

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3858-13T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

R.B.,

Defendant-Appellant.

Submitted October 6, 2016 – Decided March 23, 2017

Before Judges Fuentes and Gooden Brown.

On appeal from the Superior Court of New
Jersey, Law Division, Union County, Indictment
No. 04-05-0401.

Joseph E. Krakora, Public Defender, attorney
for appellant (Janet A. Allegro, Designated
Counsel, on the briefs).

Grace H. Park, Acting Union County Prosecutor,
attorney for respondent (Bryan S. Tiscia,
Special Deputy Attorney General/Acting
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant R.B. appeals from an August 16, 2013 order, denying his petition for post-conviction relief (PCR) without an evidentiary hearing. Having reviewed the record in light of the applicable legal principles, we affirm.

I.

Defendant was convicted by a jury of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1), second-degree sexual assault, N.J.S.A. 2C:14-2(b), and second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a). After merger, defendant was sentenced to an aggregate custodial term of eighteen years, with an eighty-five percent period of parole ineligibility pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Defendant was also sentenced to community supervision for life, N.J.S.A. 2C:43-6.4, and ordered to comply with the requirements of Megan's Law, N.J.S.A. 2C:7-1 to -23.

Defendant filed a direct appeal, asserting the following arguments:

POINT ONE

THE VERDICTS WERE CONTRARY TO THE WEIGHT OF THE EVIDENCE.

POINT TWO

AGGREGATE ERRORS DEPRIVED THE DEFENDANT OF A FAIR TRIAL IN THE SPECIFIC CONTEXT OF THIS CHILD SEXUAL ASSAULT CASE RESTING UPON THE CREDIBILITY OF THE CHILD.

1. FAILING TO DISCLOSE THAT THE CHILD WAS BEING PUNISHED AND FORCED TO SIT IN A CORNER AT THE VERY TIME SHE FIRST CAME FORWARD WITH THE ACCUSATION CONSTITUTED A BRADY¹ VIOLATION AND MANDATES REVERSAL.

2. THE STATE'S FAILURE TO DISCLOSE TAINTED PRE-TRIAL PROCEEDINGS [] RESULTED IN INAPPROPRIATE RULINGS AS TO FRESH COMPLAINT AND TENDER YEARS EVIDENCE.

3. NO LIMITING INSTRUCTIONS CONCERNING PRIOR AND CONTEMPORANEOUS BAD ACTS EVIDENCE CONCERNING THE DEFENDANT'S INCESTUOUS RELATIONSHIP WITH HIS OWN NIECE AND THE MOTHER OF THE CHILD HE WAS ACCUSED OF MOLESTING.

4. THE STATE IMPROPERLY BOLSTERED THE CHILD'S CREDIBILITY THROUGH EXPERT TESTIMONY.

5. THE TRIAL COURT IMPROPERLY QUESTIONED DEFENSE WITNESSES IN THE PRESENCE OF THE JURY IN THE DELICATE CONTEXT OF THIS CHILD SEXUAL ASSAULT CASE.

6. THE ADMISSION OF THE VIDEOTAPED STATEMENT IMPERMISSIBLY EXPANDED THE BASES OF LIABILITY TO INCLUDE DIGITAL PENETRATION WHEN THE CHILD FAILED TO DESCRIBE DIGITAL PENETRATION DURING HER TESTIMONY BEFORE THE JURY.

7. THE COURT'S JURY INSTRUCTIONS IMPROPERLY EXPANDED THE BASES OF LIABILITY FOR AGGRAVATED SEXUAL ASSAULT.

We affirmed defendant's conviction and sentence. State v. R.B., No. A-5113-05 (App. Div. July 14, 2008). Subsequently, our Supreme

¹ Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

Court denied defendant's petition for certification. State v. R.B., 198 N.J. 474 (2009).

We incorporate by reference the procedural and factual history of the case and summarize the relevant facts, drawn from our opinion. State v. R.B., supra, slip op. at 3-13. Defendant sexually assaulted by penile penetration his eight-year-old grand-niece, who was thirty-two years his junior at the time. The incident occurred when the victim fell asleep while watching television in defendant's bedroom and awoke to find her pants had been removed and defendant on top of her. At the time, defendant was romantically involved with his adult niece, the victim's mother, with whom he had fathered a child. Although defendant told the victim not to tell anyone, she disclosed the assault to her aunt eleven days later when the aunt asked her if she had ever been touched inappropriately. This aunt was also defendant's niece and the sister of the victim's mother.

At trial, in order to impeach the victim's testimony, defendant presented testimonial evidence showing that he was never left alone with the victim. This evidence also established an ostensible motive for the victim's false accusation. On the latter point, defense counsel argued that the victim's aunt had pressured the victim into wrongly accusing him of sexual assault because she was jealous of him and disapproved of his incestuous relationship

with her sister. After the victim testified that, just prior to disclosing the assault to her aunt, she was punished by her aunt for saying something "naughty[,]" defense counsel incorporated those circumstances into his attack on the victim's credibility.

In a submission, PCR counsel argued defendant's trial counsel was ineffective in failing to move in limine to preclude the State from introducing inflammatory N.J.R.E. 404(b) evidence regarding defendant's incestuous relationship with the victim's mother. Defendant asserted that a new trial was mandated because the State's failure to timely disclose the victim's claim that she was sexually molested while she was being punished induced defense counsel to adopt a fatally flawed trial strategy.

In support, PCR counsel submitted a certification by trial counsel in which he averred that the State did not disclose the fact that the victim first accused defendant of molesting her when she was being punished until the middle of the trial. PCR counsel certified that had the information been disclosed to him before trial, he "might have argued, inter alia, that [the victim] made false accusations against the defendant to divert blame from herself since she was being punished." Further, according to PCR counsel, had the information been disclosed to him before trial, he "would not have introduced the jury to the defendant's incestuous relationship with his niece" and he "would not have

argued that [the victim's aunt's] resentment of that incestuous relationship was the reason she influenced the [victim] to make false accusations against the defendant."

In rejecting defendant's ineffectiveness claims, the court reasoned:

This is the same issue packaged as ineffective assistance of counsel that [defense counsel] made on the motion for a new trial. The issue of whether or not this non-traditional relationship, whether this incest . . . was dealt with appropriately by the [c]ourt was already decided. It has been litigated. He is barred from making that argument.

With . . . respect to any other issue, it's trial strategy. It may have been forced upon him, but he dealt with it effectively. I'm satisfied that the defendant has not made out its case - - and, first of all, it has not made out a basis . . . for a hearing.

. . . .

[T]here's no need . . . for a plenary hearing in this matter based upon [trial counsel's] certification. Beyond that, this matter has already been litigated. Defense has not shown that they're entitled to relief they seek. There's no showing that [trial counsel] was ineffective. And, in fact, he was rather effective in the way he handled it. He was rather facile in the way he changed . . . his argument, the way he combined the two arguments.

And I think even [PCR counsel] alluded to that when he quoted from the . . . Appellate Division's commenting favorably upon the way [trial counsel] handled the situation. Now I don't say that that issue has been litigated.

The issue of ineffective assistance of counsel is appropriate at this time.

But [PCR counsel's] hybridization of the argument to say that he would not have gone with this, and he might not have, had there been proper discovery[,] is playing Monday morning quarterback. If . . . he didn't suffer a constitutional deprivation of his rights by that discovery process, if he had the ability to effectively cross-examine and was able to show inconsistency in [the victim's testimony], to show lack of findings, and then to show possible motive to fabricate and reason to fabricate together with expert testimony, and ultimately with all of that the jury believed [the victim] . . . it also might show that the defendant is not able to show the second prong of prejudice.

[PCR counsel] starts with the proposition that this relationship between [defendant] and [his niece] was so prejudicial that everything else . . . is dirtied by it, that every other decision thereafter is undermined and questionable.

And the fact that he uses a lot of adverbs, the fact that he talks about it as being disastrous, as being doomed from the outset doesn't change the position that, number one, it has been dealt with at the trial level; number two, it has been dealt with at the appellate level. And it has not been deemed to be ineffective in its use.

It is a non-traditional relationship. It is not covered under 404(b). That specific ruling was made by the [c]ourt on the motion for a new trial. And to argue that you . . . take the strategic position and then . . . you're faced with some change of evidence, is not to understand the role of a trial lawyer and how you have to be facile and . . . how a criminal trial is a living and breathing thing

that you never know in advance exactly how it is going to unfold.

This appeal followed. On appeal, defendant raises the following points and sub-points for our consideration:

POINT I

THE COURT ERRED IN DENYING DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE EFFECTIVE LEGAL REPRESENTATION.

. . . .

1. TRIAL COUNSEL'S FAILURE TO TAKE APPROPRIATE MEASURES TO BAR ANY REFERENCES TO DEFENDANT'S INCESTUOUS RELATIONSHIP WITH HIS NIECE FROM THE TRIAL CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

2. TRIAL COUNSEL'S FAILURE TO REQUEST PROPER VOIR DIRE QUESTIONS AND CAUTIONARY, LIMITING INSTRUCTIONS REGARDING DEFENDANT'S INCESTUOUS RELATIONSHIP WITH HIS NIECE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.²

3. TRIAL COUNSEL'S FAILURE TO INVESTIGATE POSSIBLE DEFENSES AND PREPARE AN EFFECTIVE DEFENSE

² The PCR court specifically rejected, as belied by the record, defendant's contention that trial counsel's failure to request proper voir dire questions regarding defendant's incestuous relationship with his niece constituted ineffective assistance of counsel. Contrary to defendant's assertion, the court pointed out that during the voir dire, each juror was questioned and affirmed that he or she would be able to "decide this case based upon the evidence presented and without regard to [issues concerning a non-traditional relationship]".

DEPRIVED DEFENDANT OF A FAIR TRIAL,
AND THEREFORE, CONSTITUTED
INEFFECTIVE ASSISTANCE OF COUNSEL.

POINT II

THE PCR COURT ERRED IN NOT GRANTING
DEFENDANT'S PCR PETITION BY ITS REFUSAL TO
TREAT DEFENDANT'S INEFFECTIVE ASSISTANCE OF
COUNSEL CLAIM AS A SEPARATE ACTION FROM PRIOR
PROCEEDINGS.

II.

We review the PCR court's findings of fact under a clear error standard, and conclusions of law under a de novo standard. See State v. Harris, 181 N.J. 391, 420-21 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005). However, where, as in this case, "no evidentiary hearing has been held, we 'may exercise de novo review over the factual inferences drawn from the documentary record by the [PCR judge].'" State v. Reevey, 417 N.J. Super. 134, 146-47 (App. Div. 2010) (alteration in original) (quoting Harris, supra, 181 N.J. at 421), certif. denied, 206 N.J. 64 (2011).

According to defendant, the "thrust" of his ineffectiveness claim is that "trial counsel failed to prepare an effective defense strategy, take appropriate steps to bar the introduction of prejudicial evidence and once the prejudicial, bad act evidence was revealed, to take aggressive steps to request appropriate limiting jury instructions." Defendant asserts that "[t]he PCR

court not only rejected [his] contention on its substantive merits, but further concluded [defendant] was not even entitled to an evidentiary hearing to fully address his contentions." 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 only if the defendant has presented a prima facie claim of ineffective assistance, material issues of disputed fact lie outside the record, and resolution of the issues necessitate a hearing. R. 3:22-10(b); State v. Porter, 216 N.J. 343, 355 (2013). "Rule 3:22-10 recognizes judicial discretion to conduct such hearings." State v. Preciose, 129 N.J. 451, 462 (1992).

A PCR court deciding whether to grant an evidentiary hearing "should view the facts in the light most favorable to a defendant to determine whether a defendant has established a prima facie claim." Id. at 462-63. "To establish a prima facie claim of ineffective assistance of counsel, a defendant must demonstrate the reasonable likelihood of succeeding under the test set forth in Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984), and United States v. Cronin, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), which [our

Supreme Court] adopted in State v. Fritz, 105 N.J. 42, 58 (1987)."
Id. at 463.

Under the Strickland standard, a petitioner must show counsel's performance was both deficient and prejudicial. State v. Martini, 160 N.J. 248, 264 (1999). The performance of counsel is "deficient" if it falls "below an objective standard of reasonableness" measured by "prevailing professional norms." Strickland, supra, 466 U.S. at 687-88, 104 S. Ct. at 2064-65, 80 L. Ed. 2d at 693-94. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant 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). Second, "the defendant must show that the deficient performance prejudiced the defense." Ibid. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Ibid. "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." Ibid.

In determining whether defense counsel's representation was deficient, "[j]udicial scrutiny . . . must be highly deferential," and must avoid viewing the performance under the

'distorting effects of hindsight.'" State v. Norman, 151 N.J. 5, 37 (1997) (quoting Strickland, supra, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694). Because of the inherent difficulties in evaluating a defense counsel's tactical decisions from his or her perspective during trial, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, supra, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. at 694-95 (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 164, 100 L. Ed. 83, 93 (1955)).

In determining whether defense counsel's alleged deficient performance prejudiced the defense, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693, 104 S. Ct. at 2067, 80 L. Ed. 2d at 697. Rather, defendant bears the burden of showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698; see also State v. Harris,

181 N.J. 391, 432 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005).

Judged by these standards, we are convinced that defendant failed to make a prima facie showing of ineffective assistance of trial counsel within the Strickland/Fritz test warranting an evidentiary hearing. There is no basis for concluding that trial counsel's performance was deficient. It is well established that "[i]n matters of trial strategy, we accord great deference to the decisions of counsel." State v. Biegenwald, 126 N.J. 1, 56 (1991). We agree with the PCR court that trial counsel's conduct falls within the wide range of reasonable professional assistance and sound trial strategy. Like the PCR court, we reject defendant's contention that trial counsel's performance, albeit caused by an outside force,³ was so egregious as to be tantamount to a complete denial of representation, rendering it "unnecessary for a defendant to demonstrate prejudice." State v. Savage, 120 N.J. 594, 614-15 (1990) (quoting United States v. Cronin, 466 U.S. 648, 659, 104 S. Ct. 2039, 2046, 80 L. Ed. 2d 657, 668 (1984)).

³ Although the sub-point heading in defendant's brief refers to trial counsel's ineffectiveness by failing to investigate possible defenses, his supporting argument is that trial counsel "was maneuvered into introducing a detrimental defense strategy" and "his ineffectiveness was caused by an outside circumstance, and per-se ineffective."

Even assuming *arguendo* that counsel's performance was deficient, defendant cannot demonstrate a reasonable probability that, but for counsel's arguably unprofessional errors, the result of the proceeding would have been different. Indeed, to the extent that defendant's ineffectiveness arguments are predicated on the discovery violation and the introduction at trial of purported prejudicial bad act evidence without appropriate limiting jury instructions, the rejection of those arguments on direct appeal forestalls the requisite showing of prejudice to obtain relief. A prior adjudication on the merits of an issue on direct appeal is conclusive and cannot be re-litigated, even if of constitutional dimensions.⁴ See State v. Trantino, 60 N.J. 176, 180 (1972); State v. Smith, 43 N.J. 67, 74 (1964), cert. denied, 379 U.S. 1005, 85 S. Ct. 731, 13 L. Ed. 2d 706 (1965). Moreover, our prior decision on direct appeal settled those issues "for all subsequent stages of the suit[,]" and are not subject to review by this court on


⁴ Rule 3:22-5 provides that "[a] prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any post-conviction proceeding brought pursuant to this rule or prior to the adoption thereof, or in any appeal taken from such proceedings." However, like the PCR court, we construe defendant's claims of ineffectiveness of counsel as separate and distinct from the related issues raised on direct appeal and not thereby barred from consideration for PCR relief.

PCR. State v. Hale, 127 N.J. Super. 407, 410 (App. Div. 1974)

(citation omitted).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION