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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-3724-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JUQUAN WALKER, a/k/a JAQUAN WALKER,

Defendant-Appellant.

Submitted May 31, 2017 – Decided July 21, 2017

Before Judges Messano and Grall.

On appeal from the Superior Court of New
Jersey, Law Division, Essex County, Indictment
Nos. 10-10-2488 and 10-10-2491.

Joseph E. Krakora, Public Defender, attorney
for appellant (Carolyn V. Bostic, Designated
Counsel, on the brief).

Carolyn A. Murray, Acting Essex County
Prosecutor, attorney for respondent (Stephen
A. Pogany, Special Deputy Attorney
General/Acting Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

Defendant Juquan Walker appeals the denial of his petition
for post-conviction relief (PCR) without an evidentiary hearing.

Tried before a jury, defendant was found guilty of drug offenses, as well as unlawful possession of a firearm, N.J.S.A. 2C:39-5(b), and possession of a firearm while in the course of committing certain drug offenses, N.J.S.A. 2C:39-4.1. In a second trial, the same jury found defendant guilty of possession of a firearm by a previously convicted person, N.J.S.A. 2C:39-7(b), the sole charge contained in a second indictment.¹

We briefly summarize the evidence adduced at trial.

Officers Patrick Carroll and John Berardi of the Port Authority Police Department were working in the camera room at Newark Penn Station on August 25, 2010. At approximately 8:50 p.m., they observed defendant and two other individuals jump over the turnstiles which separate the Port Authority Trans-Hudson (PATH) and New Jersey Transit (NJT) sides of the train platform. Berardi noted that defendant was carrying a backpack. After seeing defendant and his companions enter a PATH train, the officers left the camera room and approached the three men to issue summonses for failure to pay the fare.

Defendant claimed to be seventeen years old, but, when Carroll told defendant that, based on the birthdate defendant supplied, he was eighteen, defendant pushed Carroll and fled. The officers gave chase through the turnstiles and onto the NJT platform. As defendant ran, he threw the backpack onto the empty NJT tracks.

¹ Prior to sentencing, defendant pled guilty to second-degree burglary, N.J.S.A. 2C:18-2, a charge contained in a third indictment.

Carroll pursued defendant until he ran into a closed set of doors, whereupon the two collided. Defendant resisted Carroll's efforts to place him under arrest. Berardi joined the fray, and defendant was eventually subdued. Carroll walked onto the tracks and retrieved the bag that defendant had thrown. Inside was some cash, toothbrushes, clothing, a hand gun, twenty-four bags of marijuana, ten packets of cocaine and three separate vials of cocaine. Defendant's companions were never located.

Defendant was transported to the hospital by emergency medical personnel. He was treated for a laceration above his left eye and a contusion. Defendant did not testify and no defense witnesses were called.

[State v. Walker, No. A-5625-11 (App. Div. Aug. 19, 2014) (slip op. at 4-5).]²

We affirmed defendant's convictions on direct appeal. Id. at 21. The Supreme Court denied his petition for certification. 220 N.J. 574 (2015).

Defendant filed a timely pro se PCR petition that he supplemented after appointment of PCR counsel. Defendant certified he was "innocent" of the weapons offenses, he advised trial counsel the weapon was not in the backpack and the officers

² Although citing an unpublished opinion is generally forbidden, we do so here to provide a full understanding of the issues presented and pursuant to the exception in Rule 1:36-3 that permits citation "to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law." Badiali v. N.J. Mfrs. Ins. Grp., 429 N.J. Super. 121, 126 n.4 (App. Div. 2012), aff'd, 220 N.J. 544 (2015).

"must have picked up the rusty handgun from the train tracks." Defendant claimed he wanted to testify as to these facts, but trial counsel told him not to do so, given defendant's record of prior convictions. According to defendant, trial counsel assured he would raise the "issue of the handgun not being in the back pack" before the jury, but failed to do so.

Trial counsel filed a certification stating he could not recall if defendant raised any issue "regarding the rusty handgun not being inside of the backpack," or whether he had discussions with defendant about that. Trial counsel also could not recall if defendant "desired to testify regarding this issue."

At oral argument, PCR counsel briefly reiterated defendant's claim that trial counsel provided ineffective assistance (IAC) by failing to argue the gun was on the tracks, not in defendant's backpack. Judge Michael L. Ravin, who was not the trial judge, reserved decision and subsequently issued a comprehensive written decision that accompanied his January 29, 2016 order denying defendant's petition.

The judge extensively reviewed the trial testimony, as well a defense counsel's summation, in which he twice questioned the officers' account of recovering the gun from the backpack. Judge Ravin noted testimony regarding the rusty condition of the gun, and concluded the jury was capable of inferring that the gun was

not in the pack, as implied by defense counsel. The judge concluded defendant failed to establish trial counsel's performance was deficient.

Judge Ravin also concluded defendant failed to demonstrate trial counsel "interfered with [defendant's] right to testify." He noted the transcript revealed defendant "was informed of his options and strategically chose not to testify . . . in order to prevent his criminal record from coming into evidence before the jury."

Additionally, the judge determined that even if trial counsel's "failure to raise the rusty handgun issue constituted deficient performance," defendant failed to demonstrate any prejudice resulted. Judge Ravin noted the jury viewed "video evidence" showing defendant with the backpack and heard testimony that the officers found the gun in that backpack.

Lastly, the judge concluded defendant was not entitled to an evidentiary hearing because he failed to establish a prima facie IAC claim. Judge Ravin summarized his findings and conclusions as follows:

The record of the proceedings shows that [defendant's] counsel did raise the possibility that the handgun was not found in [defendant's] backpack and suggested that the officers testified falsely. The jury was also informed about the rustiness of the gun through the State's ballistic experts and was

free to draw reasonable inferences therefrom. While not delving into the details of rust formation, [trial counsel's] performance, given the facts of this case, was well within the range of competence expected of reasonable defense counsel. . . . Additionally, [trial counsel] and the court took sufficient steps to ensure that [defendant] based his decision not to testify on an informed, free choice. Finally, the certification of [trial counsel] shows that he does not recall conversations with [defendant] regarding the rusty handgun issue.

Defendant urges us to reverse Judge Ravin's order and remand the matter for an evidentiary hearing on his IAC claim. He contends trial counsel's failure to raise "the defense that the police actually found the rusty gun on the train track" as promised was not "sound legal strategy" but, rather, ineffective assistance, upon which defendant "detrimentally relied upon" in waiving his right to testify. We affirm substantially for the reasons expressed by Judge Ravin. We only add these comments.

To establish an IAC claim, a defendant must satisfy the two-prong test formulated in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). He must first demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Fritz, supra, 105 N.J. at 52

(quoting Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693).

To satisfy prong one, [a defendant] ha[s] to overcome a strong presumption that counsel exercised reasonable professional judgment and sound trial strategy in fulfilling his responsibilities. [I]f counsel makes a thorough investigation of the law and facts and considers all likely options, counsel's trial strategy is virtually unchallengeable. Mere dissatisfaction with a counsel's exercise of judgment is insufficient to warrant overturning a conviction.

[State v. Nash, 212 N.J. 518, 542 (2013) (citations and internal quotation marks omitted) (third alteration in original).]

We apply a "highly deferential standard, which requires us to avoid viewing counsel's performance through the 'distorting effects of hindsight.'" State v. Hess, 207 N.J. 123, 147 (2011) (quoting Strickland, supra, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694).

Second, a defendant must show by a "reasonable probability" that the deficient performance affected the outcome. Fritz, supra, 105 N.J. at 52. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Pierre, 223 N.J. 560, 583 (2015) (quoting Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698; Fritz, supra, 105 N.J. at 52). "If [a] defendant establishes one prong of the

Strickland-Fritz standard, but not the other, his claim will be unsuccessful." State v. Parker, 212 N.J. 269, 280 (2012).

A defendant is entitled to an evidentiary hearing "only upon the establishment of a prima facie case in support of post-conviction relief," i.e., he must "demonstrate a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits." R. 3:22-10(b). "In order for a claim of ineffective assistance of counsel to entitle a PCR petitioner to an evidentiary hearing, bald assertions are not enough – rather, the defendant must allege facts sufficient to demonstrate counsel's alleged substandard performance." State v. Jones, 219 N.J. 298, 311-12 (2014) (internal quotation marks omitted). "[W]e review under the abuse of discretion standard the PCR court's determination to proceed without an evidentiary hearing." State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013) (citing State v. Marshall, 148 N.J. 89, 157-58, cert. denied, 522 U.S. 850, 118 S. Ct. 140, 139 L. Ed. 2d 88 (1997)).

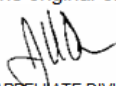
Here, trial counsel's summation focused extensively on the lack of any video corroborating much of the officers' testimony, including the seizure of defendant's backpack, law enforcement's allegedly shoddy handling of the handgun after it was seized, and its rusty condition. He repeatedly suggested the jury should

question "where [the police] even got the weapon from." In short, counsel effectively sought to raise a reasonable doubt that defendant possessed the gun or that it was seized from his backpack. There was nothing deficient about trial counsel's performance.

Defendant's suggestion that he elected not to testify because he expected counsel to raise the issue lacks any merit. The record reveals defendant knowingly, willingly and voluntarily waived his right to testify after the State rested and immediately before summations.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION