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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0436-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANTHONY SMITH,

Defendant-Appellant.

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Submitted November 16, 2022 – Decided June 12, 2023

Before Judges Accurso and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 14-04-0943.

Joseph E. Krakora, Public Defender, attorney for appellant (Phuong V. Dao, Designated Counsel, on the brief).

Theodore N. Stephens, II, Acting Essex County Prosecutor, attorney for respondent (Barbara A. Rosenkrans, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Anthony Smith appeals from a Law Division order denying his post-conviction relief (PCR) petition without an evidentiary hearing. We affirm.

I.

Defendant was arrested by two officers who had been surveilling his residence in order to execute a search warrant. When defendant left his apartment to speak to two individuals who had arrived in his driveway in a black truck, both officers approached him. In response, defendant attempted to run inside the apartment and, in his haste, dropped a bundle of heroin. The two officers managed to arrest defendant after a struggle in his foyer but were both bitten by defendant's pitbull. The police found over \$1,800 in defendant's pockets and recovered additional drugs, currency and two loaded revolvers in his apartment.<sup>1</sup>

Following his arrest, defendant was charged in two related indictments. The first charged him with ten counts: third-degree possession of heroin (count one); third-degree possession of heroin with the intent to distribute (count two); third-degree possession of heroin, with intent to distribute within 1,000 feet of school property (count three); third-degree possession of Xanax (count four);

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<sup>1</sup> We derive the factual background of defendant's arrest from our previous unpublished opinion, State v. Smith, No. A-5571-14 (App. Div. Sept. 28, 2017) (slip op. at 3).

third-degree possession of Xanax, with the intent to distribute (count five); third-degree possession of Xanax, with the intent to distribute within 1,000 feet of school property (count six); second-degree possession of a firearm while committing a CDS offense (count seven); second-degree possession of a firearm while committing a CDS offense (count eight); third-degree fortified premises for distribution of CDS (count nine); and third-degree resisting arrest (count ten). The second indictment charged defendant with second-degree certain persons not to possess weapons.

As best we can discern from the record, in February 2013, the State offered defendant a plea of seven years with three years of parole ineligibility to resolve the charges in both indictments. Our description of that plea offer is based entirely on a February 11, 2013 plea recommendation form contained in the State's appendix, and which is signed only by the prosecutor, nearly two years before defendant's trial.

Defendant elected to proceed to trial with respect to the charges in the first indictment, at which the State presented physical evidence inculcating defendant in those crimes. The State also called the two arresting officers, defendant's landlord, a ballistics expert, and an expert in street level drug distribution.

Throughout the State's case-in-chief, defendant's trial counsel objected as appropriate, thoroughly cross-examined all of the State's witnesses, and successfully convinced the court to limit the opinions of the State's expert witness. Defense counsel also moved for judgment of acquittal on all charges, arguing the evidence submitted by the State was insufficient to support a conviction on any count.

In addition, defendant's counsel persuasively advanced the theory defendant was not a drug distributor but solely an addict. In support, he called defendant's wife who testified to defendant's addiction to heroin and detailed his use of Xanax in conjunction with heroin to extend its effects. She further stated some of the cash found in the apartment was not related to drug activity but allotted for that month's rent. She also testified with respect to count nine and stated she and defendant owned two pit bulls prior to his arrest, and never had any issues with either dog with respect to "biting, attacking, [or] anything like that."

Following closing arguments and jury instructions, the jury deliberated for approximately three hours before it notified the court it could not "move ahead . . . . [as it could not] come to a decision." The court informed the jury it deliberated for a "woefully insufficient" amount of time, and the case would be

"resolved one way or another," and directed the jury to continue its deliberations. Defense counsel objected to the nature of the comments made by the court.

The jury continued to deliberate and ultimately found defendant guilty of counts one, two, three, four, seven, eight, and ten, but acquitted him of counts five, six, and nine. Immediately after the jury returned its verdict, the State requested to proceed to trial with the charge in the second indictment but the court refused, stating it was not "going to try" that case and the State could instead "dismiss that charge when the appropriate time comes."

Following the verdict, defense counsel moved for a new trial, arguing the court erred in its failure to read the jury a Czachor<sup>2</sup> instruction when it indicated it could not come to a decision. He further asserted the court's comments regarding the jury's deliberations were improper and coercive. The court denied defendant's motion, determining it acted appropriately in not reading the

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<sup>2</sup> In State v. Czachor, 82 N.J. 390, 404 n.4, 407 (1980), our Supreme Court held that in criminal cases where the jury has reported a deadlock courts should instruct jurors they should not "hesitate to reexamine [their] own views and change [their] opinion if convinced it is erroneous," but also jurors should "not surrender [their] honest conviction as to the weight or effect of evidence solely because of the opinion of . . . fellow jurors, or for the mere purpose of returning a verdict."

Czachor instruction, as the jury had not deliberated for a "reasonable period," and that its comments were not coercive.

Following defendant's trial, on February 19, 2015, the Disciplinary Review Board heard oral arguments regarding ethical violations committed by defendant's counsel unrelated to defendant's case or trial. On June 11, 2015, the Board issued its decision, and found counsel violated RPC 1.16(d), failure to return unearned fee retainer on termination of the representation, and RPC 8.1(b), failure to reply to a lawful demand for information from a disciplinary authority and recommended a three-month suspension.

That same month, on June 29, 2015, defendant was sentenced to an aggregate term of ten years imprisonment, with forty-two months of parole ineligibility. In imposing its sentence, the sentencing court found aggravating factors three, N.J.S.A. 2C:44-1(a)(3); six, N.J.S.A. 2C:44-1(a)(6); and nine, N.J.S.A. 2C:44-1(a)(b). The sentencing court did not find any mitigating factors.

In September 2015, defendant, represented by the same defense counsel, accepted the State's plea offer with respect to the certain persons gun charge. He was sentenced to a five-year term of imprisonment to run concurrently with

his prior convictions. In November 2015, the Supreme Court issued an order suspending defense counsel from the practice of law for three months.

Defendant challenged his convictions and sentence with respect to the first indictment on direct appeal, arguing the court's instructions to the jury about its deadlock were "inappropriate and coercive," and the court erred in admitting testimony from a narcotics expert. Smith, slip op. at 2. We rejected defendant's arguments and affirmed his convictions, remanding for the limited purpose of correcting defendant's judgment of conviction.<sup>3</sup> Smith, slip op. at 9.

In March 2017, defendant filed a timely PCR petition regarding counsel's representation with respect to his plea to the certain persons charge. He contended his counsel was ineffective under the two-part test enumerated in Strickland v. Washington, 466 U.S. 668, 687 (1984),<sup>4</sup> because he (1) purposefully misled defendant to ensure he plead guilty; (2) lied to defendant

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<sup>3</sup> Defendant did not petition the Supreme Court for certification.

<sup>4</sup> To establish ineffective assistance of counsel, a convicted defendant must satisfy the two-part test enunciated in Strickland, 466 U.S. at 687, by demonstrating that: (1) counsel's performance was deficient, and (2) the deficient performance actually prejudiced the accused's defense. The Strickland test has been adopted for application under our State constitution in New Jersey. See State v. Fritz, 105 N.J. 42, 58 (1987).

about his disciplinary record; and (3) failed to file a direct appeal related to the charges in the first indictment.

In response, the State asserted defendant's claims were "meritless," and refused "to take any position as to defendant's arguments." Instead, it maintained if the court granted defendant's application, the State would request an immediate trial, and, in the event defendant was found guilty, a consecutive sentence.

In July 2017, the first PCR judge issued an order granting defendant's petition and issued a subsequent order in November 2017 vacating defendant's sentence. Defendant ultimately pled guilty again and received gap time credits. The reasoning supporting the first PCR judge's decision is not contained in the record.

In December 2020, defendant timely filed the present PCR petition, pro se, with respect to counsel's alleged ineffective performance related to his trial. He initially argued his counsel was ineffective because he: (1) provided defendant with "false and misleading information" regarding defendant's chance of success at trial, causing defendant "not to accept the State's plea offer"; (2) "misrepresented his own status and state of legal practice" as related to his



disciplinary charges; and (3) "willfully misled . . . defendant as to the scope of his representation."

Defendant later amended his petition with a supplemental brief submitted by appointed counsel. In his amended petition, defendant claimed defense counsel failed to provide defendant with effective representation due to "physical, mental and ethical constraints" while acting as his trial counsel. He further argued when defendant confronted counsel about his ethical violations, he misled defendant by stating he did not have any pending violations.

Defendant also contended his counsel was ineffective because he misrepresented to defendant the likelihood of his success at trial, specifically claiming he was uninformed as to the strength of the State's case. Defendant argued he was prejudiced as a result of his counsel's misrepresentation because he would have accepted a guilty plea if provided with accurate information. Finally, defendant argued because his first PCR petition was successful, his present PCR application should similarly be granted.

After considering the parties' submissions and oral arguments, the judge denied defendant's petition without an evidentiary hearing and explained his reasoning in an oral opinion. The judge concluded defendant's allegations were

"too vague, [co]nclusory or speculative" to present a prima facie claim of ineffective assistance of counsel under Strickland.

With respect to Strickland's performance prong, the judge explained defendant "[could] not and [did] not point" to any evidence in the record "where [defense] counsel's performance was deficient," and relied on counsel's actual performance during defendant's trial, noting he was "engaged," and "prepared." The judge highlighted counsel's objections throughout the trial, including counsel's objections to the court's comments to the jury's apparent deadlock, as well as his objection to the State's expert testimony regarding street level drug distribution which persuaded the court to limit that testimony.

As to counsel's then-pending ethical violations, the judge determined even assuming counsel failed to inform defendant of those charges, any error was not evidential of a failure to "communicate on all issues or any other issues." Although the judge acknowledged counsel's eventual suspension was due to "acts and/or omissions . . . outside the range of professionally appropriate behavior," he explained those acts were ultimately adjudicated "well after" defendant's trial and were unrelated to counsel's performance at trial. Finally, the judge concluded "because [defendant] ha[d] not shown that . . . counsel's

performance was deficient, he did not meet the second prong under Strickland[]."

As to the first PCR judge's decision to grant defendant's petition related to counsel's conduct in accepting the plea to the certain person's charge, the judge determined the "underlying facts" in that petition were "different from the facts of the trial in this matter," and noted defendant failed to provide any "proof" the first PCR judge's decision was "due to the same ineffective assistance of counsel" now claimed by defendant. The judge further concluded "notwithstanding the decision by [the first PCR judge] or the reasons therein" he was not bound by that decision. Finally, the judge determined as defendant failed to establish a prima facie case of ineffective assistance of counsel under Strickland, he was not entitled to an evidentiary hearing.

This appeal followed in which defendant raises the following points:

- I. BECAUSE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, HE REJECTED A FAVORABLE PLEA OFFER, AND THEREFORE, HE IS ENTITLED TO [PCR].
  - a. Defendant's trial counsel's decision to proceed with a jury trial was not sound nor supported by the evidence at trial, including testimony from Defendant's wife.

b. Trial counsel misled Defendant about the consequences of going to trial, as well as the pending ethics charges before the District Ethics Committee and the New Jersey Supreme Court.

II. DEFENDANT HAS MADE A PRIMA FACIE SHOWING OF INEFFECTIVE ASSISTANCE OF COUNSEL, AND THUS, THE PCR COURT ERRED IN NOT GRANTING AN EVIDENTIARY HEARING.

Defendant essentially reprises his arguments rejected by the judge and maintains his defense counsel's decision to proceed to trial "substantially and obviously prejudiced" defendant, as it denied him a "favorable plea offer." As support, defendant relies on the overall strength of the State's case and explains he had "absolutely no defense at trial," and thus counsel's advice to proceed to trial was unreasonable, and therefore ineffective. Defendant further argues his wife's testimony which revealed his persistent substance abuse problem, in conjunction with the State's evidence, would have informed any competent counsel not to proceed to trial.

Defendant also argues he was prejudiced from counsel's decision to withhold information regarding his pending ethical violations, as it deprived him of being "fully informed as to whether to proceed to a jury trial or accept a plea offer." Defendant further argues the judge erred in his determination that

counsel's ethical charges were adjudicated prior to his case, as arguments took place in February 2015, and the Supreme Court did not reach its decision on the matter until November 2015. We reject all of these arguments and conclude the judge correctly determined defendant failed to establish a prima facie showing of ineffective assistance of counsel under Strickland.

## II.

We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004). The de novo standard of review also applies to mixed questions of fact and law. Id. at 420. Where, as here, an evidentiary hearing has not been held, it is within our authority "to conduct a de novo review of both the factual findings and legal conclusions of the PCR court." Id. at 421. We apply these standards in the matter before us.

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee that a defendant in a criminal proceeding has the right to the assistance of counsel in his or her defense. The right to counsel includes "the right to the effective assistance of counsel." State v. Nash, 212 N.J. 518, 541 (2013) (quoting Strickland, 466 U.S. at 686).

As noted, in Strickland, the Court established a two-part test to determine whether a defendant has been deprived of the effective assistance of counsel. Strickland, 466 U.S. at 687; Fritz, 105 N.J. at 58. Under the first prong, it must be demonstrated that counsel's handling of the matter "fell below an objective standard of reasonableness" and "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687-88. However, when considering a defendant's proofs, a court must show "extreme deference" in assessing defense counsel's performance, Fritz, 105 N.J. at 52, and "indulge a strong presumption that [it] falls within the wide range of reasonable professional assistance," Strickland, 466 U.S. at 689. "Allegations of defense counsel's . . . disciplinary problems are, standing alone, insufficient to establish that defense counsel's performance fell below an objective standard of reasonableness, as required under the first prong under the Strickland[ ] standard." State v. Allegro, 193 N.J. 352, 369 (2008). To establish prejudice under the second prong, a defendant must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

"With respect to both prongs of the Strickland test, a defendant asserting ineffective assistance of counsel on PCR bears the burden of proving his or her right to relief by a preponderance of the evidence." State v. Gaitan, 299 N.J. 339, 350 (2012); see also State v. Goodwin, 173 N.J. 583, 593 (2002). A failure to satisfy either prong of the Strickland standard requires the denial of a petition for PCR. Nash, 212 N.J. at 542; Fritz, 105 N.J. at 52.

Further, it is well-established "[a] [d]efendant is entitled to effective assistance [of counsel] in the process of negotiating a plea." State v. Chau, 473 N.J. Super. 430, 445 (App. Div. 2022); see also Lafler v. Cooper, 566 U.S. 156, 168 (2012) ("If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it."). "A claim of ineffective assistance of counsel in connection with a plea is measured by the familiar two-part Strickland standard," and the "defendant must show the outcome of the plea process would have been different with competent advice." Lafler, 566 U.S. at 163.

Specifically, "[w]hen a defendant rejects a plea based on incompetent advice and goes to trial, the defendant establishes prejudice under Strickland by demonstrating 'a reasonable probability that the plea offer would have been presented to the court . . . , that the court would have accepted its terms,' and

that the offer as to the conviction, sentence, or both 'would have been less severe than under the judgment and sentence' the court imposed." State v. Alvarez, 473 N.J. Super. 448, 457 (App. Div. 2022) (quoting Lafler, 566 U.S. at 164).

Finally, an evidentiary hearing for a PCR petition is not always required. See State v. Preciose, 129 N.J. 451, 462 (1992). Trial courts should grant an evidentiary hearing when necessary "to resolve ineffective assistance of counsel claims if a defendant has presented a prima facie claim in support of PCR and the facts supporting the claim are outside the trial record." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). "[I]n order to establish a prima facie claim, a petitioner must do more than make bald assertions that he was denied the effective assistance of counsel. He must allege facts sufficient to demonstrate counsel's alleged substandard performance." Ibid.

### III.

We agree with the judge's determination that defendant failed to establish counsel was constitutionally deficient under Strickland. First, the judge's findings that counsel was engaged and prepared are amply supported by the record. In this regard, defense counsel zealously advocated on defendant's behalf and mounted a competent defense as evidenced by his cross-examination



of the State's witnesses, his frequent, and at times successful objections, as well as his decision to move for judgment of acquittal and motion for a new trial.

We further reject defendant's arguments that counsel's advice to proceed to trial was unreasonable and evidential of constitutional ineffectiveness. On this point, defendant's claim that "the totality of the [State's] evidence" demonstrated there was "absolutely no defense" to be offered at trial, is clearly without merit, as evidenced by the jury's acquittal of defendant in counts five, six, and nine, all of which exposed defendant to significant periods of incarceration if convicted.

We also are unpersuaded by defendant's argument that his counsel was ineffective in his decision to call his wife as a witness. Her testimony described defendant's past addiction to heroin and Xanax and supported counsel's defense theory—that defendant was a drug user, not a drug dealer, which was partially accepted by the jury.

We are further satisfied with the judge's determination that defense counsel's purported misrepresentation regarding his pending ethical violations did not affect counsel's ability to represent defendant, as there is no evidence in the record before us that counsel's performance was in any way deficient. Defendant offers no substantive connection as to how counsel's disciplinary

record affected any of his actions or inactions during the trial proceedings. On this point, we observe the ethical violations facing counsel at the time of defendant's trial, failure to return an unearned fee retainer and failure to reply to a demand for information from a disciplinary authority, were wholly unrelated to defendant's case.

Although our determination defendant failed to satisfy the first Strickland prong could conclude our discussion, we address the prejudice prong for purposes of completeness. On that issue, we disagree with the judge's analysis under prong two, specifically that defendant's failure to establish counsel's deficiency under prong one necessarily supports the conclusion defendant was not prejudiced under Strickland's second prong. We are nonetheless satisfied from our de novo review of the record that defendant failed to establish even a prima facie case he was prejudiced by any ineffective assistance he received from his counsel. See State v. Heisler, 422 N.J. Super. 399, 416 (App. Div. 2011) (stating that an appellate court is "free to affirm the trial court's decision on grounds different from those relied upon by the trial court").

First, although defendant argues he was "substantially and obviously prejudiced" by counsel's advice to go to trial, as it informed his decision to "reject the State's plea offer" defendant failed to certify as to any specific

discussions he had with his counsel before, or after, the State's plea offer. Nor does defendant identify any contemporaneous communications with counsel or the court supporting his current claim that he wished to accept the State's 2013 plea offer. We also note, not insignificantly, in defendant's first PCR petition regarding the certain persons offense, he claimed his counsel was ineffective based on his misadvice to accept a plea offer with respect to the charge rather than proceeding to trial. Thus, defendant's claim he would have accepted the State's 2013 plea is expressly contradicted by his earlier claim his counsel was constitutionally ineffective for accepting a plea to one of the charges encompassed by the State's offer.

Second, as noted, the record contains only the initial plea offer made nearly two years before trial, and defendant failed to attest that proposal was the last and final offer by the State. We are therefore unable to determine based on the record if there was "'a reasonable probability the plea offer would have been presented to the court . . . , that the court would have accepted its terms,' and that the offer as to the conviction, sentence, or both 'would have been less severe than under the judgment and sentence' the court imposed." Alvarez, 473 N.J. Super. at 447 (quoting Lafler, 566 U.S. at 164).

We also reject defendant's claim that counsel's purported misrepresentation regarding his pending ethical violations prejudiced the outcome of defendant's case. As noted, defendant failed to offer any evidence tying these ethical violations to any deficiency of counsel and how these violations affected the result of his case. At bottom, defendant's claims regarding any prejudice can only be characterized as improper "bald assertions." See Cummings, 321 N.J. Super. at 170.

In sum, defendant failed to present a prima facie case to satisfy either the performance or prejudice prong under Strickland. As such, the PCR judge correctly denied defendant's petition without an evidentiary hearing. Ibid.

To the extent we have not addressed any of defendant's remaining arguments it is because we have determined 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