

SUPREME COURT OF NEW JERSEY
C-1029 September Term 2018
082366

State of New Jersey,

Plaintiff-Respondent,

v.

ORDER

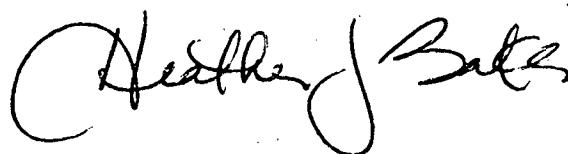
Khalil Stafford,

Defendant-Petitioner.

A petition for certification of the judgment in A-001710-17
having been submitted to this Court, and the Court having considered the
same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this
18th day of June, 2019.



CLERK OF THE SUPREME COURT

SUA SPONTE ORDER

STATE OF NEW JERSEY
V.
KHALIL STAFFORD

SUPERIOR COURT OF NEW
JERSEY
APPELLATE DIVISION
DOCKET NO. A-001710-17
BEFORE PART A
JUDGE(S):JACK M. SABATINO
STEPHANIE ANN MITTERHOFF

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT ON ITS OWN MOTION PURSUANT TO Rule 2:8-3(b) AND UPON CONSIDERATION OF THE RECORD AND THE ARGUMENTS PRESENTED IN THE BRIEFS, THE COURT BEING SATISFIED THAT THE ISSUES MAY BE SUMMARILY DECIDED;

IT IS ON THIS 11th DAY OF December, 2018, HEREBY ORDERED AS FOLLOWS:

Defendant Khalil Stafford appeals from the trial court's order dated August 30, 2017, denying his first petition for post-conviction relief ("PCR") seeking to set aside multiple convictions. We affirm the PCR court's ruling that the first three convictions that defendant challenges were time-barred. While the PCR court did err by concluding that defendant's challenges to the fourth and fifth convictions were also time-barred, it correctly concluded that defendant failed to show that he received ineffective assistance of counsel related to the fourth and fifth convictions. Thus, we affirm for the reasons set forth by the PCR court as to the fourth and fifth convictions on the merits.

The pertinent background is as follows. In an April 2004 indictment,

defendant was charged with four drug-related charges; and one count of hindering apprehension (the "first indictment"). After a trial in November 2004, he was found guilty on all counts.

In July 2004, defendant was charged under a second indictment with eight drug-related offenses; and one count of resisting arrest (the second indictment). He pled guilty to two of the drug charges and resisting arrest pursuant to a plea agreement. The plea agreement encompassed charges from a third indictment, for which he pled guilty to one drug offense and resisting arrest. Pursuant to that plea agreement, the State agreed to dismiss the remaining charges and recommended a term of three years in prison with an eighteen-month parole disqualifier. The sentence was to run concurrently with his conviction from the first indictment.

On February 14, 2005, defendant was sentenced on the first indictment to one five-year custodial term with three years of parole ineligibility and two concurrent five-year terms. That same day, defendant was sentenced on the second indictment to two three-year terms in prison, each with eighteen months of parole ineligibility and two concurrent five-year terms. Additionally, he was sentenced on to the third indictment to one three-year term in prison with eighteen months of parole ineligibility and one concurrent five-year term. The sentences for the second and third indictments ran concurrently with the sentence for the first indictment.

In September 2010, defendant was charged under a fourth indictment with eight drug-related counts. Thereafter, defendant pled guilty to one drug offense pursuant to a plea agreement. The State agreed to recommend a sentence of four years in prison with a two-year period of parole ineligibility and to dismiss the remaining charges. The sentence was to run concurrently to a sentence on a separate homicide charge that is not a matter encompassed by the present appeal. On June 16, 2011, defendant was sentenced in accordance with this plea agreement.

On March 6, 2014, defendant was charged with five drug-related charges in a fifth indictment. He was sentenced on January 26, 2015, to three years of probation in accordance with another plea agreement.

Defendant did not file a direct appeal of his five convictions. However, on April 21, 2016, defendant filed a first petition for PCR concerning all five convictions. He claimed that excusable neglect existed for filing his PCR petition late. He further claimed that his former counsel were ineffective because counsel: (1) failed to object to expert testimony at his trial on the first indictment; (2) failed to move to suppress evidence; (3) misadvised him to accept a plea agreement in the fifth indictment before the State supplied a police surveillance location; and (4) failed to inform him when entering into the various plea agreements that he could receive enhanced federal sentences for future crimes. We agree with the PCR court that none of these claims

warrant relief.

Rule 3:22-12(a)(1)(A) states that a first PCR petition cannot be filed more than five years after the date of entry of the judgment of conviction "unless [the petition] alleges facts showing that the delay beyond said time was due to defendant's excusable neglect and that there is reasonable probability that if the defendant's factual assertions were found to be true enforcement of the time bar would result in a fundamental injustice."

After oral argument, the PCR judge denied the petition without granting an evidentiary hearing, holding that the entire petition was barred because it was not filed within the time allowed by Rule 3:22-12. The court did not comment on whether the enforcement of the bar would result in a fundamental injustice.

On appeal, defendant does not address the time bar set forth in Rule 3:22-12(a). Instead, he argues the merits of his various ineffective assistance of counsel claims.

We agree with the PCR court that defendant's petition is procedurally barred as to the first, second, and third convictions. Defendant was sentenced on those three indictments on February 14, 2005. He did not file his petition until April 21, 2016, more than eleven years later. Defendant makes no argument to explain his late filing, other than implying that he did not understand the consequences of his pleas due to his allegedly ineffective

counsel. However, ignorance of the law does not establish excusable neglect.

State v. Murray, 315 N.J. Super. 535, 539-40 (App. Div. 1998) (noting that a mistaken understanding of law did not constitute excusable neglect), aff'd as modified on other grounds, 162 N.J. 240 (2000). See also State v. Cummings, 321 N.J. Super. 154, 166 (App. Div. 1999) (noting that a defendant's difficulty reading and writing and defendant's ignorance of law did not excuse a late PCR filing). Thus, defendant has not shown excusable neglect. Defendant's petition was time barred as to the first, second, and third convictions.

Defendant argues that the PCR court erred when it denied his petition without an evidentiary hearing because he allegedly presented a prima facie case of ineffective assistance of counsel. However, the PCR judge did not err in denying a hearing and rejecting the petition.

A defendant is entitled to an evidentiary hearing only "upon the establishment of a prima facie case in support of" PCR, if the court determines that there are material issues of disputed fact that cannot be resolved by reference to the existing record, and if the court determines that an evidentiary hearing is necessary to resolve the claims for relief. R. 3:22-10(b). "To establish a prima facie case, defendant must demonstrate a reasonable likelihood that his or her claim[s], viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits." R. 3:22-10(b).

Defendant would have had to show that his former counsel's performance was deficient, and if it was, that there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984). No such demonstration was made here.

There is no support in the record for defendant's allegations that his former counsel was ineffective for advising him to accept the plea related to the fifth indictment before the State released a surveillance location. Similarly, there is no support for defendant's conjectural belief that the State would have dismissed the case against him rather than simply provide the discovery. "Bald assertions" are inadequate to require an evidentiary hearing in PCR matters. Cummings, 321 N.J. Super. at 170.

Defendant's former counsel did not need to inform him of the collateral consequences of his pleas related to the fourth and fifth convictions, such as enhanced future sentences. The possible impacts of a conviction in a future criminal proceeding are merely collateral consequences and, therefore, a defense attorney is not ineffective by failing to discuss future sentencing enhancements that comprise such collateral consequences. See State v. Wilkerson, 321 N.J. Super. 219, 223-28 (App. Div. 1999).

Finally, we need not consider defendant's remaining two arguments, in which he contends that his trial counsel on the first indictment was ineffective

ORDER ON MOTION

STATE OF NEW JERSEY
v.
KHALIL STAFFORD

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001710-17T2
MOTION NO. M-002702-17
BEFORE
JUDGE(S): CARMEN MESSANO

MOTION FILED: 12/11/2017 BY: KHALIL STAFFORD

ANSWER(S)
FILED:

SUBMITTED TO COURT: January 02, 2018

ORDER

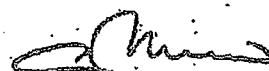
THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS, ON THIS
2nd day of January, 2018, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT

MOTION TO FILE NOTICE OF APPEAL AS
WITHIN TIME GRANTED

SUPPLEMENTAL:

FOR THE COURT:



CARMEN MESSANO, P.J.A.D.

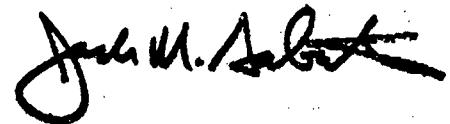
04-07-02552-I
04-04-01503-I
04-02-00665-I
10-09-02263-I
14-03-00618-I ESSEX
ORDER - REGULAR MOTION
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for failing to object to certain opinion testimony from the State's drug expert and for failing to file a motion to suppress evidence. As we have already noted, defendant's arguments in relation to the first conviction are time-barred. To the extent that defendant also refers to the second conviction, these arguments are time-barred as well and could have been raised in a direct appeal. See R. 3:22-4(a) (explaining that PCR is not substitute for direct appeal and issues that could have been raised an direct appeal are not appropriate for PCR).

For these reasons, and those expressed in the PCR judge's twenty-two-page written opinion, we summarily affirm the trial court's August 30, 2017 order, *sua sponte*.

FOR THE COURT:



JACK M. SABATINO, J.A.D.

Essex 04-07-2552-I
04-02-0665-I
04-04-1503-I
10-09-2263-I
14-03-0618-I
(Electronically Submitted)

State v. Weaver, Not Reported in A.3d (2017)

2017 WL 279580

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

State of New Jersey, Plaintiff-Respondent,
v.
Michael Weaver, Defendant-Appellant.

Submitted December 21, 2016

Decided January 23, 2017

On appeal from the Superior Court of New Jersey, Law
Division, Essex County, Indictment No. 07-05-1546.

Attorneys and Law Firms

Joseph E. Krakora, Public Defender, attorney for
appellant (Anderson D. Harkov, Designated Counsel, on
the brief).

Carolyn A. Murray, Acting Essex County Prosecutor,
attorney for respondent (Camila Garces, Special Deputy
Attorney General/ Acting Assistant Prosecutor, of
counsel and on the brief).

Before Judges Carroll and Gooden Brown.

Opinion

PER CURIAM

*1 Defendant Michael Weaver appeals from the
February 25, 2015 order denying his petition for post-
conviction relief (PCR) without an evidentiary hearing.
Because we are persuaded that a *prima facie* claim for
relief was shown, we remand for an evidentiary hearing.

Defendant was charged in Essex County Indictment No.
07-05-1546 with first-degree armed robbery, *N.J.S.A.*
2C:15-1 (count one); second-degree aggravated assault,
N.J.S.A. 2C:12-1b(1) (count two); third-degree unlawful
possession of a weapon, *N.J.S.A.* 2C:39-5b (count three);
and second-degree possession of a weapon for an unlawful
purpose, *N.J.S.A.* 2C:39-4a (count four). An October

2008 trial on the charges ended in a mistrial when the jury
was unable to reach a verdict.

Pursuant to a negotiated plea agreement, on January 5,
2009, defendant pled guilty to count one, as amended
to second-degree robbery, and to counts two and three.
Defendant also pled guilty to a fourth-degree resisting
arrest charge in Indictment No. 07-03-1058.¹ In return,
the State agreed to recommend an aggregate eight-year
prison sentence, subject to an eighty-five percent parole
ineligibility period pursuant to the No Early Release
Act (NERA), *N.J.S.A.* 2C:43-7.2, and to dismiss the
remaining counts of both indictments.

The plea agreement further provided that defendant's
sentence was to run concurrent on both indictments and
to a sentence he was presently serving.² Notably, prior to
his earlier trial, defendant rejected a plea offer that had
instead recommended a four-year NERA sentence that
would run consecutive to the sentence he was then serving.
Pertinent to this appeal, the following exchange took place
during the January 5, 2009 plea colloquy:

THE COURT: All right. Now, [the prosecutor] and
[defense counsel] have agreed upon a plea bargain on
your behalf, which effectively means that you're not
going to get any additional time in custody, from what I
can see here, and that the plea of guilty will result in any
sentence being imposed to run concurrent with what
you're presently serving. Is that [] your understanding?

[DEFENDANT]: Yes.

[(Emphasis added).]

On February 27, 2009, defendant was sentenced,
consistent with the plea agreement, to an aggregate eight-
year prison term, subject to NERA, concurrent to the state
prison term he was then serving. The judge also awarded
defendant 1057 days of gap-time credit, but no jail-time
credit. The sentence was memorialized in a judgment of
conviction (JOC) entered on May 12, 2009.

Defendant did not file a direct appeal challenging his
conviction or his sentence. On March 18, 2014, he filed a
pro se PCR petition. The court appointed counsel to assist
defendant, and counsel filed a brief and a verified PCR
petition accompanied by a certification from defendant
attesting to its accuracy. In his verified petition, defendant
alleged that plea counsel was ineffective for: misleading

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defendant regarding the material consequences of his plea; advising defendant he would receive jail credit rather than gap credit; and advising defendant that his plea would not affect his overall prison term. Defendant further asserted that if plea counsel had advised him correctly, he would not have pled guilty but rather would have proceeded to trial on the charges.

*2 The PCR judge conducted oral argument, denied the petition on procedural and substantive grounds, and rendered an oral opinion. The judge found that the petition was time-barred because it was filed nineteen days after the five-year limitations period expired. *See R. 3:22-12(a)(1)*. Nonetheless, the judge proceeded to address the merits after acknowledging that any delay was "de minimis." The judge engaged in a *Slater*³ analysis and determined defendant was not entitled to withdraw his plea. The judge found, based on her review of the transcripts, that defendant was "aware of his penal consequences" and understood he was "subject to the NERA requirement." The judge determined that no evidentiary hearing was needed "to explore what was said between [defense counsel] and [defendant]." Ultimately, the judge concluded that defendant failed to demonstrate a claim of ineffective assistance of counsel under the standard established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984), and subsequently adopted by our Supreme Court in *State v. Fritz*, 105 N.J. 42, 58 (1987).

On appeal, defendant raises the following arguments:

POINT ONE

THE TIME BAR OF [RULE] 3:22-12 SHOULD NOT BE APPLIED TO DEFENDANT'S PETITION FOR [PCR].

POINT TWO

THE PCR COURT ERRED WHEN IT FAILED TO GRANT DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING.

POINT THREE

AS A RESULT OF TRIAL COUNSEL'S INCORRECT ADVICE TO DEFENDANT THAT HE WOULD NOT SERVE ANY ADDITIONAL TIME IN STATE PRISON AS A RESULT OF HIS GUILTY PLEA, COMBINED WITH

HIS FAILURE TO EXPLAIN TO DEFENDANT THE DIFFERENCE BETWEEN JAIL CREDIT AND GAP [] CREDIT, DEFENDANT ENTERED AN INVOLUNTARY GUILTY PLEA, WITHOUT A FULL UNDERSTANDING OF ITS CONSEQUENCES, THUS DEPRIVING DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Defendant first argues that his petition is not time-barred, which the State in its brief concedes. *Rule 3:22-12(a)(1)* requires PCR petitions to be filed within five years from the JOC. Here, the JOC was entered on May 12, 2009. Defendant's PCR petition was filed on March 18, 2014, within the five-year limitations period. Accordingly, defendant's petition was timely filed.

We next address the merits. Defendant argues, as he did before the PCR court, that counsel erroneously advised him that his guilty plea would not affect his overall prison term because the sentence was to run concurrent, and that the entire time he spent incarcerated prior to his plea and sentencing would be assessed as jail credits. He further maintains that counsel failed to explain to him the difference between jail credit and gap-time credit. Consequently, his release date has been extended by seventeen months. Defendant posits that he would not have pled guilty if he knew he would be required to serve this additional prison time.

To show ineffective assistance of counsel, defendant must meet the two-pronged test set forth in *Strickland, supra*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed. 2d 674, 693, and adopted in *Fritz, supra*, 105 N.J. 42, 49-50. "The defendant must demonstrate first that counsel's performance was deficient, i.e., that 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' In making that demonstration, a defendant must overcome a strong presumption that counsel rendered reasonable professional assistance." *State v. Parker*, 212 N.J. 269, 279 (2012) (citation omitted) (quoting *Strickland, supra*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L.Ed. 2d at 693).

Second, "a defendant must also establish that the ineffectiveness of his attorney prejudiced his defense," *Ibid.* In the context of a guilty plea, "a defendant must

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prove 'that there is a reasonable probability that, but for counsel's errors, [he or she] would not have pled guilty and would have insisted on going to trial.'" *State v. Gaitan*, 209 N.J. 339, 351 (2012) (quoting *State v. Núñez-Valdés*, 200 N.J. 129, 139 (2009)), cert. denied, 133 S. Ct. 1454, 185 L.Ed. 2d 361 (2013).

*3 A court need not grant an evidentiary hearing unless a defendant has presented a *prima facie* case in support of PCR relief. *State v. Marshall*, 148 N.J. 89, 158, cert. denied, 522 U.S. 850, 118 S. Ct. 140, 139 L.Ed. 2d 88 (1997).

"To establish such a *prima facie* case, the defendant must demonstrate a reasonable likelihood that his or her claim will ultimately succeed on the merits." *Ibid.* The court must view the facts in the light most favorable to defendant. *Ibid.* Further, where there are "material issues of disputed fact which cannot be resolved by reference to the existing record an evidentiary hearing should be held." *State v. Pyatt*, 316 N.J. Super. 46, 51 (App. Div. 1998), certif. denied, 158 N.J. 72 (1999); *see also R. 3:22-10(b)*.

If the PCR court has not held an evidentiary hearing, our review is *de novo*. *State v. Harris*, 181 N.J. 391, 421 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L.Ed. 2d 898 (2005). Utilizing this standard, we conclude that defendant has demonstrated a *prima facie* case of ineffective assistance of counsel warranting an evidentiary hearing based on his argument and supporting certification that his counsel erroneously advised him that he would receive jail credit for all the time he spent incarcerated between his arrest and sentencing.

Jail credits authorized by *Rule 3:21-8* "were conceived as a matter of equal protection or fundamental fairness and a means of avoiding the double punishment that would result if no such credits" for pre-sentence confinement were awarded. *State v. Hernandez*, 208 N.J. 24, 36 (2011). They provide day-for-day credits for time spent in custody between arrest and imposition of sentence. *R. 3:21-8; Hernandez, supra*, 208 N.J. at 28, 37. In contrast, gap-time credits awarded pursuant to *N.J.S.A. 2C:44-5b(2)* are intended to address manipulation and delay by a prosecutor. *State v. Carrelcer*, 172 N.J. 100, 105, 107 (2002). Gap-time credits give a defendant who is sentenced on two separate dates credits against the second sentence for time served following imposition of the first sentence. *Hernandez, supra*, 208 N.J. at 38.

The effect of these two types of credits is different. Jail credits are applied to the "front end" of the sentence and reduce a parole ineligibility term that is part of a sentence. *Id.* at 37. "Gap-time credits are applied to the "back end" of a sentence." *Id.* at 38. Where a parole ineligibility term is not part of the sentence, "gap-time credits will advance the date on which a defendant first becomes eligible for parole." ⁴ *Id.* at 38-39. Under *Hernandez*, where gap-time credits are applicable, the judge has no discretion to award jail credits instead. *Id.* at 48-49.

Here, defendant does not argue that his eight-year aggregate sentence increased the maximum length of the concurrent sentences he was ordered to serve. Nor does he contend that he was not properly advised he would be required to serve eighty-five percent of the sentence before becoming eligible for parole. However, he asserts that counsel affirmatively represented to him that his pre-sentence incarceration would be assessed as jail credits. Consequently, as a result of counsel's incorrect advice, he was deprived of 1057 days of jail credit that he believed would be applied to his NERA parole ineligibility period, and his release date has been delayed by seventeen months.

*4 It has previously been recognized that an attorney's incorrect advice as to a plea's consequences may entitle a defendant to PCR, and in certain circumstances even extends to the collateral consequences of a plea. For example, in *Núñez-Valdés, supra*, 200 N.J. at 143, our Supreme Court held that a defendant can show ineffective assistance of counsel by proving that his guilty plea resulted from "inaccurate information from counsel concerning the deportation consequences of his plea." The Court's focus was on "false or misleading information" from counsel as establishing the violation of the defendant's constitutional rights. *Id.* at 138-40. Similarly, in *State v. Agathis*, 424 N.J. Super. 16, 18 (App. Div. 2012), we reversed the denial of a defendant's PCR application because his attorney provided him with incorrect advice that his conviction would not affect his ability to regain his firearms identification card after he completed his probation. The defendant had specifically advised his attorney that this issue was critical to his decision to plead guilty and the plea had been postponed several times to enable defense counsel to research the issue. *Ibid.*

"[B]ald assertions" are insufficient to establish a *prima facie* case of ineffective assistance of counsel. *State v.*

State v. Weaver, Not Reported in A.3d (2017)

Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999). Here, however, defendant's claim that he would not have pled guilty absent his counsel's erroneous advice that he would receive jail credits does find certain support in the record. Defendant previously rejected the State's plea offer that called for him to serve his sentence consecutively to the sentence he was then serving. Defendant elected instead to stand trial on the charges, and it is only after a mistrial was declared that he pled guilty pursuant to a revised plea offer that provided for a concurrent sentence. Further, the trial court's statement to defendant during the plea colloquy that he would not spend any additional time in custody as a result of his plea conceivably reinforced defendant's mistaken belief regarding the jail credits.

In sum, we conclude that defendant established a prima facie case of ineffective assistance of counsel that could

Footnotes

- 1 Indictment No. 07-03-1058 is not part of defendant's appeal.
- 2 The record reflects that defendant was then serving a three-year sentence for a violation of probation on Accusation No. 04-07-0606, and a consecutive ten-year NERA sentence on Indictment No. 05-03-0628.
- 3 *State v. Slater*, 198 N.J. 145 (2009).
- 4 Adhering to the Court's longstanding interpretation of how gap-time credits are applied, in *Hernandez*, the Court recognized that there is likely no benefit from gap-time credits for a defendant subject to a seventeen-year period of parole ineligibility on a twenty-year sentence. 208 N.J. at 39-41.

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