SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4169-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALTON BRYANT, a/k/a RASHAD MCKNIGHT, ALQUAN MUSLIM, DICK DICK, QUAN, PATRICK BRYANT and DWAYNE BROWN,

Defendant-Appellant.

Submitted April 24, 2018 – Decided May 7, 2018

Before Judges Yannotti and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 96-11-3839.

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

Robert D. Laurino, Acting Essex County Prosecutor, attorney for respondent (Lucille M. Rosano, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant appeals from an order denying reconsideration of an order, which denied his petition for post-conviction relief (PCR). We affirm.

The following facts are taken from the record. An Essex County grand jury charged defendant with second-degree conspiracy to commit murder, N.J.S.A. 2C:5-2 and 2C:11-3 (count one); first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2) (count two); first-degree attempted murder, N.J.S.A. 2C:11-3 and 2C:5-1 (count three); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(4) (count four); third-degree possession of a weapon, N.J.S.A. 2C:39-3(b) (count five); and second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a).

At defendant's jury trial, the State presented evidence of the following facts. On the evening of August 25, 1996, Mary Francis and Carol Hutchins were sitting in Rodney Hutchins'[1] car in Newark, when Rodney approached them on a bicycle. Rodney was speaking with the women and defendant approached on foot. He pulled out a sawed-off shotgun, pointed it at Rodney, and told him to put his hands up. Rodney told the women to run. Carol Hutchins

[1] We use first names for ease of reference. In doing so, we intend no disrespect.

got out of the car and began to run. Mary Francis remained in the car.

Defendant's brother, co-defendant Patrick Bryant, exited a cream colored car and struck Rodney in the face. Rodney knocked the gun out of defendant's hands and began to run. Patrick said, "Get that mother fucker, kill that mother fucker." Defendant chased Rodney and shot him in the back. Defendant returned to the car, pointed the shotgun at Mary, and readied it to fire, but Patrick told defendant to leave her alone. Patrick and defendant drove away. Rodney died as a result of the gunshot wounds in his back.

The State presented testimony from eyewitnesses to the shooting, as well as the testimony of Cleveland Barlow, who stated he saw Patrick with a shotgun similar to the one that was used in the shooting in the summer of 1996. Barlow also testified he saw defendant rob drug dealers, and that Rodney was a known drug dealer. Furthermore, he stated defendant confessed to the murder at the Essex County Jail in August of 1997.

Defendant was acquitted on count three, and convicted on the remaining counts. He was sentenced to an aggregate term of life imprisonment, plus six and one half years, with a thirty-eight and one half year parole disqualifier.

Defendant filed a direct appeal of his conviction and sentence, which we affirmed. State v. Bryant, No. A-5662-97 (App. Div. Oct. 20, 1999) (slip op. at 15), certif. denied, 163 N.J. 74 (2000).

Defendant filed a first petition for PCR on April 13, 2000. The PCR court denied the petition. We affirmed the order denying PCR. State v. Bryant, No. A-4448-03 (App. Div. Jan. 24, 2006) (slip op. at 14), certif. denied, 186 N.J. 604 (2006).

Defendant filed a second petition for PCR on May 1, 2006. The PCR court granted defendant's motion to compel the State to produce certain documents, but denied the petition. We affirmed the order denying PCR. State v. Bryant, No. A-4741-06 (App. Div. Oct. 9, 2008) (slip. op. at 18), certif. denied, 198 N.J. 313 (2009).

On November 22, 2011, defendant filed a pro se motion for a new trial based on newly-discovered evidence. He raised the following claims in his motion:

> (1) The "newly discovered evidence" of witness Cleveland Barlow's 9/04/97 second letter to the Essex County Prosecutor's Office exculpates Petitioner as it impeaches Barlow's trial testimony. Petitioner further alleges that the State's failure to produce the letter prior to trial constitutes a Brady[2] violation, and that the State condoned perjury by allowing Barlow to testify falsely;

[2] Brady v. Maryland, 373 U.S. 83 (1963).

(2) The State condoned perjury by allowing witness Mary Francis to testify falsely, as she could not identify Petitioner by name or provide his physical description to police on the night of the incident;

(3) The State condoned perjury by allowing witness Cleveland Barlow to testify falsely as to his familiarity with Petitioner, and that Petitioner confessed to him that he committed the charged crimes;

(4) The newly discovered evidence of Investigator DeFrancisci's 10/01/97 report indicates that witness Cleveland Barlow identified Petitioner from a photo array, not merely a single photograph as Barlow and DeFrancisci testified at trial. Thus, Petitioner claims that the State's failure to produce the photo array from which Barlow identified Petitioner constitutes a Brady violation and prevented Petitioner from challenging the suggestibility of the array through a Wade[3] hearing;

(5) The State condoned perjury by allowing witnesses Mary Francis and Carol Hutchins to testify despite the inconsistencies between their accounts, as well as Investigator DeFrancisci's account;

(6) The "newly discovered evidence" of Investigator DeFrancisci's 10/01/97 report exculpates Petitioner as it impeaches witness Cantrell Wilkes' trial testimony. Petitioner further alleges that the State's failure to produce the report prior to trial constitutes a Brady violation;

(7) The "newly discovered evidence" of witness Cleveland Barlow's additional convictions of charges pending during Petitioner's trial exculpates Petitioner as it impeaches Barlow's

[3] United State v. Wade, 388 U.S. 218 (1967).

trial testimony. Petitioner further claims that the State's failure to produce these indictments prior to trial constitutes a Brady violation;

(8) Even if each of these errors, taken individually, are insufficient to warrant a new trial, the cumulative effect of these errors requires a new trial;

(9) The "newly discovered evidence" of Yakim Abdul-Ali's 4/29/10 Affidavit exculpates Petitioner as it impeaches witness Cleveland Barlow's trial testimony;

(10) The State's misconduct deprived Petitioner of a fair trial as the prosecutor and Investigator DeFrancisci met with witnesses Mary Francis and Carol Hutchins together prior to trial to discuss the case and provide them with copies of their pre-trial statements and grand jury testimony;

(11) The State violated Petitioner's Sixth Amendment confrontation rights by allowing Investigator DeFrancisci to impermissibly provide hearsay testimony and imply to the jury that he possessed superior knowledge outside the record that incriminated Petitioner;

(12) Trial counsel provided ineffective assistance by failing to call Lorenzo Biera and Lilmonique Scott as defense witnesses;

(13) Witness Cantrell Wilkes' charges pending during Petitioner's trial exculpates Petitioner as it impeaches Wilkes' trial testimony;

(14) The "newly discovered evidence" of Jeffrey Wise's 1/12/12 Affidavit read in conjunction with the 8/08/97 Essex County Jail religious services sign-in sheet exculpates

> Petitioner as it impeaches witness Cleveland Barlow's trial testimony; and
>
> (15) The State condoned perjury by allowing witness Cleveland Barlow to testify falsely that "he was not promised to get any deal for his testimony," even though his plea agreement said otherwise (four years flat and supplemented to probation).

The trial court determined defendant's motion was in effect a third PCR petition, raising claims previously litigated on direct appeal and in prior PCR petitions. Defendant did not have the right to counsel on a third PCR application, and was obligated to provide the trial record to the court. The court explained the Public Defender's Office had appointed counsel because defendant's motion was erroneously captioned as "a motion for a new trial." When defendant told the court he believed he had no choice but to represent himself, the court allowed him to do so with appointed counsel as standby counsel.

On August 4, 2015, the trial court denied defendant's motion. In a comprehensive twenty-six-page opinion, the court found all fifteen of defendant's alleged "new trial" claims were procedurally barred by Rule 3:20-2. The trial court determined "as these claims have been raised more than ten days after Petitioner's 1997 guilty verdict, they are procedurally barred . . . ."

Regarding defendant's claims one, nine, and fourteen noted above, the trial court ruled defendant did not meet the three-prong Carter[4] test for newly discovered evidence. The court concluded Cleveland Barlow's second letter, Ali's affidavit, and Wise's affidavit did not meet the materiality prong of Carter, but rather purport "to provide impeaching or contradictory evidence concerning the trial testimony of . . . Barlow." Also, the third prong of Carter was not met because "none of these claims would affect the jury's verdict . . . ." The trial court observed we had "already determined Mr. Barlow's testimony 'merely corroborated [the] other evidence of guilt.'" The trial court found "[p]etitioner does not even attempt to demonstrate why the allegedly 'newly discovered evidence' underlying claim [fourteen] was not discoverable by reasonable diligence prior to the completion of his trial, as required by the second prong of Carter."

The trial court determined defendant's claims were time barred by Rule 3:22-12(a)(2) because his third PCR application was "filed more than one year after the latest of . . . the date on which the factual predicate for the relief sought was discovered, if that factual predicate could not have been discovered through

[4] State v. Carter, 85 N.J. 300, 314 (1981).

the exercise of reasonable diligence[.]" The court found defendant was aware of the factual predicates for his claims two, three, four, five, six, ten, eleven, twelve, and thirteen "during the trial, over fourteen years prior to filing his present [p]etition;" he was aware of "new evidence" claim one on December 12, 2009; he was aware of "new evidence" claim seven in July 2010; and he was aware of "new evidence" claim fourteen on August 8, 1997. Moreover, "[p]etitioner does not state when he learned of the factual predicates for his new evidence claims [four] and [six] . . . and does not even attempt to establish that his claims [one], [four], [six], [seven], [nine], and [fourteen] could not have been discovered sooner through the exercise of reasonable diligence."

In addition to being time barred, the trial court ruled defendant's fifteen claims were procedurally barred because they did not meet any of the exceptions of Rule 3:22-4(b)(2)(A), (B), or (C). The trial court determined defendant's claims two, three, seven, eleven, twelve, thirteen, fourteen, and fifteen were also barred by Rule 3:22-5 because they were raised and adjudicated in prior PCR and habeas proceedings. The trial court also ruled Rule 3:22-4(a) precluded defendant's claims one, two, three, five, seven, nine, ten, thirteen, fourteen, and fifteen because defendant failed to show how these claims "could not reasonably have been raised in a prior proceeding." The trial court also

denied defendant's motion to compel discovery finding a failure to show good cause.

This appeal followed. Defendant makes the following arguments:

> POINT I — MR. BRYANT'S CLAIMS OF NEWLY DISCOVERED EVIDENCE WERE NOT PROCEDURALLY BARRED.
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> POINT II — THE LOWER COURT INCORRECTLY RULED THAT NEWLY DISCOVERED EVIDENCE DID NOT WARRANT A NEW TRIAL.
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> POINT III — THE MATTER SHOULD BE REMANDED FOR A NEW HEARING BASED ON INEFFECTIVE ASSISTANCE OF ASSIGNED COUNSEL.
>
> POINT IV — THE LOWER COURT ERRED IN FAILING TO ASSIGN NEW COUNSEL.

I.

Defendant contends the trial court erred in finding that claims one, nine, and fourteen did not constitute newly-discovered evidence. He also challenges the trial court's application of the PCR time and procedural bars to these claims.

"A motion for a new trial upon the ground of newly discovered evidence is not favored and should be granted with caution by a trial court since it disrupts the judicial process." State v. Conway, 193 N.J. Super. 133, 171 (App. Div. 1984) (citing State v. Haines, 20 N.J. 438, 443 (1956)). "A motion for a new trial is addressed to the sound discretion of the trial court, and its

determination will not be reversed on appeal unless there has been a clear abuse of that discretion." State v. Puchalski, 45 N.J. 97, 107 (1965) (quoting State v. Artis, 36 N.J. 538, 541 (1962)).

Our Supreme Court has stated:

> To meet the standard for a new trial based on newly discovered evidence, defendant must show that the evidence is 1) material, and not "merely" cumulative, impeaching, or contradictory; 2) that the evidence was discovered after completion of the trial and was "not discoverable by reasonable diligence beforehand"; and 3) that the evidence "would probably change the jury's verdict if a new trial were granted." We have held that all three prongs of that test must be satisfied before a defendant will gain the relief of a new trial.
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> [State v. Ways, 180 N.J. 171, 187 (2004) (citation omitted) (quoting Carter, 85 N.J. at 314).]

"Newly discovered evidence must be reviewed with a certain degree of circumspection to ensure that it is not the product of fabrication, and, if credible and material, is of sufficient weight that it would probably alter the outcome of the verdict in a new trial." Id. at 187-88.

Under prong one of the Carter test, a defendant must show the evidence "ha[s] some bearing on the claims being advanced." Id. at 188 (quoting State v. Henries, 306 N.J. Super. 512, 531 (App. Div. 1997)). This requires the court to engage in "an evaluation of the probable impact such evidence would have on a jury verdict."

Id. at 188-89. Because the issue of materiality inquires whether the evidence would change the jury's verdict, the court should evaluate the first and third prongs of the test together. Id. at 189.

Under prong two of the Carter test, "the new evidence must have been discovered after completion of trial and must not have been discoverable earlier through the exercise of reasonable diligence." Id. at 192. A defendant must "act with reasonable dispatch in searching for evidence before the start of the trial." Ibid.

Under prong three of the Carter test, a defendant must show the evidence "would probably change the jury's verdict if a new trial were granted." Id. at 187 (quoting Carter, 85 N.J. at 314). "The power of the newly discovered evidence to alter the verdict is the central issue . . ." before the trial judge. Id. at 191. "[T]he test is whether the evidence if introduced is such as ought to have led the jury to a different conclusion — one of probability and not mere possibility[.]" Haines, 20 N.J. at 445.

We agree with the trial court claims one, nine, and fourteen did not meet the first and third prongs of Carter. We previously determined "[t]here was substantial additional evidence of defendant's guilt, including the testimony of two eyewitnesses. Barlow's testimony merely corroborated substantial other evidence

of guilt." Bryant, No. A-5662-97, slip op. at 12. Accordingly, Barlow's second letter and the affidavits would have only functioned to impeach Barlow's credibility and would not have affected the jury verdict.

In his second letter, Barlow stated: "The person who did it openly confess[ed] to me on what took place and how it happen[ed]." We agree with the trial court that "[i]n addition to th[e] absence of prejudice . . . the second Barlow letter reveals that it has little impeachment value." This does not contradict, but rather corroborates, Barlow's testimony defendant confessed to the murder at the Essex County Jail in August 1997. Moreover, defendant acknowledged he was unaware of whether Barlow's second letter was missing any pages, and "[a]ny suggestion that there are additional impeachment materials contained in any additional pages amounts to pure speculation."

Regarding claim fourteen, the trial court found defendant "does not even attempt to demonstrate why the allegedly 'newly discovered evidence' . . . was not discoverable by reasonable diligence prior to the completion of his trial . . . ." Therefore, the trial court correctly determined this evidence fails the second Carter prong. We agree with the trial court all fifteen of defendant's claims fail the Carter test for newly discovered evidence.

Defendant also contends the trial court erred in treating his motion for a new trial as a third PCR, and erred by applying the procedural bars applicable to PCRs to the motion. We disagree.

Rule 3:22-4(b) states in relevant part:

> A second or subsequent petition for post-conviction relief shall be dismissed unless:
>
> (1) it is timely under R. 3:22-12(a)(2); and
>
> (2) it alleges on its face either:
>
> . . . .
>
> (B) that the factual predicate for the relief sought could not have been discovered earlier through the exercise of reasonable diligence, and the facts underlying the ground for relief, if proven and viewed in light of the evidence as a whole, would raise a reasonable probability that the relief sought would be granted[.]

Rule 3:22-12(a)(2) states:

> Notwithstanding any other provision in this rule, no second or subsequent petition shall be filed more than one year after the latest of:
>
> (A) the date on which the constitutional right asserted was initially recognized by the United States Supreme Court or the Supreme Court of New Jersey, if that right has been newly recognized by either of those Courts and made retroactive by either of those Courts to cases on collateral review; or
>
> (B) the date on which the factual predicate for the relief sought was discovered, if that factual predicate could not have been

> discovered earlier through the exercise of reasonable diligence; or
>
> (C) the date of the denial of the first or subsequent application for post-conviction relief where ineffective assistance of counsel that represented the defendant on the first or subsequent application for postconviction relief is being alleged.

Rule 3:22-12(b) states: "[t]hese time limitations shall not be relaxed, except as provided herein." Rule 1:3-4(c) prohibits the parties and the court from enlarging the time specified in Rule 3:22-12. Rule 3:22-5 states: "A prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any post-conviction proceeding brought pursuant to this rule or prior to the adoption thereof, or in any appeal taken from such proceedings."

The trial court stated:

> Petitioner was aware of the factual predicates for his claims [two, three, four, five, six, ten, eleven, twelve, thirteen, and fifteen] during trial, over fourteen years prior to filing his present [p]etition. Petitioner was also aware of his new evidence claim [one] on [December 8, 2009] . . . claim [seven] in July of 2010 . . . claim [nine] on [April 29, 2010] . . . and claim [fourteen] on [August 8, 1997] . . . .

The trial court correctly determined defendant was aware of the factual predicates for all fifteen claims over one year prior to the filing of his motion. Defendant has not demonstrated any

excusable neglect for the filing delays, nor has he shown a reasonable probability that if his factual assertions were found to be true, enforcement of the time bar would result in fundamental injustice. R. 3:22-12(a)(1). He is not entitled to a relaxation of the rule. State v. Mitchell, 126 N.J. 565, 576 (1992). The trial court also correctly determined defendant failed to meet any of the exceptions enumerated in Rule 3:22-4(b)(2).

Moreover, the trial court correctly determined some of defendant's claims were procedurally barred by Rule 3:22-5. "[A] defendant may not use a petition for post-conviction relief as an opportunity to relitigate a claim already decided on the merits." State v. McQuaid, 147 N.J. 464, 483 (1997). The trial court found claims seven, twelve, and thirteen were already raised in defendant's first PCR petition, which was denied by the trial court and affirmed by this court. Claims seven, eleven, thirteen, fourteen, and fifteen were raised in defendant's second PCR petition, which was denied by the trial court and affirmed by this court. Claims two, three, five, seven, thirteen, and fifteen were raised in defendant's second habeas petition, which was rejected by the district court. Defendant's remaining contentions, including his contention that the court erred by treating his motion as a PCR petition rather than a motion under Rule 3:20-2,

lack sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(1)(E).

II.

Defendant contends the trial court erred in determining his trial counsel was not ineffective under Strickland. He contends the failure of assigned counsel to submit trial transcripts to the court constituted deficient performance, and argues the prejudice derived from this failure is self-evident and must be presumed.

To establish ineffective assistance of counsel, defendant must satisfy a two-prong test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.
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> [Strickland, 466 U.S. at 687; State v. Fritz, 105 N.J. 42, 52 (1987) (quoting Strickland, 466 U.S. at 687).]

Counsel's performance is evaluated with extreme deference, "requiring 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance

. . . .'" Fritz, 105 N.J. at 52 (alteration in original) (quoting Strickland, 466 U.S. at 688-89). "To rebut that strong presumption, a defendant must establish . . . trial counsel's actions did not equate to 'sound trial strategy.'" State v. Castagna, 187 N.J. 293, 314 (2006) (quoting Strickland, 466 U.S. at 689). "Mere dissatisfaction with a 'counsel's exercise of judgment' is insufficient to warrant overturning a conviction." State v. Nash, 212 N.J. 518, 542 (2013) (quoting State v. Echols, 199 N.J. 344, 358 (2009)).

To demonstrate prejudice, "'actual ineffectiveness' . . . must [generally] be proved[.]" Fritz, 105 N.J. at 52 (quoting Strickland, 466 U.S. at 692-93). Petitioner must show the existence of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Ibid. (quoting Strickland, 466 U.S. at 694). Indeed,

> [i]t is not enough for [a] defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.
>
> [Strickland, 466 U.S. at 693 (citation omitted).]

Defendant argues his trial counsel was ineffective because he failed to obtain, review, and submit to the court trial transcripts in support of defendant's motion for a new trial. Defendant contends because his motion was premised on the discovery of new evidence warranting a new trial, the trial court could only properly make this determination upon review of the record. Therefore, defendant argues prejudice is presumed.

We are satisfied from our review of the record that defendant failed to make a prima facie showing of ineffective assistance of counsel pursuant to Strickland-Fritz, substantially for the reasons stated by the PCR judge in his thoughtful written opinion. As the judge noted, assigned counsel prepared a supplemental letter-brief in support of defendant's applications and argued on defendant's behalf at the July 31, 2015 motion hearing. Furthermore, defendant was not prejudiced because there was no necessity to reach the merits of defendant's claims, which were time- and procedurally-barred. To the extent we have not specifically addressed arguments raised by defendant, we find them without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

III.

Defendant contends the trial court erred in failing to assign new counsel on his third PCR petition after assigned counsel failed to provide trial transcripts to the court. We disagree.

Rule 3:22-6(b) states:

> Upon any second or subsequent petition filed pursuant to this Rule attacking the same conviction, the matter shall be assigned to the Office of the Public Defender only upon application therefor and showing of good cause. For purposes of this section, good cause exists only when the court finds that a substantial issue of fact or law requires assignment of counsel and when a second or subsequent petition alleges on its face a basis to preclude dismissal under R[ule] 3:22-4.

Though no rule required assignment of counsel, the Office of the Public Defender afforded defendant appointed standby counsel. Defense counsel advocated for defendant by filing a supplemental brief and arguing defendant's motion at the hearing. Furthermore, defendant was not prejudiced by any alleged failure because his claims were time- and procedurally-barred.

Affirmed.