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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-0332-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

STEVEN PARKEY, a/k/a
JAMES INGRAM, MICHAEL
PARKEY, SPANKY and SPANKEY
PARKEY,

Defendant-Appellant.

Submitted January 18, 2018 – Decided April 10, 2018

Before Judges Rothstadt and Gooden Brown.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Indictment No.
11-03-0354.

Joseph E. Krakora, Public Defender, attorney
for appellant (Robert Carter Pierce,
Designated Counsel, on the brief).

Andrew C. Carey, Middlesex County Prosecutor,
attorney for respondent (Joie Piderit,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant, Steven Parkey, appeals from the denial of his petition for post-conviction relief (PCR) without an evidentiary hearing. For the reasons that follow, we vacate the order denying PCR and remand for reconsideration.

Defendant pled guilty to one count of aggravated manslaughter, N.J.S.A. 2C:11-4(a), during his 2014 trial on charges of murder, N.J.S.A. 2C:11-3(a)(1) to (3); attempted sexual assault, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:14-2(c); and weapons charges, N.J.S.A. 2C:39-4(d) and N.J.S.A. 2C:39-5(d). He pled guilty during his trial while the jury was deliberating. The judge imposed a sentence of twenty-five years' imprisonment, with twelve and one-half years of parole ineligibility, in accordance with defendant's plea agreement.

During defendant's trial, the judge conducted a Sands¹ hearing to determine the admissibility of defendant's five prior convictions for indictable offenses. At the conclusion of the hearing, the judge held that his four earlier convictions could not be admitted because they were too remote and ruled that only defendant's last conviction from 2006 would be admissible. The next day, however, the judge reconsidered her decision and ruled

¹ A court must conduct a hearing, pursuant to State v. Sands, 76 N.J. 127 (1978), to determine whether a defendant's prior convictions are admissible to impeach the defendant's credibility if he or she testifies at trial.

that all five prior convictions could be admitted for impeachment purposes. Although defense counsel expressed his surprise and asked the judge to reconsider, the judge maintained that all of the convictions would be admitted. Defendant thereafter decided he would not testify and ultimately pled guilty to the aggravated manslaughter.

Defendant filed a direct appeal, arguing only that his sentence was excessive. We affirmed his sentence, but remanded solely for the vacating of certain financial penalties imposed by the trial judge. State v. Parkey, No. A-4097-13 (App. Div. Sept. 3, 2014).

Defendant filed a PCR petition on August 5, 2015, in which he argued that he received ineffective assistance of trial counsel because his attorney's "errors concerning [the] Sands hearing led [him] to take a plea he otherwise would not have taken." He also contended that his attorney made errors in his arguments at sentencing about the aggravating and mitigating factors that the judge should consider before imposing sentence. In addition, defendant averred that the trial judge made errors in her Sands determination and sentence, and that appellate counsel erred by failing to raise those errors on appeal.

A brief and an amended petition were submitted on behalf of defendant in March 2016. In this brief, defendant contended that

trial counsel failed "to argue New Jersey Rule of Evidence 609 did not apply" and "failed to argue any mitigating factors at [his] sentencing." He also asserted that the trial judge "erred by not holding a Sands hearing pretrial[,]" and, citing State v. Slater, 198 N.J. 145 (2009), he argued that he should be allowed to withdraw his plea.

On August 24, 2016, the PCR judge, who was also the trial and sentencing judge, issued an order and fifteen-page statement of reasons denying defendant's petition. However, she limited her review of the Sands issues to her initial decision at trial to admit defendant's one prior conviction in 2006. She concluded that contrary to defendant's PCR arguments, he did not receive ineffective assistance of counsel by virtue of her admission of the one prior conviction, as there was no legal basis to exclude it from being admitted if defendant testified. The judge also found that even if counsel rendered ineffective assistance, defendant would still have pled guilty to the one charge as he received a very favorable plea offer that not only substantially reduced his exposure to prison, but was also more favorable than the State's pretrial offer. The judge did not mention her

subsequent decision during trial to admit all of defendant's other prior convictions.²

Defendant presents the following issues for our consideration in his appeal.

POINT I

THE PCR COURT ERRED BY DENYING MR. PARKEY AN EVIDENTIARY HEARING BECAUSE MR. PARKEY ESTABLISHED A PRIMA FACIE CASE THAT DEFENSE COUNSEL WAS INEFFECTIVE FOR HIS FAILURE TO ARGUE TO THE TRIAL COURT THAT FED. R. EVID. 609(b) WAS CONTROLLING AT MR. PARKEY'S SANDS HEARING.

A. THE PREVAILING LEGAL PRINCIPLES REGARDING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, EVIDENTIARY HEARINGS AND PETITIONS FOR POST CONVICTION RELIEF.

B. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PLEA STAGE BECAUSE COUNSEL FAILED TO PROPERLY ARGUE THE SANDS MOTION, WHICH WAS THE REASON FOR THE PLEA.

² According to defendant, the judge was not provided on PCR with a copy of the trial transcript from the day on which she reconsidered her decision and allowed all of the convictions to be admitted.


POINT II

MR PARKEY WAS DEPRIVED OF THE
EFFECTIVE ASSISTANCE OF PCR
COUNSEL. (Not Raised Below).^[3]

Under the circumstances presented here, we are constrained to vacate the denial of defendant's petition and remand for reconsideration of his petition anew to allow the judge to evaluate his entitlement to relief in the context of the judge's actual Sands decision and the events that occurred at trial.

The order under appeal is vacated and the matter is remanded to the Law Division for reconsideration. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION

³ We need not address this contention in light of our disposition of this appeal and since claims of ineffective assistance of PCR counsel are best addressed in a second petition for relief. See R. 3:22-4(b)(2)(C).