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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-3299-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SHAWN SOUTHERLAND,

Defendant-Appellant.

Submitted December 21, 2017 — Decided March 19, 2018

Before Judges Rothstadt and Gooden Brown.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Indictment No.
09-10-1750.

Shawn Southerland, appellant pro se.

Esther Suarez, Hudson County Prosecutor,
attorney for respondent (Kerry J. Salkin,
Assistant Prosecutor, on the brief).

PER CURIAM

Defendant, Shawn Southerland, appeals from the denial of his
petition for post-conviction relief (PCR) without an evidentiary
hearing. For the reasons that follow, we affirm.

Following a bench trial, defendant was convicted of murder, N.J.S.A. 2C:11-3(a), and hindering apprehension, N.J.S.A. 2C:29-3(b)(1). Defendant's motion for a new trial was denied, and the sentencing court imposed an aggregate sentence of thirty years' imprisonment subject to a No Early Release Act, N.J.S.A. 2C:43-7.2, parole disqualifier.

Defendant appealed and we affirmed his convictions and sentence in an unpublished opinion. See State v. Southerland, No. A-4663-11 (App. Div. Jan. 30, 2015) (slip op. at 5, 29). The Supreme Court denied his petition for certification. State v. Southerland, 221 N.J. 566 (2015).

The facts underlying defendant's convictions are set forth in our earlier opinion and need not be repeated here. See Southerland, slip op. at 5-14. For our purposes, it is sufficient to summarize the facts leading to defendant representing himself at trial, with his trial counsel remaining involved only as standby counsel.¹

¹ When a defendant waives the right to counsel, the court "should" appoint standby counsel to assist the defendant. State v. Sinclair, 49 N.J. 525, 552 (1967); accord State v. Slattery, 239 N.J. Super. 534, 549 (1990). The purpose of appointing standby counsel is to provide "a 'safety net' to insure that the litigant receives a fair hearing and to allow the trial to proceed without the undue delays likely to arise when a layperson represents his own case." State v. Ortisi, 308 N.J. Super. 573, 591 (App. Div. 1998). A court "may even-over objection by the accused—appoint a

On November 19, 2010, defendant filed a motion to waive his right to an attorney and to represent himself. During the motion hearing held on February 2, 2011, the motion judge explained to defendant the consequences of self-representation, and defendant waived his right to bring a claim of ineffective assistance of counsel. The record reflects the following exchange between defendant and the motion judge:

THE COURT: Now, here is something very important that I want you to know. When you have an attorney and the attorney makes a mistake, what we call, in the law, "provides ineffective assistance of counsel," you have recourse.

[DEFENDANT]: I understand, Your Honor.

. . . .

[DEFENDANT]: I'm aware that I can't -- I can't claim ineffective assistance of counsel.

THE COURT: So, the whole area of law . . . , which we refer to as [PCR] petitions, which many times can involve someone saying, "My attorney made a mistake I didn't get effective assistance. My Constitutional right to counsel was -- was jeopardized by my attorney." That whole area of law and all the benefits that you would have under that area of the law would not be available to you.

"standby counsel" to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." State v. Reddish, 181 N.J. 553, 597 (2004) (quoting Faretta v. California, 422 U.S. 806, 834 n.46(1975)). Whether to appoint standby counsel is within the trial court's discretion. Sinclair, 49 N.J. at 552.

[(Emphasis added).]

After the hearing, on February 18, 2011, the court granted defendant's motion and appointed his trial counsel to serve as standby counsel. It then denied defendant's subsequent motions for the appointment of new standby counsel. A bench trial was held over the course of nine nonconsecutive days and concluded with defendant's conviction and sentence.

Defendant filed a PCR petition on July 16, 2015, in which he argued his counsel provided ineffective assistance based upon: (1) counsel's incorrect legal advice regarding the anticipated testimony of the State's medical expert, "which caused him to reject the State's plea offer"; (2) standby counsel's failure "to retain a medical expert on defendant[']s behalf"; and (3) standby counsel's "deliberate act of sitting on the other side of the bar during . . . trial[, which] was an unacceptable conflict of interest[.]" In an amended petition filed in August 2015, defendant also alleged ineffective assistance of appellate counsel based on counsel's failure to raise a Fourth Amendment issue on direct appeal.

Judge Sheila A. Venable denied defendant's petition by order dated December 15, 2015. She issued a comprehensive, twenty-four

page written decision setting forth her reasons for denying defendant's petition without an evidentiary hearing.

Addressing each of defendant's arguments, Judge Venable first determined that defendant "misrepresent[ed] the legal advice provided by [his] counsel." Although defendant argued that counsel informed him in a letter that the State's medical expert would estimate that the victim died on Tuesday, April 6, 2007, which was contrary to the State's theory that the victim died on April 3, 2007, Judge Venable examined the letter,² and found "[d]efendant fail[ed] to consider that the [m]edical [e]xaminer's opinion as

² In the letter sent to defendant on August 11, 2010, counsel stated:

The only direct piece of evidence relating to [the victim's] death was that she was certainly dead when her body was discovered inside a duffle bag along the Henry Hudson Parkway on April 7, 2007 at approximately 8:45 a.m. In this regard the [m]edical [e]xaminer from the Bronx is anticipated to estimate that at the time of her initial observation of [the victim] on April 7, 2007 at 2:00 p.m., [the] victim had been dead for at least [twenty-four to thirty-six] hours, which would put her estimated time of death somewhere between 2:00 a.m. on April 6, 2007 and 2:00 p.m. on April 6, 20[07]. It is of course, possible and indeed probable that [the victim] somehow died at an earlier point in time, a point I doubt the [m]edical [e]xaminer would seriously dispute, especially if asked by the prosecutor.

[(Emphasis added).]

to time of death was in fact only an estimate . . . and the possibility that the [m]edical [e]xaminer would and could state the [v]ictim died at an earlier point than the time frame listed." She observed that in the same letter, counsel also advised defendant:

The best circumstantial evidence indicates that [the victim] was killed in her residence sometime between the late evening hours of April 2, 2007 and approximately 8:00 a.m. on April 3, 2007, at a time when it is anticipated the victim's son will testify you were not only present but prevented him from entering his mother's bedroom before he went to school that morning.

Therefore, the judge concluded:

It is relatively apparent from the letter that . . . [c]ounsel was attempting to provide [defendant] with all possible avenues of attack by the State as well as potential issues relating to . . . [d]efendant's defense relating to the [v]ictim's time of death and any potential alibi defense that [d]efendant wished to raise.

Addressing defendant's argument that this "incorrect" legal advice caused him to reject the State's plea offer, Judge Venable noted that defendant "made clear his intentions of not accepting a plea [and that he] reiterated various times throughout the action that he would not accept a plea."

Turning to defendant's argument that standby counsel was ineffective because he failed to retain a medical expert on behalf

of defendant, Judge Venable relied on McKaskle v. Wiggins, 465 U.S. 168, 174 (1984), and found because defendant chose to represent himself, "it [was] ultimately his obligation to control and organize [the] content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address [the] court and jury [during] trial." Therefore, she concluded it was defendant's responsibility to retain a medical expert if he felt one was needed at trial, and it was not standby counsel's obligation to provide one.

The judge was also unpersuaded that "[s]tandby [c]ounsel's location in the court room alone amount[ed] to deficient representation especially . . . within the scope of representation specifically granted by [d]efendant." She explained that "defendant did not want the assistance of [s]tandby [c]ounsel and effectively obstructed most [of his] efforts to assist. Defendant . . . failed to show other than via bald assertions that had [counsel] sat next to him, the outcome of the trial would have been different."

Last, Judge Venable found that defendant's argument that appellate counsel was ineffective because he failed to argue the admissibility of statements defendant made on the phone when a police officer was present on the other line was meritless. The judge observed that appellate counsel explained to defendant that

he was "reluctant to raise [the] issue on direct appeal as [he] believe[d], strategically, that it would detract from the issues that [he] intend[ed] to raise[.]" Further, defendant raised the issue himself in a pro se supplemental appellate brief, and we found his argument to be meritless.

On appeal, defendant presents the following arguments:

POINT I

THE PCR COURT COMMITTED CLEAR ERROR OF LAW BY DENYING DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING BECAUSE, DEFENDANT PRESENTED PRIMA FACIE EVIDENCE THAT JOHN J. CONVERY, ESQ., DESIGNATED PLEA COUNSEL, PROVIDED HIM WITH MISLEADING, INCORRECT, LEGAL ADVICE WHICH CAUSED NON ACCEPTANCE OF THE STATE[']S AMENDED PLEA; BECAUSE, IT'S DECISION WAS CONTRARY TO OR, UNREASONABLE APPLICATION OF LAFLEER V. COOPER . . . AND, FRYE V. MISSOURI.

A. DESIGNATED PLEA COUNSEL FAILED TO PROPERLY ADVISE DEFENDANT ON WHETHER A CONDITIONAL PLEA WAS WARRANTED. (NOT RAISED BELOW).

B. THE PCR COURT FAILED TO TAKE THE FACTS IN THE LIGHT MOST FAVORABLE TO DEFENDANT.

POINT II

THE PCR TRIAL COURT ERRED IN DENYING DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO

DETERMINE THE MERITS OF HIS CLAIM THAT STANDBY COUNSEL'S FAILURE TO OBTAIN AN EXPERT ON HIS BEHALF, PREJUDICED HIS CASE, HIS DEFENSE AND VIOLATED HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

A. THE PCR TRIAL COURT ERRED IN DENYING DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF ON HIS CLAIM THAT THE TRIAL COURT'S FAILURE TO CONDUCT PROPER HEARING ON DEFENDANT'S CONFLICT OF INTEREST CLAIM BETWEEN DEFENDANT AND STANDBY COUNSEL CREATED AN UNWAIVED CONFLICT OF INTEREST WHICH ULTIMATELY LED TO STANDBY COUNSEL ABANDONING DEFENDANT AT DEFENSE TABLE AT TRIAL; AND BECAUSE DEFENDANT WAS PREJUDICED THEREBY, HE IS ENTITLED TO REVERSAL OF HIS CONVICTION AND SENTENCE AND NEW TRIAL. (THE PCR COURT FAILED TO PASS ON ISSUE IN ITS 24-PAGE OPINION).

POINT III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO CONDUCT AN EVIDENTIARY HEARING ON POINTS 1 AND 2.

POINT IV

THE PCR TRIAL COURT ERRED IN FINDING THAT DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL WAS PROCEDURALLY BARRED UNDER [RULE] 3:22-5. DEFENDANT'S FOURTH AMENDMENT CLAIM WAS ARGUABLY MERITORIOUS; WAS NOT FULLY ADJUDICATED ON THE MERITS AND COUNSEL'S FAILURE TO RAISE ISSUE CAN NOT BE REGARDED AS PURELY

STRATEGICAL, RATHER, INEFFECTIVE ASSISTANCE. THE PCR COURT DECISION WAS CONTRARY TO OR, UNREASONABLE APPLICATION OF KIMMELMAN V. MORRISON . . . AND; EVITTS V. LUCEY. THIS COURT SHOULD REVERSE THE DEFENDANT'S CONVICTION, VACATE SENTENCE AND REMAND FOR NEW TRIAL, ABSENT THE EXCLUDABLE EVIDENCE.

A. THE APPELLATE DIVISION PANEL REVIEW ON DIRECT APPEAL DID NOT ADDRESS THE LEGAL QUESTION OF WHETHER THE ALLEGED THIRD PARTY CONSENT WAS LEGITIMATE OR VALID.

B. STATE V. NASH, IS DISPOSITIVE OF THIS MATTER.

C. THE TRIAL COURT'S JUNE 23, 2011, ORDER GRANTING THE STATE'S MOTION WAS CLEARLY MISTAKEN AND MUST BE REVERSED.

D. DEFENDANT'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

E. DEFENDANT DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL AND HAS SATISFIED THE FIRST PRONG OF STRICKLAND/FRITZ TEST.

F. DEFENDANT HAS SATISFIED THE SECOND PRONG OF STRICKLAND/FRITZ, BECAUSE ABSENT THE EXCLUDABLE EVIDENCE THE RESULT OF THE VERDICT WOULD HAVE BEEN DIFFERENT.

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 conclude from our review of the record that defendant's arguments are without merit. We affirm substantially for the reasons expressed by Judge Venable in her thorough written decision, as we agree with the judge that defendant failed to make a prima facie showing of ineffectiveness of counsel within the Strickland-Fritz test, and therefore an evidentiary hearing was not warranted. See State v. Preciose, 129 N.J. 452, 462-63 (1992). We add only the following comments.

Under the facts of this case, counsel filled two separate roles at different times. Up until February 18, 2011, he was defendant's assigned counsel and his performance as such was

subject to the Strickland-Fritz test. After defendant elected to proceed pro se, counsel's role shifted to a standby role as instructed by the trial court, and any claims of ineffectiveness defendant alleged while counsel was serving in that capacity were waived. Applying the Strickland-Fritz test as Judge Venable did, counsel was not ineffective for his actions during plea negotiations.

For defendant's remaining claims against counsel in his standby role, we are guided by the following principles. "[A] defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" Faretta, 422 U.S. at 834 n.46. Thus, a defendant's choice of "self-representation[]" constitutes a waiver of any future ineffective assistance of counsel claims under the [Strickland-Fritz] test in respect of those matters in which the defendant represents himself." State v. Figueroa, 186 N.J. 589, 595 (2006) (citations omitted).

Here, the trial court warned defendant about the consequences of self-representation and he acknowledged that he understood he could not claim ineffective assistance of counsel. The trial court's appointment of defendant's trial counsel as his standby counsel did not affect defendant's waiver of any future ineffectiveness claims because there is no "constitutional right

to standby counsel[.]" United States v. Oliver, 630 F.3d 397, 414 (5th Cir. 2011) (quoting United States v. Morrison, 153 F.3d 34, 55 (2d Cir. 1998)) ("[W]ithout a constitutional right to standby counsel, a defendant is not entitled to relief for the ineffectiveness of standby counsel." (alteration in original)); accord Rishor v. Ferguson, 822 F.3d 482, 500 (9th Cir. 2016); Simpson v. Battaglia, 458 F.3d 585, 597 (7th Cir. 2006).


Although courts have held "in a case where standby counsel held that title in name only and, in fact, acted as the defendant's lawyer throughout the proceedings, [they] would consider a claim of ineffective assistance of standby counsel[,]" United States v. Schmidt, 105 F.3d 82, 90 (2d Cir. 1997); Morrison, 153 F.3d at 55, that was not the case here. As the record reflects and as Judge Venable noted in her written opinion, defendant chose to severely limit the role of his standby counsel.

Accordingly, defendant's apparent indecisiveness on whether or not he wanted standby counsel to aid in his defense does not resuscitate a right to challenge the effectiveness of counsel he had foresworn. See State v. Crisafi, 128 N.J. 499, 517-18 (1992) (holding a defendant who "sought to manipulate the system by wavering between assigned counsel and self-representation . . . 'cannot have it both ways'" (citation omitted)).

Regardless of whether defendant's claims on PCR were related to his attorney's role as defense counsel or standby counsel, we agree with Judge Venable that defendant's claims were without merit.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION