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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-4773-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HOWARD L. RYAN,

Defendant-Appellant.

Submitted October 24, 2017 – Decided November 15, 2017

Before Judges Reisner and Mayer.

On appeal from Superior Court of New Jersey,
Law Division, Salem County, Indictment No.
08-11-0495.

Joseph E. Krakora, Public Defender, attorney
for appellant (Carolyn V. Bostic, Designated
Counsel, on the brief).

John T. Lenahan, Salem County Prosecutor,
attorney for respondent (David M. Galemba,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant Howard L. Ryan appeals from an April 27, 2016 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

A jury found defendant guilty of attempting to lure or entice a minor into a motor vehicle with a purpose to commit a criminal offense with or against the child, N.J.S.A 2C:13-6. Defendant was subsequently sentenced to a term of seven and one-half years with a five year period of parole ineligibility. Defendant appealed both the conviction and sentence. We rejected defendant's contentions and affirmed. See State v. Ryan, A-4609-10 (App. Div. May 22, 2012). The Supreme Court denied defendant's petition for certification. See State v. Ryan, 213 N.J. 45 (2013).

Defendant filed a PCR petition alleging his trial counsel was ineffective based on three specific grounds: counsel failed to file a Miranda¹ motion; counsel failed to review a taped statement by the victim prior to trial and failed to use the taped statement effectively in cross-examination; and counsel failed to meet with defendant and investigate facts/witnesses supporting the charge and possible defenses.

The PCR judge, who did not preside over defendant's criminal trial, heard oral argument on the PCR application without conducting an evidentiary hearing. The PCR judge denied defendant's petition.

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The facts relevant to defendant's PCR application were set forth in our decision denying defendant's direct appeal. We need not repeat those facts in disposing of this appeal as they are not necessary for our review of defendant's arguments related to the denial of his PCR petition.

In her comprehensive written decision on defendant's PCR application, Judge Linda L. Lawhun found that there was no meritorious basis for a Miranda motion suppressing defendant's statements. She also found that while trial counsel did not listen to the victim's taped statement prior to commencement of the trial, the trial judge permitted a brief adjournment during the trial to permit defense counsel to review the audio tape.² The PCR judge concluded that trial counsel was not ineffective in his use of the tape to cross-examine the victim. She found that defendant's remaining claims, including the claims in defendant's pro se PCR petition, were bald assertions with no evidentiary support, were duplicative of counsel's arguments in support of the PCR petition, or could have been raised as part of defendant's direct appeal.

Based on those rulings, the PCR judge determined that defendant failed to establish a prima facie case of ineffective assistance of counsel in accordance with Strickland v. Washington,

² Defense counsel asserted that the audio tape was not provided in discovery.

466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42 (1987).

On appeal from the denial of his PCR petition, defendant raises the following arguments:

POINT ONE

THE PCR COURT ABUSED ITS DISCRETION BY REFUSING TO HOLD AN EVIDENTIARY HEARING WHERE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN VIOLATION OF U.S. CONST. AMENDS. VI AND XIV, AND N.J. CONST. ART. I, PAR. 10.

A. Trial Counsel's Performance Was Deficient Because He Failed to Investigate Potential Alibi and/or Corroborating Defense Witnesses Who Were Either Identified by the Defendant or Obvious From the Discovery.

B. Trial Counsel Was Ineffective for Failing to File a Motion to Suppress the Defendant's Alleged Statement to Corporal Daniels Where the Defendant Was Subject to a Custodial Interrogation as Required by Miranda.

C. Trial Counsel's Cross-Examination of the Victim was Deficient Under Strickland Because He Did Not Effectively Utilize Her Audiotaped Statement to the Police, Which Trial Counsel Failed to Secure and Listen to Prior to the Start of Trial, to Impeach Her Testimony and Credibility.

To establish a prima facie claim of ineffective assistance of counsel, a convicted defendant must satisfy the two-part test enunciated in Strickland by demonstrating that: (1) counsel's performance was deficient, and (2) the deficient performance actually prejudiced the accused's defense. Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; see also Fritz, supra, 105 N.J. at 58.

In reviewing ineffective assistance claims, courts apply a strong presumption that a defendant's trial counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, supra, 466 U.S. at 690, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695. "[C]omplaints 'merely of matters of trial strategy' will not serve to ground a constitutional claim of inadequacy[.]" Fritz, supra, 105 N.J. at 54 (citation omitted). To establish a prima facie claim of ineffective assistance of counsel, a defendant must demonstrate a reasonable likelihood of succeeding under the Strickland/Fritz test. See State v. Preciose, 129 N.J. 451, 463 (1992). To demonstrate the likelihood of succeeding under the Strickland/Fritz test, a defendant "must do more than make bald assertions[,]. . . [and] must allege facts sufficient to demonstrate counsel's alleged substandard performance." State v.

Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999).

The PCR judge found no merit to defendant's contention that his counsel was ineffective because he should have filed a Miranda motion to suppress defendant's statements to the police. In this case, the victim flagged down a nearby police officer contemporaneous to her encounter with defendant. The victim told the officer that a man in a car approached her and offered her money. The officer saw the vehicle described by the victim and proceeded to stop defendant's car. The officer then asked defendant for his driving credentials and inquired what he was doing near the victim. The officer stopped defendant's car a second time and questioned defendant as to his purpose for being in town. Although the officer stopped defendant twice, and asked questions related to defendant's reasons for being in the area, the officer let defendant drive away both times. Defendant was never asked to step outside his car. At no time was defendant's freedom restricted so as to amount to a custodial interrogation. Moreover, defendant's statements to the officer were voluntary and provided in response to the inquiries related to the officer's investigation.

Under these circumstances, we agree that Miranda warnings were not required a result of the brief discussions between

defendant and the officer. The principles of Miranda were not intended to hamper or inhibit police engaging in "on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process. . . ."

Miranda, supra, 384 U.S. at 477, 86 S. Ct. at 1629, 16 L. Ed. 2d at 725. In responding to the officer who was making inquiry, defendant was neither under arrest nor undergoing custodial interrogation. See State v. Smith, 374 N.J. Super. 425, 430-31 (App. Div. 2005). In this situation, a suppression motion would not have been successful, and defense counsel was not ineffective for failing to file a Miranda motion. See State v. Worlock, 117 N.J. 596, 625 (1990).

As for defendant's contention that his counsel was ineffective in failing to listen to the audio recording of the victim's statement and then use that statement effectively during cross-examination, the PCR judge correctly observed that defense counsel requested, and was granted, an adjournment during the trial so that counsel could listen to the victim's recorded statement. Defense counsel continued cross-examination of the victim the next morning, after counsel had ample opportunity to listen to the audio recording of the victim's statement and formulate his cross-examination questions. We listened to the audio recording of the victim's statement, as did the PCR judge,

and agree that the victim's trial testimony did not contradict her recorded statement to the police. Defendant failed to demonstrate that defense counsel's cross-examination of the victim was deficient so as to prejudice his defense.

Lastly, defendant asserts defense counsel was ineffective in failing to meet with him and investigate potential witnesses, including defendant's wife who defendant claims would have corroborated his explanation for being in the area on the day of the incident. Rule 3:22-10(c) states that "[a]ny factual assertion that provides the predicate for a claim of relief [in a petition for PCR] must be made by an affidavit or certification . . . and based upon personal knowledge of the declarant before the court may grant an evidentiary hearing." Under this rule, a defendant asserting a claim of ineffective assistance of counsel in a PCR petition based on his counsel's failure to produce a witness at trial must present a certification by that witness concerning the testimony the witness would have given. See State v. Petrozelli, 351 N.J. Super. 14, 23 (App. Div. 2002); State v. Cummings, supra, 321 N.J. Super. at 170-71.

Defendant was unable to identify or provide any information about the group of girls or the group of males who were allegedly in the vicinity of the victim when defendant claims he stopped to ask for directions. Defendant failed to provide information that

would have allowed defense counsel to locate and question these claimed witnesses and obtain affidavits in support of his PCR application. More importantly, defendant speculates that these potential witnesses, if they could have been located by defense counsel, overheard his conversation with the victim and would have corroborated his testimony. In a PCR petition it is defendant's burden to present witnesses he claims would have been available to testify and specify the nature of their testimony. See Cummings, supra, 321 N.J. Super. at 171.


As for the failure to call defendant's wife, who allegedly would have corroborated defendant's reasons for being in the area on the day of the incident, his wife died in 2014 and thus could not confirm or deny defendant's PCR petition claim by way of a supporting affidavit.³ Moreover, as the PCR judge noted, defendant's wife was not with him when the offense occurred and thus could not have known what defendant was doing at the time of the incident. Consequently, the PCR judge found that the testimony of defendant's wife would not have been sufficient to create "a reasonable doubt with respect to an essential feature of the State's case." State v. Fortin, 178 N.J. 540, 591 (2004).

³ At no time subsequent to his conviction, until his wife's death in 2014, did defendant attempt to obtain a corroborating affidavit from his wife as to defendant's reasons for being in town on the date of the incident.

Based on our review of the record, we are satisfied that defendant failed to demonstrate that he was denied effective assistance counsel to meet the Strickland/Fritz test.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION