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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1303-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TODD M. CALLAN,

Defendant-Appellant.

Submitted March 15, 2018 – Decided May 31, 2018

Before Judges Simonelli and Rothstadt.

On appeal from Superior Court of New Jersey,
Law Division, Ocean County, Indictment No.
11-08-1432.

Joseph E. Krakora, Public Defender, attorney
for appellant (Janet A. Allegro, Designated
Counsel, on the briefs).

Joseph D. Coronato, Ocean County Prosecutor,
attorney for respondent (Samuel Marzarella,
Chief Appellate Attorney, of counsel and on
the brief).

PER CURIAM

Defendant, Todd M. Callan, 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 convicted by a jury of second-degree eluding, N.J.S.A. 2C:29-2(b), and sentenced to ten years in prison with five years of parole ineligibility. Defendant appealed and we affirmed his convictions and sentence in an unpublished opinion. State v. Callan, No. A-0593-12 (App. Div. Aug. 12, 2014) (slip op. at 17). The Supreme Court denied his petition for certification. State v. Callan, 220 N.J. 573 (2015).

The facts underlying defendant's convictions are set forth in our opinion and need not be repeated here. See Callan, slip op. at 2-5.

Defendant filed a PCR petition on March 3, 2015, in which he argued that: (1) he was not provided with discovery, which deprived him of a fair trial; (2) his Eighth Amendment constitutional right was violated because his sentence was extreme in light of his mental health issues; and (3) his conviction was the result of prosecutorial misconduct and the ineffective assistance of counsel. As to his trial counsel's performance, he argued that counsel's failure to adequately investigate his case deprived defendant of certain evidence that

would have supported his defense that he was mistakenly identified as the person who eluded the police.

A brief and amended petition were submitted by PCR counsel on behalf of defendant in December 2015. In this brief, defendant raised additional arguments relating to trial counsel having allegedly failed to obtain discovery and "adequately present a defense." He claimed that counsel failed to raise issues about alleged gaps in the audio recordings between police during their chase of defendant, which he argued had been altered. According to defendant, had the recordings not been altered, they would have supported his claim that, contrary to the testimony admitted at trial, no one was able to identify him to the police.

On June 9, 2016, PCR counsel supplemented his submission with additional arguments regarding trial counsel's performance. In the supplemental brief, defendant argued that trial counsel's performance was deficient because she failed to obtain the discovery needed to "demonstrate to the jury that the police investigation was improperly conducted[,] and failed "to expose inconsistencies in" a police officer's trial testimony as compared to his grand jury testimony. Defendant also addressed acts of alleged prosecutorial misconduct.

The PCR court considered oral argument on September 20, 2016. At the hearing, the court permitted PCR counsel and defendant to argue. After considering counsel's and defendant's arguments, the PCR court denied defendant's petition by an order dated October 3, 2016, and set forth its reasons in a twelve-page written decision dated September 30, 2016. In the decision, the court addressed defendant's argument regarding missing discovery, recounted that the trial court made determinations that the alleged omitted discovery did not exist, and found that defendant's arguments were not supported by the record. The PCR court noted that even if counsel's performance was deficient, the outcome of defendant's trial would not have changed, especially in light of the "overwhelming" evidence of defendant's guilt, as we discussed in our earlier opinion affirming defendant's conviction. It concluded that defendant failed to establish a prima facie claim of ineffective assistance of counsel and denied the petition. This appeal followed.

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

POINT I

THE COURT ERRED IN DENYING
DEFENDANT'S PETITION FOR POST-
CONVICTION RELIEF WITHOUT

AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE EFFECTIVE LEGAL REPRESENTATION.

A. THE PREVAILING LEGAL PRINCIPLES REGARDING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL ARISING OUT OF EVIDENTIARY HEARINGS AND PETITIONS FOR POST CONVICTION RELIEF.

B. TRIAL COUNSEL'S FAILURE TO CONDUCT A THOROUGH INVESTIGATION REGARDING THE IDENTIFICATION OF TODD CALLAN AS THE DRIVER OF THE VEHICLE IN QUESTION AND PRESENT A STRONG DEFENSE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

(1) TRIAL COUNSEL CONDUCTED A DEFICIENT PRE-TRIAL INVESTIGATION.

(2) TRIAL COUNSEL FAILED TO PRESENT EXCULPATORY EVIDENCE REGARDING DEFENDANT AS THE DRIVER.

(3) TRIAL COUNSEL FAILED TO PROPERLY CROSS-EXAMINE WITNESSES.

(4) TRIAL COUNSEL FAILED TO PLAY THE POLICE RECORDINGS FOR THE JURY.

(5) TRIAL COUNSEL FAILED TO CALL RELEVANT WITNESSES.

POINT II

THE PCR COURT'S DECISION SHOULD BE REVERSED SINCE THE COURT FAILED TO EVEN CONSIDER ALL BUT ONE OF DEFENDANT'S ISSUES ARGUED IN HIS PCR APPLICATION AND MISUNDERSTOOD OTHER SIGNIFICANT ISSUES.

We are not persuaded by any of these arguments and affirm. 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.

We are satisfied from our review of the record that defendant failed to make a prima facie showing of ineffectiveness of counsel within the Strickland-Fritz test.

Accordingly, the PCR court correctly concluded 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