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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-3219-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DUANE S. HORNE, a/k/a
DUANE S. HORNE JR,

Defendant-Appellant.

Submitted May 9, 2023 – Decided August 3, 2023

Before Judges Sumners and Chase.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 14-03-0466.

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

Raymond S. Santiago, Monmouth County Prosecutor, attorney for respondent (Alecia Woodard, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Following an eight-day joint jury trial with his co-defendant and brother, Maurice Horne,¹ defendant Duane S. Horne was found guilty of first-degree robbery as well as third-degree and fourth-degree weapons offenses. He was sentenced to an aggregate twelve-year prison term subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. His conviction and sentence were upheld on direct appeal. State v. Horne, No. A-5496-15 (App. Div. Apr. 9, 2018), certif. denied 236 N.J. 257 (2019).²

Defendant filed a timely post-conviction relief (PCR) petition. Before the PCR judge, defendant argued trial counsel was

ineffective during pretrial, trial and sentencing proceeding, causing [d]efendant substantial prejudice by failing to: (1) communicate/meet with [d]efendant, and negotiate a plea; (2) adequately investigate [p]retrial; (3) file a motion to sever to be tried apart from co-defendant; (4) present [d]efendant's age as a non-statutory mitigating factor; (5) object to the [j]ury [c]harge; (6) file a motion to dismiss or suppress; (7) argue for admittance to veterans court. Defendant also

¹ On direct appeal, we affirmed Maurice Horne's conviction of first-degree armed robbery and fourth-degree unlawful possession of an imitation firearm and sentence to an aggregate twelve-year prison term subject to NERA. State v. Horne, No. A-3709-15 (App. Div. Apr. 9, 2018) (slip op. at 2).

² Considering the issues raised in this appeal, it is not necessary to discuss the pre-trial rulings or the trial testimony and rulings. They are fully set forth in Horne, slip op. at 3-17.

argues appellate counsel was ineffective by failing to raise various issues.

Following argument, the PCR judge issued an order and written decision denying relief without an evidentiary hearing.

Defendant appeals, arguing in a single point that:

THE PCR COURT ERRED IN SUMMARILY DENYING DEFENDANT'S PCR PETITION WITHOUT AN EVIDENTIARY HEARING BECAUSE DEFENDANT'S CLAIMS WERE BASED ON FACTS SUFFICIENT TO DEMONSTRATE INEFFECTIVE ASSISTANCE OF COUNSEL CONCERNING COMMUNICATING WITH DEFENDANT AND PLEA NEGOTIATIONS, AND RESOLUTION REQUIRED TESTIMONY ON OFF-RECORD ATTORNEY-CLIENT DISCUSSIONS.

Based upon our de novo review of the record, see State v. Harris, 181 N.J. 391, 415 (2004), the PCR judge prudently addressed the merits of defendant's claims, determining he did not set forth a prima facie case of ineffective assistance of counsel under the two-prong test prescribed by Strickland v. Washington, 466 U.S. 668 (1984),³ based upon the standards set forth in other cited case law, and therefore was not entitled to an evidentiary hearing.

³ Adopted for application under the New Jersey Constitution in State v. Fritz, 105 N.J. 42 (1987).

With respect to defendant's claim that trial counsel failed to communicate with him about trial strategy and refused to meet with him before trial, the PCR judge determined there was no proofs to support the contention. The judge rejected defendant's OPRA⁴ request of jail records to establish trial counsel—name incorrectly spelled—never met him at the jail, finding it "does not rise to a preponderance of credible evidence." The judge, citing State v. Gaither, 396 N.J. Super. 508, 516, further found defendant did not prove the lack of communication with counsel prejudiced him. The judge also pointed out that counsel met with defendant "multiple" times at court proceedings.

Defendant does not persuade us to upset the PCR judge's determination that defendant failed to establish trial counsel did not sufficiently meet with him to develop trial strategy. Defendant offers no prima facie evidence that his meetings with counsel were inadequate or that more meetings would have resulted in a different outcome at trial. He cites no occasion where he voiced his concern during pretrial court appearances or the trial that he was unable to meet with counsel to prepare for his trial—in which he testified. Defendant's allegation is nothing more than a bald assertion. See State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999) ("[A] petitioner must do more than make

⁴ Open Public Records Act, N.J.S.A. 47:1A-1 to -13.

bald assertions that he was denied the effective assistance of counsel"); see also State v. Jones, 219 N.J. 298, 312 (2014) (holding PCR petitions must be "accompanied by an affidavit or certification by the defendant, or by others, setting forth with particularity the facts that he wished to present").

Turning to defendant's claim that trial counsel failed to provide a plea counteroffer to the State prior to plea cut off, we again conclude defendant does not persuade us to upset the PCR judge's determination that defendant failed to establish counsel was ineffective in plea negotiations.

We do not agree with the judge's finding that the record demonstrates "[t]he failure to [counteroffer] was a choice by defendant." Nevertheless, we agree with him that "[t]here is no indication of deficient performance or prejudice to the [d]efendant" because the plea negotiations "argument is a bald assertion." There has been no prima facie showing that defendant wanted to make a counteroffer and counsel refused to communicate one to the State, or that counsel failed to exercise reasonable professional assistance to develop one. The record is clear that when the trial court advised counsel that she would be given additional time prior to plea cut off to make a counteroffer, she advised none would be provided because defendant was going to trial. Defendant did not voice any objection. Moreover, defendant has failed to indicate what the

counteroffer would have been, or that he was prejudiced because it was likely to be accepted. See Lafler v. Cooper, 566 U.S. 156, 163 (2012) (holding that in the context of plea offers, "a defendant must show the outcome of the plea process would have been different with competent advice"). Defendant again alleges nothing more than a bald assertion which does establish ineffective assistance of counsel. See Cummings, 321 N.J. Super. at 170; Jones, 219 N.J. at 312.

Because we agree with the PCR judge that defendant failed to show a prima facie case of ineffective assistance of counsel, he did not abuse his discretion to grant an evidentiary hearing. See State v. Preciose, 129 N.J. 451, 462 (1992).

To the extent we have not addressed defendant's arguments, we conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2)(E).

Affirmed.

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


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