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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-3983-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FERNANDO ESPINAL,

Defendant-Appellant.

Submitted December 14, 2016 – Decided April 20, 2017

Before Judges Accurso and Manahan.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Indictment No.
06-03-0871.

Joseph E. Krakora, Public Defender, attorney
for appellant (Timothy P. Reilly, Designated
Counsel, on the brief).

Mary Eva Colalillo, Camden County
Prosecutor, attorney for respondent (Robin
A. Hamett, Assistant Prosecutor, of counsel
and on the brief).

PER CURIAM

Defendant Fernando Espinal 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. Because the trial court properly concluded the evidence was inadequate to sustain defendant's burden, we affirm.

Defendant was indicted for murder, weapons offenses and hindering apprehension in connection with the death of William Jimenez in 2004. Jimenez and a friend were driving down defendant's street in Camden when they found their way blocked by traffic. Getting out to investigate the hold up, they found defendant's son's car double-parked in the middle of the street. Jimenez and defendant's son, both in their twenties, got into a verbal altercation, which quickly escalated into a fistfight. Somebody shouted to defendant, working inside his nearby home, that his son was being beaten up.

Defendant claimed he ran out to break up the fight. Jimenez's friend claimed defendant ran to the place where his son and Jimenez were exchanging punches with his fist drawn back. The friend hit defendant, knocking him to the ground. Defendant got up and ran into his house. He returned minutes later with a ceremonial sword, which he thrust into Jimenez's abdomen.

Defendant and his son fled. Jimenez was taken to the hospital. He died a slow and agonizing death seventeen days later after contracting gangrene, presumably from the sword

wound. Defendant was later arrested in New York, where he had assumed a false identity.

On the morning jury selection was to begin, defendant pled guilty to aggravated manslaughter. In exchange, the State agreed to drop the remaining charges and recommend a sentence capped at eighteen years, subject to the periods of parole ineligibility and supervision required by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Defendant agreed to pay restitution for the victim's funeral expenses, estimated at \$6000. Defendant waived right of appeal but reserved the right to argue for a lesser sentence.

Defendant's counsel filed a sentencing memorandum in which he stressed that defendant had never had any prior involvement with the criminal justice system, had led a completely law-abiding life and acted "in the heat of passion" to protect his son from an assault. He claimed under the unusual circumstances presented, the mitigating factors "clearly outweigh the aggravating factors," and he requested a sentence of ten years "with the understanding that there would be an 85% parole disqualifier." At sentencing, counsel again argued strenuously for a sentence less than eighteen years. He reiterated the points made in his sentencing memorandum and stressed that defendant acted out of fear and panic in defense of his son.

Judge Schuck, who had taken defendant's plea and later presided over his PCR application, found three aggravating factors: the gravity and seriousness of harm inflicted on the victim, N.J.S.A. 2C:44-1a(2); the risk defendant would commit another offense, N.J.S.A. 2C:44-1a(3); and the need for deterring defendant and others, N.J.S.A. 2C:44-1a(9). The judge found two mitigating factors: defendant had no history of prior delinquency or criminal activity, N.J.S.A. 2C:44-1b(7); and defendant's conduct was the result of circumstances unlikely to recur, N.J.S.A. 2C:44-1b(8). Finding the aggravating factors "clearly, convincingly and substantially outweigh the mitigating factors," and that the cap sentence permitted by the plea agreement was "a bit below the mid-point" of the range, the judge sentenced defendant to an eighteen-year NERA term and ordered restitution of \$5000.

Defendant appealed his sentence,¹ which we reviewed on a sentencing calendar, R. 2:9-11. We rejected defendant's argument that the court misapplied aggravating factor three and

¹ Although defendant agreed to waive his right of appeal as part of his negotiated plea, that waiver is not relevant here. Its only effect would be to allow the prosecutor to rescind the plea agreement, which the prosecutor obviously chose not to do. See State v. Sainz, 107 N.J. 283, 294 n.6 (1987).

should have applied mitigating factor three, that defendant acted under strong provocation, N.J.S.A. 2C:44-1b(3), and affirmed the prison term.² See State v. Grate, 220 N.J. 317, 338 (2015) (noting State v. Dalziel, 182 N.J. 494, 504-05 (2005) requires application of only those mitigating factors for which there is ample support in the record).

Defendant thereafter filed a timely petition for PCR alleging ineffective assistance of counsel. In a supplemental brief in support of the petition, PCR counsel argued the court committed sentencing errors in identifying and balancing the aggravating and mitigating factors, "compound[ed]" by "defense counsel barely argu[ing] any mitigating factors and conced[ing] aggravating factor number [two]."

Judge Schuck denied defendant's claim that his counsel was ineffective at sentencing,³ reasoning the claim was essentially one complaining of an excessive sentence not cognizable on PCR. See State v. Acevedo, 205 N.J. 40, 42 (2011) (holding a sentence

² We, however, remanded for a hearing on defendant's obligation and ability to pay \$5000 restitution.

³ The judge granted defendant an evidentiary hearing on his claim that private counsel forced him to plead guilty based on defendant's failure to pay him additional fees to take the case to trial. After considering the testimony of defendant and plea counsel, the judge denied that claim as well. Defendant has not appealed from that determination.

not "illegal" was not subject to modification on PCR); see also State v. Flores, 228 N.J. Super. 586, 595-96 (App. Div. 1988), certif. denied, 115 N.J. 78 (1989). The judge further noted that defendant's excessive sentence claim had already been rejected by this court on direct appeal.

Defendant appeals, reiterating the arguments he made to the PCR court and contending the court erred in finding the claim not cognizable on PCR, relying on State v. Hess, 207 N.J. 123, 154 (2011). He frames the issues as follows:

POINT I

THE ORDER DENYING POST-CONVICTION RELIEF SHOULD BE REVERSED AND THE MATTER REMANDED TO THE LAW DIVISION SINCE THE POST-CONVICTION COURT ERRED IN FAILING TO CONDUCT A MEANINGFUL HEARING ON THE PETITION FOR POST-CONVICTION RELIEF REGARDING TRIAL COUNSEL'S FAILURE TO ARGUE CERTAIN MITIGATING FACTORS.

A. DEFENDANT-APPELLANT ESTABLISHED A PRIMA FACIE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BEFORE THE LAW DIVISION REGARDING TRIAL COUNSEL'S FAILURE TO ARGUE CERTAIN MITIGATING FACTORS.

B. THE ORDER DENYING POST-CONVICTION RELIEF SHOULD BE REVERSED AND THE MATTER REMANDED TO THE LAW DIVISION FOR A MEANINGFUL EVIDENTIARY HEARING.

POINT II

THE ORDER DENYING POST-CONVICTION RELIEF SHOULD BE REVERSED AND THE MATTER REMANDED TO THE LAW DIVISION SINCE THE POST-

CONVICTION COURT ERRED IN FINDING THAT THE
WITHIN PETITION IS PROCEDURALLY BARRED.

We reject his arguments. Unlike in Hess, in which the defendant's attorney was prohibited by the plea agreement from arguing the mitigating factors predominated, and made no effort to advise the sentencing court of substantial evidence in his possession indicating the defendant "was a physically and psychologically battered woman, who had been threatened and had feared for her life," id. at 138, defendant's attorney argued the unusual circumstances of the crime and the mitigating factors in urging a ten-year sentence. Counsel submitted a sentencing memorandum on defendant's behalf and made a vigorous argument, both there and on the record, that the mitigating factors outweighed the aggravating factors.

This record contains nothing to suggest that defendant's counsel withheld any information that might have had a bearing on the court's sentencing analysis. See State v. Friedman, 209 N.J. 102, 121 (2012). Moreover, although Judge Schuck rejected defendant's claim on the basis of Acevedo, he hardly gave it short shrift. To the contrary, the judge considered the claim on the merits and found the additional mitigating factors urged by defendant lacked factual support in the record.

The judge specifically addressed, and rejected, defendant's contentions that aggravating factor two, the gravity and seriousness of harm inflicted on the victim, N.J.S.A. 2C:44-1a(2), was inapplicable and that mitigating factors three, that defendant acted under strong provocation, N.J.S.A. 2C:44-1b(3), and four, that there were substantial grounds tending to excuse or justify defendant's conduct, though failing to establish a defense, N.J.S.A. 2C:44-1b(4), should have been applied. He concluded:

This is a negotiated plea [in which] the first degree murder charge where a defendant faced up to thirty years in State prison was amended to first degree aggravated manslaughter with an eighteen-year cap or maximum.

As noted, the defendant's counsel apparently marshaled the facts of the case to negotiate the favorable plea deal and argued them again at sentencing. Also the court commented on all of this at sentencing, so these factual considerations were not overlooked by defendant's trial counsel or the trial court.

Again, I note and I alluded to it before, where the defendant receives the exact sentence he bargained for as in this case, or at least up to the cap that was agreed to, a presumption of reasonableness attaches to the sentence. State v. S.C., 289 N.J. Super. 61, 71 (App. Div.) certif. denied, 145 N.J. 373 (1966).

Therefore, as I noted already, there's no showing of deficiency of counsel as

contemplated by Strickland,^[4] to allow for an evidentiary hearing or require one based on these arguments.

To establish his right to relief under the Strickland test, defendant must show not only that his attorney rendered ineffective assistance of counsel, but that the attorney's substandard representation prejudiced the defense. Strickland, supra, 466 U.S. at 687-88, 694, 104 S. Ct. at 2064, 2068, 80 L. Ed. 2d at 693, 698. Defendant established neither prong. This was a simple altercation between two young men which, solely due to defendant's unnecessary involvement, escalated into a senseless tragedy and a horrific death. Neither provocation nor defense of self or others could reasonably have been found on the facts. Defendant's counsel negotiated a favorable plea deal, which the court found reasonable in light of the unusual circumstances of the offense and sentenced defendant accordingly. The sentence was below the mid-point of the range and is not excessive.

We are satisfied Judge Schuck conscientiously considered all of defendant's claims and appropriately denied relief. We affirm, substantially for the reasons expressed in his thorough

⁴ Strickland v. Washington, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064, 2068, 80 L. Ed. 2d 674, 693, 698 (1984).

and thoughtful opinions from the bench on February 28, 2014 and February 19, 2015.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION