

# RECORD IMPOUNDED

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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-1593-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

M.P.,

Defendant-Appellant.

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Submitted February 28, 2018 — Decided May 31, 2018

Before Judges Alvarez and Geiger.

On appeal from Superior Court of New Jersey,  
Law Division, Gloucester County, Indictment  
No. 07-12-1225.

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

Charles A. Fiore, Gloucester County  
Prosecutor, attorney for respondent (Margaret  
A. Cipparrone, Senior Assistant Prosecutor, on  
the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant M.P. appeals the September 8, 2016 Law Division order denying his petition for post-conviction relief (PCR). In a cogent and thorough fifteen-page opinion, Judge Robert P. Becker, Jr., comprehensively addressed defendant's claims of error. We affirm, essentially for those reasons, subject to the following brief comments.

Tried by a jury, defendant was convicted of a range of offenses related to the sexual abuse of his step-daughter, A.A., beginning when she was eight years old and continuing until she was eleven. At the time of trial, A.A. was fifteen. The offenses included two counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1). Defendant was sentenced to an aggregate term of imprisonment of thirty-three years, subject to eighty-five percent parole ineligibility under the No Early Release Act, N.J.S.A. 2C:43-7.2.

The indictment also charged defendant with third-degree possession of a destructive device, N.J.S.A. 2C:39-3(a). The trial judge sentenced him to a concurrent term of three years on that conviction.

Our opinion on defendant's direct appeal recounted the underlying circumstances, developed during pretrial and trial motions and the trial itself. The opinion began with the following: "It is an understatement to say that the State's

evidence adequately supports the verdict." State v. M.P., No. A-2498-11 (App. Div. Mar. 26, 2014) (slip op. at 4). Defendant's petition for certification was denied by the Supreme Court. State v. M.P., 219 N.J. 631 (2014).

Relevant to this PCR petition is that defendant resided in Indiana when the case was scheduled for trial. The law firm that represented him assigned the matter to an attorney who was a new hire, and became responsible for the file three months before the scheduled trial date. Thus, it is unsurprising that the heart of defendant's PCR petition is the claim that his attorney's services were ineffective and prejudiced his right to a fair trial.

We restate only the facts relevant to the denial of defendant's PCR petition. The State introduced evidence that defendant and his wife used a sex toy, which he had allegedly also used in his sexual assaults on A.A. During the course of summation, the prosecutor said that DNA testing established the presence of a woman's saliva on the item, but it was not A.A.'s saliva. A pornographic video was also introduced during the trial, which A.A. testified defendant had shown to her.

The State's pediatric expert examined A.A. and found damage to her hymenal tissue. In the expert's opinion, the damage was caused by a penetrating trauma.

A friend of A.A. testified that the victim had told her about the sexual abuse. Because A.A. and her friend had engaged in sexual activity, which came to the attention of the authorities, A.A.'s disclosure came to light. When interviewed, the friend repeated A.A.'s narrative, leading to A.A.'s interview by a prosecutor's detective and a representative from the Division of Child Protection and Permanency (DCPP). Trial counsel objected on the record to being barred from cross-examining the friend about the sexual activity with A.A. We previously found no impropriety in the exclusion, although A.A. herself ultimately testified about the sexual experimentation. M.P., slip op. at 19. As we noted, despite application of the Rape Shield Law, "the impeaching evidence was before the jury." Id. at 21.

The court conducted a pretrial Michaels<sup>1</sup> hearing to test the admissibility of the videotaped interview. On direct appeal, we extensively discussed defendant's claim that the trial court erred in admitting the statement because the interview questions were excessively coercive and suggestive. We concluded "that the approach taken did not create a risk of eliciting unreliable information. . . . [A.A.] freely recalled and described

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<sup>1</sup> State v. Michaels, 136 N.J. 299 (1994).

defendant's conduct and her conduct. In fact[,] the interviewers did not have any detailed information." Id. at 26.

The defense theory that A.A. was a liar was developed through defendant's wife, his teenage son, and defendant himself. He also claimed that he worked such long hours and such a grueling schedule that he was absent from the home for long periods of time, thus making A.A.'s claims impossible. Defendant's wife said that she never saw any wrongdoing and that A.A. had a loving relationship with defendant. Defendant suggested that A.A.'s father had prodded the child into making the accusations as an act of hostility towards his former wife.

Before defendant rested, defense counsel mentioned on the record, but outside the presence of the jury, he might be calling an additional possible witness, a DCPD employee. Allegedly, the worker signed a letter on August 8, 2008, stating that after investigation of a June 3, 2008 referral, DCPD determined the allegation was unfounded. During the discussion with the judge, counsel acknowledged that the indictment preceded the letter by approximately a year. He said he nonetheless had a duty to attempt to locate the worker and interview her. The assistant prosecutor responded that A.A. had told another friend about the sexual abuse. The friend told her mother, who relayed it to DCPD. According to the prosecutor, the disclosure related to the subject matter of

the trial, and therefore the Division decided to take no further action. Defense counsel attempted to locate the worker, and the judge gave him time to do so, albeit expressing some skepticism about the admissibility and relevance of the letter. When the trial resumed the following day, counsel did not mention the letter again.

On appeal, defendant's counseled brief states as follows:

POINT I:

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 FROM TRIAL COUNSEL.

A. FACTUAL BACKGROUND

B. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL.

Defendant's uncounseled brief states:

POINT I(A)

TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE BY FAILING TO INTRODUCE OR INVESTIGATE PRIOR INCONSISTENT STATEMENTS. [U.S. Const.] VI, XIV; N.J. CONST. ART. 1, ¶¶ 1, 9, 10.

POINT I(B)

TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE BY FAILING TO INTRODUCE OR INVESTIGATE PRIOR INCONSISTENT STATEMENTS. [U.S. Const.] VI, XIV; N.J. CONST. ART. I, ¶¶ 1, 9, 10.

POINT I(C)

TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE BY FAILING TO INTRODUCE OR INVESTIGATE PRIOR INCONSISTENT STATEMENTS. [U.S. Const.] VI, XIV; N.J. CONST. ART. 1, ¶¶ 1, 9, 10.

POINT I(D)

TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE BY FAILING TO INTRODUCE OR INVESTIGATE PRIOR INCONSISTENT STATEMENTS. [U.S. Const.] VI, XIV; N.J. CONST. ART. 1, ¶¶ 1, 9, 10.

POINT II(A)

TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE BY FAILING TO OBJECT, CROSS-EXAMINE, OR INVESTIGATE WHETHER DR. LANE WAS QUALIFIED TO TESTIFY TO AN EXPERT OPINION ON RULING OUT CAUSES OF INJURIES TO A HYMEN, DENYING THE DEFENDANT[']S RIGHT TO PRESENT A DEFENSE. [U.S. Const.] VI, XIV; N.J. CONST. (1947) ART. I, ¶¶ 1, 9, 10.

POINT II(B)

TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE BY FAILING TO OBJECT TO AN EXPERT OPINION CIRCUMSTANTIALLY PROVING AN ELEMENT OF AN OFFENSE AS LACKING FOUNDATION, RELEVANCE, BASED ON SPECULATION, OR AS UNRELIABLE AND INCONSISTENT WITH OTHER EXPERT OPINIONS, DENYING THE DEFENDANT[']S RIGHT TO PRESENT A DEFENSE. [U.S. Const.] VI, XIV; N.J. CONST. (1947) ART. I, ¶¶ 1, 9, 10.

POINT III

TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE BY FAILING TO INTRODUCE EXCULPATORY EVIDENCE FROM VICTIM STATEMENTS, FROM DEFENDANT'S WORK RECORDS AND EMAILS, AND FROM PRIOR DROPPED ALLEGATIONS BY R.D.A. THAT DENIED THE DEFEND[ANT] THE RIGHT TO PRESENT A DEFENSE. [U.S. Const.] VI, XIV; N.J. CONST. (1947) ART. I, ¶¶ 1, 9, 10.

POINT IV(A)

TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE BY FAILING TO OBJECT, OR INVESTIGATE A HIGHLY PREJUDICIAL AND INFLAMMATORY PORNOGRAPHIC VIDEO SHOWN TO THE JURY AD INADMISSIBLE FROM LACK OF FOUNDATION, AND IRRELEVANT AS THE VIDEO WAS NOT DOWNLOADED ONTO THE DEFENDANT'S COMPUTER UNTIL AFTER THE TIME THE VICTIM ALLEGED SEEING A VIDEO, DENYING THE DEFENDANT'S RIGHT TO PRESENT A DEFENSE. [U.S. Const.] VI, XIV; N.J. CONST. (1947) ART. I, ¶¶1, 9, 10.

POINT IV(B)

TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE BY FAILING TO CHALLENGE A PREJUDICIAL STATEMENT AS PROSECUTORIAL MISCONDUCT. [U.S. Const.] VI, XIV; N.J. CONST. (1947) ART. I, ¶¶1, 9, 10.

POINT IV(C)

TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE BY FAILING TO OBJECT TO PROSECUTORIAL MISCONDUCT FROM A MATERIALLY MISLEADING TESTIMONY BY DR. LANE AND FAILING TO INTRODUCE A.A.'S PRIOR SEXUAL EXPERIENCES FOR THE LIMITED PURPOSE OF PRESENTING CIRCUMSTANTIAL EVIDENCE AS A DEFENSE TO PROVE AN ALTERNATIVE CAUSE OF A.A.'S INJURY.

POINT V

TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE BY FAILING TO OBJECT TO DETECTIVE PERRY'S INADMISSIBLE HEARSAY TESTIMONY ON A REPORT HE DID NOT WRITE, DENYING THE DEFENDANT'S RIGHT TO CONFRONTATION AND TO PRESENT A DEFENSE. [U.S. Const.] VI, XIV; N.J. CONST. (1947) ART. I, ¶¶1, 9, 10.

POINT VI

TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE BY FAILING TO CHALLENGE COUNT NINE AS UNSUPPORTED. [U.S. Const.] VI, XIV; N.J. CONST. (1947) ART. I, ¶¶1, 9, 10.



POINT VII

TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE BY FAILING TO OBJECT TO THE STATE'S FRESH COMPLAINT WITNESS TESTIMONY THAT WAS SO UNRELIABLE AS TO BE INADMISSIBLE EVIDENCE PROHIBITED BY THE 6TH AND/OR 14TH AMENDMENT. [U.S. Const.] VI, XIV; N.J. CONST. (1947) ART. I, ¶¶ 9, 10.

As Judge Becker noted, many of the issues defendant raised were addressed on direct appeal and were barred from reconsideration by way of PCR. See R. 3:22-5; State v. McQuaid, 147 N.J. 464, 595-96 (1997). This included the assertion that had counsel been better prepared, he could have succeeded in suppressing A.A.'s interview, and the facts asserted in defendant's uncounseled brief points four, five, six, and seven. Additionally, the direct appeal also addressed defendant's unsupported allegations that statements made by the prosecutor regarding DNA were misleading, and that A.A.'s sexual activities should have been developed before the jury. Similarly addressed on direct appeal were the arguments that the officer who testified regarding the explosive device relied on improper hearsay as to the make-up of the device, and that the proofs did not satisfy the statutory elements of possession of an explosive device. Finally, despite defendant's allegations to the contrary, counsel did object to the testimony of the fresh complaint witness.

Evidentiary hearings on ineffective assistance of counsel claims are only granted when a defendant presents prima facie evidence in support of PCR. See State v. Preciose, 129 N.J. 451, 462-63 (1992). As set forth in State v. Cummings, and reiterated in the cases that follow:

[I]n 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.

[321 N.J. Super. 154, 170 (App. Div. 1999) (citation omitted).]

Defendant's arguments are not supported by any certifications regarding facts allegedly overlooked by trial counsel that would have affected the outcome of the case. Therefore, no further comment is necessary on the counseled brief's argument that trial counsel's failure to meet with defendant or interview the DCPD worker prejudiced the outcome.

Under Strickland v. Washington, a defendant must identify acts or omissions allegedly showing unreasonable professional judgment by an attorney and then establish that such acts and

omissions had a prejudicial effect on the outcome. 466 U.S. 668, 687 (1984). Even if we were to agree that trial counsel should have done more, which we do not, we cannot agree that the failure to do so had any effect on the outcome.


Defendant provides no information whatsoever, other than his own bald assertions, as to the nature of that information or how it would have altered the outcome. Defendant's uncounseled brief attacks counsel's alleged failure to "investigate" or, presumably, to adequately explore on cross-examination, A.A.'s prior inconsistent statements. Had the cross-examination been more expansive, defendant's suggested areas of cross-examination would not have affected the verdict. That A.A. may have said the sexual attacks occurred in one room as opposed to another, or that family members were outside, or that she sent him affectionate e-mails, were all explored during the trial. The jury heard the testimony and apparently did not consider it important. Defendant's attack on the effectiveness of his attorney—because he did not investigate the credentials of the State's expert, or more fully attack the basis for her opinion—is nothing more than unsupported bald assertions.

Defendant's long work hours and A.A.'s father's hostility towards him, were mentioned during the trial. Obviously, they had no effect on the outcome.

Defendant has not established ineffective assistance or any prejudice. The State's proofs were indeed overwhelming.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION