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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-0650-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TERENCE L. THOMPSON,

Defendant-Appellant.

Submitted January 9, 2018 – Decided March 16, 2018

Before Judges Fasciale and Moynihan.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Indictment No.
97-06-1623.

Joseph E. Krakora, Public Defender, attorney
for appellant (John A. Albright, of counsel
and on the brief).

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

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant appeals from an August 9, 2016 order denying his application for post-conviction relief (PCR) but granting his application for a resentencing hearing. He argues:

POINT I

AFTER THE PCR COURT PROPERLY FOUND THAT DEFENDANT WAS NOT ADVISED OF HIS MAXIMUM SENTENCING EXPOSURE OR THAT HE WAS EXTENDED TERM ELIGIBLE, THE COURT ERRED IN THE REMEDY FOR TRIAL COUNSEL'S CONSTITUTIONALLY DEFICIENT PERFORMANCE – DEFENDANT SHOULD HAVE BEEN PLACED IN THE POSITION HE WOULD HAVE BEEN IN BUT FOR THE MISADVICE, AND AFFORDED AN OPPORTUNITY TO ACCEPT THE PLEA OFFER OF TWENTY YEARS WITH A TEN-YEAR PAROLE DISQUALIFIER.

And in his pro se supplemental brief he raised the following additional argument:

POINT I

THE PCR . . . JUDGE ABUSED HER DISCRETION BY FAILING TO APPLY THE PROPER REMEDY WHICH WAS TO REOFFER THE PLEA ONCE THE STATE CONCEDED THAT DEFENDANT WAS NEVER ADVISED BY HIS TRIAL ATTORNEY AND ALSO MISADVISED ON [THE] RECORD OF HIS TRUE SENTENCING EXPOSURE, AND BY DEVISING A REMEDY THAT IMPOSED A SENTENCE THREE-TIME[S] GREATER THAN THE PLEA OFFER THEREFORE THIS MATTER SHOULD BE REMANDED FOR THE ORIGINAL PLEA TO BE REOFFERED.

We conclude the PCR court correctly denied defendant's PCR petition. Inasmuch as the petition was denied, the court had no authority to resentence defendant. We therefore vacate the judgment of conviction (JOC) the PCR judge entered and remand this case for re-entry of the original JOC.

We need not set forth the long procedural history of this case. It suffices to say defendant was convicted by a jury on February 10, 2000, of first-degree felony murder, N.J.S.A. 2C:11-3(a)(3), and other charges relating to that crime. He received an extended-term sentence of life imprisonment without parole. After our remand from the Excessive Sentence Oral Argument calendar for consideration of gap-time credits, we subsequently affirmed his convictions,¹ State v. Thompson, No. A-1745-00 (App. Div. Dec. 4, 2003), certif. denied, 179 N.J. 373, cert. denied, 543 U.S. 888 (2004). Defendant's first PCR application was denied in October 2011; we affirmed that denial, State v. Thompson, No. A-3528-08 (App. Div. Feb. 15, 2011), certif. denied, 207 N.J. 35 (2011). Defendant thereafter commenced a § 2254² action in the United States District Court alleging, in part, that he was unaware of his sentencing exposure to life without parole at the time he rejected the State's plea offer. The District Court judge entered a stay of proceedings pending the filing of a second PCR regarding the sentencing exposure issue. Thompson v. Warren, No. 11-7164,

¹ We, again, remanded the case to effect the merger of certain offenses. Defendant's sentence on the felony murder conviction remained unchanged.

² 28 U.S.C. § 2254(a) (authorizing a federal district court to "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court" on the grounds of a constitutional violation).

2015 U.S. Dist. LEXIS 1207 (D.N.J. Jan. 7, 2015). That PCR was filed on February 25, 2015.

Our review of an order granting or denying PCR involves consideration of mixed questions of fact and law. State v. Harris, 181 N.J. 391, 415-16 (2004). We defer "to a PCR court's factual findings based on its review of live witness testimony" and will uphold findings that are "supported by sufficient credible evidence in the record." State v. Nash, 212 N.J. 518, 540 (2013). However, "we need not defer to a PCR court's interpretation of the law," which we review de novo. Id. at 540-41.

The PCR judge conducted an evidentiary hearing, reviewed the transcript of the pre-trial conference, and concluded

the defendant was not properly advised of what his exposure was had he been convicted after trial. He was advised by the [pre-trial conference court] his sentence would be at least a life sentence with thirty years without parole, when in all actuality his exposure with him being extended term eligible was a life do life sentence.

The judge found trial counsel's failure to discuss with defendant his extended-term eligibility prior to his conviction proved counsel met the first Fritz-Strickland³ prong.

³ State v. Fritz, 105 N.J. 42 (1987); Strickland v. Washington, 466 U.S. 668 (1984).

The judge, however, carefully considered the pre-trial conference transcript; medical records; a photograph proffered by defendant; letters from counsel; and defendant's testimony at the evidentiary hearing, and determined defendant's medical condition at the time of the pre-trial conference did not cause defendant to reject the State's plea offer. The judge expounded:

[I]n watching [defendant's] testimony, which I don't find totally credible at all, I note that when he was presented with the question as to whether or not he would have accepted . . . the plea, he hesitated and he dropped his head and he [said] he would have accepted the plea in a heartbeat. And I'm not convinced of that.

She concluded defendant failed to meet his burden of establishing that there was "a reasonable probability that but for [trial counsel's misadvice] regarding [defendant's] sentence exposure he would have accepted the plea offer." The record supports her well-reasoned decision denying the PCR petition.

Defendant's PCR petition was the only application before the PCR court and the denial of that application should have ended the matter. The judge, after the PCR denial, despite the agreement by the State, was without authority to resentence defendant.

Even if the petition was granted,

the best method of vindication and the fairest both to the State and to defendant, would be to return defendant to the position he was in prior to the plea offer. The State would then


have the option of renegotiating a plea, and if it chose not to or if defendant rejected any offer made, he would then have the right to a new trial.

[State v. Taccetta, 351 N.J. Super. 196, 201 (App. Div. 2002).]

We therefore vacate the JOC entered by the PCR judge, and remand for entry of a JOC consistent with the originally imposed sentence.

Affirmed in part, reversed in part.

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


CLERK OF THE APPELLATE DIVISION