SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1529-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SYREE HAKINS,
a/k/a ROBERT TAYLOR,
and TAYLOR RASHEED,

Defendant-Appellant.

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Submitted February 6, 2018 – Decided February 23, 2018

Before Judges Leone and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 10-11-0154.

Joseph E. Krakora, Public Defender, attorney for appellant (Michele A. Adubato, Designated Counsel, on the brief).

Gurbir S. Grewal, Attorney General, attorney for respondent (Sarah D. Brigham, Deputy Attorney General, Of Counsel and on the brief).

PER CURIAM

Defendant Syree Hakins appeals from an August 31, 2016 order denying his petition for post-conviction relief (PCR). We affirm.

On November 4, 2010, a State grand jury returned a forty-two count superseding indictment, charging nineteen defendants with various offenses, including racketeering, murder, weapons offenses, and drug-related crimes. Under this indictment, defendant was charged with the following crimes: first-degree racketeering, N.J.S.A. 2C:41-2(c) and (d) (count one); first-degree promoting organized street crime, N.J.S.A. 2C:33-30 (count three); first-degree conspiracy to murder Devin Thompson, N.J.S.A. 2C:5-2 and 2C:11-3(a) (count four); first-degree murder of Thompson, N.J.S.A. 2C:11-3(a)(1) and (2) (count five); first-degree attempted murder of C.W., N.J.S.A. 2C:5-1 and 2C:11-3 (count six); and second-degree aggravated assault of C.W., N.J.S.A. 2C:13-1(b)(1) (count seven).

The facts underlying defendant's indictment were as follows. The New Jersey State Police conducted an investigation into the "Headbusta" set of the 9-3 Bloods gang, which operated in northern New Jersey. Pursuant to the investigation, defendant was implicated in a controlled dangerous substance (CDS) distribution scheme and the shooting death of Thompson. The investigation revealed defendant, was a high-ranking member of the gang. Defendant held the rank of "Triple OG," and was therefore second

in command of the gang after co-defendant Michael Anderson, who held the rank of "Godfather." At the time of Thompson's murder, defendant was first in command because Anderson was incarcerated.

While in prison, Anderson continued to handle various gang matters by communicating with members telephonically. As a result, the State Police monitored and recorded Anderson's phone conversations from prison pursuant to a wiretap.

In late spring of 2008, a dispute arose in the Headbusta set concerning gang operations and control of certain territory in New Jersey. Defendant wanted to split the gang membership and have his own Blood set separate from Anderson, thereby making Anderson and himself the same rank. Anderson did not authorize the split, and informed defendant he would maintain his "Triple OG" rank. Defendant expressed dissatisfaction with maintenance of the gang's "kitty,"[1] and advised Anderson in a May 21, 2008 call that if the kitty was not maintained properly, "[h]e would start eliminating niggers one by one."

The day before this call, Anderson had appointed Thompson in charge of the gang's "kitty." Thompson was a "Five-Star General"

[1] According to the grand jury testimony, a "kitty" is a gang term for a pool of money saved for members and given to them once released from jail. The purpose of the kitty is to financially rehabilitate recently incarcerated members, or pay for their attorney fees.

of the Headbusta set, a lower rank than "Triple OG" or "Godfather." As a Five-Star General, Thompson was responsible for overseeing gang operations in New Brunswick.

Although Anderson did not sanction defendant's proposed split, some members of the "Headbusta" set believed the split had officially occurred and, therefore, reported directly to defendant while others continued to report to Anderson. As part of his dispute with Anderson, defendant sought to obtain more control in areas located near New Brunswick and Plainfield by placing his own leadership structures in these locations. Defendant installed another gang member, Davon Parker, as Five-Star General of New Brunswick without Anderson's consent, and stripped Thompson of his rank.

In a call on June 1, 2008, a day before Thompson's murder, Anderson reassured Thompson that he was still the Five-Star General over New Brunswick. Anderson told Thompson not to listen to Parker, who had instructed other gang members not to report to Thompson.

On June 2, 2008, at 6:20 p.m. and 6:32 p.m., a few hours before Thompson's murder, Anderson held two three-way calls with Parker and co-defendant Dorean Wheeler, who held the rank of "OG." Wheeler told Anderson that Thompson was scared because defendant was holding a gang meeting to collect dues and discuss other Blood

business that evening. Parker advised Anderson that he and co-defendant Tyrane Mathis were on their way "to whoop [Thompson's] ass."

A few hours later, Parker and Mathis met with Thompson and C.W., the attempted-murder victim, to drive Thompson and C.W. to the gang meeting. When they arrived at the park where the meeting would be held and exited the vehicle, Parker shot Thompson and C.W. Thompson succumbed to his gunshot wounds, but C.W. was wounded in the shoulder and survived. C.W. later identified Parker as the shooter to police.

In a call on June 3, 2008, Wheeler informed Anderson that Thompson got "popped." In a call later that day, Anderson told defendant "that shit is bringing mad heat," in reference to the police involvement as a result of the shooting. In response, defendant stated: "It's too late. That little nigger got what he got." Defendant then stated: "These little niggers are going to feel me. They are going to get down with what I am trying to do or I am going to lay them. And if they don't listen then it is going to be over for them."

Prior to the start of defendant's joint trial with co-defendant Mathis, both defendant and Mathis agreed to plead guilty to first-degree racketeering. In exchange for defendant's guilty plea, the State agreed to recommend a sentence of sixteen years

subject to an eighty-five percent parole disqualifier under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, dismiss the remaining counts under the superseding indictment, and dismiss a separate Middlesex County indictment.

At defendant's plea hearing, he admitted the following facts. Between July 28, 2005 and November 22, 2009, defendant was part of a criminal enterprise that included co-defendants Parker and Mathis. Defendant admitted the criminal enterprise included the distribution of drugs that affected trade and commerce in New Jersey, and at least two counts of murder. Specifically, defendant admitted that on June 2, 2008, while in New Brunswick, he ordered the shooting death of Thompson on behalf of and for the benefit of his gang. As such, defendant acknowledged that he was involved in an agreement to aid in the planning, solicitation, and commission of the purposeful death of Thompson.

Defendant testified he was not forced, threatened, or coerced to enter into the plea agreement, that he did so freely and voluntarily, and that no other promises had been made to him other than the ones contained on his plea form. Defendant confirmed he reviewed his plea form with his counsel and affirmed he was satisfied with counsel's advice and services. At his sentencing, defendant again confirmed he pleaded guilty under oath, and was

neither forced nor threatened to do so. Defendant was sentenced in accordance with the plea agreement.

Defendant appealed his sentence. We considered the appeal on our excessive sentencing oral argument (ESOA) calendar and affirmed defendant's sentence. Defendant's petition for certification to the Supreme Court was subsequently denied. State v. Hakins, 217 N.J. 53 (2014).

Defendant filed a pro se post-sentencing motion to withdraw his guilty plea based on newly discovered evidence. He also filed a pro se PCR petition. The PCR judge heard oral argument and denied the petition and the motion. Specifically, the judge found defendant failed to make a prima facie case that his trial counsel's assistance was ineffective and failed to show that it would be a manifest injustice to allow his guilty plea to stand. This appeal followed.

Defendant raises the following arguments on appeal:

> I. FAILURE OF THE PCR COURT TO GRANT DEFENDANT AN EVIDENTIARY HEARING ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WAS ERROR.
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> > A. FAILURE TO INVESTIGATE AND RAISE AN ALIBI DEFENSE.
> >
> > B. FAILURE TO FILE PRE-TRIAL MOTION.
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> > C. FAILURE OF COUNSEL TO PREVENT DEFENDANT FROM PLEADING GUILTY WHERE THE PLEA WAS INVOLUNTARY.

D. FAILURE TO ARGUE ANY RELEVANT MITIGATING FACTORS AT SENTENCING.

II. IT WAS ERROR FOR THE PCR COURT TO DENY DEFENDANT'S MOTION TO VACATE HIS GUILTY PLEA.

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). "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.; 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).

Rule 3:22-10(b) states:

> 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.
>
> [See State v. Marshall, 148 N.J. 89, 157-58 (1997); see also State v. Preciose, 129 N.J. 451, 462 (1992).]

Rule 3:22-10(e) states:

> A court shall not grant an evidentiary hearing:
>
> (1) if an evidentiary hearing will not aid the court's analysis of the defendant's entitlement to post-conviction relief;
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> (2) if the defendant's allegations are too vague, conclusory or speculative; or
>
> (3) for the purpose of permitting a defendant to investigate whether additional claims for relief exist for which defendant has not demonstrated a reasonable likelihood of success as required by R[ule] 3:22-10(b).

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. "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.
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> [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).]

On appeal, defendant contends he was denied the effective assistance of counsel who represented him in the racketeering prosecution, and that the denial of his PCR petition was error. He contends counsel failed to: investigate and raise an alibi defense on his behalf; file a pre-trial motion to suppress his

statements to police; prevent defendant from pleading guilty involuntarily; and argue any relevant mitigating factors at sentencing. Defendant's claims regarding his guilty plea and sentencing are raised for the first time on appeal.

II.

The PCR judge rejected defendant's claim his counsel failed to investigate his alleged alibi and call witnesses at trial to establish the alibi. The judge found:

> [Defendant] makes no mention as to which witnesses were available, the nature of their testimony or that trial counsel was aware of the supposed alibi witnesses prior to pleading guilty. [Defendant] does not point to any specific facts in support of this claim, which amounts to a bald assertion of ineffective assistance. A bald assertion does not suffice to establish a prima facie showing that trial counsel's performance was ineffective. See State v. Porter, 216 N.J. 343, 355 (2013). [Defendant] has failed to establish prima facie evidence that trial counsel's performance was ineffective based on the alleged existence of alibi witnesses.

We agree that defendant failed to establish a prima facie showing regarding an alibi defense. More importantly, given defendant's admission he was a gang member, and the basis of the charge was he ordered Thompson's murder, the State would not have to show he was present at the shooting. Thus, defendant failed to demonstrate the lack of an alibi defense prejudiced him.

The PCR judge also rejected defendant's claim his trial counsel should have filed a motion to suppress his statement to police. The judge held it was not unreasonable that counsel did not file a motion because the State did not seek to admit the statement or otherwise use it at trial. The judge also found:

> [Defendant] was the subject of a custodial interrogation and the officers were required to inform [defendant] of his Miranda[2] rights prior to questioning him about the offense. [Defendant] was adequately advised of his Miranda rights . . . . When the officers advised [defendant] of said rights, [defendant] verbally indicated that he understood each right and initialed a waiver of rights form after each individual right was administered to him by the interrogating officers. [Defendant] signed at the bottom of the waiver of rights form after all of the rights were read to him.
>
> [Defendant] was adequately advised of his Miranda rights and his acknowledgement of understanding the rights both verbally and in writing sufficed as a voluntary, knowing and intelligent waiver of said rights. After waiving the right to remain silent and the right to counsel, [defendant] told the officers that he was a member of the "9-3" Bloods street gang. [Defendant] denied knowing his codefendant and made no direct admission as to whether he was responsible for the shooting death of Thompson or carried out the murder himself. [Defendant] has failed to point to specific facts that establish why trial counsel's decision not to file a motion to suppress his statement was prejudicial. [Defendant] merely claims that trial counsel was ineffective on a per se basis due to trial

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

> counsel's decision not to file a motion to suppress [defendant's] statement. Without more, [defendant] cannot establish a prima facie case of ineffective assistance of counsel on this particular ground.

Notwithstanding, defendant notes that when he was asked by police whether he understood he was charged with conspiracy to commit first-degree murder, he responded "not at all." Defendant posits this is evidence the Miranda warning was improper.

Where a defendant asserts his or her attorney was ineffective by failing to file a motion, he or she must establish that the motion would have been successful. "It is not ineffective assistance of counsel for defense counsel not to file a meritless motion[.]" State v. O'Neal, 190 N.J. 601, 619 (2007).

The "prohibition against compelled self-incrimination require[s] that custodial interrogation be preceded 'by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney.'" State v. Kennedy, 97 N.J. 278, 284 (1984) (quoting Edwards v. Arizona, 451 U.S. 477, 482 (1981)). "After being advised of his Miranda rights, an accused may himself validly waive those rights and respond to interrogation." Id. at 284-85. The United States Supreme Court has held the following inquiry should occur to determine whether a defendant's waiver of Miranda rights "is made voluntarily, knowingly and intelligently":

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.
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> [Moran v. Burbine, 475 U.S. 412, 421 (1986).]

We see no basis to disturb the PCR judge's findings. Investigator Scott Crocco of the Middlesex County Prosecutor's Office (MCPO) properly administered defendant's Miranda warnings and explained defendant's rights in clear and unequivocal terms, before he and Detective Mark Pappas questioned defendant about Thompson's murder. Defendant initialed and signed each of the warnings on his Miranda form. He then made uncoerced statements thereby waiving his rights. See Berghuis v. Thompkins, 560 U.S. 370, 388-89 (2010) ("[A] suspect who has received and understood the Miranda warnings, and has not invoked his Miranda rights, waives the right to remain silent by making an uncoerced statement to the police.")

Also, defendant's "not at all" statement is taken out of context. The following colloquy illustrates defendant's knowing and voluntary waiver of his rights:

[INV. CROCCO:] Okay. Alright Syree. I gotta' read you a complaint here. Alright? This is a complaint that was signed against you . . . charging you with murder.

[DEFENDANT:] Charging me with murder?

[INV. CROCCO:] Yes. I'm gonna' read it to you. I'll give you a copy of it. . . . [W]ithin the jurisdiction of the court, purposely or knowingly did cause [the] death of Devin Thompson or did purposely or knowingly [inflict] serious bodily injury upon Devin Thompson, resulting in the death of Devin, Devin Thompson. Okay? Sec . . .

[DEFENDANT:] Um . . .

[INV. CROCCO:] . . . okay. Second charge is Conspiracy. Okay? Conspiracy to commit murder. Within the jurisdiction of this Court, conspire with Devon Parker to commit First Degree Murder in violation of, and it lists the statute there. Okay? There's gonna' be a copy in yours. A copy for you. Okay. Do you understand that?

[DEFENDANT:] No. Not at all.

[INV. CROCCO:] Well, you might not agree with me but do you understand the charge or, if you want to read it.

[DEFENDANT:] When did all this incidence suppose to have happened.

[INV. CROCCO:] I tell you what. Before we even get into that, I just gotta' read you your rights. Okay?

[DEFENDANT:] Uh-huh.

[INV. CROCCO:] [A]nd that's your choice. If you want to . . . . let me get into some of the details of it.

> [DET. PAPPAS:] Alright? Listen to what he has to say here[.]
>
> [DEFENDANT:] Okay. I'm listening.

Defendant was then informed of his rights. Immediately after signing the Miranda form, further colloquy ensued:

> [DEFENDANT:] Now what was this suppose to happen.
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> [INV. CROCCO:] This was here . . . in New Brunswick on June 2nd of this year, 2008. Okay?
>
> [DEFENDANT:] Uh-huh.
>
> [INV. CROCCO:] Um, so, . . . obviously Syree, . . . it's been two months since it happened, so we didn't just, you know, wake up this morning and say we're gonna' arrest you. So we do have some evidence . . . and the investigation, you know, led us in your direction here. Um, you want to talk about it?

This colloquy demonstrates defendant's "not at all" statement signaled his disagreement with the charge, not a misunderstanding of the charge. The record demonstrates defendant understood he had been charged with Thompson's murder, and that he knowingly, voluntarily and intelligently waived his Miranda rights before giving uncoerced statements to police. Therefore, a suppression motion filed on defendant's behalf would lack merit. Moreover, the State did not seek to admit defendant's statement or use it

at the joint trial. For these reasons, defendant's contention fails to meet both prongs of Strickland.

Defendant contends he pleaded guilty "out of fear that his defense attorney [had] not properly represented him and [would] continue in the same vein at trial." Therefore he argues his guilty plea was not voluntary and his counsel was ineffective for permitting him to enter into the plea. We find this argument lacks merit.

As noted by the State, defendant affirmed on his plea form and during his plea colloquy that he was satisfied with his attorney's services and the advice he received from counsel. Defendant admitted he was involved in a criminal enterprise and he gave the order for Thompson's murder for the benefit of the criminal enterprise. This testimony provided an adequate factual basis for racketeering under N.J.S.A. 2C:41-2(c) and (d). Defendant further testified he was not forced, threatened, or coerced to enter into the plea agreement, that he did so freely and voluntarily, and that no other promises had been made to him other than the ones contained on his plea form. Furthermore, the sentencing judge informed defendant of his rights and the consequences of pleading guilty, including the plea-negotiated sentence and potential penalties and defendant acknowledged he

understood. Therefore, defendant's contention fails the first prong of Strickland.

Moreover, defendant fails to demonstrate a reasonable probability that he would have gone to trial had he not pled guilty. Therefore, defendant's contention fails the second prong of Strickland. See State v. O'Donnell, 435 N.J. Super. 351, 371 (App. Div. 2014) (quoting Padilla v. Kentucky, 559 U.S. 356, 372 (2010)) ("In the PCR context, to obtain relief from a conviction following a plea, 'a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.'").

We decline to address defendant's claim his attorney failed to argue relevant mitigating factors during his sentencing proceeding because these claims were not raised before the PCR judge and are thus waived. See State v. Robinson, 200 N.J. 1, 18-22 (2009). Additionally, this claim is also procedurally barred because defendant could have presented this argument when he appealed from his sentence, but failed to do so. R. 3:22-4.

Had we addressed this claim, defendant still would not prevail. The sentencing judge found aggravating factors three, six, and nine applied, and defendant has not demonstrated otherwise. Aggravating factors three and six related to defendant's lengthy and uninterrupted prior record of criminality

that spanned over twenty years, and included five indictable convictions for homicide, distribution of CDS, burglary, receipt of stolen property, and reckless endangerment. Also, the evidence supports the sentencing judge's application of aggravating factor nine, namely, the need to deter defendant and others from engaging in gang activity, which the judge noted was a major societal problem. The sentencing judge applied mitigating factor fourteen because defendant expressed remorse for Thompson's death.

Defendant has failed to demonstrate how aggravating factors three, six, and nine do not apply to him, and how any further mitigating factors should have applied to him. Therefore, setting aside the procedural bar, defendant's contention fails the second prong of Strickland.

III.

Lastly, we address defendant's argument the PCR judge erred by not granting his motion to withdraw the plea. Defendant contends he met the factors set forth in State v. Slater, 198 N.J. 145, 157 (2009), to vacate the plea. We disagree.

"[A] plea may only be set aside in the exercise of the court's discretion." Slater, 198 N.J. at 156 (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)). "In meeting their burden, defendants must show more than a change of heart. A 'whimsical change of mind,' by the defendant . . . is not an adequate basis to set aside a plea." Id. at 157 (quoting State v. Huntley, 129 N.J. Super. 13, 18 (App. Div. 1974)).

"[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 State v. Smullen, 118 N.J. 408, 416 (1990)). "[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.

"A motion to withdraw a plea of guilty . . . shall be made before sentencing, but the court may permit it to be made thereafter to correct a manifest injustice." Id. at 156 (quoting R. 3:21-1). "[E]fforts to withdraw a plea after sentencing must be substantiated by strong, compelling reasons." Id. at 160. "Thus, if a defendant wishes to withdraw a guilty plea after

sentencing has occurred, 'the court weighs more heavily the State's interest in finality and applies a more stringent standard' than that which is applied to a withdrawal application made before sentencing has occurred." State v. Johnson, 182 N.J. 232, 237 (2005) (quoting State v. McQuaid, 147 N.J. 464, 487 (1997)).

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." Slater, 198 N.J. 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.

As to the first Slater factor, the PCR judge stated:

> [Defendant] points to a statement he made at sentencing in support of his claim of innocence: "Yes. First of all I'd like to speak to all the Thompson family. I'd like to say I also have a son and I never knew Devin Thompson and the thing that happened to Devin Thompson wasn't my fault. I never had anything to do with your son's death. I'm sorry about your son's death, but I had nothing to do with your son's death. That's basically all I want to say, Your Honor."

> Despite [defendant's] contention that he is innocent and the statement that he made to the court at sentencing, [defendant] entered his plea knowingly, voluntarily and intelligently. [Defendant] provided a factual basis to support the charge, admitting his involvement in the shooting death of Thompson. [Defendant's] assertion that he is now innocent is unsupported by the facts elicited at sentencing and [defendant] has not provided any additional evidence to establish a colorable claim of innocence. [Defendant's] contention that he is innocent amounts to a mere change of heart. This factor does not weigh in favor of allowing [defendant] to withdraw his guilty plea.

The PCR judge adjudicated the second Slater factor as follows:

> [Defendant] contends that the newly discovered evidence consists of a three page affidavit executed by Davon Parker, a co-defendant in the 2008 shooting death of Thompson, which allegedly exonerates [defendant] of any involvement in the shooting. . . . Parker allegedly states in his affidavit that he was ordered by leaders of his gang to implicate [defendant] in the shooting and that he did not want to implicate [defendant] or anyone else in the shooting death of Thompson. . . . Parker allegedly stated in his affidavit that he implicated [defendant] in the shooting of Thompson out of fear for the safety of his family, that he would not have otherwise implicated [defendant] and that he would be willing to testify as to the information contained in the affidavit. [Defendant] has not provided the [c]ourt with a copy of the alleged affidavit prepared by Parker, nor is there any indication that it was provided to the State. [Defendant's] unsupported assertion that an affidavit exists which exculpates him of the offense, without providing it to the [c]ourt, is insufficient

> to establish that the nature and strength of the reason for withdrawal weighs in favor of allowing [defendant] to withdraw his guilty plea.

Regarding the third Slater factor, the PCR judge stated "the existence of a plea agreement plays minimal weight in deciding whether to allow [defendant] to withdraw a guilty plea." As to the fourth Slater factor, the judge stated:

> [Defendant] does not put forth anything in support of the fourth Slater factor, other than that the withdrawal of his guilty plea would not result in unfair prejudice to the State or unfair advantage to [defendant]. [Defendant] entered a plea of guilty to the offense in 2011. Approximately five years have transpired since [defendant] entered his guilty plea and eight years have passed since the murder of Thompson in 2008. The State asserts that it would be unfairly prejudiced by the length of time since the offense if [defendant] were to be allowed to withdraw his guilty plea. As time passes witness availability becomes increasingly difficult and the State has raised this concern if it were to be forced to retry [defendant's] case eight years after the offense was committed. In light of the fact that [defendant] has not pointed to any specific facts to support his contention that the State would not be unfairly prejudiced, combined with the substantial length of time since the offense, allowing [defendant] to withdraw his plea would undoubtedly create unfair prejudice to the State. This Slater factor does not weigh in favor of allowing [defendant] to withdraw his guilty plea.

We agree with the PCR judge's thorough findings and address them in turn. "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 159.) "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). The Supreme Court has held:

> When evaluating a defendant's claim of innocence, courts may look to
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> > evidence that was available to the prosecutor and to the defendant through our discovery practices at the time the defendant entered the plea of guilt. In some cases, the proffered evidence may serve to rebut the assertion of innocence; in others, it may move a court to vacate the plea to the end that justice be done.
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> [Slater, 198 N.J. at 158-159 (quoting Smullen, 118 N.J. at 418.]

Here, despite the alleged existence of Parker's affidavit, Anderson's prison calls, which were available to both the State and the defense at the time of defendant's plea, demonstrate Parker's contentions in his affidavit were false. These calls

also show defendant made incriminating statements, which the judge found demonstrated defendant had a motive for and in fact ordered Thompson's murder. Therefore, the PCR judge properly found the first Slater factor weighed against granting defendant's motion.

Inquiry as to the nature and strength of defendant's reasons for withdrawal "requires trial courts to ascertain not only the existence of a valid defense but to determine whether . . . 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). "Timing matters as to the strength of the reasons proffered in favor of withdrawal." Slater, 198 N.J. at 160. "[T]he longer the delay in raising a reason for withdrawal, or asserting one's innocence, the greater the level of scrutiny needed to evaluate the claim." Ibid.

Here, defendant failed to provide the PCR judge with a copy of Parker's alleged affidavit. Moreover, as the State argues, "Parker's affidavit must be greatly scrutinized in light of the fact that defendant waited four years after his plea to file a motion to withdraw it post-sentencing." We agree with the PCR judge that the second Slater factor weighed in favor of denying defendant's motion.

We also agree with the PCR judge the existence of a plea bargain did not support granting defendant's motion.

"[D]efendants have a heavier burden in seeking to withdraw pleas entered as part of a plea bargain." Slater, 198 N.J. at 160-61 (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 first-degree racketeering pursuant to a plea bargain, thereby facing a definitive and shorter sentence than he could have faced following trial. As the State notes, defendant's exposure to prison time was potentially fifty-five years had the matter proceeded to trial. Therefore, the PCR judge properly found the third Slater factor would not support a motion to vacate the plea.

Finally, we agree with the PCR judge the State would be unfairly prejudiced if the motion was granted. An inquiry as to unfair prejudice to the State requires an assessment of "whether the passage of time has hampered the State's ability to present important evidence." Id. at 161. "[T]he passing of time after a conviction increases the difficulties associated with a fair and accurate reassessment of the events." State v. Murray, 162 N.J. 240, 249 (2000). "Certain facts readily demonstrate prejudice, such as the loss of or inability to locate a needed witness, a witness's faded memory on a contested point, or the loss or

deterioration of key evidence." Slater, 198 N.J. at 161. "In addition, courts may consider the State's efforts leading up to the plea and whether it is fair to require the State to repeat them." Ibid.

In Slater, also a racketeering case, the Supreme Court recognized the "[e]xtensive pre-trial preparation for a complex racketeering case, halted by a plea, might counsel against a plea withdrawal[.]" Ibid. Indeed, "the longer a defendant delays in seeking to withdraw a plea, the greater burden he or she will bear in establishing 'manifest injustice,' because the prejudice to the State under prong four will generally increase." O'Donnell, 435 N.J. Super. at 370. "The State is not required to show prejudice if a defendant fails to offer proof of other factors in support of the withdrawal of a plea." Slater, 198 N.J. at 162.

As the State argued, when defendant filed his motion five years had passed since the plea and eight years since Thompson's murder. Requiring the State to reassemble its evidence and find witnesses whose memories could have faded and were willing to testify was an unfair burden to place upon the State, especially where it had prepared for trial and a jury had been empaneled.

Therefore, the PCR judge properly found the fourth Slater factor did not favor granting the motion. We are satisfied there was no basis to grant the motion as well.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION