

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1140-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMES PINNOCK,

Defendant-Appellant.

Submitted June 7, 2017 — Decided June 29, 2017

Before Judges Alvarez and Accurso.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Indictment No.
03-09-0888.

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

Camelia M. Valdes, Passaic County
Prosecutor, attorney for respondent
(Christopher W. Hsieh, Chief Assistant
Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant James Pinnock appeals from the dismissal of his petition for post-conviction relief (PCR), contending he established a prima facie case of ineffective assistance of counsel requiring an evidentiary hearing. Because the trial judge correctly determined the evidence insufficient to sustain defendant's burden, we affirm.

Defendant was convicted by a jury of first-degree kidnapping, N.J.S.A. 2C:13-1b(1); two counts of first-degree robbery, N.J.S.A. 2C:15-1a(2) and (3); three counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2a(3), (4) and (5); third-degree terroristic threats, N.J.S.A. 2C:12-3b; third-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4a; and third-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5b, in connection with his and a co-defendant's sexual assault of a college student walking alone in Paterson on an August evening in 2003. The judge sentenced him to an aggregate forty-year prison term subject to the periods of parole ineligibility and supervision mandated by the No Early Release Act, N.J.S.A. 2C:43-7.2.

We affirmed defendant's conviction on direct appeal but remanded for reconsideration of defendant's sentence, to address merger and to correct the judgment of conviction, State v. Pinnock, No. A-6649-06 (App. Div. Mar. 8, 2010). The Supreme

Court denied defendant's petition for certification, 202 N.J. 45 (2010). On remand, the judge imposed the same aggregate sentence, which we reviewed on a sentencing calendar, R. 2:9-11, and affirmed. The Supreme Court again denied defendant's petition for certification. State v. Pinnock, 209 N.J. 99 (2012).

Defendant filed a petition for post-conviction relief based on claims of ineffective assistance of trial and appellate counsel as well as certain trial errors. Defendant claimed his trial counsel failed to prepare him to testify at trial and coerced him into not testifying on his own behalf, despite his lack of any criminal record. He further argued that the evidence was insufficient to support the kidnapping conviction, and that an error in the verdict sheet permitted the jury to convict him of kidnapping despite failing to find he acted knowingly.

Defendant claimed appellate counsel failed to argue the evidence was insufficient to support the jury's verdict, and had counsel done so that defendant's conviction would have been reversed. In a pro se submission, defendant reiterated counsel's argument about error in the verdict sheet and contended newly discovered evidence proved his innocence.

After hearing argument by counsel, the judge issued a written opinion denying the petition on the basis that defendant had failed to establish a prima facie claim for relief. See State v. Preciose, 129 N.J. 451, 462-64 (1992). The judge determined defendant's claims regarding the sufficiency of the evidence and the verdict sheet were barred by Rule 3:22-5 because they had already been raised and adjudicated, or by Rule 3:22-4(a) because they could have been raised and adjudicated on direct appeal. See State v. Nash, 212 N.J. 518, 546 (2013). Despite finding the claims procedurally barred, the judge nevertheless considered them on the merits and found both claims wanting.

The judge rejected defendant's claim that his counsel had coerced him into not testifying because it was clearly contradicted by defendant's lengthy colloquy with the trial judge and defense counsel on the record at trial, which the judge quoted in his opinion denying the petition. The judge rejected defendant's claim that his appellate counsel had been ineffective because he found defendant's arguments as to trial error without merit and thus not capable of having affected the outcome of the appeal.

The judge further rejected defendant's contention of newly discovered evidence proving his innocence. He concluded that

defendant's "bare allegations, without any supporting certifications or argument, clearly fall markedly short for post-conviction relief."

On appeal, defendant presents the following arguments through counsel:

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO DETERMINE THE MERITS OF HIS CONTENTION THAT HE WAS DENIED THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. The Prevailing Legal Principles Regarding Claims Of Ineffective Assistance Of Counsel, Evidentiary Hearings And Petitions For Post-Conviction Relief.

B. Trial Counsel Rendered Ineffective Legal Representation By Virtue Of Him Advising Defendant Not To Testify At Trial Without First Discussing Defendant's Proposed Trial Testimony And Possible Cross-Examination Questions With Him.

C. Appellate Counsel Rendered Ineffective Legal Representation By Virtue Of His Failure To Raise The Issue Of Trial Court Errors On Appeal.

D. Defendant Is Entitled To A Remand To The Trial Court To Afford Him An Evidentiary Hearing To Determine The Merits Of His Contention That He Was Denied The Effective Assistance Of Trial And Appellate Counsel.

He raises the following additional arguments by way of his pro se supplemental brief:

POINT ONE

THERE WAS A MISCARRIAGE OF JUSTICE[.] THE CLAIMS SHOULD NOT HAVE BEEN PROCEDURALLY BARRED WHEN THE STATE WAS RELIEVED OF THE HEAVY BURDEN OF PROVING ESSENTIAL ELEMENTS OF FIRST-DEGREE KIDNAPPING AND THE "SAFE PLACE" ELEMENT IS OMITTED FROM THE JURY CHARGE AND THE VERDICT SHEET DID NOT RECORD IF THERE WAS A UNANIMOUS VERDICT ON 2C:13-1b(1)/2C:2-6 UNLAWFULLY REMOVED OR UNLAWFULLY CONFINED OR 2C:13-1b(2)/2C:2-6 UNLAWFULLY REMOVED OR UNLAWFULLY CONFINED AND THE TRIAL JUDGE FOUND THE GENERAL VERDICT OF GUILT IN A JURY TRIAL BECAUSE THE VERDICT SHEET DID NOT RECORD WHICH THEORY THE DEENDANT WAS CONVICTED OF DUE PROCESS VIOLATION.

POINT TWO

MISCARRIAGE OF JUSTICE[.] INSUFFICIENT EVIDENCE TO CONVICT DEFENDANT ON COUNT 3 AND COUNT 4[.] STATE CANNOT PROVE THE ESSENTIAL ELEMENTS IN THE COURSE OF COMMITTING A THEFT AND SHARED INTENT AND NOT KNOWINGLY COMMITTING COUNT 2 THE INTENT TO COMMIT THE THEFT DURING OR BEFORE THE USE OF FORCE CANNOT BE PROVEN BY THE STATE BEYOND A REASONABLE DOUBT WITH THE ACQUITTAL OF COUNT 2[.] THIS CLAIM WAS NOT BARRED BY THE COURT UNDER RULE 3:22.

A judge's decision as to whether to hold an evidentiary hearing on a PCR petition alleging ineffective assistance of counsel is discretionary. Preciose, supra, 129 N.J. at 462. No hearing is required unless defendant has established a prima facie case, that is, a reasonable likelihood of success under the test established in Strickland v. Washington, 466 U.S. 668,

687-88, 694, 104 S. Ct. 2052, 2064, 2068, 80 L. Ed. 2d 674, 693, 698 (1984).


Under the Strickland two-part test, a defendant must establish, first, that "counsel's representation fell below an objective standard of reasonableness," and, second, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Ibid. A defendant must do more than demonstrate that an alleged error might have "had some conceivable effect on the outcome of the trial," instead, he or she must prove that the error is "so serious as to undermine our confidence in the jury's verdict." State v. Sheika, 337 N.J. Super. 228, 242 (App. Div.), certif. denied, 169 N.J. 609 (2001).

Our review of this record convinces us that Judge Taylor carefully considered each of defendant's claims. The judge's findings are well supported by sufficient credible evidence in the record. State v. Locurto, 157 N.J. 463, 472 (1999). We agree, on the basis of those findings, that defendant failed to demonstrate that the performance of his trial or appellate counsel was substandard or that, but for any of their alleged errors, the result would have been different as required by Strickland. Accordingly, we affirm substantially for the

reasons expressed by Judge Taylor in the comprehensive written statement of reasons accompanying his order of August 20, 2015, denying defendant's petition.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION