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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1124-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EYVONNE ALEXANDER, a/k/a
EYVONNE D. ALEXANDER,
EVYONNE D. BULLOCK,

Defendant-Appellant.

Submitted June 7, 2017 – Decided June 28, 2017

Before Judges Simonelli and Carroll.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 09-02-0184.

Joseph E. Krakora, Public Defender, attorney for appellant (Andrew P. Slowinski, Designated Counsel, on the brief).

Grace H. Park, Acting Union County Prosecutor, attorney for respondent (Cynthia L. Ritter, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Eyvonne Alexander appeals from the denial of her petition for post-conviction relief (PCR) without an evidentiary hearing. For the reasons that follow, we affirm.

Following a bench trial, defendant was convicted of first-degree kidnapping by unlawfully removing a child from a place of business with the purpose to permanently deprive a parent of custody, N.J.S.A. 2C:13-1b(4) (count one); and first-degree kidnapping by unlawfully removing a child a substantial distance from the vicinity where the child was found with the purpose to permanently deprive a parent of custody, N.J.S.A. 2C:13-1b(4) (count two). The trial judge imposed concurrent twenty-year terms of imprisonment with an eighty-five percent period of parole ineligibility pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2.

On appeal, we affirmed defendant's conviction and sentence on count two. State v. Alexander, No. A-3298-11 (App. Div. May 27, 2014) (slip op. at 3). However, we reversed defendant's conviction on count one, finding that N.J.S.A. 2C:13-1b(4) was inapplicable to the charged conduct because defendant did not take the victim from defendant's own place of business. Id. at 5. We remanded to the trial court solely to amend the judgment of conviction. Id. at 6. The Supreme Court thereafter denied certification. State v. Alexander, 220 N.J. 99 (2014).

The facts underlying defendant's conviction are set forth in our earlier opinion. We repeat them here to lend context to the issues raised by defendant in her PCR petition that followed:

On October 16, 2008, defendant took a three-year-old child, J.A., from a store in Elizabeth without the permission of the child's mother. Defendant took J.A. to her boyfriend's place of business and then to her home in Rahway, which was approximately 5.68 miles from the store in Elizabeth. While at her home, defendant changed J.A.'s clothing and hairstyle and removed a necklace bearing the child's name. She then returned to her boyfriend's place of business, where she was arrested.

Defendant did not dispute she took J.A. from the store without the mother's permission. The issue at trial was her state of mind. The State claimed that she took J.A. in order to pass her off to her boyfriend as his child. Defendant claimed she was insane, mentally ill, or thought J.A. had been abandoned, was in danger, and needed her protection. The trial was essentially a "battle of the experts" who testified about defendant's mental state.

[Alexander, supra, slip op. at 3-4.]

On January 7, 2015, defendant filed a pro se PCR petition in which she failed to specify any factual basis or legal argument upon which her claim for relief was based. With the assistance of PCR counsel who was thereafter appointed, defendant filed an amended petition asserting that she was denied the effective assistance of trial counsel. Specifically, defendant contended

that trial counsel was ineffective by: (1) failing to prepare the defense expert witness, Dr. Dawn Hughes, for trial or to call any other witnesses to offer testimony regarding defendant's mental disease or defect; and (2) stipulating to certain facts, which thus prevented defendant from offering witness testimony relevant to a showing of mental disease or defect.

Judge Robert J. Mega, who was also the trial judge, denied defendant's petition by order dated September 28, 2015. The judge issued a comprehensive written decision on the same date setting forth his findings and reasons for denying defendant any relief. Based on the detailed findings set forth in his opinion, Judge Mega concluded that defendant failed to satisfy the two-prong test of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), which requires a showing that trial counsel's performance was deficient and that, but for the deficient performance, the result would have been different.

With respect to defendant's first argument, that counsel failed to conduct a proper pre-trial investigation or interview Dr. Hughes, Judge Mega noted it was incumbent upon defendant to "do more than make bald assertions that [s]he was denied the effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999). Rather, a defendant must assert 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." Ibid. (citing R. 1:6-6). In rejecting defendant's argument, the judge explained:

Applying this analytical framework, the court finds that defendant has failed to present any competent evidence in support of her claim regarding trial counsel's alleged inadequate investigation. Defendant has not submitted any certifications or affidavits from other expert witnesses and has not made any proffer with respect to the testimony of same. Similarly, [d]efendant's assertion that trial counsel failed to prepare Dr. Hughes for trial is unsupported by the record before the [c]ourt and no documents have been offered to support the claim. Defendant makes this claim solely based on Dr. Hughes' performance while testifying.

The [c]ourt notes that counsel for both [d]efendant and the State conducted vigorous and extensive examinations of the experts. Each side had ample time and opportunity to question the experts on both cross and re-direct examinations. [The] State's expert[,], John Brick, Ph.D., was cross-examined twice by defense counsel. Kenneth Weiss, M.D.[,] was also cross-examined twice by the defense. Defendant's expert, Dawn Hughes, Ph.D., had the longest testimony. The [c]ourt specifically noted in its opinion that during her testimony, Dr. Hughes - while having a command of the subject area - gave an evasive answer when she was directly asked the key question of whether [d]efendant knew or did not know that taking the child was wrong. Dr. Hughes attempted to explain [d]efendant's action by reasoning that [d]efendant believed she was protecting the child. The [c]ourt identified this as an omission of the obvious

and a lack of candor with the [c]ourt, not as a sign of unpreparedness.

Consequently, the court finds that these allegations of ineffectiveness are based entirely on bald assertions and are "too vague, conclusory, or speculative to warrant an evidentiary hearing." [State v. Marshall, 148 N.J. 89, 158 (1997)]. Accordingly, the court does not find that trial counsel's performance in this regard was objectively deficient under Strickland. Having found that [defendant] fails to satisfy the first prong of the Strickland test, this court need not determine whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694[, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698].

Turning to defendant's second contention, Judge Mega found that:

[T]rial counsel's decision to stipulate to certain facts did not fall below an objective standard of reasonableness. The agreed-upon stipulations were sound trial strategy and do not meet the first prong of the Strickland test for ineffectiveness. Moreover, the [c]ourt had the ability to accept or reject the stipulated facts based on its own determination of their weight. Thus, [d]efendant has failed to make a prima facie showing on prong one – that trial counsel's performance was deficient as measured by an objective standard of reasonableness.

Further, notwithstanding that [d]efendant failed under prong one, [d]efendant fails prong two, as no evidence has been presented to this [c]ourt that the outcome would have changed by counsel doing anything that [d]efendant alleges counsel

failed to do. For example, no evidence has been presented that the decision to stipulate certain facts prejudiced [d]efendant in any way.

Judge Mega concluded that because defendant did not establish a prima facie showing of ineffective assistance of counsel, no evidentiary hearing was required. This appeal followed, in which defendant presents the following issues for our consideration:

POINT I

DEFENDANT'S CONVICTION SHOULD BE VACATED AS THE TRIAL JUDGE DID NOT ADEQUATELY ASSESS WHETHER DEFENDANT'S WAIVER OF HER RIGHT TO A JURY TRIAL WAS KNOWING AND VOLUNTARY UNDER THE TOTALITY OF THE CIRCUMSTANCES. (NOT RAISED BELOW).

POINT II

DEFENDANT'S CONVICTION SHOULD BE VACATED AS THE TRIAL COURT RELIED ON A VIDEOTAPED STATEMENT OF DEFENDANT'S INTERROGATION TAKEN IN VIOLATION OF HER FIFTH AMENDMENT RIGHTS UNDER MIRANDA V. ARIZONA.^[1] (NOT RAISED BELOW).

POINT III

THE PCR COURT'S DECISION SHOULD BE REVERSED AS DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN VIOLATION OF HER RIGHTS UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 10, PARAGRAPH 11 OF THE NEW JERSEY CONSTITUTION.

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

POINT IV

THE PCR COURT'S DECISION SHOULD BE REVERSED AND THIS MATTER REMANDED TO THE LAW DIVISION AS DEFENDANT'S PCR COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN REPRESENTING HER BEFORE THE PCR COURT. (NOT RAISED BELOW).

When petitioning for PCR, the defendant must establish, by a preponderance of the credible evidence, that he or she is entitled to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013); State v. Preciose, 129 N.J. 451, 459 (1992). To sustain that burden, the defendant must allege and articulate specific facts that "provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

As Judge Mega aptly noted, the mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing and the defendant "must do more than make bald assertions that [s]he was denied the effective assistance of counsel." Cummings, supra, 321 N.J. Super. at 170. Rather, trial courts should grant evidentiary hearings and make a determination on the merits only if the defendant has presented a prima facie claim of ineffective assistance. Preciose, supra, 129 N.J. at 462. To establish a prima facie claim of ineffective assistance of counsel, the defendant is obliged to show not only the particular manner in which counsel's performance was deficient, but also that the deficiency prejudiced her right to a fair trial. Strickland,

supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; State v. Fritz, 105 N.J. 42, 58 (1987).

There is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, supra, 466 U.S. at 690, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695. Further, because prejudice is not presumed, Fritz, supra, 105 N.J. at 52, a defendant must demonstrate with "reasonable probability" that the result would have been different had he received proper advice from his trial attorney. Lafler v. Cooper, 566 U.S. 156, 163, 132 S. Ct. 1376, 1384, 182 L. Ed. 2d 398, 406-07 (2012).

We have considered defendant's contentions with respect to the issues raised before the PCR court in light of the record and applicable legal principles and conclude that they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We therefore affirm on the issues raised in Point III of defendant's brief substantially for the reasons expressed by Judge Mega in his well-reasoned September 28, 2015 written opinion.

In Points I and II of her brief, defendant raises new issues that were not the subject of her PCR petition nor her argument before the PCR court. Specifically, defendant argues (1) that the trial court improperly allowed her to waive her right to a jury

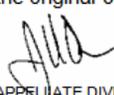
trial without ensuring that her waiver was knowing and voluntary; and (2) defendant's statement was taken in violation of her Fifth Amendment rights. Defendant further contends that PCR counsel was ineffective in failing to raise these issues, and in advancing the issues that were presented to the PCR court.

A PCR petition is not a substitute for an appeal of a conviction, Rule 3:22-3, and any available ground for relief not asserted in a prior proceeding is barred if it could have been raised earlier, Rule 3:22-4. Accordingly, defendant's belated claims concerning the waiver of her right to a jury trial and the violation of her Miranda rights are procedurally barred because they could and should have been raised on direct appeal. R. 3:22-4; State v. Afanador, 151 N.J. 41, 50 (1997).

Nor will we address the merits of these contentions, as they were not previously raised in defendant's PCR petition, not argued before the PCR court, and do not involve jurisdictional or public interest concerns. State v. Robinson, 200 N.J. 1, 20 (2009); State v. Arthur, 184 N.J. 307, 327 (2005); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). For similar reasons, we choose to withhold our review of claims about PCR counsel, which are generally reserved for "second or subsequent" PCR petitions. R. 3:22-4(b)(2)(C).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION