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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1871-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ZAIRE PALMS,

Defendant-Appellant.

Submitted May 16, 2022 – Decided May 27, 2022

Before Judges Fasciale and Firko.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 14-12-1023.

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

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Ali Y. Ozbek, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from an August 5, 2020 order denying his petition for post-conviction relief (PCR). The PCR judge¹ entered the order and rendered an oral opinion on which we substantially agree.

Defendant pled guilty twice to a series of robberies. The first time, he agreed to testify against his co-defendant. He ultimately refused to testify, and the judge vacated the plea. Defendant again pled guilty. Defendant claims that his counsel never discussed trial strategies with him and because of this conduct he felt he had no other choice but to plead guilty. Defendant's arguments are bald assertions that are belied by the record. We thus affirm and add these brief remarks.

I.

Defendant received two indictments: one in Passaic County and one in Hudson County. Hudson County Indictment No. 14-11-01900-Z charged defendant with: two counts of first-degree armed robbery, N.J.S.A. 2C:15-1(a)(2), (Counts One and Two); two counts of second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b), (Counts Three and Five); two counts of second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a), (Counts Four and Six); two counts of second-degree

¹ The PCR judge also served as defendant's plea and sentencing judge.

cluding police, N.J.S.A. 2C:29-2(a)-(b), (Counts Nine and Ten); one count of fourth-degree resisting arrest, N.J.S.A. 2C:29-1, (Count Eleven); one count of receiving stolen property in the fourth-degree, N.J.S.A. 2C:20-7(a), (Count Twelve); and one count of conspiracy to commit armed robbery in the second-degree, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:15-1, (Count Fourteen).

Passaic County Indictment No. 14-12-01023 charged defendant with: one count of first-degree felony murder, N.J.S.A. 2C:11-3(a)(3), (Count One); three counts of second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:15-1, (Counts Two, Seven, and Ten); five counts of first-degree robbery, N.J.S.A. 2C:15-1(a)(1)-(2), (Counts Three, Eight, Eleven, Thirteen, and Fifteen); five counts of second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a), (Counts Four, Nine, Twelve, Fourteen, and Sixteen); one count of second-degree unlawful possession for an unlawful purpose, N.J.S.A. 2C:39-5(b) (Count Five); and one count first-degree murder, N.J.S.A. 2C:11-3(a)(1)-(2), (Count Six).

The two indictments were consolidated and transferred to Passaic County. Defendant then pled guilty to one count of first-degree murder and seven counts of first-degree robbery pursuant to a plea agreement. As part of the plea agreement, defendant agreed to testify against his co-defendant. In turn, the

State would recommend a thirty-eight-year sentence, subject to an eighty-five percent parole disqualifier. Defendant subsequently refused to testify against his co-defendant, and the State moved to vacate the guilty plea, which was granted. Defendant again pled guilty pursuant to a new plea agreement. The State agreed to recommend a forty-year sentence, subject to an eighty-five percent parole disqualifier.

On January 27, 2017, the judge sentenced defendant to forty years imprisonment with an eighty-five percent parole disqualifier and imposed two sentences for twenty years imprisonment with an eighty-five percent parole disqualifier to run concurrent with the forty-year prison term. On July 2, 2019, defendant filed a pro se verified petition for PCR. On January 27, 2020, PCR counsel filed an amended verified petition for PCR on behalf of defendant. The judge heard oral argument on the petition on June 10, 2020. On August 5, the judge issued an oral decision denying the petition and issued an order reflecting that.

On appeal, defendant raises the following point for our consideration:

POINT I

THE PCR [JUDGE] ERRED IN DENYING THE
PETITION WITHOUT HOLDING AN
EVIDENTIARY HEARING ON HIS CLAIM THAT

[PLEA] COUNSEL IMPROPERLY PRESSURED
HIM TO PLEAD GUILTY.

II.

When a PCR judge does not conduct an evidentiary hearing—like here—we review the PCR judge's factual findings and legal conclusions de novo. See State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016); see also State v. Zeikel, 423 N.J. Super. 34, 40-41 (App. Div. 2011) (explaining our "standard of review is . . . plenary" where the PCR judge "did not take any testimony but relied solely on the same documentary record that is before us on appeal"). To establish a prima facie claim of ineffective assistance of counsel, the defendant must satisfy the two-pronged test enumerated in Strickland v. Washington, 466 U.S. 668, 687 (1984), which our Court adopted in State v. Fritz, 105 N.J. 42, 58 (1987). We must "view the facts in the light most favorable to a defendant to determine whether a defendant has established a prima facie claim." State v. Preciose, 129 N.J. 451, 462-63 (1992).

Defendant contends that the PCR judge erred in denying the PCR petition without an evidentiary hearing "because the resolution of []his claim required testimony of [plea] counsel." Specifically, that his plea "counsel pressured him into pleading guilty." And that his plea "counsel failed to review defenses with him, in particular that he was under the influence of drugs and alcohol and that

he was influenced by [co-defendant] at the time of the incidents." However, even viewing the facts in a light most favorable to him, defendant has not met either Strickland/Fritz prong.

A.

To meet the first Strickland/Fritz prong, the defendant must establish that his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687. The defendant must rebut the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." Id. at 689. Thus, we must consider whether a defense counsel's performance fell below an objective standard of reasonableness. Id. at 687-88.

Defendant asserts that his plea counsel pressured him to resolve the case with a guilty plea. He certified that his counsel did not review discovery or discuss trial strategy with him. And that because of his plea counsel's deficiencies, he felt that he had no other choice but to plead guilty. However, defendant provides nothing more than "bald assertions" that are belied by this record. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

Under the first prong, defendant must show, "that counsel's acts or omissions fell outside the wide range of professionally competent assistance

considered in light of all the circumstances of the case." State v. Allegro, 193 N.J. 352, 366 (2008) (quoting State v. Castagna, 187 N.J. 293, 314 (2006)). Plea counsel is "entitled to 'a strong presumption' that he or she provided reasonably effective assistance." State v. Pierre, 223 N.J. 560, 579 (2015) (quoting Strickland, 466 U.S. at 689).

When issuing his oral decision, the PCR judge read from defendant's guilty plea form and the plea hearing transcript:

Question two, A, did you commit the offenses to which you are pleading guilty? [Defendant] answered yes. This is on the first plea of April 21, 2016.

Question four, do you understand that by pleading guilty you are giving up certain rights, among them are, A, your right to a jury trial in which the State must prove you guilty beyond a reasonable doubt?

Then later on the plea form, question [twenty-two], have any promises other those mentioned on this form or any threats been made in order to cause you to plead guilty? The answer was no.

[Question] Twenty-four, are you satisfied with the attorney[—]or with the advice you have received from your lawyer? The answer was yes.

[Question] Twenty-six, do you have any questions concerning this plea? The answer was no.

So after that plea was set aside, we came to court on September 30th. I'm going to reference the plea transcript of September 30th, and I will start on . . .

page nine. This is after the [c]ourt went through the terms of the plea agreement.

Questioning by the [c]ourt:

Q [Defendant], do you understand what's happening here?

A Yes.

Q You've had enough time to think about it?

A Yes.

Q Do you want to go through with this plea?
The answer was yes. . . .

Q Are you sure about that?

A Yes.

.....

Q Are you satisfied with [plea counsel's] representation?

A Yes.

.....

Q [Defendant], I want you to take a look at that plea form. Is that the document you filled out with your attorney's assistance?

A Yes.

.....

Q Did you sign and initial indicated of your own free will?

A Yes.

Q You were able to read everything on that form?

A Yes.

Q And . . . with your attorney's assistance you understand everything on that form[?]

A Yes.

. . . .

Q Is anyone forcing you or threatening you to plead guilty?

A No.

Q Ha[ve] any promises or representations been made to you by anyone in connection with your guilty plea other than the ones we've gone over or discussed in open court?

A No.

[(internal quotation marks omitted).]

The PCR judge concluded defendant "has failed to provide any proof of the presence of any such circumstances" to show "he was influenced by his co-defendant or was under the influence of drugs and alcohol at the time of his arrest." Instead, defendant only "categorized such circumstances of his

defenses." Defendant did not demonstrate how these claims amounted to a viable defense. The judge thus concluded that defendant failed to meet the first prong.

Defendant has failed to show how his plea counsel's conduct fell below an objective standard of reasonableness or how he felt pressured into pleading guilty. Defendant entered his guilty plea after meeting with his attorney several times. He stated, on the record, that he understood that he was agreeing to a plea agreement, and he stated that he was not being threatened or forced to sign the plea. Defendant pled guilty twice—both times stating he understood that he was agreeing to a plea agreement, and he stated he was not being threatened or forced to sign the plea.

Defendant's only explanation why he entered the plea was that he felt he had no choice because of his counsel's conduct. But defendant has, again, not demonstrated how his plea counsel's conduct fell below the objective standard of reasonableness beyond vague assertions regarding discovery or lack of a trial strategy. "[B]ald assertions' are not enough—rather, the defendant 'must allege facts sufficient to demonstrate counsel's alleged substandard performance.'" State v. Jones, 219 N.J. 298, 311-12 (2014) (quoting State v. Porter, 216 N.J. 343, 355 (2013)). Further, "complaints 'merely of matters of trial strategy' will

not serve to ground a constitutional claim of inadequacy of representation by counsel." Fritz, 105 N.J. at 54 (quoting State v. Williams, 39 N.J. 471, 489 (1963)). Defendant's contention that his plea counsel failed to invoke his drug and alcohol use or co-defendant's influence over him does not show that his plea counsel's conduct "[fell] below an objective standard of reasonableness," State v. O'Neil, 219 N.J. 598, 611 (2014) (quoting Strickland, 466 U.S. at 688), or otherwise rebut the presumption counsel was following "a sound strategic approach to the case," Pierre, 223 N.J. at 579.

B.

Even assuming arguendo defendant had established Strickland's first prong, that plea "counsel's performance was deficient," Strickland, 466 U.S. at 687, which is not the case, he nonetheless fails to establish "but for" plea counsel's purported error, "the result of the proceeding would have been different," State v. Gideon, 244 N.J. 538, 551 (2021) (quoting Strickland, 466 U.S. at 694). And in the context of plea offers, "a defendant must show the outcome of the plea process would have been different with competent advice." Lafler v. Cooper, 566 U.S. 156, 163 (2012). Defendant does not advance any assertions showing that but for the alleged deficiency by his plea counsel, the outcome would have been different, and he would not have entered into the plea.

If defendant did present argument that he was influenced by co-defendant and alcohol and drugs, defendant did not present how or why the outcome would be different.

There was strong evidence against defendant and he was facing a significant sentence. See Gideon, 244 N.J. at 556 ("[T]he overall strength of the evidence before the factfinder is important in analyzing the second prong of Strickland"). Here, defendant was sentenced with concurrent sentences, which if convicted in a trial, could have run consecutively. Defendant fails to "show . . . 'a reasonable probability that, but for counsel's [allegedly] unprofessional errors, the result of the proceeding would have been different.'" State v. Taccetta, 200 N.J. 183, 193 (2009) (quoting Fritz, 105 N.J. at 60-61). Defendant failed to carry his burden of "affirmatively prov[ing] prejudice" and the PCR judge's conclusion with respect to Strickland's second prong should not be disturbed. Gideon, 244 N.J. at 561 (quoting Pierre, 223 N.J. at 583). In sum, defendant failed to establish either prong of the Strickland standard.

C.

As to the appropriateness of an evidentiary hearing, Rule 3:22-10(b) provides:

A defendant shall be entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of [PCR], a determination by the court that there are material issues of disputed fact that cannot be

resolved by reference to the existing record, and a determination that an evidentiary hearing is necessary to resolve the claims for relief. To establish a prima facie case, defendant must demonstrate a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits.

[See also State v. Marshall, 148 N.J. 89, 157-158 (1997) (applying the same).]

A defendant must "do more than make bald assertions that he was denied the effective assistance of counsel" to establish a prima facie claim entitling him to an evidentiary hearing. Cummings, 321 N.J. Super. at 170. A defendant bears the burden of establishing a prima facie claim. State v. Gaitan, 209 N.J. 339, 350 (2012). Defendant has clearly not met this burden and is not entitled to an evidentiary hearing.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION