

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0008-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

IVAN G. MCKINNEY,

Defendant-Appellant.

Submitted September 29, 2022 – Decided January 26, 2023

Before Judges Gooden Brown and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 11-11-1878.

Joseph E. Krakora, Public Defender, attorney for appellant (Steven M. Gilson, Designated Counsel, on the brief).

Mark Musella, Bergen County Prosecutor, attorney for respondent (William P. Miller, Assistant Prosecutor, of counsel; Catherine A. Foddai, Legal Assistant, on the briefs).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant, Ivan McKinney, appeals from the Law Division's November 2, 2020 order, which denied defendant's petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm, substantially for the reasons set forth in Judge Christopher R. Kazlau's well-reasoned opinion.

We will not recite the factual antecedents of this matter as they have already been discussed by this court at length.¹ Instead, we incorporate by reference the factual findings contained in Judge Kazlau's November 2, 2020 written decision.

On November 2, 2011, a Bergen County grand jury returned indictment No. 11-11-1878, charging defendant with fifteen counts: third-degree endangering the welfare of a child by abuse, contrary to N.J.S.A. 2C:24-4a (counts one, two, three, and four); third-degree possession of a controlled dangerous substance, (CDS) cocaine, with the intent to distribute, contrary to N.J.S.A. 2C:35-5a(1) and 2C:35-5b(3) (count five); third-degree possession of CDS, oxycodone, with the intent to distribute, contrary to N.J.S.A. 2C:35-5a(1)

¹ See State v. McKinney, No. A-1946-13 (App. Div. Jan. 25, 2017) (slip op. at 1-9).

and N.J.S.A. 2C:35-5b(5) (count six); third-degree possession of CDS, cocaine, contrary to N.J.S.A. 2C:35-10a(1) (count seven); first-degree kidnapping, contrary to N.J.S.A. 2C:13-1b(1) (count eight); first-degree aggravated sexual assault, contrary to N.J.S.A. 2C:14-2a(2)(c)(3) and N.J.S.A. 2C:14-2a(7) (counts nine, ten, and thirteen); second-degree sexual assault, contrary to N.J.S.A. 2C:14-2c(4) (counts eleven and fourteen); and third-degree endangering the welfare of a child by sexual conduct, contrary to N.J.S.A. 2C:24-4a (counts twelve and fifteen).

A fifteen-day trial took place in January and February 2013. At the close of the State's case, defendant unsuccessfully moved for a dismissal of the entire indictment. Later, the trial judge dismissed count six, possession of oxycodone with the intent to distribute, prior to submitting the case to the jury. The jury acquitted defendant of counts thirteen and fourteen, aggravated sexual assault and sexual assault, and convicted him of all other counts. On July 25, 2013, defendant was sentenced to an aggregate term of life plus twenty-four years with a parole ineligibility period of fifty-four years.

Thereafter, defendant appealed his convictions and sentence. On direct appeal, defendant—through his counsel—presented the following arguments:

(I) the jury instructions regarding whether defendant kidnapped Jane² were unsupported by sufficient evidence because any confinement was only incidental to the alleged sexual assault; (II) the trial judge failed to instruct the jury that defendant could only be convicted for non-sexual endangering the welfare of a child if he endangered the girls by "abuse[] or neglect[]," as defined by N.J.S.A. 9:6-1; (III) defendant's motion for a new trial, based on the contention that the verdict was against the weight of the evidence,³ was erroneously denied; (IV) the trial judge erred when he denied defendant's motion for judgment of acquittal on the charge of endangering Susan's welfare by committing sexual conduct, contrary to N.J.S.A. 3C:24-4a(1);⁴ and (V) defendant's aggregate sentence of life plus twenty-four years with fifty-four years of parole ineligibility shocks the judicial conscience.

² We use the pseudonyms of Jane and Susan to protect the privacy of the victims. Rule 1:38-3(c)(9).

³ Specifically, defendant contended that the State failed to prove his guilt beyond a reasonable doubt as to the charges, which pertained to Jane, of aggravated sexual assault during a kidnapping, aggravated sexual assault, sexual assault, and endangering the welfare of a child by sexual conduct.

⁴ Defendant argued that the jury could not have convicted him of this offense because it also acquitted him of aggravated sexual assault, aggravated criminal sexual contact (a lesser included offense), sexual assault, and criminal sexual contact (a lesser included offense), in which Susan was alleged to be the victim.

Also on direct appeal, defendant filed a pro se supplemental brief,⁵ advancing an additional twenty arguments: (VI) the trial judge erred when he denied defendant's motion to suppress physical evidence found in defendant's apartment and evidence found on defendant's telephone; (VII) the trial judge erred in denying defendant's motion to dismiss the underlying complaints based upon defective arrest warrants; (VIII) the trial judge erred in denying defendant's motion to introduce DNA evidence pursuant to the Rape Shield Statute; (IX) the trial judge erred in declining to compel the State to produce certain discovery, including evidence of telephone calls and text messages made by Susan to her family, Susan's family to her, and Susan's family to the police; (X) remarks made by the trial judge to the jury and defense counsel during jury selection and trial resulted in the jury rushing their verdict, which undermined the validity of their verdicts; (XI) the trial judge erred by refusing to grant a mistrial or the requested one-week postponement regarding the testimony of K.H., an alleged material witness, after telling defense counsel that he could mention the witness's statement in his opening; (XII) the trial judge erred by allowing prejudicial text messages to be heard by the jury over defense counsel's objections; (XIII) the trial judge erred by failing to give a curative instruction to the jury regarding

⁵ We have renumbered these points for clarity.

Jane stating that officers showed her a picture of defendant; (XIV) the trial judge took a number of actions that directly impinged upon defendant's right not to testify under the Fifth Amendment; (XV) the prosecutor made prejudicial remarks during opening statements and summation; (XVI) the trial court erred in not entering judgment of acquittal on counts eight and nine of the indictment; (XVII) the trial judge erred by lying to potential jurors, which tainted the jury pool and denied defendant a fair trial; (XVIII) conduct by Jane at trial undermined the strength of the State's case; (XIX) the trial judge erred by having an ex parte communication with a Clifton police superintendent regarding the forwarding of the victim's school records to defense counsel; (XX) the trial judge's refusal to instruct the jury or dismiss the jury and declare a mistrial was in error because actions by court officers—such as pointing to defendant during trial—had the effect of identifying defendant to the jury as being in custody; (XXI) the State's dismissal of all Black and Latino jurors was in error and resulted in a denial of defendant's right to a fair trial; (XXII) defendant was prejudiced by references made during trial to Jane and Susan as the "victims" and to defendant as the "suspect"; (XXIII) the trial judge erred by allowing a State's witness, who testified at the same hearing, to sit in the courtroom during a Rule 104(a) hearing on excited utterance; (XXIV) the trial judge erred by

allowing Susan to testify with the aid of a translator, notwithstanding clear testimony by a State's witness prior to her testifying that Susan knew English; and (XXV) defendant's trial was so infected with error that, even if each individual error did not require reversal, the aggregate of errors denied defendant a fair trial.

In an opinion filed January 25, 2017, we affirmed defendant's convictions and sentence.⁶ State v. McKinney, No. A-1946-13 (App. Div. Jan. 25, 2017) (slip op. at 1). On November 17, 2017, defendant filed a pro se petition for PCR. On November 27, 2017, counsel was assigned to represent defendant in the matter and later filed a letter brief in support of defendant's petition. On February 13, 2020, defendant filed a supplemental letter brief in support of his petition. On November 6, 2019, the court granted the State's motion to release the juvenile records of Jane and Susan.

On October 1, 2020, the court heard oral argument on defendant's PCR petition. In support of defendant's petition, PCR counsel first argued that defendant was denied effective assistance of trial and appellate counsel in contravention of the United States and New Jersey State Constitutions.

⁶ We found insufficient merit in defendant's points VII, VIII, X, XI, XII, XIII, XIV, XVI, XVII, XVIII, XIX, XX, XXI, XXIII, XXIV, and XXV to warrant discussion in a written opinion. See Rule 2:11-3(e)(2).

Specifically, PCR counsel argued that trial counsel denied defendant effective assistance of counsel by: (1) failing to explain the thirteen-year plea offer from the State to defendant, in the context of the maximum penalties that defendant would face if convicted at trial; (2) failing to obtain and, therefore, never using the juvenile criminal history of two of the State's witnesses, Jane and Susan, to impeach their credibility at trial; (3) failing to submit any legal brief or call any witnesses at the scheduled DNA motion hearing, which could have established the identity of an unknown DNA contributor; (4) failing to request a material witness warrant for K.H., an alleged essential witness; (5) failing to explain to defendant that his prior convictions would be sanitized under Sands-Brunson⁷ if he testified at trial; (6) failing to inform defendant that K.H. could not be located to testify at trial until after he had waived his right to testify; (7) failing to call B.B. as a witness at trial; (8) failing to move for a mistrial or other relief when defendant's parents observed several jurors falling asleep during critical portions of the trial; (9) failing to request a specific curative instruction when Jane testified that the police had shown her a photo of defendant; (10) stating for the jury that Jane had claimed that she was sixteen years old to defendant when she was actually thirteen; (11) failing to object to improper comments that the

⁷ See State v. Sands, 76 N.J. 127 (1978); State v. Brunson, 132 N.J. 377 (1993).

prosecutor made during opening statements; (12) failing to provide a strategic defense to defendant; (13) failing to call Iesha, a friend of defendant's who would have served as an alibi witness, to testify at trial; (14) failing to object to, and make a record of, the prosecution speaking with Jane and Susan during breaks in their testimony; (14) failing to withdraw as defendant's attorney when he became ethically compromised during trial after receiving privileged school records of Jane and Susan; (15) failing to interview and call C.L. to testify as an alibi witness; and (16) failing to object to the prosecutor's statement during summations that Susan was "still banged up."

Further, PCR counsel argued that appellate counsel was ineffective by: (1) failing to brief and argue the issue of the trial court incorrectly denying defendant's motion to suppress; and (2) failing to raise trial counsel's motions and objections on appeal, issues that are now considered procedurally barred on direct appeal.

Under the same point heading, PCR counsel argued that the State engaged in prosecutorial misconduct, which deprived defendant of his right to a fair trial. Specifically, PCR counsel argued that: (1) the State withheld clearly exculpatory evidence of Susan making similar allegations against an unrelated defendant only a few months before; (2) the State acted improperly by failing to

provide defense counsel with blankets and sheets taken from defendant's bed by police; and (3) the prosecutor engaged in misconduct when the lead detective for the State took marked evidence into the jury room after both parties had rested.

In addition to defendant's ineffective assistance of counsel claim, PCR counsel argued that defendant established a prima facie case sufficient to require an evidentiary hearing and that defendant's claims are not procedurally barred under Rules 3:22-4, 22-5, or 22-12.

Finally, PCR counsel incorporated the arguments raised by defendant in his pro se petition and supplemental brief. The pro se petition lists: (1) ineffective assistance of trial and appellate counsel; (2) newly discovered evidence; (3) Brady violations; (4) Fourth, Fifth, and Sixth Amendment violations; (5) ex parte communications by the trial judge and members of the prosecutor's office; and (6) false arrest.

In defendant's pro se supplemental brief, he argued that an evidentiary hearing was necessary to determine whether Susan and Jane were competent to testify, and to what extent the defense would be permitted to use past psychiatric history to impeach their testimony.

On November 2, 2020, Judge Kazlau filed an opinion and order denying defendant's PCR petition without an evidentiary hearing. On June 21, 2021, the judge denied defendant's motion for reconsideration. This appeal followed.

On appeal, defendant raises the following arguments through counsel:

THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE THE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF TRIAL COUNSEL'S INEFFECTIVENESS.

- A. Trial Counsel Failed to Investigate and Have [C.L.] Testify as an Alibi Witness.
- B. Trial Counsel Failed to Obtain the Alleged Victims' Juvenile Records, Which Could Have Been Used to Impeach Their Credibility.
- C. Trial Counsel Failed to Adhere to the Promise in His Opening Statement that a Witness Would Testify That One of the Alleged Victims "Planned to Lie and Tell the Police That a Man Had Raped Them."
- D. Trial Counsel Abridged Defendant's Constitutional Right to Testify.

In a pro se supplemental brief, defendant presents an additional eight⁸ arguments:

THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE THE

⁸ Defendant's pro se supplemental brief contains nine total arguments; however, his first argument is identical to the first argument raised by his counsel. Defendant's pro se arguments have been relettered for clarity.

DEFENDANT HAS ESTABLISHED A PRIMA FACIE CASE OF TRIAL COUNSEL'S INEFFECTIVENESS.

- E. Appellate Counsel was Ineffective in Failing to Argue on Direct Appeal That the Court Erred in Denying the Motion to Suppress the Arrest of Defendant and Subsequent Search and Seizure of Defendant's Apartment.
- F. Defense Failed to Investigate the Fact that Susan and Her Mother Testified that Susan was Seeing a Psychiatrist and a Therapist.
- G. Trial Counsel was Ineffective When He Stated to the Jury that Jane had told Defendant She Was Sixteen Years Old, Thus Implying Defendant's Guilt.
- H. The State Committed Prosecutorial Misconduct When It Promised Jurors in Their Opening That They Would Hear from Susan's Siblings [C.M.] and [J.M.] in Regards to an Alleged Distress Call from Susan.
- I. Trial Counsel Failed to Object When the Lead Detective and Testifying Witness Walked the Evidence into the Jury Room and Provided Same to Deliberating Jurors. This Also Constitute[d] Prosecutorial Misconduct.
- J. Trial Counsel was Ineffective in Failing to Withdraw as Defendant's Attorney Once He Became Ethically Compromised During the Trial After He Received Privileged School Records Regarding a State's Witness.
- K. Trial Counsel was Ineffective in Failing to Request a Mistrial When Various Jurors Were Falling Asleep During the Presentation of Evidence.

L. Defendant[']s Counsel Failed to Investigate and Follow Up on Calling [B.B.] as an Exculpatory Witness Even After She Provided an Affidavit to Defense Counsel.

On appeal, we defer "to the PCR court's factual findings, given its opportunity to hear live witness testimony, and ' . . . uphold the PCR court's findings that are supported by sufficient credible evidence in the record.'" State v. Gideon, 244 N.J. 538, 551 (2021) (quoting State v. Nash, 212 N.J. 518, 540 (2013)). "However, where the court does not hold an evidentiary hearing, we may exercise de novo review over the factual inferences the trial court has drawn from the documentary record." State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014). "When the reviewing court is satisfied that the findings and result meet this criterion, its task is complete, and it should not disturb the result, even though it has the feeling it might have reached a different conclusion were it the trial tribunal." State v. Johnson, 42 N.J. 146, 162 (1964). A PCR court's interpretation of the law, however, is reviewed de novo. Nash, 212 N.J. at 540-41.

"Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." State v. Pierre, 223 N.J. 560, 576 (2015) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). PCR acts as "a built-in 'safeguard that ensures that a defendant was not unjustly convicted.'" Nash, 212 N.J. at 540 (quoting State v. McQuaid, 147 N.J. 464, 482 (1997)). Said differently, PCR provides an adjudged

criminal defendant a "last chance to challenge the 'fairness and reliability of a criminal verdict[.]'" Ibid. (quoting State v. Feaster, 184 N.J. 235, 249 (2013)).

Specifically, a PCR petition is a collateral attack on a judgment rendered in a criminal proceeding and is the exclusive means of challenging such a judgment.

Rule 3:22-3. Under Rule 3:22-2, there are five grounds on which a court may grant a criminal defendant's PCR petition:

- (a) Substantial denial in the conviction proceedings of defendant's rights under the Constitution of the United States or the Constitution or laws of the State of New Jersey;
- (b) Lack of jurisdiction of the court to impose the judgment rendered upon defendant's conviction;
- (c) Imposition of sentence in excess of or otherwise not in accordance with the sentence authorized by law . . . ;
- (d) Any ground heretofore available as a basis for collateral attack upon a conviction by habeas corpus or any other common-law or statutory remedy; or
- (e) A claim of ineffective assistance of counsel based on trial counsel's failure to file a direct appeal of the judgment of conviction and sentence upon defendant's timely request.

When petitioning for PCR, the criminal defense must establish, by a preponderance of the credible evidence, that he is entitled to the requested relief.

Nash, 212 N.J. at 541; Preciose, 129 N.J. at 459. To sustain this burden,

"specific facts must be alleged and articulated, which, if believed, would provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

Procedural bars to PCR "exist 'in order to promote finality in judicial proceedings.'" State v. Goodwin, 173 N.J. 583, 593 (2002) (quoting McQuaid, 147 N.J. at 483). Under Rule 3:22-4, "[a]ny ground for relief not raised in the proceedings resulting in the conviction, . . . or in any appeal taken in any such proceedings is barred" from being heard on PCR unless the court finds:

- (1) that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; or
- (2) that enforcement of the bar to preclude claims, including one for ineffective assistance of counsel, would result in fundamental injustice; or
- (3) that denial of relief would be contrary to a new rule of constitutional law under either the Constitution of the United States or the State of New Jersey.

Moreover, a PCR petition is "neither a substitute for direct appeal . . . nor an opportunity to relitigate cases already decided on the merits." Preciose, 129 N.J. at 459 (citation omitted). Rule 3:22-5 provides that "[a] prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or . . . in any appeal taken from such

proceedings." Specifically, this procedural bar applies "if the issue raised is identical or substantially equivalent to that adjudicated previously on direct appeal." State v. Marshall IV, 173 N.J. 343, 351 (2002) (quoting State v. Marshall III, 148 N.J. 89, 150 (1997)).

Guided by these principles, we see no reason to address defendant's points E, H, and I. As for point E, we have already thoroughly reviewed and rejected defendant's claim of an unconstitutional search and seizure on direct appeal. We see no principled reason to address that issue again. See Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 3:22-3 ("It is . . . clear that an issue considered on direct appeal cannot be reconsidered by way of a post-conviction application.") (citation omitted). As for points H and I, defendant is procedurally barred from raising these claims of prosecutorial misconduct for failing to raise them on direct appeal. See ibid. ("Nor . . . may an issue that could have been raised on direct appeal but was not raised by way of a post-conviction relief application.") (citing State v. Reevey, 417 N.J. Super. 134, 147-148 (App. Div. 2010), certif. denied, 206 N.J. 64 (2011) (an issue that could have been, but was not, raised on appeal must fall within one of the rule's exceptions)).

Further, the Court Rules do not require evidentiary hearings for PCR petitions; rather, it is within the reviewing court's discretion to conduct such hearings. See Rule 3:22-10; Preciose, 129 N.J. at 462. As a matter of procedure, a defendant is not entitled to an evidentiary hearing absent a prima facie case of ineffective assistance of counsel. R. 3:22-10. A prima facie case is established when a defendant "allege[s] facts sufficient to demonstrate counsel's substandard performance," meaning the defendant "must do more than make bald assertions that he was denied the effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). Specifically, the petitioner "must demonstrate a reasonable likelihood that his or her claim will ultimately succeed on the merits." State v. Russo, 333 N.J. Super. 119, 138 (App. Div. 2000).

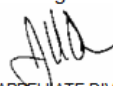
Ineffective assistance of counsel is established by meeting the two-part test set forth in Strickland v. Washington, 466 U.S. 668 (1984), which was adopted by New Jersey in State v. Fritz, 105 N.J. 42 (1987). Under this test, a petitioner must show not only the particular manner in which counsel's performance was deficient, but also that the deficiency prejudiced his right to a fair trial. Strickland, 466 U.S. at 687; Fritz, 105 N.J. at 58.

We find insufficient merit in defendant's points A, B, C, D, F, G, J, K, and L to warrant extended discussion in a written opinion. R. 2:11-3(e)(2). Having considered defendant's contentions in light of the record and the applicable law, we affirm the denial of defendant's PCR petition substantially for the reasons detailed at length in the PCR judge's opinion.

We discern no abuse of discretion in the judge's consideration of the issues, or in his decision to deny the petition without an evidentiary hearing. We are satisfied that the performance of trial and appellate counsel was not deficient, and defendant provided nothing more than bald assertions to the contrary.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION