

# RECORD IMPOUNDED

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APPROVAL OF THE APPELLATE DIVISION**

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-1875-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ERICK G. LEZAMA-  
OROZCO, a/k/a LEZAMA ERICK,  
ERICK LEZAMOROSCO, and  
ERICK OROZCO,

Defendant-Appellant.

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Submitted May 22, 2023 – Decided June 13, 2023

Before Judges Gooden Brown and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law  
Division, Middlesex County, Indictment Nos.  
16-06-1071 and 16-09-1439.

Joseph E. Krakora, Public Defender, attorney for  
appellant (Richard Sparaco, Designated Counsel, on the  
brief).

Yolanda Ciccone, Middlesex County Prosecutor,  
attorney for respondent (Nancy A. Hulett, Assistant  
Prosecutor, of counsel and on the brief).

## PER CURIAM

Defendant appeals from the January 11, 2022 Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

We glean these facts from the record. On June 21, 2016, defendant was charged in a Middlesex County indictment with first-degree attempted murder, N.J.S.A. 2C:5-1, N.J.S.A. 2C:11-3(a)(1), and N.J.S.A. 2C:11-3(a)(2) (count one); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (count two); and two counts of second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(2) (counts three and four). The charges stemmed from a December 5, 2015 domestic dispute during which defendant struck his partner, the mother of his two children, with his fist, causing her to fall down a stairwell, strike her head on the stairs, and sustain serious bodily injury, including severe brain injury.

On February 23, 2018, defendant entered an open guilty plea to count two in exchange for the dismissal of the remaining counts.<sup>1</sup> The State indicated on the plea form that it would "seek [the] maximum term pursuant to law." After

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<sup>1</sup> A separate indictment charging defendant with witness tampering and contempt related offenses would also be dismissed.

ensuring that the plea complied with the requirements of Rule 3:9-2, the trial court accepted defendant's guilty plea and scheduled sentencing. However, prior to sentencing, defendant moved to withdraw his guilty plea. After applying the four factors enumerated in State v. Slater, 198 N.J. 145, 157-58 (2009), the court denied the motion. Thereafter, on February 15, 2019, defendant was sentenced to ten years' imprisonment, subject to an eighty-five percent period of parole ineligibility pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, which sentence was affirmed on an excessive sentencing oral argument (ESOA) calendar. See R. 2:9-11.

Defendant filed a timely pro se PCR petition and brief, which was later supplemented by counsel. In his petition, defendant challenged the effectiveness of his trial and appellate counsel on various grounds. Pertinent to this appeal, defendant claimed his trial counsel was ineffective by misinforming him that he would receive a three-year NERA sentence; allowing him to enter a guilty plea with an inadequate factual basis; and failing to pursue a speedy trial motion to challenge the two-year delay from the return of the indictment to the disposition of the charges. As to appellate counsel, defendant asserted his attorney never explained to him "why they denied [his] direct appeal."

Following oral argument, on January 11, 2022, Judge Colleen M. Flynn issued an order and accompanying written opinion denying defendant's petition without an evidentiary hearing. In her opinion, the judge reviewed the factual background and procedural history of the case, applied the governing legal principles, and concluded defendant failed to establish a prima facie claim of ineffective assistance of counsel (IAC).

Specifically, Judge Flynn determined defendant failed to show that his attorneys' performance fell below the objective standard of reasonableness set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 49-58 (1987), or that the outcome would have been different without the purported deficient performance as required under the second prong of the Strickland/Fritz test. The judge also concluded that viewing the facts indulgently, defendant was not entitled to an evidentiary hearing. See State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999) ("[W]e consider petitioner's contentions indulgently and view the facts asserted by him in the light most favorable to him.").

Regarding defendant's contention that his attorney misinformed him about his sentence, the judge painstakingly reviewed the plea hearing transcript and noted that during the plea colloquy, defendant "voiced his understanding of the

plea agreement and the consequences that could result if he accepted the plea agreement." In that regard, at the plea hearing, defense counsel stated:

[DEFENSE COUNSEL]: [F]or the purposes of the record, I would like to make . . . very clear . . . what my understanding and what my client's understanding of the plea agreement is to the [c]ourt.

[Defendant] is pleading open to one count of second-degree aggravated assault. By pleading open, the [c]ourt will have to evaluate the aggravating and mitigating factors and the [c]ourt will have [to] impose a sentence anywhere in the range of [three] to [ten years] if I'm able to obviously convince the [c]ourt that the [c]ourt should sentence in the third-degree range.

Be that as it may, I don't know if I'll be able to. But [the court] will have to evaluate the aggravating and mitigating [factors] and sentence [defendant] in whatever legal range there is.

[The prosecutor], [to] my understanding, will argue for [ten] years. . . .

. . . .

NERA obviously.

During the plea colloquy, defendant confirmed for the court that he understood "everything that [defense counsel] just put on the record relative to the specific terms of [the] agreement," and acknowledged that the State was "recommend[ing] a maximum term . . . of [ten] years subject to [eighty-five] percent of parole ineligibility" but his attorney was "going to be arguing for less

than the [ten] years." See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977) ("[T]he representations of the defendant, . . . as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings.").

Critically, defendant confirmed during the plea colloquy that:

[His] attorney c[ould] make an argument that [defendant] be sentenced within the three to five-year range if he c[ould] convince the [c]ourt that the mitigating factors outweigh[ed] the aggravating factors and that it's in the interest of justice to reduce the grading of the crime. And if he doesn't convince [the court] of that, he will still try to convince [the court] to sentence [defendant] to something less than [ten], between [five] and [ten].

. . . .

And . . . it would likely be subject to [eighty-five] percent of parole ineligibility.

Defendant also acknowledged reviewing, understanding, initialing, and signing the plea forms, which were completed in both Spanish and English.

After considering the plea hearing transcript, Judge Flynn, who was also the plea judge, concluded:

[Defendant] has not presented convincing arguments to compel this court to find that counsel failed to properly inform [defendant] of the material consequences of his plea agreement. Therefore, [defendant's] contentions that his trial counselors were ineffective for giving

erroneous advice is unfounded and dissatisfaction with the outcome of his plea will not warrant an [IAC] claim under the Strickland standard.

Turning to defendant's claim that counsel allowed him to enter a guilty plea with an inadequate factual basis, after recounting defendant's plea allocution, the judge concluded defendant's assertion was "simply not supported by the facts of the case." In that regard, at the plea hearing, defendant admitted striking the victim "with [his] fist" during "a physical fight," as a result of which the victim "fell down the stairs," "struck her head on the stairs," and "suffered serious bodily injury." See State v. Sainz, 107 N.J. 283, 293 (1987) ("The factual basis for a guilty plea must obviously include defendant's admission of guilt of the crime or the acknowledgement of facts constituting the essential elements of the crime. However, the defendant's admission or acknowledgment may be understood in light of all surrounding circumstances.").

The judge noted that although defendant "mentioned he was intoxicated when the aggravated assault occurred, he stated that he knew he hit the victim several times on the record," and "[i]t is well-settled . . . that voluntary intoxication is not a defense to crimes satisfied by a mental state of recklessness," as is the case with aggravated assault. See State v. Bey, 112 N.J. 123, 145 (1988) ("[I]ntoxication is not a defense to a crime predicated on

recklessness . . . ."); State v. Warren, 104 N.J. 571, 577 (1986) ("[U]nawareness of a risk because of self-induced intoxication is immaterial when . . . recklessness is an element of the offense."). Thus, Judge Flynn concluded defendant's "arguments that the elements of aggravated assault were not met [were] unsubstantiated," as was his contention that he entered "an inadequate factual basis" to support his guilty plea.

In rejecting defendant's claim that his attorney was ineffective for failing to pursue a speedy trial motion, the judge applied the four-factor balancing test enunciated in Barker v. Wingo, 407 U.S. 514, 530 (1972), to evaluate speedy trial claims and concluded that such a motion would not have been successful. In that regard, the judge considered the "serious" nature of the crimes, "the exacerbating nature of the victim's condition," the need to "review . . . overwhelming medical records," defendant's failure to "assert[] his speedy trial right," and the absence of "oppressive pretrial incarceration" or other "showing that [defendant] suffered prejudice." See State v. Roper, 378 N.J. Super. 236, 237 (App. Div. 2005) (explaining "[i]f [a motion] had no merit, then [a] defendant would be unable to establish the 'prejudice prong' of the [IAC] standard established by Strickland"); see also State v. Fisher, 156 N.J. 494, 501 (1998) (explaining that when the IAC claim is based on counsel's failure to file



a motion, "the defendant not only must satisfy both parts of the Strickland test but also must prove that [the motion was] meritorious").

In this ensuing appeal, defendant raises the following points for our consideration:

#### POINT I

DEFENDANT WAS ENTITLED TO AN EVIDENTIARY HEARING BECAUSE HE ESTABLISHED A PRIMA FACIE CASE OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, AND THAT BUT FOR COUNSEL'S ERRORS THE RESULT WOULD HAVE BEEN DIFFERENT, AND THE EVIDENCE LAY OUTSIDE THE RECORD.

A. The Defendant's Attorney Was Ineffective In Giving The Defendant Erroneous Advice Regarding The Plea Agreement And The Court's Sentencing Options.

B. The Defendant's Counsel Was Ineffective During The Plea Hearing When He Ignored Defendant's Statements That Were Inconsistent With Guilt And, Instead, Pushed Through A Guilty Plea That Lacked An Adequate Factual Basis.

C. Trial Counsel Was Ineffective For Failing To Pursue A Speedy Trial.

#### POINT II

THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

BECAUSE OF THE FAILURE TO FILE AN APPEAL  
NOT ONLY FROM THE SENTENCE, BUT FROM  
THE CONVICTION ITSELF.

"[W]e review under the abuse of discretion standard the PCR court's determination to proceed without an evidentiary hearing." State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013). "If the court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to [PCR], . . . then an evidentiary hearing need not be granted." State v. Marshall, 148 N.J. 89, 158 (1997) (citations omitted).

An evidentiary hearing is only required when a defendant establishes "'a prima facie case in support of [PCR]," the court determines that there are "'material issues of disputed fact that cannot be resolved by reference to the existing record,'" and the court determines that "'an evidentiary hearing is necessary to resolve the claims'" asserted. State v. Porter, 216 N.J. 343, 354 (2013) (alteration in original) (quoting R. 3:22-10(b)). "[W]here . . . no evidentiary hearing was conducted," as here, "we may review the factual inferences the [trial] court has drawn from the documentary record de novo," and "[w]e also review de novo the court's conclusions of law." State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016).

"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). To establish a prima facie IAC claim, a defendant must demonstrate "by a preponderance of the credible evidence," State v. Echols, 199 N.J. 344, 357 (2009), that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense, Strickland, 466 U.S. at 687; Fritz, 105 N.J. at 58. The same Strickland/Fritz standard applies to claims of ineffective assistance of appellate counsel. State v. Gaither, 396 N.J. Super. 508, 513 (App. Div. 2007). Failure to meet either prong of the Strickland/Fritz test results in the denial of a petition for PCR. State v. Parker, 212 N.J. 269, 280 (2012) (citing Echols, 199 N.J. at 358).

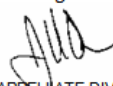
When considering Strickland's first prong, "[j]udicial scrutiny of counsel's performance must be highly deferential," and courts "must indulge a strong presumption" that counsel's performance was reasonable. Strickland, 466 U.S. at 689. To satisfy the prejudice prong, a defendant must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. To establish the prejudice prong to set aside a guilty plea based on IAC, a defendant must show "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) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

Applying these principles, we discern no abuse of discretion in Judge Flynn's decision denying defendant's PCR petition without an evidentiary hearing, and we affirm the denial of PCR substantially for the reasons stated in the judge's comprehensive and well-reasoned written opinion. Judge Flynn thoroughly and accurately addressed defendant's contentions, and the arguments are without sufficient merit to warrant further discussion here. R. 2:11-3(e)(2).<sup>2</sup>

Affirmed.

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



CLERK OF THE APPELLATE DIVISION

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<sup>2</sup> For the first time on appeal, defendant argues his appellate counsel was ineffective by failing to challenge the denial of his motion to withdraw his guilty plea and contest his purported inadequate factual basis. We decline to consider the argument because it was not raised in defendant's pro se petition or in counsel's supplemental brief and was not presented to the trial court. "Generally, an appellate court will not consider issues, even constitutional ones, which were not raised below." State v. Galicia, 210 N.J. 364, 383 (2012).