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Although it is posted on the internet, this opinion is binding only on the
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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4819-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL R. SUTTON,

Defendant-Appellant.

Submitted April 11, 2018 – Decided April 30, 2018

Before Judges Manahan and Suter.

On appeal from Superior Court of New Jersey,
Law Division, Cape May County, Indictment Nos.
15-04-0326 and 15-06-0503.

Joseph E. Krakora, Public Defender, attorney
for appellant (Karen A. Lodeserto, Designated
Counsel, on the brief).

Robert W. Johnson, Acting Cape May County
Prosecutor, attorney for respondent (Gretchen
A. Pickering, Special Deputy Attorney General/
Acting Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant Michael R. Sutton appeals from a denial of his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

Defendant pled guilty to third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10a(1); and third-degree possession with the intent to distribute a CDS, N.J.S.A. 2C:35-5a(1) and N.J.S.A. 2C:35-5b(3). Due to his two prior second-degree distribution of CDS charges, N.J.S.A. 2C:35-14a(6), defendant was subject to a mandatory extended term, N.J.S.A. 2C:43-6(f). Defendant was sentenced to an aggregate term of seven years in state prison with three-and-one-half years of parole ineligibility.

Defendant filed a petition for PCR arguing that, given his history of substance abuse, his plea counsel was ineffective for failing to advise him about Drug Court. Defendant contends had his plea counsel advised him about Drug Court, he would not have pled guilty, and he would have applied to Drug Court. Defendant's PCR counsel argued defendant met the Drug Court criteria and defendant's plea counsel was ineffective in failing to apply to Drug Court on defendant's behalf.

The PCR judge requested a proffer from the State regarding the practice in Cape May County regarding defendants who are statutorily ineligible for Drug Court. The Drug Court Assistant

Prosecutor for Cape May County from 2014-16, Ed Shim, testified how criminal defendants, statutorily ineligible for Drug Court due to their criminal histories, are handled. Shim testified:

There are a number of ways that they are handled. If they voluntarily fill out an application, then it would be screened. They would look at the criminal history, and if there were two prior second-degrees or one second-degree and a nonpossessory third-degree prior conviction, they are categorically ineligible, and they [would] be rejected.

. . . .

It could also be discovered [through] a defense counsel looking at their criminal history, talking to us informally, then being advised, your guy is ineligible. . . . At the end of the day, if you have two second-degrees or one second-degree and a third-degree, it will be found and you will be ineligible regardless of how that application [gets] before the [D]rug [C]ourt team.

When asked who made the eligibility determinations, Shim testified:

[T]he agent of the AOC, a probation officer who is part of the [D]rug [C]ourt team, makes that rejection and that information is then disseminated to everybody on the [D]rug [C]ourt team. So it is somebody making a decision who is an agent of the court. That [] is who is making the decision.

All I could do is point that out to them. The way the system works right now, I don't have any control over [D]rug [C]ourt. I just point out, there is the disqualifier and if

they wouldn't honor that, I would have to appeal that decision and I certainly would.

The judge then asked, "If they said, well, that's too bad, we're letting him through with two second-degrees?" Shim replied, "Yes, I would absolutely appeal that because it would be incumbent upon me to do so."

The PCR judge denied defendant's petition holding that defendant did not establish by a preponderance of the evidence that plea counsel was ineffective in failing to apply to Drug Court on his behalf. The PCR judge found defendant was statutorily excluded under N.J.S.A. 2C:35-14a(6), as he had two prior second-degree convictions. The PCR judge noted it would have been futile "to submit a Drug Court application that was subject to statutory rejection because of the criminal history of the defendant." This appeal followed.

Defendant raises the following point on appeal:

POINT I

DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING BECAUSE PLEA COUNSEL FAILED TO HAVE HIM APPLY TO THE DRUG COURT PROGRAM.

"Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." State v. Preciose, 129 N.J. 451, 459 (1992). A criminal defendant is entitled to post-conviction relief if there was a "[s]ubstantial denial in the conviction

proceedings of defendant's rights under the Constitution of the United States or the Constitution or laws of the State of New Jersey[.]" R. 3:22-2(a). "A petitioner must establish the right to such relief by a preponderance of the credible evidence." Preciose, 129 N.J. at 459 (citations omitted). "To sustain that burden, specific facts" that "provide the court with an adequate basis on which to rest its decision" must be articulated. State v. Mitchell, 126 N.J. 565, 579 (1992).

Claims of constitutionally ineffective assistance of counsel are well suited for post-conviction review. See R. 3:22-4(a)(2). In determining whether a defendant is entitled to relief on the basis of ineffective assistance of counsel, New Jersey courts apply the two-prong test articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687 (1984), and United States v. Cronin, 466 U.S. 648, 658-60 (1984), which we adopted in State v. Fritz, 105 N.J. 42, 49-50 (1987). Preciose, 129 N.J. at 463. Under Strickland, a defendant must show: (1) "counsel's performance was deficient;" and (2) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 687, 694.

Considering the record, we find defendant's argument lacks sufficient merit to warrant an extended discussion here. See R.

2:11-3(e)(2). For Drug Court admission, offenders subject to a mandatory prison term pursuant to N.J.S.A. 2C:35-7 must satisfy all N.J.S.A. 2C:35-14(a) requirements. See N.J.S.A. 2C:35-14(a). State v. Meyers, 192 N.J. 421, 431-32 (2007). The trial court correctly found defendant could not satisfy the requirements of N.J.S.A. 2C:35-14a(6), as defendant had two prior second-degree distribution of CDS charges. As such, defendant's argument that plea counsel's failure to advise him about Drug Court or have him apply to Drug Court on his behalf constitutes ineffective assistance of counsel is wholly without merit.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION