SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0745-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

T.L.,

Defendant-Appellant.

Submitted September 11, 2017 – Decided January 17, 2018

Before Judges Sabatino and Ostrer.

On appeal from Superior Court of New Jersey, Law Division, Sussex County, Indictment No. 07-08-0372.

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

Francis A. Koch, Sussex County Prosecutor, attorney for respondent (Shaina Brenner, Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant T.L. appeals from the trial court's order denying, without an evidentiary hearing, his petition for post-conviction

relief. Defendant collaterally challenges his conviction of one count of first-degree endangering the welfare of a child, his daughter Alicia[1]; and two counts of second-degree endangering the welfare of a child, respectively, Alicia and her sister, Betty. Defendant received an aggregate sentence of twenty-two years, with eleven years of parole ineligibility, subject to Megan's Law and Community Supervision for Life.

I.

Alicia and Betty revealed defendant's offenses to a local police officer when Alicia was over twenty-one years old, and Betty was still a teenager. In oral and written statements, they told the officer that defendant's offenses began when they were each seven or eight and his attempts continued for years until shortly before their disclosures.

Alicia stated that defendant fondled and took photos and video-recordings of her breasts, vagina and anal area. She stated that he had her touch his erect penis and he touched and kissed her vagina and breasts. He bought a vibrator for her when she was twelve or thirteen, and, over the years, videotaped her masturbating. He also trimmed her pubic hair, and saved it. Alicia also alleged defendant made her wear skirts or long tee-

[1] We use pseudonyms, to protect the children's privacy.

shirts without undergarments on, so he could look at her genitals. Although defendant told her it was her "choice," he would be "nasty[,] mean" and "manipulate" her if she resisted him. Alicia reported that defendant kept the pictures and videos in a safe in his basement workshop, although he told her he burned the evidence.

Betty also reported that defendant fondled her and made her pose nude for photographs and videos. As with Alicia, defendant purported to permit Betty to refuse, but "would get mad and upset and not talk to [her]" if she did. She alleged defendant made her walk around their backyard naked. He also "tested" her on the parts of her genital area, having her touch and identify them; and then had her identify and touch his genitals. In the course of that activity, defendant would try to masturbate Betty. Betty stated that defendant had the pictures saved on a flash drive, which he kept in his wallet.

The young women's brother told the officer he found a folder on the family computer containing nude photos of his sisters.

Based on the three children's statements, the officer sought and obtained a search warrant for defendant's home and his person. Police thereafter seized a locked box from his workshop, which contained eighteen VCR tapes, as well as a portable flash drive

from defendant.[2] The videotapes, made between 1997 and 2003, and the photographs, dating back to the children's pre-teen years, substantiated the sisters' statements. In particular, recordings depicted Alicia as she masturbated with a vibrator at defendant's direction, and depicted defendant as he rubbed his eldest daughter's anal and vaginal area with his hand, and manipulated and touched the inside of her vagina. In some of the videos, Alicia is heard speaking to defendant; in others, defendant is seen or heard.

In a post-Miranda[3] interview, defendant admitted he photographed and video-recorded his daughters in the nude over several years. He admitted he made his daughters touch themselves for his gratification. However, he denied touching the two girls.

Defendant was charged in a forty-nine count indictment. Most seriously, he was charged with two counts of first-degree aggravated sexual assault of Alicia, N.J.S.A. 2C:14-2(a), -2(a)(2)(A); and five counts of first-degree endangering the welfare of a child, Alicia and Betty, N.J.S.A. 2C:24-4(b)(3). With respect to both daughters, he was also charged with multiple counts

[2] The recordings and photographs are not in the record. We rely on the description of them provided by police witnesses before the grand jury.

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

of second-degree sexual assault, N.J.S.A. 2C:14-2(b), -2(c)(3); second-degree endangering the welfare of a minor, N.J.S.A. 2C:24-4(a), -4(b)(3), -4(b)(4); third-degree aggravated criminal sexual contact, N.J.S.A. 2C:14-3(a); fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b); and fourth-degree endangering the welfare of a minor, N.J.S.A. 2C:24-4(b)(5)(B).

Defendant's plea agreement went through three iterations. Defendant initially pleaded guilty to first- and second-degree endangering the welfare of each daughter. With respect to the first-degree counts, defendant admitted that when his daughters were under sixteen years old, he filmed Alicia while she masturbated, and filmed Betty while she was nude for the sexual stimulation or gratification of a potential viewer. For purposes of the second-degree counts, he admitted that while he filmed Alicia and Betty, he knowingly engaged in sexual conduct that would impair or debauch his daughters' morals.

The plea agreement provided that defendant would receive, on the first-degree offenses, consecutive terms of eleven years, with five-and-a-half years of parole ineligibility. Seven-year terms for the second-degree offenses would be concurrent with each other, and with the twenty-two-year sentence for the first-degree offenses.

Before sentencing, defendant underwent a psychological evaluation at the Adult Diagnostic and Treatment Center (ADTC). The examiner opined that defendant's conduct was repetitive, compulsive and stemmed from feelings of sexual attraction toward his daughters, notwithstanding his claims that he was simply attempting to educate them and express an openness to nudity similar to those who reside in nudist colonies. The examiner stated that defendant was amenable to treatment, and should be incarcerated at ADTC. At sentencing, defense counsel stated that defendant was willing to participate in treatment.

The court questioned whether it could justify sentencing defendant at the low end of the first-degree range, which required placing significant weight on mitigating factors, yet impose mandatory minimum periods of parole ineligibility, which required placing significant weight on aggravating factors. The parties then revised the plea agreement. In its new formulation, defendant would be sentenced to concurrent terms of fifteen years, with seven-and-a-half years of parole ineligibility, for the two first-degree offenses, consecutive to concurrent terms of seven years, with three-and-a-half years of parole ineligibility, for the two second-degree offenses. The aggregate sentence remained twenty-two years, with an eleven-year period of parole ineligibility.

After securing defendant's consent to the revised agreement, the court sentenced him accordingly.

In defendant's direct appeal, which we heard on an Excessive Sentencing Oral Argument calendar, we held that the aggregate sentence was not excessive. However, we remanded for consideration whether the second-degree offense for each child should be merged into the first-degree offense. State v. [T.L.], No. A-2928-08 (App. Div. July 30, 2010).

Upon remand, it was apparent that merger would complicate the effort to fashion a plea agreement that produced the aggregate sentence of twenty-two years with an eleven-year parole ineligibility period. Consequently, the State agreed to merger of the counts involving Alicia, and dismissed the first-degree count involving Betty. The court then resentenced defendant to fifteen years, with a seven-and-a-half year period of parole ineligibility on the first-degree offense involving Alicia consecutive to seven years, with a three-and-a-half-year period of parole ineligibility on the second-degree offense involving Betty — for an aggregate twenty-two years, with eleven years of parole ineligibility.

II.

Defendant filed a timely petition for PCR. His lengthy pro se petition was accompanied by a 219-page pro se brief, which was

followed by three subsequent counseled briefs.[4] At oral argument, counsel contended that defendant should be allowed to withdraw his plea because his attorney coerced him into accepting it; and his attorney told him that the judge would likely sentence him to a ten-year term, with five years of parole ineligibility. Counsel also argued that defendant did not consent to the modifications of the plea agreement, and that the judge's initial hesitation to sentence him in accord with the first plea agreement should have nullified his plea. He also contended counsel should have filed a Miranda motion to exclude defendant's confession, and should have made a more effective argument at sentencing.

Judge Thomas J. Critchley denied the petition in an oral opinion that focused on the points raised at the hearing. The judge observed that the plea agreement was mutually beneficial, as it significantly reduced defendant's sentencing exposure, while shielding the victims from the emotional turmoil of testifying at trial. Based on defendant's statements in the plea colloquies, the court rejected his assertions in his petition that he was coerced or misled into pleading, or that he did not consent to the subsequent modifications. The judge concluded that defense

[4] For the sake of completeness, we include those points in an appendix at the end of this opinion.

counsel was far from deficient in his sentencing argument. The court noted that defendant did not assert his innocence.

While questioning the merits of a potential Miranda motion, in light of defendant's signed Miranda card, the court concluded there was no prejudice from foregoing such a motion. The court noted the evidence against defendant was overwhelming; the search and seizure of the photos and videos did not depend on his custodial statement; and motion practice would likely have led to less favorable plea offers.

On appeal, defendant presents the following points in his counseled brief:

> POINT I
>
> THE PCR COURT'S ORDER THAT DENIED DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF MUST BE REVERSED BECAUSE DEFENDANT CLEARLY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN THE PROCEEDINGS BELOW.
>
> A. Defense Counsel's Gross Misrepresentation of the Defendant During the Plea Phase of the Proceedings Caused Defendant to Enter Into an Involuntary, Unknowingly and Unintelligent Guilty Plea.
>
> 1. Plea counsel affirmatively misinformed Defendant about the Sexually Violent Predator's Act, N.J.S.A. [] 30:4-27.24 to -38 ("SVPA"), consequences of his plea.
>
> 2. Plea counsel failed to object to the entry of the amended plea although said plea violated R. 3:9-2.

3. Plea counsel failed to warn Defendant of the post release supervision consequences of his plea.

4. Plea Counsel Coerced Defendant Into Pleading Guilty.

B. Defendant Further Complains That He Received Ineffective Assistance of Counsel Even Prior To The Guilty Plea Phase of His Case.

1. Defense counsel failed to file a meritorious Fifth Amendment suppression motion.

2. Counsel[] failed to properly investigate.

C. Sentencing Counsel Provided Ineffective Assistance of Counsel.

1. Sentencing Counsel Failed To Challenge The ADTC Report and PSR.

2. Sentencing counsel failed to challenge the aggravating factors found by the court and to argue in favor of mitigating circumstances supported by the record.

3. Sentencing counsel failed to argue for a downgraded sentence although T.L. had no prior criminal history.

D. Re-sentencing Counsel Provided Ineffective Assistance of Counsel.

E. Appellate Counsel Provided Ineffective Assistance of Counsel.

POINT II

THE COURT SHOULD REMAND THE MATTER FOR AN EVIDENTIARY HEARING.

In a pro se brief, defendant adds the following points for our consideration:

Point I

THE SUSSEX COUNTY POST CONVICTION RELIEF COURT FAILED TO FIND THAT THE RECORD SUPPORTS THE FACT THAT THE SENTENCING COURT REJECTED [T.L.]'S PLEA AGREEMENT AT SENTENCING.

Point II

THE SUSSEX COUNTY POST CONVICTION RELIEF COURT FAILED TO FIND THAT [T.L.] WAS DENIED HIS RIGHT TO CHAL[L]ENGE THE ADULT DIAGNOSTIC & TREATMENT CENTER'S PSYCHOLOGICAL EXAMINATION.

Point III

THE SUSSEX COUNTY POST CONVICTION RELIEF COURT FAILED TO FIND THAT THE RECORD SUPPORTS THE FACT THAT THE SENTENCING COURT DID NOT INFORM [T.L.] OF THE POSSIBILITY OF CIVIL COMMITMENT AS A CONSEQUENCE OF HIS PLEA RESULTING IN A [STATE V.] BELLAMY VIOLATION.

III.

We review de novo the trial court's denial of PCR without an evidentiary hearing. See State v. Harris, 181 N.J. 391, 421 (2004). We apply the two-pronged Strickland test, and determine whether the record reveals that defendant's plea counsel was constitutionally deficient, and defendant suffered resulting

prejudice. See Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 58 (1987).

To the extent defendant renews arguments that his PCR counsel highlighted in the hearing before the trial court, we affirm substantially for the reasons stated by Judge Critchley in his oral opinion. The remainder of defendant's arguments lack sufficient merit to warrant discussion in a written opinion, R. 2:11-3(e)(2), except for one: defendant's contention that plea counsel was deficient by failing to advise him of the risk of civil commitment under the Sexually Violent Predator Act (SVPA), N.J.S.A. 30:4-27.27, -27.32. When defendant pleaded guilty, the rule was well-settled that fundamental fairness required that a defendant be advised of the applicable risk of future civil commitment. State v. Bellamy, 178 N.J. 127, 138 (2003).

In particular, defendant contends he was not informed of the risk he could be civilly committed based on the "catch-all" provision of the SVPA's definition of a "sexually violent offense," N.J.S.A. 30:4-27.26(b). That provision allows a court to find that an offender committed a sexually violent offense sufficient to render the offender a sexually violent predator subject to civil commitment, even if the offender did not commit an offense enumerated under N.J.S.A. 30:4-27.26(a).

In In re Commitment of J.M.B., 197 N.J. 563 (2009), the Supreme Court interpreted N.J.S.A. 30:4-27.26(b) to authorize civil commitment for an offense not enumerated under N.J.S.A. 30:4-27.26(a), if the State could demonstrate the defendant engaged in conduct "substantially equivalent . . . to the conduct captured by the offenses listed in subsection (a)." J.M.B., 197 N.J. at 595. The enumerated offenses include some offenses alleged in defendant's indictment, but which were dismissed as part of the plea: aggravated sexual assault, sexual assault, aggravated criminal sexual contact, and criminal sexual contact. See N.J.S.A. 30:4-27.26(a).

A plausible argument could be made that the conduct defendant described, in pleading to first-degree endangering the welfare of Alicia, was substantially equivalent to first-degree aggravated sexual assault.[5] If defendant instructed Alicia to penetrate herself with the vibrator he provided, his conduct would apparently satisfy the "sexual penetration" element of aggravated sexual assault. See N.J.S.A. 2C:14-1(c) (defining "sexual penetration" to include "insertion of . . . [an] object into the . . . vagina . . . upon the actor's instruction"); N.J.S.A. 2C:14-2(a)(2)(A)

[5] We do not decide in this appeal whether defendant committed a subsection (b) offense. That is an issue that should be fully aired if and when the Attorney General seeks civil commitment.

(defining aggravated sexual assault as an act of sexual penetration with another person where the victim is between thirteen and sixteen and the actor is related to the victim by blood or affinity to the third degree).[6]

Turning to the first Strickland prong, defendant has presented a prima facie case that he was not informed that he risked civil commitment if the State could establish that his first-degree endangering conviction was "substantially equivalent" to an enumerated offense under N.J.S.A. 30:4-27.26(a).

Defendant's plea form was ambiguous on the subject. The "Additional Questions for Certain Sexual Offenses" form addressed civil commitment. Someone wrote "NA" — presumably, meaning "not applicable" — next to the first part of the pertinent paragraph, which tracked the enumerated offenses in N.J.S.A. 30:4-27.26(a). However, a circled asterisk was written next to the second part, which tracked the "catch-all" language of N.J.S.A. 30:40-27.26(b). The "YES" answer was circled, suggesting defendant was aware of

[6] Defendant's allocution arguably also established conduct substantially equivalent to aggravated criminal sexual contact. See N.J.S.A. 2C:14-1(d) (defining "sexual contact"); Cannel, New Jersey Criminal Code Annotated, comment 4 on N.J.S.A. 2C:14-1 at 417 (2017) (stating that "[i]t would also appear . . . that if the victim is forced to touch himself [or herself], criminal sexual contact exists").

the risks of civil commitment as described, presumably subject to the handwritten notations.[7]

However, the plea colloquy was less ambiguous. In response to the court's inquiry, defense counsel asserted that he did not believe the SVPA applied. The prosecutor concurred, adding, "They were not crimes of violence." Thus, viewing the record of the plea hearing as a whole, defendant has established at least a prima facie case that his plea counsel did not advise him that he faced the risk of civil commitment; and in fact, his counsel assured him in open court that the SVPA did not apply.

Nonetheless, for two reasons, it is debatable whether counsel was constitutionally deficient in assuring defendant on the

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[7] In its entirety, the paragraph entitled "Civil Commitment" states:

> Do you understand that if you are convicted of a sexually violent offense, such as aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping under [N.J.S.A.] 2C:13-1c(2)(b), criminal sexual contact, felony murder if the underlying crime is sexual assault, an attempt to commit any of these offenses, or any offense for which the court makes a specific finding on the record that, based on the circumstances of the case, the offense should be considered a sexually violent offense, you may upon completion of your term of incarceration be civilly committed to another facility if the courts finds, after a hearing, that you are in need of involuntary civil commitment?

record, with the prosecutor's concurrence, that the SVPA did not present a risk of civil commitment. First, "it is not clear . . . for purposes of setting aside a guilty plea," whether misinformation or lack of information about the risks of civil commitment would be "a deprivation of federal constitutional magnitude." State v. Maldon, 422 N.J. Super. 475, 484 (App. Div. 2011) (comparing a defense attorney's duty, pursuant to the obligation to provide effective assistance of counsel, to advise a client of the immigration consequences of pleading guilty, as recognized in Padilla v. Kentucky, 559 U.S. 356 (2010)).

Second, J.M.B. was decided in 2009 — almost a year after defendant's 2008 plea. An attorney is not required to predict developments in the law in order to provide effective assistance. See, e.g., McCoy v. United States, 707 F.3d 184, 188 (2d Cir. 2013); State v. Harris, 181 N.J. at 436 (rejecting defendant's argument that "trial counsel [was] ineffective for not anticipating a change in law").[8] While our court rendered its decision in J.M.B. before defendant's plea, see In re Commitment

[8] On the other hand, if the law is obviously unclear or uncertain, a defense attorney may be obliged to convey that to his client. In particular, the United States Supreme Court held that if the law governing deportation consequences "is not succinct and straightforward," a criminal defense attorney is obliged to advise a non-citizen client of the "risk of adverse immigration consequences." Padilla, 559 U.S. at 369; see also State v. Gaitan, 209 N.J. 339, 373 (2012).

of J.M.B., 395 N.J. Super. 69 (App. Div. 2007), aff'd, 197 N.J. 563 (2009), one might reasonably have read our court's decision to require proof of actual physical violence in the commission of a subsection (b) offense. Id. at 91-92. As the prosecutor noted, there was no evidence of that here.

Even assuming for argument's sake that plea counsel was constitutionally deficient by not informing defendant about the risk of civil commitment under subsection (b) — and affirmatively asserting on the record that the SVPA did not apply — defendant has failed to demonstrate that he suffered prejudice sufficient to satisfy Strickland's second prong.

"[W]hen a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a 'reasonable probability that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial.'" Lee v. United States, ___ U.S. ___, ___, 137 S.Ct. 1958, 1965 (2017) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)). "[A] petitioner must convince the court that a decision to reject a plea bargain would have been rational under the circumstances." Padilla, 559 U.S. at 372; see also Lee, 137 S.Ct. at 1968.

In the deportation context, the United States Supreme Court has recognized that it may well be rational for a defendant facing

certain deportation if convicted, to go to trial, despite overwhelming proof of guilt. Id. at 1968-69. In Lee, the record established that the defendant was concerned about possible deportation, but was repeatedly misinformed that he faced no risk. Id. at 1963. For him, pleading guilty to a single count indictment charging drug possession meant certain deportation. Id. at 1968. Going to trial provided some slim hope of avoiding that consequence. Ibid. Moreover, the risk of conviction after trial was only "a year or two more of prison time." Id. at 1969. The Supreme Court reasoned, "If deportation were the 'determinative issue' for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that 'almost' could make all the difference." Id. at 1968-69.

We recognize that the threat of civil commitment, like the threat of deportation, is momentous, and could result in life-time consequences. However, for several reasons, defendant has failed to establish, under the facts of this case, it would have been rational to go to trial, if he had known the risks of civil commitment under the catch-all provision of N.J.S.A. 30:4-27.26(b).

We should be wary of "post hoc assertions . . . about how [a defendant] would have pleaded but for his attorney's deficiencies." Id. at 1967. The Supreme Court directs judges to "look to contemporaneous evidence to substantiate a defendant's expressed preferences." Ibid. Here, plea counsel stated at sentencing that defendant was aware of the need for treatment, and he was willing to submit to it. There is no evidence that defendant feared he would be unable to succeed in treatment and remain in custody. Further, as the trial court noted, defendant did not assert his innocence. In fact, he admitted his guilt through all three iterations of his plea. There is no evidence that defendant was concerned with anything but receiving the most favorable plea terms.

Furthermore, defendant's hopes of acquittal are more far-fetched than those of an accused first-time drug offender like Lee, who was a hard-working legal resident and business owner. 137 S.Ct. at 1968. While Lee might rationally have hoped a jury would have some sympathy for him, we cannot fathom a jury expressing anything but the utmost outrage at defendant's sexual exploitation of his own children. Defendant's acquittal seems inconceivable, in view of his conduct, which was extensively documented in film and photos. Cf. Bauder v. Dep't of Corr. Fla., 619 F.3d 1272, 1274 (11th Cir. 2010) (affirming habeas corpus

relief where district court found that plea counsel's misadvice about risk of civil commitment prejudiced defendant because, among other reasons, "there was not overwhelming evidence of [the defendant's] guilt" and the defendant "maintained his innocence of the crime throughout the state criminal proceeding").

Also, the consequences of conviction after trial would not be merely "a year or two more of prison time," as in Lee. Id. at 1969. Defendant was fifty-one years old at sentencing and had 624 days of jail credit. The plea agreement offered him the chance of release at about age sixty. At trial, he would face a high risk of being convicted of first-degree aggravated sexual assault of Alicia, and sexual assault of Alicia and Betty. Those convictions would trigger the No Early Release Act, which would require defendant to serve eighty-five percent of the prison term before parole eligibility. N.J.S.A. 2C:43-7.2(d)(7), (8). Consecutive sentences — at least to address the fact there were separate victims — would also be likely. See State v. Carey, 168 N.J. 413, 423 (2001) (stating sentencing courts are instructed to consider the "facts relating to the crimes" including whether the offenses involved "numerous or separate victims" in imposing consecutive or concurrent sentences). Thus, defendant faced the prospect of a prison term that constituted the practical equivalent of a life sentence without civil commitment.

Further, despite the potential life-time duration of civil commitment, that consequence for defendant is not at all as certain as deportation would be for a defendant like Lee. See United States v. Crain, ___ F.3d ___, ___ n.45 (5th Cir. 2017) (slip op. at 18 n.45) ("While civil commitment is indisputably severe, it is not 'automatic' or 'mandatory' in the same way that deportation and sex offender registration are[.]" (quoting Margaret Colgate Love, Collateral Consequences After Padilla v. Kentucky: From Punishment to Regulation, 31 St. Louis U. Pub. L. Rev. 87, 108 (2011)).

Finally, there is one last distinction between deportation in Lee, and civil commitment in defendant's case. Lee would have faced no greater risk of deportation at trial if convicted than by pleading guilty. See Lee, 137 S.Ct. at 1968. However, defendant would have faced a higher likelihood of civil commitment if convicted at trial of sexual assault or criminal sexual contact, offenses enumerated in N.J.S.A. 30:4-27.26(a). With his plea agreement, civil commitment is less certain because the Attorney General would need to establish that his endangering conviction "should be considered a sexually violent offense." N.J.S.A. 30:4-27.26(b). However, if he went to trial and was convicted of sexual assault or criminal sexual contact, he would, by definition, be a sexually violent offender. N.J.S.A. 30:4-27.26(a).

In sum, defendant has failed to present a prima facie case that it would have been rational for him to go to trial, rather than accept the plea agreement, if he had known the risks of potential civil commitment under the catch-all provision in N.J.S.A. 30:4-27.26(b).

Affirmed.

APPENDIX

Defendant raised the following points in his pro se brief before the trial court:

POINT I

NEW JERSEY'S POST-CONVICTION RELIEF PROCEEDING IS THE ANALOGUE TO THE FEDERAL WRIT OF HABEAS CORPUS R. 3:22-1 TO -12 CONTROLS THE PROCEDURES FOR POST-CONVICTION RELIEF.

POINT II

THE PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF PLEA COUNSEL.

A.

UNDER THE UMBRELLA OF INEFFECTIVE ASSISTANCE, THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DURING CRITICAL PHASES OF PRETRIAL PROCEDURES DUE TO COUNSEL'S FAILURE TO CONDUCT A PRETRIAL INVESTIGATION[] IN PREPARATION FOR PLEA NEGOTIATIONS AND AT SENTENCING, WHICH RESULTED IN THE PETITIONER'S GUILTY PLEA BEING NEITHER INFORMED OR VOLUNTARY, BUT WAS INSTEAD COERCIVELY OBTAINED THROUGH COUNSEL'S DECEPTION PROMISES, THREATS, AND INDUCEMENTS.

B.

UNDER THE UMBRELLA OF INEFFECTIVE ASSISTANCE, PLEA COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE FAILED TO NOTIFY PETITIONER THAT HE FACED THE POSSIBILITY OF LIFELONG CIVIL COMMITMENT UNDER THE SEXUALLY VIOLENT PREDATORS ACT, N.J.S.A. § 30:4-27.24 TO -27.38. THE COURT ALSO FAILED TO PROPERLY (INFORM) EXPLAIN CIVIL COMMITMENT, AND THEREFORE COMMITTED REVERSIBLE ERROR. PLEA COUNSEL LACKED THE LEGAL KNOWLEDGE OF PAROLE SUPERVISION FOR LIFE VERS[U]S COMMUNITY SUPERVISION FOR LIFE RESULTING IN THE

PETITIONER BEING UNINFORMED OF THE CONSEQUENCES OF HIS PLEA.

C.

UNDER THE UMBRELLA OF INEFFECTIVE ASSISTANCE OF PLEA COUNSEL, THE PETITIONER'S PLEA AGREEMENT WAS NOT PREMISED ON A FACTUAL BASIS.

D.

UNDER THE UMBRELLA OF INEFFECTIVE ASSISTANCE, THE DEFENSE COUNSEL FAILED TO CHALLENGE THE ADULT DIAGNOSTIC & TREATMENT CENTER'S EVALUATION AGAINST THE PETITIONER['S] REQUEST.

E.

UNDER THE UMBRELLA OF INEFFECTIVE ASSISTANCE, PLEA BARGAINING MUST BE CONDUCTED FAIRLY ON BOTH SIDES AND THE RESULTS MUST NOT DISAPPOINT THE REASONABLE EXPECTATIONS OF EITHER. PLEA COUNSEL WAS INEFFECTIVE IN THAT HE WAS WHOLLY UNPREPARED TO MAKE ARGUMENT UNDER STATE V. BALFOUR, FOR A ONE STEP REDUCTION DOWNGRADE, (FOR THE PURPOSES OF SENTENCING) FROM A POTENTIAL FIRST DEGREE TO A SECOND DEGREE SENTENCE IN THE INTEREST OF JUSTICE. PROSECUTOR AND DEFENSE COUNSEL MAY ENTER INTO DISCUSSIONS CONCERNING PLEAS AND SENTENCES; IN THESE DISCUSSIONS THE JUDGE MUST TAKE NO PART. IN THE INSTANT CASE, COUNSEL ALLOWED THE COURT TO INTERFERE WITH THE PLEA PROCESS.

F.

UNDER THE UMBRELLA OF INEFFECTIVE ASSISTANCE, THE DEFENSE COUNSEL FAILED TO PRESENT MITIGATING CIRCUMSTANCES SUPPORTED BY CREDIBLE EVIDENCE FOUND IN THE RECORD; COUNSEL FAILED TO AGGRESSIVELY ESTABLISH A DEFENSE AGAINST THE AGGRAVATING CIRCUMSTANCES AND ABANDONED THE PETITIONER. THE COURT COMMITTED REVERSIBLE ERROR IN APPLICATION OF BOTH

AGGRAVATING AND MITIGATING FACTORS DURING SENTENCING. THE COURT FAILED TO DOCUMENT HOW IT WEIGHED AND BALANCED THE AGGRAVATING AND MITIGATING FACTORS FOR SENTENCING AND PAROLE DISQUALIFICATION.

G.

UNDER THE UMBRELLA OF INEFFECTIVE ASSISTANCE, DEFENSE COUNSEL FAILED TO PROVIDE AN ARGUMENT AGAINST COURT IMPOSED RESTITUTION BY ACTING AS AN ADVOCATE FOR THE STATE AND COLLABORATED WITH THE COURT IN VIOLATION OF THE PETITIONER'S DUE PROCESS RIGHTS.

H.

PROSECUTORIAL MISCONDUCT, POST RECESS, THROUGH THE FALSIFICATION AND FABRICATION OF STATEMENTS IN AN EFFORT TO INFLUENCE INFLAME AND PERSUADE THE COURT'S SENTENCING DECISION.

I.

THE APPELLATE DIVISION RENDERED THEIR REMAND DECISION BASED ON NON VERBATIM SENTENCING TRANSCRIPTS FROM SEPTEMBER 30, 2008. THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL DURING THE APPELLATE DIVISION'S EXCESSIVE SENTENCING ORAL ARGUMENT OF JULY 27, 2010. APPELLATE COUNSEL WAS UNPREPARED AND LACKED THE NECESSARY COURT DOCUMENTATION TO ESTABLISH AN ARDUOUS ARGUMENT. APPELLATE COUNSEL FAILED TO ARGUE MITIGATING FACTORS SUPPORTED BY THE RECORD. APPELLATE COUNSEL FAILED TO ESTABLISH A SUBSTANTIAL ARGUMENT, A DEAD-BANG WINNER, AGAINST THE PETITIONER NOT BEING FULLY INFORMED OF CIVIL COMMITMENT AND COMMUNITY SUPERVISION FOR LIFE AS A CONSEQUENCE OF PETITIONER'S PLEA. APPELLATE COUNSEL FAILED TO RAISE THE ISSUE OF THE IMPROPER REJECTION OF PETITIONER'S NEGOTIATED PLEA BY THE TRIAL COURT. APPELLATE COUNSEL WAS UNWILLING AND UNPREPARED TO RAISE HE PROSECUTOR'S BALFOUR

ARGUMENT FOR A REDUCTION OF SENTENCE. COUNSEL FAILED TO ADDRESS THE LACK OF A FACTUAL BASIS OF THE PLEA AGREEMENT.

J.

UNDER THE UMBRELLA OF INEFFECTIVE ASSISTANCE THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DURING THE RESENTENCING REMAND OF SEPTEMBER 22, 2010 AND NOVEMBER 09, 2010. COUNSEL WAS UNPREPARED AND LACKED THE NECESSARY COURT DOCUMENTATION TO ESTABLISH AN ARGUOUS ARGUMENT FOR THE MERGER OF THE COUNTS OF THE PLEA AGREEMENT AS ORDERED BY THE APPELLATE DIVISION. COUNSEL LACKED KNOWLEDGE OF THE CASE AT HAND AND HAD PREJUDICED THE PETITIONER THROUGH INEFFECTIVE REPRESENTATION ALLOWING THE STATE TO ARBITRARILY MERGE THE COUNTS INCONSISTENT WITH THE APPELLATE DIVISION'S DECISION. REMAND COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN THAT HE FAILED TO PROPERLY ARGUE IN FAVOR OF THE PLEA AGREEMENT, WHEREBY THE PETITIONER AGREED TO TWO ELEVEN YEAR SENTENCES ON THE FIRST DEGREE OFFENSES, AND TWO SEVEN YEAR CONCURRENT SENTENCES ON THE SECOND DEGREE OFFENSES.

POINT III

JUDICIAL BIAS, ABUSE OF DISCRETION/ABUSE OF PROCESS WHICH PREJUDICED THE PETITIONER RESULTING IN AN ILLEGAL SENTENCE. THE COURT EXHIBITED BIAS TOWARDS THE PETITIONER REQUIRING RECUSAL OF THE COURT.

Defendant's first counseled trial brief raised the following points:

POINT I

PETITIONER IS ENTITLED TO POST CONVICTION RELIEF INCLUDING ORAL ARGUMENT AND AN EVIDENTIARY HEARING BASED ON THE TIMELY FILING

OF THE VERIFIED PETITION AND THE FOREGOING ARGUMENTS.

POINT II

PETITIONER IS ENTITLED TO POST CONVICTION RELIEF BASED ON INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

A. INEFFECTIVE ASSISTANCE OF COUNSEL IN A PLEA CONTEXT.

B. WITHDRAWAL OF A GUILTY PLEA.

C. STATE V. SLATER ANALYSIS.

Petitioner Has Met The Majority of The Four Factors In Establishing That The Plea Should Be Set Aside Pursuant to State v. Slater (includes factor three).

Petitioner has asserted a colorable claim of innocence (factor one).

The nature and strength of petitioner's reason for withdrawal (factor two).

A. Petitioner was not properly advised of the Consequences of his guilty plea.

1. Trial counsel misled petitioner as to total punitive exposure.

2. Trial counsel misled petitioner as to the terms of the plea agreement as the agreement was rescinded at sentencing.

B. Trial counsel failed to consult with petitioner to review the evidence and prepare potential defenses for trial.

C. Trial counsel failed to properly prepare the petitioner for the plea hearing.

D. Trial counsel failed to challenge the Avenel report.

E. Trial counsel failed to make meaningful arguments at sentencing.

1. Trial counsel failed to prepare the petitioner for his interview with the probation department.

2. Trial counsel should have retained an expert on recidivism.

3. Trial counsel did not adequately address the mitigating factors.

4. Trial counsel did not zealously oppose restitution.

5. Trial counsel should have objected to prosecutorial misconduct.

Withdrawal of the plea would not result in unfair prejudice to the state (factor four).

POINT III

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

POINT IV

INEFFECTIVE ASSISTANCE OF RESENTENCING COUNSEL.

POINT V

PETITIONER REQUESTS DISQUALIFICATION OF THE HONORABLE N. PETER CONFORTI, JSC.

POINT VI

ALL ISSUES RAISED IN PETITIONER'S PRO SE CERTIFICATIONS AND FUTURE PRO SE CERTIFICATIONS MUST BE CONSIDERED IN THIS MATTER.

POINT VII

PETITIONER'S CLAIMS ARE NOT BARRED BY THE PROVISIONS OF RULE 3:22-2 AS THEY ASSERT CONSTITUTIONAL ISSUES ARISING UNDER THE STATE CONSTITUTION.

Defendant's second counseled trial brief raised the following points:

POINT I

DEFENDANT IS ENTITLED TO WITHDRAW HIS PLEA AGREEMENT AS A MATTER OF DUE PROCESS OF LAW. U.S. CONST. AMENDS. V, XIV; N.J. CONST. (1947) ART. I, PAR. 1.

POINT II

DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN VIOLATION OF THE UNITED STATES AND NEW JERSEY CONSTITUTIONS.

POINT III

THE CUMULATIVE EFFECT OF THE ERRORS COMPLAINED OF RENDERED THE TRIAL UNFAIR.

POINT IV

DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

POINT V

AN EVIDENTIARY HEARING IS REQUIRED WITH REGARD TO THE ALLEGATIONS OF HIS PETITION FOR POST CONVICTION RELIEF.

POINT VI

THE DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF SHOULD NOT BE BARRED BY PROCEDURAL CONSIDERATION.

Defendant's third counseled trial brief – a supplemental brief – raised the following point:

> POINT VII
>
> BUT FOR TRIAL COUNSEL'S INEFFECTIVE REPRESENTATION, THE DEFENDANT'S STATEMENT, AND EVIDENCE OBTAINED AS A RESULT THEREOF, WOULD HAVE BEEN SUPPRESSED.