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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-0498-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TIMOTHY M. CONNELL,

Defendant-Appellant.

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Submitted January 9, 2018 – Decided January 29, 2018

Before Judges Yannotti and Mawla.

On appeal from Superior Court of New Jersey,  
Law Division, Camden County, Indictment No.  
10-11-3173.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Andrew R. Burroughs, Designated  
Counsel, on the brief).

Mary Eva Colalillo, Camden County Prosecutor,  
attorney for respondent (Patrick D. Isbill,  
Assistant Prosecutor, of counsel and on the  
brief).

PER CURIAM

Defendant Timothy M. Connell appeals from an order entered by the Law Division on July 29, 2016, which denied his petition for post-conviction relief (PCR). We affirm.

Defendant entered a plea of guilty to first-degree armed robbery, N.J.S.A. 2C:15-1, and second-degree robbery, N.J.S.A. 2C:15-1. Pursuant to a negotiated plea agreement, defendant received a sentence of eighteen years of incarceration, with an eighty-five percent period of parole ineligibility, pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, for the first-degree armed robbery. He also received a concurrent sentence of ten years of incarceration subject to NERA on the second-degree robbery. The judgment of conviction states the sentences are to run concurrent with any sentence to be imposed for a federal parole violation.

Defendant testified to the following factual basis in support of his guilty plea. He admitted to being at a TD Bank on August 27, 2009, in the Township of Cherry Hill when he encountered a bank teller. Defendant testified he attempted to commit a robbery of the bank using a handgun to threaten and ultimately force the bank teller to comply with his demand.

Defendant admitted to being at a second TD Bank on August 28, 2009, in Gloucester Township, at which he attempted to commit a robbery. Specifically, he admitted he wore a mask and presented

a bag to the bank teller demanding she put money in it. Defendant admitted that entering the bank with a mask over his face and handing the teller a bag before telling her to put money in it was a threat.

Defendant appealed his sentence. The appeal was heard on our Excessive Sentence Oral Argument (ESOA) Calendar, and we affirmed the sentence. State v. Connell, No. A-0766-11 (App. Div. April 17, 2012).

Thereafter, defendant filed a PCR petition in which he alleged he was denied the effective assistance of counsel. He claimed his attorney misled him to believe that the State sentence would run concurrently with any sentence imposed for a federal parole violation. Defendant argued his plea was not voluntary, intelligent, or knowing, and sought an evidentiary hearing on the petition. The PCR judge found defendant failed to establish a prima facie claim of ineffective assistance of counsel and denied the petition without a hearing.

On appeal, defendant raises the following arguments:

POINT I — DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

POINT II — DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF IS NOT PROCEDURALLY BARRED.

POINT III — AS DEFENDANT'S ATTORNEY AFFIRMATIVELY MISLED HIM ABOUT THE COLLATERAL CONSEQUENCES OF ENTERING A GUILTY PLEA,

DEFENDANT'S GUILTY PLEA WAS NOT VOLUNTARILY,  
INTELLIGENTLY, AND KNOWINGLY MADE.

POINT IV – DEFENDANT DETRIMENTALLY RELIED UPON  
THE STATE'S REPRESENTATIONS TO ENTER A GUILTY  
PLEA.

POINT V – AS THERE ARE GENUINE ISSUES OF  
MATERIAL FACTS IN DISPUTE, AN EVIDENTIARY  
HEARING IS REQUIRED.

I.

The PCR process affords an adjudged criminal defendant a "last chance to challenge the 'fairness and reliability of a criminal verdict. . . .'" State v. Nash, 212 N.J. 518, 540 (2013) (quoting State v. Feaster, 184 N.J. 235, 249 (2013)); see also R. 3:22-1. As to our standard of review, "where the [PCR] court does not hold an evidentiary hearing, we may exercise de novo review over the factual inferences the trial court has drawn from the documentary record." State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014) (citing State v. Harris, 181 N.J. 391, 420-21 (2004)).

"Post-conviction relief is neither a substitute for direct appeal, [Rule] 3:22-3, nor an opportunity to relitigate cases already decided on the merits, [Rule] 3:22-5." State v. Preciose, 129 N.J. 451, 459 (1992).

Consequently, petitioners may be procedurally barred from post-conviction relief under Rule 3:22-4 if they could have, but did not, raise

the claim in a prior proceeding, unless they satisfy one of the following exceptions:

(a) that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; or (b) that enforcement of the bar would result in fundamental injustice; or (c) that denial of relief would be contrary to the Constitution of the United States or the State of New Jersey.

[Ibid.]

## II.

Defendant argues the PCR judge should have granted him an evidentiary hearing to address his claim trial counsel was ineffective for misleading him about the collateral consequences of entering a guilty plea. We disagree.

Rule 3:22-10(b) provides:

A defendant shall be entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of post-conviction relief, a determination by the court that there are material issues of disputed fact that cannot be resolved by reference to the existing record, and a determination that an evidentiary hearing is necessary to resolve the claims for relief. To establish a prima facie case, defendant must demonstrate a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits.

Furthermore, Rule 3:22-10(e) provides the court shall not grant an evidentiary hearing if: (1) it "will not aid [in] the court's analysis of the defendant's entitlement to post-conviction relief;" (2) "the defendant's allegations are too vague, conclusory or speculative; or" (3) the defendant is attempting to use the hearing to explore or investigate other possible unsubstantiated PCR claims.

The decision of whether to hold an evidentiary hearing on a PCR petition is committed to the sound discretion of the PCR judge. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). The judge should grant an evidentiary hearing and make a determination on the merits of a defendant's claim only if the defendant has presented a prima facie claim of ineffective assistance. Preciose, 129 N.J. at 462.

In determining whether a prima facie claim has been established, the facts should be viewed "in the light most favorable to a defendant." Id. at 462-63. Additionally, "[a] petitioner must establish the right to such relief by a preponderance of the credible evidence." Id. at 459. "To sustain that burden, specific facts must be alleged and articulated" to "provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

To establish ineffective assistance of counsel, defendant must satisfy a two-prong test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

[Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 52 (1987) (quoting Strickland, 466 U.S. at 687).]

Counsel's performance is evaluated with extreme deference, "requiring 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Fritz, 105 N.J. at 52 (quoting Strickland, 466 U.S. at 688-89). "To rebut that strong presumption, a [petitioner] must establish . . . trial counsel's actions did not equate to 'sound trial strategy.'" State v. Castagna, 187 N.J. 293, 314 (2005) (quoting Strickland, 466 U.S. at 689). "Mere dissatisfaction with a 'counsel's exercise of judgment' is insufficient to warrant overturning a conviction." Nash, 212 N.J. at 542 (quoting State v. Echols, 199 N.J. 344, 358 (2009)).

To demonstrate prejudice, "'actual ineffectiveness' . . . must [generally] be proved[.]" Fritz, 105 N.J. at 52 (quoting Strickland, 466 U.S. at 692-93). Petitioner must show the existence of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Ibid. (quoting Strickland, 466 U.S. at 694). Indeed,

[i]t is not enough for [a] defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

[Strickland, 466 U.S. at 693 (citation omitted).]

Here, the PCR judge noted the State cannot bind the federal prosecutor. The judge stated trial counsel represented defendant during the entry of his guilty plea and also at sentencing in state court for this matter, but that "[t]here [wa]s nothing in this state plea and this state sentence that could bind any federal authorities" nor was there any "legal authority" for such a proposition. The PCR judge held "[t]he fact that in this sentence . . . there was some knowledge that there was a federal parole violation pending . . . [indicates trial counsel] did everything



he could to at least have the [S]tate agree that this would run concurrent to any federal sentence."

Therefore, the PCR judge concluded:

I think, in this case, the attorney did everything he could to ensure – that was under his authority and under the state court's authority to get the best deal that he could in vis-à-vis, the federal sentence. . . . [T]here's really nothing that could have bound the federal authorities from making anything concurrent to the state. And . . . maybe once [defendant] goes to answer to the federal parole violation, they would be willing to make it concurrent to the state sentence and be willing to give him credit. . . . [I]t's the opinion of this Court that neither [defendant's] attorney at the plea and sentence, nor the sentencing Court, could have made the federal authorities act in any other way and make it concurrent to the federal sentence if the federal authorities feel that it should not be a concurrent sentence to the state sentence.

Ultimately, the PCR judge found that "there [was] no meeting of the minds yet on the federal matter so it could be that [defendant] eventually, when he answers to the federal charge, will have something run concurrent to the state charge[.]"

We agree. Defendant's adult presentence report made defendant aware his federal case, per his parole officer, would be stayed until defendant completed his state sentence and supervision would continue thereafter. The presentence report includes no representations that the federal matter was in some

way resolved or that any potential federal sentence would run consecutive or concurrent to the sentence imposed in this case. Furthermore, the sentencing court confirmed defendant understood this when it reviewed the terms and conditions of the plea agreement with defendant directly before accepting the plea.

The sentencing judge asked defendant, "You do know that this could trigger a violation of your federal parole, correct?" Defendant then replied, "Yes, Your Honor." The judge stated, "You could receive consecutive sentences. And there are some other charges in there that could also be consecutive, and all those could be consecutive to your federal sentence, as well, do you understand that?" Defendant replied, "Yes."

Thereafter, on the record, defendant signed the plea forms acknowledging he understood his pending federal parole violation was yet to be resolved and that there was no promise or representation, express or implied, binding the federal court to impose a specific sentence to any degree of certainty, concurrent or otherwise. When asked whether he was satisfied with trial counsel's services and if counsel had answered all of his questions, defendant twice answered, "Yes, Your Honor."

Defendant's PCR petition failed to demonstrate actual ineffectiveness of counsel or a reasonable probability the outcome would have been different had trial counsel alternatively informed

him that his federal charge could run consecutively to his state plea. The PCR judge correctly found defendant did not present a prima facie case of ineffective assistance of counsel and an evidentiary hearing was not required.

Moreover, defendant's argument that he did not enter a knowing, voluntary, and intelligent guilty plea is without merit. At his sentencing hearing, when the judge asked whether there was anything defendant wanted to say prior to the court imposing the sentence, defendant stated:

You know, you gave me a lot of sentencing scenarios during our . . . appearances here. That was a heavy influence of my . . . willingness to plea. I wrote you letters where from the second degree to the first one was - actually, I was considering trial on the first degree and the thing that persuaded me was your sentencing scenarios, the fact that you would give me the extended term on a conviction.

Defendant did not "reasonably and detrimentally" rely on the State's representation in entering his guilty plea. The record demonstrates his plea was knowing, voluntary, and intelligent.

Furthermore, defendant's argument that his claims should not be procedurally barred as a result of the ineffective assistance of appellate counsel as part of the ESOA hearing are without merit. Defendant's arguments could have been raised on direct appeal. "A petitioner is generally barred from presenting a claim on PCR that

could have been raised at trial or on direct appeal[.]” Nash, 212 N.J. at 546 (citing R. 3:22-4(a)).

The PCR judge did not find defendant's claims were procedurally barred. Moreover, defendant fails to demonstrate that appellate counsel's decision not to raise defendant's purported claims on direct appeal was anything other than the exercise of reasonable professional judgment and sound strategy, or that had appellate counsel raised the issues, there was a reasonable probability of a different outcome on appeal. State v. Hess, 207 N.J. 123, 147 (2011); Fritz, 105 N.J. at 52.

Defendant's remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION