SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1130-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

OMAR CROMER, a/k/a JALIN PARKER,

Defendant-Appellant.

Submitted March 19, 2018 – Decided May 2, 2018

Before Judges Messano and Accurso.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Indictment No. 12-06-1473.

Joseph E. Krakora, Public Defender, attorney for appellant (Anderson D. Harkov, Designated Counsel, on the brief).

Mary Eva Colalillo, Camden County Prosecutor, attorney for respondent (Linda A. Shashoua, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

After the trial court denied a motion to suppress the highly incriminating statement he gave to law enforcement, defendant Omar

Cromer pled guilty to first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1), admitting under oath that he vaginally penetrated N.P., who was less than thirteen-years old, with his penis. Prior to sentencing and represented by different counsel, defendant moved to withdraw his guilty plea, claiming he was pressured to plead guilty by predecessor counsel, and he was innocent of the charges, citing reports in discovery of two examinations of the victim that revealed no physical injuries corroborating her claim of sexual penetration.

The judge held a hearing on the motion, at which defendant reiterated he was innocent of the charge and only pled guilty under pressure from his attorney. Defendant acknowledged that he had the opportunity to review discovery and knew its contents prior to pleading guilty. After considering the factors outlined by the Court in State v. Slater, 198 N.J. 145, 157-62 (2009), the judge denied defendant's motion.

Defendant was subsequently sentenced in accordance with the plea bargain to twelve years' imprisonment with an 85% period of parole ineligibility pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2. We considered defendant's appeal on our Excessive Sentence Oral Argument calendar, affirming both defendant's sentence and denial of the motion to withdraw his guilty plea. State v. Omar Cromer, No. A-3710-14 (App. Div. Sept. 28, 2015).

Defendant filed a petition for post-conviction relief (PCR), alleging various claims of ineffective assistance of counsel (IAC), only one of which is preserved for this appeal. Specifically, defendant argued second trial counsel failed "to [p]roperly [r]esearch, [b]rief, and [a]rgue [his] [m]otion to [w]ithdraw his [g]uilty [p]lea." Defendant asserted that counsel should have retained an expert regarding the lack of physical findings of sexual penetration, and this would have lent credible support to defendant's claim of actual innocence. See Slater, 198 N.J. at 159 ("[Courts] should simply consider whether a defendant's assertion of innocence is more than a blanket, bald statement and rests instead on particular, plausible facts.").

After considering oral argument, Judge Steven J. Polansky, who was not the judge who took the defendant's plea, properly set forth the two-prong analysis for IAC claims 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, 58 (1987). The judge noted that a successful IAC defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Id. at 52 (quoting Strickland, 466 U.S. at 687). Second, a defendant must prove he suffered prejudice due to counsel's deficient performance. Strickland, 466 U.S. at 687.

Judge Polansky quoted from the expert report of Dr. Mara D. McColgan, M.D., which defendant furnished in support of his petition. There, Dr. McColgan stated:

> The American Academy of Pediatrics recommends that every child who reports sexual abuse receive a medical examination to identify any injuries or signs of infection. However, the vast majority of children who have been sexually abused, even in cases where there is penetration[,] have a normal examination. Less than five percent will have definitive evidence of penetration, however. Therefore a normal exam never rules in or rules out sexual abuse. A normal exam can be consistent with having been sexually abused but may also be consistent with never having been sexually abused. Therefore, the medical exam rarely confirms or denies sexual abuse occurred.
>
> As there is rarely physical evidence, as medical providers, we often rely on the history to make a diagnosis.

Judge Polansky reasoned that even if counsel had retained an expert witness prior to arguing defendant's motion to withdraw, that expert would opine that the lack of physical findings did not negate the sexual assault and would not have lent support to defendant's claim of actual innocence. Therefore, counsel did not provide ineffective assistance when preparing, investigating and arguing defendant's motion to withdraw. See, e.g., State v. Echols, 199 N.J. 344, 361 (2009) (counsel does not provide ineffective assistance by failing to raise unsuccessful legal claims). Judge Polansky addressed all the other claims raised by

PCR counsel and defendant in his pro se brief, before entering an order denying the petition. This appeal followed.

Defendant raises the following points for our consideration:

> POINT ONE
>
> THE PCR COURT ERRED WHEN IT FAILED TO GRANT DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING.
>
> POINT TWO
>
> THE FAILURE OF TRIAL COUNSEL TO RETAIN AN EXPERT WITNESS IN ADVANCE OF THE HEARING ON DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA, DEPRIVED DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

In light of the record and applicable legal standards, defendant's contentions lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We affirm for the reasons set forth by Judge Polansky in his oral opinion.

Affirmed.