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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-0143-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PHILIP HOLDEN,

Defendant-Appellant.

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Submitted December 14, 2017 – Decided March 12, 2018

Before Judges Rothstadt and Gooden Brown.

On appeal from Superior Court of New Jersey,  
Law Division, Essex County, Indictment No. 10-  
08-1918.

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

Robert D. Laurino, Acting Essex County  
Prosecutor, attorney for respondent (Tiffany  
M. Russo, Special Deputy Attorney General/  
Acting Assistant Prosecutor, of counsel and  
on the brief).

PER CURIAM

Defendant appeals from the March 28, 2016 Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

Following a jury trial, on June 24, 2011, defendant was convicted of third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2) (count two);<sup>1</sup> first-degree attempted murder, N.J.S.A. 2C:5-1, 11-3 (count three); first-degree murder, N.J.S.A. 2C:11-3(a)(1), (2) (count four); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b) (count five); and second-degree unlawful use of a handgun, N.J.S.A. 2C:39-4(a) (count six). After appropriate mergers, he was sentenced on August 5, 2011, to two consecutive terms of life imprisonment, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2,<sup>2</sup> on counts three and four, and a concurrent ten-year term with a five-year parole disqualifier on count five.

Defendant's convictions and sentence were affirmed on appeal, and his petition for certification was denied. State v. Holden,

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<sup>1</sup> The jury convicted defendant of third-degree aggravated assault as a lesser included offense of second-degree aggravated assault, N.J.S.A. 2C:12-1(a).

<sup>2</sup> A defendant convicted of a first-degree crime subject to NERA must serve eighty-five percent of his sentence before he is eligible for parole. N.J.S.A. 2C:43-7.2(a). Furthermore, solely for the purpose of calculating the minimum term of parole ineligibility, a term of life imprisonment shall be deemed to be seventy-five years. N.J.S.A. 2C:43-7.2(b).

No. A-2663-11 (App. Div. Apr. 10, 2014), certif. denied, 220 N.J. 40 (2014). We incorporate by reference the proofs adduced at the trial detailed in our earlier opinion and will not repeat them here at length. Suffice it to say for purposes of this opinion that the convictions stemmed from defendant fatally shooting an innocent bystander outside of a liquor store when he shot at, but missed, a drug dealer with whom he had a dispute over their respective drug dealing activities. The State's proofs included eyewitness testimony from the drug dealer and a buyer at the scene, who had had prior encounters with defendant, as well as surveillance footage of the street. Although police subsequently executed a search warrant at defendant's home which he shared with his girlfriend, Daphne Stuckey, the gun used in the shooting was not recovered. At trial, defendant presented an alibi defense through Stuckey's testimony. In addition, through a stipulation, defendant presented evidence of third-party guilt by virtue of the fact that the same gun used in the shooting was used in two subsequent shootings, which occurred months later while defendant was incarcerated.

Defendant filed a timely pro se petition for PCR, alleging that trial counsel was ineffective in several areas. Assigned PCR counsel supplemented the petition with briefs, underscoring that trial counsel was ineffective for failing to thoroughly

investigate and effectively advance defendant's defenses. Specifically, PCR counsel argued that trial counsel failed to thwart the State's efforts to impeach his alibi witness by calling two additional witnesses who could corroborate one aspect of her testimony. PCR counsel also argued that trial counsel merely relied on the stipulation without more in advancing defendant's third-party guilt defense.

In a supplemental certification, defendant certified that he told trial counsel that two witnesses, Monique and Carl Blanchard, could verify that Stuckey was arrested the day after the shooting and spent all day at the precinct because the Blanchards "picked her up after she was released." However, according to defendant, trial counsel did nothing with this information and allowed the State's rebuttal witness to deny that Stuckey was taken to police headquarters to "[make] her look like she had fabricated the story and lied about what happened." Defendant submitted certifications by Monique Blanchard, Stuckey's sister, and her husband, Carl Blanchard, confirming his account. Defendant also averred that although trial counsel entered into a stipulation with the State that an individual named Juan Scott was found in possession of the gun used in the homicide, trial counsel failed to conduct "any further investigation" and failed to present "to the jury the

similar physical characteristics" between Scott and defendant to support defendant's claim of misidentification.

On March 24, 2016, during oral argument, PCR counsel emphasized the "great importance" of Stuckey's credibility as a witness. He argued that the importance of Stuckey's credibility was evidenced by the fact that "the State actually called a rebuttal witness" to discredit her by showing "that she wasn't . . . stuck in the precinct all day, as she testified to when, in fact, that's exactly what . . . happened" and "Monique and Carl Blanchard were witnesses that would've supported that." According to PCR counsel, Stuckey being removed from her home by police the day after the shooting and taken to headquarters where she remained the entire day was significant because it was her reference point for vouching for defendant's whereabouts when he purportedly committed the crimes. PCR counsel asserted that allowing the State's rebuttal testimony to go unchallenged constituted ineffective assistance of counsel. Turning to the third-party guilt defense, PCR counsel argued trial counsel's performance was deficient in relying solely on the stipulation rather than emphasizing the "similar physical characteristics" between Scott and defendant to point out that defendant could have been easily misidentified.

In an oral decision, the PCR judge, who was also the trial judge, rejected all of defendant's arguments and denied defendant's petition. The judge determined that defendant failed to establish a prima facie case of ineffective assistance of counsel under the two-pronged test formulated in Strickland v. Washington, 466 U.S. 668, 687 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42 (1987), to warrant an evidentiary hearing. After noting that defendant's trial counsel had "experience" and "trial abilities" that were "probably unsurpassed in this County," the judge rejected defendant's contentions regarding his alibi defense. The judge explained that the two affidavits of the Blanchards "don't really go to the alibi issue" but instead would "go to . . . bolstering the witness' testimony . . . ." The judge also rejected defendant's argument as to the third-party defense claim and concluded that the challenged performance was all "a matter of strategy" and would not have "changed anything" to meet "the second prong of Strickland . . . ." The judge entered a memorializing order and this appeal followed.

On appeal, defendant raises a single point for our consideration:

POINT I<sup>3</sup>

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION AT THE TRIAL LEVEL.

A. THE DEFENDANT DID NOT RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL AS A RESULT OF COUNSEL'S FAILURE TO ELICIT RELEVANT TESTIMONY TENDING TO ESTABLISH THIRD-PARTY GUILT.

B. THE DEFENDANT DID NOT RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL AS A RESULT OF TRIAL COUNSEL'S FAILURE TO UTILIZE THE TESTIMONY OF TWO POTENTIAL WITNESSES WHO WOULD HAVE SERVED TO REHABILITATE THE CREDIBILITY OF THE DEFENDANT'S ALIBI WITNESS, DAPHNE STUCKEY, AFTER IT HAD BEEN IMPEACHED BY THE STATE DURING REBUTTAL.

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. 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).

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<sup>3</sup> We condensed Point I for clarity.

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). Where, as in this case, "no evidentiary hearing has been held, we 'may exercise [de novo] review over the factual inferences drawn from the documentary record by the [PCR judge].'" State v. Reevey, 417 N.J. Super. 134, 146-47 (App. Div. 2010) (second alteration in original) (quoting State v. Harris, 181 N.J. 391, 421 (2004)).

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) (alteration in original) (citations omitted)]



(quoting Strickland, 466 U.S. at 687-88, 694).]

"[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. Indeed, 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). In determining whether counsel's performance fell "outside the wide range of professionally competent assistance," Strickland, 466 U.S. at 690, "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Id. at 688-89. Thus, a "strong presumption" of competence applies. Id. at 689.

For that reason,

[A]n otherwise valid conviction will not be overturned merely because the defendant is dissatisfied with his or her counsel's exercise of judgment during the trial. The quality of counsel's performance cannot be fairly assessed by focusing on a handful of issues while ignoring the totality of counsel's performance in the context of the State's evidence of defendant's guilt. As a general rule, strategic miscalculations or


trial mistakes are insufficient to warrant reversal except in those rare instances where they are of such magnitude as to thwart the fundamental guarantee of a fair trial.

[State v. Allegro, 193 N.J. 352, 367 (2008) (quoting State v. Castagna, 187 N.J. 293, 314-15 (2006)).]

Here, defendant renews his arguments that his trial counsel's failure to elicit "critical testimony" that the person found in possession of the gun matched defendant's physical description, and failure to call the Blanchards "to rehabilitate Stuckey's credibility" violated his right to effective assistance of counsel. We disagree and are in accord with the PCR judge's reasons for rejecting defendant's arguments. Moreover, even assuming counsels' performance could in some way be characterized as deficient, which we do not find, defendant has failed to meet the heavy burden of proof that but for counsels' performance, the result would have been any different given the damning evidence of his guilt. Accordingly, 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