RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3218-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

M.S.,[1]

Defendant-Appellant.

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Submitted June 2, 2022 – Decided June 14, 2022

Before Judges Mawla and Alvarez.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 18-01-0004.

Joseph E. Krakora, Public Defender, attorney for appellant (John J. Bannan, Designated Counsel, on the brief).

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Stephanie Davis Elson, Assistant Prosecutor, on the brief).

PER CURIAM

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[1] We use initials to protect the identity of the minor victim. R. 1:38-3(c)(9).

Defendant M.S. appeals from a March 5, 2021 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

In January 2018, defendant was indicted on fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b) (count one), and third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(1) (count two). The complaint-warrant alleged the victim M.R., then sixteen years old, reported that on or about March 23, 2014, when she was thirteen years old, defendant

> touched her bare vagina and buttocks on one occasion. M.R. explained she was sleeping in her father's bedroom and . . . defendant entered the bedroom, removed the blanket and reached inside her shorts and touched her buttocks and . . . vagina on her skin. M.R. said the vaginal touch hurt her but she did not know if there was penetration as she stated she was half asleep. M.R. reported she saw . . . defendant masturbate himself during this . . . incident but she does not know if he ejaculated.

M.R. identified defendant because he was a family friend and was "missing a thumb." She alerted her family about the incident, and defendant was kicked out of the home. M.R.'s father "confirmed that M.R. disclosed the defendant touched her." M.R.'s brother corroborated her disclosure.

In February 2018, defendant pled guilty to count two in exchange for the State agreeing to dismiss count one. The State also agreed to recommend: three years of non-custodial probation with a suspended sentence; Megan's Law

registration, N.J.S.A. 2C:7-1 to -23; an Avenel assessment; parole supervision for life (PSL); or alternatively, three years in prison. Defendant initialed every page of the plea form and signed the last page.

Defendant also completed the Additional Questions for Certain Sexual Offenses form which contains a section entitled "Parole Supervision for Life." The form inquired if defendant understood that if he was "pleading guilty to . . . endangering the welfare of a child by engaging in sexual conduct . . . pursuant to [N.J.S.A.] 2C:24-4[(a)] . . . the court, in addition to any other sentence, [would] impose a special sentence of parole supervision for life?" The form also asked:

> Do you understand that being sentenced to parole supervision for life means that . . . immediately upon imposition of a suspended sentence you will be supervised by the Division of Parole for at least [fifteen] years and will be subject to provisions and conditions of parole, including conditions appropriate to protect the public and foster rehabilitation, such as, but not limited to, counseling, [i]nternet access or use, and other restrictions which may include restrictions on where you can live, work, travel or persons you can contact?

Defendant responded "[y]es" to each question.

At the plea hearing, the prosecutor reiterated the State's sentencing recommendation. However, the judge clarified defendant could not get

probation and a suspended sentence "because he's on supervision for life." The judge questioned whether the parties understood the terms of the plea, and defense counsel and defendant responded affirmatively.

The judge asked defendant, "[y]ou understand you're also going to be placed on [PSL] as a result of your plea here[?]" Defendant responded: "I understand." Defendant confirmed he understood there could be restrictions placed upon him, including regarding who he could live with and access to the internet.

The judge asked defendant whether he wished to plead guilty knowing he would not get probation but rather a three-year suspended sentence and be subject to PSL. Defendant twice confirmed he understood the sentence the court would impose. The judge also confirmed defendant understood he could "be returned to custody as a parole violator" if he violated the terms. Defendant acknowledged he reviewed the plea forms with counsel, counsel answered all his questions, and he was satisfied with counsel's representation. He also confirmed the voluntary nature of his plea.

Following the plea, defendant underwent an examination at the Avenel Adult Diagnostic and Treatment Center (ADTC), which concluded he was not at risk of re-offense to require commitment to the ADTC. The report noted

defendant maintained his innocence and claimed he pled guilty "to get the matter over with and move on with his life." At defendant's May 2018 sentencing hearing, the judge reviewed the report, and noting defendant's claim of innocence, asked defendant if he stood by his plea allocution. Defendant responded, "[y]es." The judge proceeded to sentence defendant to a three-year suspended sentence, PSL, Megan's Law, and imposed fines and fees.

In September 2019, defendant was charged with a violation of suspended sentence for possession of prescription drugs, N.J.S.A. 2C:35-10.5(a)(2), and possession of a controlled dangerous substance, N.J.S.A. 2C:35-10(a)(1). He also failed to pay his court-imposed financial obligations.

On December 2, 2019, we heard defendant's challenge to his sentence on our Sentencing Oral Argument (SOA) calendar. We affirmed, finding "the sentence is not manifestly excessive or unduly punitive and does not constitute an abuse of discretion."

In January 2020, defendant filed a pro se PCR application,[2] alleging ineffective assistance of counsel and violation of his sixth amendment rights.[3] He claimed he never received the probation term he "was suppose[d] to get[,]"

[2] Defendant's counsel submitted a supplemental brief in support of his petition.

[3] U.S. Const. amend. VI.

and "out of [nowhere,] . . . got parole for life." He alleged his plea counsel was ineffective because there was no DNA or photographic evidence tying him to the offense, and counsel did not obtain a polygraph test to prove his innocence.

Defendant claimed M.R.'s father told him she was lying because she gave three different versions of the events. M.R.'s brother submitted a certification in support of the PCR petition, stating: "At some point following the charges being file[d], . . . [M.R.] told me that she had wanted to withdraw the charges against [defendant] but couldn't due to" pressure from their family. Defendant's father submitted a certification stating defendant moved to New York in March 2014. Defendant alleged counsel was ineffective for not investigating these claims.

Defendant did not allege, as he does on this appeal, that plea counsel was ineffective for failing to inform him the plea would include PSL. However, he asserted appellate counsel was ineffective for only challenging the sentence at the SOA hearing. Defendant argued the court should hold an evidentiary hearing given the prima facie showing of ineffective assistance of counsel.

The PCR judge issued a written decision, denying the petition. He noted M.R.'s disclosure of the offense was years after it happened "so no DNA testing would be possible." Further, "[a]s to [defendant's] request for a polygraph test,

New Jersey [c]ourts have historically been distrustful of polygraph tests and tend to reject it as evidence. State v. Capone, 215 N.J. Super. 497 (App. Div. 1987); see State v. Carter, 91 N.J. 86, 116 (1982)." Citing Carter, the judge stated polygraph evidence is "generally inadmissible" absent a stipulation by the parties to have the defendant undergo one, which did not happen here. He found defendant "provides no specifics or any details as to what photographs he believes exist which would have helped his case. In other words, [defendant's] claims amount to nothing more than bald assertions that do not demonstrate substandard performance by his trial counsel." The judge noted the certification from defendant's father was irrelevant because "[w]here [defendant] was residing at the time of the offense was never in issue and has no bearing on whether he stayed one night at another residence."

The judge concluded defendant's plea showed he understood the rights he was giving up and expressed satisfaction with his counsel's representation. Likewise, the judge found defendant "asserts no evidence, facts, or claims that his appellate counsel was ineffective besides those already raised regarding his trial counsel."

Defendant raises the following points on appeal:

> POINT I: BECAUSE [DEFENDANT] RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, THE

PCR COURT ERRED IN DENYING [HIS] PETITION FOR PCR.

(A) Legal Standards Governing Applications For [PCR].

(B) Defense Counsel Was Ineffective For Among Other Reasons Failing To Make Sure [Defendant] Was Advised That [PSL] Was The Functional Equivalent Of Life Time Parole.

(C) Defense Counsel Was Ineffective For Among Other Reasons Failing To Investigate.

(D) Appellate Counsel Was Ineffective For Among Other Reasons Failing To Raise The Issues Herein Presented.

POINT II: BECAUSE DEFENDANT DID NOT MAKE A KNOWING, INTELLIGENT, AND VOLUNTARY PLEA, THE PCR COURT ERRED IN DENYING DEFENDANT'S PETITION FOR PCR.

(A) Legal Standards Governing Applications For [PCR].

(B) Defendant Did Not Make A Knowing, Intelligent, And Voluntary Guilty Plea.

POINT III: IN THE ALTERNATIVE, BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE, THE PCR COURT ERRED IN DENYING AN EVIDENTIARY HEARING.

(A) Legal Standards Governing [PCR] Evidentiary Hearings.

(B) In The Alternative, [Defendant] Is Entitled To An Evidentiary Hearing.

I.

The Strickland v. Washington standard requires a defendant show counsel rendered substandard professional assistance that prejudiced the outcome of the proceedings. 466 U.S. 668, 687 (1984); see also State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the Strickland standard). Where defendants seek to set aside a guilty plea based on ineffective assistance of counsel they must show: "(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." State v. DiFrisco, 137 N.J. 434, 457 (1994) (alteration in original) (citations omitted).

"[W]here the [PCR] court does not hold an evidentiary hearing, we may exercise de novo review over the factual inferences the trial court has drawn from the . . . record." State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014) (citing State v. Harris, 181 N.J. 391, 420-21 (2004)). We also review a PCR court's legal conclusions de novo. Ibid.

II.

A guilty plea must be entered into knowingly and voluntarily. State v. Belton, 452 N.J. Super. 528, 540-41 (App. Div. 2017). "[A] guilty plea entered without sufficient understanding of the penal consequences is ordinarily invalid." State v. Jamgochian, 363 N.J. Super. 220, 225 (App. Div. 2003); see also R. 3:9-2. "Even misinformation about a collateral consequence may vitiate a guilty plea if the consequence is a material element of the plea." Jamgochian, 363 N.J. Super. at 225.

A court considers the following factors when a defendant seeks to withdraw a plea: "(1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant's reasons for withdrawal; (3) the existence of a plea bargain; and (4) whether withdrawal would result in unfair prejudice to the State or unfair advantage to the accused." State v. Slater, 198 N.J. 145, 157-58 (2009). "No single Slater factor is dispositive; 'if one is missing, that does not automatically disqualify or dictate relief.'" State v. McDonald, 211 N.J. 4, 16-17 (2012) (quoting Slater, 198 N.J. at 162).

Defendant's argument that he did not understand the terms of the plea and the PSL component lacks merit. R. 2:11-3(e)(2). The plea forms defendant

completed and his testimony at the plea proceeding clearly refute his claims that the plea was unknowingly made.

We also reject defendant's argument plea counsel was ineffective for not negotiating a plea under count one or arguing for a lesser sentence "by asking the trial court to reduce the charge to criminal sexual contact, which would have avoided [defendant] receiving [PSL]." "[A] defendant has no legal entitlement to compel a plea offer or a plea bargain; the decision whether to engage in such bargaining rests with the prosecutor." State v. Williams, 277 N.J. Super. 40, 46 (App. Div. 1994). There is no evidence in the record showing the prosecutor was willing to negotiate a plea under count one, let alone that defendant could have received a more favorable plea offer. Defendant received the lowest possible sentence for the offense to which he pled.

Defendant's arguments there was no DNA or photographic evidence tying him to the offense, and that counsel failed to investigate the case lack merit and we affirm for the reasons expressed by the PCR judge. We add the following comments.

"[W]hen a petitioner claims his trial attorney inadequately investigated his case, he 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." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). Defendant's claims regarding photographic evidence are unpersuasive because there is no indication photography was involved in the commission of the offense or a part of the allegations, and taking a photograph is not an element of any of the charges. See N.J.S.A. 2C:14-3(b); N.J.S.A. 2C:14-2(c)(1)-(5); N.J.S.A. 2C:24-4(a)(1).

The certification from defendant's father was wholly irrelevant and did not require counsel to investigate. The certification from M.R.'s brother stating she wished to withdraw the charges, also was not dispositive because it did not allege M.R.'s allegations were untrue or that she lied.

The record does not substantiate that defendant had a colorable claim of innocence and lends no support to the withdrawal of his plea. This was a negotiated plea. The incident occurred eight years ago, and we are unconvinced the State would not be prejudiced in its prosecution by the passage of this much time. Therefore, defendant would not have met any of the Slater factors, which further demonstrates plea counsel was not ineffective.

Finally, a defendant is entitled to effective assistance of appellate counsel, but "appellate counsel does not have a constitutional duty to raise every nonfrivolous issue requested by the defendant." State v. Morrison, 215 N.J.

Super. 540, 549 (App. Div. 1987). Appellate counsel will not be found ineffective for failure to raise a meritless issue or errors an appellate court would deem harmless. See State v. Echols, 199 N.J. 344, 361 (2009); State v. Harris, 181 N.J. 391, 499 (2004); State v. Reyes, 140 N.J. 344, 365 (1995). For these reasons, and because defendant did not make a prima facie showing of ineffective assistance of plea counsel, we conclude such claims could not lie against appellate counsel.

Affirmed.