

**NOT FOR PUBLICATION WITHOUT THE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-1191-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHARLES DAVIS,

Defendant-Appellant.

Submitted December 13, 2017 — Decided January 19, 2018

Before Judges Nugent and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Indictment No.
06-07-1042.

Joseph E. Krakora, Public Defender, attorney
for appellant (Adam W. Toraya, Designated
Counsel, of counsel and on the brief).

Andrew C. Carey, Middlesex County Prosecutor,
attorney for respondent, (Susan Berkow,
Special Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant Charles Davis appeals from an August 20, 2015 order
denying his petition for post-conviction relief (PCR). On appeal,

defendant challenges the denial of his petition without affording him an evidentiary hearing. We affirm.

In our opinion on defendant's direct appeal, we summarized the evidence presented at trial. State v. Davis, No. A-0106-07 (App. Div. Feb. 6, 2012) (slip op. at 2-6). We noted:

On March 21, 2006, . . . Evelyn Schwartz was shopping at the Macy's department store in Menlo Park in Edison. Schwartz left Macy's and walked to her car, which was parked about 100 yards from the entrance. She unlocked and opened the driver's side door and placed her handbag on the front passenger's seat. Before she could close the door, defendant ran to the car, reached across Schwartz, and grabbed the handbag. Schwartz's hand became entangled in the strap of the bag, and she was pulled from the car, lacerating her wrists.

A Macy's employee, Thomas Thomas, drove into the parking lot and parked nearby just as Schwartz's purse was taken. He observed a young, black male in his 20's, approximately 5'11" with a thin build, pull Schwartz out of the car and drag her as she struggled. Thomas exited his car and stood next to his vehicle. Defendant walked past, entered a Honda Accord, and drove away. Thomas wrote down the license plate number, then assisted Schwartz.

The police responded, gathering matching descriptions of defendant from Schwartz and Thomas. The police investigated the license plate number and learned that the plate had been stolen.

Two days later, Evelyn Kentos was shopping at Shop-Rite in Edison. She exited the Shop-Rite and walked to her car, unlocked the driver's side door and walked around her minivan to open the passenger-side sliding

door. Her purse was in the child's seat section of her shopping cart as she was unloading her groceries. Defendant drove his car in front of Kentos' car, blocking her exit. He ran from the car, grabbed Kentos' purse, ran to his vehicle and drove away.

The police were contacted, and upon arrival asked Kentos for a quick description of the suspect. She described the suspect as a "[b]lack male, approximately six foot, wearing a green sweat shirt, gold sweat shirt, green sweat pants and wool knit, like a knit cap." . . .

On April 11, 2006, at 4:15 p.m., a security officer at the Menlo Park Mall told a patrolling police officer that he had seen a person who matched the composite picture police had produced in the Schwartz robbery driving a red Honda Accord with an identified license plate number outside the Macy's parking lot. The police responded, but the Honda was gone when they arrived. The police ran a vehicle check and learned that the car had been reported as stolen from Piscataway the previous day.

Later that day, at approximately 5:45 p.m., Janet Tadduni was at the Shop-Rite in Edison. Tadduni exited the store and began unloading her groceries when she observed a red car with a spoiler. She then saw defendant exit the car and walk into the Shop-Rite. As she unloaded her groceries, she placed her purse in the child's seat section of her shopping cart. Defendant exited the Shop-Rite, dashed towards Tadduni, grabbed her purse, and ran away. Defendant entered the red car, but before he could drive away, Tadduni reached the vehicle and observed defendant. She banged on the window and roof and yelled at defendant to return her purse. Defendant grinned and drove away. . . .

Two days later, Edison Police Officer Alan Varady was on patrol on his motorcycle when he saw a red Honda Accord driving towards him. Varady read the license plate and identified the Honda as the stolen car seen two days earlier at the Menlo Park Mall. He also noted that defendant was driving the car. As he attempted to approach the car, defendant suddenly drove away towards an adjoining parking lot. Varady turned on his lights and siren and followed.

[Id. at 2-5.]

A lengthy, high-speed pursuit ensued, during which defendant's vehicle side-swiped a car, crossed a median, collided with another car, and continued to elude three pursuing police officers, including Detective Rigby, at a high rate of speed.

As defendant continued north on Route 1, Rigby pulled next to the driver's side and could see defendant driving with a heavier black male in the passenger seat, later identified as [Bilam] Muslim. Defendant swerved into Rigby, forcing him to back off. After an overpass, . . . defendant diverted into a Wal-Mart shopping center. Defendant drove into a field behind the store, through a fence, but became stuck attempting to cross some railroad tracks. Defendant and Muslim got out of the car and ran in opposite directions. . . . Muslim was immediately apprehended, but defendant was discovered forty minutes later, hiding inside an abandoned refrigerator.

[Id. at 6.]

On July 13, 2006, a Middlesex County grand jury charged defendant with second-degree robbery, N.J.S.A. 2C:15-1 (counts

one, two, and three); third-degree receiving stolen property, N.J.S.A. 2C:20-7; (count four); second-degree eluding, N.J.S.A. 2C:29-2(b) (count five); and fourth-degree hindering investigation, N.J.S.A. 2C:29-3(b)(4) (count six).

Defendant moved to suppress the statement he gave to police, sever the various robbery and theft offenses, and dismiss the indictment. Judge James F. Mulvihill held a four-day evidentiary hearing on the motions. On February 21, 2007, the judge denied defendant's suppression and severance motions. The judge declined to dismiss the indictment but amended counts two and three from second-degree robbery to third-degree theft from the person, N.J.S.A. 2C:20-2(b)(2)(d). In addition, since Muslim had pled guilty to the eluding offense, defendant asserted he could not be found guilty of the same offense. The judge rejected that argument.

Tried to a jury, defendant was convicted of all counts as amended. On May 4, 2007, the judge denied defendant's motion for a new trial. On May 18, 2007, the judge granted the State's motion to impose an extended term of imprisonment pursuant to N.J.S.A. 2C:43-7.1(b) and imposed a fourteen-year prison term, subject to an eighty-five percent period of parole ineligibility under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, on count one. On count two, the court sentenced defendant to a three-year prison

term to run consecutively to count one. On count three, the court sentenced defendant to a three-year prison term to run consecutively to counts one and two. The court merged counts four and six into count five and sentenced defendant on count five to a six-year prison term, subject to a twenty-four month period of parole ineligibility, to run consecutively to the other counts. This yielded an aggregate twenty-six-year prison term with a fourteen-year period of parole ineligibility.

Defendant appealed his conviction and sentence. Through counsel, defendant raised the following issues on direct appeal:

POINT I

THE TRIAL COURT'S REFUSAL TO SEVER THE COUNTS OF THE INDICTMENT DENIED DEFENDANT HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL. U.S. CONST. AMENDS. V, VI AND XIV; N.J. CONST. (1947), ART. I, ¶¶ 1, 9 AND 10. (NOT RAISED BELOW)

POINT II

THE EVIDENCE THAT MR. MUSLIM HAD BEEN CONVICTED OF THE ELUDING CHARGE IN THIS CASE PRECLUDED THE STATE FROM PROVING BEYOND A REASONABLE DOUBT THAT MR. DAVIS WAS GUILTY OF THE ELUDING CHARGE.

POINT III

THE EXCESSIVE 20-YEAR AGGREGATE SENTENCE, 14 YEARS WITHOUT PAROLE, WAS ACHIEVED BY IMPOSING INAPPROPRIATE CONSECUTIVE SENTENCES AND THE INDIVIDUAL SENTENCES FOR EACH OFFENSE WERE CALCULATED WITHOUT REFERENCE TO APPLICABLE MITIGATING FACTORS.

In a pro se brief, defendant raised these additional issues:

POINT I

THE DEFENDANT WAS DENIED HIS RIGHT TO THE MIRANDA SAFEGUARDS AFFORDED UNDER THE STATE'S CONSTITUTION (1947) ARTICLE I par, 10. BECAUSE THE DEFENDANT WAS INTERROGATED THREE SEPARATE TIMES ON THE SAME SUBJECT, WHEREBY FAILING TO "SCRUPULOUSLY HONOR" THE DEFENDANT'S RIGHT TO REMAIN SILENT AND CUT OFF COMMUNICATIONS WITH THE INTERROGATORS. CONTRARY TO MIRANDA, 384 U.S. 86 [] (1966) (sic) AND ITS PROGENY.

POINT II

WITHHOLDING OF RELEVANT AND PROBATIVE OUT OF COURT NON-IDENTIFICATION EVIDENCE VIOLATED DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS AND DEPRIVED THE DEFENDANT OF HIS RIGHT TO A FAIR TRIAL.

(A) WESTFIELD POLICE DEPARTMENT'S WITHHOLDING OF IDENTIFICATION EVIDENCE IN CONNECTION TO THE INCIDENTS DATED APRIL 10, 2006; (B) THE WILLFUL WITHHOLDING OF IDENTIFICATION EVIDENCE IN CONNECTION TO COUNT ONE OF THE INDICTMENT; (C) THE WILLFUL WITHHOLDING OF IDENTIFICATION EVIDENCE IN CONNECTION TO COUNT THREE OF THE INDICTMENT.

POINT III

THE DENIAL OF THE DEFENDANT'S MOTION TO DISMISS WAS FUNDAMENTALLY UNFAIR.

On February 6, 2012, we affirmed defendant's conviction and sentence. We rejected defendant's argument that the trial court erred in refusing to sever the various counts of the indictment,

concluding the trial judge "conducted a careful Cofield¹ analysis" and that "the Cofield factors were satisfied." Davis, slip op. at 11, 13. We concluded the trial court correctly determined the proof of other crimes was clear and convincing. We noted "the trial judge was well within his discretion in determining that the probative value of the evidence of other crimes was greater than its prejudice" and found "no abuse of discretion." Id. at 13.

Defendant also contended the trial court erred in denying his Miranda motion. Judge Mulvihill found that:

[defendant] was given his Miranda warnings; that he finally understood his Miranda warnings; that he gave a voluntary statement. He was not coerced, threatened, intimidated. He knew what was happening. He said he was playing a game with the police so he knew exactly what was going on and he gave a voluntary statement to the police. I find that beyond a reasonable doubt and the motion is denied.

[Id. at 14 (alteration in original).]

We determined that the judge's findings were supported by sufficient, credible evidence in the record and found that defendant's argument as to this issue and the other issues raised in his supplemental brief were without merit.

¹ State v. Cofield, 127 N.J. 328 (1992).

Defendant further contended the trial court erred by imposing consecutive sentences and by failing to consider relevant mitigating factors. We concluded "the judge properly relied upon evidence in the record in rejecting mitigating factors one and two." Id. at 19. As to the consecutive sentences, defendant contended that the decision not to sever the counts precluded consecutive sentencing. We noted that "the Yarbough² factors are clearly distinct from a Cofield analysis." Davis, slip op. at 19. We held "Judge Mulvihill did not abuse his discretion in concluding that the crimes were separate and distinct under Yarbough." Id. at 20.

Finally, defendant contended that since Muslim had previously pled guilty to the eluding offense, he could not be found guilty of the same offense. The State conceded the eluding charge is personal to a single individual and only one person could be convicted of the offense. We did not find the issue to be a basis for overturning defendant's conviction of that offense. We noted, however, that Muslim's eluding conviction may be subject to collateral attack and determined that we need not address the issue on direct appeal.

² State v. Yarbough, 100 N.J. 627 (1985).

Defendant then moved before the Appellate Division for reconsideration with consent of the State. On March 1, 2012, we granted reconsideration, vacated defendant's conviction for second-degree eluding, and remanded to the Law Division for re-sentencing on the remaining charges. On June 22, 2012, defendant was re-sentenced to the same sentences on counts one, two, and three. Due to the dismissal of count five, counts four and six were no longer subject to merger. On count four, defendant was re-sentenced to a three-year prison term, to run consecutive to counts one, two, and three. On count six, defendant was re-sentenced to a one-year prison term, to run consecutively to counts one, two, three, and four. Defendant's sentence was thereby reduced to an aggregate twenty-four-year prison term.

Defendant appealed his sentence. On April 10, 2013, an Excessive Sentencing Oral Argument (ESOA) panel affirmed the sentence. The Supreme Court denied defendant's petition for certification. State v. Davis, 216 N.J. 363 (2013).

On October 3, 2014, defendant filed a pro se PCR petition. Counsel was appointed to represent defendant. PCR counsel submitted two supplemental briefs and a certification of defendant raising several grounds for PCR. First, defendant claimed trial counsel was ineffective by not interviewing three victim-witnesses before trial regarding their inability to identify defendant as

the robber. Second, he claimed trial counsel's opening statement was ineffective. Third, he argued trial counsel was ineffective during the Miranda hearing by failing to question Detective Alan Sciarrillo about any force that was used against defendant during the questioning and whether defendant was harmed or threatened during the questioning. He further claimed trial counsel was ineffective by not calling Detective Duffy as a witness. He also claimed trial counsel failed to obtain an expert to examine the tape recording of his statement to determine if the tape had been paused during the interrogation. Finally, defendant argued that even if the individual claims do not establish ineffectiveness of counsel, their cumulative effect support a finding of ineffectiveness.

Defendant raised the following additional grounds for PCR in a pro se submission: (1) the denial of his severance motion denied him a fair trial; (2) trial counsel failed to investigate the State's identification evidence; (3) trial counsel failed to investigate the charged offenses during critical stages of the proceeding; (4) appellate counsel improperly waived the identification issue without his consent; and (5) appellate counsel waived his right against self-incrimination. On the day his petition was heard, defendant delivered an additional pro se submission, in which he claimed that because the eluding conviction

was vacated, the entire case should be dismissed due to the prejudicial effect of trying the eluding charge with the theft-related charges, despite our prior ruling upholding the denial of the severance motion.

The PCR court heard oral argument on August 14, 2015. On August 20, 2015, Judge Alberto Rivas issued an eight-page written opinion and order denying defendant's petition.

In his opinion, Judge Rivas noted that on direct appeal, defendant, through counsel, challenged the denial of his motion to sever, the eluding charge, and the length of his sentence. Additionally, in his pro se submissions, defendant alleged a violation of his Miranda rights, a failure to provide relevant and probative out-of-court non-identification evidence in violation of his Sixth and Fourteenth Amendment rights, and challenged the denial of his motion to dismiss the indictment.

With respect to his claims that force was used against him during his custodial interrogation and that the tape recording was paused during the questioning, Judge Rivas concluded these were issues that should have been raised as part of his direct appeal challenging the trial court's Miranda ruling. The judge also found "the very questions that Davis claims were not asked by his lawyer regarding the use of force or the pausing of the tape were asked at the Miranda hearing. . . . The fact that the questions

were asked by the [c]ourt, and not defense counsel, does not create in and of itself ineffective assistance." As to defendant's claim that trial counsel was ineffective by failing to call Officer Duffy as a witness to corroborate defendant's testimony that he did not want to give a statement, the judge noted defendant's "testimony was undermined by what actually took place and the fact that Davis did give a statement which was found to be voluntary."

The judge also analyzed defendant's claim that trial counsel failed to conduct adequate investigation by not interviewing the three victims.

Davis contends that if the interviews were conducted, counsel would have learned that the victims were unable to identify him, and as a result, the charges would have been dismissed or he would have been offered a favorable plea deal. However, the information that Davis claims his counsel would have gleaned from interviewing the witnesses was already known to counsel. Specifically, as to Evelyn Schwartz, the first victim, she was unable to identify Davis at a pretrial photo array or at the actual trial. Evelyn Kantos, the second victim, was also unable to identify Davis during the actual trial. Victim number three, Janet Tadduni, was able to make an in-court identification, but was unable to identify Davis pretrial when shown a photo array. The information that Davis said would be gained by a pretrial investigation was information available to all parties and used at the trial. Prior to the trial, no witness has positively identified Davis. This information was possessed by Davis['] counsel and the prosecution was also aware of the witnesses' shortcomings. Cognizant of these

facts, the prosecution went forward with the trial thereby negating Davis' theory that had the prosecutor been made aware of the non-identifications, the case would have either been dismissed or downgraded through plea negotiations. Davis' suppositions are belied by what actually took place and there was no ineffective assistance of counsel. The proposed investigation would not have added any additional information not already possessed by counsel.

The judge also analyzed defendant's claim that trial counsel failed to emphasize the following concepts during his opening statement: burden of proof, presumption of innocence, proof beyond a reasonable doubt, the grand jury process, cross-examination of witnesses, closing argument, and eyewitness identification. The judge noted the trial transcript revealed that these topics were discussed during the opening. The judge also noted these concepts were discussed in the jury instructions given by the court to the jury at the beginning and end of the trial. The judge found defendant "fails to make the connection of how developing these themes further would have resulted in a different outcome. Stylistic differences regarding opening statements do not constitute ineffective assistance."

As to defendant's claim that appellate counsel was ineffective by waiving the identification issue without his consent, the judge found that, although the claim as presented was unclear, identification was addressed on direct appeal and decided

adversely to defendant. With regard to defendant's claim that appellate counsel waived his right against self-incrimination, the judge found that no facts were presented to either precisely identify the issue or to demonstrate appellate counsel's related actions.

This appeal followed. Defendant raises the following issue through counsel:

POINT ONE

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.

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee criminal defendants the right to the effective assistance of counsel. State v. O'Neil, 219 N.J. 598, 610 (2014) (citing Strickland v. Washington, 466 U.S. 668, 686 (1984); State v. Fritz, 105 N.J. 42, 58 (1987)). "The right to effective assistance includes the right to the effective assistance of appellate counsel on direct appeal." Ibid. (citing Evitts v. Lucey, 469 U.S. 387, 396 (1985)).

To succeed on his PCR claim of ineffective assistance of counsel, defendant must satisfy the two-prong test established by

Strickland, 466 U.S. at 686, and adopted by our Supreme Court in Fritz, 105 N.J. at 58. "The defendant must demonstrate first that counsel's performance was deficient, i.e., that 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" State v. Parker, 212 N.J. 269, 279 (2012) (quoting Strickland, 466 U.S. at 687).

Second, "a defendant must also establish that the ineffectiveness of his attorney prejudiced his defense. 'The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 279-80 (quoting Strickland, 466 U.S. at 694).

"Judicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689. The defendant must overcome a "strong presumption that counsel's conduct falls within the wide range of professional assistance." Ibid.

"A claim for post-conviction relief must be established by a preponderance of the credible evidence." State v. McQuaid, 147 N.J. 464, 483 (1997) (citing State v. Preciose, 129 N.J. 451, 459 (1992); State v. Mitchell, 126 N.J. 565, 579 (1992)).

"A defendant shall be entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of post-

conviction relief[.]" R. 3:22-10(b). "To establish such a prima facie case, the defendant must demonstrate a reasonable likelihood that his or her claim will ultimately succeed on the merits." State v. Marshall, 148 N.J. 89, 158 (1997). The court must view the facts "in the light most favorable to defendant." Ibid. (quoting Preciose, 129 N.J. at 462-63).

"A court shall not grant an evidentiary hearing . . . if the defendant's allegations are too vague, conclusory or speculative[.]" R. 3:22-10(e)(2); see Marshall, 148 N.J. at 158. "Rather, defendant must allege specific facts and evidence supporting his allegations." State v. Porter, 216 N.J. 343, 355 (2013). Accordingly,

in order to establish a prima facie claim, a petitioner 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. Thus, when a petitioner claims his trial attorney inadequately investigated his case, he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification.

[State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).]

Generally, we review the PCR court's findings of fact under a clear error standard and conclusions of law under a de novo

standard. State v. Harris, 181 N.J. 391, 420-21 (2004). However, 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) (alteration in original) (quoting Harris, 181 N.J. at 421).

Applying these standards, we affirm substantially for the reasons stated by Judge Rivas in his thorough and well-reasoned written opinion. We add only the following comments.

A PCR petition is not "a substitute for appeal." R. 3:22-3. A defendant "is generally barred from presenting a claim on PCR that could have been raised . . . on direct appeal." State v. Nash, 212 N.J. 518, 546 (2013) (citing R. 3:22-4(a)); see also McQuaid, 147 N.J. at 483. "Additionally, a defendant may not use a petition for post-conviction relief as an opportunity to relitigate a claim already decided on the merits." McQuaid, 147 N.J. at 483 (citations omitted). Judge Rivas correctly found that many of the issues raised by defendant were procedurally barred because they had been previously adjudicated on the merits by the trial court or on direct appeal or should have been advanced on direct appeal but were not. In particular, defendant's claim that he was subjected to improper force and threats during custodial

interrogation was rejected by the trial court after a testimonial hearing and affirmed on direct appeal.

We discern no such abuse of discretion by the PCR court. The record supports Judge Rivas' conclusion that defendant did not make a prima facie showing of ineffective assistance of counsel. Defendant did not satisfy either prong of the Strickland-Fritz test. Accordingly, his petition was properly denied without conducting 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