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Although it is posted on the internet, this opinion is binding only on the  
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1798-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DONELL J. ANDERSON,

Defendant-Appellant.

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Submitted April 9, 2018 – Decided April 23, 2018

Before Judges Sabatino and Ostrer.

On appeal from Superior Court of New Jersey,  
Law Division, Essex County, Indictment No.  
12-05-1394.

Joseph E. Krakora, Public Defender, attorney  
for appellant (John V. Molitor, Designated  
Counsel, on the brief).

Robert D. Laurino, Acting Essex County  
Prosecutor, attorney for respondent (Stephen  
A. Pogany, Special Deputy Attorney General/  
Acting Assistant Prosecutor, of counsel and  
on the brief).

PER CURIAM

Defendant Donnell Anderson appeals from the trial court's  
order denying, without an evidentiary hearing, his petition for

post-conviction relief (PCR). Defendant collaterally challenges his conviction, after a guilty plea, to two counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(7). We affirm.

Defendant was charged with anal and vaginal penetration of a victim whom he knew or should have known was physically helpless, mentally defective or mentally incapacitated. Defendant also pleaded guilty to first-degree robbery of a different victim, N.J.S.A. 2C:15-1, second-degree unlawful possession of a firearm, N.J.S.A. 2C:39-4(a), and other fourth-degree crimes. Defendant's original plea agreement called for the State's recommendation of a ten-year term, but the plea judge assured defendant she would impose eight years and consider a request for seven years. A different judge imposed an aggregate sentence of eight years, consisting of concurrent eight-year terms on each first-degree and second-degree conviction and concurrent eighteen-month terms on the fourth-degree convictions. Defendant was required to serve eighty-five percent of the term before parole eligibility under the No Early Release Act, N.J.S.A. 2C:43-7.2.

Defendant contends he provided an inadequate factual basis for his plea to the aggravated sexual assault charges, because he admitted only that he attempted penetration of the victim.<sup>1</sup> He

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<sup>1</sup> Defendant also challenged the factual basis of his robbery conviction, but has abandoned that argument on appeal.

argues his plea counsel and appellate counsel were ineffective by failing to raise that infirmity.

In fact, defendant's appellate counsel alerted an ESOA appellate panel that he intended to raise the lack of a factual basis, as well as the alleged excessiveness of defendant's sentence. At oral argument, the court acknowledged the deficiency in defendant's allocution. However, appellate counsel then affirmatively withdrew the point.

[APPELLATE COUNSEL]: But I agree that this court has grounds for vacating his convictions and -- but we are arguing here for a remand for resentencing --

[THE COURT]: Okay.

[APPELLATE COUNSEL]: -- to a lower sentence than eight years.

[THE COURT]: Well, in your sheet you pointed out the factual basis as well as the term.

[APPELLATE COUNSEL]: Yes.

[THE COURT]: Okay.

[APPELLATE COUNSEL]: I have -- after talking to the client I -- yesterday I did think that it was primarily -- that what I wanted -- what we need to argue today is for a remand for resentencing.

[THE COURT]: A remand for resentencing?

[APPELLATE COUNSEL]: Yes, Your Honor.

[THE COURT]: Okay. So you're withdrawing the argument about factual basis or no?

[APPELLATE COUNSEL]: Yes, Your Honor.

The PCR court denied the petition after concluding that defendant failed to demonstrate sufficiently deficient performance or resulting prejudice under the well-settled Strickland test. See Strickland v. Washington, 466 U.S. 668, 687 (1984) (requiring a showing of deficient performance and resulting prejudice); State v. Fritz, 105 N.J. 42, 58 (1987). In light of defendant's second-degree sentence for first-degree crimes, the PCR court concluded that defendant failed to show that his plea and appellate attorneys' performances were "so egregious that counsel was not functioning as the 'counsel' guaranteed to the defendant by the Sixth Amendment." The court noted that counsel spared defendant exposure to conviction at trial of first-degree crimes and a lengthier sentence. Also, as defendant's allocution satisfied the elements of second-degree attempt, he suffered no prejudice in receiving sentences in the second-degree range.

We review the trial court's determination de novo. See State v. Harris, 181 N.J. 391, 421 (2004) (stating appellate court conducts de novo review where PCR court does not hold an evidentiary hearing). We concur in the trial court's determination that defendant failed to demonstrate that his plea and appellate counsels performed deficiently, or that he suffered prejudice because they did not challenge the adequacy of his factual basis.

We add that neither in defendant's pro se petition, nor in his counseled supplemental certification, did he contradict his appellate counsel's representation that they conferred, and defendant agreed with the strategy not to pursue the argument that his factual basis was inadequate.<sup>2</sup> An effective counsel may withhold even a winning argument – such as, a challenge to the adequacy of the factual basis – in service of a more important goal – preserving a plea agreement that limited defendant's exposure to an aggregate eight-year term. See Brown v. Cain, 337 F.3d 546, 550 (5th Cir. 2003) (concluding defense counsel was not ineffective when he failed to make a motion to quash an indictment charging second-degree murder, because the motion would likely have triggered an indictment charging first-degree murder). Absent any details about appellate counsel's conversation with defendant, and their decision to withhold the argument about the factual basis, defendant's contention that his appellate counsel was ineffective is a bald assertion that warrants no relief. See State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999) (noting PCR requires more than defendant's "bald assertions").

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<sup>2</sup> We note defendant's supplemental certification, which he swore was "true to the best of my knowledge and belief," failed to comply with Rule 1:6-6. See Jacobs v. Walt Disney World, Co., 309 N.J. Super. 443, 454 (App. Div. 1998) (stating that "factual assertions based merely upon 'information and belief' are patently inadequate" under Rule 1:6-6).

Finally, we note that absent a showing of ineffective assistance, defendant's conviction is not subject to collateral attack solely because of the inadequate factual basis. Defendant did not assert a contemporaneous claim of innocence, nor did he challenge the voluntariness of his plea. See State v. Mitchell, 126 N.J. 565, 577 (1992) (noting that "[a]s long as a guilty plea is knowing and voluntary . . . a court's failure to elicit a factual basis for the plea is not necessarily of constitutional dimension and thus does not render illegal a sentence imposed without such basis"); State v. Barboza, 115 N.J. 415, 421 n.1 (1989) (stating that "[a] factual basis is not constitutionally required unless the defendant accompanies the plea with a claim of innocence").

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION