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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-2837-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SEAN STOVEKEN,

Defendant-Appellant.

Submitted March 1, 2017 – Decided March 22, 2017

Before Judges Simonelli and Carroll.

On appeal from the Superior Court of New
Jersey, Law Division, Passaic County,
Municipal Appeal No. 6072.

Basile Birchwale & Pellino, LLP, attorneys for
appellant (Stephen F. Pellino and Florence D.
Nolan, on the briefs).

Camelia M. Valdes, Passaic County Prosecutor,
attorney for respondent (Marc A. Festa, Senior
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant Sean Stoveken appeals from a February 10, 2016 Law
Division order denying his petition for post-conviction relief
(PCR) without an evidentiary hearing. Defendant sought to overturn

his 2012 guilty plea that constituted his then second conviction for driving while under the influence (DWI), N.J.S.A. 39:4-50. Defendant's claim that trial counsel was ineffective came before the Law Division as an appeal, under the provisions of Rule 3:23-1, from a similar decision made by the Wanaque Municipal Court pursuant to Rule 7:10-2. We affirm.

The facts and procedural history pertinent to this appeal are essentially undisputed. Defendant, represented by counsel, pled guilty to DWI in the Wanaque Municipal Court on July 24, 2012. The transcript of that proceeding has not been supplied, and is purportedly unavailable. Defendant did not appeal that conviction.

On March 26, 2015, defendant was again arrested and charged in Wanaque with DWI and refusal to take a breath test. Thereafter, defendant filed a PCR petition in the Wanaque Municipal Court seeking to vacate his 2012 guilty plea. In his verified petition, defendant asserted that, after reviewing the discovery relating to his 2012 conviction with PCR counsel, he "ascertained that there is a clear and distinct issue as to whether or not he was properly observed for a twenty[-]minute time period prior to the administration of the Alcotest as required by the Supreme Court in . . . State v. Chun, 194 N.J. 54 (2008)." Defendant further asserted that he performed well on the videotaped field sobriety

tests and would not have pled guilty had trial counsel raised and discussed the Alcotest issue with him. PCR counsel submitted a separate certification indicating that he had reviewed the discovery and videotape in connection with defendant's 2012 arrest, and consulted with a DWI expert, Joseph Tafuni, who opined that three of the field sobriety tests were "not scientifically validated for determining alcohol impairment[,]" and that defendant passed the other two tests.

Judge Ronald B. Sokalski denied defendant's petition after considering the arguments of counsel. The judge found defendant's allegations "speculative and conclusory" and that "[d]efendant has not presented credible evidence to justify granting this [PCR] application." Specifically, the judge noted that defendant failed to supply the discovery materials, including the Alcohol Influence Report, with respect to the administration of the Alcotest. Defendant also failed to provide the court with the videotape to support his contention that he did not appear intoxicated and performed well on the field sobriety tests.

Defendant now appeals from the memorializing order. Renewing the arguments he raised before the trial court, defendant presents the following points for our consideration:

I. THE STATE DID NOT DISPUTE THE FACTUAL
ASSERTIONS OF DEFENDANT IN THE HEARING BELOW.

II. THE FAILURE OF THE STATE TO PROVE A TWENTY[-]MINUTE OBSERVATION OF A DWI DEFENDANT PRIOR TO THE ADMINISTRATION OF THE [ALCOTEST] MAKES THE [ALCOTEST] READINGS INADMISSIBLE.

III. THE FAILURE OF [TRIAL] COUNSEL TO IDENTIFY THE TWENTY[-]MINUTE ISSUE, AND TO DISCUSS SAME WITH [] DEFENDANT, CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL, JUSTIFYING THE GRANT OF PCR RELIEF.

IV. THE TRIAL COURT ERRED IN NOT ORDERING AN EVIDENTIARY HEARING ON DEFENDANT'S [PETITION] FOR [PCR].

We reject these arguments substantially for the reasons expressed by Judge Sokalski in his February 10, 2016 oral opinion. We add only the following brief comments.

The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999). 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. State v. Preciose, 129 N.J. 451, 459-64 (1992). "[I]n order to establish a prima facie claim, [the defendant] 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." Cummings, supra, 321 N.J. Super. at 170.

Here, as Judge Sokalski aptly noted, except for his bald assertions, defendant presented no competent evidence that trial counsel was ineffective. Defendant did not submit any of the discovery that would support his claim that the police failed to comply with the requisite twenty-minute observation period before administering the Alcotest. He also did not submit the videotape he claims demonstrates that he was not impaired. Defendant also presented no expert report or affidavit to substantiate his contentions that the Alcotest readings were inadmissible, or that some of the field sobriety tests were not scientifically reliable and he successfully performed the others. PCR counsel's certification attesting to opinions purportedly expressed by the DWI expert, Tafuni, does not constitute competent evidence of such expert opinions. See Murray v. Allstate Ins. Co., 209 N.J. Super. 163, 169 (App. Div. 1986); R. 1:6-6.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION