raise a prima facie case of ineffective assistance of counsel.

Defendant also argues that his counsel was ineffective in failing to file a pretrial motion to learn the identity of the CI. Such a motion is discussed in State v. Milligan, 71 N.J. 373, 384 (1976). See State v. Foreshaw, 245 N.J. Super. 166, 181 (App. Div.), certif. denied, 126 N.J. 327 (1991) (stating that under most circumstances the identity of a CI should not be disclosed). In light of the plea agreement, defendant withdrew his motion to dismiss prior to a ruling on its merits. He presents no reason why he would not have withdrawn any other pre-trial motion he had filed for the same reason. Further, defendant does not claim that he would not have pled guilty had his counsel filed a successful motion to disclose the identity of the CI.

As defendant did not demonstrate a prima facie case that he would prevail on either Strickland prong, the PCR court did not err in denying his petition without an evidentiary hearing. We remand only to correct the judgment of conviction to reflect a "final charge" of N.J.S.A. 2C:21-17.3(b)(2).

Affirmed.

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


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