SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0385-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RICHARD BARGE,

Defendant-Appellant.

Submitted February 28, 2017 – Decided July 31, 2017

Before Judges Messano and Suter.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Indictment No. 08-06-1851.

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

Mary Eva Colalillo, Camden County Prosecutor, attorney for respondent (Nancy P. Scharff, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Richard Barge appeals the order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

In 2012, defendant was convicted by a jury of first-degree murder, N.J.S.A. 2C:11-3(a)(1),(2), and other charges[1] in the shooting death of Nicholas Syders on Thanksgiving night in 2007 as Syders sat in his car with passenger, Steven Goldsboro, in the parking lot of the Off Broadway Lounge in Camden. Defendant was sentenced to fifty-seven years in prison with a period of parole ineligibility. Defendant appealed the convictions and sentence in 2012. We affirmed and the Supreme Court denied his petition for certification. State v. Barge, No. A-4970-09 (App. Div. Mar. 27, 2013), certif. denied, 216 N.J. 7 (2013).

We quote from our unreported opinion to provide context to the issues on appeal here.

> Goldsboro told the police that the assailant was unknown to him but subsequently admitted he knew the identity of the shooter.
>
> . . . .
>
> Goldsboro gave a taped statement at the Prosecutor's Office in which he indicated that the person who shot Syders on Thanksgiving night was the man he knew as "Rich" who had been in a fight with Syders at the Nice Little Bar weeks earlier.
>
> . . . .

[1] These include second-degree possession of a weapon, handgun, for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1); third-degree unlawful possession of a weapon, handgun, N.J.S.A. 2C:39-5(b); and second-degree certain person not to have weapons, N.J.S.A. 2C:39-7(b)(1).

That summer, months after he provided this statement, Goldsboro received threats directed not only at him but at his family.

. . . .

Goldsboro signed a written statement on that date, July 7, 2008, indicating that he "saw the shooter that killed Nicholas and it was not Richard Barge."

Approximately one year [later] Goldsboro . . . indicated that this statement was not true; he reiterated that it was in fact defendant who shot Syders on Thanksgiving night.

. . . .

At trial, . . . Goldsboro explained that he did not initially identify defendant because he was afraid for himself and the safety of his family.

Two inmates housed with defendant at the Camden County Jail also testified at trial.

. . . .

Both [Jamal] Gibbs and [Andre] Munday admitted they hoped their cooperation would reduce the sentences they would receive.

. . . .

According to Gibbs, defendant communicated to him that he approached or "checked" Nick Syders at a bar and that the two of them "had words" and it got "heated." When defendant was later shot, defendant believed that "it was Nick [Syders's] work." On Thanksgiving, somebody called defendant and told him that Nick was at the Off Broadway bar downtown. Defendant went there and "got at" Nick when he was in a car . . . . Gibbs explained that

"you don't want to come out and say I killed him. You want to say I got at him."

. . . .

Munday testified that . . . [d]efendant ran up to the car and as soon as Nick started his engine, "Rich shot him."

. . . .

Defendant testified and denied he killed Nicholas Syders or had any knowledge of the crime.

. . . .

In addition to defendant, three witnesses testified on defendant's behalf . . . . All three women testified that defendant had Thanksgiving dinner with them at Vanessa's apartment at approximately 10:00 p.m. that night and that, except for leaving for a few minutes at approximately 6:00 or 6:30 p.m. to drive his son home, defendant was at the apartment from the late afternoon until approximately 11:00 p.m. or midnight.

. . . .

[Defendant] stated that Gibbs and Munday were lying when they testified that he admitted his involvement in Syders's death and maintained that he had "no idea" what all three of them were "talking about."

Defendant acknowledged that he . . . [was] at the Nice Little Bar . . . approximately three weeks before the homicide . . . . He admitted that he and Nick had "words" but denied it ever got physical. Defendant also testified that he was shot after the incident with Nick Syders at the Nice Little Bar.

[Barge, supra, No. A-4970-09 (slip op. at 2-9).]

In 2014, defendant filed a pro se PCR petition raising ineffective assistance because of his trial counsel's alleged failure to investigate an eyewitness to the shooting and to raise at trial instances of "prosecutorial misconduct" involving the introduction of gang activity evidence. After PCR counsel was appointed, defendant submitted a certification raising other issues and, of those, defendant pursues on appeal the alleged failure to request a limiting instruction regarding his altercation with Syders three weeks earlier.[2]

[2] Defendant does not pursue the prosecutorial misconduct claim. Defendant's PCR petition additionally claimed his counsel was not familiar with discovery because he was not aware defendant was shot after the incident with Syders, his sentence was excessive because mitigating factor eleven should have been considered, and there were cumulative errors. Defendant supported the failure to investigate claim with a certification from Terrance Damon, dated February 20, 2015, that contended Andre Munday and Jamal Gibbs are "'jailhouse rats' and they have reputations for getting favors from authorities for providing information about inmates' cases." In 2010, while trial was in progress, defendant submitted a 2010 certification from Damon "in which he stated that Gibbs admitted to him that he was reviewing discovery of inmates and then lying . . . to get a better sentence." Barge, supra, No. A-4970-09 (slip op. at 23). We affirmed the trial court's rejection of that claim as a basis for a new trial. Id. (slip op. at 24).

Judge Blue addressed all of the issues defendant raised in his PCR. He has only appealed two issues, and thus he has waived the others. See N.J. Dep't of Envtl. Prot. v. Alloway Twp., 438 N.J. Super. 501, 506 n.2 (App. Div.) ("An issue that is not briefed is deemed waived upon appeal." (citations omitted)), certif. denied, 222 N.J. 17 (2015).

Defendant submitted a May 7, 2015 certification from James Jordan III (Jordan) in support of his PCR petition. Jordan claimed that he was working at the Off Broadway Lounge as a doorman on Thanksgiving 2007, the night Syders was killed, and witnessed "a man fire[] shots into a vehicle outside of the bar." Jordan certified that he "had seen Richard Barge come in and out of the bar, as a regular customer, for a couple of years before this incident," and that "[t]he shooter was not Richard Barge." Jordan claimed in his certification that the reason he did not come forward with this information or "talk[] to anyone about the incident" was that he "did not want to get involved in the aftermath of it all and lose my job."

Judge Gwendolyn Blue denied defendant's PCR petition on May 8, 2015, following oral argument.[3] In her thorough oral opinion, Judge Blue rejected defendant's claim that his trial counsel's investigation was inadequate.

> There is absolutely no certification that James Jordan's name was given to defense counsel for investigation in this case. And I draw a reasonable inference that the reasons why it wasn't given to defense counsel is because no one knew about James Jordan as a witness.

[3] We limit our discussion to the issues defendant has raised on appeal.

> James Jordan himself says, I never talked to anyone about the incident, because I did not want to get involved.
>
> There's no certification that defense counsel did not go out to that bar to conduct an investigation.
>
> . . . .
>
> As there is absolutely nothing that shows the [c]ourt that defense counsel failed to conduct an investigation in this matter, there's nothing that supports it.
>
> And for the record, I want to make it clear what my distinction is.
>
> What you have here is something from James Jordan that may be considered newly-discovered evidence, but that's not what a Post-Conviction Relief [a]pplication is.

Judge Blue also rejected defendant's claim that trial counsel erred by not requesting a limiting instruction under N.J.R.E. 404(b) following testimony about the fight three weeks earlier. Judge Blue found "[t]here is absolutely no showing that the State used this evidence to show anything other than possibly motive or intent for the shooting[,]" and that defendant "himself[] took the stand and testified . . . that he and the victim had some type of argument prior to the victim's death." Accordingly, the judge found that defendant "failed to show the [c]ourt how such an instruction would have changed the outcome of the case."

Defendant appeals the May 8, 2015 order denying his PCR petition by raising the following issues:

> THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF TRIAL COUNSEL'S INEFFECTIVENESS.
>
> > A. Trial Counsel Failed To Conduct An Adequate Investigation, Which Would Have Resulted In The Testimony Of An Exculpatory Witness.
> >
> > B. Trial Counsel Failed To Request A Limiting Instruction Regarding A Prior Altercation Between Defendant And The Victim.

We are not persuaded by defendant's arguments and affirm.

The standard for determining whether counsel's performance was ineffective for purposes of the Sixth Amendment was formulated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42 (1987). In order to prevail on an ineffective assistance of counsel claim, defendant must meet a two-prong test by establishing that: (1) counsel's performance was deficient and he or she made errors that were so egregious that counsel was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution; and (2) the defect in performance prejudiced defendant's rights to a fair trial such that there exists "a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." Strickland, supra, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 2068, 80 L. Ed. 2d at 693, 698.

"[W]hen a petitioner claims his trial attorney inadequately investigated his case, he must assert the facts an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." State v. Porter, 216 N.J. 343, 353 (2013) (alteration in original) (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999)).

Defendant's argument about lack of investigation is that because an alleged eyewitness has now stepped forward, there must have been a failure by counsel to investigate. Because defendant had no evidence to connect these two concepts, we agree that the PCR court properly rejected this non sequitur. We assess the reasonableness of an attorney's performance "on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, supra, 466 U.S. at 690, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695. All that defendant showed was that now there is an alleged eyewitness who did not want to step forward earlier. Although this information might form the subject of an application for a new trial, see State v. Ways, 180 N.J. 171, 187 (2004), we

agree with the PCR court that under the Strickland/Fritz analysis, it did not prove counsel's performance was deficient.

Defendant contends his trial counsel erred by not requesting a limiting instruction under N.J.R.E. 404(b) regarding evidence of defendant's earlier confrontation with Syders. We agree with the PCR court that the lack of a limiting instruction did not warrant post-conviction relief.

N.J.R.E. 404(b) provides,

> [e]xcept as otherwise provided by [N.J.R.E.] 608(b), evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.
>
> [(Emphasis added).]

At trial, both sides presented evidence about the earlier confrontation as it related to defendant's possible motive. Defendant contended the confrontation was minor. The lack of a request for a limiting instruction reasonably could have been part of the strategy at trial to minimize the incident consistent with defendant's theory of the case and not an error by counsel that "fell below an objective standard of reasonableness." Strickland, supra, 466 U.S. at 688, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

"[A] court must indulge a strong presumption that counsel's conduct falls well within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694-95. See also State v. Chew, 179 N.J. 186, 217 (2004) ("[I]f counsel makes a thorough investigation of the law and facts and considers all likely options, counsel's trial strategy is 'virtually unchallengeable.'") (citation omitted)). Moreover, if an instruction were given, we agree with Judge Blue that defendant did not show there was "a reasonable probability that . . . the result of the proceeding would have been different." See Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

We are satisfied from our review of the record that defendant failed to make a prima facie showing of ineffectiveness of trial counsel within the Strickland/Fritz test. Accordingly, the PCR court correctly concluded that an evidentiary hearing was not warranted. See State v. Preciose, 129 N.J. 451, 462-63 (1992).

Affirmed.