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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-1877-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RORY A. ROBINSON,

Defendant-Appellant.

Submitted October 12, 2023 – Decided November 8, 2023

Before Judges Currier and Susswein.

On appeal from the Supreme Court of New Jersey, Law Division, Monmouth County, Indictment No. 18-05-0589.

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

Raymond S. Santiago, Monmouth County Prosecutor, attorney for respondent (Melina A. Harrigan, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Rory A. Robinson appeals from a December 8, 2021 order issued by Judge Michael A. Guadagno, denying his petition for post-conviction relief (PCR) without an evidentiary hearing. Defendant contends he was denied effective assistance of counsel because his request to file a direct appeal was not heeded by his plea counsel. After carefully reviewing the record in light of the governing legal principles, we affirm substantially for the reasons set forth in Judge Guadagno's written opinion.

In June 2018, defendant pled guilty to first-degree robbery pursuant to a plea agreement. On August 17, 2018, defendant was sentenced to an eleven-year prison term to run concurrent with a previous sentence. On May 6, 2019, appointed counsel from the Appellate Section of the Office of the Public Defender filed a motion to file notice of appeal as within time. That motion included a certification by defendant dated March 27, 2019, stating he did not make a timely request to plea counsel to file an appeal because he had not been properly informed of his right to appeal. Specifically, defendant certified:

The only reason why I did not timely request ... an appeal was because I was not properly informed on the law. I was under the false impression that because I plead[ed] guilty, I had no rights to appeal. Had I been properly informed, for sure I would have timely requested an appeal.

On May 29, 2019, Chief Appellate Judge Carmen Messano denied the motion to file as within time. Judge Messano rejected defendant's claim that he had been misinformed as to his right to appeal, noting the trial record shows defendant was specifically advised he had forty-five days to appeal. Further, defendant signed the appeal rights form acknowledging he understood that if he failed to file a notice of appeal with the Appellate Division within forty-five days, he would lose his right to appeal.

Defendant filed a PCR petition in September 2020. On December 1, 2021, defendant's plea counsel filed a certification stating he had reviewed the appeal rights form with defendant, who acknowledged that he understood his appellate rights. Counsel further certified that he did not receive any indication that defendant wanted to appeal until November 27, 2018, more than ninety days after sentencing. Counsel then prepared the appeal transmittal package and forwarded it to the Appellate Section of the Public Defender's Office on December 12, 2018.

On December 8, 2021, Judge Guadagno denied PCR, concluding defendant failed to establish a prima facie case of ineffective assistance of counsel to warrant an evidentiary hearing.

Defendant raises the following contention for our consideration:

POINT ONE

THIS MATTER MUST BE REMANDED FOR LEAVE TO FILE A DIRECT APPEAL OR FOR AN EVIDENTIARY HEARING ON MR. ROBINSON'S CLAIM THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO FILE A DIRECT APPEAL.

PCR serves the same function as a federal writ of habeas corpus. State v. Preciose, 129 N.J. 451, 459 (1992). It is not a substitute for a direct appeal. Ibid. When petitioning for PCR, defendants must establish by a preponderance of the credible evidence that they are entitled to the requested relief. Ibid. To sustain this burden, the petitioner must allege and articulate specific facts, "which, if believed, would provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

Both the Sixth Amendment of the United States Constitution and Article one, paragraph ten of the State Constitution guarantee the right to effective assistance of counsel at all stages of criminal proceedings. Strickland v. Washington, 466 U.S. 668, 684-85 (1984); see N.J. Const. art. 1, ¶ 10. In order to demonstrate ineffectiveness of counsel, "[f]irst, the defendant must show that counsel's performance was deficient. . . . [s]econd, the defendant must show that

the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687. In State v. Fritz, our Supreme Court adopted the two-part test articulated in Strickland. 105 N.J. 42, 52 (1987).

To meet the first prong of the Strickland/Fritz test, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Strickland, 466 U.S. at 687. Reviewing courts indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 669.

To satisfy the second prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Gideon, 244 N.J. 538, 550-51 (2021) (alteration in original) (quoting Strickland, 466 U.S. at 694). "Prejudice is not to be presumed." Id. at 551 (citing Fritz, 105 N.J. at 52). "The defendant must 'affirmatively prove prejudice.'" Ibid. (quoting Strickland, 466 U.S. at 693). The second Strickland prong is particularly demanding: "the error committed must be so serious as to undermine the court's confidence in the jury's verdict or the result reached." State v. Allegro, 193 N.J. 352, 367 (2008) (quoting State v. Castagna, 187 N.J. 293, 315 (2006)).

Furthermore, to set aside a guilty plea based on ineffective assistance of counsel, a defendant must show "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) (quoting Hill v. Lockhart, 474 U.S. 52, 52 (1985)).

Short of obtaining immediate relief, a defendant may establish that an evidentiary hearing is warranted to develop the factual record in connection with an ineffective assistance claim. Preciose, 129 N.J. at 462-63. A defendant is entitled to an evidentiary hearing only when (1) he or she is able to prove a prima facie case of ineffective assistance of counsel, (2) there are material issues of disputed fact that must be resolved with evidence outside of the record, and (3) the hearing is necessary to resolve the claims for relief. R. 3:22-10(b). A defendant must "do more than make bald assertions that he was denied the effective assistance of counsel" to establish a prima facie case entitling him to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). Furthermore, to meet this burden of proving a prima facie case, a defendant must show a reasonable likelihood of success under both prongs of the Strickland test. Preciose, 129 N.J. at 463.

Applying these legal principles to the case before us, we agree with Judge Guadagno that defendant failed to establish the grounds for an evidentiary hearing. Judge Guadagno correctly concluded that counsel acted promptly to process defendant's appeal as soon as he received it, and that counsel bears no responsibility for the out-of-time filing. Accordingly, defendant failed to prove counsel's performance was constitutionally deficient under the first prong of the Strickland test. As to the second prong, Judge Guadagno aptly noted that defendant "has not even alleged, yet alone established a prima facie showing of prejudice. There is not even a suggestion of what issue defendant was precluded from raising on appeal."

Having failed to establish either prong of the two-part test, defendant has not proved a prima facie case that would entitle him to an evidentiary hearing. Furthermore, the pertinent facts relating to defendant's ineffective assistance claim are readily gleaned from the existing record and need not be supplemented by a PCR 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