

# RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1654-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MATTHEW P. ROONEY,  
a/k/a FRANCIS X. ROONEY,

Defendant-Appellant.

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Submitted May 9, 2022 – Decided May 20, 2022

Before Judges Fasciale and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Indictment No. 11-02-0097.

Joseph E. Krakora, Public Defender, attorney for appellant (Karen A. Lodeserto, Designated Counsel, on the brief).

Scott A. Coffina, Burlington County Prosecutor, attorney for respondent (Alexis R. Agre, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from a June 25, 2020 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. The PCR judge<sup>1</sup> conducted oral argument, entered the PCR order, and rendered a lengthy written opinion on which we substantially agree, concluding that defendant failed to demonstrate a prima facie case of ineffective assistance of counsel.

## I.

We set forth the facts in our March 18, 2018 unpublished opinion, affirming defendant's conviction for a series of sexual assaults and a kidnapping, and subsequent sentencing. State v. M.P.R., No. A-3604-14T4 (App. Div. Mar. 16, 2018). At defendant's trial, the victim S.L.<sup>2</sup> testified she went to her boyfriend B.R.'s apartment on August 19, 2009. She found B.R.'s brother—defendant—asleep on the couch. After driving defendant to a 5:00 p.m. appointment, defendant and S.L. went to a bar. On the way home, a tire fell off of S.L.'s van. The car then broke down, and defendant left S.L. with the van. S.L. then walked back to B.R.'s apartment. Around midnight, defendant arrived again at B.R.'s apartment and was alone with S.L. Defendant exited the

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<sup>1</sup> The PCR judge also served as the trial judge.

<sup>2</sup> Initials are employed to identify the witnesses, including the victim, to protect the victim's privacy and because her identity is excluded from public access under Rule 1:38-3(c)(12).

apartment again. Upon re-entering the apartment around 2:45 a.m., defendant grew agitated and started breaking furniture. Defendant then proceeded to sexually assault S.L. multiple times that night.

After the assaults, when defendant was asleep, S.L. grabbed clothing and escaped out the front door. She took refuge with a female neighbor and the neighbor called 9-1-1. S.L. was then taken to a hospital and treated for her injuries. At the hospital, a Sexual Assault Nurse Examiner (SANE) examination was administered to S.L. and biological samples were taken. The biological samples taken at the hospital were put into evidence, and though they tested negative for the presence of sperm, an external genital specimen tested positive for the presence of amylase. The sample was sent to another lab to be tested for DNA, which yielded a positive result for defendant's DNA.

B.R. also testified at trial. During his cross-examination, past incidents involving domestic violence by him against S.L. were brought to light. S.L. was not recalled to testify.

The jury found defendant guilty of four counts of second-degree sexual assault, N.J.S.A. 2C:14-2(c)(1); one count of first-degree kidnapping, N.J.S.A. 2C:13-1(b)(1); and one count of third-degree terroristic threats by threat to kill, N.J.S.A. 2C:12-3(b). The judge sentenced defendant to consecutive terms of

seven years in prison on each of the four counts of sexual assault and a concurrent twenty-four-year-term on the kidnapping charge. On each of the sentences, defendant was required to serve eight-five percent with parole ineligibility under the No Early Release Act<sup>3</sup> (NERA).

On appeal, defendant argues:

POINT I

THE PCR [JUDGE] ERRED IN DENYING [DEFENDANT] AN EVIDENTIARY HEARING AS TESTIMONY IS NEEDED REGARDING TRIAL COUNSEL'S FAILURE TO RECALL S.L. TO THE STAND TO ESTABLISH THIRD-PARTY GUILT.

POINT II

THE PCR [JUDGE] ERRED IN DENYING [DEFENDANT] AN EVIDENTIARY HEARING AS TESTIMONY IS NEEDED REGARDING TRIAL COUNSEL'S FAILURE TO REQUEST SPECIFIC LANGUAGE IN THE JURY CHARGE THAT THIRD-PARTY GUILT DOES NOT SHIFT THE BURDEN OF PROOF TO THE DEFENSE.

POINT III

THIS MATTER SHOULD BE REMANDED FOR CONSIDERATION OF ALL ISSUES RAISED IN THE PCR PETITION. (Not raised below).

We disagree and affirm.

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<sup>3</sup> N.J.S.A. 2C:43-7.2.

## II.

When a PCR judge does not conduct an evidentiary hearing—like here—we review the PCR judge's factual findings and legal conclusions de novo. See State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016). To establish a prima facie claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test enumerated in Strickland v. Washington, 466 U.S. 668, 687 (1984), which our Court adopted in State v. Fritz, 105 N.J. 42, 58 (1987). Defendant has not met either prong.

### A.

To meet the first Strickland/Fritz prong, a defendant must establish that his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687. The defendant must rebut the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." Id. at 689. Thus, we consider whether counsel's performance fell below an objective standard of reasonableness. Id. at 687-88.

Although defendant faults the PCR judge for "speculat[ing]" as to a strategic purpose for trial counsel's failure to recall S.L. and asserts an evidentiary hearing is required to determine whether this was a strategic

decision, he has the burden of overcoming "'the presumption that' [trial counsel's] decisions followed a sound strategic approach to the case." State v. Pierre, 223 N.J. 560, 579 (2015) (quoting Strickland, 466 U.S. at 689); see State v. Savage, 120 N.J. 594, 617 (1990) (indicating "[i]f counsel thoroughly investigates law and facts, considering all possible options, his or her trial strategy is 'virtually unchalleng[e]able'" (quoting Strickland, 466 U.S. at 691)). It is well-recognized that "[d]etermining which witnesses to call to the stand is one of the most difficult strategic decisions that any trial attorney must confront." Ibid. (alteration in original) (quoting State v. Arthur, 184 N.J. 307, 320 (2005)).

Defendant had no idea what S.L. would have testified to if recalled to the stand, especially since she had earlier testified "[t]here is no doubt in my mind[,] [i]t's [one-hundred] percent that [defendant] did that to me that night." Recalling her could have harmed defendant's third-party guilt defense rather than bolster it. As we previously explained in affirming defendant's conviction, "[r]ecalling S.L. carried the risk she would deny the statements the jury had already heard," M.P.R., slip op. at 15, and trial counsel "argued in closing that S.L. could not admit to police or her friends that her own boyfriend beat her up," id. at 15 n.6. The PCR judge was correct in reasoning "[r]ecalling S.L. . . . had the potential

to have disastrous effects on [defendant's] case." Thus, defendant's speculation as to what S.L. may have testified to does not establish trial counsel's failure to recall S.L. "[fell] below an objective standard of reasonableness," State v. O'Neil, 219 N.J. 598, 611 (2014) (quoting Strickland, 466 U.S. at 688), or otherwise rebut the presumption counsel was following "a sound strategic approach to the case." Pierre, 223 N.J. at 579.

Defendant asserts the PCR judge erred in denying his PCR petition without an evidentiary hearing because his trial counsel was ineffective for failing to request the inclusion of language in the jury charge setting forth the defense of third-party guilt, that such a defense does not shift the burden of proof to defendant. He contends "the PCR [judge] failed to consider a [layperson] on the jury would be expecting . . . defendant to have proven . . . someone else committed the crimes in question" and would not have understood defendant did not bear the burden of disproving guilt.

"[A]ppropriate and proper charges are essential for a fair trial." State v. Scharf, 225 N.J. 547, 581 (2016) (quoting State v. Reddish, 181 N.J. 553, 613 (2004)). The instructions "must provide a 'comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find.'" State v. Montalvo, 229 N.J. 300, 320 (2017)

(quoting State v. Singleton, 211 N.J. 157, 181-82 (2012)). In assessing the propriety of a jury charge, the instructions must be viewed as a whole in order "to see whether the jury was misinformed as to the controlling law," and it must be determined "whether the charge in its entirety was ambiguous or misleading." State v. R.B., 183 N.J. 308, 324-25 (2005) (quoting State v. Hipplewith, 33 N.J. 300, 317 (1960)).

Prior to the issuance of the jury instructions, the State, the judge, and defense counsel engaged in a colloquy regarding the third-party guilt defense jury charge, and the judge accepted the third-party guilt jury instruction defendant requested, with the exception the May 2010 assault would not be considered a substantive offense. Ultimately, the charge on the defense of third-party guilt read to the jury was as follows:

The defense has introduced evidence that [B.R.] had assaulted [S.L] before the date of August 20[,], 2009[,], specifically by striking her and or tearing or ripping off a piece of her clothing and also on May 19[,], 2010. The evidence has been offered because . . . defendant . . . has certain reason that attends alone or along with other evidence submitted in this case to negate defendant['s] . . . guilt of the crimes charged against him. You should consider this evidence along with all the other evidence in the case in determining whether or not the State has proven beyond a reasonable doubt that defendant is the person who committed the offense of sexual assault, kidnapping, terroristic threat, or the lesser included



offense of criminal restraint, criminal sexual contact or false imprisonment.

[(emphasis added).]

In alleging ineffective assistance of counsel, defendant asserts "[t]he charge never advised that the burden of proof never shifts to the defendant." However, this instruction placed consideration of evidence related to the defense of third-party guilt in its proper context, whether the State had proven its case beyond reasonable doubt. The instructions did not suggest that introduction of evidence related to third-party guilt had shifted the burden of proof to defendant but instead reiterated that the State bore the burden of proving defendant's guilt.

At the outset of jury instructions, the judge stated twice, "[t]he burden of proving each element of a charge beyond a reasonable doubt rests upon the State and that burden never shifts to the defendant." The judge elaborated, "[t]he defendant in a criminal case has no obligation or duty to prove his innocence or offer any proof relating to his innocence." Here, as we already found on defendant's direct appeal, "defendant got 'an adequate instruction of the law'" in the instructions read to the jury. M.P.R., slip op. at 18 (quoting State v. Pleasant, 313 N.J. Super. 325, 333 (App. Div. 1998)).

Defendant cites no authority that a failure to request a reiteration of this instruction—that defendant does not bear the burden of proving his innocence—

must accompany the specific instruction on the defense of third-party guilt when it has already been stated. He fails to articulate in what way trial counsel's failure to request a reiteration as to the State and defendant's burdens of proof constitutes an "error[]" so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Considering the jury instruction was neither inaccurate nor misleading, R.B., 183 N.J. at 324-25, and included the instructions defendant contends trial counsel erroneously failed to request, defendant failed to establish the first prong of the Strickland standard and the PCR judge was correct in determining defendant's argument lacks merit.

B.

To satisfy the second Strickland/Fritz prong, a defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 566 U.S. at 687. A defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. "[I]f counsel's performance has been so deficient as to create a reasonable probability

that these deficiencies materially contributed to defendant's conviction, the constitutional right will have been violated." Fritz, 105 N.J. at 58.

Even assuming arguendo defendant had established Strickland's first prong, which is not the case, he nonetheless fails to establish "but for" trial counsel's purported error, "the result of the proceeding would have been different." State v. Gideon, 244 N.J. 538, 551 (2021) (quoting Strickland, 466 U.S. at 694). Consideration of a PCR claim alleging ineffective assistance of counsel for a failure to call witnesses, is "guided, in part, by the standard applicable to claims of newly discovered evidence, that is, that the evidence would probably change the jury's verdict if a new trial were granted." State v. Allegro, 193 N.J. 352, 370 (2008) (internal quotation marks omitted) (quoting State v. Ways, 180 N.J. 171, 187 (2004)).

Additionally, defendant fails to show prejudice, or but for trial counsel's failure to request reiteration of the respective burdens of proof accompanying the third-party guilt defense, the verdict would have been different. Defendant's bald assertion a layperson juror would be confused as to who bore the burden of proof after the assertion of a third-party guilt defense, and after the burden of proof had been previously emphasized, runs contrary to "[o]ne of the foundations of our jury system . . . that the jury is presumed to follow the trial

court's instructions." State v. Burns, 192 N.J. 312, 335 (2007); see State v. Winter, 96 N.J. 540, 647 (1984). As we concluded on direct appeal, "defendant shows no reason to believe the jurors forgot that instruction which they heard a short time earlier and which they had copies of in the jury room." M.P.R., slip op. at 20.

The PCR judge correctly determined the "overwhelming" evidence presented by the State warranted the conclusion that defendant was not prejudiced by trial counsel's purported error in failing to recall S.L. Gideon, 244 N.J. at 556 (stating "the overall strength of the evidence before the factfinder is important in analyzing the second prong of Strickland"). In considering Strickland's prejudice-prong, we must "fairly assess defendant's trial counsel's decisions in the context of the State's case against defendant and the strengths and weaknesses of the evidence available to the defense." Pierre, 223 N.J. at 579.

The State's case was exceedingly strong: the victim knew defendant, identified him as her assailant, expressed one hundred percent certitude in her identification, and the two were irrefutably within the apartment together at the time the crimes occurred; DNA evidence matching defendant was recovered from S.L.'s genitalia; and B.R.'s next-door neighbor testified he observed

defendant outside the home almost immediately after he heard the sounds of an altercation coming from within B.R.'s apartment.

Defendant's third-party guilt defense was comparably weak, despite the information defendant was able to elicit regarding past allegations of abuse by B.R. against S.L. Defendant testified that he was asleep at the time the crimes occurred and could not hear the attack in the apartment because the air conditioner and television were on but awoke at some point to see B.R. entering the home. The State presented evidence discrediting defendant's self-serving testimony and his third-party guilt defense. B.R.'s next door neighbor testified that he did not see B.R.'s truck the night of the assault. B.R. was at a cabin with other men that night, over an hour away from the apartment. Three of those men testified at trial as to B.R.'s presence at the cabin when they all had gone to sleep sometime after midnight. The man who had slept in the same room as B.R. testified he was a light sleeper for various medical reasons and if B.R. had left the campsite, the witness would have "absolutely" woken up. And the same witness testified B.R. was still asleep on the top bunk between 5:30 a.m. and 6:00 a.m. the morning of the assault.

In view of the comparative strength of the prosecution's and the weakness of the defense's evidence, and in view of our finding on defendant's direct appeal

that defendant was afforded "substantial cross-examination to support his argument on third-party guilt," M.P.R., slip op. at 13, defendant fails to "show . . . a reasonable probability that, but for counsel's [allegedly] unprofessional errors, the result of the proceeding would have been different," State v. Taccetta, 200 N.J. 183, 193 (2009) (internal quotation marks omitted) (quoting Fritz, 105 N.J. at 52). Defendant failed to carry his burden of "affirmatively prov[ing] prejudice" and the PCR judge's conclusion with respect to Strickland's second prong should not be disturbed. Gideon, 244 N.J. at 561 (quoting Pierre 223 N.J. at 583).

### III.

Defendant argues the PCR judge erred in denying his petition for PCR without addressing his arguments that appellate counsel had also been ineffective because they did not raise the issue of prior counsel's failure to recall S.L. and did not speak with defendant prior to submitting his appeal brief. He argues remand is necessary "for proper consideration as to this issue."

Defendant is correct that he raised these issues in his PCR petition and the issue of appellate counsel's failure to raise trial counsel's ineffective assistance in his PCR brief, and the PCR judge failed to expressly address these arguments in denying defendant's petition for PCR. The PCR judge should have made

findings of fact and conclusions of law with respect to them because the issues were raised before him. R. 1:7-4(a). However, in reviewing defendant's claims under the de novo standard of review, State v. Harris, 181 N.J. 391, 419-20 (2004), and in light of the record, it is clear both of these claims are without merit, as they fail to establish deficiencies that would satisfy either of the Strickland standard's two prongs.

Defendant's argument that appellate counsel was ineffective for failing to argue the issue of prior counsel's failure to recall S.L. on direct appeal is unavailing for the reasons already discussed with regard to trial counsel's alleged ineffective assistance of counsel. Had appellate counsel raised the issue of trial counsel's failure to recall S.L. on direct appeal it would have been unsuccessful. Thus, appellate counsel was not ineffective for failing to raise this argument. "The failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel." State v. Worlock, 117 N.J. 596, 625 (1990).

Defendant's claim appellate counsel failed to speak with him or show him the appellate brief prior to its submission is unsupported by the record. Defendant offered no argument whatsoever, either in his PCR brief, at the PCR hearing, or in his brief on the present appeal, as to how this purported error deprived him the effective assistance of counsel. Strickland, 466 U.S. at 687;

see State v. Jones, 219 N.J. 298, 311-12 (2014) ("[T]he defendant 'must allege facts sufficient to demonstrate counsel's alleged substandard performance.'" (quoting State v. Porter, 216 N.J. 343, 355 (2013))). Defendant provided no facts to support this claim. His certification offers no support for this, or any other claim alleged in his petition, and instead focuses exclusively on trial counsel's failure to recall S.L. See State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999) (explaining a PCR petition claim of ineffective assistance of counsel must be "supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification").

In addition to the complete lack of support in the record, it appears defendant has abandoned this claim. As noted, defendant failed to argue the issue of appellate counsel's failure to communicate, as well as the remainder of the issues defendant raised in his PCR petition, in his initial PCR brief or in a supplemental pro se brief, and he does not challenge the conduct of PCR counsel on appeal. Because there was no reference to appellate counsel's failure to communicate in any brief that was before the PCR judge, no reference made at the PCR hearing, and there is no challenge to PCR counsel's representation raised on this appeal, we can presume that in consultation with his PCR counsel, defendant agreed that this and the additional claims made in his petition were



not supported by the record. See Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) (stating that "[a]n issue not briefed on appeal is deemed waived").

And assuming arguendo the claim was not waived, appellate counsel was not ineffective for failure to raise an unsuccessful argument, and defendant's claim appellate counsel was ineffective for failure to communicate with him is alleged in only a conclusory manner. "PCR counsel must communicate with the client, investigate the claims urged by the client" and "[t]hereafter . . . advance all of the legitimate arguments that the record will support." State v. Webster, 187 N.J. 254, 257 (2006). "If after investigation counsel can formulate no fair legal argument in support of a particular claim raised by defendant, no argument need be made on that point." Ibid. Had these claims been expressly addressed by the PCR judge in his written opinion, he would have been compelled to conclude defendant had failed to establish a prima facie claim of ineffective assistance of counsel warranting an evidentiary hearing. There is no purpose to remand because our de novo review of defendant's claims demonstrates the record does not support either claim of ineffective assistance of counsel. Harris, 181 N.J. at 419-20

#### IV.

Finally, a defendant bears the burden of establishing a prima facie claim. State v. Gaitan, 209 N.J. 339, 350 (2012). A defendant is entitled to an evidentiary hearing if the facts viewed "in the light most favorable to defendant," would entitle him to PCR. State v. Marshall, 148 N.J. 89, 158 (1997) (quoting State v. Preciose, 129 N.J. 451, 462-63 (1992)); R. 3:22-10(b). "If, with the facts so viewed, the PCR claim has a reasonable probability of being meritorious, then the defendant should ordinarily receive an evidentiary hearing in order to prove his entitlement to relief." Jones, 219 N.J. at 311. A defendant must "do more than make bald assertions that he was denied the effective assistance of counsel" to establish a prima facie claim entitling him to an evidentiary hearing. Cummings, 321 N.J. Super. at 170. On this record, defendant has been unable to demonstrate a hearing is warranted.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION