

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

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-0997-22**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FREDERICK SIMPSON,
a/k/a FRED SIMPSON, and
JAMAL SIMPSON,

Defendant-Appellant.

Submitted May 13, 2024 - Decided June 14, 2024

Before Judges Sabatino and Vinci.

On appeal from the Superior Court of New Jersey, Law
Division, Passaic County, Indictment No. 16-12-0976.

Jennifer Nicole Silletti, Public Defender, attorney for
appellant (Monique D. Moyse, Designated Counsel, on
the brief).

Carmelia M. Valdes, Passaic County Prosecutor,
attorney for respondent (Timothy P. Kerrigan, Jr., Chief
Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Frederick Simpson appeals from the September 29, 2022 order denying his petition for post-conviction relief ("PCR") without an evidentiary hearing. We affirm.

On August 21, 2016, defendant repeatedly struck his long-term girlfriend, M.C., and her daughter, C.C., with an aluminum baseball bat at the residence they shared. During an argument with M.C. on the first floor of the residence, defendant struck M.C. several times with the bat on her head and about her body. C.C. heard M.C. screaming for help and ran downstairs where she saw defendant beating M.C. C.C. ran back upstairs to call the police, and defendant followed her. He then struck C.C. with the bat several times on her head and about her body in the presence of C.C.'s two young children.

As a result of the attack, M.C. was hospitalized for an extended period. She suffered a brain bleed, a fractured skull that required the insertion of a metal plate, two broken arms, bruising, fractures throughout her body, and permanent loss of hearing in one ear. C.C. suffered a broken thumb, fractured hand, fractured skull, lacerations to her head and body that required staples, and bruising on her body.

Defendant was indicted for two counts each of first-degree attempted murder, N.J.S.A. 2C:5-1(a)(1) and 2C:11-3(a)(1); second-degree aggravated

assault, N.J.S.A. 2C:12-1(b)(1); third-degree terroristic threats, N.J.S.A. 2C:12-3(a) and (b); 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); third-degree endangering an injured victim, N.J.S.A. 2C:12-1.2(a); and one count of third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a), N.J.S.A. 9:6-1, and N.J.S.A. 9:6-3.

Defendant, who was represented by private counsel, pleaded guilty to two counts of second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1). In exchange for his plea, the State agreed to recommend defendant be sentenced at the lowest end of the second-degree range to consecutive sentences of five years per count subject to the No Early Release Act, N.J.S.A. 2C:43-7.2.

At the plea hearing, defendant testified he reviewed the plea agreement and plea forms with his attorney and understood the plea agreement. Defendant also testified no other promises were made to him and he was satisfied with his attorney's services. Defendant confirmed he understood "the State [was] recommending five years, with [eighty-five] percent on each count [and] [o]rdinarily a second-degree charge carries between five and ten years in prison." The court advised defendant his "attorney has a right to argue for

concurrent sentences and [it will] hear the arguments and then . . . make [its] decision when [it has] reviewed all the information and . . . heard everything."

On February 13, 2018, the court sentenced defendant in accordance with the plea agreement. Trial counsel argued for leniency based on defendant's service to his community and family, physical abuse he suffered as a child, and letters submitted to the court attesting to defendant's character. Counsel also presented a witness who spoke on defendant's behalf again attesting to his good character and community involvement. Counsel acknowledged defendant was "facing some significant time" and requested the court "lessen that sentence."

The court explained that, based on the terms of the plea agreement, its decision was "whether to run the sentences concurrent or consecutive." In making that determination, the court stated:

[T]here are two victims in this case, both of whom suffered horribly. The victim [M.C.] . . . suffered the following injuries[:]. . . [t]wo broken arms, a fractured skull, hearing loss out of one ear, a metal plate in her head and suffers pain daily. She was hospitalized for an extended period of time and had to undergo physical therapy as well.

. . . .

[C.C.] . . . suffered numerous injuries which required hospitalization, including a broken thumb, a fractured skull, and bruising about her body.

The court reviewed the facts of the case including defendant's extensive criminal history and found the aggravating factors were "extremely strong and very substantially outweigh[ed] the one mitigating factor." The court determined:

Consecutive sentences . . . are not only justified, but they are absolutely required here for a lot of reasons. . . . [T]he terrible injuries they suffered. [Defendant's] prior record.

[The court] would also note that the five years on each [count] is at the lower end of the second-degree. Ten years would have been fully justified in terms of the aggravating factors here, so running them consecutive and bringing them up to ten years . . . is totally, totally justified and . . . required to give any justice to the two people who suffered this horrific, horrific attack.

The court explained defendant's appeal rights as follows:

You have a right to appeal this sentence within [forty-five] days if you [a]re aggrieved by it. If you cannot afford an attorney to represent you on appeal, you may make [an] application to the public [defender's] office. If you qualify under their financial guidelines, they [will] represent you at substantially reduced costs on appeal.

If you do [no]t appeal within the first [forty-five] days, you can get a [thirty]-day extension for good cause. If you do [no]t appeal within that time, you could lose your right to appeal.

. . . .

[The court] want[s] to further instruct you that since you have been represented by private counsel to date, if you wish to appeal any aspect of this case, you can apply for the services of a public defender.

You would contact the [C]riminal [D]ivision manager's office on the second floor of this building. They would interview you to see if you are financially eligible.

Defendant confirmed he understood the court's instructions regarding his right to appeal and did not have any questions. Defendant did not file a direct appeal.

On February 16, 2021, defendant sent a letter to the Appellate Division in which he wrote:

I . . . am seeking to find out if an appeal was ever processed on my behalf.

. . . .

If so, may you please send a copy to the address above. By chance if this appeal was never filed, I am also requesting that the appeal be "[f]iled" on my behalf, because time is of essence.

By letter dated February 19, 2021, defendant was advised there was no record of a pending appeal in his case.

On February 18, 2022, defendant filed a pro se petition for PCR. After PCR counsel was appointed, defendant filed a supplemental brief arguing trial

counsel was ineffective because he failed to argue for concurrent sentences at the time of sentencing and failed to file an appeal arguing his sentence was excessive. Defendant's supplemental brief was supported by a certification in which he contended he "told [trial counsel] that [he] wanted to file an appeal and challenge [his] sentence as being excessive, but counsel failed to file the paperwork for [his] appeal." Defendant also stated he was "not seeking to disturb [his] plea."¹

In response, defendant's trial counsel filed a certification stating he had:

no specific recollection if the defendant asked [him] to file an [a]ppeal for him in this case, but if [defendant] had [he] would have replied "No," as [he] do[es] not handle criminal appeals, especially in this case where the defendant freely and voluntarily pled guilty and was sentenced in accordance with the plea agreement.

The same judge who conducted the plea hearing and sentenced defendant conducted oral argument on the petition for PCR. On September 29, 2022, the court entered an order denying PCR supported by an oral opinion. The court explained that when trial counsel asked for leniency at sentencing, it "obviously

¹ Defendant additionally contended he believed concurrent sentences would be imposed because trial counsel told him so. That contention is directly contradicted by the plea forms and the colloquy at the plea hearing. Moreover, because defendant is not seeking to withdraw his plea, this allegation is not material to our analysis of the issues raised on appeal.

understood that he was asking the [c]ourt to impose concurrent sentences." The court noted:

The proofs were extremely strong and the injuries horrific . . . to both [victims].

Both victims suffered not only terrible physical injuries, but terrible emotional injuries. . . .

. . . .

The defendant was indicted for attempted murder of both victims. . . . [and] had substantial exposure to attempted murder convictions if he had gone to trial.

[Trial counsel] was able to negotiate down to two second-degree aggravated assaults. These aggravated assaults carry a five-to-ten-year range. [Trial counsel] negotiated down to five years on each, with the right to argue for concurrent sentences at the time of sentence.

The court continued:

[Trial counsel] spoke at length of the person he deemed [defendant] to be, and asked for leniency. [The court] totally interpreted that from the totality of everything as a request for concurrent sentences, and then [the court] explained why [it] was imposing consecutive sentences.

With respect to [the court's] ultimate decision as to consecutive sentences, [the court] will be very blunt today, as [it] was then. [The court] believe[s] that . . . concurrent sentences in this matter, given what happened to these victims, would have been . . . a travesty.

The court also rejected defendant's self-serving claim that he advised trial counsel to file an appeal. The court found "defendant was fully apprised of his right to appeal [A]s time passed he easily could have written to [trial counsel], which he did not. He could have written to the public defender or contacted the Criminal Division manager's office, as [the court] instructed him to do," but did not. During oral argument, defendant confirmed he never paid trial counsel to file an appeal.

The court also noted defendant filed a motion for change of custody in 2019 that was denied in 2020, and in February 2021 learned that no appeal was pending in his case, yet waited another year, until February 2022, to file his petition for PCR. Based on its consideration of those facts, the court "accepted [trial counsel's] certification that if it came up at all he told . . . defendant he did not do such appeals."

On appeal, defendant raises the following issue for our consideration:

POINT I: [DEFENDANT] IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT HIS ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING BY FAILING TO ARGUE FOR CONCURRENT SENTENCES AND BY FAILING TO FILE A NOTICE OF DIRECT APPEAL.

We review the denial of PCR without an evidentiary hearing de novo. State v. Harris, 181 N.J. 391, 421 (2004).² Because the PCR judge did not hold an evidentiary hearing, we review de novo both the factual inferences drawn by the judge from the record and the judge's legal conclusions. State v. Aburoumi, 464 N.J. Super. 326, 338 (App. Div. 2020); see also State v. Nash, 212 N.J. 518, 540-41 (2013). A defendant bears the burden of establishing a prima facie claim. State v. Gaitan, 209 N.J. 339, 350 (2012). A defendant must "do more than make bald assertions that he was denied the effective assistance of counsel" to establish a prima facie claim. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). "The failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel." State v. Worlock, 117 N.J. 596, 625 (1990).

An evidentiary hearing is warranted only when "a defendant has presented a prima facie [claim] in support of [PCR]," meaning a "defendant must

² To establish a PCR claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test formulated in Strickland v. Washington, 466 U.S. 668, 687 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987), first by "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment," then by proving he suffered prejudice due to counsel's deficient performance. Strickland, 466 U.S. at 687; see also Fritz, 105 N.J. at 52. Defendant must show by a "reasonable probability" that the deficient performance affected the outcome of the proceeding. Fritz, 105 N.J. at 58.

demonstrate a reasonable likelihood that his . . . claim will ultimately succeed on the merits." State v. Marshall, 148 N.J. 89, 158 (1997) (quoting State v. Preciose, 129 N.J. 451, 462-63 (1992)). A PCR court's decision to proceed without an evidentiary hearing is reviewed for an abuse of discretion. State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013).

We affirm substantially for the reasons set forth in the PCR court's comprehensive and well-reasoned September 29, 2022 oral opinion. We add the following comments.

Defendant's claim that trial counsel was ineffective by failing to argue for concurrent sentences fails both prongs of the Strickland test. As to the first prong, we are not convinced by defendant's contention that trial counsel failed to argue for concurrent sentences. As the court explained, because the plea agreement contemplated sentences at the lowest end of the second-degree range, the only leniency the court could have afforded would have been to impose concurrent, rather than consecutive, sentences.³ We are persuaded, therefore,

³ Because the court determined the aggravating factors outweighed the one applicable mitigating factor, a sentence below the second-degree range would have been an illegal sentence. Pursuant to N.J.S.A. 2C:44-1(f)(2), a sentence below the second-degree range would have been permissible only if the court was "clearly convinced that the mitigating factors substantially outweigh[ed] the aggravating factors. . . ."

that the court understood trial counsel's request for leniency to be an argument in favor of concurrent sentences under the facts and circumstances of this case.

In addition, even if trial counsel did not argue for concurrent sentences, defendant cannot establish he suffered prejudice as required by the second prong of Strickland. As the court explained, given the horrific nature of the attack and the serious injuries suffered by both victims, concurrent sentences would have been a "travesty." In other words, no amount of advocacy in favor of concurrent sentences could have changed the result. Based on the plea agreement and the totality of the facts and circumstances of the case, the court would have imposed consecutive sentences whether trial counsel argued for concurrent sentences or not. In addition, we are satisfied the court properly applied and analyzed the Yarbough⁴ factors and correctly determined consecutive sentences were appropriate under the egregious facts of this case.

We are also persuaded the PCR court did not misapply its discretion by denying defendant's request for an evidentiary hearing regarding his claim that he instructed his private counsel to file an appeal. Although an evidentiary hearing is often warranted when a PCR court is presented with conflicting certifications, in this case the court considered a years-long course of conduct

⁴ State v. Yarbough, 100 N.J. 627 (1985).

and determined defendant's newly-minted, self-serving claim that he instructed trial counsel to file an appeal lacked merit. The court specifically noted defendant was advised of his appellate rights at the time of sentencing and was advised that because he was represented by private counsel through sentencing, he could apply for a public defender to pursue an appeal. Defendant, however, never applied for a public defender, did not pay his private counsel to file an appeal, and did not contact his private counsel regarding an appeal at any time after sentencing. We are convinced the PCR court correctly determined defendant's claim he instructed trial counsel to file an appeal lacks merit.

We are satisfied the PCR court correctly determined defendant failed to establish a prima facie claim of ineffective assistance of counsel and did not misapply its discretion by denying defendant's request for an evidentiary hearing. To the extent we have not otherwise addressed defendant's arguments, they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Defendant is, of course, free to seek leave to file an appeal as within time.

Our Supreme Court has held:

a defendant who has been advised of his right to appeal as provided under R[ule] 3:21-4(h) and fails to prosecute his appeal in a timely manner may be entitled to as within time relief if he demonstrates, by his own

certification and by a preponderance of the credible evidence, that the defendant did request the filing of an appeal in a timely manner and that counsel failed to prosecute it.

[State v. Molina, 187 N.J. 531, 535-36 (2006).]

We do not express any view as to the merits of such an application.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION