

**NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION**

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-0428-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WAYNE J. DAVENPORT, JR.,  
a/k/a WAYNE J. DAVENPORT,

Defendant-Appellant.

---

Submitted December 21, 2017 — Decided March 13, 2018

Before Judges Rothstadt and Gooden Brown.

On appeal from Superior Court of New Jersey,  
Law Division, Salem County, Indictment Nos.  
11-03-0117 and 11-04-0234.

Joseph E. Krakora, Public Defender, attorney  
for appellant (John A. Albright, Designated  
Counsel, on the brief).

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

PER CURIAM

Defendant, Wayne J. Davenport, Jr., appeals from the denial of his petition for post-conviction relief (PCR) without an evidentiary hearing. For the reasons that follow, we affirm.

Defendant was charged in an indictment and convicted by a jury of third-degree possession of a controlled dangerous substance (CDS), cocaine, N.J.S.A. 2C:35-10(a)(1); third-degree distribution of CDS, cocaine, N.J.S.A. 2C:35-5(b)(5); third-degree distribution of CDS, cocaine, within 1000 feet of a school, N.J.S.A. 2C:35-7; and second-degree distribution of CDS, cocaine, within 500 feet of public housing, N.J.S.A. 2C:35-7.1. After his conviction, defendant pled guilty to committing third-degree possession of CDS, marijuana, with intent to distribute, N.J.S.A. 2C:35-5(b)(11), as charged in a separate indictment. The sentencing court imposed an aggregate sentence of fourteen years' imprisonment, with a five-year period of parole ineligibility.

Defendant appealed and, in an unpublished opinion, we affirmed his convictions, but remanded his sentence only for merger of certain counts. State v. Davenport, No. A-2003-12 (App. Div. Mar. 18, 2014) (slip op. at 14). The Supreme Court denied defendant's petition for certification. State v. Davenport, 219 N.J. 631 (2014). On remand, the trial court entered an amended judgment of conviction to reflect the merger of the counts that we directed in our opinion.

The facts underlying defendant's convictions are set forth in our earlier opinion and need not be repeated at length here. See Davenport, slip op. at 4-7. Suffice it to say for purposes of this opinion that the evidence at trial established, among other things, that defendant sold CDS (cocaine) to an undercover police officer while inside a car that the officer testified was located within 1000 feet of a school and 500 feet of public housing. Defendant's trial counsel stipulated that the location the officer testified about was within those zones and the trial court charged the jury that it could accept or reject the stipulated facts in their consideration of the evidence.

Defendant filed a PCR petition on May 8, 2015, in which he argued his trial counsel provided ineffective assistance. Among his numerous contentions, defendant argued that counsel was ineffective by stipulating, without defendant's consent, that the place of the alleged offenses took place within 500 feet of public housing and 1000 feet of a school. PCR counsel filed a brief and amended petition in February 2016. In this brief, defendant argued, among other contentions, that trial counsel was ineffective because he did not challenge the State's allegations about the offenses taking place within a school zone or near public housing, nor did he seek the appropriate charge to the jury about "the unreliability of distance estimates."

The PCR court denied defendant's petition, without an evidentiary hearing, by order dated June 24, 2016, and issued a seventeen-page written decision setting forth its reasons. In the court's decision, it found that many of defendant's contentions were procedurally barred under Rule 3:22-3 and Rule 3:22-4 as having already been raised on appeal or that they could have been raised, but were not. The court found defendant's other claims were unsustainable because he did not establish that, even if counsel erred, the outcome of the trial would have been different, or they were without merit or belied by the record.

Addressing defendant's PCR claims arising from his trial counsel's failure to challenge the location of the alleged offenses being near public housing or a school, the PCR court found that defendant, through counsel, stipulated at trial to the proximity of the offenses' location to both public housing and a school. According to the PCR court, the agreement to stipulate was "a strategy-based decision by counsel, [because] the defense advanced by counsel at trial was misidentification and not a lack of proof as to the elements of the crime." Moreover, the PCR court found that the trial judge properly instructed the jury that it was free to accept or reject the stipulation in reaching its verdict. Also, as a result of the stipulation, defendant's argument on PCR that counsel should have sought a charge on the unreliability of

distance estimates was without any merit. Similarly, the PCR court found defendant's contention that counsel should have sought dismissal of the school zone and public housing counts was unsupported by any evidence that such motions would have been successful. It also found defendant's argument that there was a lack of specificity necessary to sustain his conviction for those offenses meaningless in light of the stipulation made at trial.

Defendant presents the following issues for our consideration in his appeal.

POINT I

THE LOWER COURT ERRED IN DENYING DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING BECAUSE HE ESTABLISHED A PRIMA FACIE CASE OF TRIAL COUNSEL'S INEFFECTIVENESS FOR, AMONG OTHER THINGS, STIPULATING TO MULTIPLE ESSENTIAL ELEMENTS OF THE DISTRIBUTION OFFENSES CHARGED WITHOUT HIS CONSENT (AND WITHOUT ANY CONSULTATION AT ALL).

A. THE PCR JUDGE'S CONCLUSION THAT TRIAL COUNSEL'S STIPULATION THAT THE DRUG TRANSACTION AT ISSUE IN THIS CASE OCCURRED IN SCHOOL AND PUBLIC HOUSING ZONES WAS "INVARIABLY A STRATEGY-BASED DECISION" IS NOT SUPPORTED BY ANY EVIDENCE IN THE RECORD BECAUSE NO EVIDENTIARY HEARING WAS CONDUCTED.

B. DEFENDANT'S FACTUAL  
CONTENTION THAT HE DID NOT AUTHORIZE  
HIS TRIAL COUNSEL TO STIPULATE TO  
MULTIPLE ESSENTIAL ELEMENTS OF THE  
OFFENSES CHARGED IS UNDISPUTED IN  
THE RECORD.

The standard for determining whether counsel's performance was ineffective for purposes of the Sixth Amendment was 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, 49 (1987). In order to prevail on a claim of ineffective assistance of counsel, defendant must meet the two-prong test of establishing both that: (1) counsel's performance was deficient and he or she made errors that were so egregious that counsel was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution; and (2) the defect in performance prejudiced defendant's rights to a fair trial such that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 687, 694.

In reviewing claims of ineffective assistance of counsel, courts apply a strong presumption that defense counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. "[C]omplaints 'merely of matters of trial strategy' will not serve

to ground a constitutional claim of inadequacy . . . ." Fritz, 105 N.J. at 54 (citations omitted). The act or omission complained of must amount to more than mere tactical strategy. See Strickland, 466 U.S. at 699.

PCR claims arising from trial counsel's strategic decisions cannot be considered in isolation and a miscalculation does not automatically establish ineffectiveness. "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." State v. Castagna, 187 N.J. 293, 314 (2006) (citing State v. Marshall, 123 N.J. 1, 165 (1991)). Generally, "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.'" Id. at 314-15 (alteration in original) (citations omitted).

"[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." State v. Allegro, 193 N.J. 352, 367 (2008) (quoting Castagna, 187 N.J. at 314). Although the parameters of such conduct are not easily defined, "there is a strong presumption that counsel's conduct

falls within the wide range of reasonable professional assistance [and that, t]o rebut that strong presumption, a defendant must establish that trial counsel's actions did not equate to sound trial strategy." Id. at 366 (alteration in original) (quoting Castagna, 187 N.J. at 314). Critically important to the analysis is that the conduct must be judged "on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 366-67 (quoting Castagna, 187 N.J. at 314).

We conclude from our review of the record that defendant failed to make a prima facie showing of ineffectiveness of trial counsel within the Strickland-Fritz test. We agree with the PCR court that trial strategy was the dominant consideration in stipulating to the offenses being committed near public housing and in a school zone in light of the fact that the theme of defendant's defense was undisputedly misidentification and not that the offenses, if committed, were carried out in a different location.


Even if counsel's agreeing to the stipulation was not strategic, defendant did not offer any proof that without the challenged testimony the result of the trial would have been different. See State v. Jones, 219 N.J. 298, 309-10 (2014). As pointed out by defendant in his brief to us, the evidence at trial included testimony by a police officer about the location of the

drug purchase he made from defendant in a car in which he was "mere inches away" from defendant. In his PCR petition, defendant offered no facts to dispute that the location was not within a school zone or in proximity to public housing. See id. at 311-12 ("In order for a claim of ineffective assistance of counsel to entitle a PCR petitioner to an evidentiary hearing, 'bald assertions' are not enough—rather, the defendant 'must allege facts sufficient to demonstrate counsel's alleged substandard performance.'" (quoting State v. Porter, 216 N.J. 343, 355 (2013))). Without such evidence, defendant cannot demonstrate that trial counsel's decision to stipulate to the location would have changed the trial's outcome. Defendant therefore did not meet his burden to "undermine [our] confidence in [his] conviction." State v. Echols, 199 N.J. 344, 359 (2009) (citing Strickland, 466 U.S. at 694).

As defendant failed to prove a prima facie claim of ineffective assistance of counsel, we agree with the PCR court that an evidentiary hearing was not warranted. See State v. Preciose, 129 N.J. 451, 462-63 (1992).

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION