SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3104-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARK A. MARTIN, a/k/a
KEVIN GREEN, and
KELVIN GREEN,

Defendant-Appellant.

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Submitted September 30, 2023 – Decided October 17, 2023

Before Judges Gummer and Walcott-Henderson.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Indictment No. 15-10-0688.

Joseph E. Krakora, Public Defender, attorney for appellant (Mark Zavotsky, Designated Counsel, on the brief).

Christine A. Hoffman, Acting Gloucester County Prosecutor, attorney for respondent (Michael C. Mellon, Special Deputy Attorney General/Acting Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Mark Martin appeals from an order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. Defendant focuses his appeal on his assertions that his counsel rendered ineffective assistance by failing to request an adjournment of the trial when he told the trial judge he was inadequately prepared for it, thereby coercing defendant into entering a guilty plea. Having reviewed the record and applicable legal standards, we are unpersuaded by defendant's arguments and affirm.

Defendant was arrested in July 2015. During a search of defendant's residence, police observed suspected illicit drugs and drug-related paraphernalia. A grand jury issued an indictment charging defendant with third-degree possession of cocaine, N.J.S.A. 2C:35-10(a)(1); third-degree possession of cocaine with intent to distribute, N.J.S.A. 2C:35-5(b)(3); third-degree possession of cocaine with intent to distribute within 1000 feet of a school, N.J.S.A. 2C:35-7; third-degree possession of Oxycodone, N.J.S.A. 2C:35-10(a)(1); and fourth-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(a).

During a January 24, 2017 status conference, an assistant prosecutor advised the judge the State had made an offer to resolve the case, proposing

defendant serve a five-year term of imprisonment, with a two-year period of parole ineligibility, concurrent with a sentence defendant already was serving. After agreeing with the judge that the proposal did not "seem unreasonable," defense counsel – the lawyer about whom defendant complains in this appeal – advised the judge he had spoken with defendant "at length" and that defendant "simply isn't interested in the offer." Counsel stated he would be meeting with defendant later in the week.

During a March 6, 2017 status conference, the assistant prosecutor advised the judge, defense counsel, and defendant, who was present, that the State's best plea offer – a five-year term of imprisonment with a thirty-month period of parole ineligibility – would remain open until March 20, 2017. The judge noted "we discussed that offer on December 5, so this is getting pretty long in the tooth. I think everybody has agreed that we're at the final hour." The judge stated, "March 20 will be it and we'll either be placing one or all of them, frankly, on the trial list and then we'll start moving forward." Defense counsel told the judge he had seen defendant the previous week and would visit him again before returning to court.

After denying defendant's motion to suppress evidence on June 5, 2017, the judge conducted a pretrial conference. The judge confirmed directly with

defendant that defendant had reviewed the pretrial memorandum with his counsel. Defendant also confirmed he understood the charges filed against him, the potential maximum sentences he faced for each charge, the State's plea offer of a concurrent sentence of a five-year term of imprisonment with a thirty-month period of parole ineligibility, and that if he rejected the offer, the judge could impose a maximum sentence of over twenty-six years with a longer parole-ineligibility period. The judge also confirmed defendant understood that if he rejected the plea offer that day, "no subsequent plea agreement can be accepted by this court with a recommendation. It would have to be open for [the court's] discretion."[1]

About three months later, on the day of trial, defendant entered an open guilty plea to the charges in the indictment. Defendant indicated he wished to accept the plea bargain previously offered by the State. Noting it was well past the plea cutoff date, the judge informed defendant that if he wished to plead guilty, it would be an open plea to the indictment. The judge told defendant that he had spoken at length with defense counsel and the assistant prosecutor about

[1] "An 'open plea' to an indictment neither 'include[s] a recommendation from the State, nor a prior indication from the court, regarding sentence.'" State v. Vanness, 474 N.J. Super. 609, 625 (App. Div. 2023) (quoting State v. Kates, 426 N.J. Super. 32, 42 n.4 (App. Div. 2012)).

the reasonableness of the State's position on sentencing, but, he told defendant, "[t]he [c]ourt . . . is not involved in the resolution of the case by way of the conversations between counsel or negotiations." An extensive colloquy followed, which demonstrated defendant understood the maximum sentence for each offense and that there was no plea agreement in place.

Defendant testified he had had sufficient time to meet with his counsel to discuss the case, his counsel had answered all of his questions, he was satisfied with his counsel's services, he had reviewed the indictment with his counsel, he understood the charges and maximum penalties, he had discussed with his counsel any discovery he had received from the State and the overall strengths and weaknesses of his case, and he had reviewed the plea form with his counsel and executed it. Defendant also testified he understood he had the right to a jury trial and the right to proceed to trial if he did not plead guilty and that by pleading guilty he was waiving his right to a trial. Defendant denied anyone had coerced or threatened him or in any way had placed him under duress to enter the plea. He also denied anyone had promised him anything in return for the guilty plea. He testified he was pleading guilty "voluntarily and of [his] own free will" and that he was guilty of the crimes charged in the indictment. Defendant also provided a factual basis for each count of the indictment.

Prior to sentencing, defendant moved to withdraw his guilty plea pursuant to State v. Slater, 198 N.J. 145 (2009). Defense counsel argued in support of the motion:

> Mr. Martin entered a guilty plea, Judge, under the belief that, had he not entered a plea, that he would have been severely hurt in this case and . . . that is true, Judge.
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> But Mr. Martin, I think, entered a guilty plea in an effort to get out of the way here. He's given the matter some more thought, Judge, and he wishes to withdraw his guilty plea, as he believes he has a defensible case.
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> There are a number of things in the case that make it defensible. How it will turn out, no one knows for certain, Judge, but he hasn't stated a colorable claim of innocence, Judge, other than to say that there are witnesses in the trial he believes would testi[fy] favorably on his behalf.
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> Now, the reasons for withdrawing his guilty plea, Judge, I'll just sum it up by saying that it's not just because it's convenient for him, Judge. He's given the matter some thought. Mr. Martin is very involved in his case. He's very involved in his documents and his papers and he believes that the case is defensible and it's only his choice to defend against the allegations. So that, I would suggest, is his rationale for, his reason for wanting to withdraw.
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> . . . .
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> He's shared with me a number of things that he believes would point to his innocence and many of

> those would not come to fruition unless a particular witness came in and testified on his behalf. He merely seeks an opportunity to do that, to have those witnesses testify against him.
>
> Now, Mr. Martin is aware that it may not be advisable to go to trial but he, at this point, . . . his . . . given preference, Judge, is to go take it to trial.

Defendant did not identify in either his motion to withdraw his plea or his PCR petition what witnesses he would have called at trial.

After analyzing the Slater factors, the judge denied defendant's motion and sentenced defendant to a mandatory extended seven-year term of imprisonment with a thirty-nine-month period of parole ineligibility and a concurrent eighteen-month term of imprisonment on the certain-persons offense.

We affirmed defendant's convictions and sentence. State v. Martin, No. A-4032-17 (App. Div. Mar. 9, 2020). The Supreme Court denied defendant's petition for certification. State v. Martin, 246 N.J. 579 (2020).

On November 21, 2020, defendant filed a pro se PCR petition. He did not state the facts or legal grounds on which the petition was based. On August 2, 2021, assigned counsel submitted an amended petition, alleging, among other things, that two lawyers who had represented defendant had rendered ineffective assistance of counsel. PCR counsel asserted defendant's initial attorney was ineffective in that he had failed to file a bail motion on defendant's behalf and

had failed to assist defendant in arguing the bail motion he filed. PCR counsel asserted defendant's subsequent attorney – the attorney at issue in this appeal – was ineffective in failing to visit and review the case with defendant, conduct any investigation, interview any witnesses, and request an adjournment of the trial when he was not properly prepared for trial, thereby giving defendant "no other alternative than to enter a guilty plea."

In support of the amended petition, defendant submitted his certification, in which he asserted his second counsel had never visited or reviewed the case with him, conducted any investigations, or interviewed any witnesses. According to defendant, on the day of the trial, counsel told the judge he was "not properly prepared" and could not "adequately represent [defendant] at trial" but did not request an adjournment. Defendant stated: "[a]s I did not believe that [counsel] would adequately represent me at trial, I had no other alternative than to enter into a guilty plea." Defendant also submitted the certification of his mother. Contrary to defendant's assertion that his counsel had not visited him, conducted any investigations, or interviewed any witnesses, defendant's mother certified she had provided information to counsel and had had a conversation with him in which counsel told her he was visiting defendant in prison.

After hearing argument, the PCR judge placed a decision on the record and issued an order denying defendant's petition. The judge denied the petition and defendant's request for a plenary hearing because defendant had failed to demonstrate a prima facie case of ineffective assistance of counsel. The judge found defendant had presented "nothing . . . other than bald assertions" regarding counsel's alleged ineffectiveness. The judge cited defendant's testimony during the plea colloquy, in which defendant had made a "knowing, intelligent, voluntary waiver of his rights; and, he acknowledged the guilt to the offense . . . ." The judge also found defendant had received a reasonable sentence under the totality of the circumstances.

On appeal, defendant contends the PCR judge should have held an evidentiary hearing "to determine disputed extra-record facts bearing on counsel's ineffective representation." Defendant raises the following points for our consideration:

> POINT I
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> DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR COUNSEL'S FAILURE TO REQUEST AN ADJOURNMENT WHILE INADEQUATELY PREPARED FOR TRIAL AND FOR HAVING COERCED HIM INTO ENTERING A GUILTY PLEA.
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> (A) APPLICABLE LAW

(B) DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR TRIAL COUNSEL'S FAILURE TO REQUEST AN ADJOURNMENT AFTER SELF-DISCLOSING HE WAS UNPREPARED TO PROCEED WITH TRIAL.

(C) COUNSEL WAS INEFFECTIVE FOR HAVING COERCED DEFENDANT INTO ENTERING A GUILTY PLEA.

POINT II

DEFENDANT'S PETITION FOR POST CONVICTION RELIEF SHOULD NOT BE BARRED BECAUSE DEFENDANT'S CLAIMS WERE NOT EXPRESSLY ADJUDICATED BY THE APPELLATE DIVISION.

In the absence of an evidentiary hearing, we review de novo both the factual inferences drawn from the record by the PCR judge and the judge's legal conclusions. State v. Aburoumi, 464 N.J. Super. 326, 338 (App. Div. 2020). We review a PCR judge's decision to deny a defendant's request for an evidentiary hearing under an abuse-of-discretion standard. See State v. L.G.-M., 462 N.J. Super. 357, 365 (App. Div. 2020).

To establish an ineffective assistance of counsel 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). "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). "With respect to both prongs of the Strickland test, a defendant asserting ineffective assistance of counsel on PCR bears the burden of proving his or her right to relief by a preponderance of the evidence." State v. Gaitan, 209 N.J. 339, 350 (2012). A failure to satisfy either prong of the Strickland test requires the denial of a PCR petition. Strickland, 466 U.S. at 700; State v. Nash, 212 N.J. 518, 542 (2013).

To meet the first prong of the Strickland test, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Reviewing courts must make "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." Id. at 689; see also Nash, 212 N.J. at 542.

The second prong of the Strickland test requires a defendant to show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial

whose result is reliable." Strickland, 466 U.S. at 687. A defendant must show by a "reasonable probability" that the deficient performance affected the outcome. Fritz, 105 N.J. at 58. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Pierre, 223 N.J. 560, 583 (2015) (quoting Strickland, 466 U.S. at 694; Fritz, 105 N.J. at 52).

"A 'guilty plea must be made voluntarily, knowingly, and intelligently.'" State v. J.J., 397 N.J. Super. 91, 98 (App. Div. 2007) (quoting State v. Howard, 110 N.J. 113, 122 (1988)); see also Vanness, 474 N.J. Super. at 624. The Strickand test applies to a claim of ineffective assistance of counsel regarding a plea.

> [T]o set aside a guilty plea based on ineffective assistance of counsel, a defendant must show that (i) counsel's assistance was not "within the range of competence demanded of attorneys in criminal cases"; and (ii)"that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial."
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> [State v. Nuñez-Valdez, 200 N.J. 129, 139 (2009) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)).]

See also State v. Chau, 473 N.J. Super. 430, 445 (App. Div. 2022). Plea 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). 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).

A petitioner is not automatically entitled to an evidentiary hearing. State v. Porter, 216 N.J. 343, 355 (2013); see also State v. Peoples, 446 N.J. Super. 245, 254 (App. Div. 2016) (holding "[t]he mere raising of a claim of [ineffective assistance of counsel] does not entitle the defendant to an evidentiary hearing"). A court should hold an evidentiary hearing on a PCR petition only if the defendant establishes a prima facie case in support of PCR, "there are material issues of disputed fact that cannot be resolved by reference to the existing record," and "an evidentiary hearing is necessary to resolve the claims for relief." R. 3:22-10(b); see also Porter, 216 N.J. at 354; State v. Bringhurst, 401 N.J. Super. 421, 436-37 (App. Div. 2008) (holding a "[d]efendant must demonstrate a prima facie case for relief before an evidentiary hearing is required, and the court is not obligated to conduct an evidentiary hearing to allow defendant to establish a prima facie case not contained within the allegations in his PCR petition").

"A prima facie case is established when a petitioner demonstrates 'a reasonable likelihood that his or her claim, viewing the facts alleged in the light

most favorable to the defendant, will ultimately succeed on the merits.'" Porter, 216 N.J. at 355 (quoting R. 3:22-10(b)). "[T]o establish a prima facie claim, a defendant must do more than make bald assertions that he was denied the effective assistance of counsel." Ibid. (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)).

Defendant does not assert his counsel failed to provide him with "correct information concerning all of the relevant material consequences that flow[ed]" from entering the open plea, Agathis, 424 N.J. Super. at 22, or that counsel "provide[d] misleading, material information that result[ed] in an uninformed plea," Nuñez-Valdez, 200 N.J. at 140. Instead, he contends he had "no alternative other than to enter into a guilty plea" because on the day of the trial, counsel did not request an adjournment after telling the judge he was "not properly prepared" and could not "adequately represent [defendant] at trial." Defendant's assertion he was coerced into entering the plea by his counsel's statement to the judge about being unprepared is not supported by the record. The record is devoid of any comments by counsel to the judge about being unprepared or any indication he was unprepared. Defendant's allegation of coercion is belied by his extensive colloquy with the judge and the statements he made under oath, including his confirmation that he was satisfied with his

counsel's services, he understood he did not have to plead guilty, and he was pleading guilty "voluntarily" and of his own "free will."

Defendant faults his counsel for failing to request an adjournment but does not contend the judge would have adjourned the trial if his counsel of more than two and a half years had requested an adjournment based on a lack of preparedness. Defendant also fails to assert or provide any evidence supporting a conclusion that an adjournment and subsequent trial would have resulted in a different or more favorable outcome. See Alvarez, 473 N.J. Super. at 455. Because defendant did not establish he was entitled to an adjournment or that his counsel's failure to seek an adjournment deprived him of a fair and reliable outcome, he fails to meet either Strickland prong. See 466 U.S. at 687.

Relying on bald assertions that were untethered to any competent evidence in the record, see Cummings, 321 N.J. Super. at 170-71, defendant failed to demonstrate a prima facie case in support of his petition. Accordingly, the PCR judge did not abuse his discretion by deciding and denying the petition without an evidentiary hearing.

Affirmed.