SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0955-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAY R. ARTZ,

Defendant-Appellant.

Submitted February 13, 2018 – Decided March 5, 2018

Before Judges Carroll and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 12-08-1998.

Joseph E. Krakora, Public Defender, attorney for appellant (David J. Reich, Designated Counsel, on the brief).

Damon G. Tyner, Atlantic County Prosecutor, attorney for respondent (John J. Lafferty, IV, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Jay R. Artz appeals from an August 18, 2016 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

On August 21, 2012, an Atlantic County grand jury returned a five count indictment against defendant as follows: third-degree aggravated assault against multiple police officers, N.J.S.A. 2C:12-1(b)(2) (count one); third-degree resisting arrest, N.J.S.A. 2C:29-2(a)(3)(2) (count two); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count three); fourth-degree infliction of harm on a law enforcement animal, N.J.S.A. 2C:29-3.1 (count four); and third-degree terroristic threats by threatening to commit a crime of violence and then acting on that threat of violence, N.J.S.A. 2C:12-3(a) (count five).

The following facts are taken from the record. On June 21, 2012, officers from the Hamilton Township Police Department (HTPD) were advised defendant had been making harassing telephone calls to police dispatch. Defendant claimed there were people knocking on his door and people were coming out of the woods to get him. Defendant resided in an apartment complex, and police knew there were no woods nearby.

Police then received a telephone call from the clinical manager of Mobile Outreach advising defendant was enrolled in

their outpatient program. The manager advised defendant had not been cooperating with the program and stopped returning their calls. She believed defendant had ceased taking his medication. The manager also indicated defendant had threatened a staff member who had been visiting him with a baseball bat. She expressed concern for defendant's well-being and the safety of others.

Police also reviewed defendant's criminal record and learned he had been adjudicated not guilty of homicide by reason of insanity in 1981. Upon receiving the aforementioned information, the police became concerned for the safety of others residing in defendant's apartment complex, including children. Hamilton Township police requested assistance from Human Services police because they had prior experience responding to defendant's residence and interacting with him. Both departments responded to defendant's residence to attempt to speak with him, assure his safety, and the safety of others.

Upon arrival at defendant's residence, Sergeant Christopher Robell and other officers of the HTPD observed that Human Services Police officers were already on the scene. Defendant repeatedly refused requests to open the door and instead challenged police to get him. Defendant also stated to another officer: "Lieutenant you're gonna get hot water in your face if you come in here." Sergeant Robell could hear defendant tapping on his front door

with an object. Another officer peered into defendant's apartment, observed it to be strewn with garbage, and observed defendant holding a plastic ice scraper.

As a result of defendant's statements and the officers' observations, Sergeant Robell became concerned for the safety of the other residents in the apartment complex. Therefore, police attempted to enter defendant's apartment, at first with a master key from the property manager, but this was unsuccessful. Therefore, police breached defendant's door with a battering ram and noticed the door had been barricaded.

Robell attempted to speak with defendant, but he refused. Robell then observed defendant remove a pot of boiling water from his stove and throw it at him and the other officers. Defendant then began throwing ceramic plates at the other officers and advanced toward Robell with a clenched fist and an ice scraper.

Robell had entered defendant's residence with a police canine in an effort to subdue defendant. Defendant kicked the canine and also struck Robell with an object believed to be the ice scraper. Eventually, with the aid of the other officers, defendant was subdued and arrested.

Defendant pled guilty to aggravated assault, as charged in count one. The State dismissed the remaining counts pursuant to the plea agreement. Defendant was initially sentenced to three

years of probation, but was resentenced to a three-year suspended sentence with the condition that he continue to cooperate with treatment, including all prescribed medications, and that he not re-offend.

Defendant filed his PCR petition and argued his trial counsel was ineffective for failing to seek a dismissal of the indictment, and failing to file a motion to vacate the plea on the grounds police had unlawfully entered his home to arrest him. In a written opinion, the PCR judge denied the petition.

The judge found there was probable cause for police to enter defendant's home. Specifically, the probable cause was grounded in the following facts: defendant's harassing calls to police dispatch; the concern for the safety of defendant and others expressed by Mobile Outreach staff, and his threats to harm a staff member with a baseball bat; defendant's prior homicide charge; and the concern for the safety of others living near defendant.

The PCR judge found there was probable cause to arrest defendant based on his false report there were people coming to his home from out of the woods. The judge found this constituted a violation of N.J.S.A. 2C:28-4(b)(1), namely, that he reported to law enforcement "an offense or other incident within their concern knowing it did not occur."

The PCR judge also concluded police had probable cause to arrest defendant pursuant to the emergency aid doctrine. The judge found the circumstances demonstrated the emergency, namely, defendant's threat to throw boiling water on an officer, his possession of an ice scraper as a weapon, and that defendant had barricaded himself in a garbage-strewn apartment. The judge concluded: "Undoubtedly, these observations confirmed the officers' suspicions that [defendant] was suffering from a mental episode and that both himself and the community at large were in danger."

The PCR judge further stated:

> While [defendant] may argue that he was doing nothing wrong in the confines of his own home, the fact remains that he was displaying extremely bizarre behavior and appeared not to be compliant with his medication. He has stopped responding to treatment, was ignoring his medical supervisors and had even threatened one with a bat. He was displaying violent behavior towards the officers and had a history of such behavior. All the while, he was residing in a populated apartment community. Thus, the need to have [defendant] immediately evaluated in the interest of preventing harm to himself and others clearly presented a medical emergency whereby the officers were justified in their intrusion under the emergency-aid doctrine. The subsequent assault of the officers clearly established probable cause to arrest for the various charges brought against [defendant].

Thus, the judge concluded defendant failed to establish a prima facie showing of ineffective assistance of counsel because there were enough facts to support the grand jury indictment. As a result, the judge rejected defendant's argument that a motion to dismiss the indictment would have succeeded. The judge also found there was no basis for defendant's counsel to file a motion to vacate his plea. The judge stated:

> [Defendant] received an extremely favorable plea bargain which resulted in a suspended sentence. Short of acquittal, a suspended sentence is a most favorable sentencing outcome. Given that [defendant] faced a maximum exposure of sixteen and one half years and also considering the evidence against him, it would not be logical for him to reject the plea and proceed to trial under these circumstances.

On appeal defendant argues the following points:

> POINT I — THE TRIAL COURT ERRED IN DENYING [DEFENDANT'S] PETITION FOR POST-CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING CONCERNING HIS CLAIM THAT HE WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIEW OF HIS COUNSEL'S FAILURE TO FILE A MOTION TO DISMISS THE INDICTMENT.
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> POINT II — THE TRIAL COURT ERRED IN SUMMARILY REJECTING [DEFENDANT'S] CLAIM THAT HIS COUNSEL WAS INEFFECTIVE IN FAILING TO MOVE TO WITHDRAW [DEFENDANT'S] GUILTY PLEA BEFORE FINAL SENTENCING.
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> POINT III — [DEFENDANT'S] GUILTY PLEA DID NOT HAVE AN ADEQUATE FACTUAL BASIS (Not Raised Below).

I.

We begin by reciting our standard of review. A PCR court need not grant an evidentiary hearing unless "a defendant has presented a prima facie [case] in support of post-conviction relief." State v. Marshall, 148 N.J. 89, 158 (1997) (alteration in original) (quoting State v. Preciose, 129 N.J. 451, 462 (1992)). "To establish such a prima facie case, the defendant must demonstrate a reasonable likelihood that his or her claim will ultimately succeed on the merits." Ibid. The court must view the facts "in the light most favorable to defendant." Ibid. (quoting Preciose, 129 N.J. at 462-63); accord R. 3:22-10(b). If the PCR court has not held an evidentiary hearing, we "conduct a de novo review . . . ." State v. Harris, 181 N.J. 391, 421 (2004).

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 (alteration in original) (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 (2006) (quoting Strickland, 466 U.S. at 689). "Mere dissatisfaction with a 'counsel's exercise of judgment' is insufficient to warrant overturning a conviction." State v. Nash, 212 N.J. 518, 542 (2013) (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). Defendant 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.
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> [Strickland, 466 U.S. at 693 (citation omitted).]

II.

Defendant contends the PCR judge erred by denying his petition without an evidentiary hearing because his counsel was ineffective for failing to challenge the legality of the police entry into his home. Defendant argues he did not violate N.J.S.A. 2C:28-4(b)(1) because his statements to the dispatcher did not qualify as a false report of criminal conduct. We find no basis to disturb the PCR judge's findings.

N.J.S.A. 2C:28-4(b)(1) states "[a] person commits a crime of the fourth degree if he . . . causes to be reported to law enforcement authorities an offense or other incident within their concern knowing that it did not occur[.]" N.J.S.A. 2C:33-4(a) states "a person commits a petty disorderly offense if, with purpose to harass another, he: (a) Makes, or causes to be made, a communication or communications [in] any other manner likely to cause annoyance or alarm[.]" N.J.S.A. 2C:12-1(a)(1) states "[a]

person is guilty of assault if he: Attempts to cause . . . bodily injury to another[.]"

It is clear from the facts presented that police were lawfully present at defendant's home. As the State notes, defendant made repeated telephone calls to the police in which he used inflammatory and vulgar language. This alone provided adequate probable cause to constitute harassment pursuant to N.J.S.A. 2C:33-4(a). Also, defendant's calls violated N.J.S.A. 2C:28-4(b)(1) because by reporting that others were "coming to get him" he falsely reported conduct that, if true, would constitute harassment. Therefore, police clearly had the right to travel to defendant's home to further investigate these calls and take appropriate action.

We also reject defendant's assertion police did not have probable cause to enter his residence. The United States Constitution and the New Jersey Constitution both guarantee the right of persons to be free from unreasonable searches and seizure in their home. U.S. Const. amend. IV; N.J. Const. art. I, ¶7. Warrantless searches are presumptively invalid unless, among other exceptions, voluntary consent to the search, without coercion or duress, is provided. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); State v. Domicz, 188 N.J. 285, 308 (2006).

In Brigham City v. Stuart, 547 U.S. 398, 403-04 (2006), the United States Supreme Court addressed the emergency aid exception for warrantless searches and held:

> "[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." Mincey v. Arizona, 437 U.S. 385, 393-394 (1978).
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> One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury. "'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.'" Id. at 392 (quoting Wayne v. United States, 318 F.2d 205, 212, (D.C. Cir. 1963) (Burger, J.))[.] Accordingly, law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. Mincey, [437 U.S.] at 392; see also Georgia v. Randolph, [547 U.S. 103,] 118 (2006) ("[I]t would be silly to suggest that the police would commit a tort by entering . . . to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur").
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> [(citations omitted).]

The Brigham Court upheld the warrantless entry of a home where officers were responding to complaints about a loud party at three o'clock in the morning, and on arrival heard and saw two individuals engaged in a fight inside the home. Id. at 406. The

Court noted that the officers' entry without a warrant was reasonable because they entered only after announcing their presence and receiving no response. Ibid. The Court concluded it was reasonable for the officers to enter without a warrant in view of the exigency because "[t]he role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties[.]" Ibid.

In State v. Castro, 238 N.J. Super. 482 (App. Div. 1990), we reversed the granting of a defendant's motion to suppress where an officer entered a home without a warrant because he believed one of its occupants had swallowed a package of cocaine. We stated:

> As former Chief Justice (then Judge) Burger observed in Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir. 1963), there is in cases like this a "balancing of interests and needs." "When policemen, firemen or other public officers are confronted with evidence which would lead a prudent and reasonable official to see a need to act to protect life or property, they are authorized to act on that information, even if ultimately found erroneous." Id. What gives rise to genuine exigency is, "[t]he need to protect or preserve life or avoid serious injury . . . [.]" Id.
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> [Castro, 238 N.J. Super. at 488 (alterations in original).]

Here, as we noted, police had credible reports defendant could harm himself and harm others. This information came from

more than one source, namely, the concerns reported by the Mobile Outreach manager and defendant's violent criminal history. Moreover, when police arrived, they observed defendant's behavior and determined it constituted a threat to his safety and the safety of the other residents of the apartment complex. Given this information, police were not required to retreat and wait for defendant to either harm himself or others while securing a warrant. Thus, the warrantless entry of defendant's home was justified under the emergency aid exception.

III.

Defendant argues the PCR judge erred by failing to find his counsel was ineffective for failing to move to dismiss the indictment. Primarily, defendant argues the PCR judge failed to consider whether the State had established the requisite mens rea for the five counts of the indictment. Defendant asserts the PCR judge failed to consider the prosecutor's failure to instruct the grand jury on his diminished mental state. Defendant argues the failure to consider his diminished mental state made the indictment defective, and if his counsel had filed a motion to dismiss the indictment, it would have been successful contrary to the PCR judge's finding.

The Supreme Court has explained the role of the grand jury.

> [T]he grand jury must determine whether the State has established a prima facie case that a crime has been committed and that the accused has committed it.
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> The purposes of the grand jury extend beyond bringing the guilty to trial. Equally significant is its responsibility to "protect[] the innocent from unfounded prosecution."
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> [State v. Hogan, 144 N.J. 216, 227-28 (1996) (citations omitted).]

The Hogan Court concluded:

> We thus decline to adopt any rule that would compel prosecutors generally to provide the grand jury with evidence on behalf of the accused. Such a rule would unduly alter the traditional function of the grand jury by changing the proceedings from an ex parte inquest into a mini-trial.
>
> The grand jury's role is not to weigh evidence presented by each party, but rather to investigate potential defendants and decide whether a criminal proceeding should be commenced. . . . In seeking an indictment, the prosecutor's sole evidential obligation is to present a prima facie case that the accused has committed a crime.
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> Nevertheless, in establishing its prima facie case against the accused, the State may not deceive the grand jury or present its evidence in a way that is tantamount to telling the grand jury a "half-truth." . . .
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> [T]he grand jury cannot be denied access to evidence that is credible, material, and so clearly exculpatory as to induce a rational grand juror to conclude that the State has not made out a prima facie case against the accused. . . .

> Our perception is that the routine presentation of evidence by prosecutors to grand juries only rarely will involve significant questions about exculpatory evidence. More often than not the evidence accumulated by the prosecutor abundantly demonstrates probable cause for return of an indictment. . . . Hence, the standard we adopt is intended to be applied only in the exceptional case in which a prosecutor's file includes not only evidence of guilt but also evidence negating guilt that is genuinely exculpatory.
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> For those unique cases, . . . the competing concerns we have discussed are best reconciled by imposing a limited duty on prosecutors, a duty that is triggered only in the rare case in which the prosecutor is informed of evidence that both directly negates the guilt of the accused and is clearly exculpatory.
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> [Id. at 235-37.]

Here, as the State notes, the prosecutor presented the grand jury with ample evidence regarding defendant's alleged diminished capacity. Our review of the grand jury proceedings reveals that the prosecutor elicited testimony from Sergeant Robell that police knew defendant had "psychological disorders," that he was admitted into an outpatient program, and that he had not been taking his medications. Thus, the prosecutor did not withhold any exculpatory evidence.

Moreover, the grand jury fulfilled its independent role as an accusatory body when its members inquired about defendant's

mental state. Specifically, grand jury members asked the prosecutor to provide the definition for purposely and knowingly, and the prosecutor read the statutory definition of both. After doing so, the prosecutor inquired whether his reading of the statutory definitions had answered the grand jury's question, and the grand jury responded affirmatively.

The record also does not reveal the prosecutor withheld information from the grand jury in response to its inquiry regarding defendant's diminished capacity. Rather, the prosecutor explained the elements of each crime and the mens rea required to establish a prima facie basis to charge the crime. The exchange between the grand jury and the prosecutor does not indicate to us, as defendant suggests, that the jury needed to be "informed they could have determined, based on [defendant's] mental condition at the time of the incident, that he lacked the state of mind required to commit the crimes charged." The exchange between the prosecutor and the grand jury confirms the grand jury understood its options before it retired to deliberate.

A prima facie showing of the crimes charged and the requisite mens rea were made in the grand jury proceedings. For these reasons, we agree with the PCR judge that defendant's counsel was not ineffective for failing to pursue a motion to dismiss the indictment. Such a motion would not have been successful.

IV.

Defendant contends plea counsel was ineffective in not moving to withdraw defendant's guilty plea because he expressed confusion during his resentencing. Also, for the first time on appeal, defendant argues his guilty plea did not have an adequate factual basis.

Defendant argues he was "seriously confused" at his final sentencing hearing. He asserts that during his sentencing he questioned whether the proceeding related to June or January and whether the dog or police were present during the incident. Thus, defendant argues he was confused because the incident for which he was sentenced clearly involved both the police canine and officers. Also, defendant argues his inquiry regarding the month in which the incident occurred demonstrated he confused his guilty plea, relating to a separate misdemeanor for kicking the police canine, and not his plea to the aggravated assault.

Defendant argues his questions "should have raised a red flag for his counsel concerning whether [defendant's] previous guilty plea . . . was made knowingly and intelligently[.]" Thus, defendant asserts his counsel was ineffective for failing to file a motion to withdraw the guilty plea. We find these arguments unpersuasive.

"[A] plea may only be set aside in the exercise of the court's discretion." State v. Slater, 198 N.J. 145, 156 (2009) (citing State v. Simon, 161 N.J. 416, 444 (1999)). "Thus, the trial court's denial of defendant's request to withdraw his guilty plea will be reversed on appeal only if there was an abuse of discretion which renders the lower court's decision clearly erroneous." Simon, 161 N.J. at 444.

"[T]he burden rests on the defendant . . . to present some plausible basis for his request, and his good faith in asserting a defense on the merits." Slater, 198 N.J. at 156 (quoting State v. Smullen, 118 N.J. 408, 416 (1990)). "[A] defendant carries a heavier burden to succeed in withdrawing a plea 'when the plea is entered pursuant to a plea bargain.'" State v. Means, 191 N.J. 610, 619 (2007) (quoting Smullen, 118 N.J. at 416). "[A] defendant's representations and the trial court's findings during a plea hearing create a 'formidable barrier' the defendant must overcome in any subsequent proceeding." Slater, 198 N.J. at 156.

"[E]fforts to withdraw a plea after sentencing must be substantiated by strong, compelling reasons." Id. at 160. The Supreme Court established four factors for consideration regarding motions to withdraw a guilty plea: "(1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant's reasons for withdrawal; (3) the existence

of a plea bargain; and (4) whether withdrawal would result in unfair prejudice to the State or unfair advantage to the accused." Id. at 150. "Trial courts should consider and balance all of the factors . . . in assessing a motion for withdrawal of a plea. No factor is mandatory; if one is missing, that does not automatically disqualify or dictate relief." Id. at 162.

Defendant did not have a colorable claim of innocence relating to the aggravated assault charge. "A colorable claim of innocence is one that rests on 'particular, plausible facts' that, if proven in court, would lead a reasonable factfinder to determine the claim is meritorious." State v. Munroe, 210 N.J. 429, 442 (2012) (quoting Slater, 198 N.J. at 158-59.) "It is more than '[a] bare assertion of innocence[.]'" Ibid. (alteration in original) (quoting Slater, 198 N.J. at 158). "Defendant must 'present specific, credible facts and, where possible, point to facts in the record that buttress [his] claim.'" State v. McDonald, 211 N.J. 4, 17 (2012) (alteration in original) (quoting Slater, 198 N.J. at 158).

Defendant's testimony during the plea colloquy demonstrates there were no facts he could assert to disprove the aggravated assault. He admitted he threw hot water at several police officers, and knew it could be dangerous and cause them bodily injury.

Inquiry as to the nature and strength of a defendant's reasons for withdrawal "requires trial courts to ascertain not only the existence of a valid defense but to determine whether a defendant has 'credibly demonstrated' why a 'defense was "forgotten or missed" at the time of the plea.'" McDonald, 211 N.J. at 23 (quoting Slater, 198 N.J. at 160). Here, defendant's challenge to the plea is not predicated on the existence of a defense per se, but on his claim that he was confused during the plea proceedings.

As we noted, the resentencing transcript does not demonstrate defendant was confused. Instead, as the State argues, "defendant has had contacts with law enforcement before and wanted clarification as to which of these incidents he was going to be sentenced on." We agree. The transcript of the resentencing hearing, which took place with counsel who had represented defendant in the plea and during the first sentencing, demonstrates defendant was seeking clarification, not misunderstanding the nature of his plea.

As to the third Slater factor, "defendants have a heavier burden in seeking to withdraw pleas entered as part of a plea bargain." Slater, 198 N.J. at 160 (citing Smullen, 118 N.J. at 416-17). This is because the criminal justice system "'rests on the advantages both sides receive from' the plea-bargaining

process[.]" Munroe, 210 N.J. at 443 (quoting Slater, 198 N.J. at 161).

Defendant received the benefit of pleading guilty to third-degree aggravated assault pursuant to a plea bargain. As the PCR judge found, defendant avoided exposure to a sentence of sixteen plus years, and instead received a three-year suspended sentence. Therefore, the PCR judge properly found the third Slater factor would not support a motion to vacate the plea.

As to the fourth Slater factor, the State need not show prejudice where, as here, "a defendant fails to offer proof of other factors in support of the withdrawal of a plea." Slater, 198 N.J. at 162. In any event, even in the absence of prejudice to the State, on balancing the remaining Slater factors we are convinced a motion to vacate defendant's guilty plea would have been unsuccessful.

Finally, defendant argues that his guilty plea lacked a sufficient factual basis. We reject defendant's argument because he failed to raise it before the PCR judge. Generally, an appellate court will not consider issues, even constitutional ones, which were not raised below. State v. Galicia, 210 N.J. 364, 383 (2012). Even if he had raised the argument, it would have been procedurally barred because it could have been raised on direct appeal. R. 3:22-4(a).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION