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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-2293-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TIMOTHY A. HORNE,
a/k/a TIMOTHY HORNE,
TIMOTHY ALLEN HORNE,
NICE, and BABY DRE,

Defendant-Appellant.

Submitted November 29, 2022 – Decided December 20, 2022

Before Judges Messano and Gummer.

On appeal from the Superior Court of New Jersey, Law
Division, Camden County, Indictment No. 14-03-0873.

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

Grace C. MacAulay, Camden County Prosecutor,
attorney for respondent (Krysten A. Russell, Assistant
Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Timothy Horne appeals the denial of his post-conviction relief (PCR) petition without an evidentiary hearing. Perceiving no abuse of discretion in Judge Christine S. Orlando's decision not to conduct an evidentiary hearing and agreeing with her finding that defendant did not establish a prima facie case of ineffective assistance of counsel, we affirm.

After defendant shot his girlfriend, he was convicted by a jury of second-degree aggravated assault, N.J.S.A. 2C:12-(1)(b)(1) (causing serious bodily injury); third-degree aggravated assault, N.J.S.A. 2C:12-(1)(b)(2) (causing bodily injury with a firearm); fourth-degree aggravated assault, N.J.S.A. 2C:12-(1)(b)(4) (knowingly pointing a firearm at another with extreme indifference to the value of human life); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); and second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b). The jury acquitted defendant of the most serious charge, first-degree attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3.

In response to his direct appeal, we remanded the case to the Law Division for resentencing on the certain-person conviction but otherwise affirmed his convictions and sentences. State v. Horne, No. A-0448-15 (App. Div. May 24,

2018) (slip op. at 6). In a pro se supplemental brief submitted in support of his direct appeal, defendant argued his trial counsel "was ineffective for not advancing; nor developing self[-]defense as a claim for his client." Id. (slip op. at 5). We rejected that argument and concluded it "warrant[ed] no further discussion in a written opinion," citing Rule 2:11-3(e)(2). Id. (slip op. at 21-22). The Court denied defendant's petition for certification. State v. Horne, 237 N.J. 196 (2019).

In his pro se PCR petition, defendant argued, among other things, his trial counsel had rendered ineffective assistance by "failing to advance [a] claim of self[-]defense which was clearly in the record." His PCR counsel expanded on that argument in a brief and represented defendant during argument before Judge Orlando. Unconvinced by defendant's arguments, Judge Orlando denied his petition.

Defendant raises the following argument on appeal:

THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF TRIAL COUNSEL'S INEFFECTIVENESS FOR NOT REQUESTING A SELF-DEFENSE CHARGE.

We affirm substantially for the reasons set forth in the comprehensive opinion Judge Orlando placed on the record. As the judge found, "[b]ased on

the evidence presented, including defendant's statement, the record is woefully deficient of any evidence to support a charge of self-defense." In particular, "there was no evidence that defendant reasonably believed that the use of a weapon was immediately necessary for the purpose of protecting himself against any use of unlawful force by [his girlfriend]." See State v. Fowler, 239 N.J. 171, 185 (2019) (describing "the basic principles of the self-defense justification," the Court held the use of force against another person is justified "'when the actor reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion'" (quoting N.J.S.A. 2C:3-4(a)).

Instead, "[t]he facts established at trial show that at the time of the shooting, [defendant's girlfriend] was getting ready for work, she heard defendant fumbling with the gun, and when she turned, he shot her. She testified he said he was sorry, he did not mean to shoot her." Judge Orlando appropriately gave deference to defense counsel's "sound trial strategy to pursue a theory of the case as an accident, which was supported by defendant's own version of the events." That strategy resulted in an acquittal of the first-degree attempted-murder charge.

We discern no abuse of discretion in Judge Orlando's decision to forego an evidentiary hearing. See State v. L.G.-M., 462 N.J. Super. 357, 365 (App. Div. 2020) (holding "[w]e review a trial court's decision to grant or deny a defendant's request for a hearing under an abuse of discretion standard"). A petitioner is not automatically entitled to an evidentiary hearing. State v. Porter, 216 N.J. 343, 355 (2013); see also State v. Peoples, 446 N.J. Super. 245, 254 (App. Div. 2016) (holding "[t]he mere raising of a claim of [ineffective assistance of counsel] does not entitle the defendant to an evidentiary hearing").

Rule 3:22-10(b) provides that a court should hold an evidentiary hearing on a PCR petition only if the defendant establishes a prima facie case in support of PCR, "there are material issues of disputed fact that cannot be resolved by reference to the existing record," and "an evidentiary hearing is necessary to resolve the claims for relief." See also Porter, 216 N.J. at 354. "A prima facie case is established when a defendant demonstrates '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.'" Id. at 355 (quoting R. 3:22-10(b)). Defendant did not meet that standard, and, thus, Judge Orlando did not abuse her discretion by deciding the petition without 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