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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-4210-13T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RASHAWN McCLINTON,

Defendant-Appellant.

Submitted June 6, 2016 - Decided March 6, 2017

Before Judges Lihotz and Nugent.

On appeal from Superior Court of New Jersey,
Law Division, Mercer County, Indictment No.
05-01-0081.

Joseph E. Krakora, Public Defender, attorney
for appellant (Alan I. Smith, Designated
Counsel, on the brief).

Angelo J. Onofri, Acting Mercer County
Prosecutor, attorney for respondent (Dorothy
Hersh, Special Deputy Attorney General/Acting
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant Rashawn McClinton appeals from a January 17, 2014
order denying his petition for post-conviction relief (PCR). On

appeal, defendant challenges the denial of his PCR and his request for an evidentiary hearing, arguing:

POINT I

THE ORDER DENYING POST-CONVICTION RELIEF SHOULD BE REVERSED AND THE MATTER REMANDED FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT MADE A PRIMA FACIE SHOWING OF INEFFECTIVE ASSISTANCE OF COUNSEL.

POINT II

THE ORDER DENYING POST-CONVICTION RELIEF SHOULD BE REVERSED BECAUSE IT VIOLATED DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

POINT III

THE ORDER DENYING POST-CONVICTION RELIEF SHOULD BE REVERSED BECAUSE THE PCR COURT MISAPPLIED THE PROCEDURAL BARS OF R. 3:22-4 AND R. 3:22-5.

Following review of the record and applicable law, we reject defendant's challenges. We affirm the order denying his petition for PCR substantially for the reasons stated by the PCR judge.

On direct appeal, in an unpublished opinion, we detailed evidence presented by the State to support defendant's conviction, which we incorporate by reference. State v. McClinton, No. A-1321-05 (App. Div. Nov. 6, 2006) (slip op. 1-4). After merger, defendant was sentenced to a fourteen-year term of imprisonment on four counts of first-degree armed robbery, N.J.S.A. 2C:15-1,

to be served concurrently, subject to an 85% period of parole ineligibility, and a concurrent three-year term for possession of a sawed-off shotgun, N.J.S.A. 2C:39-3(b). After a separate trial conducted immediately following the first, defendant was sentenced to a consecutive nine-month term, for certain persons not to possess weapons, N.J.S.A. 2C:39-7(a).

Defendant's appointed counsel filed a PCR petition alleging nine separate grounds of ineffective assistance of trial counsel. Defendant also submitted a pro se supplemental brief, repeating the issues raised by counsel. Primarily, the requests for relief focused on trial counsel's failure to file motions to suppress the State's evidence, particularly, the witness identifications, a shotgun found in his sister's home, and an out-of-court identification. Following oral argument, in a written statement of reasons attached to the January 17, 2014 order, the PCR judge denied relief and the request for an evidentiary hearing. This appeal ensued.

"Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." State v. Goodwin, 173 N.J. 583, 593 (2002) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). "A petitioner must establish the right to such relief by a preponderance of the credible evidence." Preciose, supra, 129 N.J. at 459.

New Jersey has adopted the two-prong test handed down by the United States Supreme Court in the companion cases of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and United States v. Cronin, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). See State v. Fritz, 105 N.J. 42, 58 (1987) (adopting Strickland's two-pronged test). To establish a prima facie case of ineffective assistance of counsel:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. 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.

[Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.]

Under the first prong, a defendant must demonstrate "counsel's representation fell below an objective standard of reasonableness." Id. at 688, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. Thus, "th[e] test requires the defendant to identify specific acts or omissions that are outside the 'wide range of reasonable professional assistance[.]'" State v. Jack, 144 N.J. 240, 249 (1996) (citation omitted). "'Reasonable competence' does not require the best of attorneys, but certainly not one so ineffective

as to make the idea of a fair trial meaningless." State v. Davis, 116 N.J. 341, 351 (1989).

To meet the second prong, "[a] 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." Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Ibid.

In our review, we defer to the motion judge's findings if "supported by sufficient credible evidence in the record." State v. Nash, 212 N.J. 518, 540 (2013). See State v. Elders, 192 N.J. 224, 244 (2007) ("A trial court's findings should be disturbed only if they are so clearly mistaken that the interest of justice demand intervention and correction.") (citation omitted). Legal conclusions which flow from those facts, however, are reviewed de novo. Nash, supra, 212 N.J. at 540–41.

Although the PCR judge identified procedural bars to preclude certain issues defendant raised, he, nevertheless, considered the merits of each argument. We affirm substantially for the reasons expressed in that opinion and add these comments.

In overarching statements, defendant's PCR petition asserted trial counsel failed to file meritorious pretrial motions, object to inadmissible hearsay testimony, communicate with defendant, and

object to the unwarranted and excessive number of sheriff's officers in the courtroom. Addressing these broad claims, defendant's pleadings recited trial events, such as impermissible admission of the victim's identification testimony. He then recited the legal proposition underpinning a Wade¹ hearing; however, factual links substantiating why counsel's handling of the matter amounted to ineffective assistance were missing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999).

The pattern continues in the present appeal. For example, defendant asserts:

contrary to the PCR [c]ourt's findings, there was a "connect" between the claimed deficiencies by trial counsel to the law and to the Strickland test. It is well-established that trial counsel has a duty to file appropriate pretrial motions seeking the suppression of wrongfully obtained evidence. Trial counsel has a duty to file an [sic] pretrial motion to preclude admission of an improperly secured out-of-court identification. Trial counsel has a duty to object to inappropriate prejudicial jury instructions and to seek appropriate limiting jury instructions ameliorating the prejudice caused by the admission of inadmissible hearsay. Trial counsel has a duty to communicate with defendant in a timely manner.

[(citations omitted).]

¹ United States v. Wade, 388 U.S. 218, 87 S. Ct. 2052, 80 L. Ed. 2d 1149 (1967).

Defendant also he suggests appellate counsel was ineffective and failed to engage "a meaningful opportunity to root out the claimed injustices," but treated the appeal like "a pro forma exercise."

Again, defendant lists alleged problems, but the claims are untethered to facts showing how counsel's conduct deviated from acceptable standards of representation or any showing of the impact resulting from the suggested omissions. We offer these illustrations.

Relating to suppression of the gun evidence, defendant accurately sets forth constitutional protections against warrantless searches and seizures. He notes the shotgun introduced by the State was found under the steps of his sister's home and claims she did not recall giving consent and, alternatively, was coerced. Defendant concludes his Fourth Amendment rights were violated and suppression was required. See State v. Fisher, 156 N.J. 494, 501 (1998) ("[W]hen counsel fails to file a suppression motion, the defendant not only must satisfy both parts of the Strickland test but also must prove that his Fourth Amendment claim is meritorious.") (citing Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 2583, 91 L. Ed. 2d 305, 325 (1986)). Therefore, counsel must have been ineffective because the gun was not suppressed.

This reasoning omits significant evidence that easily defeats any suppression claim. At trial, defendant's sister acknowledged her signature on the consent to search form and no evidence supported defendant somehow held a reasonable expectation of privacy for items placed under exterior steps at his sister's house. See State v. Hempele, 120 N.J. 182, 200 (1990) (holding the Fourth Amendment is not violated when there is not a reasonable expectation of privacy in the area searched). Furthermore, the specific issue was considered on direct appeal, and the reviewing panel concluded there was no evidence of coercion for the consent to search, making it "not a close case."

This example shows the insufficiency of defendant's alleged PCR claims. We reviewed each of the other additional claims, which suggest trial counsel failed to communicate with defendant, should have requested a mistrial, failed to oppose admission of hearsay testimony (a matter raised and rejected on direct appeal), did not effectively object to improper remarks in the State's summation (also rejected on direct appeal), and failed to recognize the prejudice suffered as a result of numerous Sheriff's officers present during trial.

Even if we consider defendant's contentions indulgently, we find no basis to grant relief. Repetition of claimed errors unsupported by "facts sufficient to demonstrate counsel's alleged

substandard performance" amounts to nothing more than "bald assertions that he was denied the effective assistance of counsel." Cummings, supra, 321 N.J. Super. at 170. Without more, we agree with the PCR judge the petition filed was insufficient to support a prima facie case of ineffectiveness as there is nothing to demonstrate how "counsel's representation fell below an objective standard of reasonableness." Strickland, supra, 466 U.S. at 688, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. We conclude, "there is no basis for finding that defendant was denied the effective assistance of counsel." State v. Taimanglo, 403 N.J. Super. 112, 124 (App. Div. 2008), certif. denied, 197 N.J. 477 (2009). We reject claims concluding it was error barred by Rule 3:22-5, because they were reviewed on appeal, or otherwise found to be meritless, R. 2:11-3(e)(2).

In our review, we also find no basis to reverse the denial of PCR regarding the attacks on appellate counsel's assistance. "The right to effective assistance includes the right to the effective assistance of appellate counsel on direct appeal." State v. O'Neil, 219 N.J. 598, 610-11 (2014) (citing Evitts v. Lucey, 469 U.S. 387, 396, 105 S. Ct. 830, 836, 83 L. Ed. 2d 821, 830 (1985) ("A first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.")); State v. Guzman, 313 N.J.

Super. 363, 374 (App. Div.) (holding that Strickland test applies to claims of ineffective assistance at trial level and on appeal), certif. denied, 156 N.J. 424 (1998).

The trial judge's denial of trial counsel's motion for a Wade hearing was not presented on direct appeal.² In his consideration of the Wade issue, the PCR judge found no evidence of taint offered to rebut the trial judge's similar finding. See State v. Herrera, 187 N.J. 493, 503-04 (2006) (examining suggestiveness of out-of-court identification procedures). The PCR judge's consideration of the evidence showed the photographic array was properly conducted by an officer not involved in the investigation and the victim chose defendant's picture, identifying defendant as the unmasked robber who held the sawed off shotgun to his head. At trial, intense cross-examination of the witness's testimony challenged his recollection of the specifics of his out-of-court identification such as showing the witness could not state whether the perpetrator had a mustache. These facts may challenge the credibility of the witness's recollection; however, they do not taint the identification. We conclude the PCR judge fully

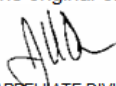
² The appeal does not specifically limit this argument to appellate counsel and suggests trial counsel was also ineffective in not securing exclusion of the identification testimony. Procedurally, PCR petitions are not a substitute for direct appeal from conviction; therefore, review on this ground as it relates to trial counsel's presentation of the issue is barred. R. 3:22-3.

considered this issue and properly applied the law. We reject the notion appellate counsel was ineffective for not raising an issue for which appellate relief was not warranted.

Following our review of the record, we discern no basis to interfere with determinations of the PCR judge denying defendant's PCR petition. See Taimanglo, supra, 403 N.J. Super. at 124 ("[A]s there is no basis for reversing [a] conviction on the grounds asserted, there is no basis for finding that defendant was denied the effective assistance of counsel."). Further, defendant's failure to state a prima facie case for PCR obviates the need for an evidentiary hearing, which was also properly denied. Preciose, supra, 129 N.J. at 462.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION