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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-4673-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MELVIN RAINEY,

Defendant-Appellant.

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Submitted December 7, 2017 – Decided December 20, 2017

Before Judges Simonelli and Haas.

On appeal from Superior Court of New Jersey,  
Law Division, Passaic County, Indictment No.  
08-04-0502.

Joseph E. Krakora, Public Defender, attorney  
for appellant (William Welaj, Designated  
Counsel, on the brief).

Camelia M. Valdes, Passaic County Prosecutor,  
attorney for respondent (Robert J. Wisse,  
Assistant Prosecutor, of counsel and on the  
brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Melvin Rainey appeals from the March 18, 2016 Law Division order, which denied his petition for post-conviction (PCR) relief without an evidentiary hearing. We affirm.

The underlying facts of this case are set forth in State v. Rainey, No. A-3457-10 (App. Div. May 28, 2013), certif. denied, 216 N.J. 367 (2013), and incorporated herein. The following facts are pertinent to our review.

Following a jury trial, defendant was convicted of the first-degree aggravated manslaughter of Joyce Foster, N.J.S.A. 2C:11-4(a); second-degree leaving the scene of a fatal accident, N.J.S.A. 2C:11-5.1; third-degree endangering an impaired or helpless person, N.J.S.A. 2C:12-1.2; third-degree hindering, N.J.S.A. 2C:29-3(b)(1); and fourth-degree tampering with evidence, N.J.S.A. 2C:28-28-6(1). Defendant initially claimed he found Foster dead in the back seat of his SUV on the morning of November 23, 2007, and had no knowledge of how she got there. He later admitted that he may have struck something with his SUV the night before, heard someone moaning when he exited his SUV, and could have put someone in the back seat of the SUV and forgot to bring them to the hospital. Two witnesses saw defendant with Foster in the roadway, and they helped defendant place her in his SUV and saw that she was alive at the time.

The State's theory was that although defendant struck Foster with his SUV, this did not kill her. Rather, defendant's failure to seek immediate medical attention was the cause of Foster's death. The State's forensic pathologist, Dr. Zhongxue Hua, found that Foster was highly intoxicated, had cocaine in her system, and lost a large amount of blood; however, these factors did not cause her death. Dr. Hua testified that the cause of Foster's death was blunt injury to the torso. He opined she did not die quickly and that he regularly treated patients with more severe injuries who survived because they were brought for treatment in a timely manner. He classified Foster's death as "a homicide," rather than an accident, because she was not taken to a hospital and because emergency personnel were not called to provide her with medical care.

Defense counsel obtained an expert to counter Dr. Hua's opinion, but he became unavailable. Defense then consulted Dr. Mark L. Taff, a forensic pathologist, who stated that Foster's "death would be 'rapid' occurring in about [five to ten] minutes." However, Dr. Taff also stated there were a number of unknown factors surrounding this case, including the exact time of Foster's death. He also stated that survivability was "a complex issue which depend[ed] on a variety of factors[;]" "[e]xpert opinions regarding survivability vary widely depending on who you speak

to[;]" defendant had "a lot of hurdles to get over to be completely exonerated[;]" and "[t]his is not an easy case to defend." Dr. Taff did not opine within a reasonable degree of medical certainty as to the cause or manner of Foster's death.

During a pre-trial hearing, defense counsel informed the court that she attempted to obtain a new expert, but was unable to find a suitable replacement. Counsel questioned defendant about this issue on the record, and he stated he wished to proceed to trial without an expert. Defendant also acknowledged that he spoke to defense counsel about the unavailable expert and the steps counsel had taken to find a replacement.

In his PCR petition, defendant argued that defense counsel rendered ineffective assistance by failing to call Dr. Taff as an expert witness. In an oral opinion, Judge Joseph A. Portelli concluded that defense counsel attempted to obtain a suitable replacement, properly determined Dr. Taff was not suitable, and counsel exercised sound trial strategy by not to call Dr. Taff to testify.

Defendant also argued that defense counsel rendered ineffective assistance by failing request an adverse inference charge on the destruction of his SUV. Judge Portelli found there was no duty to preserve the SUV because it did not possess any exculpatory value that was apparent before it was destroyed. The

judge also found the State did not purposely destroy the SUV for any untoward reason. This appeal followed.

On appeal, defendant raises the following contentions:

POINT I: THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR [PCR] WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL AT THE TRIAL LEVEL.

A. THE PREVAILING LEGAL PRINCIPLES REGARDING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, EVIDENTIARY HEARINGS AND PETITIONS FOR [PCR].

B. THE DEFENDANT DID NOT RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL AS A RESULT OF TRIAL COUNSEL'S FAILURE TO PRESENT READILY[-]AVAILABLE EXPERT TESTIMONY TO REBUT THE EXPERT TESTIMONY PRESENTED BY THE STATE THROUGH [THE DOCTOR] OPINING THE DEFENDANT'S FAILURE TO RENDER AID TO THE VICTIM CAUSED HER DEATH.

C. THE DEFENDANT DID NOT RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL AS A RESULT OF TRIAL COUNSEL'S FAILURE TO REQUEST AN ADVERSE-INTERFERENCE CHARGE ARISING OUT OF THE STATE'S UNEXPLAINED DESTRUCTION OF THE VEHICLE THE DEFENDANT WAS DRIVING ON THE NIGHT IN QUESTION.

Defendant raises the following contentions in his pro se supplemental brief:

POINT ONE

THE MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE A PRIMA FACIE CASE WAS ESTABLISHED AS TO INEFFECTIVENESS OF TRIAL COUNSEL.

POINT TWO

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO PRODUCE A DEFENSE FORENSIC PATHOLOGY EXPERT TO REFUTE THE STATE'S EXPERT TESTIMONY, THEREBY DEPRIVING DEFENDANT OF A FAIR TRIAL. [U.S. CONST., AMEND. VI; N.J. CONST., ART. I, ¶ 10.]

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 facts 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). 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).

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) (quoting Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984)).]

"[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, 321 N.J. Super. at 170. The defendant must establish, by a preponderance of the credible evidence, that he is entitled to the required relief. State v. Nash, 212 N.J. 518, 541 (2013).

We have considered defendant's contentions in light of the record and applicable legal principles and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We affirm substantially for the reasons

Judge Portelli expressed his oral opinion. We discern no abuse of discretion in the denial of defendant's PCR petition without an evidentiary hearing, as defendant failed to present a prima facie claim of ineffective assistance of counsel warranting an 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