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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0013-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WILLIE E. SHUMAN, JR., a/k/a
PUMPKIN SHUMAN,

Defendant-Appellant.

Submitted September 27, 2017 – Decided October 12, 2017

Before Judges Nugent and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Mercer County, Indictment No.
08-06-0597.

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

Angelo J. Onofri, Mercer County Prosecutor,
attorney for respondent (Joseph Paravecchia,
Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Willie Shuman, Jr. appeals from the April 20, 2016 order of the trial court denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

A Mercer County grand jury charged defendant and co-defendants Michael Smith, Dennis Merritt (Dennis),¹ and Melanie Merritt (Melanie) with first-degree attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3 (count one); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (count two); third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2) (count three); fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(4) (count four); second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count five); third-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b) (count six); and first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:11-3 (count seven).

Defendant moved to suppress the videotaped statements he gave to the police after he was arrested. A Miranda² hearing was conducted on July 23, 2009. Detective Matthew Kemp of the West Windsor Police Department testified on behalf of the State at the

¹ Because two co-defendants share the same surname, we use their first names to avoid confusion. We intend no disrespect in doing so.

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

hearing. Defendant did not testify or call any witnesses at the hearing. The portions of the videotapes regarding the Miranda warnings defendant received and other aspects of the voluntariness of his statements were played during the hearing.

In a detailed oral decision rendered on November 4, 2009, the motion judge noted that the defendant read the Miranda warning form aloud and signed the form before each statement was given. The judge found that defendant understood his rights and knowingly waived them. She further found that defendant never asked to stop the interviews and never asked for an attorney. The judge also found that no promises were made to defendant regarding his bail or seeing his family. When defendant asked for certain assurances the detectives told him they could not do that. At one point the detective told defendant: "We can't promise you anything."

The second interview was initiated by defendant's own request to speak to the investigating detective. Defendant was given breaks and a cigarette during the interviews. The police did not intimidate or threaten defendant. For these reasons, the motion judge held that the statements were given voluntarily and were admissible at trial.

Defendant was tried separately. Following a five-day trial, the jury acquitted defendant of conspiracy to commit murder (count seven) but convicted him of the lesser-included offense of second-

degree conspiracy to commit aggravated assault and counts one through six of the indictment.

The facts underlying defendant's convictions are set forth in our opinion in his direct appeal. Therefore, we review only the facts pertinent to the issues raised.

On December 15, 2007, Chaz Mathis helped Melanie and her husband Dennis move their apartment furnishings from Trenton into a storage unit in Ewing, New Jersey. Mathis transported the couple's belongings in his van.

Five days later, on December 20, 2007, Melanie called Mathis and accused him of stealing a television and a gold chain during the move. Mathis denied the allegations. Later that day, Mathis was approached outside his Trenton boarding house by Smith. Smith questioned Mathis about the items, and Mathis again denied the allegations. Mathis invited Smith to inspect his bedroom for the items, but Smith said "I believe you" and left.

Following his conversation with Smith, Mathis went to his second-floor bedroom to take a nap. About forty-five minutes later, he heard his name being called and woke up to see a man in the doorway, holding a gun. Mathis tried "to roll out of the way," but the gunman shot him four times.

. . . .

Detective Matthew Kemp of the West Windsor Township Police Department investigated the shooting. When Kemp spoke with Mathis at the hospital, Mathis said he believed Dennis was involved, and that a "black male, very big, tall, six foot four,

[weighing] 300 pounds" was involved. This matched the description of Smith.

Kemp met with Smith on December 26, 2007. According to Smith, he only gave Kemp "a little bit" of information about the incident at that time. However, when they met a second time on January 2, 2008, Smith provided Kemp with a formal statement, which explained what happened.

On January 17, 2008, Smith was arrested and charged with attempted murder and other offenses. The following day, while in custody, Smith asked to speak with Kemp. During that meeting, Smith identified defendant as the shooter. Defendant was arrested on January 23, 2008.

When Kemp interviewed defendant on January 24, 2008, he confessed to shooting Mathis and provided the police with a videotaped statement, which was admitted into evidence at defendant's trial. In his statement, defendant confirmed that Smith led him to Mathis' bedroom. Defendant also admitted that he pushed open the unlocked door to Mathis' room, saw Mathis "on the bed," and "squeezed [the gun] four times."

Neither Dennis nor Melanie testified at trial. However, Smith testified for the State, and he made an in-court identification of defendant as the shooter. . . .

Defendant testified on his own behalf. On direct examination, defendant denied he was involved in the shooting. Defendant admitted he told Kemp he shot Mathis, but defendant claimed he did so because he "felt it was the only way [he] was going to get home to [his] fiancée and kids."

On cross-examination, defendant conceded he had signed a Miranda form and a waiver of

rights prior to his videotaped statement. Nevertheless, he testified his confession was a lie[.]

[State v. Shuman, No. A-0859-10 (App. Div. March 11, 2013) (slip op. at 3-7), certif. denied, 217 N.J. 52 (2014).]

At sentencing, the court merged counts two, three, and four into count one and sentenced defendant to a seventeen-and-one-half-year prison term subject to the eighty-five percent period of parole ineligibility mandated by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Defendant received concurrent sentences on counts five and six. Appropriate penalties, fees, and assessments were also imposed.

On direct appeal, defendant raised the following arguments: (1) the admission of testimonial hearsay of non-testifying alleged accomplices violated defendant's constitutional right to confrontation; (2) the conviction for possession of a weapon for an unlawful purpose (count five) should have been merged into count one (attempted murder); and (3) defendant's sentence was manifestly excessive. Shuman, supra, (slip op. at 3). Notably, defendant did not argue that the denial of his suppression motion was error.

We concluded that defendant received a fair trial and an appropriate sentence. We affirmed the convictions and sentence but remanded for entry of an amended judgment of conviction merging

count five into count one. On March 12, 2013, an amended judgment of conviction was entered. Defendant's petition for certification was denied by the Supreme Court on January 14, 2014. State v. Shuman, 217 N.J. 52 (2014).

Defendant filed a timely pro se PCR petition that was supplemented with a brief by appointed PCR counsel. Through counsel, defendant raised the following issues:

POINT I

DEFENDANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL, DUE PROCESS OF THE LAW AND OF HIS RIGHT TO A FAIR TRIAL SINCE TRIAL COUNSEL FAILED TO CALL THE DEFENDANT TO TESTIFY AT THE MIRANDA HEARING AND SUCH FAILURE RESULTED IN THE ADMISSION OF DEFENDANT'S INCULPATORY STATEMENT.

POINT II

DEFENDANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL, DUE PROCESS OF THE LAW AND OF HIS RIGHT TO A FAIR TRIAL SINCE TRIAL COUNSEL FAILED TO PRESENT AN ALIBI DEFENSE.

POINT III

DEFENDANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL, DUE PROCESS OF THE LAW AND OF HIS RIGHT TO A FAIR TRIAL SINCE TRIAL COUNSEL FAILED TO ARGUE THAT MICHAEL SMITH WAS UNABLE TO IDENTIFY THE DEFENDANT AS THE SHOOTER.

POINT IV

DEFENDANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL, DUE PROCESS OF THE LAW AND OF HIS RIGHT TO A FAIR TRIAL SINCE TRIAL COUNSEL FAILED TO ARGUE THAT A FAMILY COURT JUDGE IMPERMISSIBLY ISSUED THE ARREST WARRANT.

Defendant claims that at the time of the shooting he was with a man named "Orlando" at Orlando's grandmother's house, located at Randle and Elm Streets in Trenton, New Jersey. He argues that even though he shared this information with trial counsel, his counsel was ineffective by failing to investigate this alibi and present it as a defense at trial.

Defendant did not provide the full name of, or identifying information for, the alleged alibi witness to his trial counsel or the PCR court. Nor did he provide the specific facts that an investigation would have revealed. His PCR application did not include any affidavits or certifications regarding the alibi from any alibi witness.

The State submitted a certification of defendant's trial counsel in opposition to defendant's PCR claims. In his certification, trial counsel stated: "At one point he briefly remarked that he was 'probably' at a friend's grandmother's house at the time of the shooting. He indicated he would get her name and address. I do not believe I was ever given her name." Trial

counsel then stated: "The fact that this could be a weak alibi was certainly a consideration; however there were other factors that questioned the value and credibility of the 'alibi[.]'" Those factors included: (1) defendant's failure to raise the alibi shortly after arrest; (2) the alibi was not supported by independent objective evidence; (3) defendant gave a statement admitting he was present and involved in the shooting incident; and (4) defendant rarely mentioned his possible presence elsewhere during conversations with trial counsel. Taking these factors into account, trial counsel concluded that defendant's unsupported suggestion that he may have been at someone's residence at the time of the incident "was not a provable alibi that could have altered the outcome of the case."

Defendant did not testify at the Miranda hearing. He claims that he would have testified that he only gave the incriminating statement to the police because they promised him that he could go home to his family. The transcripts of the videotaped statements are devoid of any such promises. Moreover, as noted by the PCR judge,

the facts surrounding the statements made to police by the Petitioner do not support his claim. On January 23, 2008, Detective Kemp placed the Petitioner under arrest. Immediately following his arrest, Petitioner waived his Miranda rights and spoke to the detective investigating the shooting. The

Petitioner stated he had no information regarding the shooting. On the following day, January 24, 2008, the Petitioner requested to speak to Detective Kemp about the shooting. Detective Kemp did not initiate the second interview. During the second interview, after waiving his Miranda rights, the Petitioner admitted to shooting Mathis at the request of [Dennis] Merritt and [Melanie] Gerald.

[(citations omitted).]

The PCR was heard by Judge Robert C. Billmeier, who issued a seventeen-page written decision denying defendant's petition without conducting an evidentiary hearing. The judge found that defendant failed to establish a prima facie case of ineffective assistance of counsel, concluding that: (1) defendant failed to show that trial counsel's representation fell below an objective standard of reasonableness; (2) defendant failed to demonstrate a reasonable probability that, but for trial counsel's alleged unprofessional errors, the outcome of the trial would have been different; (3) trial counsel was not ineffective by failing to argue in summation that Smith did not see defendant actually shoot the victim; and (4) trial counsel was not ineffective by failing to argue that a Family Law judge impermissibly issued his arrest warrant, since that claim was legally baseless. Defendant appeals from that ruling.

In his present appeal, defendant raises the following arguments:

POINT ONE

A. DEFENDANT SHOULD BE ENTITLED TO AN EVIDENTIARY HEARING BECAUSE HIS TRIAL ATTORNEY WAS INEFFECTIVE IN FAILING TO PRESENT AN ALIBI DEFENSE.

B. DEFENDANT SHOULD BE ENTITLED TO AN EVIDENTIARY HEARING BECAUSE HIS TRIAL ATTORNEY WAS INEFFECTIVE IN FAILING TO CALL HIM TO TESTIFY AT HIS MIRANDA HEARING.

We affirm substantially for the reasons stated by Judge Billmeier in his thorough and well-reasoned written decision. We add only the following comments.

PCR petitioners are not automatically entitled to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999). Rather,

[a] defendant shall be entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of post-conviction relief, a determination by the court that there are material issues of disputed fact that cannot be resolved by reference to the existing record, and a determination that an evidentiary hearing is necessary to resolve the claims for relief.

[R. 3:22-10(b).]

To establish a prima facie claim of ineffectiveness of counsel, the defendant

must satisfy two prongs. First, he must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. An attorney's representation

is deficient when it [falls] below an objective standard of reasonableness.

Second, a defendant must show that the deficient performance prejudiced the defense. A defendant will be prejudiced when counsel's errors are sufficiently serious to deny him a fair trial. The prejudice standard is met if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability simply means a probability sufficient to undermine confidence in the outcome of the proceeding.

[State v. O'Neil, 219 N.J. 598, 611 (2014) (citations omitted).]

"A court shall not grant an evidentiary hearing . . . if the defendant's allegations are too vague, conclusionary or speculative[.]" R. 3:22-10(d); see State v. Marshall, 148 N.J. 89, 158, cert. denied, 522 U.S. 850, 118 S. Ct. 140, 139 L. Ed.2d 88 (1997). "Rather, defendant must allege specific facts and evidence supporting his allegations." State v. Porter, 216 N.J. 343, 355 (2013). As we explained in Cummings:

[I]n order to establish a prima facie claim, a petitioner must do more than make bald assertions that he was denied the effective assistance of counsel. He must allege facts sufficient to demonstrate counsel's alleged substandard performance. Thus, when 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.

[Cummings, supra, 321 N.J. Super. at 170.]

We review a judge's decision to deny a PCR petition without an evidentiary hearing for abuse of discretion. State v. Preciose, 129 N.J. 451, 462 (1992).

Defendant claims that his trial counsel was ineffective by inadequately investigating his alibi defense and not presenting it at trial. We disagree.

Rule 3:22-10(c) requires the factual assertions in support of defendant's alibi defense be made by affidavit or certification based on personal knowledge in order to secure an evidential hearing. State v. Jones, 219 N.J. 298, 312 (2014); Porter, supra, 216 N.J. at 355. Defendant did not satisfy this requirement. As noted by Judge Billmeier, defendant did not provide the full name of, or identifying information for, the alleged alibi witness. He did not assert specific facts that an investigation would have revealed and failed to submit any affidavits or certifications from any witness attesting to the alibi. Moreover, the alibi is contradicted by defendant's own statement to the police. This led trial counsel to conclude that the alibi defense was too weak to pursue at trial.

"[A]ny claimed errors of counsel must amount to more than mere tactical strategy." State v. Drisco, 355 N.J. Super. 283,

290 (App. Div. 2002), certif. denied, 178 N.J. 252 (2003) (citing Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694-95 (1984)). A trial counsel's strategic decision to withhold a weak alibi defense does not constitute ineffective assistance of counsel. See id. at 290-91 (explaining that a trial counsel's fear that a weak alibi defense could cause more harm than good is the type of strategic decision that should not be second guessed on appeal).

For the reasons recounted in his certification, trial counsel reasonably concluded that defendant's unsupported suggestion that he may have been at someone's residence at the time of the incident "was not a provable alibi that could have altered the outcome of the case." Our review of the record leads us to conclude that the judge's determination that trial counsel made a strategic decision not to present the alibi defense was based on substantial credible evidence in the record. Moreover, defendant has not shown that there is a reasonable likelihood that the alibi defense would have been successful if properly investigated and presented at trial.

Defendant also argues that his trial counsel was ineffective by failing to have him testify at the Miranda hearing, resulting in the admission of his inculpatory statement in which he confessed to shooting the victim. Defendant claims he would have testified

that he only gave the statement to police because they promised him he could go home to his family if he did so.

Deciding whether to call defendant as a witness at the Miranda hearing is one of the most difficult strategic decisions that trial counsel must confront. See State v. Arthur, 184 N.J. 307, 320 (2005).

A trial attorney must consider what testimony a witness can be expected to give, whether the witness's testimony will be subject to effective impeachment by prior inconsistent statements or other means, whether the witness is likely to contradict the testimony of other witnesses the attorney intends to present and thereby undermine their credibility, whether the trier of fact is likely to find the witness credible, and a variety of other tangible and intangible factors.

[Id. at 320-21.]

Our review of such decisions is highly deferential. Id. at 321.

In order to prevail on this claim, defendant must show that the failure to call him as a witness was a serious professional error, and that had he testified during the hearing the effect would have been the suppression of the statement and a different trial outcome. Defendant failed to satisfy either prong.

Defendant has not shown that his testimony at the Miranda hearing would have resulted in the suppression of his statement and a different trial outcome. His bare allegation that he confessed to the police only because he was promised that he would


be able to reunite with his family is contradicted by the record. The decision to not have him testify at the hearing appears to have been a reasonable, strategic decision made by an experienced attorney, not a serious professional error.

In summary, we discern no abuse of discretion by the PCR court. Judge Billmeier correctly concluded that defendant did not establish a prima facie case of ineffective assistance of counsel and was not entitled to an evidentiary hearing.

The remaining issues raised by defendant lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION