

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-2120-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HUMBERTO GONZALEZ, a/k/a
JOSE ROSE SANTOS SOLARES,
HOMBERTO M. SANTOS, and
JOSE R. SANTOS,

Defendant-Appellant.

Submitted September 12, 2022 – Decided November 18, 2022

Before Judges Whipple, Smith, and Marczyk.

On appeal from the Superior Court of New Jersey, Law
Division, Mercer County, Indictment No. 12-10-1028.

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

Angelo J. Onofri, Mercer County Prosecutor, attorney
for respondent (Patrick L. Harty, Assistant Prosecutor,
of counsel and on the brief).

PER CURIAM

Defendant Humberto Gonzalez appeals from a Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. He presents the following points on appeal:

POINT I

THE PCR COURT ERRED IN DENYING DEFENDANT AN EVIDENTIARY HEARING AS TESTIMONY IS NEEDED FROM TRIAL COUNSEL EXPLAINING WHY SHE FAILED TO ADVISE THE STATE THAT DEFENDANT WAS ACCEPTING THEIR FAVORABLE PLEA OFFER.

POINT II

THE PCR COURT ERRED IN DENYING DEFENDANT AN EVIDENTIARY HEARING AS TESTIMONY IS NEEDED FROM TRIAL COUNSEL REGARDING HER FAILURE TO INTERVIEW AND INVESTIGATE HIS MATTER.

Having reviewed the record and applicable legal standards, we are unpersuaded by defendant's arguments and affirm.

I.

The procedural history and factual background are detailed in our unpublished decision on defendant's direct appeal affirming his conviction by a jury. See State v. Gonzalez, No. A-2784-14 (App. Div. May 31, 2017) (slip op. at 2). A jury found defendant guilty of: first-degree kidnapping, N.J.S.A.

2C:13-1(b); second-degree sexual assault as a lesser included offense of first-degree aggravated sexual assault while armed, N.J.S.A. 2C:14-2(a)(4); first-degree aggravated sexual assault in the course of committing a kidnapping, N.J.S.A. 2C:14-2(a)(3); and third-degree criminal restraint, N.J.S.A. 2C:13-2(a). He was sentenced to an aggregate twenty-five-year term of incarceration subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, parole supervision for life, and ordered to comply with all Megan's Law registration requirements.

In his petition, defendant alleges trial counsel was ineffective for three primary reasons: (1) failing to adequately investigate his case; (2) failing to inform the State he wished to accept the plea offer; and (3) improperly advising him about his sentence exposure.¹ The PCR court heard oral argument on August 6, 2020. It denied defendant's application without an evidentiary hearing after concluding his arguments on ineffective assistance of counsel were unsupported, bald assertions.

¹ Defendant raised a myriad of other ineffective assistance claims in his pro se application. He alleged counsel committed over twenty-four prejudicial errors. The PCR court systematically rejected each of these claims. He also contended his application should be granted based on cumulative error. These claims were also dismissed by the PCR court. Defendant does not make these claims on appeal, therefore we do not address them here.

II.

We use a de novo standard of review when a PCR court does not conduct an evidentiary hearing. State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016) (citing State v. Harris, 181 N.J. 391, 420-21 (2004)). When petitioning for PCR, a defendant must establish he is entitled to "PCR by a preponderance of the evidence." State v. O'Donnell, 435 N.J. Super. 351, 370 (App. Div. 2014) (citing State v. Preciose, 129 N.J. 451, 459 (1992)).

We analyze ineffective assistance of counsel claims using the two-prong test established by the Supreme Court in Strickland.² See Preciose, 129 N.J. at 459; see also State v. Fritz, 105 N.J. 42, 58 (1987). The first prong of the Strickland test requires a defendant to establish counsel's performance was deficient. Preciose, 129 N.J. at 463. "The second, and far more difficult, prong of the [Strickland] test is whether there exists 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 463-64 (quoting Strickland, 466 U.S. at 694).

There exists a strong presumption counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Further, because prejudice is not

² Strickland v. Washington, 466 U.S. 668 (1984).

presumed, a defendant must demonstrate how specific errors by counsel undermined the reliability of the proceeding. State v. Drisco, 355 N.J. Super. 283, 289-90 (App. Div. 2002) (citing United States v. Cronin, 466 U.S. 648, 659 n.26 (1984)).

A defendant may not rely on "bald assertions that he was denied the effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). A court must reject a claim if it rests on allegations that "are too vague, conclusory, or speculative." State v. Porter, 216 N.J. 343, 355 (2013) (quoting State v. Marshall, 148 N.J. 89, 158 (1997)). The petition, therefore, must allege specific facts that are "sufficient to demonstrate counsel's alleged substandard performance." Cummings, 321 N.J. Super. at 170.

III.

In light of our well-settled jurisprudence, we agree with the PCR court that defendant failed to meet his burden to show trial counsel was ineffective under any of his theories.

Turning first to counsel's alleged failure to investigate, the PCR court found this claim was "devoid of any evidentiary support." The court stated defendant "failed to articulate other facts that an investigation would have revealed or submit any affidavits or certifications in support" The PCR

court concluded defendant's claim was nothing more than a "bald assertion[] of substandard performance."

The court found trial counsel did in fact conduct a pre-trial investigation by hiring an investigator who visited the crime scene, photographed the area, and attempted to interview the State's witnesses. The court found trial counsel's investigation fell within the "wide range of reasonable professional assistance." See Strickland, 466 U.S. at 689. On this claim the PCR court determined defendant failed to show ineffective assistance. We find no error here.

Next, the PCR court found defendant's additional claims – that counsel was ineffective for failing to communicate his acceptance of the plea offer and advise him of his sentence exposure – were similarly unsupported. The court noted defendant's plea agreement argument was "unfounded." It relied, in part, on the fact that at the pretrial conference, defendant "informed the trial court" on the record "that he wished to reject [the offer]."

The record shows the following colloquy between the court, the State, and defendant concerning his decision to go to trial:

The court: It's my understanding that the State has now offered for the defendant to plead guilty to one count of aggravated assault sexual assault in the first degree for which there would be a recommendation of ten years' incarceration subject to the No Early

Release Act. There would then be a requirement of Megan's Law, parole supervision upon release, and parole supervision for life. [Counsel], can you - is that the State's current offer with respect to resolution?

The state: Yes. Obviously, no contact with the victim. Other conditions would apply, but that's basically what it is.

....

The court: All right, now having heard what the State's intended proofs are, and you've also heard that the State's current offer is to plead guilty to one count of sexual - aggravated sexual assault for which there would be a recommendation of a ten-year period of incarceration, again, subject to the No Early Release Act, meaning you would have to spend eight-and-a-half years, and then a five-year period of parole supervision upon your release, balancing that against the potential maximum sentence of 50 years with a 42-and-a-half-year period of parole ineligibility, is it your intention to proceed with trial in this matter?

Defendant: Yes.

In rejecting defendant's claim he wished to accept a plea deal from the State, but that his attorney failed to convey his timely acceptance, we look no further than this colloquy. In addition, the PCR court accurately noted defendant maintained his innocence throughout the negotiations and proceedings. The

PCR court stated, "[d]efendant's claim of innocence would have barred his acceptance of the State's offer because our Supreme Court has held that a defendant cannot establish a 'truthful factual basis' to plead guilty, while [also] maintaining his innocence." See State v. Taccetta, 200 N.J. 183, 196 (2009). We find defendant's plea argument unpersuasive.

In considering defendant's final argument on appeal, that trial counsel failed to properly advise him of his sentencing exposure, the PCR court found defendant's claim "erroneous." At the pretrial conference, the trial court and his counsel informed defendant, on the record, that his maximum sentence exposure was fifty years. Defendant answered "yes" when asked by the trial court if he understood that "there [was] a possibility that the maximum sentence to be imposed could be up to fifty years." Next, defendant answered "yes" when the trial court asked him if he understood that his parole ineligibility under the NERA would be "forty-two-and a half-years." The PCR court concluded that because defendant had been apprised of a sentencing exposure "well in excess of twenty-five years," this aspect of his claim was "unsupportable." We agree.

The record shows quite clearly defendant failed to meet his burden on either prong one or two of Strickland. His bald assertions did not overcome the "strong presumption" of trial counsel's adequate assistance, as she investigated

his case and informed him of the plea offer and sentence exposure. Strickland, 466 U.S. at 689. Defendant's colloquy during the pre-trial conference with his counsel and the court demonstrates that he understood the risks of proceeding to trial.

In sum, defendant has failed to draw the required nexus between "specific errors of counsel" he has alleged and any harm to the reliability of his trial. Drisco, 355 N.J. Super. at 290 (citing Cronic, 466 U.S. at 659 n.26). No evidentiary hearing is merited.

To the extent that we have not addressed any remaining arguments by defendant, it is because they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION