

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2121-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KENNETH L. MCNAMARA,

Defendant-Appellant.

Submitted April 4, 2022 – Decided April 18, 2022

Before Judges Fasciale and Firko.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Accusation No. 17-07-0995.

Joseph E. Krakora, Public Defender, attorney for appellant (Frank M. Gennaro, Designated Counsel, on the brief).

Lori Linskey, Acting Monmouth County Prosecutor, attorney for respondent (Alecia Woodard, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Kenneth L. McNamara appeals from a July 30, 2020 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. In his petition, defendant contended his sentence is illegal and his plea counsel was ineffective. For the reasons that follow, we vacate the July 30, 2020 order without prejudice, and reverse and remand for an evidentiary hearing.

I.

We derive the following facts from the record. Between April 28 and June 15, 2017, defendant repeatedly contacted the victim, R.K.¹ and left her threatening voice mails and text messages threatening her life. Defendant stalked R.K. through these communications, followed her, and climbed onto the roof of her house.

On July 24, 2017, defendant waived his right to an indictment and consented to be charged by way of accusation to third-degree terroristic threats, contrary to N.J.S.A. 2C:12-3(b), and fourth-degree stalking, contrary to N.J.S.A. 2C:12-10(b). Defendant was also charged by way of a summons with petty disorderly persons harassment, contrary to N.J.S.A. 2C:33-4(a), and petty disorderly persons criminal trespass, contrary to N.J.S.A. 20:18-3(b). In addition, defendant was charged on a warrant with disorderly persons resisting

¹ We use initials to protect the identity of the victim. R. 1:38-3(d)(10).

arrest, contrary to N.J.S.A. 2C:29-2(a)(1) and petty disorderly persons harassment, contrary to N.J.S.A. 2C:33-4(a).

That same day, defendant entered into a negotiated plea agreement with the State. He agreed to plead guilty to both counts in the accusation in exchange for the dismissal of the remaining charges in the other complaints. As part of the plea agreement, defendant consented to a permanent restraining order, which required him to reside and distance himself outside a five-mile radius of R.K.'s house.

In establishing the factual basis for his guilty plea, defendant testified that he called R.K. on a "daily basis" from "different cell phone numbers" and admitted telling her "you will wish for a bullet by the time I'm done with you." Defendant mentioned an "A-R 15" (Arma Lite Rifle), and said "bring it" to R.K. in connection with his threats. He admitted to making these threats in order to place R.K. "in fear that they would be carried out." Defendant acknowledged he followed R.K. in Marlboro Township and stalked her by sending text messages from different cell phones. On April 28, 2017, defendant conceded he went to R.K.'s house and climbed onto her roof. Defendant also claimed to be "drunk" when many of these events occurred, which he understood was not a defense to his actions.

The plea court found there was an adequate factual basis for the guilty plea and that defendant understood the nature of the charges against him and the consequences of his guilty plea. In addition, the plea court held defendant "entered the plea knowingly and voluntarily with the assistance of competent counsel" and defendant was "satisfied" with counsel's services. Defendant indicated he possibly resided within a five-mile radius of R.K.'s house, and he might "have to relocate." The court accepted defendant's guilty plea and executed the consent order² previously signed by defendant and the permanent restraining order, which barred defendant from having contact with R.K., her family members, and friends.

Following his plea allocution, defendant tried to call R.K. from jail using other inmates' pin numbers. On August 7, 2017, defendant called his wife and told her, "you better call [R.K.] up and tell her to get up \$100,000 and get me the fuck out of here or she better find another planet to live on." He also wanted his wife to tell R.K., "I am thinking about how I am going to torture her ass[,] [i]t may not be now but sometime in the future," and "[s]he will meet the wrath of God."

² The consent order was not provided in defendant's appendix.

On August 25, 2017, defendant called his wife again and told her to contact R.K. He wanted R.K. to hear, "you tell the bitch that she better come up with \$100,000 or she's history" and repeated his earlier warnings. The next day, defendant called his wife again from jail and advised her to contact R.K. As a result of these phone calls, defendant was charged with fourth-degree contempt for violating the restraining order, contrary to N.J.S.A. 2C:29-9(a).

On October 6, 2017, defendant appeared with his counsel at his sentencing hearing. Prior to being sentenced, "[p]lea counsel argued for a lesser sentence than the negotiated term" and also sought to modify the restraining order to permit defendant to remain at his home, which was located within a five-mile radius of R.K.'s house. The sentencing court denied these requests and advised defense counsel to file a motion to modify the restraining order. The court sentenced defendant to three years' imprisonment on the terroristic threats charge and eighteen months' imprisonment on the stalking charge to run concurrent to each other. The requisite fines and penalties were imposed.³ On November 28, 2017, the judgment of conviction was amended to delete the eighteen-month sentence on the stalking charge.

³ On October 24, 2017, defendant's driving while intoxicated charge was removed from his judgment of conviction.

On February 19, 2019, defendant filed a pro se PCR petition and claimed plea counsel was ineffective by: (1) failing to timely appeal his sentence; (2) failing to inform him on how to request the public defender to represent him on appeal; and (3) the geographic restriction in the restraining order constituted an illegal sentence and exceeded the court's authority.

In his supplemental PCR brief, defendant argued plea counsel was ineffective for: (1) failing to explain the effects of the permanent restraining order; (2) failing to argue against aggravating factors; and (3) failing to raise and argue mitigating factors.

On June 19, 2020, the PCR court conducted oral argument on defendant's PCR petition. Defendant was represented by PCR counsel. After hearing oral argument, the PCR court reserved decision. On July 30, 2020, the PCR court issued a written opinion denying defendant's PCR petition without affording him an evidentiary hearing. The PCR court found defendant's contention that his plea counsel failed to appeal his sentence was merely a "bald assertion" because defendant did not provide evidence in support of this claim. In addition, the PCR court found defendant's illegal sentence claim relative to the imposition of the permanent restraining order was procedurally barred by Rule 3:22-4(a)(2) because defendant could have filed a motion to correct an illegal sentence but

did not. The PCR court highlighted that the sentencing court told counsel "to file a motion to change the order" because the order "had been in effect since the plea on July 24, 2017." The PCR court found defendant failed to show his plea counsel's actions were deficient or prejudicial. A memorializing order was entered.

Defendant presents the following arguments for our consideration on appeal:

THE PCR COURT IMPROPERLY DENIED DEFENDANT'S CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF HIS PLEA COUNSEL WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING.

- A. THE PREVAILING LEGAL PRINCIPLES REGARDING CLAIMS FOR INEFFECTIVE ASSISTANCE OF COUNSEL, EVIDENTIARY HEARINGS AND PETITIONS FOR [PCR].
- B. DEFENDANT'S ILLEGAL SENTENCE CLAIM WAS NOT PROCEDURALLY BARRED, AND RAISED A PRIMA FACIE CLAIM FOR [PCR] ENTITLING DEFENDANT TO AN EVIDENTIARY HEARING.
- C. DEFENDANT'S CLAIM THAT PLEA COUNSEL WAS INEFFECTIVE FOR FAILING TO ADEQUATELY ADVISE HIM AS TO ALL THE CONSEQUENCES OF THE RESTRAINING ORDER RAISED A PRIMA FACIE CLAIM FOR [PCR] ENTITLING HIM TO AN EVIDENTIARY HEARING.

D. COUNSEL'S FAILURE TO FILE AN APPEAL.

II.

"The Sixth Amendment of the United States Constitution and Article I, paragraph 10 of the New Jersey Constitution require that a defendant receive 'the effective assistance of counsel' during a criminal proceeding." State v. Porter, 216 N.J. 343, 352 (2013). When a guilty plea is involved, a defendant must satisfy two criteria to set aside the plea based on ineffective assistance of counsel. See State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009). The defendant must demonstrate "(i) counsel's assistance was not 'within the range of competence demanded of attorneys in criminal cases;' and (ii) 'that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial.'" Ibid. (alteration in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)); see also Strickland v. Washington, 466 U.S. 668, 694 (1984); State v. Fritz, 105 N.J. 42, 58 (1987). The defendant must also show that doing so "would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010); accord Nuñez-Valdéz, 200 N.J. at 139.

Rule 3:22-10(b) reflects the case law regarding the defendant's right to an evidentiary hearing. It 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.

[R. 3:22-10(b).]

"Defendant may not create a genuine issue of fact, warranting an evidentiary hearing, by contradicting his [or her] prior statements without explanation." State v. Blake, 444 N.J. Super. 285, 299 (App. Div. 2016). To determine whether a prima facie claim of ineffective assistance of counsel is present, the claim must be evaluated under the two-prong Strickland test where "a reviewing court must determine: (1) whether counsel's performance 'fell below an objective standard of reasonableness,' and if so, (2) whether there exists a 'reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different.'" State v. Castagna, 187 N.J. 293, 313-14 (2006) (citations omitted) (quoting Strickland, 466 U.S. at 688, 694 (internal citation omitted)).

To establish a prima facie case of ineffective assistance of counsel, defendant "must do more than make bald assertions that" counsel's performance was substandard. Porter, 216 N.J. at 355 (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)). "Rather, defendant must allege specific facts and evidence supporting his allegations." Ibid. A defendant bears the burden of establishing a prima facie claim. State v. Gaitan, 209 N.J. 339, 350 (2012).

"However, a defendant is not entitled to an evidentiary hearing if the 'allegations are too vague, conclusory, or speculative.'" Porter, 216 N.J. at 355 (quoting State v. Marshall, 148 N.J. 89, 158 (1997)). "Thus, when a petitioner claims his [or her] trial attorney inadequately investigated his case, he [or she] must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." Ibid. (quoting Cummings, 321 N.J. Super. at 170); accord R. 3:22-10(c). A defendant is entitled to an evidentiary hearing if the facts "viewed 'in the light most favorable to defendant,'" would entitle him or her to PCR. Marshall, 148 N.J. at 158 (quoting State v. Preciose, 129 N.J. 451, 462-63 (1992)); R. 3:22-10(b). "If, with the facts so viewed, the PCR claim has a reasonable probability of being meritorious, then the defendant should

ordinarily receive an evidentiary hearing in order to prove his entitlement to relief." State v. Jones, 219 N.J. 298, 311 (2014).

As the PCR court did not conduct an evidentiary hearing on the claims that defendant raises in this "appeal, we 'conduct a de novo review.'" State v. Jackson, 454 N.J. Super. 284, 291 (App. Div. 2018) (quoting State v. Harris, 181 N.J. 391, 421 (2004)). Here, on the record before us, defendant has demonstrated an evidentiary hearing is warranted. The restraining order was entered in accordance with the anti-stalking statute, which provides, in pertinent part:

a. A judgment of conviction for stalking shall operate as an application for a permanent restraining order limiting the contact of the defendant and the victim who was stalked.

b. A hearing shall be held on the application for a permanent restraining order at the time of the verdict or plea of guilty unless the victim requests otherwise. This hearing shall be in Superior Court. A permanent restraining order may grant the following specific relief:

(1) An order restraining the defendant from entering the residence, property, school, or place of employment of the victim and requiring the defendant to stay away from any specified place that is named in the order and is frequented regularly by the victim.

[N.J.S.A. 2C:12-10.1.]

No hearing was conducted prior to the entry of the permanent restraining order entered against defendant in violation of the anti-stalking statute and the due process clauses contained in the United States Constitution, Amendment XIV, Section 1, and the New Jersey Constitution, Article I, Section 1. N.J.S.A. 2C:12-10.1(b); see, e.g., Franklin v. Sloskey, 385 N.J. Super. 534, 540 (App. Div. 2006) (noting a final restraining order issued without a proper hearing to be a fundamental violation of the defendant's constitutional right to due process). Here, the PCR court simply relied upon defendant's plea allocution and determined he understood he might have to relocate his residence. This runs afoul of the hearing requirement set forth in N.J.S.A. 2C:12-10.1.

Moreover, at the sentencing hearing, plea counsel raised the geographical distance issue and there were inconsistent assertions made by the court and assistant prosecutor about whether defendant would need to re-locate. A reasonable interpretation of the record suggests defendant might not have to move, and he may not have pled guilty pursuant to the plea agreement, if that

meant he had to re-locate. We also conclude defendant is entitled to an evidentiary hearing as to why counsel never filed an appeal on his behalf.⁴

Therefore, we vacate the July 30, 2020 order without prejudice denying defendant's PCR relief and remand for an evidentiary hearing consistent with our opinion. By doing so, we express no opinion as to whether defendant's sentence was illegal because the permanent restraining order was issued or as to any other issues raised in his PCR petition or his supplemental PCR brief.

Reversed and remanded. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION

⁴ "[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." State v. Jones, 446 N.J. Super. 28, 32 (App. Div. 2016) (quoting Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000)). In most circumstances, an attorney's error, "even if professionally unreasonable," does not require setting aside a judgment if the error had no effect on the outcome of the case. Ibid. (citation omitted). However, a "forfeiture of the proceeding itself" is a special circumstance that leads to a "presumption of prejudice." Ibid. (citations omitted). "[W]hen counsel's constitutionally deficient performance deprives a defendant of an appeal that he [or she] otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel" claim. Ibid. (citing Flores-Ortega, 528 U.S. at 484). The subject of the failure to file an appeal is an appropriate area for the remand hearing.