

## RECORD IMPOUNDED

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Although it is posted on the internet, this opinion is binding only on the  
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-1528-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

A.M.,

Defendant-Appellant.

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Submitted June 1, 2017 – Decided July 6, 2017

Before Judges Manahan and Lisa.

On appeal from Superior Court of New Jersey,  
Law Division, Ocean County, Indictment No. 07-  
10-1621.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Peter B. Meadow, Designated  
Counsel, on the brief).

Joseph D. Coronato, Ocean County Prosecutor,  
attorney for respondent (Samuel Marzarella,  
Chief Appellate Attorney, on the brief).

PER CURIAM

Defendant, A.M., appeals from the March 11, 2014 order denying  
his petition for post-conviction relief (PCR) without conducting  
an evidentiary hearing. Defendant is serving an aggregate sentence

of twenty-two years' imprisonment, fifteen years of which is subject to an eighty-five percent parole disqualifier under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. More particularly, defendant was sentenced on two counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2a, to fifteen-year NERA terms to be served concurrently; he was also sentenced on one count of second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4a, to a consecutive term of seven years. Additionally, defendant was sentenced to community supervision for life under Megan's Law, and all appropriate penalties and assessments were imposed.

The convictions arose out of three sexual offenses defendant committed against his granddaughter between 2000 and 2002. At the time of the first offense, the victim was five years old. She was six years old at the time of the second offense and seven years old at the time of the third offense. At that time, defendant was between seventy and seventy-two years old. The indictment was returned in 2007. Defendant went to trial in 2009. After he was convicted, he filed a direct appeal, and we affirmed his conviction and sentence. State v. A.M., No. A-1190-09 (App. Div. Feb. 4, 2011).

In his pro se PCR petition, defendant raised two arguments. He first claimed that his trial counsel was deficient during the

voir dire process for not inquiring into potential bias of prospective jurors, failing to exercise peremptory challenges to remove jurors who were related to law enforcement officers, and allowing a jury to be selected that was "full of females with children, where the ratio was 3 to 1 females." In his second argument, he contended his trial counsel was deficient for failing to communicate a plea offer that could have resulted in a lower sentence.

Defendant obtained counsel, who filed a supplemental PCR brief raising the following three issues:

POINT I.

MR. [M.] WAS DENIED HIS RIGHT TO REMAIN SILENT AND RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO TRIAL COUNSEL'S REMARKS DURING HER OPENING STATEMENT THAT MR. [M.] WOULD TESTIFY DURING THE TRIAL.

POINT II.

MR. [M.]'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE'S REFERENCE TO IMPER[M]ISSIBLE EVIDENCE DURING THE STATE'S DIRECT EXAMINATION OF MS. [V.] AND ITS CLOSING.

POINT III.

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND OFFER EVIDENCE OF C.V.'S BIAS AND MOTIVE DURING CROSS EXAMINATION AND THE DEFENSE'S CASE.

Judge Robert A. Coogan heard oral argument on the PCR petition on February 25, 2014. He reserved decision and issued a fifteen-page written decision on March 11, 2014, together with an accompanying order, denying defendant's petition.

In his decision, the judge discussed at length his basis for rejecting the three points raised by defendant's counsel. The judge did not specifically address the two points raised by defendant in his pro se petition nor were those points addressed by counsel during the oral argument. Perhaps they were deemed abandoned as having been superseded by the arguments raised in the supplemental brief filed by defendant's counsel.

On appeal, defendant now raises a single issue:

THE POST-CONVICTION RELIEF COURT BELOW ERRED  
IN DENYING DEFENDANT'S PETITION WITHOUT THE  
BENEFIT OF AN EVIDENTIARY HEARING.

We are unpersuaded by defendant's argument, and we affirm.

In Judge Coogan's written decision, he rejected the argument that defendant was "forced" to testify because his attorney told the jury in her opening statement that he would. To the extent that defendant argued under this point that his Fifth Amendment right against self-incrimination was violated, the judge concluded that the claim was procedurally barred by Rule 3:22-4 because it could have been raised on direct appeal. The trial record contained colloquy between the trial judge and defendant regarding

his right to testify. During that colloquy, trial counsel advised the court that defendant had stated all along that he wanted to testify. In response to the judge's questions, defendant acknowledged that it was his choice to testify, he understood that he did not have to testify and would be entitled to an instruction advising the jury that they could not draw an adverse inference from his failure to testify, and he acknowledged that his decision was made without coercion or force. The judge further found that because it was allegedly because of defense counsel's conduct, not that of the prosecutor or the court, that defendant now asserts he was compelled to testify, there could be no Fifth Amendment violation.

Addressing the ineffective assistance claim, the judge concluded that, applying the Strickland/Fritz<sup>1</sup> test, defendant could not prevail on either the deficiency or prejudice prong. The judge concluded that counsel made a reasoned strategic decision, and pursued an appropriate trial strategy in which defendant would testify. It is noteworthy that in pretrial proceedings, the trial court ruled that tape recorded conversations in which defendant admitted to the misconduct and

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<sup>1</sup> Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Fritz, 105 N.J. 42 (1987).

his statement to the police in which he also admitted to it would be admissible at trial. Accordingly, it was reasonable to develop a trial strategy in which defendant would testify, deny the incidents, and provide his explanation for any misunderstanding he contended might have arisen from his prior statements that would be in evidence.

Thus, Judge Coogan, abiding by the principle that counsel should be accorded a presumption of reasonable strategic decisions and should not be second-guessed in hindsight, concluded that counsel's decision did not constitute deficient conduct. Further, in light of the strong evidence against defendant, which included his own words admitting to the offenses, there was no reasonable probability that the result would have been different had he not testified.

We further note that defendant did not submit an affidavit or certification stating that he did not authorize his attorney to tell the jurors he would testify, that he disagreed with that strategy, that he would not have testified had his counsel not so informed the jury, or the like. Under these circumstances, an after-the-fact bald assertion that counsel's opening statement constituted ineffective assistance could not establish a prima facie case of ineffective assistance. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999).

Judge Coogan also concluded that the second point raised in PCR counsel's brief was procedurally barred by Rule 3:22-5, which provides that "[a] prior adjudication upon the merits of any ground for relief is conclusive." On this point, defendant argued that in providing fresh complaint testimony, the victim's mother described prejudicial details that went beyond what is permitted in such testimony. The trial court gave a curative instruction. In summation, the prosecutor referred to the same impermissible testimony. There was no objection and no further curative instruction.

Defendant raised this issue on direct appeal. We agreed that the details of what the victim told her mother should not have been permitted as part of the fresh complaint testimony. We concluded, however, that any error was harmless. We further concluded that the prosecutor's reference to that testimony in summation was fleeting and did not have the probability of affecting the outcome.

On the third point raised in the brief filed by defendant's PCR counsel, Judge Coogan noted that trial counsel did cross-examine C.V. extensively regarding her potential bias, going as far as the trial court would permit. Judge Coogan found that neither prong of the Strickland/Fritz test was met on this point.

Imbedded in defendant's argument on this point was his contention that his trial counsel failed to investigate the claim of bias by C.V. that he now claims should have been, but was not, exposed at trial. However, he has failed to produce an affidavit or certification by anyone with personal knowledge of what such an investigation would have revealed. Therefore, under Cummings, he could not make a prima facie showing on this point. See Cummings, supra, 321 N.J. Super. at 170.

Based upon our review of the record with respect to these three points, we concur with Judge Coogan's findings, analysis, and conclusions. None of these three arguments entitled defendant to relief, nor did they establish a prima facie case that would have entitled him to an evidentiary hearing.

We address the two points defendant raised in his pro se PCR petition because he has raised them in his appellate brief. These points lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We nevertheless make these brief comments.

In the first point, defendant contends that his attorney was deficient during voir dire. First, he has not provided transcripts of the voir dire, which makes appellate review impossible. Second, he has not pointed to any specific instances of deficient conduct. He relies on his unsubstantiated assertion that his attorney picked


a jury that he now claims, after-the-fact, was not likely to be receptive to his case. These bald allegations provide no basis for relief, nor do they establish a prima facie case that would require an evidentiary hearing.

In his second point, defendant contends that his trial counsel failed to communicate a plea offer that could have resulted in a lower sentence. This contention is also unsupported by an affidavit or certification. Further, it is contradicted by defendant's pro se PCR brief, in which he said his trial counsel did approach him with several plea bargain offers, one for ten years, another for eight years, and a third for seven years. He contended that he was interested in the seven year offer, but his counsel did not provide him sufficient information "on the penal consequences of the plea bargain." These conflicting and conclusory statements constitute nothing more than bald assertions and lack sufficient facts contained in an affidavit or certification to establish a prima facie case of deficient conduct.

We affirm substantially for the reasons expressed by Judge Coogan in his written decision of March 11, 2014, as supplemented by our discussion of the two points defendant raised in his pro se PCR 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