SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4272-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DIANA M. HOFFMAN,

Defendant-Appellant.

Submitted February 9, 2017 - Decided April 4, 2017

Before Judges Lihotz and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Burlington County, Indictment No. 10-10-1007.

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

Robert D. Bernardi, Burlington County Prosecutor, attorney for respondent (Jennifer B. Paszkiewicz, Assistant Prosecutor, of counsel; Linda A. Rinaldi, Legal Assistant, on the brief).

PER CURIAM

Defendant Diana M. Hoffman appeals from an April 2, 2015 order denying her petition for post-conviction relief (PCR).

Defendant's current incarceration results from two instances in June 2010, where defendant fled police at high speed in her vehicle, first in Burlington County, and four days later in Monmouth County. Defendant successfully eluded police in Burlington County, but was apprehended in Monmouth County when her car ran out of gas. Upon her apprehension, she falsely reported to a state trooper she had fled out of fear of a gunman. While searching for the non-existent gunman, a state trooper was killed by another motorist.

Defendant was separately indicted in both Burlington and Monmouth Counties. A Burlington County grand jury charged her with second degree eluding, N.J.S.A. 2C:29-2(b). A Monmouth County grand jury charged her with both eluding and first-degree issuing a false public alarm. She subsequently pled guilty to both indictments, but was sentenced on the Burlington County indictment first. Following sentencing in Monmouth County, defendant filed a direct appeal, challenging only the sentence issued for the Monmouth County convictions. We affirmed that sentence in an unpublished order during an excessive sentencing oral argument calendar. See State v. Hoffman, No. A-1145-11 (App. Div. July 31, 2012). Defendant never challenged her Burlington County sentence on direct appeal, but timely filed the underlying petition for PCR. On appeal, defendant argues the trial court erred in denying

her petition without conducting an evidentiary hearing. We are not persuaded and affirm.

Under the terms of the Burlington County plea agreement, the State agreed to recommend a seven-year sentence, with three and one-half years of parole ineligibility, and to dismiss the motor vehicle summonses issued as a result of the indictment. The terms of the written plea agreement stated the imposed sentence in this matter would run consecutive to the Monmouth County sentence "if that matter proceeds to sentence before this matter."[1]

During sentencing in this case, held on April 29, 2011, the State recited the terms of the negotiated plea. The prosecutor advised sentencing in the Monmouth County matter would not be held until July 8, 2011, and stated: "the State's position all along during plea negotiations was that this matter would run consecutive to that matter. Obviously, that matter will now run consecutive to this matter."

In imposing sentence, the judge reiterated the prior understanding set forth in the plea agreement, noting had defendant been sentenced in Monmouth County first, the sentence in Burlington County would run consecutively to the Monmouth County sentence.

[1] Defendant was later sentenced under the Monmouth County indictment to fifteen years, with five years of parole ineligibility, running consecutive to the Burlington County sentence.

However, because the Burlington County sentence was imposed first, it was up to the Monmouth County judge to determine whether the sentence imposed on the Monmouth County charges would run consecutive or concurrent to the sentence he was now imposing. No direct appeal of the Burlington County sentence was filed.

Defendant timely filed the underlying PCR petition challenging her Burlington County sentence. She asserted plea counsel provided ineffective assistance because he advised the sentences would run concurrently and failed to argue the application of mitigating factor eleven, N.J.S.A. 2C:44-1(b)(11), that incarceration would cause excessive hardship upon defendant's dependents, noting defendant has four children. Designated counsel supplemented defendant's filing with a brief, arguing plea counsel failed "to position the case so that he could seek concurrent a [sic] sentence . . . although he represented . . . he would do so if the Burlington County sentencing occurred after the Monmouth County sentencing."

Following argument, Judge Susan L. Claypoole issued a written opinion, denying defendant's petition and her request for an evidentiary hearing. The judge analyzed defendant's claim of ineffective assistance of counsel against the two-pronged standard formulated in Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), adopted by our

Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). Judge Claypoole rejected defendant's arguments as factually unsupported, determining there was no basis to show counsel's representation was deficient. Further, the judge concluded the assertion plea counsel should have secured consecutive sentences in the separate matters pending in distinct vicinages was legally untenable, noting the clear provisions of the plea agreement stated sentences would be served consecutively. To support her decision, the judge recounted several record references to the required imposition of consecutive sentences, along with defendant's acknowledgement of the terms of her plea, and the sentencing provision.

On appeal, defendant presents the same arguments raised before Judge Claypoole. She argues the judge erroneously denied her request for an evidentiary hearing to present the merits of her position regarding counsel's alleged misadvice, urging a postponement of sentencing in Burlington County to follow sentencing in Monmouth County would have resulted in the imposition of a concurrent sentence. She additionally insists counsel should have vigorously argued for application of mitigating factor eleven, which would have lessened the length of her sentence.

We reject defendant's arguments and affirm substantially for the reasons set forth in Judge Claypoole's opinion. We conclude the PCR court did not err in declining to conduct an evidentiary

hearing on the basis of defendant's assertions. See State v. Preciose, 129 N.J. 451, 459-60 (1992) (requiring evidentiary hearing only when facts must be discerned to review defendant's prima facie case of ineffective assistance of counsel).

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, or that the defendant's allegations are too vague, conclusory, or speculative to warrant an evidentiary hearing, . . . then an evidentiary hearing need not be granted." Marshall, supra, 148 N.J. at 158 (citations omitted). "[T]he defendant must demonstrate a reasonable likelihood that his or her claim will ultimately succeed on the merits." Ibid. This standard was not met.

There is no factual support for defendant's claims. The record consistently shows the sentence imposed in this matter would be consecutive, not concurrent, to that in Monmouth County. Further, mitigating factor eleven was not applicable. Clearly, there was no hardship on defendant's four children who were in the legal custody of the Division of Child Protection and Permanency;

defendant had no relationship with the children and no visitation rights; and admitted she did not even know where her children were residing. As the sentencing judge noted, no mitigating factors applied "in any way, shape or form."

Affirmed.