

RECORD IMPOUNDED

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This opinion shall not "constitute precedent or be binding upon any court." 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-2375-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

W.M.,

Defendant-Appellant.

Submitted January 25, 2018 – Decided March 19, 2018

Before Judges Simonelli and Gooden Brown.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Accusation No.
97-11-3281.

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

Mary Eva Colalillo, Camden County Prosecutor,
attorney for respondent (Maura Murphy
Sullivan, Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant appeals from the December 9, 2016 Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

On November 12, 1997, defendant entered a negotiated guilty plea to second-degree sexual assault, N.J.S.A. 2C:14-2(c), and admitted touching an eleven-year-old's penis for sexual gratification when he (defendant) was eighteen years old. On February 20, 1998, defendant was sentenced in accordance with the plea agreement to seven years' imprisonment to be served at the Adult Diagnostic and Treatment Center pursuant to N.J.S.A. 2C:47-3. Defendant was also sentenced to community supervision for life, N.J.S.A. 2C:43-6.4, and ordered to comply with Megan's Law, N.J.S.A. 2C:7-1 to -23. Defendant did not appeal his conviction or sentence. In 2003, after serving his sentence, defendant was civilly committed under the Sexually Violent Predator Act (SVPA), N.J.S.A. 30:4-27.24 to -27.38, and currently remains confined.

On December 16, 2015, defendant filed an untimely PCR petition, claiming he was deprived of effective assistance of counsel at the time of his plea because his attorney never informed him that his conviction could subject him to indefinite civil commitment under the SVPA. As a result, defendant argued, "he did not understand the nature of the consequences of the plea." After defendant was assigned counsel, defendant submitted a supplemental

certification, stating that "[i]f [he] had been aware of the possibility of being civilly committed, for possibly the rest of [his] life, . . . [he] would have opted to reject the plea offer and go to trial." Additionally, defendant certified that his attorney "never explained [his] right to file for post-conviction relief [or related time limits," and "[he] only became aware of [his] PCR rights in the summer of 2015" through another inmate. In a supporting brief filed by assigned counsel, defendant argued "[he] should be permitted to withdraw his guilty plea." He also argued that his attorney's and the court's failure to inform him of his PCR rights constituted "truly exceptional circumstances compelling a relaxation of the five[-]year time bar imposed by [Rule] 3:22-12."

On December 9, 2016, following oral argument, the PCR court rejected defendant's arguments, finding that defendant's application was procedurally barred by Rule 3:22-12 and substantively barred by State v. J.K., 407 N.J. Super. 15 (App. Div. 2009). As to the procedural bar, the judge noted that defendant filed his petition seventeen years after his conviction and explained that "ignorance or mistake of law [was] simply not a basis . . . to excuse the five-year limitation. Case law is very clear on that." Moreover, the court pointed out that defendant did not claim that there was "a serious question about

his guilt." To the contrary, "[d]efendant confessed . . . to the crime."

As to the substantive bar, the court noted that the SVPA "wasn't passed until well after [defendant] was sentenced. It would be an unfair burden to place on any lawyer to know what was going to happen in the future." Accordingly, the court concluded defendant failed to establish a prima facie case of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984), to warrant an evidentiary hearing or PCR. A memorializing order was entered on December 9, 2016, and this appeal followed.

On appeal, defendant raises the following points for our consideration:

POINT ONE

[DEFENDANT] IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT HIS TRIAL ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO ADVISE HIM ADEQUATELY OF THE CIVIL COMMITMENT CONSEQUENCES OF HIS PLEA.

POINT TWO

THE PCR COURT ERRONEOUSLY RULED THAT [DEFENDANT'S] PETITION WAS TIME[-]BARRED BECAUSE ANY DELAY IN FILING THE PETITION WAS DUE TO EXCUSABLE NEGLIGENCE[,] AND THERE IS A REASONABLE PROBABILITY THAT IF . . . DEFENDANT'S FACTUAL ASSERTIONS WERE FOUND TO BE TRUE, ENFORCEMENT OF THE TIME BAR WOULD RESULT IN A FUNDAMENTAL INJUSTICE.

When a PCR petition is premised on ineffective assistance of counsel, New Jersey courts apply the two-part Strickland/Fritz¹ framework:

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 Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

[Strickland, 466 U.S. at 687.]

The second prong of this test is satisfied by a showing that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. In the case of a defendant who enters a guilty plea, he or she must demonstrate a reasonable probability that, but for counsel's errors, no plea would have been entered, and he or she "would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

A defendant who makes a prima facie showing of ineffective assistance of counsel requiring PCR, that is, "demonstrate[s] a reasonable likelihood that his or her claim will ultimately succeed

¹ State v. Fritz, 105 N.J. 42, 67 (1987) (adopting the standard in Strickland, 466 U.S. at 687-88).

on the merits," is generally entitled to an evidentiary hearing. State v. Marshall, 148 N.J. 89, 158 (1997). Absent such a showing, however, no evidentiary hearing is required. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999); see also R. 3:22-10(b). We review a judge's decision denying a PCR petition without an evidentiary hearing for abuse of discretion. State v. Preciose, 129 N.J. 451, 462 (1992). Where, as in this case, "no evidentiary hearing has been held, we 'may exercise de novo review over the factual inferences drawn from the documentary record by the [PCR judge].'" State v. Reevey, 417 N.J. Super. 134, 146-47 (App. Div. 2010) (alteration in original) (emphasis omitted) (quoting State v. Harris, 181 N.J. 391, 421 (2004)).


Here, we agree with the PCR court that J.K. is dispositive and warrants rejection of defendant's petition. In J.K., 407 N.J. Super. at 19-20, we considered a PCR application by a defendant who was civilly committed under the SVPA after serving his sentence for a conviction he received approximately four years before the Act became effective. Relying on our Supreme Court's holding in State v. Bellamy, 178 N.J. 127 (2003), we rejected defendant's application. J.K., 407 N.J. at 19-21. Bellamy allowed defendants who pled guilty to SVPA-eligible charges without being advised of the potential SVPA consequences to withdraw their guilty pleas but

limited the application of the new rule to pipeline retroactivity only. Id. at 140-43.

In J.K., as here, the defendant contended he received ineffective assistance of counsel because his attorney had not informed him of the possibility that the SVPA might apply retroactively to his case. Id. at 18. However, as here, "[a]t the time [the] defendant pled guilty, he was fully apprised of all relevant consequences of his plea that were known at the time." Id. at 21. We determined that "[w]ith knowledge of those consequences, his plea was knowing and voluntary based upon the law as it then existed," and his attorney could "hardly be found deficient for failing to advise [the] defendant of a potential consequence that did not then exist." Ibid. Therefore, we concluded defendant could not meet the first prong of Strickland, requiring that counsel's performance fall "below an objective standard of reasonableness." Ibid. (quoting Strickland, 466 U.S. at 687-88). The same result obtains here.²

Affirmed.

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


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² Here, as in J.K., the judge also found defendant's petition time-barred. See R. 3:22-12. However, "[b]ecause of our disposition on the substantive issue[], we do not address the procedural time bar." J.K., 407 N.J. Super. at 19 n.2.