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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-5555-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DEWAYNE J. JOHNSON, a/k/a
DEWAYNE L. JOHNSON, DWAYNE
JACKSON, WAYNE JOHNSON,
SAMUEL JOHNSON, SAMMY JOHNSON,
JEFFERY JOHNSON, DWAYNE
JOHNSON, KAREEM A. MALIK,
WAYNE JOHN, and SAMMY JEFFREY,

Defendant-Appellant.

Submitted May 16, 2018 – Decided May 31, 2018

Before Judges Manahan and Suter.

On appeal from Superior Court of New Jersey,
Law Division, Burlington County, Indictment
No. 09-05-0410.

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

Scott A. Coffina, Burlington County
Prosecutor, attorney for respondent (Nicole
Handy, Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant DeWayne J. Johnson appeals from a denial of his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

On May 7, 2009, the Burlington County Grand Jury returned Indictment 09-05-0410, charging defendant with first-degree attempted murder, N.J.S.A. 2C:5-1(a)(3) and N.J.S.A. 2C:11-3(a)(1); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); first-degree robbery, N.J.S.A. 2C:15-1(a)(1); third-degree endangering an injured victim, N.J.S.A. 2C:12-1.2(a); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d); fourth-degree theft by unlawful taking, N.J.S.A. 2C:20-3(a); and fourth-degree tampering with or fabricating physical evidence, N.J.S.A. 2C:28-6(1).

On September 23, 2009, the Camden County Grand Jury returned Indictment 09-09-3247 charging defendant with first-degree murder, N.J.S.A. 2C:11-3(a)(1); first-degree murder during the commission of a crime, N.J.S.A. 2C:11-3(a)(3); first-degree robbery, N.J.S.A. 2C:15-1; third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d); third-degree endangering an

impaired/helpless person, N.J.S.A. 2C:12-1.2; and fourth-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(a).

We recite the following from our decision on direct appeal at length to provide context. State v. Johnson, No. A-2661-12 (App. Div. June 16, 2014) (slip op. at 1-9), certif. denied, 220 N.J. 264 (2015).

On August 13, 2010, defendant pled guilty in Camden County to an amended charge of first[-]degree [a]ggravated [m]anslaughter under Indictment 09-09-3247. In return for the plea, defendant was sentenced on November 5, 2010, to twenty-five years in New Jersey State Prison, eighty-five percent to be served without parole eligibility. The Camden County plea form and [j]udgment of [c]onviction specified that defendant's sentence was to run concurrent to his sentence on his pending Burlington County charges.

Following an unsuccessful suppression motion on January 25, 2011, defendant pled guilty to [c]ount [t]hree of Burlington County Indictment 09-05-0410, first[-]degree [r]obbery, pursuant to a negotiated plea agreement. In exchange for defendant's plea agreement, the State agreed to recommend a sentence of ten years in New Jersey State Prison, subject to the No Early Release Act ("NERA"), N.J.S.A. 2C:43-7.2. The sentence was to run "consecutively," not "concurrently" to the sentence defendant was serving under the Camden County [i]ndictment. During the plea, the State noted that imposition of consecutive terms of imprisonment would result in defendant serving a maximum term of thirty-five years in prison, eighty-five percent to be served without parole eligibility, and that defendant would be approximately seventy-

eight years of age before becoming eligible for parole.

The Burlington County trial judge participated in an extensive plea colloquy with defendant. At the conclusion of the colloquy, the judge found that defendant was entering into the plea knowingly and voluntarily. As such, the court accepted the plea agreement.

On March 24, 2011, on the date set for sentence, the judge placed on the record that defendant communicated by letter to his counsel that his plea was not intelligently made because: he had been on depression medications, he had been coerced into pleading guilty by his lawyer, and he was under the impression that his ten-year Burlington County sentence would run concurrent to his twenty-five-year Camden County sentence. On that date, in lieu of the sentence, the judge heard oral argument on defendant's application to withdraw his plea. During this proceeding, the judge inquired whether defendant understood the proceedings. Defendant stated that he did because he had not taken his depression medications. According to defendant, the medications made him "drowsy and sleepy," which sometimes made him not understand what people were saying to him. Defendant also professed his innocence in that he did not commit the robbery since he "wasn't there," the clothing was never identified as his, and because police saw him in the area of the robbery did not necessarily mean he robbed someone. According to defendant, the details he provided in his factual plea narrative came from what he learned from discovery.

Both defense counsel and the State noted that defendant appeared lucid on the date of his plea hearing. Defense counsel also noted that defendant should not lose the benefit of

his plea agreement without expert testimony about the effects of defendant's medication on his lucidity. The State also noted that defendant appeared coherent at his plea hearing and had been able to answer the judge's questions, both close-ended and open-ended, appropriately and with specificity. Moreover, the State argued that defendant was on medication when he asked to retract his plea. So defendant's argument that the medications created his impaired cognitive ability did not make logical sense.

The judge stated that defendant may be giving the court the "run around." The judge was demonstrably skeptical of defendant's claims but nonetheless ordered a competency hearing to evaluate defendant's medications and their effect on his cognitive ability.

Defendant was examined by Dr. Douglas Smith from the Ann Klein Forensic Center on December 29, 2011[,] for the purpose of determining defendant's fitness to proceed. In his report, Dr. Smith wrote that defendant was "unhappy about the outcome of his plea bargain in January and would like to retract it" and that while there was a possibility that defendant did not understand that his sentences would run consecutive, that element would be only one factor in assessing defendant's fitness. Dr. Smith noted, "Mr. Johnson expressed to me that he knew he was entering a plea, but had misunderstood the details of how the sentences would be served. A misunderstanding would not equate to being not fit to proceed."

Dr. Smith opined that there were no indications of any psychosis, depression, or cognitive impairments that would have adversely affected defendant's fitness to proceed at the time of his plea hearing and "observations by the judge and the prosecutor on the [January 25, 2011] proceeding did not

suggest Mr. Johnson was experiencing psychosis or cognitive impairments." Dr. Smith found defendant currently was fit to proceed to trial and had been fit at both his January 25, 2011 plea hearing and his March 24, 2011 motion hearing.

On September 13, 2012, the motion to withdraw defendant's plea was resumed. Defendant argued on his own behalf that he took the plea agreement only because he believed the sentences in Camden and Burlington would run concurrent and was only aware of the consecutive aspect after he signed the plea form. Defendant reiterated his desire to retract his plea and take his case to trial.

The judge denied defendant's motion to withdraw his plea after finding that the plea agreement "clearly spelled out the terms of the plea agreement" and that the court had been very careful to go over the terms of the plea agreement with him. The judge found that the plea form stated defendant's Burlington County sentence would run consecutive to the sentence he was serving in Camden County and that defendant was aware for months that his sentence in Burlington County would be consecutive to his Camden County sentence.

The judge further found the proofs "overwhelming" and that defendant would likely be convicted of attempted murder if he had taken his case to trial. The judge also noted the case was five years old and there existed the potential unavailability of the witness as an additional factor in his ruling.

In denying defendant's motion the judge held, "[W]ith all of it said, with all of the caution that this Court has exercised towards sentencing, it is satisfied that there is no reasonable basis to permit the defendant to retract his plea of guilty." Defendant was

thereafter sentenced in accord with the plea agreement.

On defendant's direct appeal, he argued that the judge improperly denied his pre-sentence motion to withdraw his guilty plea. We affirmed after reviewing the record and concluding that the trial court correctly applied the standard established in State v. Slater, 198 N.J. 145, 157-60 (2009). See Johnson, slip op. at 13-16).

In March 2015, defendant filed a pro se PCR, which was supplemented with the assistance of counsel in December 2015. A hearing on the PCR was held on April 18, 2016.¹ Defendant argued that he received ineffective assistance of counsel based upon trial counsel's failure "to investigate and strategize a defense and through the explanation of his plea bargain" Defendant renewed his argument, previously raised on direct appeal, to withdraw his plea. At oral argument, defendant's counsel argued that both trial and appellate counsel provided ineffective counsel.

On May 3, 2016, Judge Philip E. Haines issued a written decision denying the PCR. This appeal followed.

On appeal, defendant argues:

¹ Notably, even though he raised the issue on appeal, defendant did not seek an evidentiary hearing in his petition and stated he would rely upon the record.

POINT I


THE PCR COURT ERRED IN DENYING DEFENDANT AN EVIDENTIARY HEARING DESPITE THE FACT THAT HE DEMONSTRATED A PRIMA FACIE CASE OF INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL.

- A. Trial Counsel Was Ineffective.
- B. Trial Counsel Was Ineffective In His Sequencing of the Camden and Burlington Sentencings.
- C. Trial Counsel Was Ineffective For Numerous Reasons Outlined In Defendant's Pro-Se Petition.
- D. Appellate Counsel Was Ineffective.

We reject these arguments and affirm the denial of the petition for PCR substantially for the reasons set forth in Judge Haines's cogent and comprehensive written opinion.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION