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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-2783-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHARLES R. KANE, JR.,

Defendant-Appellant.

Submitted April 24, 2018 – Decided May 1, 2018

Before Judges Hoffman and Gilson.

On appeal from Superior Court of New Jersey,
Law Division, Cape May County, Indictment No.
11-04-0235.

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

Jeffrey H. Sutherland, Cape May County
Prosecutor, attorney for respondent (Gretchen
A. Pickering, Assistant Prosecutor, of counsel
and on the brief).

PER CURIAM

Defendant Charles R. Kane, Jr. appeals from a January 27,
2017 order denying his petition for post-conviction relief (PCR)

without an evidentiary hearing. We affirm because he did not establish a prima facie showing of ineffective assistance of counsel.

I.

In April 2011, defendant was indicted for first-degree murder, N.J.S.A. 2C:11-3(a)(2), and two counts of endangering the welfare of a child, N.J.S.A. 2C:24-4(a). On March 27, 2012, he pled guilty to an amended count of first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a). In pleading guilty, defendant admitted to shoving a three-year old child into a refrigerator, which resulted in severe head injuries that directly caused the child's death.

As part of the plea agreement, the State recommended a fifteen-year prison sentence, with eighty-five percent of that time ineligible for parole as prescribed by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, followed by five years of parole supervision. By comparison, the statutory maximum sentence for first-degree aggravated manslaughter is a thirty-year prison term subject to NERA.

Defendant's pre-sentence report (PSR) noted that he had been diagnosed with Post Traumatic Stress Disorder (PTSD) in August 2006, after serving in the United States Navy for nine years. Defendant reported attending inpatient treatment at a Veteran's

Affairs (VA) hospital in Maryland from January 2007 until June 2007, to address both PTSD and "substance abuse issues[.]" He also stated that he "check[ed] himself out" of the program and discontinued his prescribed medications. In 2008, he "sporadically attended" a PTSD outpatient group at a Coast Guard base in Cape May County until his incarceration in February 2010.

At sentencing, defense counsel emphasized defendant's honorable military service and highlighted defendant's PTSD diagnosis as a mitigating circumstance for the court to consider. Counsel also stated that defendant "went to the VA hospital a few times to get treated for [PTSD] and some drug [and] alcohol issues and never really stuck with it." Defense counsel also stated that defendant "should have followed back up with that treatment[.]"

Following defense counsel's presentation, the sentencing judge addressed defendant. The judge asked defendant whether the PSR was substantially accurate and whether he wished to clarify anything in the report. Defendant stated that the report was accurate and he had no additions or clarifications.

Thereafter, the sentencing court made extensive findings regarding the aggravating and mitigating factors and imposed the recommended sentence of fifteen years in prison, subject to NERA, followed by five years of parole supervision. As mitigating circumstances, the court recognized defendant's nine years of

honorable military service, his PTSD, and also his traumatic brain injury (TBI), as detailed in the PSR.

Defendant appealed his sentence, arguing that it was excessive. We rejected that argument and affirmed, concluding that the sentence was neither manifestly excessive nor unduly punitive, and did not otherwise constitute an abuse of discretion. State v. Kane, No. A-5493-12 (App. Div. Oct. 23, 2013).

On May 2, 2016, defendant, representing himself, filed a petition for PCR, alleging ineffective assistance of counsel at sentencing. Specifically, he contended that his counsel "failed to present all the facts" at sentencing by not informing the sentencing court that he had attended treatment beyond 2007. He argued that if counsel had presented that additional information, he would have received more "favorable considerations" from the sentencing judge.

Defendant was assigned PCR counsel and the PCR court heard oral arguments on January 23, 2017. At the end of the argument, the court denied defendant's petition and declined to hold an evidentiary hearing. The PCR court noted that "[t]he sentencing court . . . addressed, and the defense attorney made mention of, defendant's mental health issues, including [PTSD]." The PCR court then found that the sentencing court referenced the PSR in its decision, which contained specific dates and detailed when

defendant had attended treatment. The PCR court concluded that while "the defense attorney may not have gone into minute detail about [defendant's] mental health treatment," his description of defendant's treatment was not ineffective.

The PCR court also concluded that even if counsel had stated treatment dates on the record, as defendant desired, the sentence imposed would not have been any different – particularly in light of the negotiated plea agreement. In that regard, the PCR court noted that based upon the information in evidence about defendant's mental health issues, the sentencing court had awarded mitigating factor four.¹

II.

On this appeal, defendant argues:

POINT ONE – MR. KANE IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT HIS ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO ARGUE ADEQUATELY AT SENTENCING.

Defendant contends that had his counsel told the sentencing court that he "voluntarily received ongoing treatment at the VA hospital through 2010," then "his sentence likely would have been lower[.]" Additionally, he asserts that counsel "egregiously

¹ Mitigating factor four states that "[t]here were substantial grounds tending to excuse or justify the defendant's conduct, though [they] fail[] to establish a defense." N.J.S.A. 2C:44-1(b)(4).

failed to argue for any mitigating factors[.]"

As a threshold issue, the State contends that defendant's PCR claim, though couched in terms of ineffective assistance of counsel, is essentially an excessive sentence claim that is not cognizable under Rule 3:22-2 and State v. Acevedo, 205 N.J. 40, 45, 47 (2011). Contra, State v. Hess, 207 N.J. 123, 145 (2011) (holding that PCR was "a proper vehicle for defendant's ineffective-assistance-of-counsel [at sentencing] claim because much of the mitigating evidence that support[ed] her argument . . . was not presented to the sentencing court by her counsel" and therefore the claim "could not have been raised on direct appeal"). The State further contends that issues concerning defendant's sentence and the mitigating factors were already adjudicated on direct appeal and are therefore barred from consideration under Rule 3:22-5.

Because the State's contentions were not raised below, we need not consider them. See State v. Stein, 225 N.J. 582, 599 (2016) (declining to grant a remedy not sought "at the appropriate time in the appropriate forum"). Since the PCR court addressed the merits of defendant's ineffective assistance claim, we also review them.

Rule 3:22-10(b) provides that a defendant is only entitled to an evidentiary hearing if he or she establishes a prima facie

case in support of PCR. Moreover, there must be "material issues of disputed fact that cannot be resolved by reference to the existing record," and the court must determine that "an evidentiary hearing is necessary to resolve the claims for relief." State v. Porter, 216 N.J. 343, 354 (2013) (quoting R. 3:22-10(b)). To establish a prima facie case, a defendant must demonstrate "the reasonable likelihood of succeeding under the test set forth in Strickland." State v. Preciose, 129 N.J. 451, 463 (1992).

To prevail on an ineffective assistance of counsel claim, defendant must demonstrate (1) that counsel's performance "fell below an objective standard of reasonableness," and (2) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694 (1984); see also State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the Strickland standard in New Jersey). "A defendant must overcome a strong presumption that counsel rendered reasonable professional assistance." State v. Parker, 212 N.J. 269, 279 (2012). "Objectively reasonable, albeit debatable or unsuccessful strategic decisions, by counsel are within the range of adequate representation." Pressler & Verniero, Current N.J. Court Rules, cmt. 1.1 on R. 3:22-1 (2018). "If defendant establishes one prong of the Strickland-Fritz standard, but not the other, his claim

will be unsuccessful." Parker, 212 N.J. at 280.

To set aside a guilty plea based on ineffective assistance of counsel, a defendant must show "that there is a reasonable probability that, but for counsel's errors, [defendant] would not have pled guilty and would have insisted on going to trial." State v. DiFrisco, 137 N.J. 434, 457 (1994) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)). Here, defendant's petition fails on that basis. Defendant is not seeking to set aside his guilty plea. Instead, he is arguing for a lesser sentence. Such an argument does not demonstrate sufficient prejudice to satisfy the second prong of the Strickland test. See Parker, 212 N.J. at 279-80; see also State v. Nunez-Valdez, 200 N.J. 129, 139 (2009) (applying the modified standard, adopted by the DiFrisco Court, in reviewing the denial of a PCR claim involving a guilty plea).

Furthermore, the sentencing court imposed the negotiated fifteen-year prison term in accordance with the plea agreement. Defendant failed to submit any evidence to support his claim that he would have received a lesser sentence had counsel gone into greater detail about his psychological treatment. "A sentence imposed pursuant to a plea agreement is presumed to be reasonable." State v. Fuentes, 217 N.J. 57, 70 (2014). Thus, defendant has not shown any prejudice.

In addition, defendant's contention that counsel failed to

argue for any mitigating factors is belied by the record. While defense counsel did not recite each mitigating factor by name during argument, the transcript shows that he did ask the sentencing court to consider defendant's military service and PTSD as mitigating circumstances. Indeed, as noted by the PCR court, the sentencing court considered and applied mitigating factor four based upon defendant's history of mental health issues. Furthermore, the sentencing court found that the remaining twelve mitigating factors listed in N.J.S.A. 2C:44-1(b) were not applicable.

Accordingly, the PCR court properly denied defendant's PCR petition without an evidentiary hearing. R. 3:22-10(b); Porter, 216 N.J. at 354-55; Preciose, 129 N.J. at 462-64.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION