SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4061-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALLAN L. EAFORD, a/k/a LASHAUN EAFORD, ALAN EAFORD, LESHAUN A. EAFORD, LASHAWN S. EAFORD, LESHAUN EFORD, ALLEN L. EAFORD, and BILL EAFORD,

Defendant-Appellant.

Submitted October 17, 2017 – Decided December 15, 2017

Before Judges Fasciale and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 08-10-1785.

Joseph E. Krakora, Public Defender, attorney for appellant (David J. Reich, Designated Counsel, on the brief).

Andrew C. Carey, Middlesex County Prosecutor, attorney for respondent (Joie Piderit, Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant appeals the denial of his application for post-conviction relief (PCR) without an evidentiary hearing, and raises the following single argument in his merits brief:

> THE COURT BELOW ERRED IN DENYING EAFORD'S PETITION WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING CONCERNING HIS CLAIM THAT COUNSEL'S FAILURE TO REQUEST A LESSER[-]INCLUDED OFFENSE JURY INSTRUCTION, WHICH WOULD HAVE ALLOWED THE JURY TO FIND EAFORD GUILTY OF MANSLAUGHTER INSTEAD OF PURPOSEFUL MURDER, OR EVEN TO CONSULT WITH EAFORD CONCERNING THAT POSSIBILITY, VIOLATED EAFORD'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE UNITED STATES AND NEW JERSEY STATE CONSTITUTIONS.

In his pro se brief, he contends:

> POINT I
>
> TRIAL COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO OBJECT TO THE TRIAL COURT WHEN IT ABUSED ITS DISCRETION WHEN IT ALLOWED THE JURY TO WATCH A REPLAY OF THE VIDEO DURING DELIBERATION WITHOUT TAKING PRECAUTIONS TO REDUCE THE POSSIBLE PREJUDICE TO THE DEFENDANT, AND SUCH REPLAY WAS NOT HELD IN OPEN COURT, WHICH WAS CONTRARY TO THE U.S. CONST. AMENDS. V [sic], XIV; THE N.J. CONST. ART. 1, [¶¶] 1, 10.
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> A. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILURE TO RAISE THIS ISSUE ON DIRECT APPEAL.
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> POINT II
>
> INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE TO DISCLOSE FAVORABLE PLEA BARGAIN FRO[M] THE STATE TO THE DEFENDANT AND FAILURE

TO ADVISE DEFENDANT OF THE MAXIMUM SENTENCE EXPOSURE, VIOLATING THE U.S. CONST. AMENDS. V [sic], XIV; N.J. CONST. ART. 1, [¶¶] 1, 10.

We conclude petitioner failed to establish that defense counsel was ineffective, and that the results of the trial would have been different but for counsel's alleged errors; accordingly, we affirm the denial of his petition.

Inasmuch as the PCR judge did not conduct an evidentiary hearing, our review of the factual inferences drawn by the court from the record is de novo. State v. Blake, 444 N.J. Super. 285, 294 (App. Div.), certif. denied, 226 N.J. 213 (2016). Likewise, we review de novo the PCR judge's legal conclusions. Ibid.

The State argued, and the PCR judge agreed, that petitioner's claim was barred under Rule 3:22-5 because the issue of counsel's failure to request instructions on lesser-included offenses had already been adjudicated on appeal. Petitioner contends the PCR issue is different from that which was considered on direct appeal.

We previously considered petitioner's claim on direct appeal that "the trial court erred in failing to instruct the jury regarding aggravated manslaughter and reckless manslaughter as lesser[-]included offenses of purposeful/knowing murder." State v. Price, No. A-2937-10, State v. Eaford, No. A-5405-10 (consolidated) (App. Div. March 12, 2014) (slip op. at 10). The facts of the case are set forth in that opinion and we will not

repeat them here except as required to address the present issues. On direct appeal we noted that defense counsel declined the judge's suggestion that the jury receive instructions on the lesser-included offenses; we concluded the judge was not duty-bound to include those offenses in the jury charge because they would have been inconsistent with petitioner's theory that he was not present when the victim was shot, citing State v. Chew, 150 N.J. 30, 75 (1997), overruled in part on other grounds by State v. Boretsky, 186 N.J. 271, 283-84 (2006). Eaford, slip op. at 23-24. We were also unpersuaded that the trial judge's accession to defense counsel's argument against inclusion of the lesser-included offenses was clearly capable of producing an unjust result, citing Rule 2:10-2. Eaford, slip op. at 24.

In determining that petitioner's claim was procedurally barred, the PCR judge recognized that petitioner was required to prove prejudice by 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." Strickland v. Washington, 466 U.S. 668, 694 (1984). He grafted our conclusion that the omission of the lesser-included offenses was incapable of producing an unjust result onto the prejudice prong, and held petitioner could not show prejudice. He

ruled that petitioner's claim regarding the lesser-included offenses instruction "was substantively decided in the Appellate Division[]."

We agree with petitioner that the analysis of a PCR claim is different from that required under Rule 2:10-2. We also recognize the issue on appeal was the averred error by the trial judge who failed to instruct the jury on lesser-included offenses to the murder charge; here, petitioner claims his counsel was ineffective for failing to request that instruction. Although the arguments have common facts, they are discrete; we will, therefore, consider the substantive merits of the petition.

To establish a case of ineffective assistance of counsel, defendant must demonstrate a reasonable likelihood of success under the two-pronged test established by Strickland, 466 U.S. at 694, and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). A defendant must first show that counsel was deficient or made egregious errors, so serious that counsel was not functioning effectively as guaranteed by the Sixth Amendment of the United States Constitution, Strickland, 466 U.S. at 687-91, and Article I, paragraph 10 of the New Jersey Constitution, Fritz, 105 N.J. at 58. A defendant must also demonstrate that there exists "a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

Petitioner argues that his trial counsel failed to comprehend the law on accomplice liability, pointing to portions of the jury charge conference when defense counsel argued to the trial judge against presenting the instructions on lesser-included offenses to the jury. Contrary to petitioner's argument that defense counsel's statements evidenced his lack of knowledge about accomplice liability, they actually showed his knowledge of the law and the practical implications of presenting the accomplice theory to the jury.

The State alleged petitioner, who had been involved in a physical altercation with the victim earlier in the evening, retrieved a gun, met the co-defendant and had a subsequent confrontation with the victim. The State presented witness testimony that during that confrontation, petitioner raised the gun and pointed it at the victim, then lowered the gun; and that the co-defendant took the gun from petitioner and shot the victim multiple times, causing his death.

The defense theory was that petitioner was not present when the victim was shot. Defense counsel's summation capsulized the trial proofs he said supported that theory: the numerous discrepancies in the testimony of the State's witnesses; the

absence of crime scene evidence — hair, fibers, DNA, fingerprints — linked to petitioner; that, although one of the State's witnesses said people left in a Chevy Tahoe, police found nothing in that vehicle that was linked to petitioner, and they did not dust that vehicle for fingerprints; that one of the State's witnesses, who said there was a "small possibility" she might recognize the black male at the scene if shown a photo, was never shown an array that included petitioner's photo; and that the State's witness — on whom counsel said "the entire case against [petitioner] rests" — who identified petitioner as the man with a gun, admitted on cross-examination he previously said he could not see the person's face, and said it was "possible" it could have been petitioner. Notably, as to that last witness, the assistant prosecutor told the jury that he "wasn't particularly a strong witness. Obviously, he didn't want to be here and it was pretty easy for somebody as skilled as [petitioner's defense counsel] to lead him around by the nose and put times and estimates in his mouth and get him to agree to."

During the charge conference, the trial judge suggested that the lesser-included offenses of aggravated manslaughter and manslaughter were appropriate charges for the jury because, although petitioner may not have actually shot the victim, the act of bringing the gun to the scene might make him "arguably guilty

of being an accomplice by being reckless and bring[ing] that [gun]." When defense counsel expressed that he did not think the charges were appropriate, the judge told him "tell me how to get around it." Counsel then queried, "[I]s it the [c]ourt's opinion . . . that [petitioner] could then be convicted of a lesser[-]included of aggravated or reckless? I thought he had to have the same state of mind as to the perpetrator of the original act."

Contrary to petitioner's contention that that comment, as well as a few others during the same colloquy, manifested defense counsel's ignorance of the law on accomplice liability and lesser-included offenses, as the trial judge then realized, counsel was correct; the law requires an accomplice to have the purpose of promoting or facilitating the lesser-included offense. Thus, the judge's original assertion that petitioner could be guilty as an accomplice for recklessly bringing the gun to the scene was mistaken.

Defense counsel later explained that, although he would still argue petitioner was not at the scene, he would still have to "work . . . in there one way or another" that there was no proof that petitioner had any intention that the victim would be shot and killed, notwithstanding that the person alleged to be the petitioner brought the gun, pointed it at the victim, and then lowered the gun, before the actual shooter took the gun and

murdered the victim. In fact, defense counsel twice argued that point to the jury during his summation. In essence, he argued the non-shooter perpetrator lowered the gun and put it in his waistband; and, therefore, did not share any state of mind with the shooter, and could not be guilty as an accomplice for any crime.

We review defense counsel's actions under the familiar standards synopsized by the Court in State v. Arthur, 184 N.J. 307, 318-19 (2005) (alterations in original):

> 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, 697 A.2d 511 (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. 2d at 694-95 (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 164, 100 L. Ed. 83, 93 (1955)).
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> 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 proceedings." 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, 859 A.2d 364 (2004).

The "all or nothing" approach taken by defense counsel, in light of the facts of the case, was sound trial strategy. It is telling that, in the words of the trial judge, "three seasoned" attorneys — counsel for both defendants and the assistant prosecutor — agreed they did not want lesser-included offenses to murder charged to the jury; that such charges were not "supported by any credible evidence and that such [charges] would have a tendency to perhaps mislead the jury and lead to perhaps a compromised verdict not supported by the evidence." Defense counsel's main tack was to argue petitioner was misidentified as the non-shooter at the crime scene. He accounted for the possibility that the jury might find petitioner was the person who brought the gun used by the shooter, and offered that the non-shooter, by lowering the gun and putting it away before the shooter grabbed it and shot the victim, showed he had no intention that the gun be used or that the victim be shot. That theory — in

practical application — exonerated petitioner from any culpability for the homicide.

The assistant prosecutor argued in summation that petitioner retrieved the gun and met the co-defendant on the street. He continued:

> He doesn't have a permit. He's not allowed to have it out on the street, but he brings it out on the street, puts it to a man's head. There's two crimes he's committed. And he provided the murder weapon.
>
> . . . I suggest to you that you will be firmly convinced that [petitioner] was an accomplice with [the co-defendant-shooter] in the murder of [the victim].

The State's essentially played to defense counsel's theory. There was proof petitioner possessed a firearm on the street without a permit and that he pointed it at the victim; but the only proof tying him to the murder charge was the State's allegation that he brought the gun to the scene. Considering the State's accomplice theory of liability against petitioner, it was not unreasonable to alternatively argue that there was no proof petitioner shared the shooter's homicidal state of mind, whether it was for murder or a lesser-included crime.

The trial judge's observations prove defense counsel's strategy even more cogent. In considering whether to charge the lesser-included offenses, he rhetorically asked:

> How the heck do you get agg[ravated] man[slaughter] or man[slaughter] with six shots?
>
> . . . .
>
> . . . How is it in the case? You put on a [m]edical [e]xaminer and [the victim] had five holes in his body from point-blank range with stippling on three-quarters of the holes and powder on the other remaining holes from close range.

Defense counsel recognized that evidence established the shooter's purposeful intent to cause the victim's death and distanced his client from that evidence, not only by arguing he wasn't present and was misidentified, but also by arguing the facts showed he did not share the shooter's intent that the victim be shot. It was not unreasonable to forego the confusing argument that petitioner only intended to recklessly cause the victim's death — either under circumstances manifesting extreme indifference to human life, or not — especially in light of the proofs that established he had no intention that the gun be used.

We conclude defense counsel's strategy was sound, and petitioner has not met his burden of showing that if counsel had argued for instructions on the lesser-included offenses, the verdict would have been different. Petitioner has failed to establish either required prong.

We find insufficient merit in petitioner's claim that defense counsel was ineffective because he never spoke to him about the lesser-included offenses, and that he was entitled to an evidentiary hearing, to warrant further discussion. R. 2:11-3(e)(2). Petitioner has not proffered any support for his claim that counsel did not discuss the lesser-included issue with him; his is a bald-faced assertion. An evidentiary hearing should be held only if a defendant presents "a prima facie claim in support of [PCR]." R. 3:22-10(b); State v. Preciose, 129 N.J. 451, 462 (1992). In order to establish a prima facie case, 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)." Id. at 463. Merely raising a claim for [PCR] does not entitle a defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.). A "defendant must allege specific facts and evidence supporting his allegations," State v. Porter, 216 N.J. 343, 355 (2013), and "do more than make bald assertions that he was denied the effective assistance of counsel," Cummings, 321 N.J. Super. at 170. Petitions must be "accompanied by an affidavit or certification by defendant, or by others, setting forth with particularity the facts that he wished to present." State v. Jones, 219 N.J. 298, 312 (2014).

Petitioner has not established that there was a reasonable likelihood his claim regarding counsel's failure to request lesser-included offenses would succeed. And he has made only bald assertions regarding his claim counsel failed to meet with him to discuss the lesser-included offenses. Even if counsel did not meet with petitioner, petitioner has failed to show how he was prejudiced. Further, petitioner's claim of ineffective assistance of counsel is not grounded in facts outside the trial record; thus, he was not entitled to an evidentiary hearing. Preciose, 129 N.J. at 462.

We also find the issues raised in petitioner's pro se brief to be without sufficient merit to warrant discussion. R. 2:11-3(e)(2). We agree with the PCR judge's reasons for rejecting petitioner's pro se claims.

Affirmed.