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November 1, 2023

LETTER BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

Honorable Judges of the Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
25 Market Street
P. O. Box 006
Trenton, NJ 08625

Re: State of New Jersey (Plaintiff-Respondent)
v. Dana Kearney (Defendant-Appellant)
Indictment. No.: 16-10-01645
Docket No. A-2638-22

Criminal Action: On Appeal From an Order Denying a Petition
for Post-Conviction Relief in the Superior Court of New Jersey,
Law Division, Middlesex County.

Sat Below: Hon. Colleen M. Flynn, P.J.S.C.

Honorable Judges:

In accordance with R. 2:6-2(b), this letter in lieu of formal brief is submitted on
behalf of the State on appeal with respect to the above-referenced matter.

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COUNTER-STATEMENT OF PROCEDURAL HISTORY

On October 21, 2016, a Middlesex County Grand Jury returned Indictment No. 16-10-01645 charging Dana Kearney (hereinafter “defendant”) charging him with Conspiracy to Commit Aggravated Assault in contravention of N.J.S.A. 2C:5-2a and N.J.S.A. 2C:12-1b(1) (Count One); one count of Murder in contravention of N.J.S.A. 11-3a and N.J.S.A. 2C:2-6a (Count Two); Endangering an Injured Victim in contravention of N.J.S.A. 2C: 12-1.2a (Count Three); one count of Hindering Apprehension in contravention of N.J.S.A. 2C:29-3b(3) (Count Five); and one count of Witness Tampering in contravention of N.J.S.A. 2C:28-5a (Count Six). (Da1-3).¹

¹ The State adopts the following notations:

“Da” refers to defendant’s appendix.

“Db” refers to defendant’s brief.

“1T” denotes motion transcript dated May 3, 2017.

“2T” denotes hearing transcript dated May 16, 2017.

“3T” denotes motion to be relieved transcript dated May 22, 2017.

“4T” denotes motion transcript dated May 22, 2017.

“5T” denotes hearing transcript dated May 23, 2017.

“6T” denotes hearing transcript dated June 19, 2017.

“7T” denotes hearing transcript dated July 5, 2017.

“8T” denotes hearing transcript dated July 6, 2017.

“9T” denotes hearing transcript dated July 18, 2017.

“10T” denotes trial transcript dated July 19, 2017.

“11T” denotes trial transcript dated July 20, 2017.

“12T” denotes trial transcript dated July 24, 2017.

“13T” denotes trial transcript dated July 25, 2017.

“14T” denotes trial transcript dated July 26, 2017.

“15T” denotes trial transcript dated August 2, 2017.

“16T” denotes trial transcript dated August 3, 2017.

Between July 19, 2017, and September 5, 2017, defendant and his two co-defendants, Joseph Kearney and Shane Timmons, were tried by the Honorable Joseph Paone, J.S.C., and a jury. Nineteen witnesses testified at trial. Defendant was found guilty of all charges. (10T to 29T).

On December 22, 2017, Judge Paone sentenced defendant to an aggregate fifty-year term of incarceration, subject to the No Early Release Act ("NERA"). (30T; Da8-11). On the charge of endangering an injured victim, the court imposed a ten-year term of imprisonment. Ibid. On the charge of hindering, the court imposed a term of ten years. Ibid. On the charge of witness tampering, the court imposed a term of five years imprisonment. Ibid. The court ordered that the sentence for endangering run consecutively to that for murder; that the

"17T" denotes trial transcript dated August 14, 2017.

"18T" denotes trial transcript dated August 15, 2017.

"19T" denotes trial transcript dated August 16, 2017.

"20T" denotes trial transcript dated August 17, 2017.

"21T" denotes trial transcript dated August 18, 2017.

"22T" denotes trial transcript dated August 21, 2017.

"23T" denotes trial transcript dated August 22, 2017.

"24T" denotes trial transcript dated August 23, 2017.

"25T" denotes trial transcript dated August 24, 2017.

"26T" denotes trial transcript dated August 29, 2017.

"27T" denotes trial transcript dated August 30, 2017.

"28T" denotes trial transcript dated August 31, 2017.

"29T" denotes trial transcript dated September 5, 2017.

"30T" denotes sentencing transcript dated December 22, 2017.

"31T" denotes post-conviction relief hearing transcript dated January 19, 2023.

sentence for hindering run concurrently with that for murder; and that witness tampering run consecutively with the endangering count. Ibid. The court also imposed the mandatory fees, fines, and restitution of \$2,500.00 to the Victims of Crime Compensation Office. Ibid.

On May 17, 2018, a notice of appeal was filed by defendant. The Appellate Division consolidated defendant's appeal with the appeals filed by his co-defendants. On January 7, 2020, the Appellate Division denied the appeal in an unpublished decision. (Da12-112). On November 2, 2020, the New Jersey Supreme Court denied defendant's petition for certification. (Da113). On April 1, 2021, defendant filed a petition for Post-Conviction Relief. (Da114). Oral arguments were held on January 19, 2023, and PCR was denied without an evidentiary hearing on February 1, 2023. (Da140-164). This appeal follows.

COUNTER-STATEMENT OF FACTS

The State relies on the statement of facts contained in this court's unpublished decision of January 7, 2020:

The State's proofs showed that the victim, Christopher Sharp, was stabbed to death after an altercation at a house party in Perth Amboy at the home of Alicia Boone. During the course of the party, an argument erupted between Sharp and the three defendants. [Defendant] went upstairs and grabbed an object and returned. The victim was then stabbed fatally three times in the chest. Outdoor surveillance footage showed

the three defendants leaving the house in the middle of the night. A bloody palm print of Joseph Kearney was found on the porch railing.

Boone and other witnesses provided testimony corroborating the altercation. Boone fled the house with her children in the middle of the night because the argument appeared to be escalating. When she returned later that early morning, Sharp had been killed.

The jury found Joseph and [defendant] were both guilty of conspiracy to commit murder and aggravated assault, that all three defendants were guilty of hindering the prosecution, and that [defendant] was guilty of endangering an injured victim and witness tampering.

The trial court sentenced [defendant], the apparent stabber, to a fifty-year aggregate custodial term. It imposed an aggregate thirty-year sentence upon Joseph Kearney, and seven years upon [Shane] Timmons.

[State v. Timmons, A-2567-17T4 (App. Div. Jan. 7, 2020) (Da12-112).]

LEGAL ARGUMENT

POINT I

THE PCR COURT PROPERLY FOUND THAT DEFENDANT RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL (Da140-164).²

Defendant raises two arguments with respect to the constitutional effectiveness of his attorney on appeal. First, defendant claims that, because

² Point I of the State's brief encompasses Point I and Point II of defendant's brief.

Alicia Boone paid for his attorney, trial counsel had an inherent conflict of interest and was *per se* ineffective. Here, the trial court properly determined that Boone did no more than hire an attorney for defendant, her then-boyfriend, no conflict existed. On appeal, defendant asserts that trial counsel was “beholden” to Boone and that trial counsel therefore was inhibited on cross-examination. Second, defendant alleges that trial counsel deprived him of his right to testify. The PCR court properly found that this was a bare allegation and was belied by the record, as defendant told the trial court that counsel had discussed his right to testify with him. As defendant’s claims lack any evidentiary support, they cannot support a prima facie claim of ineffective assistance.

To establish a prima facie claim of ineffective assistance of counsel, a petitioner must demonstrate a reasonable likelihood that his claim will meet the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984) and United States v. Cronin, 466 U.S. 648 (1984) and adopted by the New Jersey Supreme Court in State v. Fritz, 105 N.J. 42, 51 (1987). (See State v. Preciose, 129 N.J. 451, 463 (1992)). In determining whether a prima facie claim has been established, reviewing courts must judge the facts in the light most favorable to the petitioner. Preciose at 462-63. Under the Strickland test, the petitioner must show that (1) “counsel’s representation fell below an objective standard of

reasonableness” and (2) “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Preciose, 129 N.J. at 459.

The proper inquiry for the first prong is “whether counsel’s assistance was reasonable considering all the circumstances.” Strickland 466 U.S. at 668. Prevailing norms of the practice of law should be used as a guidepost. Ibid. The petition “must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.” Id. at 690. The court must then decide in light of the particular circumstances of the case whether the acts or omissions identified by the petitioner “were outside the wide range of professionally competent assistance.” Ibid. In rendering its decision, the court should apply the strong presumption that counsel has rendered adequate assistance. Ibid.

The second prong of Strickland requires that prejudice be proven by the petitioner; it is not presumed. Fritz, 105 N.J. at 52. “A petitioner alleging [ineffective assistance of counsel] must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. (quoting Strickland, 466 U.S. at 694). A “reasonable probability” is one that is “sufficient to undermine confidence in the outcome.” Ibid. Purely speculative deficiencies in

representation are insufficient to support a claim of ineffective assistance of counsel. Ibid. Thus, in order to be entitled to an evidentiary hearing, a petitioner “must do more than make bald assertions that he was denied the effective assistance of counsel.” State v. Cummings, 321 N.J. Super. 154 at 170, certif. denied, 162 N.J. 199 (App. Div. 1999). Instead, a petitioner must allege facts sufficient to demonstrate counsel’s alleged substandard performance. Id. In reviewing this claim, counsel’s performance must be evaluated from his or her perspective at the time of the error, and “[j]udicial scrutiny of counsel’s performance must be highly deferential.” Strickland, 466 U.S. at 689; Kimmelman v. Morrison, 477 U.S. 365, 381 (1986). “A [reviewing] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Strickland, 466 U.S. at 689.

It is with this framework in mind that defendant’s claims are addressed and repudiated.

a. The PCR court properly determined that no conflict of interest existed.

“The Rules of Professional Conduct are designed to assure that, in representing a client, counsel’s judgment is not impaired by divided loyalties or other entangling interests.” State v. Jimenez, 175 N.J. 484–85 (2003). Specifically, the Rules of Professional Conduct provide that a conflict of interest exists when “there is a significant risk that the representation of one or more

clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." R.P.C. 1.7(b) (2004). Inquiries into conflicts of interest are highly fact specific. In re Op. No. 653 of the Advisory Comm. on Prof'l Ethics, 132 N.J. 124, 132 (1993). However, courts have held that where an informed citizen would conclude that "there is no high risk of impropriety," a conflict of interest likely does not exist. See State v. Hudson, 443 N.J. Super. 276, 286 (App. Div. 2015) (citing State v. Bruno, 323 N.J. Super. 322, 337–38 (App. Div. 1999)).

Here, Alicia Boone, one of the State's witnesses, hired and paid defendant's trial counsel to represent defendant. (21T2-25 to 5-15; 21T82-25 to 83-4). However, this was the extent of Boone's interaction with defendant's counsel. Boone, who was defendant's then-girlfriend, did nothing more than retain an attorney for her boyfriend. Boone never discussed any facts of the case with defendant's trial attorney. (21T5-17 to 19). The PCR court noted that Boone testified that she did not even communicate with defendant's trial counsel from the time she paid his legal fees to the time of the trial, a period of several years and that their interactions "were limited in nature." (21T95-10 to 22, Da149). Moreover, Boone also testified that "she hired her own lawyer" in preparation for trial. (Da149). Since there is no "high risk of impropriety" as required by Hudson and Bruno, and because the totality of the circumstances

suggest no material limitations on the trial counsel's responsibilities to defendant as required by R.P.C. 1.7(a)(2), there is no conflict of interest. Therefore, the PCR court properly determined that defendant's claim is without merit.

b. The PCR court properly determined that trial counsel did not abridge defendant's right to testify.

A criminal defendant has a constitutional right to testify on his own behalf and "[t]he decision whether to testify rests with the defendant." State v. Bey, 161 N.J. 233, 269 (1999) (citing State v. Savage, 120 N.J. 594, 626-28 (1990)). Counsel must inform the defendant of the right to testify and "may not merely rely on their own trial strategy." Id. at 269-70. A defendant's decision whether to testify is an "important strategic or tactical decision" for a defendant to make with the advice of counsel. State v. Coon, 314 N.J. Super. 426, 435 (App. Div. 1998).

Here, defendant argues that his attorney was ineffective for failing to inform him of his right to testify. Defendant has presented no prima facie evidence at any point that suggests his counsel failed to make him aware of his right to testify. Indeed, the trial court discussed defendant's right to testify with him on the record at trial. (26T136-5 to 137-15). As the PCR court noted, the record reflects that defendant told the judge that he had adequate time to discuss

the potential of testifying with his lawyer. (26T138-22 to 138-25; Da155-156). Following the judge's questioning, defendant waived his right to testify in satisfaction of the standard discussed in Bey. (26T138-22 to 139-7). The PCR court properly found that any claims that defendant did not discuss his right to testify with his attorney was belied by the trial record. (Da156). The PCR court therefore properly denied defendant's claim, as defendant alone made the decision not to testify based upon advice of competent counsel.

Further, the PCR court properly determined that it would have been sound trial strategy to advise defendant not to testify. Decisions as to trial strategy or tactics are virtually unassailable on ineffective assistance of counsel grounds. State v. Cooper, 410 N.J. Super. 43, 57 (App. Div. 2009). Furthermore, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. Strickland, 690-691. The trial court noted that defendant had a criminal history that would be explored on cross-examination. (Da156). The court properly found that "without more, a trial strategy's failure does not render performance deficient." Ibid. This claim was therefore properly denied on multiple grounds.

POINT II

AS DEFENDANT FAILED TO ESTABLISH A
PRIMA FACIE CLAIM OF INEFFECTIVE
ASSISTANCE, THE TRIAL COURT PROPERLY
FOUND THAT HE WAS NOT ENTITLED TO AN
EVIDENTIARY HEARING (Da159)

“A petitioner must establish the right to [post-conviction relief] by a preponderance of the credible evidence.” Preciose, 129 N.J. at 459 (1992)(citations omitted). To meet this standard, “specific facts must be alleged and articulated, which, if believed would provide a court with an adequate basis on which to rest its decision.” R. 3:22-8; State v. Mitchell, 156 N.J. 565, 579 (1992).

R. 3:22-1 et. seq. does not require a trial court to conduct an evidentiary hearing on a petition for post-conviction relief, and while a trial court may require oral argument concerning the petition, no statutory or procedural requirement exists to hear such an argument. State v. Flores, 228 N.J. Super. 586, 589-90 (App. Div. 1988), certif. denied, 115 N.J. 78 (1989). See also State v. Marshall, 148 N.J. 89, 158 (1997), certif. denied, 522 U.S. 850 (1997); Cummings, 321 N.J. Super. at 170 (App. Div. 1999).

Although Rule 3:22-1 does not require evidentiary hearings to be held on PCR petitions, Rule 3:22-10 recognizes judicial discretion to conduct such hearings. State v. Russo, 333 N.J. Super. 119 (App. Div. 2000), citing Marshall,

148 N.J. 89 (1997). However, only if there are disputed issues of material facts regarding entitlement to PCR should an evidentiary hearing be conducted. State v. Pyatt, 316 N.J. Super. 46, 51 (App. Div. 1998), certif. denied, 158 N.J. 72 (1999).

The New Jersey Supreme Court specifically addressed the propriety of an evidentiary hearing in Marshall:

We observe, however, that there is a pragmatic dimension to the PCR court's determination. If the court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the Petitioner is entitled to post conviction relief, or that the Petitioner's allegations are too vague, conclusory, or speculative to warrant an evidentiary hearing, then an evidentiary hearing need not be granted.

[Marshall, 148 N.J. at 158 (citations omitted).]

Pursuant to Preciose, claims of ineffective assistance of counsel may be properly raised for the first time in a petition for post-conviction relief. Preciose, 129 N.J. at 460. However, the mere raising of such a claim does not, in and of itself, entitle a petitioner to an evidentiary hearing. Id. at 462. Moreover, "trial courts should ordinarily grant evidentiary hearings... if a Petitioner has presented a prima facie claim in support of post-conviction relief." Ibid. The Supreme Court continued:

To establish a prima facie claim of ineffective assistance of counsel, a Petitioner must demonstrate the reasonable likelihood of succeeding under the test set

forth in Strickland v. Washington, 466 U.S. 668, 694 (1984) and United States v. Cronin, 466 U.S. 648 (1984), which we adopted in State v. Fritz, 105 N.J. 42 (1987).

[Id. at 463; Cummings, 321 N.J. Super. at 170.]

The PCR court properly determined that there were no disputed issues of material fact in this case that lie outside the record. The court noted that “[t]he record below is clear relative to the issues raised in this PCR.” Both the issue of Boone paying for defendant’s trial counsel and whether defendant had been advised of his right to testify were fully fleshed out before the court at time of trial. Defendant does not provide with any level of specificity what additional facts, if any, would be adduced at an evidentiary hearing or how they would be of use to the trial court in determining the merits of his claim. Therefore, the PCR court properly found that defendant was not entitled to an evidentiary hearing.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this court affirm the denial of defendant's second petition for post-conviction relief.

**Respectfully submitted,
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