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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-3972-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FRED MOSLEY,

Defendant-Appellant.

Submitted March 6, 2018 - Decided March 22, 2018

Before Judges Reisner and Mayer.

On appeal from Superior Court of New Jersey,
Law Division, Atlantic County, Indictment Nos.
13-09-2433, 14-07-2379, and 14-07-2250.

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

Damon G. Tyner, Atlantic County Prosecutor,
attorney for respondent (John J. Santoliquido,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant appeals from an April 13, 2017 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

Defendant pled guilty to burglary and kidnapping pursuant to a negotiated plea agreement providing for an aggregate prison term of no greater than twenty years. In return, defendant agreed to provide truthful testimony against his co-defendant.¹ Defendant was sentenced to a nineteen-year prison term.

Defendant filed a notice of appeal as to the sentence imposed pursuant to Rule 2:9-11. We affirmed the sentence in an Excessive Sentence Oral Argument (ESOA) panel order. State v. Mosley, Docket No. A-4510-14 (App. Div. Jan. 12, 2016).

Defendant filed a PCR petition, arguing that his trial counsel spoke with the judge and the assistant prosecutor in chambers, and it was represented that if defendant cooperated by testifying against his co-defendant, defendant would "get four or five years off" his sentence. However, defendant received the same sentence as his co-defendant. In his PCR petition, defendant asserted that if he knew he was going to receive the same prison sentence as his co-defendant, he would not have accepted the plea offer.

¹ Defendant was not required to testify at trial as his co-defendant eventually accepted a plea offer.

After reviewing the written submission regarding defendant's PCR petition and hearing the arguments of counsel, the PCR judge found defendant's bald assertion as to the discussion in the judge's chambers, without a supporting certification from defendant's trial attorney, did not warrant a plenary hearing. The PCR judge also noted defendant agreed during the plea colloquy, on his plea form, and at sentencing that the "agreed for bargain was the cap at twenty years." In addition, the PCR judge determined that the sentencing judge "but for [defendant's] cooperation, would have rejected the plea, would have considered seriously sentencing [defendant] to the maximum on the kidnapping charge, which . . . was [thirty] years at that particular point." While the PCR judge did not believe that a conversation took place in the trial judge's chambers as alleged by defendant, even assuming such a communication occurred, the PCR judge found "no showing of prejudice . . . to defendant." The PCR judge concluded defendant failed to make a prima facie showing of ineffective assistance of counsel and failed to make any showing of prejudice.

On appeal, defendant argues:

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL, RESULTING

IN A GUILTY PLEA WHICH HAD BEEN FREELY,
KNOWINGLY AND VOLUNTARILY ENTERED.

The standard for determining whether counsel's performance was ineffective for purposes of the Sixth Amendment was formulated in Strickland v. Washington, 466 U.S. 668 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42 (1987). In order to prevail on a claim of ineffective assistance of counsel, defendant must meet the two-prong test of establishing both that: (1) counsel's performance was deficient and he or she made errors that were so egregious that counsel was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution; and (2) the defect in performance prejudiced defendant's rights to a fair trial such that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

In the context of a guilty plea, "a defendant must prove 'that there is a reasonable probability that, but for counsel's errors, [he or she] would not have pled guilty and would have insisted on going to trial.'" State v. Gaitan, 209 N.J. 339, 351 (2012) (alteration in original) (quoting State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009)). A defendant must also convince the court that "a decision to reject the plea bargain would have been

rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010).

We agree with the PCR judge that defendant has not established a prima facie claim under the Strickland/Fritz test. Defendant makes a bald and unsubstantiated allegation that there was an in-chambers discussion among his trial counsel, the assistant prosecutor, and the judge in which it was agreed defendant would receive a sentence four to five years less than the sentence imposed on his co-defendant.

Defendant failed to obtain an affidavit or certification from his trial attorney in support of his allegation. Further, defendant's bare assertion is belied by the plea colloquy, the plea form, and the sentencing transcript. The sentencing judge made it clear that but for defendant's cooperation and truthful testimony regarding the co-defendant, "the sentence [the judge was] about to impose [was] nowhere near what [defendant] deserves because of his prior record." The sentencing judge also noted that defendant's willingness to testify caused co-defendant to plead guilty and spared the need for the eighty-eight year old victim to relive her harrowing experience and testify at trial. Had these considerations not existed, the sentencing judge stated he would have rejected the plea and imposed a higher sentence. By accepting the State's offer to plead guilty in exchange for a

recommended sentence of not more than twenty years, defendant avoided the potential exposure of a longer sentence. Defendant did not produce evidence that it would have been rational to reject the plea agreement and insist on going to trial.

We are satisfied from our review of the record that defendant failed to make a prima facie showing of ineffective assistance of trial counsel within the Strickland/Fritz test. Accordingly, the PCR court correctly concluded that an evidentiary hearing was not warranted. See State v. Preciose, 129 N.J. 451, 462-63 (1992).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION