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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3008-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ZABDIEL VARGAS,

Defendant-Appellant.

Submitted March 29, 2023 – Decided April 10, 2023

Before Judges Mayer and Enright.

On appeal from the Superior Court of New Jersey, Law
Division, Essex County, Accusation No. 17-11-0256.

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

Matthew J. Platkin, Attorney General, attorney for
respondent (Boris Moczula, Deputy Attorney General,
of counsel and on the brief).

PER CURIAM

Defendant Zabdiel Vargas appeals from a February 12, 2021 order

denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm, substantially for the reasons set forth by Judge Ronald D. Wigler in his cogent oral and written opinions.

I.

In November 2017, the State filed Accusation No. 17-11-0256, charging defendant with two counts of first-degree murder, N.J.S.A. 2C:11-3(a)(2); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1); and second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b). The charges stemmed from defendant shooting two victims on a public street in Newark. Defendant subsequently pleaded guilty to first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1) and second-degree manslaughter, N.J.S.A. 2C:11-4(b)(1), in exchange for the State's recommendation that he serve a sixteen-year prison term subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, on the first-degree aggravated manslaughter offense, concurrent to a five-year term for the second-degree manslaughter offense, subject to NERA. The State also agreed to recommend dismissal of the two remaining counts and that defendant's aggregate sixteen-year sentence run concurrent to a three-year prison term imposed under another indictment.

During his November 2017 plea colloquy before Judge Wigler, defendant testified he was satisfied with plea counsel's services, had enough time to discuss his case with counsel, and counsel answered all his questions. Additionally, defendant testified he understood that at sentencing, the State would seek a sixteen-year prison term, subject to NERA, on the first-degree aggravated manslaughter offense. Judge Wigler accepted defendant's plea, after defendant provided a sufficient factual basis.

In February 2015, Judge Wigler sentenced defendant consistent with the plea agreement and imposed an aggregate sixteen-year prison term for defendant's two NERA convictions. Four months later, defendant appealed from his aggregate sentence, arguing his mental health condition was overlooked by the sentencing judge. We heard the appeal on a sentencing calendar, pursuant to Rule 2:9-11, and affirmed the sentence, finding it was "not manifestly excessive or unduly punitive and [did] not constitute an abuse of discretion." State v. Vargas, No. A-5188-17 (App. Div. June 3, 2019) (citations omitted).

In September 2019, defendant timely filed a PCR petition, and his assigned counsel later supplemented the petition, claiming, in part, plea counsel was ineffective by:

- (1) misleading defendant about the plea agreement; (2)
- preventing defendant from informing the trial court

about his mental condition and failing to present same as a mitigating factor; (3) advising defendant to plead guilty despite defendant's assertion he acted in self-defense; (4) failing to provide defendant with discovery; (5) neglecting to file any motions, investigate, or visit defendant sufficiently and; (6) failing to use an interpreter while reviewing the plea forms.

Following argument on February 12, 2021, Judge Wigler orally denied defendant's petition and entered a conforming order that day. The judge also issued a supplemental written opinion four days later. In denying PCR and declining to find plea counsel was ineffective, Judge Wigler initially rejected defendant's argument that plea counsel misled defendant to believe he would receive a custodial sentence of ten years. Relying on defendant's extensive testimony during the plea hearing, the judge stated defendant "provided no support that [plea counsel] misled him or that [defendant] had any other understanding as to what his plea agreement was."

Similarly, the judge discredited defendant's claim that he was prevented from speaking about his mental health issues during the plea colloquy. After again quoting from defendant's testimony during the plea hearing, the judge stated, "[a]s the plea transcript reveals, this allegation is completely false."

Moreover, the judge declined to find plea counsel was ineffective for failing to try defendant's case on the theory of self-defense, explaining,

"[c]ounsel could have reasonably assessed the facts of the case and determined that advocating for self-defense was not a viable approach." The judge added, "[w]hile petitioner stated he was defending his sister, he neglected to mention that the alleged attack on his sister by the victims happened an hour before the double homicide." Further, Judge Wigler found that although defendant claimed the victims were armed with knives, there was "only one knife . . . recovered from the scene and it was a butter knife." The judge also noted one of the victims was "shot in the back in addition to . . . three shots to the front of his body." Additionally, the judge observed that defendant "stood before th[e c]ourt, said that he understood the plea and wanted to plea[d guilty]." Further, he stated, "[i]f [defendant] truly believed that he acted in self-defense or the defense of others, it begs the question why he would waive the presentation of his case to both a grand jury and trial jury and profess his guilt to the homicides."

Next, Judge Wigler rejected defendant's claim plea counsel was ineffective for failing to provide him with "complete discovery." The judge found defendant "did not show in any way how [plea counsel's] alleged failure to provide [him] with discovery could have impacted either his plea or sentencing," noting defendant "affirmed, at his plea, that he was pleased with [his attorney's] services and did not need to speak with him further." The judge

also considered the State's evidence against defendant, finding defendant "admitted to shooting both victims, he told the police that the gun he used in the shooting was at his home, and he consented to a search of his home." Further, the judge noted that after the police recovered the gun from defendant's home, it "was a match to ballistic evidence recovered at the location of the shooting."

Considering the State's proofs, the judge concluded plea counsel "clearly advocated for his client in negotiating the plea," adding defendant "was looking at an enormous amount of time in prison for two homicides, an aggravated assault stabbing and a [violation of probation]. [Plea] counsel was able to secure . . . an incredibly favorable plea for [sixteen] years to wrap up all [four] of [defendant's] matters." The judge also found plea counsel's efforts led to the State conceding at sentencing that defendant acted under strong provocation during the shooting incident, and his conduct was the result of circumstances unlikely to occur again. Additionally, the judge noted plea counsel provided defendant with discovery "after the fact and nothing in the discovery . . . contradicted the State's version of the events []or exculpated" defendant. Thus, the judge concluded defendant failed to demonstrate how he was prejudiced by pleading guilty before receiving complete discovery.

Likewise, the judge found no merit to defendant's claims that trial counsel

was ineffective for "failing to file any motions, investigate, or more frequently visit" defendant. Judge Wigler concluded defendant failed to specify "what types of motions . . . [c]ounsel should have filed or what needed to be investigated." Additionally, the judge found defendant presented no proofs to support how plea counsel "was ineffective for meeting with him twice or how he was prejudiced by that alleged fact," given the "extremely favorable plea deal" his attorney negotiated.

Lastly, the judge found defendant's claim that plea counsel was ineffective for failing to have an interpreter present while reviewing the plea form "was in direct contradiction to what he placed on the record" and defendant did not show he was prejudiced by his attorney's alleged failure. Based on these findings, the judge determined defendant did not establish a prima facie case of ineffective assistance of counsel warranting an evidentiary hearing.

II.

On appeal defendant raises the following arguments for our consideration:

POINT I

THE PCR COURT ERRED IN FAILING TO HOLD
AN EVIDENTIARY HEARING TO DETERMINE
DEFENDANT'S ALLEGATIONS OF INEFFECTIVE
ASSISTANCE OF COUNSEL.

A. The Court Made Rulings Denying PCR Based Upon Conjecture and Upon Facts Alleged in the State's Brief Rather Than Upon Facts Presented at an Evidentiary Hearing.

B. The Defendant Presented a Prima Facie Case That Counsel Was Ineffective in Failing to Provide Him with Discovery, and that Had He Been Presented with the Evidence Against Him, He Would Not Have Pleaded Guilty.

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, 415-16 (2004) (citation omitted). 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. However, 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). Under the first Strickland prong, 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. "[T]he 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. 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 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) (alteration in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)); see also State v. McDonald, 211 N.J. 4, 30 (2012). 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). Furthermore, prejudice is not presumed, a defendant "must demonstrate 'how specific errors

of counsel undermined the reliability' of the proceeding." State v. Drisco, 355 N.J. Super. 283, 289-90 (App. Div. 2002) (citations omitted).

A petitioner must establish both prongs of the Strickland standard to obtain a reversal of the challenged conviction. 466 U.S. at 687; State v. Nash, 212 N.J. 518, 542 (2013); State v. Fritz, 105 N.J. 42, 52 (1987). Therefore, failure to satisfy either prong of the Strickland standard requires the denial of a petition for PCR. 466 U.S. at 700.

A defendant must establish entitlement to "PCR by a preponderance of the evidence." State v. O'Donnell, 435 N.J. Super. 351, 370 (App. Div. 2014) (citing Preciose, 129 N.J. at 459). Additionally, a defendant is not automatically entitled to an evidentiary hearing by simply raising a PCR claim. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). To obtain an evidentiary hearing, a defendant must "demonstrate a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits." State v. Peoples, 446 N.J. Super. 245, 254 (App. Div. 2016) (quoting State v. Porter, 216 N.J. 343, 355 (2013)). The petitioner's claims "must be supported by 'specific facts and evidence supporting his [or her] allegations.'" Ibid.

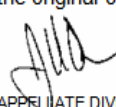
"If the [PCR] court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to [PCR], . . . then an evidentiary hearing need not be granted." State v. Brewster, 429 N.J. Super.

387, 401 (App. Div. 2013) (quoting State v. Marshall, 148 N.J. 89, 158 (1997)). If defendant's "allegations are too vague, conclusory, or speculative[.]" they are not entitled to an evidentiary hearing. Porter, 216 N.J. at 355 (quoting Marshall, 148 N.J. at 158). A defendant "must do more than make bald assertions that [the defendant] was denied the effective assistance of counsel. [A defendant] must allege facts sufficient to demonstrate counsel's alleged substandard performance." Ibid. (quoting Cummings, 321 N.J. Super. at 170).

Guided by these standards, the strong evidence the State marshalled against defendant, and defendant's exposure for a much lengthier aggregate prison term if he was convicted of the two homicides at trial, we are satisfied Judge Wigler correctly determined defendant failed to satisfy either Strickland prong and defendant was not entitled to an evidentiary hearing. Thus, we affirm the February 12, 2021 order for the reasons expressed by Judge Wigler in his thoughtful oral and written opinions.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION