

# RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2210-22

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

R.S.,<sup>1</sup>

Defendant-Appellant.

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Submitted April 23, 2024 – Decided May 22, 2024

Before Judges Perez Friscia and Torregrossa-O'Connor.

On appeal from the Superior Court of New Jersey, Law Division, Cape May County, Indictment No. 16-02-0198.

Jennifer Nicole Sellitti, Public Defender, attorney for appellant (Robert Carter Pierce, Designated Counsel, on the brief).

Jeffrey H. Sutherland, Cape May County Prosecutor, attorney for respondent (Gretchen A. Pickering, Deputy First Assistant Prosecutor, of counsel and on the brief).

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<sup>1</sup> We use initials pursuant to Rule 1:38-3(a)(2) to protect the confidentiality of defendant's mental health diagnoses.

## PER CURIAM

Defendant R.S. presently involuntarily committed, appeals the January 24, 2023 denial of his petition for post-conviction relief (PCR) without a hearing. Defendant contends the PCR judge improperly rejected his claim that trial counsel was ineffective for failing to advise him of the possibility that civil commitment pursuant to N.J.S.A. 30:4-23 to -78.5 might follow completion of his maximum term of supervision or commitment pursuant to N.J.S.A. 2C:4-8(b)(3), after being found not guilty by reason of insanity (NGRI). See State v. Krol, 68 N.J. 236, 257-258 (1975). After carefully considering defendant's claims, we affirm.

### I.

#### A. The Offense and Trial Proceedings

We glean the following stipulated facts and procedural history from the record. In December 2015, police found abandoned a van reported stolen a day earlier. An investigation revealed that defendant had received a motor vehicle summons in the stolen van that same day. Defendant admitted he took the van without permission after finding the keys inside. Police arrested defendant on December 17, 2015, and he remained detained pretrial. An indictment was returned charging defendant with third-degree burglary, N.J.S.A. 2C:18-2(a),

and fourth-degree unlawful taking of a means of conveyance, N.J.S.A. 2C:20-10.

In January 2016, a Criminal Part judge ordered defendant evaluated for fitness to stand trial finding good cause to question his mental competency. An evaluation began in February, but defendant's "active psychiatric symptoms" prevented its completion. Inpatient hospitalization was recommended and ordered, and defendant, then age forty-six, was admitted to Ancora Psychiatric Hospital (Ancora) for further treatment and evaluation. Safeer Ansari, D.O., a board-certified psychiatrist who evaluated defendant throughout the proceedings, completed his first evaluation and issued his initial report on August 2, 2016, finding defendant fit to stand trial, despite suffering from "a major mental illness," including "an AXIS I diagnosis of Schizoaffective disorder." He further concluded, however, that "[o]utside of a highly structured, and supervised setting such as a hospital and a supervised group home, [defendant] would continue to represent a danger to himself and others by reason of his mental illness."

Dr. Ansari detailed defendant's "extensive psychiatric history and legal history, including multiple hospitalizations and incarcerations," which we need not detail here except to recognize its magnitude. Defendant's documented

odyssey of mental health struggles, institutionalizations, and legal offenses commenced at age four, and his first hospitalization took place at age five. His prior criminal convictions are numerous and include serious offenses and sentences ranging from probation to state prison, with numerous competency evaluations woven throughout those prior proceedings. His lifelong psychiatric hospitalizations and commitments varied in length, but spanned decades, including eight stays at Ancora alone, at least one of which was an involuntary commitment after reaching the maximum term on a prior "sentence and commitment to Ann Klein Forensic Center." Dr. Ansari explained that defendant "presented with suicidal ideation and depression as well as acute psychotic crisis. He has been engaged in self-injurious behavior . . . . [and] has a long history of noncompliance with his medications and not following up with his aftercare appointments."

On October 16, 2016, a different Criminal Part judge considered this evaluation and entered an order finding defendant fit to proceed to trial but "suffer[ing] from mental illness and requir[ing] institutionalization . . ." and ordered that defendant remain hospitalized. The order scheduled a non-jury trial the following month to determine "if the defendant is criminally responsible for alleged criminal conduct."

On November 16, 2016, the trial court engaged in a colloquy with defendant on the record regarding his right to trial by jury and request to proceed by "trial to the bench," which was accepted and confirmed by defendant's signed written waiver. Defendant acknowledged he was "thinking clearly" and "underst[ood] everything that's going on." Defendant indicated he understood the court's explanation that

the issues will be submitted to me, the judge, to determine whether or not you're guilty of the offenses charged in the indictment. And if you are found guilty, then you'd be sentenced by me in my discretion. If you're found not guilty or not guilty by reason of mental disease or defect, then you would be handled accordingly based on the [c]ourt's findings.

The court also confirmed defendant's understanding that "a jury would have to be unanimous as to all issues in the case . . . . [and] find [him] unanimously not guilty, unanimously guilty or unanimously not guilty by reason of mental disease or defect." Defendant also affirmed that his waiver was "knowing, intelligent, and voluntary." Defendant indicated his satisfaction of trial counsel's representation:

Q. Okay. And you've had the advice of your counsel in this case?

A. Yes, I have.

Q. And you believe that his advice has been in your best interest?

A. Yes.

Despite the prior order finding defendant fit to proceed to trial, the court again confirmed that the parties stipulated to defendant's competency. The court placed on the record its "own observations" of defendant and found "he appear[ed] to be oriented to time and place. He appear[ed] to be in good physical and mental health and able to assist his counsel during these proceedings." Defendant confirmed the accuracy of the court's observations.

Proceeding to trial, defendant stipulated to the facts as recounted above. Defense counsel then presented the report and opinions of Dr. Ansari, in support of defendant's NGRI defense, arguing:

[Dr. Ansari] lays out an extensive history of mental illness, concluding that he has an extensive mental health history with prior diagnoses of schizophrenic disorder, bipolar type of borderline personality disorder, and anti-social grates.

His most recent admission as a result of the charges before Your Honor represent his eighth hospitalization to Ancora . . . over a decade as a result of [defendant]'s psychiatric history.

It is the defense['s] opinion that based upon the information contained in Dr. Ansari's report and the conclusions that he reaches that [defendant] would be [NGRI] . . . .

The State did not dispute those opinions.

After accepting the stipulated facts, the court found the State proved the elements of both "burglary and joyriding beyond a reasonable doubt." Immediately thereafter, the court found defendant established by a preponderance of the evidence the defense of NGRI, finding he suffered from a "long history of serious mental disease" and experienced those effects for "a significant period before and after the events." Accordingly, the court found defendant NGRI, pursuant to N.J.S.A. 2C:4-1, as "he did not have sufficient mind and understanding to have enabled him to comprehend what he was doing was wrong if he had used his faculties for that purpose." The court imposed a period of five years'<sup>2</sup> "Krol supervision" pursuant to N.J.S.A. 2C:4-8(b)(3); see also Krol, 68 N.J. at 257-58.

The court further reasoned:

While [defendant's] psychosis has improved significantly, it is often hard to follow his thoughts or understand his thought processes. Defendant, although competent to proceed today while medicated and treated, continues to benefit from hospitalization, as without a highly structured supervised setting, [defendant] would continue to represent a danger to himself and others by reasons of his mental illness.

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<sup>2</sup> We note that the trial court did not merge or include the eighteen-month maximum sentence for joyriding in its calculation of the maximum term.

In accordance with N.J.S.A. 2C:4-8(a), the court ordered defendant not be released pending evaluation of his dangerousness to self or others and set a hearing to consider further commitment.

B. The Krol and Commitment Proceedings

Dr. Ansari again evaluated defendant and issued a comprehensive report, dated March 8, 2017, chronicling defendant's mental health and criminal histories, finding that without continued supervision and treatment in a "highly structured, and supervised setting . . . [defendant] would continue to represent a danger to himself and others by reason of his mental illness." After a hearing in April 2017, the court ordered defendant committed pursuant to N.J.S.A. 2C:4-8(b)(3) and ordered periodic review hearings in accordance with N.J.S.A. 2C:4-9.

Thereafter, periodic review hearings occurred regularly, with each evaluation recommending and resulting in continued commitment for the same reasons of dangerous to self or others. In November 2020, as defendant approached completion of the maximum five-year term under N.J.S.A. 2C:4-8, Dr. Ansari and defendant's treatment team recommended continued commitment. On December 20, the court ordered conversion of defendant's



status to civil commitment<sup>3</sup> and, after a hearing, defendant was civilly committed pursuant to N.J.S.A. 30:4-23 to -78.5.

### C. PCR Proceedings

On January 10, 2021, defendant filed a pro se handwritten request for "relief," that was largely unintelligible except to state that trial counsel was "ineffective." In January 2022, appointed counsel filed an "amended petition for post-conviction relief" specifically alleging that trial counsel failed to inform defendant that by advancing a successful NGRI defense he faced possible civil commitment upon the completion of his maximum NGRI term. Defendant claimed he would not have asserted an NGRI defense and instead, proceed to trial by jury, had he known of that exposure.

The PCR judge held arguments, and defendant claimed his election to proceed to a bench trial on stipulated facts and psychiatric opinions was tantamount to pleading guilty. Defendant alleged he would have not raised an NGRI defense and instead proceeded to trial, where, if convicted, "he would have—could have been sentenced to five years in prison. He would have maxed out on that sentence, and he would not be subject to Krol." The State countered

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<sup>3</sup> Despite defendant's brief indicating that the State moved to commit defendant, the court's order reflects the application for continued commitment was brought by the public defender.

that it is possible that trial counsel advised defendant, but regardless, defendant did not plead guilty. Nevertheless, the State argued that defendant's potential civil commitment after completing his NGRI term would have been speculative at the time counsel provided trial strategy advice and counsel was not required to provide that information to render adequate representation.

In a detailed written decision, the PCR judge applied the two-part test of Strickland v. Washington, 466 U.S. 668, 687 (1984), denying the petition without an evidentiary hearing. The judge found defendant's situation distinguishable from a guilty plea and reasoned that further involuntary civil commitment was "not a direct or penal consequence of [his] NGRI acquittal." The judge explained that unlike sentencing after a guilty plea, potential NGRI dispositions include release. See N.J.S.A. 2C:4-8(b)(1) to (2), -9. Further, viewing defendant's civil commitment as not inevitable or indefinite, the court determined that it was not "a penal or guaranteed consequence of an NGRI finding . . . ." and counsel was not obligated to advise defendant of that possibility. The court found defendant showed no prejudice as defendant's extensive prior history suggests he knew that further commitment was possible. The judge found unsupported defendant's claim that the outcome of a jury trial

would have resulted in either release or a completed prison term. As such, he found defendant failed to set forth a prima facie claim of error or prejudice.

## II.

On appeal, defendant raises a single point:

[DEFENDANT] ESTABLISHED A PRIMA FACIE CASE THAT DEFENSE COUNSEL WAS INEFFECTIVE FOR COUNSEL'S FAILURE TO ADEQUATELY ADVISE [DEFENDANT] THAT BY RAISING A[N] NGRI DEFENSE THE STATE COULD SEEK CIVIL COMMITMENT AFTER [DEFENDANT] SERVED HIS KROL SENTENCE, WHICH REQUIRED THE PCR COURT TO ORDER AN EVIDENTIARY HEARING TO EXPAND THE RECORD.

Defendant likens his decision to assert the NGRI defense in a stipulated bench trial to the decision to enter a guilty plea, and claims "counsel and the trial court were required to advise [defendant] that he could be civilly committed indefinitely if he was found NGRI." Defendant asserts prejudice resulted as a post-NGRI term of civil commitment "can be indefinite," but prison terms are finite with required release at their conclusion. Accordingly, defendant argues that he has established a prima facie case of ineffective assistance of counsel and is entitled to an evidentiary hearing.

The State asserts as it did below that defendant failed to demonstrate either counsel's error or resulting prejudice, urging that possible civil commitment is not a penal consequence or a certain outcome after an NGRI acquittal.

### III.

We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004). In the absence of an evidentiary hearing, we may review without deference "both the factual findings and legal conclusions of the PCR court." Id. at 421.

Defendant raised his claims by way of PCR, which provides a pathway to relief to "[a]ny person convicted of a crime . . . ," R. 3:22-1, presenting sufficient cognizable grounds to challenge a criminal conviction, R. 3:22-2 (enumerating five specific grounds to challenge convictions). New Jersey's PCR petition serves as an "analogue to the federal writ of habeas corpus." State v. Preciose, 129 N.J. 451, 459 (1992). "[N]either a substitute for direct appeal" for those criminally convicted nor a vehicle to re-litigate matters already resolved on their merits, PCR proceedings can offer the best opportunity for ineffective assistance claims to be reviewed. Id. at 459-60.

The United States Supreme Court in Strickland, 466 U.S. at 687, established a two-part test to determine whether a defendant has been deprived

of the effective assistance of counsel, which the New Jersey Supreme Court adopted in State v. Fritz, 105 N.J. 42, 58 (1987), under New Jersey's Constitution. Failure to establish either prong requires the denial of a PCR petition founded on an ineffective assistance of counsel claim. Strickland, 466 U.S. at 700. To satisfy the first prong, defendant must demonstrate counsel's performance was deficient and "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." Id. at 687-88. Defendants "must allege specific facts and evidence supporting [their] allegations." State v. Porter, 216 N.J. 343, 355 (2013). "Bald assertions" will not suffice. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). Further, reviewing courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and "the defendant must overcome the presumption that, under the circumstances, the challenged action [by counsel] 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (citing Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

Under Strickland's second prong, a defendant must "affirmatively prove" "a reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different." State v. Gideon, 244 N.J. 538, 551 (2021) (quoting Strickland, 466 U.S. at 694). To show sufficient prejudice when a conviction results from a guilty plea, defendant must show 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. Nunez-Valdez, 200 N.J. 129, 139 (2009) (alteration in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)); see also State v. Gaitan, 209 N.J. 339, 351 (2012), and that "a decision to reject the plea bargain would have been rational under the circumstances," Padilla v. Kentucky, 559 U.S. 356, 372 (2010). "Although a demonstration of prejudice constitutes the second part of the Strickland analysis, 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 (internal citation omitted); see also State v. Alvarez, 473 N.J. Super. 448, 455-56 (App. Div. 2022).

A PCR evidentiary hearing need not be granted simply upon request, see Cummings, 321 N.J. Super. at 170; however, a hearing may be warranted if a defendant demonstrates its necessity to develop a sufficient factual record, see Preciose, 129 N.J. at 462-63. Evidentiary hearings are required only when

(1) the defendant establishes a prima facie case in support of PCR; (2) the court determines that there are disputed issues of material fact that cannot be resolved by review of the existing record; and (3) the court determines that an evidentiary hearing is required to resolve the claims asserted.

[State v. Vanness, 474 N.J. Super. 609, 623 (App. Div. 2023) (citing Porter, 216 N.J. at 354).]

#### IV.

Applying these standards to defendant's claims, we see no basis for PCR relief. Preliminarily, we question whether defendant has established that his arguments are cognizable claims for post-conviction relief, as no "conviction" resulted here. See R. 3:22-1 (affording PCR relief "pursuant to this rule" to "[a]ny person convicted of a crime"). Plainly, a successful NGRI defense results in an acquittal. See N.J.S.A. 2C:4-8(a) (enumerating available dispositions "[a]fter acquittal by reason of insanity."). Nevertheless, because the State responded substantively to defendant's appeal rather than asserting a procedural bar, we address defendant's claims under the applicable law and find no grounds for relief. In these unique circumstances, we are not persuaded that defendant made a prima facie showing for PCR relief.

We briefly address Strickland's first prong. Even if for purposes of argument we were to equate pursuing an NGRI defense to electing to plead

guilty to a crime, the possibility of civil commitment at the end of the NGRI supervision term is not penal and is not certain. See generally Krol, 68 N.J. at 246 (recognizing NGRI commitment is not intended to punish the acquittee, but instead designed "to protect society against individuals who, through no culpable fault of their own, pose a threat to public safety"). There is no precedent for defendant's contention that counsel erred, and we cannot as defendant suggests readily draw a parallel of this case to State v. Bellamy, 178 N.J. 127 (2003), where civil commitment pursuant to New Jersey's Sexually Violent Predator Act, N.J.S.A. 30:4-27.24 to -27.38, was a possible consequence of a guilty plea to certain predicate sexual offenses.

While we agree that the record on appeal does not reflect that the trial court or counsel advised defendant that he could be involuntarily civilly committed at the conclusion of his NGRI term, we also note that commitment at the conclusion of the Krol review process follows the same statutory process for civil commitment and would be imposed only if deemed warranted under the law of civil commitment applicable to anyone, including non-offenders. See Krol, 68 N.J. at 263-64 (expressly recognizing "[o]nce . . . the commitment order is unconditionally terminated, the defendant must be treated thereafter like any other person for purposes of involuntary commitment"). Regardless, we need



not delve deeper into the first Strickland prong in this tenuous PCR posture as we find the second Strickland prong clearly deficient. See Alvarez, 473 N.J. Super. at 457 (declining to resolve first Strickland prong despite the importance of the issue when "convinced defendant cannot establish prejudice under the second Strickland prong.").

Accepting Strickland's invitation to address its two-part test in any order, 466 U.S. at 697, we determine that defendant has failed to show sufficient prejudice. We find unconvincing defendant's claims that he would not have asserted an NGRI defense or waived a jury trial had he known he faced possible further commitment after expiration of a maximum NGRI term. His likelihood of success at trial was questionable as he was found in possession of the stolen vehicle and made admissions. Further, his prior criminal history would have made imprisonment the likely sentence, and its length could have probably exceeded the five-year term given his two offenses and prior history. Even if defendant had made such an election and risked conviction despite the threat of significant incarceration, we cannot find the choice to risk prison rational in his circumstances. See Padilla, 559 U.S. at 372. Finally, even assuming for purposes of argument that a jury trial resulted in an acquittal, defendant had already been found competent to stand trial, but nevertheless held hospitalized


on a finding that absent institutionalization he posed a danger to himself or others. As such, in that status, the record establishes he faced the possibility of involuntary civil commitment under straight application of N.J.S.A. 30:4-23 to -78.5 even if found not guilty or placed on probation.

Defendant's life history converged at the intersection of the mental health and criminal justice systems. Indeed, he was incarcerated and involuntarily committed multiple times and at least once civilly committed at the expiration of a maximum term. As such, he was uniquely familiar with the involuntary commitment process by his own experience. Although by no means a certainty, involuntary civil commitment loomed as a possibility whether defendant reached him maximum NGRI term, see N.J.S.A. 2C:4-9(b), reached a maximum prison term, see N.J.S.A. 30:4-27.10(c), or was found not guilty after being held hospitalized upon a competency determination, see N.J.S.A. 30:4-23 to -78.

Defendant does not dispute his awareness that under N.J.S.A. 2C:4-8(b)(3) he faced commitment for the maximum ordinary term he would have received if convicted of the offenses with which he was charged, or in this case, the five-year term imposed by the trial court. Nor does he dispute his understanding of the review process for NGRI acquittees, which appears to have been followed scrupulously here. He was aware generally that he "may be held

in continued confinement if . . . a danger to self or others and . . . in need of medical treatment." In re W.K., 159 N.J. 1, 2 (1999). In fact, that dangerousness determination had already been made after his competency hearing. Given defendant's history and status when he elected to pursue NGRI, we cannot conclude that he has established the requisite prejudice, even if counsel failed to advise that civil commitment might follow after completion of his NGRI term.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.  
  
CLERK OF THE APPELLATE DIVISION