SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2185-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SENDER N. VILLATORO-REYES,

Defendant-Appellant.

Submitted December 5, 2022 – Decided January 26, 2023

Before Judges Whipple and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 15-03-0484.

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

Raymond S. Santiago, Acting Monmouth County Prosecutor, attorney for respondent (Alecia Woodard, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Sender Villatoro-Reyes appeals from the November 18, 2020 denial of his post-conviction relief (PCR) petition without an evidentiary hearing. For the reasons below, we affirm.

Defendant raises the following issues on appeal:

> THE PCR COURT MISAPPLIED THE LAW IN DENYING THE DEFENDANT'S PETITION FOR [PCR] WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION HE WAS PROVIDED WITH INADEQUATE ASSISTANCE OF COUNSEL.
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> 1. Plea counsel was ineffective for failing to investigate defendant's mental state and order a psychiatric evaluation to determine if his mental state allowed him to enter a voluntary plea.
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> 2. Plea counsel was also ineffective for advising defendant that defendant would receive a [ten]-year sentence, for failing to discuss trial strategy with defendant and for being biased against defendant because plea counsel and the victim were both female.
>
> 3. Plea counsel was also ineffective for failing to file an appeal on behalf of defendant.

A Monmouth County grand jury indicted defendant on one count of first-degree murder: purposely or knowingly causing the death of another, N.J.S.A. 2C:11-3(a)(1), or purposely or knowingly causing serious bodily injury resulting in the death of another, N.J.S.A. 2C:11-3(a)(2).

Defendant retracted his original plea of not guilty and agreed to plead guilty to an amended charge of aggravated manslaughter, N.J.S.A. 2C:11-4(a), a first-degree offense. In exchange, the State agreed to recommend a sentence of twenty-eight years with eighty-five percent parole ineligibility pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Defendant's plea counsel promised to argue for the minimum sentence of ten years at sentencing.

At the plea hearing that same day, defendant put forth the factual basis for his plea. On May 16, 2014, defendant was living with his girlfriend, Lucenay Furman Gallegos, and his three-year-old son. Gallegos was five months pregnant. At some point in the middle of the night, Gallegos got up to use the bathroom, and defendant asked to speak to her in the living room, since his son was sleeping in the bedroom with them. He confronted her about some calls made to him that led him to believe she was cheating on him. After some back and forth, Gallagos told him the baby she was carrying was not his and gave him a "mocking look in her face[,] like laughing."

Defendant then put his hands around her neck, "grab[bing] her with great strength." He explained he "didn't want her to die." However, he left the apartment after he noticed she had stopped breathing.

During the colloquy, the court questioned defendant about his mental state at the time of the plea. The judge asked defendant if he was on any medication or other substances, and defendant answered he had taken sleeping pills the morning of the day before the plea hearing. Defendant said he was alert and understood what was happening at the hearing. According to defendant's presentence report (PSR), these pills were Lexapro, an antidepressant he was prescribed while in jail.

On April 21, 2017, though plea counsel did argue for a ten-year sentence, defendant was sentenced to twenty-eight years in prison subject to eighty-five percent parole ineligibility under NERA.

Defendant filed a pro se petition for PCR. In February 2020, PCR counsel assisted defendant in filing a certification. That April, PCR counsel also filed a memorandum of law in support of the petition, and defendant submitted a letter.

Defendant put forth five arguments before the PCR court:

> (1) Counsel failed to meet sufficiently to discuss his case; (2) Counsel, being a woman[,] "expressed her own feelings on this matter making it clear she disapproved, and that he would not succeed at trial"; (3) Defendant did not understand that his plea was to [twenty-eight] years, not the [ten] year minimum; (4) Defendant wanted to appeal to withdraw his plea, but no appeal was taken; (5) Defendant's plea was involuntary because he was taking the anti-depressant Lexapro.

The PCR judge heard argument in October 2020 and issued a written opinion on November 18, 2020, denying the petition. The court dismissed defendant's argument his plea counsel was biased as "a mere bald assertion." It also noted defendant knew of the twenty-eight-year term of incarceration because it was on his plea form and mentioned at the plea colloquy.

In analyzing whether defendant's plea was involuntary, the court applied the manifest injustice standard found in State v. McQuaid, 147 N.J. 464 (1997), treating it as a motion to withdraw a plea. It concluded there was no manifest injustice because defendant was told of the possibility of the twenty-eight years of imprisonment at the plea colloquy.

As to the alleged failure to file an appeal, the court found defendant could have filed a motion to withdraw his plea under Rule 3:21-1 by showing manifest injustice. This relief is not time barred. Thus, the court concluded defendant's plea counsel was not deficient.

The court found defendant failed to establish a prima facie case of ineffective assistance of counsel and was not entitled to an evidentiary hearing under Rule 3:22-10(c). This appeal followed.

To succeed on an ineffective assistance of counsel claim, a defendant must satisfy the two-part test under Strickland v. Washington, 466 U.S. 668 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. . . . . Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.
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> [State v. Fritz, 105 N.J. 42, 52 (1987) (quoting Strickland, 466 U.S. at 687).]

In a case where the defendant pleaded guilty, the second prong of Strickland requires a defendant to establish "a reasonable probability that, but for counsel's errors, [he] would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985); State v. Di Frisco, 137 N.J. 434, 457 (1994). A court considers whether a defendant can "show that, had he been properly advised, it would have been rational for him to decline the plea offer and insist on going to trial and, in fact, that he probably would have done so[.]" State v. Maldon, 422 N.J. Super. 475, 486 (App. Div. 2011) (citing Padilla v. Kentucky, 559 U.S. 356, 372 (2010)). "Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." Lee v. United States, 137 S. Ct. 1958, 1967 (2017).

In PCR cases, a defendant is only entitled to an evidentiary hearing

> upon the establishment of a prima facie case in support of [PCR], a determination by the court that there are material issues of disputed fact that cannot be resolved by reference to the existing record, and a determination that an evidentiary hearing is necessary to resolve the claims for relief.
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> [R. 3:22-10(b).]

A defendant establishes a prima facie case when he shows there is a "reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to [him], will ultimately succeed on the merits." Ibid. "To establish a prima facie claim of ineffective assistance of counsel, a defendant must demonstrate the reasonable likelihood of succeeding under the test set forth in [Strickland, 466 U.S. at 694], and United States v. Cronic, [466 U.S. 648 (1984)]." State v. Preciose, 129 N.J. 451, 463 (1992).

"[A] defendant is not entitled to an evidentiary hearing if the 'allegations are too vague, conclusory, or speculative to warrant an evidentiary hearing[.]'" State v. Porter, 216 N.J. 343, 355 (2013) (alteration in original) (quoting State v. Marshall, 148 N.J. 89, 159 (1997)). A defendant "must allege specific facts and evidence supporting his allegations." Ibid.

I.

On appeal, defendant first argues his counsel was ineffective because she failed to investigate his mental state before allowing him to enter his plea. We begin our analysis by addressing whether the PCR court erred in using the manifest injustice standard rather than the two-prong test in Strickland. The PCR court considered this argument a motion to withdraw his plea and accordingly applied the manifest injustice standard found in Rule 3:21-1. Defendant argues this is in error, and the court should have instead applied the two-prong Strickland test.

A motion to withdraw a plea and a petition for PCR based on ineffective assistance of counsel "are distinct, and governed by different rules of court." State v. O'Donnell, 435 N.J. Super. 351, 368 (App. Div. 2014). A motion to withdraw a plea after sentencing requires a showing of a "manifest injustice." R. 3:21-1. Ineffective assistance of counsel is governed by the Strickland test. 466 U.S. at 687.

Defendant's PCR brief which counsel wrote, as well as the letter he wrote himself to the court on January 15, 2018, both frame the issue as an ineffective assistance of counsel argument. Defendant does the same on appeal. While there are statements suggesting the plea was involuntary due to defendant's

medication, the crux of defendant's argument is that his counsel failed to investigate or raise the involuntariness argument before he pleaded guilty. He did not ask in his petition—nor does he now ask in this appeal—to withdraw his guilty plea.

The PCR court erred in applying the "manifest injustice" standard under Rule 3:21-1 rather than Strickland's two-prong test. Since we review this issue de novo, we apply the Strickland test.

II.

Defendant argues his plea counsel's performance was deficient because she failed to investigate his mental state.

Counsel is obligated to order an expert appraisal of a defendant's mental condition if doing so is "critical" to making a competent trial strategy decision. State v. Savage, 120 N.J. 594, 622 (1990). However, the need for such an appraisal must be apparent on the facts known to counsel at the time. For example, Savage concerned multiple outward signs of mental illness, such as defendant's jumping out of a window, heavy cocaine usage, potential hallucinations, and previous hospitalization for a mental condition while serving in the Navy. Id. at 618-20. Counsel's excuse for failing to order a mental exam—because "nothing jogged his mind"—was insufficient to overcome the

overwhelming external signs of mental incapacity, which presumably should have alerted counsel to the need to pursue this line of inquiry. Id. at 622. When these outward signs are not present, counsel has a lessened obligation to investigate.

When a court has "fully explored" the mental state of a defendant at the time of the plea and determined the plea was voluntary, the plea will not be deemed involuntary simply because the defendant was taking prescription medication at the time. See State v. Colon, 374 N.J. Super. 199, 222 (App. Div. 2005) (defendant was taking anti-mania drug); State v. Clark, 104 N.J. Super. 67, 70 (Law Div. 1968) (defendant was taking tranquilizer to treat shock and depression after death of wife).

Defendant told the judge during the plea colloquy that he was prescribed "sleeping pills." His PSR indicates these pills were Lexapro, an antidepressant used to treat anxiety and depression. He was prescribed this medication after he killed his girlfriend, while he was in jail. According to the PSR, defendant took these pills once every day, in the morning. The conversation with the court the morning of his plea was as follows:

> [Court:] Are you under the influence today of any medication or other substances which would prevent you from understanding my questions?

> [Defendant:] No. I take sleeping pills but I believe I am okay.
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> [Court:] When was the last time you took them?
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> [Defendant:] Yesterday.
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> [Court:] Before bed?
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> [Defendant:] Yes. In the morning.
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> [Court:] You took one this morning?
>
> [Defendant:] No, I didn't take one this morning.
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> [Court:] Okay, so you are alert and you understand what is being said. Is that correct?
>
> [Defendant:] Yes.

Petitioner failed to provide sufficient and credible evidence which could overcome his own testimony. The mere fact that defendant was taking Lexapro at the time of the plea is not enough to render it involuntary. See Colon, 374 N.J. Super. at 222; Clark, 104 N.J. Super. at 70. Therefore, there were no facts known to defendant's plea counsel at the time of the plea that would require her to investigate his mental state. Defendant was therefore not prejudiced by any failure to do so.

III.

Defendant next argues his plea counsel was ineffective for failing to file an appeal withdrawing his plea. He alleges his plea counsel told him he could only withdraw his plea by filing an appeal, but she never filed that appeal.

It is ineffective assistance of counsel to fail to file a requested appeal. State v. Perkins, 449 N.J. Super. 309, 311 (App. Div. 2017); see also State v. Jones, 446 N.J. Super. 28, 32-33 (App. Div. 2016). Indeed, Rule 3:22-2(e) lists as a ground for PCR "[a] claim of ineffective assistance of counsel based on trial counsel's failure to file a direct appeal of the judgment of conviction and sentence upon defendant's timely request."

Here, however, the sole mention of a failure to file an appeal in defendant's PCR petition is this sentence in his certification: "After my sentence was imposed, I decided to withdraw my plea and [plea counsel] said I could only do it on appeal." Nowhere in his petition or his brief does he allege he requested counsel to actually file an appeal.

"[I]t is only when a defendant has not conveyed his wishes regarding the filing of an appeal that we consider 'whether counsel's assistance was reasonable considering all the circumstances,' . . . and whether counsel's deficient performance 'actually cause[d] the forfeiture of the defendant's appeal.'" Jones,

446 N.J. Super. at 33-34 (quoting Roe v. Flores-Ortega, 528 U.S. 470, 478, 484 (2000)). Thus, we analyze this case, in which it is not clear whether defendant actually requested an appeal, under the typical two-prong Strickland standard, rather than automatically finding ineffective assistance of counsel.

The trial court is correct that, in order to withdraw a plea after sentencing, a defendant should file a motion under Rule 3:21-1, which reads: "A motion to withdraw a plea of guilty or non vult shall be made before sentencing, but the court may permit it to be made thereafter to correct a manifest injustice." Therefore, defendant's plea counsel was only possibly ineffective for not advising him of this avenue, Rule 3:21-1, which might allow him to withdraw his plea after sentencing.

While it might have been error for defendant's counsel to tell him he would need to withdraw his plea on appeal, he can still file a motion to withdraw his plea by showing "manifest injustice" under Rule 3:21-1. See O'Donnell, 435 N.J. Super. at 368 (noting a motion to withdraw a plea may be made "any time" after sentencing). There was no prejudice to defendant.

Defendant's remaining arguments—that his plea counsel was biased and incorrectly advised him he would only be sentenced to ten years as a result of

the plea—are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2); see Porter, 216 N.J. at 355.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION