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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-0969-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANTHONY GLASS,

Defendant-Appellant.

Submitted March 20, 2018- Decided April 17, 2018

Before Judges Carroll and Mawla.

On appeal from Superior Court of New Jersey,
Law Division, Atlantic County, Indictment No.
10-10-2465.

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

Gurbir S. Grewal, Attorney General, attorney
for respondent (Claudia Joy Demitro, Deputy
Attorney General, of counsel and on the
brief).

PER CURIAM

Defendant Anthony Glass appeals from a September 13, 2016 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

The following facts are taken from the record. An Atlantic County grand jury charged defendant, in three separate indictments, with: third-degree theft by unlawful taking, N.J.S.A. 2C:20-3 and 2C:2-6; second-degree robbery, N.J.S.A. 2C:15-1 and 2C:2-6; and third-degree theft by unlawful taking, N.J.S.A. 2C:20-3 and 2C:2-6. Defendant pled guilty to second-degree robbery and four counts of third-degree theft by unlawful taking.

During defendant's plea colloquy, he admitted that on June 14, 2010, he stole a wallet containing approximately \$130 belonging to a Showboat Atlantic City casino patron. On June 23, 2010, co-defendant David Albright drove defendant to Caesars casino and distracted a patron while defendant stole an envelope containing \$500 from the patron's shirt pocket. On July 7, 2010, defendant wrote a note which stated, "Give me all hundreds and fifties, don't make me do something I might regret," that co-defendant Johnny Pannell passed to a Resorts casino cashier. On June 23, 2010, defendant stole \$130 from the back pocket of a Borgata casino patron, while Albright distracted the patron. On July 17, 2010, defendant stole vouchers worth \$1500 and \$975 from the pocket of a Caesars casino patron, while Albright blocked the view of others.

In exchange for defendant's plea, the State agreed to recommend a sentence of seven years imprisonment, subject to an eighty-five-percent period of parole ineligibility under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, followed by three years of parole supervision upon release on the second-degree robbery count. The State also agreed to recommend a concurrent term of four years imprisonment on each of the remaining indictments. The plea was conditioned on defendant's appearance at sentencing and truthful testimony against his co-defendants.

During the plea colloquy, defendant testified as follows: he understood the terms of his plea agreement; no one forced him to enter into the plea deal; he understood he was relinquishing his right to a trial; his lawyer reviewed all of the discovery with him; he understood the robbery charge was subject to NERA; and understood if he failed to return to the court for sentencing, the plea deal would be voided, and he could receive the maximum sentence allowed for his charges.

The court accepted defendant's plea as knowing and voluntary, and scheduled sentencing for January 14, 2011. Defendant was released on his own recognizance pending sentencing. Defendant failed to appear for his sentencing, and remained a fugitive until he was arrested in September 2013. Following his arrest, defendant filed a motion to withdraw his guilty plea.

At the motion hearing, defendant's counsel argued defendant fled because he had been threatened by Albright. Counsel noted the police report following defendant's arrest reflected that he told police he had nothing to do with the robberies and was willing to testify against Albright. He asserted the reason he accepted the State's plea offer was because Albright threatened to kill him if he talked. Defendant further asserted Albright made threats against defendant's wife and niece "if [defendant] talked."

The motion judge rejected defendant's argument and denied the motion. The judge found no colorable claim of innocence. The judge stated "The facts upon which the defendant ma[de] this motion [were], in a word, bogus. They're not credible." Noting defendant had received the benefit of "a very lenient, fair plea bargain," the judge rejected defendant's allegation he entered into his plea deal under duress due to threats from Albright as "also bogus."

Defendant was sentenced to ten years in prison on the second-degree robbery indictment, with an eighty-five-percent period of parole ineligibility under NERA, and three years of parole supervision upon release, concurrent with four years in prison on the remaining indictments, each concurrent to the other. Defendant was ordered to pay restitution and was prohibited from entering Atlantic City casinos.

Defendant appealed his sentence, which we heard on our Excessive Sentencing Oral Argument calendar. We affirmed defendant's sentence, but remanded for defendant to receive 190 days of jail credit on each indictment. State v. Glass, No. A-2588-13 (App. Div. April 15, 2015). The Supreme Court denied defendant's petition for certification. State v. Glass, 223 N.J. 165 (2015).

Defendant filed a pro se petition for PCR, and pro se supplemental brief and certification. Counsel for defendant filed a letter brief in support of the PCR petition. Defendant asserted his trial counsel was ineffective for failing to investigate defendant's claim that he had been threatened by Albright prior to accepting the plea deal, and for failing to provide discovery documents and review the accusations and indictments with defendant.

The PCR judge denied defendant's petition. The judge also found defendant's claim he pled guilty under duress was not credible because defendant's testimony implicating Albright indicated he did not take Albright's alleged threats seriously. The judge rejected defendant's claim counsel failed to review discovery and consult with him as "bare . . . and bald assertions that . . . are simply not supported by the record."

This appeal followed. Defendant makes the following arguments:

POINT I – DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ENTITLING HIM TO POST CONVICTION RELIEF AND AN EVIDENTIARY HEARING.

A. Counsel Was Ineffective For Failing To Investigate Defendant's Contention That He Was Entering A Plea Under Duress By Threat Of Co-Defendant Thereby Compelling Defendant To Fail To Report For Sentencing For His Own Safety Which In Turn Increased The Penal Exposure He Would Have Otherwise Been Exposed To.

B. Counsel Was Ineffective For Failing To Review Discovery Prior To Advising Defendant To Accept A Plea.

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 demonstrate prejudice, "'actual ineffectiveness' . . . must [generally] be proved[.]" Ibid. (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).

"A defendant shall be entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of post-conviction relief[.]" R. 3:22-10(b). "A court shall not grant an evidentiary hearing . . . if the defendant's allegations are too vague, conclusory, or speculative[.]" R. 3:22-10(e)(2). "Rather, defendant must allege specific facts and evidence supporting his allegations." State v. Porter, 216 N.J. 343, 355 (2013).

Defendant argues he was denied the effective assistance of counsel. Specifically, he contends counsel failed to investigate his claims that he accepted his plea deal under duress, and failed to review discovery with defendant prior to negotiating his plea deal. Defendant asserts he is entitled to an evidentiary hearing "in order to establish a record of counsel's prejudicial inaction on these issues."

The PCR judge determined defendant's plea and appellate counsel were not ineffective. The judge found defendant's "bare . . . and bald assertions . . . his various attorneys did not share with him discovery or he did not have adequate time to discuss the matters with them are just simply not supported by the record." The judge concluded: "Based on the totality of the record

and the transcripts . . . [defendant's] guilty plea was in fact intelligent and voluntary." We agree.

Counsel has no duty to investigate unfounded or meritless claims. State v. Cummings, 321 N.J. Super. 154, 170 (1999). Counsel's duty is to make "reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." State v. Savage, 120 N.J. 594, 618 (1990) (quoting Strickland, 466 U.S. at 691).

Defense counsel was not ineffective as to the investigation of the case, including defendant's claim he was forced to plead guilty by Albright. At the hearing on defendant's motion to withdraw his guilty plea prior to sentencing, the judge found it was irrational for defendant to contend Albright coerced him to plead guilty, and yet defendant implicated Albright. Defendant's favorable plea agreement was conditioned on truthful testimony against Albright. Therefore, defendant did not satisfy the first Strickland prong.

Moreover, defendant cannot show prejudice to meet the second Strickland prong. Defendant failed to assert any facts that indicated a reasonable probability he would not have pled guilty and would have insisted on going to trial, but for the alleged ineffective assistance of counsel. Indeed, the evidence against defendant, which included eyewitness evidence, was considerable.

He faced a significant sentence, including an extended term due to the charged offenses and an extensive criminal history.

Defendant also has not shown the failure to investigate his duress claim would have changed the outcome of his motion to withdraw his guilty plea. When a defendant attempts to withdraw his plea, he bears the burden of demonstrating that fairness requires withdrawal of his plea, and he must make that showing upon a balance of competing factors. State v. Slater, 198 N.J. 145, 157-58 (2009); State v. Russo, 262 N.J. Super. 367, 373 (App. Div. 1993). A motion to withdraw a plea after sentencing must be supported by "strong, compelling reasons[,]. . . a lesser showing is required for motions raised before sentencing." Slater, 198 N.J. at 160.

In evaluating motions to withdraw a guilty plea, trial courts should consider the following factors: (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.]

While all factors must be considered and balanced, "[n]o factor is mandatory; if one is missing, that does not automatically disqualify or dictate relief." Id. at 162.

With respect to the first factor, "[a] bare assertion of innocence is insufficient to justify withdrawal of a plea." Id. at 158. Instead, a "[d]efendant[] must present specific, credible facts and, where possible, point to facts in the record that buttress [his] claim." Ibid. There must be "more than [just] a change of heart" to warrant leave to withdraw a guilty plea once entered. Id. at 157.

The second factor "focuses on the basic fairness of enforcing a guilty plea by asking whether defendant has presented fair and just reasons for withdrawal, and whether those reasons have any force." Id. at 159. Although we are not to approach the reasons for withdrawal with "skepticism," we "must act with 'great care and realism' because defendants often have little to lose in challenging a guilty plea." Id. at 160 (quoting State v. Taylor, 80 N.J. 353, 365 (2009)).

Under the third factor, "defendants have a heavier burden in seeking to withdraw pleas entered as part of a plea bargain." Id. at 160. However, the Court did "not suggest [the third] factor be given great weight in the balancing process." Id. at 161.

As to the fourth factor, "[t]here is no fixed formula to analyze the degree of unfair prejudice or advantage that should override withdrawal of a plea[,] [and] . . . courts must examine this factor by looking closely at the particulars of each case."

Ibid. "The critical inquiry . . . is whether the passage of time has hampered the State's ability to present important evidence."

Ibid. The State need not "show prejudice if a defendant fails to offer proof of other factors in support of the withdrawal of a plea." Id. at 162.

Here, the motion judge denied defendant's motion to withdraw his plea, finding it failed to "come close to satisfying the Slater criteria to withdraw the plea." Specifically, the judge found no colorable claim of innocence, determined defendant's reasons for withdrawal to be illegitimate, noted defendant's plea as part of a plea bargain carried a heavier burden for withdrawal, and found there would be prejudice to the State if the plea was withdrawn. The PCR judge agreed with the motion judge's assessment, and so do we.


The transcript of the plea colloquy does not support defendant's claims he pled guilty under duress. Defendant also has not demonstrated prejudice as a result of the plea, as he avoided exposure to a thirty-year sentence and instead opted for a sentence potentially under six years after the NERA disqualifier. For these reasons, the PCR judge correctly concluded an evidentiary hearing was not warranted. To the extent we have not specifically addressed arguments raised by defendant, we find them without

sufficient merit to warrant discussion in a written opinion. R.

2:11-3(e)(2).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION