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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-2748-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KENNETH KNOX,

Defendant-Appellant.

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Submitted January 23, 2018 – Decided February 5, 2018

Before Judges Yannotti and Carroll.

On appeal from Superior Court of New Jersey,  
Law Division, Essex County, Indictment No. 13-  
05-1007.

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

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

PER CURIAM

Defendant Kenneth Knox appeals from an order entered by the Law Division on June 23, 2016, which denied his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

I.

Defendant was charged in Essex County Indictment No. 13-05-1007 with first-degree murder, contrary to N.J.S.A. 2C:11-3(a); second-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5(b), and second-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4(a). On September 9, 2014, defendant pled guilty to count one of the indictment, which was amended to charge first-degree aggravated manslaughter, contrary to N.J.S.A. 2C:11-4(a)(1).

The State agreed to recommend that the court sentence defendant to sixteen years of incarceration, with an eighty-five percent period of parole ineligibility, pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. The State also agreed to dismiss the remaining charges.

At the plea hearing, defendant admitted that on May 18, 2012, he fired a gun in the direction of the victim, Dean Brown, who died as a result of the gunshot wounds. Defendant stated that he knew his action of firing the gun was life-threatening, and that he had acted with extreme indifference to human life.

During the plea hearing, defendant stated that he understood he was waiving all of the rights attendant to a trial, including the right to cross-examine witnesses and otherwise challenge the State's evidence against him. He stated that he was not forced or coerced into pleading guilty. Defendant also said he was satisfied with his counsel's advice, that he "had enough time to speak to [counsel] about [his] case," and that counsel "answered every one of [his] questions."

The court sentenced defendant in accordance with the plea agreement. The court imposed a custodial term of sixteen years with an eighty-five percent period of parole ineligibility, as prescribed by NERA. Defendant did not appeal from the judgment of conviction dated October 22, 2014.

## II.

On October 6, 2015, defendant filed a pro se petition for PCR in the Law Division. The court assigned counsel for defendant, and PCR counsel filed a brief in support of the petition, arguing that defendant had been denied the effective assistance of trial counsel.

PCR counsel argued that defendant's trial attorney failed to adequately discuss with him the strengths and weaknesses of the State's case. PCR counsel asserted that there were discrepancies in and between the statements of the witnesses. PCR counsel also

asserted that trial counsel had not provided defendant time to review the State's discovery. He argued that the court should conduct an evidentiary hearing on the petition.

In support of the petition, defendant submitted a certification in which he stated that he only pled guilty because of the "great amount of prison time" he was facing if found guilty. He stated that his attorneys had advised him to plead guilty because two witnesses had identified him as the shooter. He claimed his attorneys did not discuss with him the "problems" the State had with the witnesses' accounts.

He also stated that his attorneys did not provide him with his own copy of the State's discovery. He asserted that his "initial" attorney only let him browse once through the discovery documents for about forty-five minutes while they viewed the videotaped statements of two witnesses who had identified defendant as the shooter. He claimed his "second" attorney only let him browse through the discovery one time for about twenty minutes as they viewed parts of the videotaped witness statements.

According to defendant, both attorneys repeatedly told him to accept the State's plea offer because of the witness statements. He asserted that there were problems with the State's identifications. He stated that one witness said she did not know

him, and the other witness initially said she could not identify the shooter.

Defendant asserted that another witness had seen numerous males coming from the scene after the shooting, and after the incident, one of the identifying witnesses told her boyfriend, "Why did you all do this to me. You destroyed my life, you all messed my life up. Why did you all do this?"

Defendant also stated that this witness had her boyfriend's name tattooed three times on her body. He asserted that if he had known of the State's "proof problems," he would not have pled guilty and he would have gone to trial.

On June 23, 2016, after hearing oral argument by counsel, the PCR judge placed his decision on the record. The judge found that defendant was arguing that there were discrepancies in witness statements, but he had "cherry-picked" portions of those statements in an attempt to "prove an alternative theory to the case." The judge also found that defendant failed to show that he would not have pled guilty if he had been provided more time to review the State's discovery. The judge concluded that defendant had not established a prima facie case of ineffective assistance of counsel and that an evidentiary hearing was not required.

The judge entered an order dated June 23, 2016, denying PCR. This appeal followed. On appeal, defendant argues that the PCR

court erred by denying his request for an evidentiary hearing. He asserts that he presented a prima facie case of ineffective assistance of counsel, and that the record contains genuine issues of material fact.

### III.

An evidentiary hearing is required in a PCR matter only when a defendant establishes a prima facie case of ineffective assistance. State v. Preciose, 129 N.J. 451, 462-63 (1992). "To establish a prima facie case, a 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." R. 3:22-10(b). "'[B]ald assertions' are not enough—rather, the defendant 'must allege facts sufficient to demonstrate counsel's alleged substandard performance.'" State v. Jones, 219 N.J. 298, 311-12 (2014) (quoting State v. Porter, 216 N.J. 343, 355 (2013)).

Claims of ineffective assistance of counsel are considered under the two-part test enunciated in Strickland v. Washington, 466 U.S. 668, 687 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). The Strickland test requires a defendant to show that the performance of his attorney was deficient, and counsel's deficient performance prejudiced the defense. Strickland, 466 U.S. at 687.

To meet the first part of the Strickland test, a defendant must establish that his attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Ibid. The defendant must rebut the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

Moreover, to satisfy the second part of the Strickland test, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. The defendant must establish that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

The Strickland test applies when a defendant seeks to set aside a guilty plea based on ineffective assistance of counsel. State v. DiFrisco, 137 N.J. 434, 456-57 (1994) (citing Hill v. Lockhart, 474 U.S. 52, 58 (1985)); see also State v. Nunez-Valdez, 200 N.J. 129, 139 (2009) (citing DiFrisco, 137 N.J. at 457). To obtain relief, the defendant must show that counsel's handling of the matter was not "within the range of competence demanded of attorneys in criminal cases." DiFrisco, 137 N.J. at 457 (quoting Tollett v. Henderson, 411 U.S. 258, 266 (1973)). The defendant must also show "that there is a reasonable probability that, but

for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial." Ibid. (alteration in original) (quoting Hill, 474 U.S. at 59).

Here, defendant argues that he was denied the effective assistance of counsel because his attorney failed to discuss with him the alleged strengths and weaknesses of the State's case, specifically discrepancies in the statements of three persons the State interviewed. The PCR judge found that defendant had essentially "cherry-picked" comments from the witness statements in an effort to prove an alternative theory of the case, specifically that a person known as "Pauly" may have been the shooter.

The record shows that K.C.<sup>1</sup> and her sister resided in an apartment on the third floor of a multi-family dwelling on North 18th Street in East Orange. They also gave statements to detectives from the Essex County Prosecutor's Office.

K.C. told the detectives she had been with Brown on the porch, but she went inside to help her sister. She heard a gunshot and saw defendant running away with a gun in his hand. He was wearing red sweatpants. She said another man was on the porch at the time, but she did not know his name or whether he was involved. She was

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<sup>1</sup> We use initials to identify certain persons to protect their identities.



sure he was not the shooter. Without qualification, K.C. identified defendant in a photo array as the shooter.

K.C.'s sister told the detectives that she had gotten into an argument with a person called "Kenny" or "Merce" because he wanted to get into her house. She described "Kenny" or "Merce" as a sixteen-year old with brown skin, who was wearing red sweatpants and a hat over his Afro-style haircut. She told him to leave. Then, she heard a shot, turned around, and saw the person with a gun running to the side of the house. She identified defendant as the shooter in a photo array.

T.M. also gave a statement to the detectives. She said she had been inside her apartment on the second floor of the building on North 18th Street when she heard a pop. She ran out onto the balcony and saw neighbors running outside. K.C. ran downstairs. She was talking on the phone. According to T.M., K.C. said "why did you do all that? Why you all do that? You all didn't have to do that," and that "they damaged her life." T.M. thought K.C. was talking to "Pauly," who T.M. believed was K.C.'s husband, but K.C. told the detectives "Pauly" was not at the house at the time of the shooting.

Defendant argues there were several material discrepancies in the statements. Defendant asserts K.C.'s comments to the person on the phone indicated that she was accusing someone other than

defendant of shooting Brown, and that it is reasonable to infer that "Pauly" was that person. He asserts that the witness statements indicate another person was present and could have been the shooter. Defendant also asserts that K.C.'s sister was not credible because she did not know all the details of his juvenile history.

The PCR judge found that the record does not support defendant's attempt to create an alternative theory that someone other than defendant shot Brown. The judge noted that defendant had "cherry-picked" certain comments in the witness statements to support that theory, but the record shows that the State had strong evidence that defendant was the shooter. While there may have been some discrepancies in the statements, they were not material.

Defendant has not shown that defense counsel was in any way deficient in analyzing the strengths and weaknesses of the State's case. Furthermore, defendant failed to show that any discrepancies in the statements supported possible third-party culpability, which might have justified counsel advising defendant to reject what was clearly a favorable plea offer.

In addition, defendant claims his attorneys did not give him sufficient time to review the State's discovery. The record shows, however, that defendant had been given the State's discovery, which included the witness statements. His attorneys gave him an

opportunity to read the discovery materials. Defendant claims that if he had been given more time to review the statements, he would have rejected the State's plea offer and gone to trial, but the record does not support that assertion. As we have explained, even if defendant had taken more time to review the discovery, he would not have found any material discrepancies that would have justified rejection of the State's favorable plea offer. Moreover, when he entered his plea, defendant told the court he was satisfied with the services his counsel had provided, and he had sufficient time to discuss the case with counsel.

We therefore conclude that the PCR judge correctly found that defendant had not established a prima facie case of ineffective assistance of counsel. The judge correctly determined that defendant's claims could be resolved based on the existing record, and an evidentiary hearing was not required.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION