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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-4313-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAVID FERNANDEZ,

Defendant-Appellant.

Submitted May 17, 2017 – Decided July 7, 2017

Before Judges Simonelli and Farrington.

On appeal from the Superior Court of New
Jersey, Law Division, Essex County, Indictment
No. 08-09-2742.

Joseph E. Krakora, Public Defender, attorney
for appellant (Steven M. Gilson, Designated
Counsel, on the brief).

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

PER CURIAM

Defendant David Fernandez appeals from the April 11, 2016 Law Division order, which denied his motion for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

Following a jury trial, defendant was convicted of first-degree attempted murder of Mr. Ocasio,¹ N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3 (count one); first-degree murder of Jose Rivera, N.J.S.A. 2C:11-3(a)(1) and (2) (count two); third-degree possession of a weapon without a permit, N.J.S.A. 2C:39-5(b) (count three); and second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count four). Defendant's sole theory was that he acted in self-defense and in defense of a friend.

Defendant filed a motion for a new trial, arguing, in part, that trial counsel rendered ineffective assistance by failing to ensure his participation in sidebar conferences. The trial judge denied the motion, finding defendant utilized a wireless listening device that allowed him to listen to all sidebar conferences from the voir dire process through the verdict. The judge found that all in-court conferences occurred in defendant's presence and within his hearing range, and if he did not hear what was said,

¹ The court elected to use only Ocasio's last name to provide some privacy to the victim.

he had ample opportunity to ask trial counsel to relay the substance of the conferences to him.

At sentencing, after merging count four into count two, the judge sentenced defendant as follows: a thirty-year term of imprisonment on count two with a thirty-year period of parole ineligibility pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, on count two; a consecutive ten-year term of imprisonment subject to NERA on count one; and a concurrent three-year term of imprisonment with a one-year period of parole ineligibility pursuant to the Graves Act, N.J.S.A. 2C:43-6, on count three.

Defendant appealed his conviction and sentence. He argued, in part, that the trial court should have sua sponte declared a mistrial due to the misconduct of Juror No. 2 during voir dire and deliberations. He also argued that his exclusion from sidebar conferences and trial counsel's failure to confer with him about sidebar conferences mandated reversal. He further argued that trial counsel rendered ineffective assistance by failing to confer with him about sidebar conferences and seek a full voir dire of the jury and a mistrial based on Juror No. 2's misconduct.

We affirmed defendant's conviction and sentence. State v. Fernandez, No. A-0573-11 (App. Div. Aug. 8, 2014). Regarding

Juror No. 2's alleged misconduct during voir dire, we found as follows, in pertinent part:

Despite the presumption that a juror's omission of information during voir dire is prejudicial, a defendant is required "to demonstrate that, had he or she known of the omitted information, he or she would have exercised a peremptory challenge to exclude the juror." State v. Cooper, 151 N.J. 326, 349, (1997), cert. denied, 528 U.S. 1084, 120 S. Ct. 809, 145 L. Ed. 2d 681 (2000). . . .

Other than [defendant's] bald assertions that "there is no question that he would have excluded" Juror No. 2, defendant made no affirmative showing that he would have challenged her for cause or through a peremptory challenge. In fact, the record supports the opposition conclusion. During jury selection and jury deliberations, the juror clearly expressed views favorable to defendant, and even after learning of the omission, defendant did not request the juror's removal or a mistrial. In addition, defendant did not challenge three other empaneled jurors who had revealed during jury selection that they were victims of violent crimes, or had family members who were victims of violent crimes or accused of crimes. We, thus, conclude that no error occurred with respect to Juror No. 2.

[Id. (slip op. at 15-16).]

Regarding Juror No. 2's alleged misconduct during deliberations, we found as follows, in pertinent part:

The judge found that Juror No. 2 did not express any bias or prejudice against defendant [during deliberations] but merely expressed her general observations based on

her own experiences. We find no fault with the judge's determination.

. . . .

In compliance with [State v. R.D., 169 N.J. 551, 557 (2001)], as explained in Rule 1:16-1, the judge questioned Juror No. 2 to determine if there was taint and correctly determined she had not been exposed to extraneous information or outside influence that could have possibly impinged on her impartiality. We are satisfied that Juror No. 2 did not prematurely form an unalterable opinion of the defendant's guilt, nor was she swayed by any outside influences prejudicial to defendant. To the contrary, the juror clearly expressed views favorable to defendant, including the view she expressed to her fellow jurors during deliberations that they must put aside personal experiences, be objective and reasonable, and consider all the evidence.

[Id. (slip op. at 11, 14).]

We determined there was no reason to voir dire the other jurors or declare a mistrial. Ibid.

We declined to consider defendant's ineffective assistance of counsel arguments, preserving them for a PCR petition. Id. (slip op. at 4) (citing State v. Castagna, 187 N.J. 293, 313 (2006)). However, we considered his argument that his exclusion from sidebar conferences mandated reversal in light of the record and applicable legal principles and concluded it was without sufficient merit warrant discussion in a written opinion. Id.

(slip op. at 19-20) (citing R. 2:11-30(e)(2)). We added the following comments:

Defendant did not affirmatively request the right to participate in voir dire sidebar conferences. To the contrary, he specifically waived his right to personally participate in those conferences. Because the right to be present is waivable, defendant was not deprived of a fair trial as a result of his absences from the voir dire sidebar conferences. In addition, there is nothing in the record indicating that defendant did not knowingly and intelligently waive participation in sidebar proceedings. There were numerous sidebar conferences throughout the fifteen-day trial, and defendant never personally objected or requested to be present at them. Accordingly, defendant's exclusion from sidebar conferences does not mandate reversal of his convictions.

[Id. (slip op. at 20.)]

Our Supreme Court denied certification. State v. Fernandez, certif. denied, 220 N.J. 572 (2015).

Defendant thereafter filed a PCR petition, arguing that trial counsel rendered ineffective assistance by failing to: (1) investigate and obtain exculpatory witnesses in support of his self-defense theory; (2) inform him after his conviction about Juror No. 2's misconduct during voir dire and deliberations; (3) confer with him about sidebar conferences; (4) seek a voir dire of the other deliberating jurors or a mistrial; and (5) convey the State's plea offer.

In an oral opinion, the PCR judge denied the petition without an evidentiary hearing. The PCR judge found, incorrectly, that defendant's claims were procedurally barred by Rule 3:22-12(a)(1) and Rule 3:22-5. However, as the State concedes, defendant timely filed his PCR petition. In addition, we did not determine defendant's ineffective assistance of counsel claim on the merits in the prior appeal. See State v. McQuaid, 147 N.J. 464, 484 (1997) (barring re-litigation of an issue that was determined on the merits in a prior appeal). Rather, we preserved that claim for a PCR petition.

The PCR judge also found defendant's claim that trial counsel failed to confer with him about sidebar conferences was procedurally barred by Rule 3:22-4(a)(1), as the trial judge decided this issue on the merits following defendant's motion for a new trial.

Addressing the merits of defendant's claims, the PCR judge found defendant did not assert any specific facts regarding whom he would have called, what they would have offered, or whether he asked trial counsel to call witnesses and counsel refused. The PCR judge also found defendant failed to provide certifications from any witnesses, or a certification from trial counsel that he had identified and sought to include exculpatory witnesses at trial. The PCR judge concluded that without any material support,

defendant's claim that counsel failed to obtain exculpatory witnesses was too vague, conclusory, or speculative to warrant a hearing.

The PCR judge determined that defendant's physical presence at sidebar conferences was not an absolute requirement, and defendant utilized a wireless listening device that allowed him to listen to all sidebar conferences from the voir dire process through the verdict. The PCR judge found that all in-court conferences occurred in defendant's presence and within his hearing range, and defendant did not complain he could not hear the conferences. The PCR judge concluded that defendant was provided the proper means of assessing the sidebar conferences and had ample opportunity to be present at those conferences.

The PCR judge relied primarily on our findings in addressing defendant's claims that trial counsel failed to inform him after his conviction about Juror No. 2's misconduct during voir dire and deliberations and seek a voir dire of the other deliberating jurors or a mistrial. The PCR judge made no specific findings on defendant's claim that trial counsel failed to convey the State's plea offer. The PCR judge memorialized her decision in an April 11, 2016 order.

On appeal, defendant raises the following contentions:

POINT I DEFENDANT'S PCR PETITION SHOULD NOT HAVE BEEN PROCEDURALLY BARRED. (26T 11-10 to 13-2).

POINT II THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF TRIAL COUNSEL'S INEFFECTIVENESS.

- A. Trial Counsel Failed To Conduct An Adequate Investigation, Including Obtaining Exculpatory Witnesses.
- B. Trial Counsel Failed To Convey The State's Plea Offer To Defendant.
- C. Trial Counsel Failed To Confer With Defendant About The Sidebars, Seek Full Voir Dire, Or Move For A Mistrial.

We review a judge's decision to deny a PCR petition without an evidentiary hearing for abuse of discretion. State v. Preciose, 129 N.J. 451, 462 (1992). We discern no abuse of discretion here.

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 and make a determination on the merits 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 necessitates a hearing. R. 3:22-10(b); State v. Porter, 216 N.J.

343, 355 (2013). To establish a prima facie claim of ineffective assistance of counsel, the defendant

must satisfy two prongs. First, he must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. An attorney's representation is deficient when it [falls] below an objective standard of reasonableness.

Second, a defendant must show that the deficient performance prejudiced the defense. A defendant will be prejudiced when counsel's errors are sufficiently serious to deny him a fair trial. The prejudice standard is met if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability simply means a probability sufficient to undermine confidence in the outcome of the proceeding.

[State v. O'Neil, 219 N.J. 598, 611 (2014) (citations omitted).]

"[I]n order to establish a prima facie claim, [the defendant] must do more than make bald assertions that he was denied the effective assistance of counsel. He must allege facts sufficient to demonstrate counsel's alleged substandard performance." Cummings, supra, 321 N.J. Super. at 170. The defendant must establish, by a preponderance of the credible evidence, that he is entitled to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013). "[W]hen a [defendant] claims his trial attorney inadequately investigated his case, he must assert the facts that

an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." Porter, supra, 216 N.J. at 353 (quoting Cummings, supra, 321 N.J. Super. at 170).

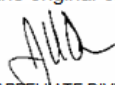
While, arguably, defendant's claim that trial counsel rendered ineffective assistance by failing to confer with him about sidebar conferences is barred by Rule 3:22-4(a)(1), the claim nonetheless lacks merit, as do defendant's other ineffective assistance of counsel claims. We determined in defendant's prior appeal there was no error regarding Juror No. 2's alleged misconduct and no reason to voir dire the other jurors or declare a mistrial. We also found no merit in defendant's argument that his exclusion from sidebar conferences mandated reversal, and commented that he specifically waived his right to personally participate in those conferences. Thus, even if trial counsel's performance was deficient, which it was not, defendant cannot establish the deficient performance prejudiced his defense.

In addition, defendant did not assert the facts which an investigation of exculpatory witnesses would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant. Defendant did not even name exculpatory witness, let alone provide the required certifications or affidavits or any information of what exculpatory evidence they

witnesses would provide. Lastly, defendant provided no evidence whatsoever of a plea offer. Accordingly, because defendant failed to present a prima facie claim of ineffective assistance of counsel, the PCR judge properly denied his PCR petition without evidentiary hearing.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION