SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0138-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TYREE BLUFORD, a/k/a TYRE BLUFORD, a/k/a TYRE COLEY, a/k/a MARCUS MCDANIELS,

Defendant-Appellant.

Submitted December 11, 2017 — Decided January 5, 2018

Before Judges Sabatino and Ostrer.

On appeal from Superior Court of New Jersey, Law Division, Gloucester County, Indictment No. 08-04-0382.

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

Christopher S. Porrino, Attorney General, attorney for respondent (Carol M. Henderson, Assistant Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Tyree Bluford appeals from the denial of his petition for post-conviction relief, after an evidentiary hearing. Defendant collaterally challenges his 2009 conviction for first-degree aggravated manslaughter and related crimes. He principally contends that his trial attorney was ineffective by failing to discover and investigate alibi witnesses. He also argues that his petition should be deemed timely, although he filed it a month after the five-year deadline. See R. 3:22-12.

We reviewed the facts at length in our opinion affirming the conviction on direct appeal. State v. Bluford, No. A-2241-09 (App. Div. Jan. 14, 2013), certif. denied, 216 N.J. 213 (2013). Suffice it to say there was substantial evidence of defendant's guilt, including: the victim's dying declaration; the presence of gunshot residue on defendant's hands and clothing; his own admission to a close friend that he shot the victim in the leg because she had snitched on him; and the seizure of a gun linked to the shooting, which defendant reportedly asked a witness to hide for him.

The State also presented a redacted custodial interrogation in which defendant firmly denied his guilt but provided implausible explanations for his whereabouts and activities. Notably, he contended he left the area of the shooting around 10:00 or 11:00 p.m., went to Palmer's night club in Philadelphia, which closed

at 3:00 a.m.; he left at 3:30 a.m.; stopped to get something to eat; and arrived at a friend's apartment at 5:00 a.m.[1] The State argued that defendant's exculpatory statements were patently false. Defendant did not recall the names of the women he went to the club with, or the friend who drove him home, nor did he identify the restaurant where they stopped to eat.

Defendant did not testify or present any witnesses. His trial counsel attempted to cast doubt on whether the victim was physically capable of making the dying declarations that multiple witnesses claimed they heard.

The PCR judge — who also had presided over the trial — granted defendant an evidentiary hearing to explore his claim that his trial attorney was ineffective. The attorney was the sole witness at the hearing. After some prompting, he recalled that defendant had asserted he was at a nightclub when the shooting occurred. But, counsel contended "there was nothing to follow up on." He explained:

> [H]e couldn't tell me who he was with, how he got there, how he got home, and those sorts of things. And it still didn't explain how he was in the apartment in the complex, telling, supposedly, some of the witnesses . . . that he had just shot [the victim].

[1] Neither party included the transcript of defendant's interrogation in the record on this PCR appeal. However, it was provided to us previously on defendant's direct appeal.

Trial counsel concluded that pursuing the alibi was not a "workable theory."

In a thorough written decision, Judge Christine Allen-Jackson held that defendant's petition was time-barred, as he filed it one month past the deadline. The judge nonetheless addressed the merits of the petition, and found none, after applying the two-pronged Strickland test.[2] With respect to the claim that trial counsel failed to investigate defendant's alibi witnesses,[3] Judge Allen-Jackson noted that defendant could not name the people who accompanied him to and from the nightclub he allegedly visited. Citing State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999), the judge held that defendant failed to meet his obligation to present, through competent evidence, what an investigation would have revealed. The judge concluded that trial counsel was not ineffective "for failure to follow up on leads when the Defendant failed to give his attorney information about them. Furthermore, the defendant failed to show the specific facts, not already on the record that would have been revealed by trial counsel's further investigation."

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[2] See Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 58 (1987).

[3] Defendant raised other claims of ineffectiveness before the trial court, which we need not discuss as he does not renew them on appeal.

On appeal, defendant presents the following points for our consideration:

> POINT I:
>
> THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF, IN PART, UPON PROCEDURAL GROUNDS PURSUANT TO RULE 3:22-12(a)(1).
>
> POINT II:
>
> THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF FOLLOWING THE EVIDENTIARY HEARING SINCE THE DEFENDANT FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL REGARDING COUNSEL'S FAILURE TO EFFECTIVELY PURSUE AN ALIBI DEFENSE, WHILE THE FACTUAL FINDINGS MADE BY THE TRIAL COURT UNDERLYING ITS DENIAL WERE NOT SUPPORTED BY THE RECORD ESTABLISHED AT THE HEARING.

We agree with Judge Allen-Jackson's conclusion that defendant fell short of establishing his trial attorney was ineffective by failing to conduct an adequate investigation. Our review of the court's decision, which was reached after an evidentiary hearing, "is necessarily deferential to [the] court's factual findings based on its review of live witness testimony." State v. Nash, 212 N.J. 518, 540 (2013). We review legal conclusions de novo. Ibid.

Our Supreme Court has recognized that the "[f]ailure to investigate an alibi defense is a serious deficiency that can result in the reversal of a conviction." State v. Porter, 216

N.J. 343, 353 (2013). Yet, "[w]hen a petitioner claims his trial attorney inadequately investigated his case, he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." Ibid. (quoting Cummings, 321 N.J. Super. at 170).

The test of an attorney's incomplete pre-trial investigation is, essentially, one of reasonableness. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691.

The information the defendant himself provides to his attorney will affect the reasonableness of the attorney's responsive investigation:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.
>
> [Ibid.]

An attorney is not obliged to conduct an investigation where "a defendant has given counsel reason to believe . . . [it] would be fruitless or even harmful . . . ." Ibid.

Also, "[t]he right to counsel does not require that a criminal defense attorney leave no stone unturned and no witness unpursued," Berryman v. Morton, 100 F.3d 1089, 1101 (3d Cir. 1996), especially if there are other avenues of defense. Cf. Coleman v. Brown, 802 F.2d 1227, 1233-34 (10th Cir. 1986) (stating that "when the defendant has but one stone, it should at least be nudged"). A court must account for an attorney's limited resources, and a client's limited information. See Rogers v. Zant, 13 F.3d 384, 387 (11th Cir. 1994) (stating that the "correct approach toward investigation reflects the reality that lawyers do not enjoy the benefit of endless time, energy or financial resources").

Here, defendant provided his trial counsel with little to go on. He claimed he was at a club in Philadelphia but could not name the women who brought him, or the man who drove him home. Furthermore, there is no evidence he gave his attorney any other information about his alleged companions that would reasonably have enabled counsel to locate those people, and to verify defendant's story. Nor is there evidence defendant gave his attorney any description of persons or employees with whom he may have interacted at the club or at the unnamed restaurant where he

allegedly stopped on his way home. Cf. Coleman, 802 F.2d at 1234 (concluding it was "improper" for an attorney to fail to contact a potential alibi witness whom the defendant could not name, but the defendant described her and told his attorney where she lived). Trial counsel had virtually no basis to establish an alibi defense. Instead, counsel reasonably chose the strategy of raising doubt that the victim actually made a dying declaration. "To support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates." Harrington v. Richter, 562 U.S. 86, 109 (2011).

In sum, defendant failed to establish that his attorney provided him with constitutionally deficient representation by not conducting a reasonable investigation. Inasmuch as defendant failed to establish ineffective assistance of counsel, we need not reach the issue of his petition's timeliness.

Affirmed.