NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0788-07T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TAWANNA MURPHY,

Defendant-Appellant.

Submitted October 6, 2009 - Decided December 17, 2009

Before Judges Wefing and LeWinn.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment Nos. 97-06-2933 and 97-10-4114.

Yvonne Smith Segars, Public Defender, attorney for appellant (Louis H. Miron, Designated Counsel, on the brief).

Paula T. Dow, Essex County Prosecutor, attorney for respondent (Raymond W. Hoffman, Assistant County Prosecutor, on the brief).

PER CURIAM

Defendant, Tawanna Murphy, appeals from the January 26, 2007 order of the Criminal Part denying her petition for post-conviction relief (PCR). We affirm.

In 1997, defendant faced two indictments charging her with a total of nine counts of first-degree robbery, N.J.S.A. 2C:15-1, involving nine different victims between March 27 and April 7, 1997; defendant also faced one charge of second-degree kidnapping, N.J.S.A. 2C:13-1(b)(1), and two weapons offenses, N.J.S.A. 2C:39-4(a) and -5(b).

On October 10, 1997, pursuant to a negotiated plea agreement defendant pled guilty to six counts of first-degree robbery; the State agreed to recommend a sentence not to exceed forty years with a twenty-year parole ineligibility period. The trial judge stated at the plea hearing that, "based upon the information before [him,]" he would sentence defendant to a term of thirty years with a fifteen-year parole ineligibility period.

Defendant provided a factual basis for each of the six counts, stating that on each occasion she approached a young female, threatened that she had a gun while gesturing under her clothing, and then demanded the jewelry that each victim was wearing.

In response to questioning from the judge, defendant stated that her plea of guilty was "entirely voluntary[.]" Defendant further acknowledged that her attorney had "spoken with [her], [and] answered any questions [she] may have [had,]" and that she

"had enough time to meet with her [attorney] and [was] . . . satisfied with her services[.]"

At sentencing on November 14, 1997, defendant's attorney made the following statement on her behalf:

> [Y]our Honor, [defendant] is 23 years of age. We have knowledge that she has a prior record and has served time already in State prison, is presently serving a violation of parole with a maximum date . . . in the year 2[]001.
>
> She has a very bad drug problem. And the presentence report notes that she was clean for a while, relapsed[,] started using heroin again. And that is not a defense.
>
> I would suggest the mitigating factor as to her behavior. Other than with this case, Judge, it was a spree[,] was a mistake, was no harm done to any of the victims. In fact, she approached the wom[e]n on the street, conversed with them and talked them into handing over pieces of jewelry. And in most of the instances she then just retained them.
>
> Our position is there was no robbery, Judge. We acknowledge that there was a first[-]degree robbery based upon the threat of a gun and the []motion with her hand in a jacket. But, in fact, there was no potentially real threat to the victims.
>
> I would ask that you consider sentencing her below the State's recommendation, forty with twenty, and sentence her, Judge, please concurrent to her present violation of parole sentence.

The following colloquy then ensued between the judge and defendant:

> THE COURT: Miss Murphy, anything you want to say?
>
> DEFENDANT MURPHY: That I . . . didn't mean to do it. I was under the influence of drugs.
>
> THE COURT: What are you doing now? I assume you are in custody. You are serving a sentence now.
>
> DEFENDANT MURPHY: Yes.
>
> THE COURT: What are you doing to deal with the drug problem?
>
> . . . .
>
> DEFENDANT MURPHY: There's a program I am participating in.

After weighing the aggravating and mitigating factors, the judge sentenced defendant to an aggregate term of thirty years with a fifteen-year parole ineligibility period.

Defendant appealed her sentence pursuant to Rule 2:9-11. On November 4, 1998, we entered an order affirming defendant's sentence. The Supreme Court denied defendant's petition for certification on February 2, 1999. State v. Murphy 158 N.J. 71 (1999).

Defendant asserts that she filed a PCR petition on February 21, 2005; however, no such petition has been provided in her appendix. On or about April 20, 2006, assigned counsel filed an amended PCR petition, with a supporting brief and appendix,

claiming that defendant received ineffective assistance of trial and appellate counsel.

On January 26, 2007, Judge Thomas R. Vena held a hearing on defendant's PCR petition. At the outset of that hearing, defense counsel proffered "medical evidence from the prison" apparently indicating that defendant is "on many psychotropic medications"; counsel also referred to a "supplemental verified petition" that he had filed "basically detailing her mental incapacitation." Neither the medical records nor the supplemental petition has been included in defendant's appendix on this appeal.

Based upon his review of that medical documentation, Judge Vena found that "excusable neglect" existed to waive the five-year time bar in Rule 3:22-12(a), and proceeded to consider defendant's ineffective assistance of counsel claims on the merits. Those claims were counsel's alleged failures to: (1) investigate defendant's case; (2) "explain[] to defendant the potential outcomes at sentence[] if the case had gone to a jury, . . . the doctrine of merger, the doctrine of concurrent and consecutive sentences . . ." [;] and (3) make "a better argument on sentencing," by asserting mitigating factors. PCR counsel also claimed ineffective assistance of appellate counsel for "appeal[ing] the sentence, not the plea[,]" and never "[sitting]

down to explain . . . [defendant's] [a]ppellate rights and go over the case." PCR counsel further asserted that defendant "believes her sentence is grossly out of range with what she thought she would be sentenced to."

At the conclusion of the hearing, Judge Vena rendered a decision from the bench, adding that he had prepared a written decision which would be available the following week. In his bench decision, Judge Vena found that: (1) at her plea hearing defendant was "specifically" advised both by her attorney and by the trial judge as to her exposure on sentencing; (2) the trial judge "elicited from [defendant] a factual basis" in which she "explained . . . how it was that [she] actually did commit those . . . robberies"; and (3) there was "no prima facie claim . . . of ineffective assistance by counsel."

On January 26, 2007, Judge Vena issued a lengthy written opinion, amplifying his reasons for denying defendant's PCR petition as follows.

> [Defendant] makes unsubstantiated allegations that "trial counsel did not investigate the case and present and[/]or prepare any defenses to the allegations." The [defendant] has not presented or alleged any facts or details of trial counsel's supposed misfeasance or nonfeasance. The record itself makes clear that trial counsel succeeded in her plea negotiations in winning for her client a sentence of 30 years with 15 years parole ineligibility for six [first-]degree robberies of the nine

charged as well as various other . . . counts dismissed as part of the plea agreement. The record also makes clear that all procedures in the plea allocution and sentencing were proper, the defendant representing that she understood the ramifications of the plea in open court.

All [defendant's] claims in this respect were vague and evasive allegations concerning information that could not plausibly be investigated. [Defendant] has failed to show a prima facie case by affidavits and competent proofs of what a sufficient investigation would have disclosed and/or that these witnesses were available and would have offered exculpatory information if called at trial.

[Defendant]'s other claim found in her [p]etition involving the sentence imposed on her should also fail pursuant to Rule 3:22-5, because the issue of excessive sentence was heard and decided by the Appellate Division in a prior adjudication.

. . . .

In addition, the impact of [defendant]'s claims of error was not prejudicial, either individually or taken together, to . . . [defendant]'s outcome through the plea agreement. Therefore, even if, arguendo, [defendant]'s trial counsel's performance was deficient, she has failed to demonstrate a reasonable likelihood of succeeding on the second prong of the Strickland [v. Washington, 466 U.S. 668, 104 S. Ct. 2052 80 L. Ed. 2d 674 (1984)] test.

[Defendant] has not established a prima facie case of ineffective assistance under either prong of Strickland, nor has she demonstrated her right to post-conviction relief by a preponderance of the credible

> evidence. State v. Preciose, [129 N.J. 451, 459 (1992)]; State v. Mitchell, [126 N.J. 565, 579 (1992)]. Thus, [defendant]'s motion should be denied as not meeting the prima facie threshold and there is no need for an evidentiary hearing.

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

> I. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AND PCR COUNSEL DEPRIVED MURPHY OF A FAIR TRIAL AND RENDERED THE JURY'S VERDICT AS FUNDAMENTALLY UNRELIABLE [SIC]
>
> > A. MURPHY WAS DEPRIVED OF HER CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL UNDER THE UNITED STATES CONSTITUTION AND THE NEW JERSEY CONSTITUTION
> >
> > B. THE COURT SHOULD SET ASIDE MURPHY'S PLEA OR REMAND THIS CASE FOR AN EVIDENTIARY HEARING CONCERNING WHETHER MURPHY RECEIVED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL
> >
> > C. MURPHY WAS DEPRIVED OF THE ASSISTANCE OF EFFECTIVE TRIAL COUNSEL AND PCR COUNSEL BECAUSE BOTH COUNSEL FAILED TO ADDRESS MURPHY'S LACK OF UNDERSTANDING OF THE PLEA
> >
> > D. MURPHY WAS DEPRIVED OF THE ASSISTANCE OF EFFECTIVE TRIAL COUNSEL BECAUSE COUNSEL FAILED TO ARGUE MITIGATING FACTORS AT THE TIME OF SENTENCING
>
> II. THE PCR COURT SHOULD HAVE CONDUCTED AN EVIDENTIARY HEARING TO ADDRESS ALL OF THE CLAIMS RAISED BY MURPHY

Having considered these contentions in light of the record and the controlling legal principles, we conclude they "are without sufficient merit to warrant discussion in a written opinion . . . ." R. 2:11-3(e)(2). We affirm substantially for the reasons stated in Judge Vena's bench decision and written opinion of January 26, 2007.

Affirmed.