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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2411-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHARLOTTE M. CARMAN,

Defendant-Appellant.

Submitted March 8, 2023 – Decided May 16, 2023

Before Judges Vernoia and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 15-12-1362.

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

Angelo J. Onofri, Mercer County Prosecutor, attorney for respondent (Laura C. Sunyak, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Charlotte M. Carman appeals from a March 4, 2022 order denying her post-conviction relief (PCR) petition without an evidentiary hearing. We affirm.

I.

Defendant was indicted for first-degree murder, N.J.S.A. 2C:11-3(a)(3), first-degree robbery, N.J.S.A. 2C:15-1, third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d), fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d), and fourth-degree criminal mischief, N.J.S.A. 2C:17-3, in connection with the death of Paris France Way, who she described as her boyfriend. After she agreed to enter an open plea of guilty to an amended charge of first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1), the State dismissed the remaining charges. Under our Criminal Code, the sentencing range for first-degree aggravated manslaughter is ten to thirty years. N.J.S.A. 2C:11-4(c).

At her plea hearing, defendant testified she was entering her plea "freely, voluntarily [and] with full knowledge and understanding of the consequences" In addition, she expressly admitted, consistent with her plea forms, that she understood the range of any potential sentence could be between ten to thirty years. She was also aware, based on the court's comments

and those memorialized in her plea form, the court was inclined to sentence her to a range of fifteen to seventeen years, subject to the court's review of the presentence report, and with the understanding both her counsel and the State reserved their rights to argue, respectively, for a lesser or greater custodial term.

In addition, defendant informed the court she was satisfied with her counsel's services, was not forced to enter the plea, and understood she was waiving her right to a jury trial. She further acknowledged her sentence was subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, and a period of parole ineligibility.

In support of her factual basis for the aggravated manslaughter charge, defendant stated that in May 2015, she approached Way on a Trenton street while he was carrying a bag of groceries. An altercation between the two ensued after Way refused to give her "what [she] wanted from him." Defendant admitted she recklessly stabbed Way with a knife she was carrying, which perforated his heart and collapsed his lung, causing his death. She also acknowledged leaving the scene while Way was "lying in the street bleeding." Despite contending Way hit her "with a soda bottle" during the incident resulting in "some fractures," she agreed to waive any claim of self-defense as the "force

. . . [she] used was disproportionate in its intensity from the force" Way employed.

At sentencing, the court considered statements from Way's family and fiancé, arguments of counsel, the parties' sentencing memoranda, and defendant's presentence report. That report detailed, among other things, the events immediately preceding and subsequent to defendant's stabbing of Way. It also noted defendant "stated she had been diagnosed with [attention deficit hyperactivity disorder], anxiety disorder, manic depression, personality disorder and [post-traumatic stress disorder]." According to the report, defendant stated she was being treated only for depression and was taking medication.

The report further reflected defendant's statement "she was physically abused as a child by her sister . . . and was also a victim of sexual abuse . . . [when] she was molested by her pastor from the ages of [thirteen] to [fifteen]." Defendant admitted to "cutting . . . [Way] while he was beating her, as well as stealing . . . [his] money, cell phone and cigarettes before fleeing the scene," and she contended she was under the influence of marijuana at the time.

In its arguments to the sentencing court, the State requested a sentence toward the "high end" of the statutory range, and argued there was "no reason to go . . . below . . . [twenty years]." The State maintained aggravating factors

three, ("risk that the defendant will commit another offense"), N.J.S.A. 2C:44-1(a)(3); six, ("extent of the defendant's prior criminal record and the seriousness of the offenses of which the defendant has been convicted"), N.J.S.A. 2C:44-1(a)(6); and nine, ("need for deterring the defendant and others from violating the law "), N.J.S.A. 2C:44-1(a)(9), applied. It also contended mitigating factors three, ("defendant acted under strong provocation"), N.J.S.A. 2C:44-1(b)(3); and six, ("defendant has compensated or will compensate the victim of the defendant's conduct for the damage or injury that the victim sustained, or will participate in a program of community service"), N.J.S.A. 2C:44-1(b)(6), were inapplicable.

The State further argued a lengthy sentence was warranted because defendant "viciously stabbed" Way. The prosecutor contended the case was "about jealousy" and "rage," as evidenced by the fact that after stabbing Way, defendant slashed his fiancée's tires "while he lay bleeding . . . [and then] took his money, his phone, his cigarettes, and . . . came back to make sure she spit on him." The State also maintained defendant used Way's stolen money following the altercation to get a tattoo commemorating his death.

Defendant's counsel did not present any witnesses, nor did he submit any letters on her behalf. As noted, however, counsel did submit a memorandum in

which he specifically advocated for application of mitigating factors three, four, ("[t]here were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense"), N.J.S.A. 2C:44-1(b)(4); eight, ("defendant's conduct was the result of circumstances unlikely to recur"), N.J.S.A. 2C:44-1(b)(8); and nine, ("[t]he character and attitude of the defendant indicate that [they are] unlikely to commit another offense"), N.J.S.A. 2C:44-1(b)(9).

In support of mitigating factors three and four, counsel contended defendant had a viable claim of self-defense if the case went to trial based on Way hitting her with a soda bottle causing facial fractures. Defendant's counsel also informed the court Way previously abused defendant, specifically "[i]n one incident . . . chok[ing] . . . defendant and tr[ying] to run her over with his car." Her counsel also highlighted Way "had an extensive history of domestic violence against women," including accusations of abusive behavior from three different women. He further explained based on defendant's age and her limited violent criminal record, there was a low risk of recidivism and requested a sentence of fifteen years.

At the proceeding, defendant's counsel reiterated the points raised in his sentencing memorandum, specifically that Way provoked the victim by hitting

her in the face with a glass bottle and, based on her criminal record and age, defendant was unlikely to reoffend. Counsel also informed the court defendant was remorseful and requested consideration of mitigating factor seven, ("defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense"), N.J.S.A. 2C:44-1(b)(7), based on defendant's limited prior criminal history.

Defendant's counsel argued against aggravating factors three and six, again relying on defendant's limited criminal record, and claimed aggravating factor nine should not be given substantial weight in light of the circumstances of the altercation. Overall, counsel contended the mitigating factors outweighed the aggravating factors and reiterated his request for a sentence of fifteen years. Finally, defendant's counsel advised the court defendant did not wish to address the court directly.

After considering the witness statements, presentence report, sentencing memoranda and arguments of counsel, the court imposed a seventeen-year custodial term, subject to NERA. In its evaluation of the aggravating and mitigating factors, the court rejected the State's requests to apply aggravating factors three and six. As to factor three, the court relied on the extended period

of time between the prior offenses committed by defendant. The court did not apply aggravating factor six because defendant's two prior offenses were fourth-degree crimes. The court, however, applied aggravating factor nine, reasoning there was "a need for deterring this defendant and others from violating the law," and assigned it "great weight."

With respect to the mitigating factors, the court determined factors three, four, and nine applied, and also partially applied mitigating factor seven.¹ Regarding factor three, the court reasoned defendant acted under provocation, which in this case "was the altercation that she had with . . . [Way] who hit her with a soda bottle," as well as the "obvious jealousy" associated with Way being with another woman at the time of the altercation. The court applied mitigating factor four in part based on the circumstances of the altercation and because "defendant has some level of mental health issues as . . . reflected in the presentence report." The court applied mitigating factor seven based on the extended period between her prior convictions and the present crime. Finally, the court concluded mitigating factor nine applied, relying on defendant's

¹ Mitigating factor five, ("the victim of the defendant's conduct induced or facilitated its commission"), N.J.S.A. 2C:44-1(b)(5), is stated in the judgment of conviction but the court did not expound upon its finding of this factor in its oral decision.

remorse, her limited criminal record, and age. The court indicated the mitigating factors outweighed the aggravating factors and therefore determined a custodial term less than mid-range was appropriate.

On direct appeal, defendant challenged only her sentence which we considered after arguments on our excessive sentencing calendar, pursuant to Rule 2:9-11. We rejected defendant's contentions that the sentencing court failed to weigh properly the aggravating and mitigating factors, and we affirmed. State v. Carman, No. A-2555-17 (App. Div. May 7, 2018) (slip op. at 1). Specifically, we determined the court's findings on both the aggravating and mitigating factors "were based on competent and credible evidence in the record, that the court correctly applied the sentencing guidelines enunciated in the Code, and that the court did not abuse its discretion in applying the sentencing guidelines." Ibid. We further concluded the judge issued sufficient "detailed reasons to support the sentence in accordance with the plea agreement." Ibid. The Supreme Court denied defendant's petition for certification. See State v. Carman, 235 N.J. 290 (2018).

Defendant filed a timely pro se PCR submission in which she initially argued the sentencing court "double-counted . . . aggravating factor [nine] and imposed [an] excessive sentence in violation of the United States Constitution

and New Jersey Constitution."² She later amended her petition, and relied on a brief filed by appointed PCR counsel, where she contended her prior counsel was ineffective under the two-part test enumerated in Strickland v. Washington, 466 U.S. 668, 687 (1984),³ for failing to offer evidence at sentencing which would have weighed in favor of mitigation.

Specifically, defendant argued her counsel failed to present three letters from family and friends in counsel's possession prior to the sentencing hearing, which evidenced Way's abusive actions towards her. In one letter, Reverend Rebecca McMillan, defendant's aunt, detailed incidents of abuse committed by Way upon defendant, including times when he choked and burned her, struck her, and attempted to run her over with a car.

² In her submissions before us, defendant does not raise any arguments regarding the court's purported improper double-counting. We therefore consider any such contentions waived. See Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2023) ("[A]n issue not briefed is deemed waived."); Telebright Corp. v. Dir., N.J. Div. of Taxation, 424 N.J. Super. 384, 393 (App. Div. 2012) (deeming a contention waived when the party failed to include any arguments supporting the contention in its brief).

³ 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).

A second letter, written by defendant's mother, Gloria Carman, confirmed Rev. McMillan's statement that Way choked defendant and attempted to run her over with a car. She also stated Way stole defendant's money and threatened and stalked her. She also believed her daughter was a person of good character and suggested she must have been "provoked in order for this to have happened." Finally, in a third letter, defendant's sister, Qushona Carman-Seawright, also confirmed Way previously choked defendant, tried to run her over with a car, and stole from her.

Further, PCR counsel located two additional letters sent to defendant's prior counsel by her mother and Rev. McMillan, in January 2017, prior to defendant's sentencing. These letters reassert defendant's good character, the multi-decade history of abuse by Way, and that she was a survivor of sexual assault and abuse. Both letters also requested the court "take into consideration her past abuse with [Way] and others, and realize she was afraid for her safety and life but did not mean to kill . . . [Way] . . . whom she loved unconditionally."

In her amended petition, defendant also stated she provided her prior counsel with names of individuals who would provide additional letters to the court or testify on her behalf, as they were aware of Way's abusive action, but counsel failed to contact them. She supported her claims with certifications

from four additional individuals who informed PCR counsel's investigator they would have written letters or testified at sentencing had they been requested. Specifically, Shakia Gilbert, described as a "close family member," certified she was not contacted by defendant's counsel but would have been willing to speak on defendant's behalf as a "character witness" as she was "informed by [defendant's] family members . . . [defendant] was in a controlling, abusive relationship" with Way.

Sylvia Sapp, defendant's "family friend," indicated she had a brief conversation with defendant's counsel and informed him she had known defendant for eleven years, was godmother of her son, and had custody of him while defendant was incarcerated. Sapp certified she told defendant's counsel, defendant was likely "defending herself" against Way.

Evita Reddice, defendant's "aunt by marriage," stated she was not contacted by defendant's counsel but would have submitted a statement indicating that although she did not know Way, she believed defendant was "a good person who [got] things done" and was not the "type of person to put her hands on anyone, but she would defend herself." Reddice also stated defendant "changed her ways for the better," when she returned to school and obtained her GED.

Lillian Holman, defendant's cousin, indicated she too was not contacted by defense counsel but if she had been, she would have informed counsel that defendant "is a good person," "kind, [and] giving" who possesses "good character." In addition, Holman stated it was her belief defendant was not aware "the fight would turn into the death of someone."

Defendant also claimed prior counsel was deficient in his failure to argue for the application of mitigating factor two, ("defendant did not contemplate that the defendant's conduct would cause or threaten serious harm"), N.J.S.A. 2C:44-1(b)(2), based on her mental health issues. In support, defendant submitted an evaluation completed by Dr. Charles Harris Heller, Ph.D., in 2021.

According to his report, Dr. Heller stated medical records existed that documented defendant's history of depression, mental illness, major mood disorder, intermittent paranoia, anxiety, long-term emotional, physical and sexual abuse commencing at age eleven, drug abuse and numerous rapes.⁴ Dr. Heller also stated these records established defendant was previously diagnosed with bipolar disorder and was prescribed psychiatric medication. He further explained defendant sustained trauma as a result of her inability to care for her children and their subsequent adoption.

⁴ The record does not include the referenced medical records.

Dr. Heller stated that based on these records, it was his opinion defendant was exhibiting psychosis and delusional symptoms at the time of the accident. He further explained, based on "the documented history of thought disorder, paranoia, and mood disorder" in conjunction with defendant's "lack of appropriate psychological and psychiatric treatment," defendant "was suffering from severe mental disease or disorder and therefore had difficulty in controlling her impulses and anger in a restrained manner when confronted with an extremely conflictual and inflammatory event." Dr. Heller stated it was therefore "understandable" for defendant to "impulsively strike back" at Way.

Judge Robert W. Bingham, II, denied defendant's petition in a March 4, 2022 order, and issued a coincident written opinion in which he addressed and rejected all defendant's arguments. With respect to Strickland's performance prong, Judge Bingham concluded the "record d[id] not indicate counsel's performance was deficient" and relied on the sentencing memorandum submitted by counsel, as well as his oral argument. Specifically, Judge Bingham noted "[c]ounsel emphasized [defendant]'s age, that . . . [Way] had previously abused her, that [defendant] acted in self-defense or was provoked . . . , [defendant]'s minimal prior criminal history, that her character was such that she was unlikely to recidivate, and that she was remorseful for her actions."

As the judge further explained, the "essence" of the information contained in the letters provided to her counsel and the statements from family and friends was "clearly presented" to the sentencing court. In addition, Judge Bingham found the sentencing court was aware of defendant's mental health history and rejected defendant's reliance on Dr. Heller's report as supporting mitigating factor two as "Dr. Heller did not actually opine that [defendant] did not contemplate that her conduct would cause or threaten serious harm." Finally, the judge concluded that, based on defendant's plea colloquy, mitigating factor two did not apply.

With respect to Strickland's prejudice prong, Judge Bingham explained that even assuming defendant satisfied Strickland's first prong, she failed to establish a "reasonable probability . . . the result of the proceeding would have been different." On this point, the judge characterized defendant's contentions that the "cumulative" and "other information" would have altered the sentence imposed as "mere conjecture."

Finally, as defendant failed to establish a prima facie claim of ineffective assistance, the judge determined she was not entitled to an evidentiary hearing. This appeal followed.

II.

Before us, defendant raises the following point for our consideration:

[DEFENDANT] IS ENTITLED TO AN EVIDENTIARY HEARING ON HER CLAIM THAT HER ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO ADVOCATE ADEQUATELY AT SENTENCING.

Defendant essentially reprises her arguments rejected by Judge Bingham and maintains prior counsel was deficient in his failure to offer specific evidence in favor of mitigation of sentence, as well as neglecting to advocate for the application of mitigating factor two. She specifically claims counsel should have obtained a psychological examination which "would have enabled him to present a meaningful and comprehensive understanding" of the incident to the sentencing court, and as a result of that failure, did not present a "complete and compassionate" explanation of her actions at sentencing.

Defendant also argues her prior counsel was constitutionally deficient when he failed to present evidence of defendant's serious mental health issues. Although defendant acknowledges the sentencing court possessed some understanding of defendant's mental health history from the presentence report, she maintains this information was "narrow and incomplete," and was "not on

par with or a substitute for the constitutionally [] mandated advocacy of defense counsel."

Defendant further contends her counsel's performance was ineffective by failing "to present letters or statements to the sentencing court" which "would have supported a lower sentence" and contacting additional witnesses who would have testified or submitted statements on her behalf. She asserts the absence of these letters and testimony omitted critical and necessary background information into Way's history of abuse as well as a deeper understanding of defendant's actions and allowed the State to present defendant as a "monster" at sentencing.

Defendant also disagrees with Judge Bingham's determination any claims of prejudice were "speculative," and asserts the omitted letters, along with Dr. Heller's expert report, illustrate the presence of "highly relevant and applicable mitigating evidence." She contends had this evidence been presented, the court would have been compelled to further mitigate defendant's sentence. We disagree.

III.

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.

To establish prejudice under the second 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. "Although a demonstration of prejudice constitutes the second part of the Strickland analysis, courts are permitted leeway to choose to examine first whether a defendant has been prejudiced, and if not, to dismiss the claim without determining whether counsel's performance was constitutionally deficient." State v. Gaitan, 209 N.J. 339, 350 (2012).

A plea agreement does not prevent "a defense attorney from presenting or arguing mitigating evidence to the sentencing court," as such a restriction would "deprive[] the court of the information it needs to faithfully carry out its unfettered obligation to identify and weigh the appropriate sentencing factors." State v. Hess, 207 N.J. 123, 153 (2011); see also State v. Briggs, 349 N.J. Super. 496, 501 (App. Div. 2002) ("[A] defense attorney must have an unfettered right to argue in favor of a lesser sentence than that contemplated by the negotiated plea agreement."). Counsel has a duty to argue for a lesser sentence when supported by the facts. Hess, 207 N.J. at 154.

Defense counsel owes an independent duty to present "mitigating evidence in support of a lesser sentence," and a failure to honor that obligation denies a defendant of the "constitutional right to the effective assistance of counsel at sentencing." Id. at 129. "[T]he failure [of defense counsel] to present and argue the mitigating evidence can only be explained as attorney dereliction" and in some cases can rise to the level of ineffective assistance of counsel. Id. at 154; see ibid. (finding the defendant did not receive effective assistance of counsel at sentencing due to his attorney's failure to raise mitigating factors).

"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." Gaitan, 209 N.J. at 350; 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, an evidentiary hearing for a PCR petition is not automatic. See State v. Preciose, 129 N.J. 451, 462 (1992). Trial courts, however, should grant an evidentiary hearing "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.

IV.

We agree with Judge Bingham's determination defendant failed to satisfy either Strickland prong. First, defendant's claim her counsel's actions were in any way deficient are belied by the record. Her very experienced counsel zealously advocated on her behalf. Both his sentencing memorandum and arguments at the hearing alerted the court to much of the information defendant now alleges was absent at her sentencing proceeding. For example, counsel's memorandum advanced factual support for the application of several mitigating factors, all accepted by the court, such as defendant's limited criminal record, Way's past abusive behavior, and the circumstances of the altercation, including Way's purported provocation of defendant.

Further, counsel vigorously argued these points before the court at sentencing. As a result of his advocacy, counsel successfully convinced the court to reject the application of two aggravating factors, and also secured the application of mitigating factors three, four, five, seven, and nine. We find

further support for our conclusion based on the sentence defendant received, which was below the mid-range of her exposure to a possible custodial term of thirty years. Although we acknowledge counsel did not offer testimony, letters of support, or a mental health evaluation at defendant's sentencing, it is clear from the presentence report and counsel's submissions and arguments, he ensured the court was aware of this information. Based on the record before us, we simply cannot conclude counsel's actions "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 687-88.

We are further satisfied with Judge Bingham's conclusion defendant's arguments fail under the second prong of Strickland, as there is not a "reasonable probability" that, but for her counsel's alleged deficient conduct or errors, the proceeding's outcome would have been different. Fritz, 105 N.J. at 52 (quoting Strickland, 466 U.S. at 694). Specifically, the evidence allegedly omitted by counsel provided only cumulative information that was otherwise before the court, the court did in fact consider that information in its analysis of the aggravating and mitigating factors.

As to defendant's arguments regarding prior counsel's failure to advocate for mitigating factor two, we likewise are confident counsel's omission, even if found to be deficient, would not have altered the outcome of defendant's

sentence. As noted, Judge Bingham was privy to defendant's struggle with mental health, as evidenced in his review of the presentence report. Further, he specifically relied, in part, on her "mental health issues" in his application of mitigating factor four.

Further, although Dr. Heller's report undoubtedly provides additional detail into defendant's mental state on the day in question, we agree with Judge Bingham that evaluation, when read in context with defendant's statements at her plea colloquy, does not support the application of mitigating factor two. Indeed, although Dr. Heller stated defendant "had difficulty controlling her impulses and anger in a restrained manner," he does not expressly conclude defendant did not contemplate her actions would cause serious harm to Way. Nor does other evidence in the record support the conclusion defendant, who violently stabbed Way twice in the chest, was unaware her actions would cause or threaten serious harm. See State v. Locane, 454 N.J. Super. 98, 127-28 (App. Div. 2018) (rejecting a court's finding of mitigating factor two for a drunk driving case concluding "[e]very driver is aware, when sober, of the responsibility to never drive while intoxicated. That defendant voluntarily became intoxicated, knowing she would drive, means she ignored the possibility of harm her behavior would cause"); see also State v. Cullen, 351 N.J. Super.

505, 511 (App. Div. 2002) (stating mitigating factor two is related "to the seriousness of the offense rather than the background and character of the offender").

Further, as noted, defendant received a sentence below the mid-range that is consistent with defendant's understanding at the time of her plea. Under these circumstances, we have little doubt that even if counsel provided the alleged omitted information or advocated for the application of mitigating factor two, it would not have resulted in defendant receiving a lesser sentence.

In sum, defendant failed to present a prima facie case to satisfy either the performance or prejudice prong under Strickland. As such, Judge Bingham correctly denied defendant's petition without an evidentiary hearing. Cummings, 321 N.J. Super. at 170.

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