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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-3105-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARVIN DAMON, a/k/a MARVIN
T. DAMON,

Defendant-Appellant.

Submitted February 13, 2018 – Decided March 6, 2018

Before Judges Hoffman and Gilson.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Indictment No.
11-01-0160.

Joseph E. Krakora, Public Defender, attorney
for appellant (Frank M. Gennaro, Designated
Counsel, on the brief).

Mary Eva Colalillo, Camden County Prosecutor,
attorney for respondent (Nancy P. Scharff,
Assistant Prosecutor, of counsel and on the
brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Marvin Damon appeals from a December 21, 2016 Law Division order denying his petition for post-conviction relief (PCR). For the reasons that follow, we affirm.

I

The facts surrounding defendant's offenses are set forth in our opinion on direct appeal. See State v. Damon, No. A-0486-12 (App. Div. Dec. 17, 2014) (slip op. at 2-4), certif. denied, 221 N.J. 287 (2015). The following summary gives context to defendant's arguments regarding this appeal from the order denying PCR.

On July 31, 2010, G.H. was riding his bike on the sidewalk near an intersection, when defendant struck him with a gun, knocking him onto the ground. G.H. testified defendant "had this . . . big gun in his hand and he swung it at me and I fell and then he jumped over top of me and told me to give him everything" G.H. pushed defendant away, stood up, and began backing into the street, hoping to attract the attention of passing motorists, while defendant pointed a gun directly at him.

As this occurred, a Pennsauken Township Police Department patrol officer approached the intersection in a patrol car. The officer saw defendant attempting to hide the gun in his pants. Defendant fled, and the officer gave pursuit.

The patrolman lost sight of defendant for a short time, but then saw him run across the street and hide between parked cars. Defendant was unarmed when police ultimately apprehended him. The following day, police recovered a revolver with a distinctive appearance near the location where they apprehended defendant.

At trial, defendant maintained his innocence. He presented an alibi witness who testified he was with defendant during the incident, and never saw defendant with a gun.

A jury found defendant guilty of first-degree armed robbery, N.J.S.A. 2C:15-1(a)(1), and fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(4). At sentencing, the trial judge granted the State's motion to impose an extended term pursuant to N.J.S.A. 2C:44-3. The judge sentenced defendant to twenty-five years in prison with an eighty-five percent parole ineligibility on the first-degree armed robbery charge, and a concurrent eighteen months, with eighteen months parole ineligibility, on the fourth-degree aggravated assault charge.

Defendant appealed, and we affirmed defendant's conviction and sentence. Damon, slip op. at 19. In that opinion, we declined to address defendant's ineffective assistance of counsel claims, noting "we routinely decline to entertain ineffective assistance of counsel claims on direct appeal because those claims 'involve

allegations and evidence that lie outside the trial record.'" Id. at 15 (quoting State v. Hess, 207 N.J. 123, 145 (2011)).

On June 30, 2015, defendant filed a pro se PCR petition alleging he had been denied effective assistance of counsel; appointed PCR counsel later filed a supporting brief, which the State opposed. On December 21, 2016, the PCR judge heard oral argument, and denied defendant's petition in an oral opinion on the same date. The judge found defendant merely presented "blanket allegations . . . not supported by anything in the record, or . . . by any exhibits either." Accordingly, she found defendant failed to present a prima facie showing of ineffective assistance of counsel, and denied his PCR petition.

II

On this appeal, defendant's brief presents the following points of argument:

THE TRIAL COURT ERRED IN DENYING RELIEF
WITHOUT AFFORDING DEFENDANT AN EVIDENTIARY
HEARING[.]

- A. The Jury Instruction on Second Degree Robbery
- B. Ineffective Assistance of Appellate Counsel
- C. Failure to Investigate

Restated, defendant argues: (1) trial counsel was ineffective because he did not request a charge on the lesser-included offense

of second-degree robbery; (2) appellate counsel was ineffective for failing to address the lesser-included offense issue; and (3) trial counsel was ineffective for failing to investigate.

Defendant also submitted a pro se brief, which presented two additional points of argument:

Point One

Defendant's Constitutional Rights [were] violated when [the] [T]rial Court failed to conduct a fair and impartial trial for Defendant.

Point Two

Trial Counsel admitted on brief for [Judgment] of acquit[t]al that he himself was ineffective in representing Defendant at trial.

We review the PCR judge's findings de novo because she did not hold an evidentiary hearing on defendant's claims. See State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014) (citing State v. Harris, 181 N.J. 391, 421 (2004) (denying PCR)). Ineffective assistance of counsel claims are considered under the two-prong test enunciated in Strickland v. Washington, 466 U.S. 668 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). The Strickland test requires a defendant to show that the performance of his or her attorney was deficient, and counsel's deficient performance prejudiced the defense. 466 U.S. at 687.

To meet the first prong of the Strickland test, a defendant must establish that his or her attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Ibid. The defendant must rebut the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" Id. at 689.

Moreover, to satisfy the second prong of the Strickland test, a defendant must show "that counsel's errors were so serious as to deprive [him or her] of a fair trial, a trial whose result is reliable." Id. at 687. A defendant must establish that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

We have considered defendants contentions in light of the record and the applicable legal principals. We conclude defendant's arguments lack merit.

Defendant's argument that his trial counsel provided ineffective assistance in failing to advocate and request a jury charge for second-degree robbery finds no support in the record. Trial counsel considered requesting such a charge, but ultimately decided against it. As the PCR judge noted, it was the trial attorney's "position that the State put forth evidence only to

support first-degree robbery." She determined the evidence, including trial counsel's cross-examinations and "presentation of an alibi witness" demonstrated defendant's trial counsel pursued an "all or nothing position"; to wit: "[e]ither [the jury] find[s] that [defendant] was guilty of a [first-degree] robbery when the facts presented by the State supported a [first-degree] robbery only, or [the jury] find[s] [defendant] guilty of none of the charges."

Notably, the trial judge ultimately charged the jury on second-degree robbery. Therefore, defendant cannot demonstrate the trial's results would have been different had trial counsel pursued the second-degree robbery charge. Accordingly, the PCR judge appropriately held defendant failed to meet the first and second Strickland prongs.

Furthermore, defendant's arguments against appellate counsel fail for the same reasons. Appellate counsel cannot be faulted for failing to pursue the lesser-included offense issue when defendant can neither refute that trial counsel's actions were the result of strategy nor establish that he was prejudiced. Moreover, this court declined to address defendant's ineffective assistance of counsel arguments on direct appeal. Damon, slip op. at 15-16.

Finally, defendant's contention that his trial counsel failed to properly investigate also lacks merit. We acknowledge that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." State v. Savage, 120 N.J. 594, 618 (1990) (internal quotation marks and citation omitted). To demonstrate failure to investigate, a defendant "must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon personal knowledge of the affiant or the person making the certification." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

Here, defendant fails to present any evidence to support his allegation. Instead, he asserts "the extent of counsel's investigation is unclear . . . because proof as to what a non-existent investigation may have unearthed is beyond the capacity of any defendant" This bald allegation provides no basis for relief.

Moreover, defendant's trial counsel presented an alibi witness who claimed he and defendant were together on a porch during the robbery. The PCR judge found "counsel certainly would not have known that this individual was allegedly with . . . defendant at the time of this incident unless there was some communication with defense counsel." Accordingly, the PCR

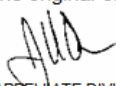
judge did not err in finding defendant presented merely "blanket allegations" that did not support his contentions.

The arguments defendant raises in his pro se brief also lack merit. The first argument should have been raised on direct appeal and is not appropriate for PCR. See State v. Reevey, 417 N.J. Super. 134, 148 (App. Div. 2010) (citing R. 3:22-4) ("Issues that could and should have been raised on direct appeal from the defendant's conviction are barred by Rule 3:22-4(a) unless the exceptions to the Rule have been established."). The second argument lacks support in the record.

The PCR judge correctly found defendant failed to establish a prima facie showing of ineffective assistance of both trial and appellate counsel. We discern no basis to disturb the order under review.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION