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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-3690-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROMULO GREGORIO,

Defendant-Appellant.

Submitted February 28, 2018 – Decided March 19, 2018

Before Judges Fuentes and Manahan.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Indictment No.
10-02-0334.

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

Esther Suarez, Hudson County Prosecutor,
attorney for respondent (Stephanie Davis
Elson, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Romulo Gregorio appeals from a denial of his
petition for post-conviction relief (PCR) without an evidentiary
hearing. We affirm.

On September 1, 2009, Jersey City firefighters found the body of Christine Mariano laid out on a bed in a room that had been intentionally set on fire. The victim was the twenty-two-year-old daughter of Clarissa Mariano, who had been dating defendant and had recently ended their relationship. The police quickly developed defendant as a suspect because of his numerous unwanted text messages to and threats against Clarissa Mariano and his presence at the scene of the fire. He was arrested the same day.

Defendant was tried before a jury and convicted of first-degree murder, N.J.S.A. 2C:11-3(a)(1) and N.J.S.A. 2C:11-3(a)(2) (count one); second-degree aggravated arson, N.J.S.A. 2C:17-1(a)(2) (count two); fourth-degree stalking, N.J.S.A. 2C:12-10(b) (count three); and third-degree terroristic threats, N.J.S.A. 2C:12-3(a) (count four). At sentencing in April 2012, upon weighing the aggravating and mitigating factors, the court determined that the aggravating factor outweighed the mitigating factor in the circumstances of this case and sentenced defendant as to count one to a fifty-year term of imprisonment with an eighty-five percent period of parole ineligibility and five years of parole supervision pursuant to the No Early Release Act, N.J.S.A. 2C:43.7.2 (NERA). On the other three counts of the conviction, the court imposed the maximum prison terms permissible, but all the sentences to run concurrently with the

murder conviction. All statutorily required terms of parole supervision after release from prison and monetary penalties were also imposed.

Defendant filed a notice of appeal from his conviction by a jury in June 2012. In an unpublished opinion, State v. Gregorio, No. A-5383-11 (App. Div. Apr. 2015), we affirmed the conviction. The Supreme Court denied the petition for certification, State v. Gregorio, 223 N.J. 556 (2015). In January 2016, through counsel, defendant filed a petition for PCR. Following argument that addressed all of the issues raised by defendant and the PCR counsel, the PCR judge issued a decision on March 9, 2017, denying the petition without an evidentiary hearing.¹ This appeal followed.

Defendant raises the following points on appeal:

POINT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR [PCR] WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION AT THE TRIAL LEVEL.

A. THE PREVAILING LEGAL PRINCIPLES REGARDING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, EVIDENTIARY HEARINGS AND PETITIONS FOR [PCR].

¹ Defendant's brief notes that he filed an amended petition for PCR on October 20, 2016.

B. TRIAL COUNSEL DID NOT PROVIDE ADEQUATE LEGAL REPRESENTATION TO THE DEFENDANT AS A RESULT OF COUNSEL'S FAILURE TO CALL SEVERAL POTENTIAL DEFENSE WITNESSES AT TRIAL.

C. TRIAL COUNSEL DID NOT ADEQUATELY REPRESENT THE DEFENDANT AS A RESULT OF HIS FAILURE TO OBJECT TO HEARSAY TESTIMONY ELICITED BY THE STATE FROM CHRISTOPHER MARIANO, AND FURTHER ERRED BY ELICITING ADDITIONAL PREJUDICIAL AND DAMAGING TESTIMONY DURING CROSS-EXAMINATION.

D. TRIAL COUNSEL DID NOT ADEQUATELY REPRESENT THE DEFENDANT AS A RESULT OF HIS FAILURE TO UTILIZE THE PHONE RECORDS OF THE VICTIM TO ATTACK THE CREDIBILITY OF BRANDON BIGHAM.

We have closely examined the record in light of the contentions posed in this appeal. Our examination included the considerable amount of evidence, unrelated to the grounds upon which the PCR petition was based, that supported defendant's conviction. Upon conclusion of that examination, we affirm substantially for the reasons set forth in the decision of the PCR judge who was also the trial judge. We add only the following.

"Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." State v. Preciose, 129 N.J. 451, 459 (1992). Under Rule 3:22-2(a), a criminal defendant is entitled to post-conviction relief if there was a "[s]ubstantial denial in the conviction proceedings of defendant's rights under the

Constitution of the United States or the Constitution or laws of the State of New Jersey[.]” “A petitioner must establish the right to such relief by a preponderance of the credible evidence.” Preciose, 129 N.J. at 459 (citations omitted). “To sustain that burden, specific facts” that “provide the court with an adequate basis on which to rest its decision” must be articulated. State v. Mitchell, 126 N.J. 565, 579 (1992).

Claims of constitutionally ineffective assistance of counsel are well suited for post-conviction review. See R. 3:22-4(a)(2); Preciose, 129 N.J. at 460. In determining whether a defendant is entitled to relief on the basis of ineffective assistance of counsel, New Jersey courts apply the two-prong test articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687 (1984), and United States v. Cronin, 466 U.S. 648, 658-60 (1984). Preciose, 129 N.J. at 463; see State v. Fritz, 105 N.J. 42, 49-50 (1987).

Under the first prong of the Strickland test, a “defendant must show that [defense] counsel's performance was deficient.” Strickland, 466 U.S. at 687. Under the second prong, a defendant must demonstrate “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Id. at 694.

Defendant argues that his trial counsel was ineffective for failing to interview and to call three citizen witnesses. The witnesses were interviewed and provided statements to the police. Two witnesses stated that they observed individuals outside of the residence on the date of the murder. One witness stated that he thought he observed the victim on the balcony of the residence smoking a cigarette. As the PCR judge held, as we agree, none of these witnesses provided exculpatory information.

Defendant also argues that his counsel was ineffective for eliciting damaging testimony during cross-examination from the victim's brother. In his testimony, the brother expressed his personal animus toward defendant. Again, the PCR judge held, and we agree, that the brother's isolated comments about his personal feelings about defendant did not influence the outcome of the trial.

As well, defendant's argument that the failure to use the victim's cell phone records to challenge the credibility of her boyfriend and inculcate him in her death is unavailing. As the State commented in its brief, "there is not one scintilla of evidence supporting" that claim. From our review of the trial record, we are in accord with the State's comment.

Notwithstanding our determination regarding defendant's failure to establish that counsel's performance was deficient, we

briefly address the second Strickland prong. Upon consideration of the record, we conclude that defendant has also failed to demonstrate how any alleged deficiency resulted in a prejudice that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694; Fritz, 105 N.J. at 52 (citation omitted).

Finally, we reject defendant's argument that the court erred in denying his petition without an evidentiary hearing. An evidentiary hearing is required where the defendant has shown a prima facie case and the facts on which he relies are not already of record. Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R. 3:22-10 (2018). The mere raising of a claim for PCR does not entitle defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)). As defendant failed to establish a prima facie case of ineffective assistance of counsel, no evidentiary hearing was required.

We conclude our analysis by repeating those precepts that guide reviewing courts in determining "ineffective assistance of counsel" claims. Effective representation is not synonymous with errorless representation. An attorney may make tactical decisions that in the lens of hindsight were debatable or even erroneous. For any error by counsel to be constitutionally significant, it must undermine the fundamental fairness of the proceeding.

Strickland, 466 U.S. at 693. The competency standard enunciated by Strickland is both broad and flexible. Ibid. It is intended to encompass varied factual scenarios and circumstances. The proper test is whether counsel's performance was within the range of competence required of attorneys in criminal cases. While attorneys are expected to fulfill their duty of competent representation, a conviction should not be overturned unless there was a breach of that duty that mattered. To the extent, if any, trial counsel's performance was deficient, we hold that it did not result in prejudice to the defense since there is not a reasonable probability of a different result sufficient to undermine our confidence in the outcome. See State v. Arthur, 184 N.J. 307, 319 (2005) (quoting Strickland, 466 U.S. at 693).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION