

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-4211-13T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANTHONY SCALTRITO,

Defendant-Appellant.

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Submitted September 1, 2015 – Decided September 28, 2015

Before Judges Messano and Maven.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment NO. 11-12-2990.

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

James P. McClain, Atlantic County Prosecutor, attorney for respondent (Brett Yore, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Anthony Scaltrito appeals from the denial of his petition for post-conviction relief (PCR) following an evidentiary hearing. On April 3, 2012, defendant voluntarily and knowingly pled guilty before Judge Bernard E. DeLury, Jr., to second-degree leaving the scene of a fatal accident, N.J.S.A.

2C:11-5.1. The State agreed to dismiss the remaining charges and recommend a sentence of imprisonment not to exceed six years. On July 13, 2012, Judge DeLury sentenced defendant in accordance with the plea agreement. The judgment of conviction reflects no period of parole ineligibility was imposed, and the court consented to a "reduction of the primary parole eligibility date pursuant to N.J.S.A. 30:4-123.67."<sup>1</sup>

On April 9, 2013, defendant filed a pro se PCR petition in which he alleged the ineffective assistance of counsel (IAC). PCR counsel was appointed, and, in a supplemental certification, defendant explained "that [trial] counsel gave him misinformation and advice, specifically by advising [defendant] that he was eligible for ISP (Intensive Supervision Program) . . . ." In his petition, defendant sought "to have [his] sentence . . . set aside and the case set down for a sentencing hearing . . . ."

In support of the petition, trial counsel filed a certification in which he stated he advised defendant that he was eligible for ISP. Defendant's cousin certified that he was

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<sup>1</sup> That statute permits inmates to enter into agreements with the Department of Corrections that provide for "individual programs of education, training, or other activity which shall result in a specified reduction of . . . the inmate's primary parole eligibility date . . . upon such successful completion of the program." N.J.S.A. 30:4-123.67(a).

present during conversations between trial counsel and defendant, and that trial counsel clearly told defendant that he would be eligible for ISP within fifteen and eighteen months. Defendant's cousin certified that defendant executed an application for ISP in counsel's office before pleading guilty. However, in a letter dated August 16, 2012, a supervising officer in ISP explained that defendant's application was denied because "[a]ny applicant whose current conviction is included in Chapter 11 of the New Jersey Code of Criminal Justice, titled Criminal Homicide, is not eligible to participate in the program." Efforts by trial counsel and defendant to have ISP reconsider were unsuccessful.

At the PCR hearing before Judge DeLury, defendant argued that trial counsel was ineffective because he misadvised defendant regarding his eligibility for ISP. The prosecutor contended, however, that trial counsel did not provide ineffective assistance because the ISP statute, N.J.S.A. 2C:43-11, does not, on its face, prohibit defendant's admission based upon his conviction of violating N.J.S.A. 2C:11-5.1. Rather, the statute permitted the program to impose more restrictive standards for admission, which trial counsel could not have been aware of. See N.J.S.A. 2C:43-11(a). Judge DeLury concluded that an evidentiary hearing was necessary.

At that hearing, trial counsel testified consistently with the documents we referenced above. On cross-examination, counsel acknowledged that he never "guaranteed" defendant's admission into ISP, because an attorney "[c]an't do that." He further testified that he had examined N.J.S.A. 2C:43-11, and defendant did not fit into any of five statutory "exclusions."<sup>2</sup>

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<sup>2</sup> An inmate is ineligible for ISP

if the inmate:

(1) Is serving a sentence for a conviction of any crime of the first degree; or

(2) Is serving a sentence for a conviction of any offense in which the sentencing court found that there is a substantial likelihood that the defendant is involved in organized criminal activity . . . ; or

(3) Is serving any statutorily mandated parole ineligibility, or any parole ineligibility imposed by the court pursuant to subsection b. of [N.J.S.A.]2C:43-6 or [N.J.S.A.]2C:43-6.5); or

(4) . . . .

(5) Has previously been convicted of a crime of the first degree, or of any offense in any other jurisdiction which, if committed in New Jersey, would constitute a crime of the first degree and the inmate was released from incarceration on the first degree offense within five years of the commission of the offense for which the inmate is applying for intensive supervision.

(continued)

In response to questions by the judge, trial counsel acknowledged that he would not have done anything differently, but he could not say whether defendant would have accepted the plea knowing he was ineligible for ISP. Counsel told the judge that the State had "a strong case," including a "strong statement" defendant made to police. Defendant did not testify at the PCR hearing.

Judge DeLury reserved decision and issued a comprehensive written opinion on January 24, 2014. After reviewing relevant case law, the judge concluded that despite trial counsel's erroneous advice regarding ISP eligibility, there was no evidence that had defendant known of the ineligibility, he "would not have pled guilty and would have proceeded to trial instead." Judge DeLury credited trial counsel's testimony that he never guaranteed defendant's acceptance into the program. The judge also concluded that defendant suffered no prejudice despite counsel's erroneous advice because the plea agreement was favorable and defendant "would not have fared any better at trial." Judge DeLury denied the PCR petition and this appeal followed.

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(continued)

[N.J.S.A. 2C:43-11(a).]

Before us, defendant argues that trial counsel provided ineffective assistance. He does not seek, however, to have his conviction set aside, but rather defendant asks us to remand the matter for "resentencing."

Having considered defendant's contention in light of the record and applicable legal standards, we affirm substantially for the reasons expressed by Judge DeLury. We add only the following.

To establish an IAC claim, a defendant must satisfy the two-pronged test formulated in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). First, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Id. at 52 (quoting Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693). Second, a defendant must prove that he suffered prejudice due to counsel's deficient performance. Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. A defendant must show by a "reasonable probability" that the deficient performance affected the outcome. Fritz, supra, 105 N.J. at 58.

"When a defendant has entered into a plea agreement, a deficiency is prejudicial if there is a reasonable probability that, but for counsel's errors, the defendant would [] have decided to forego the plea agreement and would have gone to trial." State v. McDonald, 211 N.J. 4, 30 (2012) (emphasis added). More recently, we expressed what might appear to be at first blush a slightly different standard:

In determining a claim of ineffective assistance of counsel in a case in which a defendant pled guilty, "the issue is whether it is ineffective assistance of counsel for counsel to provide misleading, material information that results in an uninformed plea . . . ."

[State v. Smullen, 437 N.J. Super. 102, 108-09 (App. Div. 2014) (quoting State v. Nunez-Valdez, 200 N.J. 129, 139-40 (2009)).]

On closer scrutiny, however, the standard remains the same. Whenever a guilty plea is involved, in order to prove the second prong of the Strickland/Fritz standard a defendant must demonstrate "'that there is a reasonable probability that, but for counsel's errors, [he] would not have pled guilty and would have insisted on going to trial.'" Nunez-Valdez, supra, 200 N.J. at 139 (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)).

In Smullen, defense counsel was unaware that the defendant's guilty plea subjected him to community supervision

for life, see N.J.S.A. 2C:43-6.4. *Smullen, supra*, 437 N.J. Super. at 105-09. Because there was no evidentiary hearing, we remanded the matter to the PCR court to conduct a hearing "to determine whether '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.'" Id. at 110 (quoting Nunez-Valdez, supra, 200 N.J. at 138) (emphasis added); see also State v. Agathis, 424 N.J. Super. 16, 23 (App. Div. 2012) (remanding for an evidentiary hearing to determine whether misinformation regarding the defendant's ineligibility to obtain a firearms identification card because of his guilty plea "was a material consideration . . . in deciding whether to accept" the plea offer, and whether the defendant "would not have pled guilty if he had known") (emphasis added); State v. Maldon, 422 N.J. Super. 475, 486 (App. Div. 2011) (remanding for evidentiary hearing as to whether the defendant was misinformed regarding civil commitment consequences of his guilty plea and whether "that misinformation le[d] him to plead guilty when he otherwise would have insisted on going to trial") (emphasis added).

In this case, defendant has never asserted that, but for trial counsel's erroneous advice regarding ISP eligibility, he would not have pled guilty and insisted on going to trial. Defendant had the opportunity to assert such a claim, both in



his petition and during the evidentiary hearing. He chose not to do so.

Indeed, even now, defendant does not seek to vacate his conviction; he only seeks a remand so he can be resentenced, presumably on more lenient terms. There is no reason to resentence defendant. Judge DeLury imposed a perfectly legal sentence that fully complied with defendant's expectations in accordance with the plea bargain.

Moreover, Judge DeLury specifically credited trial counsel's representation that he never promised defendant a favorable result from the ISP application. In other words, defendant may have believed that he was eligible for the program, or that he had a reasonable prospect for admission. But, when he pled guilty, defendant was not assured to a certainty, nor could he be, that he would be admitted.

Affirmed.

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



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