SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2205-22

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

VICTOR SEGASTUME,

Defendant-Appellant.

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Submitted April 30, 2024 – Decided June 13, 2024

Before Judges Gooden Brown and Bergman.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 17-04-0262.

Jennifer Nicole Sellitti, Public Defender, attorney for appellant (Anderson David Harkov, Designated Counsel, on the brief).

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Stephanie Davis-Elson, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Victor Segastume appeals from the January 30, 2023, Law Division order denying his petition for post-conviction relief (PCR) following an evidentiary hearing. We affirm.

Defendant was charged in a Hudson County indictment with first-degree attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3(a)(1) (count one); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (count two); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1) (count three); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1) (count four); and third-degree receiving stolen property, N.J.S.A. 2C:20-7 (count five). The charges stemmed from a domestic dispute during which defendant shot his girlfriend in the chest while he was in a drunken stupor and then transported her along with their two children to the hospital where she was treated and recovered from the gunshot wound. Reportedly, defendant became enraged when he returned home in the early morning hours of February 18, 2017, to find his children and his girlfriend asleep in the bed, leaving no room for him.

On December 4, 2017, defendant entered a negotiated guilty plea to second-degree aggravated assault (count two). At the plea hearing, the prosecutor represented that in exchange for the guilty plea, the State would recommend a nine-year prison sentence, subject to an eighty-five percent period

of parole ineligibility in accordance with the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, and would move for the dismissal of the remaining charges at sentencing. Defense counsel countered that during plea negotiations, the State's sentencing recommendation had ranged from a ten-year to an eight-year prison sentence, but that he (defense counsel) would be "arguing for eight years" at sentencing regardless of the State's recommendation.

During the plea colloquy, the trial judge confirmed defendant understood that the plea agreement called for a maximum sentence of nine years in the following exchange:

> THE COURT: Okay. All right. Up to nine years is what the State is asking for. You understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay. And do you want to plead guilty today?
>
> THE DEFENDANT: Yes.

Before accepting the plea, in accordance with Rule 3:9-2, the judge also ensured that there was a factual basis for the plea, and further confirmed that defendant was entering the plea voluntarily, without force, coercion, or promises not disclosed on the record, and with a full understanding of the nature of the charge and the consequences of the plea.

On March 2, 2018, defendant appeared for sentencing. In the presentence investigation (PSI) report presented to the judge and counsel at sentencing, the following notation appeared:

> On the plea agreement [paperwork] in both section(s) [thirteen] and [twenty-one], what was originally listed as eight years with [eighty-five percent p]arole [i]neligibility was struck out to reflect [n]ine [y]ears with the initials "KR." The defendant indicated he was unaware of how the plea paperwork was changed and whose initials were "KR." According to the [p]lea [a]greement in Court Smart, [Assistant Prosecutor] Kevin Roe changed the plea agreement, which was acknowledged on the record by Attorney Dennis McAlevy and that the issue of either nine or eight years [New Jersey State Prison] will be addressed at the sentencing.

In addressing the discrepancy in the plea form raised in the PSI report, defense counsel, Dennis McAlevy, pointed out to the judge that the plea form "was originally written out for eight years" but was "changed to nine years" by "the prosecutor's office." Defense counsel explained that "[he] wrote in eight years [on the plea form] because that's what [he was] asking for, and . . . Roe took it upon himself to cross that out[] and put in nine years." Defense counsel stated on the record that on three separate occasions, twice at the jail and once at the courthouse, he had explained to defendant that they were "going to ask for eight [years]," that eight years "was the original agreement," but that "[t]he

prosecutor [was] going to ask for nine." Defense counsel told defendant he did not "know what the [j]udge [was] going to do" but it was "now up to the [j]udge."

In making his sentencing arguments, defense counsel urged the judge to impose an eight-year prison sentence, subject to NERA, irrespective of the fact that the plea agreement called for a maximum sentence of nine years. In support, defense counsel told the judge that he had spoken to the victim on three occasions and although she was "too nervous" to speak at the sentencing, she had asked defense counsel to seek an eight-year sentence.[1] In turn, Assistant Prosecutor Kevin Roe confirmed that he had changed the plea form as indicated in the PSI report to reflect that the State's offer was a nine-year NERA sentence. He explained that the offer had "started out as a first-degree offer," and "[t]here was . . . consideration at one point of either a seven or an eight [year sentence]," both of which were "rejected" by defendant and McAlevy. According to Roe, ultimately, "the offer from the State," which was accepted, "was a nine [year prison sentence]." Roe added that "at no time did [the victim] ask [him] to . . . consider less time."

In sentencing defendant to a nine-year prison sentence, subject to NERA, the judge determined that the sentence comported with the plea agreement and

[1] Defense counsel noted that the victim was present at the sentencing hearing.

was "appropriate based on the conduct and the background of . . . defendant." The judge explained that defendant "ha[d] been involved in the criminal justice system for more than half his life" of twenty-six years. Accordingly, given the "substantial risk" of re-offense, the "seriousness of his record," and the "overwhelming need to deter," the judge found aggravating factors three, six, and nine, see N.J.S.A. 2C:44-1(a)(3), (6), and (9), and no mitigating factors.

The judge added:

> Whatever the discussions were regarding the plea agreement, . . . whether it's an eight or a nine, the fact . . . that [defense counsel was] able to convince the prosecutor to take this case out of the first-degree range and put it in the second-degree range was a feat in and of itself. Because I can tell you that I would have no difficulty in the facts in this case having sentenced [defendant] in the first-degree range.

Pursuant to Rule 2:9-11, defendant challenged his sentence as excessive on the Sentencing Oral Argument (SOA) calendar. In an order filed October 29, 2018, we affirmed the sentence because we were "satisfied that the sentence [was] not manifestly excessive or unduly punitive and [did] not constitute an abuse of discretion." We were "further satisfied that in applying the sentencing guidelines, the judge gave detailed reasons to support the sentence in accordance with the plea agreement."

In 2022, defendant filed a timely pro se PCR petition, which was subsequently supplemented by appointed counsel. Among other things, defendant argued his trial counsel was ineffective by misleading him about his sentence. Defendant certified that "[w]hen [he] signed the [p]lea [f]orms, . . . McAlevy promised that [he] would be sentenced to eight years" as "reflected on the plea form when [he] signed it." However, "the eight years [was] crossed out and replaced with nine years" which was "not what [he] had agreed to when [he] signed the [p]lea forms." When he "addressed th[e] issue with . . . McAlevy," McAlevy "stated that he would work it out with the prosecutor and that [he] would be sentenced to only eight years," but, instead, he was "subsequently sentenced to nine years."

Following oral argument, the PCR judge conducted an evidentiary hearing to address the "discrepancy of the custodial term and [defendant's] understanding of the original plea." Defendant testified on his own behalf and Roe testified for the State. McAlevy did not testify. During his testimony, defendant reiterated that when he signed the plea form, it indicated that he would receive an eight-year NERA sentence, but when he received a copy of the plea form, he "discovered that the [eight] was crossed out" and "replaced [with nine]." When he discussed the discrepancy with McAlevy, McAlevy explained

that "the plea agreement was changed to [nine] years" because defendant "didn't sign a day before." Nonetheless, McAlevy told defendant he would talk to the prosecutor and "promised" defendant that he would receive eight years provided the victim agreed. As a result, defendant "reached out to [the victim] and got an agreement with her," but he still received nine years.

Roe testified to his recollection of the plea negotiations consistent with his account at the sentencing hearing. He acknowledged changing the plea form in McAlevy's presence because it did not accurately reflect "the State's offer." He confirmed the circumstances that led to the modification of the plea offer, recounting that after a lower offer was rejected, the State's final offer was a nine-year NERA sentence.

Following the evidentiary hearing, the judge issued an order and written decision denying defendant's PCR petition. Applying the governing principles, the judge concluded defendant failed to "sustain[] his burden of proving that his attorney was ineffective" or that he "was misinformed of any material element of the plea agreement." The judge noted defendant "did not, at the time of the plea, nor even at the time of sentence, indicate any surprise as to the discussions surrounding the recommended sentence." Further, according to the judge, even if trial counsel was deficient in informing defendant of the consequences of the

plea agreement, defendant "has not shown that he was prejudiced by any such deficiency." The judge explained defendant "was advised of and personally acknowledged the fact that the sentencing judge . . . had the right to impose a sentence up to [nine] years" and defendant "ha[d] not convinced th[e] court that he would not have accepted the plea agreement if his attorney's conduct had been different."

Further, the judge reasoned that:

> [D]espite the burden of proof that [defendant] has, [defendant] did not call [d]efense [c]ounsel at the plenary hearing to substantiate the perceived "promise" made to him that the judge would impose only an [eight]-year prison sentence. When queried, PCR counsel noted that [defendant's] strategy did not include this testimony and that reliance would be placed on the plea hearing and sentencing transcripts. The transcripts contradict the assertions made by [defendant] as to the nature and quality of the conversations that generated his belief that a promise of a lower custodial term was made to him. This detracts substantially from the credibility for which [defendant] asks this court to acknowledge.
>
> In contrast, the testimony provided by the Assistant Prosecutor at the hearing about the interactions that he had with [d]efense [c]ounsel was reasonable, direct, and inherently credible. It corroborated the assertions made by the State at both the plea hearing and at [defendant's] sentencing. On balance, therefore, the evidence, at best, [was] in equipoise. Therefore, [defendant] has not sustained his burden of proof.

In this ensuing appeal, defendant raises the following single argument for our consideration:

> DEFENSE COUNSEL FAILED HIS CLIENT WHEN HE PROMISED DEFENDANT HE WOULD RECEIVE AN EIGHT-YEAR SENTENCE AND REVIEWED PLEA FORMS WITH DEFENDANT THAT INDICATED THE STATE WOULD RECOMMEND EIGHT[ ]YEARS, RESULTING IN DEFENDANT LACKING THE KNOWLEDGE AND UNDERSTANDING OF THE PRISON TIME HE WAS EXPOSED TO AS A RESULT OF HIS GUILTY PLEA, THUS DEPRIVING DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

We begin with our standard of review. Where an evidentiary hearing is conducted, we "defer to the PCR court's factual findings, given its opportunity to hear live witness testimony." State v. Gideon, 244 N.J. 538, 551 (2021). "In such circumstances[,] we will uphold the PCR court's findings that are supported by sufficient credible evidence in the record" but we will review "de novo" the PCR court's "legal conclusion[s]." State v. Nash, 212 N.J. 518, 540-41 (2013).

Turning to the substantive guideposts that inform our review, "[p]ost-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." State v. Pierre, 223 N.J. 560, 576 (2015) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). Rule 3:22-2 recognizes five cognizable grounds for PCR,

including a "[s]ubstantial denial in the conviction proceedings of defendant's [constitutional] rights," R. 3:22-2(a), which encompasses the right to the effective assistance of counsel, Nash, 212 N.J. at 541-42.

To establish an ineffective assistance of counsel (IAC) claim,

> a defendant must demonstrate: (1) "counsel's performance was deficient"; and (2) "the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984); see also State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the Strickland two-pronged analysis in New Jersey). "That is, the defendant must establish, first, that 'counsel's representation fell below an objective standard of reasonableness' and, second, that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" State v. Alvarez, 473 N.J. Super. 448, 455 (App. Div. 2022) (quoting Strickland, 466 U.S. at 688, 694).
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> [State v. Vanness, 474 N.J. Super. 609, 623-24 (App. Div. 2023).]

"It is well established that the Strickland standard applies with equal force to assertions of [IAC] associated with the entry of guilty pleas as to trial derelictions." State v. Gaitan, 209 N.J. 339, 350-51 (2012). However,

> [p]lea counsel's performance will not be deemed deficient if counsel has provided the defendant "correct information concerning all of the relevant material consequences that flow from such a plea." State v. Agathis, 424 N.J. Super. 16, 22 (App. Div. 2012) (citing State v. Nuñez-Valdez, 200 N.J. 129, 138

> (2009)). Stated another way, counsel must not "'provide misleading, material information that results in an uninformed plea.'" [Gaitan, 209 N.J. at 353] (quoting Nuñez-Valdez, 200 N.J. at 140).
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> [Vanness, 474 N.J. Super. at 624.]

To establish the prejudice prong to set aside a guilty plea based on IAC, a defendant must show "that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." State v. DiFrisco, 137 N.J. 434, 457 (1994) (alteration in original) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)). To that end, "'a [defendant] must convince the court that a decision to reject the plea bargain'" and "insist on going to trial" would have been "'rational under the circumstances.'" State v. Maldon, 422 N.J. Super. 475, 486 (App. Div. 2011) (quoting Padilla v. Kentucky, 559 U.S. 356, 372 (2010)). That determination should be "based on evidence, not speculation." Ibid.

Ultimately, a defendant must "establish the right 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). "Under the preponderance standard, 'a litigant must establish that a desired inference is more probable than not. If the evidence is in equipoise, the burden has not been met.'" Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 169 (2006) (quoting Biunno, Current N.J. Rules

of Evidence, cmt. 5(a) on N.J.R.E. 101(b)(1) (2005)). "To sustain that burden, specific facts must be alleged and articulated, which, if believed, would provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

Failure to meet either prong of the two-pronged Strickland/Fritz test results in the denial of a petition for PCR. State v. Parker, 212 N.J. 269, 280 (2012) (citing State v. Echols, 199 N.J. 344, 358 (2009)). That said, "courts are permitted leeway to choose to examine first whether a defendant has been prejudiced, and if not, to dismiss the claim without determining whether counsel's performance was constitutionally deficient." Gaitan, 209 N.J. at 350 (citation omitted) (citing Strickland, 466 U.S. at 697).

Guided by these principles, we agree with the PCR judge that defendant failed to meet his burden of proof particularly regarding the prejudice prong. Defendant argues his attorney was ineffective because he misled him into believing he would receive an eight-year sentence and never explained to him that he could be sentenced to a nine-year prison sentence. Defendant urges us to "remand[] with instructions that defendant be resentenced to the eight-year term he believed he would receive or, in the alternative, to negotiate a new plea offer." Defendant never alleged that had counsel correctly informed him about

the sentence, he would have pleaded not guilty and insisted on going to trial. Because defendant never alleged the kind of prejudice necessary to satisfy the second half of the Strickland/Fritz test associated with the entry of a guilty plea, his IAC claim fails.

To the extent we have not addressed a particular argument, it is because either our disposition makes it unnecessary or the argument is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.