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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-2528-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LEWIS HOOPER, a/k/a
LEWIS HOPPER,

Defendant-Appellant.

Submitted June 7, 2023 – Decided October 16, 2023

Before Judges Accurso and Firko.

On appeal from the Superior Court of New Jersey,
Law Division, Middlesex County, Indictment No. 13-
06-0768.

Joseph E. Krakora, Public Defender, attorney for
appellant (Andrew R. Burroughs, Designated counsel,
on the briefs).

Yolanda Ciccone, Middlesex County Prosecutor,
attorney for respondent (David M. Liston, Assistant
Prosecutor, of counsel and on the brief).

PER CURIAM

In 2019, we reversed the order denying defendant Lewis Hooper's post-sentencing Slater¹ motion and refusing to consider his claim of ineffective assistance of counsel under Strickland,² and remanded for an evidentiary hearing for the trial court to consider both claims. State v. Hooper, 459 N.J. Super. 157, 175-76, 185 (App. Div. 2019). In a nutshell, defendant, on advice of counsel, rejected an alleged offer to plead guilty in exchange for a recommended thirty-year NERA³ term, "because his lawyers thought thirty years excessive." Id. at 176.

"Four days later, on advice of those same lawyers, defendant entered an 'open plea,'" to an indictment charging him with attempted murder, conspiracy, armed robbery, weapons offenses and hindering, "which exposed him to a NERA term over twice that long and to a possible extended term of life in prison." Ibid. The court sentenced defendant as a persistent offender to an aggregate sixty-year NERA term. Id. at 168-70.

Backed by averments of his plea counsel, we found defendant's claim that his "patently irrational" decision to plead "open," based on his lawyers'

¹ State v. Slater, 198 N.J. 145, 157 (2009).

² Strickland v. Washington, 466 U.S. 668, 693-94 (1984).

³ The No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

"incompetent legal advice that he was not extended-term eligible[,] . . . that consecutive terms were not appropriate on the facts," and that "he entered his plea with the understanding he would likely be sentenced to a term of between ten to twenty years, but that his exposure was capped at thirty years, subject to NERA," stated a prima facie case of ineffective assistance of counsel "entitling him to an evidentiary hearing." Id. at 177.

Defendant thereafter elected not to proceed with an evidentiary hearing on remand but instead entered into a negotiated plea to armed robbery and attempted murder in exchange for the merger or dismissal of all other charges and a recommended extended-term sentence of thirty years subject to the periods of parole ineligibility and supervision required by NERA. He was sentenced in accord with his plea agreement.

Defendant did not appeal. Three months after his sentencing, however, defendant filed a petition for post-conviction relief in his own behalf alleging he received ineffective assistance of counsel before his first plea because his counsel failed to file a motion to dismiss the indictment. Specifically, following defendant's very late notice that he intended to assert a claim of self-defense at trial, the State moved to preclude defendant from raising the defense, contending defendant's several statements to the police and the

surveillance video of the robbery and shooting made clear it was not viable. The trial court held an extended N.J.R.E. 104 hearing at which defendant testified and was cross-examined at length by the prosecutor. Following the hearing, the court found the evidentiary record did not support a charge on self-defense and barred defendant from raising it at trial.

Defendant retained new counsel, who moved for reconsideration and to suppress defendant's testimony at the N.J.R.E. 104 hearing. Another judge granted the motion, finding the first judge should have denied the motion without prejudice to await development of the evidence at trial. The second judge barred the State from using defendant's hearing testimony for impeachment purposes should he decide to testify at trial, thus leaving him "in the same position as if the hearing never took place." In the course of his opinion, however, the judge gratuitously opined defendant's first lawyer provided defendant ineffective assistance by allowing defendant to testify, waiving his right against self-incrimination and "irreparably" exposing "defendant's trial strategy beyond his duty to provide notice." Defendant's pro se petition centered on those comments.

A third judge appointed counsel for defendant, who filed a supplemental brief arguing defendant received ineffective assistance when his counsel failed

to pursue a speedy trial, advised him to plead "open" prior to his first guilty plea and allowed that plea to be taken without an adequate factual basis, and failed to file a motion to dismiss the indictment pursuant to State v. Sugar, 84 N.J. 1 (1980). Defendant supported that last claim with a certification from his former counsel averring he did not file a motion to dismiss the indictment, which he believed had a "considerable" chance of succeeding based on the second judge's statements that defendant's trial strategy had been "irreparably exposed" at the N.J.R.E. 104 hearing, because he was unaware of the Court's opinion in Sugar.

PCR counsel further argued defendant was denied effective assistance by the cumulative errors of his counsel and was entitled to an evidentiary hearing. PCR counsel also requested the court consider points defendant wished to raise. In addition to restating points raised by his counsel, defendant contended he was denied "the right to a fair trial" because the victim's family attended the "illegal" N.J.R.E. 104 hearing, allowing them access to his trial strategy; the second judge said the N.J.R.E. 104 hearing conducted by the first judge "was illegal" adding "to the illegality of this issue"; it was improper for the first judge "to deny him the use of self-defense as a trial strategy"; that his former counsel "told" the attorney representing defendant in connection with

his negotiated second guilty plea "to file an order of dismissal" of the indictment based on his testimony at the N.J.R.E. 104 hearing, but "she refused and never even read the transcript of the 104 hearing"; that all his attorneys were ineffective for failing to move to dismiss the indictment because despite the record being sealed, defendant's "claim of self-defense was exposed to too many people," allowing "anyone who saw the illegal 104 hearing [to] manipulate his or her trial strategy against [defendant's] testimony, which denied him a right to a fair trial"; and an "uncensored video was played at [his second] sentencing in front of children without warning."

Judge Flynn denied the petition in a comprehensive opinion. The judge declared defendant's speedy trial claim without merit based on the four-factor Barker v. Wingo⁴ test, finding defendant advanced no evidence that he suffered any prejudice by the delay in getting his case to trial, much of which was caused by the number of motions he filed and the number of times he switched attorneys. Judge Flynn also found any claim based on the Criminal Justice Reform Act, N.J.S.A. 2A:162-15 to -26, not viable as the Act became effective on January 2, 2017, subsequent to defendant's arrest and is not

⁴ Barker v. Wingo, 407 U.S. 514, 530-33 (1972).

retroactive. L. 2014, c. 31, § 21 (stating the statute applies to persons arrested "on or after the effective date").

Judge Flynn further found defendant's claims relating to his first plea were moot. The judge noted our decision on defendant's direct appeal reversed the denial of his motion to withdraw his plea and allowed him the opportunity of an evidentiary hearing on that motion as well as on his claim of ineffective assistance in connection with his first plea. Defendant elected to forego that hearing in favor of a second guilty plea, which cut his sentence in half, making it the sentence he repeatedly said he wanted on remand and the one he expected could be imposed at the time of his first plea. Although noting PCR counsel withdrew defendant's claim of ineffective assistance in connection with defendant's second plea after reviewing the plea transcript, Judge Flynn nevertheless found any claims of ineffective assistance relating to defendant's second plea disingenuous based on the extended plea colloquy at the time defendant entered that plea.

The judge rejected defendant's plea that any of his lawyers rendered ineffective assistance based on their failure to file a motion to dismiss the indictment, finding Sugar, the only published case on which defendant relied, inapposite. The judge noted the egregious circumstances in Sugar, where the

chief of detectives in the prosecutor's office surreptitiously listened in on Sugar's conversations with his attorney following Sugar's arrest in connection with the disappearance and suspected murder of his wife. 84 N.J. at 4-7. The judge found those circumstances were entirely distinct from the on-the-record N.J.R.E. 104 hearing that occurred here, making it highly unlikely any court would have dismissed the indictment on that basis, particularly as the second judge determined that sealing defendant's testimony at the N.J.R.E. 104 hearing left him "in the same position as if the hearing never took place."

The judge rejected all of defendant's pro se claims as without merit and found, because defendant had not shown any error rising to the level of ineffective assistance of counsel, he could not succeed on his claim that cumulative errors by his various lawyers amounted to ineffective assistance of counsel. Finally, Judge Flynn found that viewing plaintiff's claims in the light most favorable to him in accord with State v. Marshall, 148 N.J. 89, 158 (1997), still leaves them as "speculative and unsubstantiated." Finding defendant alleged "no facts to show that he was prejudiced or denied a fair trial by his trial counselors' performance" under the Strickland standard, the judge denied defendant's claim for an evidentiary hearing.

Defendant appeals, reprising his claims that his counsel was ineffective by failing to move to dismiss the indictment after the first judge required him to testify at an evidentiary hearing before she would consider whether to permit the defense of self-defense, by rendering erroneous advice in connection with his first guilty plea, by allowing defendant to enter a guilty plea at his second plea hearing without an adequate factual basis, that his lawyers' cumulative errors denied defendant effective legal representation, and that factually disputed issues required an evidentiary hearing.

Our review of the record convinces us Judge Flynn conscientiously considered all of defendant's claims and appropriately denied him relief. Defendant's arguments on appeal to the contrary are without sufficient merit to warrant any extended discussion in a written opinion, Rule 2:11-3(e)(2). We agree with Judge Flynn that defendant's claims as to any ineffective assistance he received in connection with his first plea were mooted by our decision on his direct appeal and his election to forego an evidentiary hearing on remand in favor of a second guilty plea.

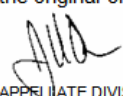
Further, defendant never articulated how he was actually prejudiced by the sealed testimony he gave at the N.J.R.E. 104 hearing. Defendants often "expose" trial strategy in pre-hearings on such matters as search and seizure,

identification and use of their statements at trial without any "irreparable" damage to their defense. Despite Judge Flynn's repeated questions to counsel to explain how defendant's testimony at the hearing prejudiced him, defense counsel only repeated the second judge's gratuitous comments in dicta that his first lawyer rendered ineffective assistance in permitting the hearing to go forward and "irreparably" exposed "defendant's trial strategy." Besides being dicta, wholly unnecessary to resolving the reconsideration motion before the court, defendant ignores that the same judge concluded the remedy he imposed of sealing defendant's testimony at the hearing and barring the State from using it for impeachment purposes if defendant testified at trial, put defendant "in the same position as if the hearing never took place."

The record convincingly refutes any claims that defendant received ineffective assistance in connection with his second plea or that, but for any of the alleged errors, there was a reasonable probability he would not have pleaded guilty but would have instead insisted on going to trial. See State v. Gaitan, 209 N.J. 339, 351 (2012). Accordingly, we affirm dismissal of defendant's PCR petition, substantially for the reasons expressed in Judge Flynn's thorough and thoughtful opinion of March 8, 2022.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION