SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3422-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARCUS SANDERS, a/k/a
MARCUS SAUNDERS,

Defendant-Appellant.

Submitted December 7, 2022 – Decided January 24, 2023

Before Judges Bishop-Thompson and Puglisi.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 05-12-2772.

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

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

PER CURIAM

Defendant Marcus Sanders appeals the Law Division's May 11, 2021 denial of his first petition for post-conviction relief (PCR) without an evidentiary hearing. Having reviewed the facts in light of the applicable law, we affirm.

I.

The detailed facts in this case are set forth in our opinion of March 3, 2009, and we incorporate them by reference. State v. Sanders, No. A-2445-07 (App. Div. Mar. 3, 2009) (slip op. at 1-4).

On December 28, 2005, a Monmouth County grand jury indicted defendant for fourth-degree stalking, N.J.S.A. 2C:12-10 (count one); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (count two); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count three); third-degree terroristic threats, N.J.S.A. 2C:12-3(a) and (b) (count four); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (count five); and fourth-degree certain persons not to have a weapon, N.J.S.A. 2C:39-7(a) (count six).

On September 14, 2006, a jury found defendant guilty of counts one through five. He was sentenced to an aggregate twenty-one and one-half years,

including an extended term, with a twenty-year parole ineligibility term pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

Defendant appealed his conviction, arguing he was incompetent to stand trial. We reversed the conviction and remanded for a competency evaluation. Sanders, slip op. at 18. The trial court deemed defendant incompetent to stand trial based on multiple evaluations over the five years following remand. On December 18, 2014, the court conducted a hearing and determined defendant had gained competency.

Also on that date, defendant entered into an "open" plea agreement.[1] He pleaded guilty to counts two, three, four and five, and the State agreed to dismiss counts one and six. The State advised it would again be seeking an extended term of imprisonment. The court engaged in a colloquy with defendant, who affirmed defense counsel reviewed the plea forms with him and he understood and signed them.

The court further advised defendant:

> [I]f I accept your plea this afternoon as being freely and voluntarily entered and you later come to court and try to tell myself or some other judge that this wasn't true, that on the day of your plea, meaning today, that you were sick, that you were drunk, that you didn't

[1] An "open" plea agreement does not bind the State to recommend a specific sentence.

> understand what was going on and somebody forced or coerced you into this plea or there was some sort of a side deal that you didn't tell me about, either myself or some other judge is going to have a hard time believing that because we're going to go over all that now with you under oath on the record. Do you understand that?
>
> [(Emphasis added).]

Defendant answered affirmatively.

The court also reviewed the plea forms with defendant, including the mandatory minimum terms on counts two and five. Paragraph seven of the plea form acknowledges defendant was pleading guilty to a charge that requires a mandatory period of parole ineligibility or a mandatory extended term, and notes the mandatory minimum period of parole ineligibility as seventeen years, which is the NERA term for a twenty-year sentence. As defense counsel noted during the sentencing, twenty years indicates the upper range of the extended term, not the floor, which is ten years. See N.J.S.A. 2C:43-7(a)(3).

At sentencing, the State argued defendant was subject to a mandatory extended term as a repeat violent offender pursuant to N.J.S.A. 2C:43-7.1(b)(1). Defense counsel advised the court that he and defendant were "under the impression" defendant was subject to a discretionary extended term; counsel stated if it were a mandatory extended term, he wanted the opportunity to file a motion to withdraw the guilty plea but he did not ultimately do so.

The court determined defendant was subject to a mandatory extended term and sentenced him to eight years on count two, subject to NERA; five years on count four; and sixteen years on count five, subject to NERA. Count three was merged into count five, and the sentences were to run concurrently.

Defendant filed a motion for reconsideration of the credits ordered in the judgment of conviction, which was denied. Defendant then filed an appeal alleging an excessive sentence. We affirmed the sentence. State v. Sanders, No. A-3459-14 (App. Div. Oct. 28, 2015).

Defendant then filed a pro se petition for PCR alleging ineffective assistance of counsel, claiming his attorney advised him he would be sentenced to eight years. The court appointed PCR counsel, who filed an amended petition, amended certification and brief. The amended petition contained an additional claim that trial counsel failed to conduct an investigation, which he does not pursue in this appeal.

After hearing oral argument, the PCR judge denied the petition in a written order and opinion. This appeal followed.

Defendant presents the following issue for our consideration:

> [DEFENDANT] IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT HIS ATTORNEY RENDERED INEFFECTIVE

ASSISTANCE OF COUNSEL BY MISADVISING HIM ABOUT HIS SENTENCE.

We review the legal conclusions of a PCR judge de novo. State v. Harris, 181 N.J. 391, 420-21 (2004) (citing Mickens-Thomas v. Vaughn, 355 F.3d 294, 303 (3d Cir. 2004)). Additionally, where no evidentiary hearing has been held, we "may exercise de novo review over the factual inferences drawn from the documentary record by the [PCR judge]." Id. at 421 (citing Zettlemoyer v. Fulcomer, 923 F.2d 284, 291 n.5 (3d Cir. 1991)).

Applying that standard, we conclude the PCR judge correctly denied defendant's petition substantially for the reasons expressed in his thorough written decision.

II.

A defendant must prove two elements to establish a PCR claim that trial counsel was constitutionally ineffective: first, "counsel's performance was deficient[,]" that is, "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and second, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688-89, 694 (1984); accord State v. Fritz, 105 N.J. 42, 52, 60-61 (1987).

Under the first prong, a defendant must demonstrate "counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. Thus, "th[e] test requires [a] defendant to identify specific acts or omissions that are outside the wide range of reasonable professional assistance." State v. Jack, 144 N.J. 240, 249 (1996) (citation and internal quotation marks omitted). "'Reasonable competence' does not require the best of attorneys, but certainly not one so ineffective as to make the idea of a fair trial meaningless." State v. Davis, 116 N.J. 341, 351 (1989). A defendant must "overcome a 'strong presumption' that counsel exercised 'reasonable professional judgment' and 'sound trial strategy' in fulfilling his responsibilities." State v. Nash, 212 N.J. 518, 542 (2013) (quoting State v. Hess, 207 N.J. 123, 147 (2011) (internal quotations omitted)).

To meet the second prong, "[a] defendant [must] show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. A defendant must demonstrate "how specific errors of counsel undermined the reliability of the finding of guilt." United States v. Cronic, 466 U.S. 648, 659 n.26 (1984).

"A petitioner must establish the right to [post-conviction] relief by a preponderance of the credible evidence." State v. Preciose, 129 N.J. 451, 459 (1992) (citing State v. Mitchell, 126 N.J. 565, 579 (1992)). To sustain that burden, the petitioner must set forth specific facts that "provide the court with an adequate basis on which to rest its decision." Mitchell, 126 N.J. at 579.

PCR courts are not required to conduct evidentiary hearings unless the defendant establishes a prima facie case and "there are material issues of disputed fact that cannot be resolved by reference to the existing record." R. 3:22-10(b). "To establish such a prima facie case, the defendant must demonstrate a reasonable likelihood that his or her claim will ultimately succeed on the merits." State v. Marshall, 148 N.J. 89, 158 (1997). Bald assertions are insufficient to establish a prima facie case of ineffective assistance of counsel. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

Defendant argues he was denied effective assistance of trial counsel because his attorney "promised" him in an off-the-record conversation that he would be sentenced to an eight-year term; he claims he would not have pleaded guilty had he known he was subject to a mandatory extended term.

The PCR judge noted "[t]he only evidence of [d]efendant's claims regarding the possibility of an [eight]-year sentence come[s] from the

[d]efendant's certification." The judge pointed to an exchange between the trial court and defense counsel at sentencing, during which "[c]ounsel does mention eight years, but it is in reference to the mandatory custodial term of the NERA charge, specifically . . . [defense counsel said,] 'Well, if – if it was mandatory, the floor would be eight – eight and half years on the 10.'" The PCR judge noted, "[t]his is the only time a period of eight years is mentioned. It is the term of parole ineligibility on a 10-year NERA sentence."

The PCR judge further found the trial court ensured defendant was "aware of the length of his sentencing exposure at the plea colloquy," including the mandatory minimum terms for the second-degree offenses. The PCR judge opined, "[t]here is no indication in the plea transcript of an eight-year term either promised or implied. Defendant's contention is a bald assertion and contrary to the record." See ibid. We also note defendant affirmed before the trial court that there was no "side deal," which belies his claim counsel "promised" him a specific sentence in an open plea agreement.

The PCR judge concluded the plea forms "clearly establish the possibility of a [twenty]-year term of incarceration, [seventeen]-years NERA. Defendant was aware and made an inquiry about withdrawing his guilty plea. However, no motion was filed."

Because the PCR judge determined defendant had not established a prima facie case of ineffective assistance of counsel, he found defendant was not entitled to an evidentiary hearing. See Preciose, 129 N.J. at 462. We find no reason to disturb the court's decision.

To the extent that we have not specifically addressed any remaining arguments, it is because we consider them sufficiently without merit to require discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.