

**NOT FOR PUBLICATION WITHOUT THE  
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-2239-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NAJEE M. DEAN,

Defendant-Appellant.

---

Submitted June 1, 2023 – Decided June 12, 2023

Before Judges Enright and Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Accusation No. 19-03-0288.

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

Matthew J. Platkin, Attorney General, attorney for respondent (Lila B. Leonard, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Najee M. Dean appeals from a November 16, 2021 order

denying his petition for post-conviction relief (PCR).<sup>1</sup> We affirm, substantially for the reasons explained in Judge Marilyn C. Clark's thoughtful and comprehensive written opinion.

## I.

Shortly after midnight on July 26, 2018, Rui Zhou and his wife were delivering a food order to defendant when he approached the couple's car, brandished a handgun, and demanded they give him money. Once Zhou's wife told defendant they had no money, he fatally shot Zhou in the face and ran away. Defendant was two months shy of his eighteenth birthday when the incident occurred.

Defendant immediately told a friend that he killed Zhou. The next day, defendant went to the police, accompanied by counsel, and turned himself in. He was arrested and charged with first-degree murder, N.J.S.A. 2C:11-3(1); first-degree felony murder, N.J.S.A. 2C:11-3(a)(3); two counts of first-degree robbery, N.J.S.A. 2C:15-1(a)(1); and various weapons charges.

Defendant agreed to be waived to the adult Criminal Part and pleaded guilty under an Accusation to first-degree aggravated manslaughter, N.J.S.A.

---

<sup>1</sup> The November 16 order was amended on March 22, 2022 to reflect defendant pleaded guilty to an Accusation.

2C:11-4(a)(1). In exchange for the plea, the State agreed to recommend a twenty-four-year prison sentence, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

Judge Clark accepted defendant's guilty plea and sentenced him in accordance with the plea agreement. In conducting her aggravating and mitigating factor analysis, the judge found: the crime was committed in a "particularly cruel and depraved" manner; defendant was at risk of reoffending; and there was a need to deter him and others from violating the law, N.J.S.A. 2C:44-1(a)(1), (3) and (9).

While she found no statutory mitigating factors, the judge considered mitigating evidence, including material outlined in a psychological report and a sentencing memo submitted by defendant's counsel. Further, the judge accepted the State's representation that it considered defendant's mitigating proofs when it negotiated the plea agreement.

The judge determined the mitigating evidence carried "some weight, but it [was] not an excuse or justification." She also stated she "considered that [defendant] was young, but at age [seventeen] and [ten] months and a recent high school graduate, there ha[d] to be substantial understanding of the horror that a bullet in the face will cause, and there ha[d] to be accountability." She

concluded "the aggravating factors qualitatively strongly outweigh[ed] the mitigating information" and "the maximum sentence permitted under the plea agreement [was] totally justified."

Defendant appealed limited to his sentence. We heard the appeal on a sentencing calendar, pursuant to Rule 2:9-11. During the hearing, appellate counsel argued Judge Clark failed to "give adequate weight to the relationship between [defendant's] childhood trauma and his mental health issues" and that if the judge had "properly considered [defendant's] youth and his possibility for rehabilitation with the appropriate treatment, [s]he would have imposed a lower sentence." We affirmed the sentence, concluding it was "not manifestly excessive or unduly punitive and d[id] not constitute an abuse of discretion." State v. Dean, No. A-5453-18 (App. Div. Apr. 1, 2020).

Approximately four months later, defendant filed a PCR petition, arguing, in part, that plea, sentencing, and appellate counsel were ineffective, and his sentence "was improper, illegal and . . . otherwise unconstitutional." He contended the judge "should have given proper consideration to [his] youth in imposing sentence," consistent with the principles set forth in Miller v. Alabama, 567 U.S. 460 (2012), and State v. Zuber, 227 N.J. 422 (2017). Additionally, he urged the judge to find "NERA mandatory parole ineligibility

requirements should not be applied to juveniles" who are waived to the adult Criminal Part.

On November 16, 2021, Judge Clark issued an oral opinion, denying defendant's petition without an evidentiary hearing. She issued a conforming order and thirty-page opinion later that day.

The judge found defendant "was afforded excellent representation" during his plea hearing, sentencing, and appellate proceedings. Further, she determined his "juvenile and adult attorneys, both highly experienced, undoubtedly thoroughly reviewed the discovery and, . . . concluded the State had an extremely strong and compelling case" so both "did whatever they could reasonably do to assist and advocate for [defendant], particularly in light of the devastating proofs that he faced in this case." The judge provided examples of the evidence the State marshalled against defendant, including surveillance footage, "a generally accurate description of the shooter by the deceased victim's wife, her positive identification of . . . defendant in a photo line-up," and his confession to his friend.

Turning to defendant's constitutional challenge to his NERA sentence, the judge stated the sentence was "fully" "considered on direct appeal," and "should not be the subject of a [PCR] motion." Nevertheless, in considering the merits

of defendant's sentencing argument, she found his NERA sentence was appropriate and "imposed after full advocacy by both defense counsel and the prosecutor, and full judicial consideration of all aggravating and mitigating information." In that regard, the judge noted defendant's counsel argued at sentencing that defendant "was . . . extremely remorseful for the crime he committed" and "had suffered a tragic, chaotic, and abusive life."

Additionally, Judge Clark rejected defendant's argument that she failed "to properly apply mitigating factors that were clearly present in this case." She recalled that at sentencing, defendant's attorney asked her to find mitigating factors four (substantial grounds tending to excuse or justify defendant's conduct) and twelve (cooperation with the State), N.J.S.A. 2C:44-1(b)(4) and (12), and non-statutory mitigating evidence, considering defendant was abused as a child, suffered from mental illness, and struggled with substance abuse.

The judge noted that at sentencing, she declined to find mitigating factor four, concluding there could "never be any excuse or justification for what [defendant] did." Regarding mitigating factor twelve, the judge stated that while defendant did surrender to the police, "this was when the police had already identified him as the shooter, had powerful evidence to support that conclusion, and were looking for him." Thus, she found defendant failed to provide

"mitigating factor [twelve] evidence."

Further, the judge declined to find mitigating factors eight (defendant's conduct was the result of circumstances unlikely to recur); nine (the character and attitude of the defendant indicate that he is unlikely to commit another offense); and eleven (excessive hardship from imprisonment), N.J.S.A. 2C:44-1(b)(8), (9), and (11), were applicable. She reasoned, "defendant committed one of the most calculating, terrible, horrific and cruel offenses . . . this [c]ourt has ever seen," and "[b]ased upon the horrendous circumstances of th[e] crime, the psychiatric issues present, and his prior juvenile history which was cited at the sentence, I would have categorically rejected . . . that he was unlikely to commit another offense or that the conduct was the result of circumstances unlikely to recur." She also stated she would have rejected mitigating factor eleven if it were argued at sentencing, because she anticipated defendant would "receive counsel[ing] services . . . that [would] hopefully assist in his rehabilitation." Judge Clark concluded, "it is clear that while I rejected certain statutory mitigating factors, I fully considered all of the mitigation evidence, and referenced it as mitigation evidence a number of times, both at sentence and on the judgment of conviction."

Finally, the judge acknowledged the cases cited by defendant, specifically

Miller and Zuber, "provide[d] guidance with respect to relevant factors that a judge must consider when sentencing a juvenile, particularly in a lengthy sentence for a serious crime." However, she found these cases "in no way render[ed] the imposition of a parole ineligibility term to be per se unconstitutional or illegal." The judge added, "these cases specifically indicated that a juvenile who commits a serious offense . . . must be held accountable, and it was those sentences which constituted a life sentence or the practical equivalent of a life sentence that particularly caused those courts to intervene and to issue guidelines."

Judge Clark also found there was "no evidence . . . [defendant's] sentence [was] illegal," and given the nature of his offense, his "juvenile record[,] his several sentences to probation, his violation of probation," and prior "substantial court intervention in . . . ongoing efforts to assist him," there was no basis to revisit his twenty-four-year NERA sentence. She observed, too, that he would be eligible for parole "at age [thirty-seven,] . . . a relatively young age."

## II.

On appeal, defendant raises the following arguments:

### POINT I

THE DEFENDANT'S SENTENCE PURSUANT TO  
THE NO EARLY RELEASE ACT (NERA) WAS



UNCONSTITUTIONAL[,] REQUIRING THAT HIS SENTENCE BE VACATED AND THE MATTER REMANDED FOR RESENTENCING.

POINT II

THE COURT BELOW ERRED IN DENYING POST-CONVICTION RELIEF BECAUSE PLEA, SENTENCING, AND APPELLATE COUNSEL ALL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN PLEA COUNSEL FAILED TO GATHER EVIDENCE IN SUPPORT OF MITIGATING FACTORS WHILE NEGOTIATING THE PLEA AND FAILED TO PROVIDE COMPLETE DISCOVERY TO DEFENDANT PRIOR TO PLEADING GUILTY; WHEN SENTENCING COUNSEL FAILED TO ARGUE THAT INCARCERATION WOULD BE AN EXTREME HARDSHIP TO DEFENDANT AND THAT THE CIRCUMSTANCE[S] WHICH BROUGHT HIM BEFORE THE COURT WERE UNLIKELY TO RECUR, AND FURTHER FAILED TO FULLY DEVELOP THE MITIGATING EVIDENCE THAT WAS PRESENTED; AND WHEN APPELLATE COUNSEL SIMPLY REPEATED THE SAME INCOMPLETE ARGUMENTS, ALL LEADING TO A HIGHER SENTENCE THAN SHOULD HAVE BEEN IMPOSED IF ALL MITIGATING FACTORS HAD BEEN FULLY DEVELOPED AND SOONER PRESENTED.

These arguments are unavailing.

We review the legal conclusions of a PCR court de novo, but generally defer to its factual findings when those findings are "supported by adequate, substantial and credible evidence." State v. Harris, 181 N.J. 391, 415 (2004).

When an evidentiary hearing has not been held, we may conduct a "de novo review of both the factual findings and legal conclusions of the PCR court." Id. at 421. But we review a trial court's decision to deny a PCR petition without an evidentiary hearing for an abuse of discretion. State v. Preciose, 129 N.J. 451, 462 (1992).

To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test enunciated in Strickland v. Washington, 466 U.S. 668 (1984); see also State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the Strickland two-part test in New Jersey). Under the first Strickland prong, a defendant must show counsel's performance "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." 466 U.S. at 687-88. "The quality of counsel's performance cannot be fairly assessed by focusing on a handful of issues while ignoring the totality of counsel's performance in the context of the State's evidence of defendant's guilt." State v. Castagna, 187 N.J. 293, 314 (2006) (citing State v. Marshall, 123 N.J. 1, 165 (1991)).

To satisfy the second prong of the Strickland standard, a defendant "must show that the deficient performance prejudiced the defense." 466 U.S. at 687.

There must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. In the context of a PCR petition challenging a guilty plea based on the ineffective assistance of counsel, the second Strickland prong is established when the defendant demonstrates 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. Nuñez-Valdéz, 200 N.J. 129, 139 (2009) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)). Additionally, the defendant must establish that a "decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010).

"The right to effective assistance includes the right to effective assistance of appellate counsel on direct appeal." State v. O'Neil, 219 N.J. 598, 610 (2014). Thus, the Strickland standard applies to claims regarding appellate counsel's performance. State v. Morrison, 215 N.J. Super. 540, 546 (App. Div. 1987). But appellate counsel does not have an obligation to "advance every argument, regardless of merit, urged by the appellant." Evitts v. Lucey, 469 U.S. 387, 394 (1985); see also State v. Gaither, 396 N.J. Super. 508, 515 (App. Div. 2007). Instead, appellate counsel "should bring to the court's attention controlling law that will vindicate her client's cause." O'Neil, 219 N.J. at 612.

A defendant is entitled to an evidentiary hearing only after establishing a prima facie case supporting the PCR claims, meaning a "defendant must demonstrate a reasonable likelihood that [the PCR] . . . claim will ultimately succeed on the merits." State v. Marshall, 148 N.J. 89, 158 (1997). To secure an evidentiary hearing to address ineffective assistance of counsel claims, "a petitioner must do more than make bald assertions . . . . [The petitioner] must allege facts sufficient to demonstrate counsel's alleged substandard performance." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

Guided by these principles, and for the reasons expressed by Judge Clark in her detailed opinion, we are persuaded defendant failed to present a prima facie claim in support of either prong of the Strickland/Fritz test regarding plea, sentencing, or appellate counsel. Therefore, he was not entitled to an evidentiary hearing to resolve his ineffective assistance of counsel claims. Preciose, 129 N.J. at 462.

Similarly, we are not convinced Judge Clark abused her discretion in sentencing defendant. As to defendant's arguments that the judge failed to consider defendant's youth or find mitigating factors four and twelve, we note, as Judge Clark did, these issues were "fully" addressed on direct appeal. Moreover, although Judge Clark considered the merits of these arguments, she

was not obliged to do so on defendant's PCR application. See Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 3:22-3 (2023). ("It is . . . clear that an issue considered on direct appeal cannot thereafter be reconsidered by way of a post-conviction application."). Indeed, a PCR petition is not "an opportunity to relitigate cases already decided on the merits." Preciose, 129 N.J. at 459; see also R. 3:22-5.

We next turn to defendant's alternate contention that recent case law addressing juvenile defendants warrants a reduction in his NERA sentence. In doing so, we acknowledge a defendant may challenge an illegal sentence at any time. State v. Acevedo, 205 N.J. 40, 47 n.4 (2011) (citing R. 3:21-10(b)(5)). Generally, "an 'illegal sentence' is one . . . 'not imposed in accordance with law.'" Id. at 45 (citation omitted). An illegal sentence also can be challenged "because it was imposed without regard to some constitutional safeguard or procedural requirement." State v. Tavares, 286 N.J. Super. 610, 618 (App. Div. 1996). However, "mere excessiveness of sentence otherwise within authorized limits, as distinct from illegality by reason of being beyond or not in accordance with legal authorization, is not an appropriate ground of post-conviction relief and can only be raised on direct appeal from the conviction." Acevedo, 205 N.J. at 46-47 (citation omitted).

Here, it cannot reasonably be disputed that defendant's sentence fell within the range permitted under the Criminal Code. We also are convinced it was imposed with due regard to all constitutional safeguards and procedural requirements. Thus, it was not illegal.

Finally, defendant asks us to extrapolate from the holdings in Miller and Zuber that a trial court may no longer impose a NERA sentence on a juvenile waived to the adult Criminal Part. We decline to make that leap.

In Miller v. Alabama, the United States Supreme Court held a mandatory life-without-parole sentence imposed on Miller — who was fourteen years old when he committed murder — constituted cruel and unusual punishment. 567 U.S. at 465. But while the Court stressed that sentencing courts must consider "how children are different, and how those differences counsel against irrevocably sentencing them to [a] lifetime in prison," it did not categorically bar juveniles from being sentenced to life without parole in homicide cases. Id. at 480-81.

In Zuber, our Supreme Court built upon this federal juvenile sentencing jurisprudence and extended application of the Miller principles to situations where a juvenile is facing a term of imprisonment that is the "practical equivalent to life without parole." 227 N.J. at 429-30. "Thus, Miller and Zuber

are uniquely concerned with the sentencing of juvenile offenders to lifetime imprisonment or its functional equivalent without the possibility of parole." State v. Ryan, 249 N.J. 581, 601 (2022).

Accordingly, we are not convinced that Miller or Zuber preclude the imposition of any NERA sentence for a juvenile waived to the adult Criminal Part. Our conclusion is bolstered by the fact that while the sentence imposed here is substantial, it is not the "practical equivalent" of life without parole, particularly since defendant will be eligible for parole before he turns forty.

To the extent we have not addressed any other arguments raised by defendant, 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