RECORD IMPOUNDED

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION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-5543-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WILFREDO RODRIGUEZ,

Defendant-Appellant.

Submitted August 1, 2017 – Decided November 28, 2017

Before Judges Sabatino and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 11-03-0406.

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

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Kerry J. Salkin, Assistant Prosecutor, on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Wilfredo Rodriguez appeals from the denial of his petition for post-conviction relief (PCR) without an evidentiary hearing. For the reasons that follow, we affirm.

In 2011, defendant pled guilty to first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1); second-degree sexual assault, N.J.S.A. 2C:14-2(b); and two counts of fourth-degree cruelty and neglect of children, N.J.S.A. 9:6-3. During the plea colloquy, defendant admitted he (1) inserted his fingers and penis into his cousin's vagina, who at the time of the incident was less than thirteen-years of age; (2) touched the vagina of an eleven-year old; and (3) although he and the two victims were fully clothed, rubbed his groin against the buttocks of two boys, ages six and seven.

Defendant was sentenced to a fifteen-year term of imprisonment at the Adult Diagnostic and Treatment Center on the conviction for first-degree aggravated sexual assault, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2; a seven-year term of imprisonment on the conviction for second-degree sexual assault, also subject to NERA; and an eighteen-month term of imprisonment for the two counts of cruelty and neglect of children. All sentences were ordered to run concurrently. Defendant did not file a direct appeal from his convictions and sentence.

In 2015, defendant filed a petition for post-conviction relief; assigned counsel subsequently filed a brief on defendant's behalf. The contention defendant asserted before the PCR court relevant to the issues on appeal was plea counsel informed him the State had DNA evidence directly linking him to the criminal acts with which he was charged. In fact, the State did not have such evidence.

Defendant argued had his attorney accurately represented the State did not have any incriminating DNA evidence, he would not have pled guilty and instead would have proceeded to trial. Defendant further argued counsel failed to review discovery with defendant, but a close reading of his argument is plea counsel did not advise defendant the State did not possess inculpatory DNA evidence.

The PCR court rejected defendant's argument and denied his petition for post-conviction relief. The court found even if plea counsel informed defendant the State possessed incriminating DNA evidence, it is implausible defendant credited such representation. The court reasoned defendant was aware any DNA evidence that existed would not have survived the passage of time between the commission of each criminal act and the time each act was reported to the police. Thus, the court determined, it was improbable defendant in fact relied upon the

attorney's misrepresentation the State possessed DNA evidence when defendant decided to plead guilty. The PCR court further concluded that, in light of the charges, the number of victims, and what court deemed a favorable plea offer, defendant would not have spurned such offer and have risked going to trial.

On June 27, 2016, the PCR court entered an order denying defendant's petition for post-conviction relief.

On appeal, defendant presents the following argument for our consideration.

> POINT I – MR. RODRIGUEZ IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT HIS ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL.

The brief clarifies defendant challenges those determinations made by the PCR court that are addressed above.

As a self-represented litigant, defendant filed a brief in reply to the State's brief, in which he asserts the following arguments:

> POINT I – PETITIONER PRESENTED A PRIMA FACIE CLAIM TO SUPPORT HIS REQUEST FOR POST-CONVICTION RELIEF AND THEREFORE IS ENTITLED TO AN EVIDENTIARY HEARING.
>
> POINT II – THE EVIDENCE IN THE CASE FAILS TO SUPPORT THE CHARGES.

In his brief, defendant argues he did not know the DNA evidence would have diminished or dissipated over time, and that the

factual basis for his plea to first-degree aggravated sexual assault was deficient.

The standard for determining whether counsel's performance was ineffective for purposes of the Sixth Amendment 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). In order to prevail on a claim of ineffective assistance of counsel, defendant must meet a two-prong test. The first prong is counsel's performance was deficient and he or she made errors so egregious counsel was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution. Strickland, supra, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 2068, 80 L. Ed. 2d at 693, 698.

The second prong is the defect in performance prejudiced defendant's rights to a fair trial and there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Ibid. If a defendant has pled guilty, the second prong a defendant must fulfill is "'there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty but would have insisted on going to trial.'" State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)).

Here, we cannot find support in the record defendant was aware the State was not in possession of DNA evidence that linked him to the subject criminal acts. We also question, without deciding, the trial court's assumption defendant, a lay person, would have known any DNA evidence in this matter would have been destroyed by the time he was charged. However, we concur with the court defendant failed to present any evidence that, but for plea counsel's alleged errors, there was a reasonable probability defendant would not have pled guilty and instead have insisted on going to trial. See ibid.

There were four victims and four different crimes, making this matter eligible for four consecutive sentences pursuant to State v. Yarbough, 100 N.J. 627, 643-44 (1985). However, under the plea agreement, the State agreed to recommend the sentences on the four convictions run concurrently, and that the aggregate sentence be limited to fifteen years. We agree with the PCR court defendant secured a favorable plea agreement.

In our view, defendant failed to show it was probable that had he known the State did not possess damaging DNA evidence, he would have rejected the plea offer and have gone to trial, risking the imposition of a far greater term of imprisonment if he did not prevail. Accordingly, defendant did not make a prima

facie showing of ineffectiveness of plea counsel sufficient to satisfy the Strickland-Fritz standard.

We have considered the argument the factual basis to defendant's plea to first-degree aggravated sexual assault was insufficient. This argument was raised for the first time in a reply brief; it is improper for a party to use a reply brief to advance an issue for the first time. See L.J. Zucca, Inc. v. Allen Bros. Wholesale Distribs. Inc., 434 N.J. Super. 60, 87 (App. Div.), certif. denied, 218 N.J. 273 (2014). In addition, this argument was not raised before the PCR court. "Generally, an appellate court will not consider issues, even constitutional ones, which were not raised below." State v. Galicia, 210 N.J. 364, 383 (2012). Even if this issue had been raised, the PCR court did not address this question in its opinion and, thus, we decline to do so in the first instance. Duddy v. Gov't Emps. Ins. Co., 421 N.J. Super. 214, 221 (App. Div. 2011).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION