

**NOT FOR PUBLICATION WITHOUT THE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-4295-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ELVIS HERNANDEZ,

Defendant-Appellant.

Submitted February 14, 2017 – Decided March 30, 2017

Before Judges Koblitz and Summers.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment Nos. 12-09-1455, 12-11-1705 and 12-11-1708.

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

Andrew C. Carey, Middlesex County Prosecutor, attorney for respondents (Susan Berkow, Special Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Elvis Hernandez appeals from a February 10, 2015 decision denying his petition for post-conviction relief (PCR)

without an evidentiary hearing.¹ Defendant raises the following issues on appeal:

POINT ONE: THE ORDER DENYING POST-CONVICTION RELIEF SHOULD BE REVERSED AND THE MATTER REMANDED FOR AN EVIDENTIARY HEARING BECAUSE THE ISSUES ADVANCED IN DEFENDANT'S PETITION, IN CONJUNCTION WITH THE STATE'S FAILURE TO SUBMIT AN AFFIDAVIT OR CERTIFICATION BY TRIAL COUNSEL CONTESTING THE DEFENDANT'S CLAIMS, PRESENTED THE COURT WITH PRIMA FACIE PROOF OF INEFFECTIVE ASSISTANCE OF COUNSEL BY A PREPONDERANCE OF THE EVIDENCE.

POINT TWO: THE ORDER DENYING POST-CONVICTION RELIEF SHOULD BE REVERSED BECAUSE IT VIOLATED DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

We reverse to allow defendant an opportunity to file a direct appeal.

Defendant pled guilty in an agreement with the State that resolved eight pending indictments involving numerous burglaries.² Two defense attorneys represented defendant, one on the three indictments currently under appeal. On the twelve-page Plea Form,³

¹ The PCR judge, who also presided over the guilty plea, apparently did not file an order with his opinion, as none was provided to us by the parties.

² The additional indictments are Indictment Nos. 12-06-0884, 12-06-0885, 12-06-0886, 12-06-0958 and 12-06-0960.

³ Revised form promulgated by Administrative Directive #05-11, "Criminal Plea Form - Question Regarding the Immigration Consequences of a Guilty Plea" (August 1, 2011), http://www.judiciary.state.nj.us/directive/2011/dir_05_11.pdf.

defendant agreed in writing to pay restitution of \$16,536.36 plus an unspecified amount to "Advanced Pharmacy." Defendant pled guilty to various counts of those three indictments and received an aggregate custodial sentence of ten years with three years of parole ineligibility. When the judge reviewed the restitution for these charges on the record at the plea hearing, the judge mistakenly used amounts totaling \$200 less than the agreed-upon amount. Defendant did not admit to owing any amount of restitution from the pharmacy. The judge sentenced defendant to pay \$17,536 in restitution, \$1200 more than he stated at the guilty plea hearing. The restitution included \$1000 to Advanced Pharmacy. In his PCR petition, defendant states that his attorney misled him as to his parole eligibility and should have requested a restitution hearing because he has no ability to pay restitution. See State v. Newman, 132 N.J. 159 (1993). He also claims he sought to appeal, but his lawyer did not process the appeal.⁴

The PCR judge, who had also accepted the plea and sentenced defendant, denied the PCR petition in a written opinion in which he stated that defendant's potential parole ineligibility was clearly explained to him during the plea, as was the restitution. Regarding his attorney's failure to appeal, the judge wrote simply:

⁴ Both parties note that the judgment of conviction should be corrected to reflect that defendant pled guilty to counts one and four of Indictment No. 12-09-1455.

"Lastly, because Mr. Hernandez failed to demonstrate that [defense counsel] was ineffective at the trial level, his claim that [defense counsel] was ineffective for failing to file a direct appeal is without merit."

Defendant certified that he sought an appeal, but it was not filed.⁵ No evidence to the contrary was submitted. In State v. Jones, 446 N.J. Super. 28, 30 (App. Div.), certif. denied, ___ N.J. ___ (2016), we reversed the denial of a petition for PCR, holding that prejudice is presumed where defendant's undisputed sworn statement asserts that he directed his attorney to file an appeal, but no appeal was filed. Ibid. Our decision in Jones is consistent with Roe v. Flores-Ortega, 528 U.S. 470, 477, 120 S. Ct. 1029, 1035, 145 L. Ed. 2d 985, 995 (2000), which held that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable."

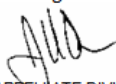
We do not decide the issues regarding restitution and parole ineligibility because defendant will have the right to air similar claims on direct appeal. Because the PCR judge did not apply the principles enunciated in Jones, which was decided after the order

⁵ The copy of defendant's certification submitted to us is not signed, however the State does not object, nor does the PCR judge comment on the fact that the certification is not signed. We can only assume the original submitted to the court was signed.

denying PCR, we reverse his order and exercise original jurisdiction to permit defendant to file a notice of appeal, seeking review of the judgment of conviction, within forty-five days from today's date.

Reversed.

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



CLERK OF THE APPELLATE DIVISION