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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-3094-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LUDJI G. DESROCHES,
a/k/a LUDGI DESROCHES,

Defendant-Appellant.

Submitted March 20, 2018 – Decided April 11, 2018

Before Judges Carroll and Mawla.

On appeal from Superior Court of New Jersey,
Law Division, Monmouth County, Indictment No.
10-07-1361.

Joseph E. Krakora, Public Defender, attorney
for appellant (Kevin G. Byrnes, Designated
Counsel, on the brief).

Christopher J. Gramiccioni, Monmouth County
Prosecutor, attorney for respondent (Monica
Lucinda do Outeiro, Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

Defendant Ludji G. Desroches appeals from a September 30, 2016 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

The following facts are taken from the record. A Monmouth County Grand Jury charged defendant with third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1) (counts one, six, and eleven); third-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(b)(3) (counts two, seven, and twelve); third-degree distribution of CDS, N.J.S.A. 2C:35-5(b)(3) (counts three, eight, and thirteen); second-degree possession of CDS with intent to distribute within 500 feet of a public park, N.J.S.A. 2C:35-7.1 (counts four and nine); second-degree distribution of CDS within 500 feet of a public park, N.J.S.A. 2C:35-7.1 (counts five and ten); second-degree possession of CDS with intent to distribute within 500 feet of a public housing facility, N.J.S.A. 2C:35-7.1 (count fourteen); second-degree distribution of CDS within 500 feet of a public housing facility, N.J.S.A. 2C:35-7.1 (count fifteen); third-degree possession of CDS with intent to distribute within 1000 feet of a school, N.J.S.A. 2C:35-7 (count sixteen); and third-degree distribution of CDS within 1000 feet of a school, N.J.S.A. 2C:35-7 (count seventeen).

On August 9, 2011, defendant appeared with counsel and pled guilty to counts eight and thirteen of the indictment, and to a violation of probation. Defendant confirmed he had reviewed and understood all of the discovery provided in the case. Defendant then provided a factual basis for the plea, confirming the knowing and voluntary nature of the plea. Defendant also answered a series of questions confirming he understood his plea may result in his deportation.

Although defendant informed the court his counsel had answered all of his questions he stated he was dissatisfied with counsel's advice. As a result, the court recessed, and the next day defendant's counsel engaged in colloquy with defendant during which defendant indicated he was satisfied with counsel's advice. Defendant then informed the court he read, reviewed, completed, and signed the plea form. The form corroborated his testimony from the day before, and memorialized that he understood his guilty plea may result in deportation.

Defendant's counsel again elicited a factual basis supporting defendant's guilty plea. Specifically, defendant testified that on September 4 and 9, 2009, he knowingly sold cocaine to an undercover police officer in Asbury Park. Defendant admitted he knew it was illegal to possess and sell cocaine. The judge

accepted defendant's guilty plea, and found it was voluntary and intelligent.

Defendant was sentenced to an aggregate custodial term of six years, subject to three years of parole ineligibility. Defendant did not file a direct appeal of his conviction or sentence.

Defendant filed a timely PCR petition. Pertinent to this appeal, defendant argued plea counsel was ineffective for "affirmatively misadvis[ing] him that he would certainly not be deported." Defendant alternatively requested to withdraw his guilty plea pursuant to State v. Slater, 198 N.J. 145 (2009).

The PCR judge heard oral argument and issued a comprehensive written opinion denying the petition. He determined:

Ultimately . . . defendant loses his claims here for two basic reasons: (1) his claim that his lawyer misinformed him of the "collateral" consequence of deportation is without merit as the plea form and plea colloquy demonstrate that he was fully informed that drug distribution convictions such as these would subject him to mandatory, federal removal; [and] (2) State v. O'Donnell, 435 N.J. Super. 351, 368-71 (App. Div. 2014) requires that PCR claims for relief from guilty pleas must also satisfy the Slater standards for withdrawal of guilty pleas under stricter standards for claims of withdrawal that occur, as here, after sentence is imposed.

A defendant, under Slater, must raise a "colorable claim of innocence," but the verified petitions in this case fail to raise any claim whatsoever that he is "innocent" in these 2009 drug distribution offenses.

Defendant must, in this proceeding, come forward with some factual basis to suggest that he is innocent of these 2009 crimes. He has failed to do so. Additionally, defendant's claims that his lawyer at the time of his August 2011 plea gave him misleading or erroneous advice about the immigration consequences, specifically deportation, are in direct contradiction to the clear record in this case. Hence, he is not entitled to an evidentiary hearing and this PCR petition must be dismissed.

The PCR judge rejected defendant's argument his counsel was ineffective pursuant to Strickland v. Washington, 466 U.S. 668 (1984). Specifically, he determined defendant entered into a knowing, voluntary, and intelligent plea in accordance with Rule 3:9-2, and the fact defense counsel had allowed defendant to plead guilty did not in itself demonstrate a deficiency.

The judge rejected defendant's assertion that, if he had known he was facing mandatory deportation he would not have pled guilty, as contradicted by the record. The judge noted the record demonstrated defendant was advised by an immigration attorney that he would be subject to deportation if he pled guilty to a crime considered to be an aggravated felony under federal law. Therefore, the judge concluded defendant failed to demonstrate prejudice.

This appeal followed. Defendant makes the following arguments:

POINT I — THE DEFENDANT WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 10 OF THE NEW JERSEY CONSTITUTION.

POINT II — THE DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING.

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) (quoting State v. Preciose, 129 N.J. 451, 462 (1992)). "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. (quoting Preciose, 129 N.J. at 462-63); 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).

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.

[Strickland, 466 U.S. at 687; 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 defendant 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). Petitioner 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.

[Strickland, 466 U.S. at 693 (citation omitted).]

On appeal defendant argues his plea counsel was ineffective because he misled defendant during the plea colloquy causing him to believe that by entering into the plea he would either be in jail or be deported. Defendant claims he later found out he would be both jailed and deported. Defendant claims the plea colloquy demonstrates he was dissatisfied with his counsel's performance and did not completely understand the plea. Thus, defendant argues he should have received an evidentiary hearing.

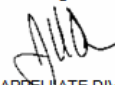
We are satisfied from our review of the record that defendant failed to make a prima facie showing of ineffective assistance of counsel pursuant to Strickland-Fritz, substantially for the reasons stated by the PCR judge in his thoughtful written opinion. Indeed, the transcript of the plea colloquy does not support defendant's claims that he misunderstood the consequences of his

plea. Defendant also has not demonstrated prejudice as a result of the plea, as he avoided facing the full seventeen count indictment, which contained charges bearing mandatory parole disqualifiers.

Accordingly, the judge correctly concluded an evidentiary hearing was not warranted. See Preciose, 129 N.J. at 462-63. To the extent we have not specifically addressed arguments raised by defendant, we find them without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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


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