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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3579-22**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NICHOLAS J. ST. JOHN,

Defendant-Appellant.

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Submitted May 20, 2024 – Decided June 3, 2024

Before Judges Mawla and Vinci.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 19-04-0470.

Jennifer Nicole Sellitti, Public Defender, attorney for appellant (Mark Zavotsky, Designated Counsel, on the brief).

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

PER CURIAM

Defendant Nicholas J. St. John appeals from the June 6, 2023 order denying his petition for post-conviction relief ("PCR"). We affirm.

On January 19, 2019, defendant and an accomplice entered a residence with the purpose of committing a theft. Defendant was armed with a handgun and threatened the victim with force to facilitate the theft. Defendant stole drugs and other items from the victim. Later that day, he was stopped by police in a vehicle driven by his father. Officers discovered defendant's handgun and the drugs taken from the victim.

Defendant was charged in a twenty-four-count indictment stemming from the armed robbery. Defendant's father was also charged with drug and weapon possession, among other offenses. However, defendant contended his father was simply giving him a ride and knew nothing about the robbery or the firearm.

Pursuant to a plea agreement, defendant pleaded guilty to first-degree armed robbery, N.J.S.A. 2C:15-1(a)(1), and second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1). In exchange for his plea, the State agreed to recommend defendant be sentenced in the second-degree range to nine years subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, for first-degree armed robbery, and a concurrent sentence of five years with a three-and-one-half-year period of parole ineligibility pursuant to the Graves

Act, N.J.S.A. 2C:43-6.2, for the firearms offense. The State also agreed to dismiss the remaining counts in the indictment and all charges against defendant's father.

For several years before the armed robbery, defendant suffered from shoulder pain and repeated dislocation of his left shoulder. Defendant contended he required shoulder surgery. During plea negotiations, defendant requested that the prosecutor agree not to object to his release from custody for surgery. The prosecutor refused to agree, and that condition was deleted from the plea form.

Item twenty-one on page five of the plea form read:

List any other promises or representations that have been made by you, the prosecutor, your defense attorney, or anyone else as a part of this plea of guilty:

- Prosecutor to dismiss all charges and counts against [defendant's father] at time of sentence [] based on [defendant] exculpating [his father].

~~—Prosecutor will not object to release for defendant to have surgery to his left shoulder that has been required since before arrest.~~

- Defense will request that court suggest youth facility at sentence.

At the plea hearing, the judge reviewed the plea form with defendant. Defendant testified he read and understood the plea agreement before signing and initialing each page of the plea form. The judge accepted the plea, finding defendant understood and agreed to it knowingly and voluntarily. The judge also found defense counsel answered defendant's questions, and defendant was satisfied with his representation.

Prior to sentencing, defendant moved for temporary release from custody to have shoulder surgery. Defense counsel submitted a certification in support of the motion, stating:

During plea negotiations . . . [defendant's] medical condition was discussed. . . . [Defendant] wanted to include a provision in the plea [a]greement in which the [p]rosecutor would direct and arrange with the [c]ounty [j]ail for [defendant] to have the necessary surgery and therapy[.] [H]owever[,] the [p]rosecutor could not agree to the provision as [he] had no[] authority over the Monmouth County Jail[.] [H]owever, the [p]rosecutor did agree to assist in any way he could to facilitate the surgery.

The court denied defendant's motion. Defendant thereafter retained new counsel and moved to withdraw his guilty plea. Defendant asserted he was told he would be released pending sentencing to have shoulder surgery as part of the plea agreement. He argued the provision was deleted from the plea form without

his knowledge or consent. The court denied defendant's motion to withdraw his plea.

As we noted in a prior decision affirming defendant's convictions and sentence, the trial court found defendant did not meet any of the Slater<sup>1</sup> factors: (1) Defendant did not "challenge the factual basis of the plea or 'set forth a colorable claim of innocence"; (2) the nature and the strength of defendant's reasons for withdrawing the plea did not warrant granting the motion because "[t]here was no misinformation"; and (3) "with regard[] to the hospitalization, although at some point that may have been his desire, it was crystal clear from the State and clearly nothing on this record would support that that was part of the inducement for him to enter into the plea agreement." State v. St. John, No. A-3146-19 (App. Div. Nov. 4, 2021) (slip op. at 41-42). The trial judge also stated: "the clause mentioning a release for the surgery is clearly crossed out on the final signed plea agreement."

On direct appeal, defendant argued:

POINT I: A PLENARY HEARING IS REQUIRED TO DETERMINE WHETHER DEFENDANT ENTERED HIS GUILTY PLEA BASED ON A BELIEF THAT BY PLEADING GUILTY HE WOULD BE RELEASED FROM JAIL FOR NEEDED SHOULDER SURGERY.

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<sup>1</sup> State v. Slater, 198 N.J. 145 (2009).

We affirmed his conviction because:

[t]he plea transcript lends no support to defendant's claim that the deleted language was part of the plea agreement. The judge thoroughly reviewed each page of the plea form including the language surrounding the deleted provision. We discern no reason why, if the parties had agreed to defendant's release, the judge would not have mentioned that provision as well. This conclusion is supported by former defense counsel's certification supporting the motion seeking defendant's release, which explained the State could not agree to the deleted language because it was infeasible. There is no evidence defendant was misinformed about the terms of the plea or that enforcing the plea would be unjust.

[St. John, slip op. at 10.]

On June 14, 2022, defendant filed a pro se petition for PCR arguing defense counsel forced him to sign the plea agreement, "lied about [the] plea deal," and the "plea said [he] would be released for surgery before sentencing." After PCR counsel was appointed, defendant filed an amended petition additionally arguing defense counsel "was ineffective for not conducting any investigation whatsoever pre-trial through trial and sentencing."

The court heard oral argument on the petition for PCR. On June 6, 2023, the court entered an order denying defendant's petition supported by a written opinion. The court found:

[the plea judge] reviewed the terms of the five-page plea agreement in detail with defendant. Defendant acknowledged that he read and understood the plea agreement before signing it and initialing each page. [The plea judge] found that defendant's plea counsel answered all of defendant's questions and defendant was satisfied with his services. [The plea judge] accepted defendant's guilty pleas after determining that they were entered voluntarily, knowingly, and intelligently, and were supported by an adequate factual basis.

....

Before sentencing, defendant retained new counsel, . . . and moved to withdraw his guilty pleas. Defendant maintained that he was told he would be released pending sentencing to have shoulder surgery "[a]s part of the consideration given in exchange for . . . waiving all his rights associated with a trial[.]" [Defense counsel] asserted "[s]ubsequently, this part of his plea form was crossed out, but [defendant] was never told about this, and did not consent to it." Counsel claimed the deletion "was never brought up" at the plea allocution and certified that defendant would never have agreed to the plea if he knew he would not be released to have the surgery.

The court further found:

At the outset, this court notes that defendant underwent surgery on his shoulder while in custody in March 2021, although defendant claims, without any supporting medical documentation, that he needs additional surgery. Moreover, the Appellate Division has already considered and rejected defendant's claim that he entered this guilty plea based on a belief that he

would be released from jail for shoulder surgery. Therefore, this claim barred by Rule 3:22-5.

. . . .

Although defendant now cloaks his current challenge as an ineffective assistance claim, PCR proceedings are not an opportunity to re-litigate claims already decided on the merits in prior proceedings. State v. McQuaid, 147 N.J. 464, 483 (1997). Thus, Rule 3:22-5 precludes consideration of defendant's arguments.

Even if this court considered defendant's claim, it lacks merit. During defendant's plea hearing on August 5, 2019, there was no mention of release for the surgical procedure. Moreover, when [the plea judge] questioned defendant, he confirmed that no undisclosed promises were made to induce his plea. Finally, the surgical procedure has been completed and this issue is now moot.

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

POINT I: DEFENDANT RECEIVED AFFIRMATIVE [MISADVICE] AS TO A MATERIAL ELEMENT OF HIS PLEA AND IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM

POINT II: DEFENDANT'S PETITION FOR [PCR] IS NOT BARRED BECAUSE DEFENDANT'S CLAIMS WERE NOT EXPRESSLY ADJUDICATED BY THE APPELLATE DIVISION



We review the denial of PCR without an evidentiary hearing de novo. State v. Harris, 181 N.J. 391, 420-21 (2004).<sup>2</sup> 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).

To demonstrate "prejudice after having entered a guilty plea, a defendant must prove 'that there is a reasonable probability that, but for counsel's errors, [they] would not have pled guilty and would have insisted on going to trial.'" Gaitan, 209 N.J. at 351 (quoting State v. Nunez-Valdez, 200 N.J. 129, 139 (2009)). A defendant must show that, "had he been properly advised, it would have been rational for him to decline the plea offer and insist on going to trial and, in fact, that he probably would have done so." State v. Maldon, 422 N.J. Super. 475, 486 (App. Div. 2011).

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<sup>2</sup> 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.

An evidentiary hearing is warranted only when "a defendant has presented a prima facie [claim] in support of [PCR]," meaning a "defendant must demonstrate a reasonable likelihood that [their] . . . 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).

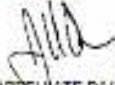
PCR is not another avenue for a defendant to submit the same arguments advanced on direct appeal. See State v. McQuaid, 147 N.J. 464, 484 (1997). "[A] defendant may not employ [PCR] . . . to relitigate a claim already decided on the merits, Rule 3:22-5." State v. Goodwin, 173 N.J. 583, 593 (2002). In determining whether this procedural bar applies, the challenged claim should be compared with the prior claim to determine if the two "are either identical or 'substantially equivalent.'" State v. Marshall, 173 N.J. 343, 351 (2002).

We affirm substantially for the reasons set forth in the PCR court's thorough and well-reasoned written opinion. We are satisfied the PCR court correctly determined defendant failed to establish a prima facie claim of ineffective assistance of counsel and did not abuse its discretion by denying defendant's request for an evidentiary hearing. It is undisputed that the

prosecutor rejected defendant's request that the State not object to his release for surgery and that condition was stricken from the plea form. The plea judge reviewed the plea form and the terms of the plea agreement with defendant and defendant confirmed no other promises were made to him in connection with the plea agreement. The PCR court also correctly found defendant's arguments are precluded because they were previously raised and rejected on direct appeal. To the extent we have not addressed any remaining arguments, it is because they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION