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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-0426-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JEROD K. WISE,

Defendant-Appellant.

Submitted December 4, 2017 – Decided March 15, 2018

Before Judges Messano and O'Connor.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No. 10-
05-1273.

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

Robert D. Laurino, Acting Essex County
Prosecutor, attorney for respondent (Frank J.
Ducoat, Special Deputy Attorney
General/Acting Assistant Prosecutor, of
counsel; Samantha Monteleone, on the brief).

Appellant filed a pro se supplement brief.

PER CURIAM

A jury convicted defendant Jerod K. Wise of first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2), and the judge sentenced defendant to life imprisonment with a thirty-five year period of parole ineligibility. We affirmed defendant's conviction on direct appeal and remanded for resentencing because the period of parole ineligibility did not comply with the requirements of the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. State v. Jerod K. Wise, No. A-1672-11 (App. Div. Nov. 22, 2013) (slip op. at 3, 16-17). The Supreme Court denied defendant's petition for certification. 218 N.J. 274 (2014). On resentencing, the judge again imposed a life sentence, along with a period of parole ineligibility of sixty-three years and nine months as required by NERA.

Defendant filed a pro se petition for post-conviction relief (PCR) alleging the ineffective assistance of counsel (IAC). He specifically claimed trial counsel failed to assert passion/provocation manslaughter as a defense, was ineffective during plea negotiations and provided incorrect advice regarding defendant's maximum sentence exposure.

After the court appointed PCR counsel, defendant filed a supplemental certification in which he claimed trial counsel told him the maximum sentence he could receive if convicted at trial was life imprisonment with a thirty-year period of parole

ineligibility. Defendant certified that had he known he could receive the actual sentence imposed by the judge, i.e., life with a period of parole ineligibility that exceeded sixty-three years, he would have pled guilty rather than go to trial. PCR counsel included a copy of the "Pretrial Memorandum," executed by trial counsel, defendant and the prosecutor, which indicated the maximum sentence defendant faced if convicted of murder was life imprisonment with thirty years of parole ineligibility. The memorandum also stated, however, that there was no plea offer by the State.¹

In an oral opinion, the PCR judge, who was also the trial judge, addressed all of the issues defendant raised and denied the petition. This appeal followed.

Defendant contends trial counsel rendered ineffective assistance by misadvising him regarding the maximum sentence exposure defendant faced if convicted at trial. As to this particular IAC claim, the PCR judge found defendant failed to meet

¹ Defendant's certification further stated that he rejected the State's plea offer of eighteen years, subject to NERA, on the advice of his attorney, and trial counsel never discussed with him the possibility of passion/provocation manslaughter as a defense. The PCR judge considered and rejected these arguments, and defendant does not raise them on appeal.

the Strickland/Fritz² test. He noted that in addition to the Pretrial Memorandum, which indicated there was no plea offer at all, the transcript of a status conference before trial corroborated the State had not extended a plea offer. The judge stated: "In the absence of a plea offer, defendant's only options were to plead to the indictment without any recommendation as to the sentencing . . . [or] go to trial." The judge reasoned "[a]ny misrepresentations . . . without a plea offer [were] of no consequence since there is nothing to compare it with or for petitioner to consider." In short, the judge concluded defendant suffered no prejudice from trial counsel's error.

To establish an IAC claim, a defendant must satisfy the two-prong test formulated in Strickland, 466 U.S. at 687, and adopted by our Supreme Court in Fritz, 105 N.J. at 58. A defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Id. at 52 (quoting Strickland, 466 U.S. at 687). Second, a defendant must prove he suffered prejudice due to counsel's deficient performance. Strickland, 466 U.S. at 687. A defendant must show by a "reasonable probability" that the deficient performance affected the outcome. Fritz, 105 N.J. at

² Strickland v. Washington, 466 U.S. 668 (1984); State v. Fritz, 105 N.J. 42 (1987).

58. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Pierre, 223 N.J. 560, 583 (2015) (quoting Strickland, 466 U.S. at 694; Fritz, 105 N.J. at 52). "[A]n attorney's gross misadvice of sentencing exposure that prevents defendant from making a fair evaluation of a plea offer and induces him to reject a plea agreement he otherwise would likely have accepted constitutes remediable ineffective assistance." State v. Rountree, 388 N.J. Super. 190, 214 (App. Div. 2006) (quoting State v. Taccetta, 351 N.J. Super. 196, 200 (App. Div.), certif. denied, 174 N.J. 544 (2002)).

The PCR judge concluded that since there was no plea offer, defendant could not have suffered any prejudice from defense counsel's erroneous statement of the maximum period of parole ineligibility. However, the transcript from the status conference provides more detail as to why there was no plea offer from the State.

Defendant faced life imprisonment if convicted of murder. It is unclear whether the State actually made a plea offer, but defense counsel told the judge at the status conference he "countered" with an offer that defendant would plead guilty to second-degree manslaughter and face a maximum sentence of six years, subject to NERA. The judge pressed the prosecutor whether the State would consider "aggravated manslaughter," but defense

counsel acknowledged defendant would not "consider[] discussing" a guilty plea to aggravated manslaughter.

The judge asked defendant if he wanted his attorney to continue plea negotiations, and defendant said, "[h]e can discuss further." There was a brief recess. When the proceedings resumed, the judge spoke directly to defendant, who acknowledged he did not want counsel to "continue plea discussions" and rather "wish[ed] to get a trial date."

We evaluate this complete record, which defendant highlights in his pro se supplemental brief, in light of the undisputed fact that during these discussions, defense counsel labored under the mistaken impression that the maximum period of parole ineligibility was thirty years, as demonstrated by the Pretrial Memorandum. We can reasonably presume, even in the absence of an evidentiary hearing, that defense counsel conveyed that erroneous information to defendant. But, we cannot presume, in the absence of an evidentiary hearing, that defendant would have terminated plea negotiations if he understood that he faced the potential for more than sixty years of parole ineligibility if convicted at trial. Without a more extensive record, the PCR judge's conclusion that defendant suffered no prejudice because there was no plea offer lacks sufficient support.

However, regardless of what an evidentiary hearing regarding the plea negotiations might reveal, we affirm the order denying defendant's PCR petition for a different, purely legal reason. See Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001) ("[I]t is well-settled that appeals are taken from orders and judgments and not from opinions, oral decisions . . . or reasons given for the ultimate conclusion.").

Defendant gave a statement to police in which he asserted self-defense, and reiterated this claim during his testimony at trial. Wise, slip op. at 5. Defendant testified that he had "swung" his knife in the victim's direction, attempting to scare him, and did not realize "the knife connected with the guy at all." Id. at 6. Trial counsel stressed self-defense in his summation, and the judge charged the jury with that affirmative defense. Id. at 7.

The Court has clearly stated that a defendant is not entitled to PCR relief by claiming he would have pled guilty to a more favorable plea offer, while at the same time maintaining his innocence. State v. Taccetta, 200 N.J. 183, 186 (2009). In Taccetta, the defendant was convicted of numerous crimes and sentenced to life imprisonment, plus ten years, and a thirty-year period of parole ineligibility. Id. at 185. On PCR, the judge found the defendant would have accepted a more favorable plea

offer but for the ineffective assistance of counsel, who misinformed the defendant of his sentencing exposure if convicted. Id. at 189-90. We affirmed the PCR court's grant of a new trial. Id. at 186.

The Court, however, said that as a matter of law, the "defendant could not have entered a plea of guilty" to the purported more favorable plea offer. Id. at 194.

We reach that conclusion for the simple reason that a defendant does not have the right to commit perjury in giving a factual basis for a crime that he insists he did not commit. Therefore, even if defendant met the first prong of the Strickland/Fritz standard -- that his counsel was constitutionally ineffective for giving him mistaken advice about the sentencing consequences of proceeding to trial -- defendant cannot satisfy the second prong of that standard, which requires a showing of prejudice.

[Id. at 194-95.]

"Our court rules and case law require a factual basis for a plea of guilty, that is, a truthful account of what actually occurred to justify the acceptance of a plea." Id. at 198.

As noted, here, defendant testified under oath that he acted in self-defense. A defendant who asserts facts that imply he acted in self-defense cannot provide an adequate factual basis for a guilty plea to aggravated manslaughter, State v. Urbina, 221 N.J. 509, 528 (2015), much less an adequate factual basis for a

guilty plea to murder. "A defendant may not plead guilty to an offense while maintaining his innocence because [a] [c]ourt will not sanction perjury as a permissible basis to resolve pending criminal charges by way of a guilty plea." State v. Perez, 220 N.J. 423, 433 (2015) (citing Taccetta, 200 N.J. at 195-96).

Therefore, defendant could not have pled guilty to aggravated manslaughter or murder because he necessarily would have had to provide a factual basis inconsistent with his assertion of self-defense. Counsel's ineffective assistance did not prejudice defendant.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION