

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-3893-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

S.Y.,

Defendant-Appellant.

Submitted October 24, 2017 – Decided January 8, 2018

Before Judges Fasciale and Summers.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Indictment No.
12-02-0452.

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

Mary Eva Colalillo, Camden County Prosecutor,
attorney for respondent (Linda A. Shashoua,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

In accordance with a plea agreement, defendant S.Y. pled guilty to first-degree aggravated sexual assault and was sentenced

to an eighteen-year prison term, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2. Defendant now appeals from a January 19, 2016 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing, arguing:

POINT ONE

THE PCR COURT ERRED IN DENYING [S.Y.]'S MOTION FOR A PROTECTIVE ORDER.

POINT TWO

[S.Y.] IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT HIS ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL.

Having considered these arguments in light of the record and applicable legal standards, we affirm substantially for the reasons set forth by Judge Richard F. Wells in his well-reasoned written decision.

In his first point, defendant contends that Judge Wells denied his request to have his forensic expert review three videos, contained in a thumb drive turned over to the police by defendant's ex-girlfriend, which the State contended depicts defendant having sex with his minor daughter, and was under a protective order preventing disclosure or reproduction. Defendant contends he has concerns that the female in the videos, whose face is not shown, is not his daughter. Defendant argues that repudiation of the discovery opportunity denies him due process because he is unable

to show that his trial counsel was ineffective in not retaining an expert to review the videos.

Judge Wells was correct in relying upon our Supreme Court's recognition in State v. Marshall, 148 N.J. 89, 270 (1997), that PCR is a "means for vindicating actual claims," and not "a device for investigating possible claims."

Moreover, in rejecting defendant's argument, Judge Wells scrutinized the trial record and found that defendant's assertion of innocence was without any factual support. The judge's review of defendant's recorded police confession that the videos showed defendant sexually assaulting his daughter, led him to conclude that the confession was knowingly, voluntary, without any undue influence, and intelligently made. The record revealed defendant's ex-girlfriend, who viewed the videos, confirmed that it was defendant and his daughter in the videos having sex. In light of this "overwhelming . . . incriminating evidence," we join Judge Wells' thinking that it was "wholly unreasonable to argue [that] trial counsel should have engaged in an independent [crusade] to impeach or disprove her client's confession."

In his second point, defendant argues he was entitled to an evidentiary hearing, where counsel would testify, in order to prove that counsel was ineffective in: investigating the charges

by retaining experts; advising him about his right to appeal; and not adequately arguing for a lesser sentence.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-part Strickland test by demonstrating that "counsel's performance was deficient," that is, "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to] the defendant by the Sixth Amendment," and "there is 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, 687, 694 (1984); accord State v. Fritz, 105 N.J. 42, 58 (1987).

A court reviewing a PCR petition based on claims of ineffective assistance has the discretion to grant an evidentiary hearing only if a defendant establishes a prima facie showing in support of the requested relief. State v. Preciose, 129 N.J. 451, 462 (1992). The mere raising of a claim for PCR does not entitle a defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (1999). When determining whether to grant an evidentiary hearing, the PCR court must consider the facts in the light most favorable to the defendant to determine if a defendant has established a prima facie claim. Preciose, 129 N.J. at 462-63. The court should only conduct a hearing if there are disputed issues as to material facts regarding entitlement to PCR

that cannot be resolved based on the existing record. State v. Porter, 216 N.J. 343, 354 (2013).

Applying these principles, it is obvious to us, as it was to Judge Wells, that defendant failed to present any prima facie claim that counsel was ineffective. Considering the overwhelming evidence against defendant, there was no reasonable basis for counsel to retain experts to refute the State's medical expert or defendant's admission that his daughter was sexually assaulted. Counsel's performance at sentencing was more than adequate. She urged the sentencing court to impose the sentence set forth in defendant's plea agreement, and successfully persuaded the court to make defendant's prison term run concurrent to a pending sentence for unrelated sexual assault charges in a neighboring county, and to have his prison term sentence reduced to the amount of the pending sentence. Lastly, the fact that defendant was clearly advised of his appeal rights by the sentencing court, and that he filed but withdrew an appeal, belies his assertion. Hence, an evidentiary hearing was unwarranted.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION