NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." 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-4294-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAIME M. KANTER,

Defendant-Appellant.

Submitted March 29, 2017 – Decided April 17, 2017

Before Judges Manahan and Lisa.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Indictment Nos. 07-10-1715 and 08-07-1096.

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

Gurbir S. Grewal, Bergen County Prosecutor, attorney for respondent (Catherine A. Foddai, Senior Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant, Jaime M. Kanter, appeals from the December 15, 2014 order denying his petition for post-conviction relief (PCR) and declining to conduct an evidentiary hearing. Defendant is serving an aggregate sentence of nine years imprisonment, subject to an eighty-five percent parole disqualifier and three years parole supervision pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, arising out of the sentences imposed on October 29, 2010, under two separate Bergen County indictments. Defendant's sentencing appeal was rejected. He then filed a PCR petition, in which he requested an evidentiary hearing. The petition was denied and the court declined to order a hearing. Defendant now appeals, arguing:

> POINT I
>
> PERFORMANCE OF TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO PROPERLY AND FULLY EXPLAIN THE SENTENCING RAMIFICATIONS OF THE PLEA TO HIS CLIENT.
>
> POINT II
>
> BECAUSE THE DEFENDANT MADE A PRIMA FACIE SHOWING OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, THE COURT MISAPPLIED ITS DISCRETION IN DENYING POST-CONVICTION RELIEF WITHOUT CONDUCTING A FULL EVIDENTIARY HEARING.

We reject these arguments and affirm.

On April 6, 2010, the matter came before Judge Patrick J. Roma for trial under Indictment No. 07-10-1715. This indictment

contained nine counts and was the more serious of the two indictments pending against defendant. The lead count was the most serious, charging defendant with second-degree burglary. The other counts charged various second, third and fourth-degree offenses arising out of the same incident. Indictment No. 08-07-1096 contained five counts, one charging fourth-degree credit card theft, and four charging third-degree fraudulent use of a credit card.

The prosecutor and defense counsel informed the court that they had reached an agreement by which defendant would enter an open plea to the first count in each indictment, namely second-degree burglary and fourth-degree credit card theft. The State would not recommend any particular sentence,[1] but would agree to a maximum aggregate sentence of ten years imprisonment subject to NERA, with the sentence on the second indictment for credit card theft to run concurrent to whatever sentence was imposed for the second-degree burglary. The State further agreed that all remaining counts of both indictments would be dismissed.

Defendant entered his plea to these two counts. Judge Roma conducted an extensive plea colloquy to assure defendant's

---

[1] This plea, coming after the pretrial conference, was subject to a plea cutoff, which generally prohibits a plea agreement containing a recommended sentence. See R. 3:9-3(g).

understanding of the consequences and that he was pleading guilty freely and voluntarily. On October 29, 2010, Judge Roma sentenced defendant to a nine-year NERA sentence for second-degree burglary and a concurrent eighteen-month sentence for credit card theft.

Defendant filed an appeal. Because he was only seeking a reduction in sentence, the matter was heard on our excessive sentencing calendar. See R. 2:9-11. After hearing oral argument, the panel affirmed the sentences on both offenses.[2] The Supreme Court denied defendant's petition for certification. State v. Kanter, 214 N.J. 176 (2013).

In his PCR petition, defendant argued he was misled by his plea counsel to believe he would be sentenced in the third-degree range to a term of imprisonment between three and five years, and had he known he would be sentenced to nine years, he would not have pled guilty but would have gone to trial. Judge James J. Guida heard oral argument on November 14, 2014, and on December 15, 2014, issued a written opinion denying relief and declining to conduct an evidentiary hearing. He entered an order on that date to that effect. This appeal followed.

---

[2] With the consent of both parties, the panel remanded to amend the judgments of conviction to award defendant additional jail credits to which he was entitled.

In a certification filed in support of his PCR petition, defendant stated that prior to pleading guilty he discussed with his counsel the sentence that would be imposed. He further certified:

> I was specifically told by my trial attorney that although I was pleading guilty to a second[-]degree offense, I would be sentenced as a third[-]degree offender. I was told by my attorney that this would mean I would be receiving a sentence between three and five years in state prison. . . . I never would have agreed to a plea in this case if I had known that I would be receiving a nine[-]year state prison sentence.

In his written opinion, Judge Guida referred at length to portions of the plea form which defendant signed and passages from the plea colloquy as well as the sentencing colloquy. All of these clearly negated any notion that defendant would be sentenced in the third-degree range. The plea form made clear that no promises or representations were made to defendant other than as noted in the form, that there was no recommendation as to the sentence defendant would receive, and that he could receive up to a ten year NERA sentence. There was some discussion in the plea colloquy that defense counsel intended to request sentencing in the third-degree range. However, the prosecutor made it perfectly clear that whether defense counsel made such a request or not, she would be seeking a second-degree NERA sentence. The judge also

made it abundantly clear that he could sentence defendant for as much as ten years imprisonment subject to NERA. He asked defendant, "Do you understand that no one can make any promises or representations or agreements on my behalf?" Defendant answered, "Yes."

In a letter memorandum submitted before sentencing, defendant's attorney urged the court to consider sentencing in the third-degree range, based upon several proposed mitigating factors. At the sentencing hearing, defense counsel did not verbally seek a third-degree sentence, but proposed sentencing at the low end of the second-degree range of five-to-ten years. Defendant did not speak up at the sentencing hearing on this issue. The judge found the presence of numerous aggravating factors and no mitigating factors and imposed the nine-year sentence. After sentence was pronounced, defendant again did not address the court on this issue.

As we previously stated, an excessive sentencing panel affirmed defendant's sentences on both indictments. It found that the aggravating and mitigating factors found by the trial court were based upon sufficient evidence in the record, that the sentences were in accordance with the sentencing guidelines in the Criminal Code, and the sentences were not unreasonable or unduly punitive.

In the PCR proceeding, defendant argued that an evidentiary hearing was necessary because the representations allegedly made to him by his trial counsel were outside the record of court proceedings. In rejecting the request for an evidentiary hearing, Judge Guida reasoned that "[d]efendant's allegations that his attorney told him he would be sentenced in the third-degree range both prior to the entry of the plea and after the plea was accepted by the trial judge, belie credibility." The judge based this conclusion on the plea agreement, which did not reference a sentence in the third-degree range and which provided that no promises or representations outside the plea agreement had been made that induced defendant to enter the plea.

The judge further relied on the plea transcript, which revealed the extended discussions explaining to defendant that he was subject to a sentence of up to ten years subject to NERA. The judge further reasoned that "[i]f it is true that defendant's attorney advised him diametrically opposite to the plea agreement as he alleges, then defendant lied to the judge and subjected himself to a perjury prosecution." This was because "[t]he plea agreement in this matter is so clear and precise and that the judge thoroughly explored the issues regarding promises, representations and sentencing parameters." The judge therefore concluded that defendant "failed to establish a prima facie case

of ineffective assistance of counsel and there are no material issues of fact which require a plenary hearing."

Evidentiary hearings may be granted on a PCR petition if the defendant establishes a prima facie case of ineffective assistance of counsel. State v. Preciose, 129 N.J. 451, 462 (1992). Such hearings are only required if resolution of disputed issues are "necessary to resolve the claims for relief." R. 3:22-10(b). Hearings shall not be granted if they "will not aid the court's analysis of the defendant's entitlement to post-conviction relief," or "if the defendant's allegations are too vague, conclusory or speculative." R. 3:22-10(e)(1) and (2). In order to establish a prima facie case, a defendant must demonstrate a reasonable likelihood that he or she will ultimately succeed on the merits. State v. Marshall, 148 N.J. 89, 157, cert. denied, 552 U.S. 850, 118 S. Ct. 140, 139 L. Ed. 2d 88 (1997).

The essential fact which defendant wishes to prove at an evidentiary hearing is that his attorney told him he would be sentenced in the third-degree range to three-to-five years for this second-degree crime to which he was pleading guilty. PCR determinations are guided by the two-prong Strickland/Fritz[3] test. To establish the first prong, a defendant must show that his

[3] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1985); State v. Fritz, 105 N.J. 42 (1987).

attorney's conduct was deficient. The deficiency here, according to defendant, is that his counsel guaranteed a sentence of three-to-five years. This is far different from advice that counsel would seek such a sentence, argue for such a sentence, and that such a sentence could be possible. The latter proposition is in line with the discussions at the plea hearing and the argument made in defendant's attorney's pre-sentencing letter memorandum. Notably, even in the brief now before us, appellate counsel for defendant states that defendant's attorney had "promised him that he would be seeking to have the court impose a more lenient sentence on the second[-]degree burglary charge, which was anticipated to be somewhere between three to five years in State prison." (Emphasis added). We agree with Judge Guida that the assertion of a guarantee simply belies credibility in light of the clear record that was made.

Even if it were established that defendant's attorney told defendant he would get a three-to-five year sentence, such deficient conduct would not create a reasonable likelihood of success in the PCR proceeding. This is because of the overwhelming record evidence establishing that defendant was clearly advised to the contrary by the court and by defendant's own admissions and acknowledgments.

This situation is similar to that in State v. Ball, 381 N.J. Super. 545 (App. Div. 2005). There, the defendant complained that his trial counsel did not advise him properly about his right to testify at trial, which induced him to refrain from testifying. Id. at 555-57. After he was convicted, he sought a new trial through a PCR petition, supported by a certification stating what his trial testimony would have consisted of. Id. at 556-57.

In affirming the PCR judge's determination that a prima facie case had not been established, we held that even if counsel had not adequately advised defendant of his right to testify, "the trial judge fully explained defendant's right to testify, the possible consequences of his choice and the option to have the jury instructed to draw no inference from defendant's choice not to testify." Id. at 557. We noted that "the trial judge specifically advised defendant that since he had no prior convictions, he could not be impeached on the basis of a prior record if he chose to testify." Ibid.

Applying the same reasoning, we conclude that Judge Guida did not err in finding that a prima facie case of entitlement to post-conviction relief was not established and he did not mistakenly exercise his discretion in declining to conduct an evidentiary hearing.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION