SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4385-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSHUA T. STALLS,

Defendant-Appellant.

Submitted October 26, 2016 – Decided March 6, 2017

Before Judges Accurso and Manahan.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Accusation No. 13-04-0218.

Joseph E. Krakora, Public Defender, attorney for appellant (Karen A. Lodeserto, Designated Counsel, on the brief).

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Erin M. Campbell, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Joshua Stalls appeals from a Law Division order denying his petition for post-conviction relief (PCR) after oral argument and an evidentiary hearing. We affirm substantially for

the reasons set forth in the comprehensive and well-reasoned, sixteen-page written opinion of Judge Bernadette N. DeCastro. We add only the following.

Defendant was charged in Hudson County by accusation with one count of second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a). Defendant was also charged by complaint with one count of aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1), and two counts of child abuse, N.J.S.A. 9:6-1 and 6-3. The minor victim of these sexual offenses was defendant's dance student and family friend.

In November 2012, the victim's mother reported to the Jersey City Police that her daughter appeared uncomfortable and had been scratching her vaginal area. In response to her questioning, the victim stated that on multiple occasions, while she stayed at defendant's residence, defendant reached into her underwear and rubbed her vagina.

In April 2013, defendant entered a guilty plea to second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4. The remaining counts of the complaint were dismissed. Defendant admitted that between September and November 2012, and while responsible for her care, he committed certain sexual acts upon the victim. At sentencing, defendant received a five-year flat term in state prison, in accordance with the plea agreement.

Pursuant to the plea agreement, in addition to the applicable fines and fees, the court imposed the requirements under Megan's Law, Nicole's Law, and parole supervision for life. Defendant did not file a direct appeal.

Defendant filed a self-represented petition, which was supplemented after he was assigned counsel. In the petition, defendant argued his plea counsel provided ineffective assistance. After hearing oral argument, the judge held defendant was entitled to an evidentiary hearing.

The evidentiary hearing took place over four days. The hearing was limited to whether plea counsel incorrectly informed defendant there was evidence of penetration. During the hearing, defendant, defendant's mother, and Dr. Robert Berman, an expert in the field of general gynecology, testified for the defense. Defendant's plea counsel testified on behalf of the State. After reviewing the submissions, the judge issued a written opinion denying the PCR petition. This appeal followed.

On appeal, defendant raises the following point:

POINT I

> THE DECISION OF THE PCR COURT MUST BE REVERSED BECAUSE PLEA COUNSEL MISADVISED DEFENDANT ABOUT THE EVIDENCE AGAINST HIM.

"Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." State v. Goodwin, 173 N.J. 583,

593 (2002) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). The test for ineffective assistance of counsel was formulated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42 (1987). To establish a deprivation of the Sixth Amendment right to the effective assistance of counsel, a defendant must satisfy the following two-pronged Strickland test: (1) that counsel's performance was deficient and he or she made errors that were so serious that counsel was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution; and (2) that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

A defendant must overcome a strong presumption that counsel rendered reasonable professional assistance. State v. Parker, 212 N.J. 269, 279 (2012) (citations omitted). If a defendant establishes one prong of this test, but not the other, the petition for PCR must fail. Id. at 280 (citing State v. Echols, 100 N.J. 344, 358 (2009)). Thus, both prongs of the Strickland test must be satisfied before post-conviction relief may be granted. Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

Both the United States Supreme Court and the New Jersey Supreme Court have extended the Strickland test to challenges of guilty pleas based on ineffective assistance of counsel. Lafler v. Cooper, 566 U.S. 156, 162-63, 132 S. Ct. 1376, 1384-85, 182 L. Ed. 2d 398, 406-07 (2012); Missouri v. Frye, 566 U.S. 134, 140, 132 S. Ct. 1399, 1405, 182 L. Ed. 2d 379, 387 (2012); State v. DiFrisco, 137 N.J. 434, 456-57 (1994).

When petitioning for PCR, the defendant must establish by a preponderance of the credible evidence that he or she is entitled to the requested relief. Preciose, supra, 129 N.J. at 459. To sustain that burden, the defendant must allege and articulate specific facts which "provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

Our review of an order granting or denying PCR contains consideration of mixed questions of law and fact. State v. Harris, 181 N.J. 391, 415-16 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005). We defer to a PCR court's factual findings and will uphold those findings that are "supported by sufficient credible evidence in the record." State v. Nash, 212 N.J. 518, 540 (2013). However, a PCR court's interpretations of law are provided no deference and are reviewed de novo. Id. at 540-41.

On appeal, defendant argues that the judge erred by failing to find his plea counsel was ineffective for: (1) falsely informing him that the State had evidence of penetration; (2) failing to explain Megan's Law tier classifications; and (3) incorrectly telling defendant his incarceration would not exceed sixteen months. Thus, defendant contends he was misled by plea counsel and induced into accepting the plea agreement. We disagree.

In her decision, the judge addressed defendant's argument that he was "misadvised" as to the evidence of penetration:

> [Defendant] claims that plea counsel incorrectly advised him that there was evidence of penetration which is an element of first-degree aggravated sexual assault. The [c]ourt finds that plea counsel's review of [defendant's] case was reasonable and he properly advised [defendant] that if the State presented the case to the [g]rand [j]ury he would be charged with first[-]degree aggravated sexual assault, for which sexual penetration is an element. At the evidentiary hearing, [plea counsel] credibly testified that he reviewed the discovery he received with [defendant] as well as the law pertaining to first[-]degree aggravated assault. [Plea counsel] had received a copy of both the child's and mother's fresh complaint statement, a video of [defendant]'s statement, and the physical evidence, i.e. the forensic sexual assault examination. The [c]ourt does not find [defendant's] testimony that [plea counsel] would not tell him how he knew there was penetration credible, especially in light of his own admission that he was aware that the child had undergone a forensic examination. Rather, [defendant's] claims that plea counsel refused to tell him the

source of the information that there was evidence of penetration are self-serving in nature. It is clear to the [c]ourt that [defendant] had several discussions with [plea counsel] regarding the State's ability to show penetration as well as about the State's evidence.

. . . .

In light of the State's evidence against [defendant], it is completely self-serving for him to now claim he would have rejected the plea and insisted on going to trial. Much was made about when [defendant] received the discovery in this pre-indictment case. [P]lea counsel testified that he reviewed all the discovery that was provided to him with [defendant] early in this case. Counsel was clear that he based his recommendations on the cumulative evidence in this case and not simply from one piece of evidence. The record is devoid of information indicating that [defendant] was dissatisfied with his attorney's advice or that he wished to proceed to trial because he believed he was innocent. In fact, [defendant] did not allege in his certification nor testify at the evidentiary hearing that he is innocent.

The [c]ourt notes that even if [defendant] were not charged with first[-]degree aggravated sexual assault when the case went before the [g]rand [j]ury, he would have been charged with second-degree sexual assault pursuant to N.J.S.A. 2C:14-2(b). Both of these offenses are subject to the No Early Release Act [(NERA)], which requires an offender serve at least eighty-five percent of their sentence before becoming eligible for parole. N.J.S.A. 2C:43-7.2. Here, [defendant] received the benefit of a pre-indictment plea to second[-]degree endangering the welfare of a child, which carries a potential sentence of up to ten

> years. In exchange for his guilty plea, the State agreed to recommend a sentence of "five flat," which is at the bottom end of the second[-]degree range. In light of this very favorable plea offer and the State's evidence against [defendant], it is difficult for the [c]ourt to believe that [defendant] would have rejected the plea offer and proceeded to go to trial.

The judge then addressed defendant's Megan's Law argument:

> Here, [defendant's] claim that he was uninformed about the requirements of Megan's Law is belied by the record. When [defendant] pled guilty, Judge Rose asked [defendant] if he reviewed and answered all of the questions in the supplemental plea forms for certain sexual offenses. [Defendant] responded in the affirmative. Included in the supplemental plea forms, which [defendant] affirmed that he understood were the registration requirements of Megan's Law, the community notification requirements, and that he will be subject to provisions and conditions of parole, including conditions appropriate to protect the public and foster rehabilitation, such as restrictions on where he lives and works. Additionally, Judge Rose specifically asked [defendant] if he understood that he would have to register for Megan's Law and Parole Supervision for Life to which [defendant] responded in the affirmative. Accordingly, [defendant] has failed to demonstrate a prima facie case that plea counsel failed to inform [defendant] about Megan's Law.

Finally, the judge addressed defendant's argument regarding the length of his sentence:

> [Defendant's] claim that plea counsel misinformed him about the length of his sentence is similarly rejected. Specifically,

> [defendant] claims that he was told by plea counsel he would only serve sixteen months. In the plea forms, which [defendant] signed and reviewed with plea counsel, it clearly indicates that [defendant] was only promised a "[f]ive [f]lat." While plea counsel and [defendant] may have been hoping he would receive parole in [sixteen] months, this was not a promise or guarantee made by plea counsel as to what would indeed happen. Similarly, the [p]arole [b]oard cannot be bound by such an understanding.

We apply the Strickland standard and review the reasonableness of counsel's assistance with "a heavy measure of deference to counsel's judgments." State v. Martini, 160 N.J. 248, 266 (1999) (quoting Strickland, supra, 466 U.S. at 691, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695). The judge aptly applied this standard and concluded that defendant's arguments did not support a finding of ineffective assistance of counsel. Moreover, plea counsel's alleged failure to advise defendant regarding the consequences of the plea deal is supported only by self-serving assertions and bare allegations. See State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999). Here, we find counsel's performance with respect to his representation of defendant – which included obtaining a favorable plea agreement – was well within the minimum standard of effective assistance of counsel.

Similarly, we find no basis in the record to support defendant's assertions that counsel was deficient or that he was not functioning in a manner guaranteed by the Sixth Amendment. See State v. Gaitan, 209 N.J. 339, 349-50 (2012) (citation omitted), cert. denied, ___ U.S. ___, 133 S. Ct. 1454, 185 L. Ed. 2d 361 (2013). Therefore, we conclude defendant has not made out a prima facie case of ineffective assistance of counsel. See Preciose, supra, 129 N.J. at 463.

Notwithstanding our determination as to the failure to make out a prima facie case, we briefly address the second Strickland prong. We hold with respect to the second prong, that defendant has failed to demonstrate how any alleged deficiency resulted in a prejudice that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698; Fritz, supra, 105 N.J. at 52 (citation omitted). When considering the entire record, we are persuaded that the alleged deficiencies here clearly fail to meet either the performance or the prejudice prong of the Strickland test.

Affirmed.