

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
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-3216-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAVID GASKINS,

Defendant-Appellant.

Submitted October 31, 2017 – Decided December 28, 2017

Before Judges Yannotti and Carroll.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Indictment No.
08-05-0729.

Joseph E. Krakora, Public Defender, attorney
for appellant (Brian D. Driscoll, 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).

PER CURIAM

Defendant David Gaskins appeals from an order entered by the Law Division on December 15, 2015, which denied his petition for post-conviction relief (PCR). We affirm.

I.

Defendant was charged with third-degree possession of a controlled dangerous substance (CDS), cocaine, N.J.S.A. 2C:35-10(a)(1) (count one); first-degree possession of a CDS, cocaine, with intent to distribute, in a quantity of five ounces or more, N.J.S.A. 2C:35-5(a)(1) and (b)(1) (count two); third-degree possession of a CDS, heroin, N.J.S.A. 2C:35-10(a)(1) (count three); third-degree possession of a CDS, heroin, in the quantity of less than one-half ounce, with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and (b)(3) (count four); first-degree maintaining a CDS production facility, N.J.S.A. 2C:35-4 (count five); second-degree possession of a weapon while committing certain CDS offenses, N.J.S.A. 2C:39-4.1 (count six); and second-degree possession of a weapon by certain persons not to have weapons, N.J.S.A. 2C:39:7(b) (count seven).

In our opinion on defendant's direct appeal, we summarized the evidence presented at trial. State v. Gaskins, No. A-6204-09 (App. Div. Jan. 10, 2014) (slip op. at 2-10). We noted that in September 2007, Detective Orlando Robinson of the Paterson Police

Department commenced an investigation of a suspected drug dealer with the street name of "Divine." Id. at 2.

A confidential informant (CI) told Robinson that Divine was a black male who made deliveries of crack cocaine from a 1991 Dodge van with a New Jersey license plate number. Id. at 3. The CI said Divine possessed weapons and operated out of a location on River Street in Paterson. Ibid.

Robinson arranged for the CI to make a "controlled buy" of illegal drugs from Divine. Ibid. The CI contacted Divine, and Robinson observed a man exit the River Street Location. Id. at 3. The CI identified the man as Divine, and the CI met the man at a prearranged site. Id. at 3-4. The CI gave Robinson a quantity of crack cocaine that he had purchased with the money that Robinson had provided to him. Id. at 4.

Robinson checked the registration on the 1991 Dodge van and learned that the van was registered to Frankie Gaskins, Jr., who resided on 12th Avenue in Paterson. Ibid. During his search for a photo of Frankie Gaskins, Jr., Robinson came across a photo of defendant, who the CI later positively identified as Divine. Ibid.

In October 2007, Robinson conducted further surveillance of defendant and saw him leave the River Street location, enter the Dodge van, and later meet with known drug dealers. Id. at 5. At those meetings, the drug dealers entered the van and remained in

the van for a short period. Ibid. Thereafter, defendant would return to the River Street location. Ibid.

Based on these facts, Robinson sought a warrant to search the second-floor apartment and attic of the River Street location, defendant's person, and the van that defendant was seen using. Ibid. The search warrants were issued and executed on November 5, 2007. Ibid. Defendant was found in the stairwell between the second floor and attic. Ibid. Defendant was arrested and the officers recovered keys from his pocket. Id. at 5-6. He was in possession of \$1017 in cash. Id. at 6.

The officers used the keys to open a closed closet door in the front bedroom of the apartment. Ibid. They found a large quantity of suspected crack cocaine. Ibid. They also found a jacket which contained documents addressed to David L. Gaskins, a handgun, and thirty-three glassine envelopes of suspected heroin. Ibid.

In the bedroom, the officers also found mail and a receipt with defendant's name, drug paraphernalia, a digital calculator, a digital scale, and other evidence. Ibid. Additional bags of suspected crack cocaine were found in another bedroom. Id. at 6-7. The suspected drugs tested positive for CDS. Id. at 7.

Audrey Robinson testified for the defense. Id. at 8. Ms. Robinson stated that defendant lived with her in a residence on Sheridan Street in Paterson. Ibid. She said he was only present

at the River Street location to take care of a pet belonging to his cousin, Frankie Gaskins. Ibid. She also said defendant was the father of her three children.

Defendant elected not to testify. Ibid. However, he presented a letter from a cable provider, which indicated that other individuals had been billed for service at the second-floor apartment on River Street. Ibid. In addition, defendant presented utility bills for the apartment addressed to one of those individuals. Ibid.

The jury found defendant guilty on all counts. Ibid. Thereafter, the trial judge denied defendant's motion for a new trial based on newly discovered evidence, and granted the State's motion for imposition of an extended term pursuant to N.J.S.A. 2C:43-6(f). Id. at 8-9. The judge sentenced defendant to an aggregate term of twenty-nine years of incarceration, with sixteen years of parole ineligibility. Ibid.

Defendant appealed from the judgment of conviction dated July 30, 2010, and raised the following arguments:

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE BECAUSE THERE WERE INSUFFICIENT FACTS SUPPORTING A FINDING OF PROBABLE CAUSE.

POINT II

THE COURT ERRED IN REFUSING TO DISCLOSE THE IDENTITY OF THE CONFIDENTIAL INFORMANT AND SURVEILLANCE POINTS.

A. The Court erred in denying defendant's motion to discover the identity of the CI.

B. The Court erred in denying defendant's motion to disclose surveillance points.

POINT III

DEFENDANT'S RIGHT TO CONFRONT WITNESSES AGAINST HIM WAS DENIED DUE TO THE ABSENCE OF REQUIRED HEARINGS ON HIS MOTIONS TO OBTAIN DISCOVERY AND TO SUPPRESS EVIDENCE.

POINT IV

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO EXPLORE THE ISSUE OF THIRD-PARTY GUILT.

POINT V

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AT THE END OF THE STATE'S CASE; THE ABSENCE OF EVIDENCE OF DEFENDANT'S POSSESSION OF ANY ITEMS IN THE BACK ROOM REQUIRED THE COURT TO SUA SPONTE STRIKE JURY CONSIDERATION OF THAT EVIDENCE. R. 3-18-1; R. 2:10-2.

POINT VI

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL BASED ON NEWLY-DISCOVERED EVIDENCE. R. 3:20-1.

POINT VII

DEFENDANT'S SENTENCE WAS EXCESSIVE.

We rejected defendant's arguments on appeal and affirmed defendant's convictions and sentences. Gaskins, No. A-6204-09

(slip op. at 26). The Supreme Court denied defendant's petition for certification. State v. Gaskins, 218 N.J. 531 (2014).

II.

In August 2014, defendant filed a pro se petition for post-conviction relief (PCR). The court appointed PCR counsel to represent defendant. Counsel did not file an amended petition. Defendant later filed a certification dated May 22, 2015, in which he asserted that he was denied the effective assistance of appellate counsel.

In his certification, defendant stated that his appellate attorney was deficient because counsel failed to argue that: (1) the trial court erred by failing to strike the testimony of Detective Robinson that he had seen defendant selling drugs on prior occasions; (2) the assistant prosecutor engaged in misconduct by questioning Robinson about the two-week period prior to his arrest and the related underlying investigation; (3) the prosecutor improperly badgered Audrey Jackson on the witness stand by asking her if there was a time in the previous twenty years when defendant did not live with her; (4) the prosecutor committed misconduct during summations when he attacked and belittled the defense; and (5) the prosecutor inflamed the jury by placing the gun, ammunition, and all of the drugs within reach of the jurors.

On December 3, 2015, the PCR court heard oral argument on the petition. At the argument, PCR counsel stated that defendant was "arguing that he received ineffective assistance of Appellate counsel, not his trial counsel." PCR counsel presented arguments in support of the claims in defendant's certification.

On December 15, 2015, the PCR judge placed his decision on the record. The judge rejected defendant's claim that appellate counsel was deficient because counsel did not argue on appeal that the court erred by failing to strike certain statements in Detective Robinson's testimony, which allegedly gave the jurors the impression defendant was a drug dealer.

In his decision, the judge noted that on cross-examination, defense counsel elicited Robinson's testimony and no motion was made to strike the testimony or issue a curative instruction to the jurors. The judge found that it was defense counsel's strategic decision to elicit this testimony. The judge determined that defendant had not shown that if appellate counsel had raised this issue, the outcome of the appeal would have been different.

The judge then addressed defendant's claim that appellate counsel erred by failing to argue on appeal that the prosecutor improperly badgered Audrey Jackson on cross-examination. Defendant asserted that the prosecutor asked Ms. Jackson whether there was any time in the previous twenty years when defendant did not reside

with her. According to defendant, the question was improper because the prosecutor knew that in this period, defendant had been incarcerated at least eight times.

The judge found that appellate counsel did not err by failing to raise this issue on appeal. The judge determined that the prosecutor properly questioned Ms. Jackson regarding her personal knowledge of defendant's handwriting, employer, work hours, and the reasons he went to the River Street apartment, where the search warrant was executed and the CDS found. Defendant claimed he only went to the River Street location to feed his brother's cat.

The judge also rejected defendant's contention that appellate counsel was ineffective because counsel did not argue on appeal that the prosecutor improperly inflamed the jury during his closing argument by placing the gun, ammunition, and drugs within reach of the jury. Defendant asserted that the prosecutor placed these items near the jury to elicit an adverse reaction and motivate the jurors to convict him. The judge noted that these items had been admitted into evidence and the jurors had this evidence with them in the jury room during deliberations.

The judge concluded that defendant had not raised a prima facie case of the ineffective assistance of appellate counsel. Therefore, defendant was not entitled to an evidentiary hearing

on his petition. The judge entered an order dated December 15, 2015, denying PCR. This appeal followed.

On appeal, defendant raises the following arguments:

POINT I

DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL. (NOT RAISED BELOW).

POINT II

DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF PCR COUNSEL. (NOT RAISED BELOW).

POINT III

THE PCR COURT ERRED IN DENYING AN EVIDENTIARY HEARING.

III.

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee criminal defendants the right to the effective assistance of counsel. State v. O'Neil, 219 N.J. 598, 610 (2014) (citing Strickland v. Washington, 466 U.S. 668, 686 (1984); State v. Fritz, 105 N.J. 42, 58 (1987)). "The right to effective assistance includes the right to the effective assistance of appellate counsel on direct appeal." Ibid. (citing Evitts v. Lucey, 469 U.S. 387, 396 (1985)).

To succeed on his PCR claim of ineffective assistance of counsel, a defendant must meet the two-part test established by Strickland, 466 U.S. at 686, and adopted by our Supreme Court in Fritz, 105 N.J. at 58. Under Strickland, a defendant must show

that counsel made errors "so serious that counsel was not functioning as 'counsel' guaranteed by the Sixth Amendment." Strickland, 466 U.S. at 688. Counsel's performance is deficient if it "[falls] below an objective standard of reasonableness." Ibid.

A defendant also must show that counsel's "deficient performance prejudiced the defense." Id. at 687. The defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome" of the proceeding. Ibid.

On appeal, defendant does not argue that the PCR judge erred by finding he was not denied the effective assistance of appellate counsel. Rather, defendant argues for the first time on appeal that he was denied the effective assistance of trial counsel and PCR counsel.

Ordinarily, we would not consider arguments that were not raised and addressed by the trial court. Neider v. Royal Indemn. Ins. Co., 62 N.J. 229, 234 (1973) (citing Reynolds Offset Co. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959)). We have elected, however, to exercise our discretion and address these arguments

because the claims are entirely without merit and can be resolved based on the existing record.

A. Claims Pertaining to Trial Counsel

Defendant raises three claims of ineffective assistance on the part of his trial attorney. They pertain to Ms. Jackson's passing comment that defendant had been incarcerated, testimony by Detective Robinson, and alleged misconduct on the part of the assistant prosecutor.

1. Ms. Jackson's Testimony

Defendant asserts that during cross-examination, Ms. Jackson stated that defendant always paid the rent and other expenses for the apartment they shared except when he was incarcerated. Defendant asserts that defense counsel did not object to this statement, but raised the issue with the trial judge after defendant rested his case and the jury was excused. Defendant's counsel asked the judge to address the issue.

The judge acknowledged that Ms. Jackson had referred to incarceration, but the judge took no action. The judge noted that he heard the comment, but did not want to draw any attention to it. The judge said if defense counsel had objected to the comment when it was made, he would have taken some action. The judge stated that he thought defense counsel did not want to highlight the remark.

On appeal, defendant argues that it is clear from the record that trial counsel's performance regarding Ms. Jackson's comment was deficient and counsel's deficient performance prejudiced his defense. The State agrees that Ms. Jackson's mention of incarceration was improper, but argues that counsel's failure to object was reasonable under the circumstances. The State further argues that defendant was not prejudiced by the comment.

The record shows that Ms. Jackson had been asked whether defendant had always provided money to pay the rent and support their children. She replied, "Always." She stated that she never had a problem in this regard, but added, "Unless he's incarcerated then he can't pay it." The State notes the remark was isolated and not accompanied by any testimony that defendant had previously been convicted of a crime.

It should be noted that earlier, Ms. Jackson testified that the rent was not paid on November 5, 2007, and because the rent was not paid, she was forced to leave the apartment. The evidence showed that defendant was arrested on November 5, 2007. Thus, as the State argues, the jury could logically interpret Ms. Jackson's comment about "incarceration" as a reference to defendant's arrest on the charges at issue in this case.

Therefore, the record does not support defendant's claim that counsel was deficient in failing to object to Ms. Jackson's comment

about "incarceration." Moreover, the record does not support defendant's contention that he was prejudiced by counsel's failure to object. As noted, Ms. Jackson's comment was a passing reference to "incarceration" and there was no testimony defendant had previously been in jail on other charges.

2. Detective Robinson's Testimony

Defendant argues that his trial counsel was deficient because when he cross-examined Detective Robinson, he asked him whether he had ever seen defendant selling drugs. According to defendant, Robinson stated that he had seen defendant sell drugs. Defendant asserts defense counsel erred by failing to ask the trial judge to instruct the jury to disregard the statement.

The record shows that during his direct examination of Robinson, the assistant prosecutor asked him about his observations during the period from October 21, 2007, to November 5, 2007. Robinson stated that he personally observed defendant at the River Street location. He said he saw defendant talking on his cell phone on the second-floor porch.

During cross-examination, the following colloquy between defense counsel and Robinson ensued:

Q. Now, you don't know [defendant] personally, do you?

A. No.

Q. Prior to this incident, you hadn't seen him before, is that correct?

A. No.

Q. You've never seen him selling drugs, is that correct?

A. Prior to this incident?

Q. Right.

A. Yes.

Q. You have --

At this point, the assistant prosecutor objected, apparently out of concern that further questioning might elicit testimony about the CI. Out of the presence of the jury, the prosecutor noted that Robinson had been instructed not to mention the search warrant application.

Defendant's attorney stated that he did not intend to ask Robinson about prior drug transactions. Rather, he wanted to ask the detective if he "had seen [defendant] make any sales on the day of the arrest." The cross-examination of Robinson continued. Defense counsel told the judge he would strike the previous question and rephrase it. Counsel asked Robinson whether he observed defendant selling drugs on the day of his arrest, and Robinson replied, "No."

Thus, the record does not support defendant's assertion that his attorney erred by failing to object to Robinson's statement

that he had seen defendant selling drugs. As noted, Robinson answered "Yes" in response to the question, "You've never seen him selling drugs, is that correct?" Moreover, defense counsel asked the court to strike that question. He then asked Robinson whether he had observed defendant selling drugs on the day of his arrest, and Robinson said, "No."

Defendant further argues that his trial counsel was deficient because he failed to object when Robinson referred to an "affidavit." The record shows that, during direct examination, the assistant prosecutor asked Robinson about his observations of the River Street location from October 21 to November 5, 2007. On re-cross-examination, the following colloquy ensued between defense counsel and Robinson:

Q. While you were making those observations did you observe [defendant] sell any drugs?

A. I mean if you want me to answer that that's all part of the affidavit --

Q. Well, did you --

A. -- to answer that question.

Q. -- write that -- I'm going to show you what's been marked.

Defendant argues that Robinson's reference to the "affidavit" "obviously implied" that Robinson had seen him selling drugs during his observations. We disagree. The reference to an "affidavit" did

not imply that Robinson had seen defendant selling drugs, and it would be unreasonable to assume the jury would interpret the statement in that manner. Indeed, Robinson testified that he did not see defendant selling drugs in the period at issue.

We therefore conclude that defense counsel was not deficient in failing to object to Robinson's testimony regarding his observations of defendant or his reference to an "affidavit." Defendant also has not shown that he was in any way prejudiced by counsel's alleged deficient performance regarding Robinson's testimony.

3. Alleged Prosecutorial Misconduct

In addition, defendant claims defense counsel was deficient because he did not object to a comment by the assistant prosecutor in summation that "cultural differences" may be a possible explanation for Ms. Jackson's lack of knowledge about defendant and his work.

The record shows that in summation, defense counsel stated that Ms. Jackson might have appeared nervous because this was her first time in court. He commented upon Ms. Jackson's lack of knowledge about defendant's whereabouts and his job. He stated:

Well, I submit to you that possibly there's a cultural difference. Just because the [p]rosecutor's wife may know everything about . . . his job and his boss, and about where he is [twenty-four] hours a day, not everybody

has that same type of relationship. Perhaps it's a cultural difference.

In his summation, the assistant prosecutor also commented on Jackson's testimony. He stated:

Maybe it's a cultural difference. I don't know. Your common sense will control. [Your] alleged experiences will dictate whether you judge her credibility as truthful or not. She was with [defendant] for [eighteen] years, according to her testimony. They lived together. They had three [children] together. She didn't know what his hours were . . . you know, use your common sense and credibility. If you have a significant other and you've been together a significant period of time can you answer any of those questions?

"Prosecutors are afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented." State v. Frost, 158 N.J. 76, 82 (1999) (citing State v. Harris, 141 N.J. 525, 559 (1995); State v. Williams, 113 N.J. 393, 447 (1988)). A prosecutor's comments do not justify reversal of a conviction, unless the comments are "so egregious that [they] deprived the defendant of a fair trial." State v. Wakefield, 190 N.J. 397, 438 (2007) (citing State v. Smith, 167 N.J. 158, 181 (2001)).

As noted, the assistant prosecutor's comment was in response to the summation of defense counsel, who had cited "cultural difference" as a possible explanation for Ms. Jackson's lack of knowledge about defendant and his work. The comment was not

"improper" or "denigrating." Thus, there is no merit to defendant's claim that his attorney should have objected to the prosecutor's remark.

We therefore reject defendant's contention that he was denied the effective assistance of trial counsel.

B. Claims Regarding PCR Counsel

On appeal, defendant argues he was denied the effective assistance of PCR counsel. He contends PCR counsel was ineffective because he improperly framed all of defendant's claims as claims of ineffective assistance of appellate counsel.

We find no merit in this argument. Even if counsel erred by failing to claim defendant was denied the effective assistance of trial counsel, defendant was not prejudiced by any such error. We have addressed defendant's claims of ineffective assistance on the part of his trial attorney, and have determined that the claims have no merit. Thus, the result here would have been the same if those claims had been raised in the PCR court.

We therefore reject defendant's contention that he was denied the effective assistance of PCR counsel.


C. Evidentiary Hearing

Defendant further argues that the PCR court erred by denying his request for an evidentiary hearing on his petition. We disagree. Notwithstanding his arguments to the contrary, defendant

failed to establish a prima facie case of ineffective assistance of trial or appellate counsel, and the existing record was sufficient to resolve those claims. State v. Porter, 216 N.J. 343, 355 (2013) (citing R. 3:22-10(a)). Thus, an evidentiary hearing was not required.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION