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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-4763-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GIANCARLO BONILLA, a/k/a  
ELEX BLANKS, GIANCARIO BONILLA,  
JAJAINCAR L. BONILLA,  
JOSE MENDEZ, CARLOS ORTIZ,  
and JOSE SOLER,

Defendant-Appellant.

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Submitted December 11, 2017 – Decided January 18, 2018

Before Judges Sabatino and Whipple.

On appeal from Superior Court of New Jersey,  
Law Division, Essex County, Indictment No. 10-  
01-0102.

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

Christopher S. Porrino, Attorney General,  
attorney for respondent (Sarah Lichter, Deputy  
Attorney General, of counsel and on the  
brief).

PER CURIAM

After a 2011 jury trial, defendant Giancarlo Bonilla was convicted of first-degree felony murder, first-degree robbery, and second-degree conspiracy to commit robbery. The charges arose out of the fatal attack upon an inmate at Delaney Hall, a private correctional facility, by defendant and other prisoners attempting to rob the victim. Defendant was acquitted of murder.

The trial court imposed a sentence of life imprisonment with a thirty-year period of parole ineligibility for the felony murder conviction, subject to an eighty-five percent period of parole ineligibility under the No Early Release Act, N.J.S.A. 2C:43-7.2. The other offenses merged for sentencing purposes.

Defendant unsuccessfully pursued a direct appeal, variously arguing that: (1) the court unfairly thwarted his right to impeach State witnesses to show their bias; (2) the court erroneously instructed the jury that it could consider his pretrial silence to impeach his testimony; (3) the court unfairly questioned his credibility before the jury; (4) there was insufficient evidence to support his convictions for conspiracy and robbery; and (5) his life sentence is excessive and illegal. In a twenty-three-page unpublished opinion we rejected these arguments and affirmed defendant's conviction and sentence. State v. Bonilla, No. A-1079-11 (App. Div. Aug. 6, 2013). The Supreme Court denied defendant's petition for certification. 217 N.J. 293 (2014).

Following the exhaustion of his direct appeal, defendant filed a petition for post-conviction relief ("PCR"). He also moved for a new trial based upon alleged newly-discovered evidence. The trial court provided an evidentiary hearing to defendant on these claims. Defendant testified at that hearing, along with his former trial counsel, and a third witness named Gerald Williams.

Upon considering this evidence in light of the applicable law, the PCR judge, Hon. Verna G. Leath, issued a written opinion on January 26, 2016, denying defendant's requests for relief. Among other things, the judge concluded that defendant had failed to prove his various contentions of ineffective assistance of trial counsel. In addition, the judge denied defendant's request for a new trial, specifically finding on this score that the testimony of Williams, attempting to exculpate defendant, simply was not credible.

This appeal ensued. Defendant argues:

THE PCR COURT ERRED IN DENYING DEFENDANT'S  
PETITION FOR POST-CONVICTION RELIEF, DESPITE  
THE FACT THAT HE DEMONSTRATED THE INEFFECTIVE  
ASSISTANCE OF TRIAL COUNSEL.

More specifically, defendant maintains that his trial attorney was ineffective by: (1) opening the door to enable the State to present otherwise-inadmissible testimony; (2) failing to prepare him properly to testify; (3) failing to establish that clothing worn

by defendant did not match the described clothing of the assailant; (4) failing to call a gang expert to testify; (5) failing to investigate the case adequately; and (6) causing cumulative errors. Defendant further asserts that he should have received a new trial based on Williams' exculpatory testimony.

Having fully considered these contentions in light of the record and the applicable law, we affirm the trial court's denial of relief. We do so substantially for the cogent reasons expressed in Judge Leath's written opinion. Only a few short comments are in order.

This court's standard of review "is necessarily deferential to a PCR court's factual findings based on its review of live witness testimony. In such circumstances we will uphold the PCR court's findings that are supported by sufficient credible evidence in the record." State v. Nash, 212 N.J. 518, 540 (2013) (citations omitted). "An appellate court's reading of a cold record is a pale substitute for a trial judge's assessment of the credibility of a witness he has observed firsthand." Ibid. (citations omitted). We must give deference to the PCR judge's post-hearing findings "which are substantially influenced by [her] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy[.]" State v. Taccetta, 200 N.J. 183, 194 (2009) (quoting State v. Johnson, 42

N.J. 146, 161 (1964)). However, we apply de novo review to the judge's legal conclusions. Nash, 212 N.J. at 540-41.

First, we concur with the PCR judge that defendant is not entitled to a new trial because his counsel posed questions to defendant on direct examination that then opened the door to testimony about defendant's pre-arrest silence. To be sure, trial counsel asked defendant why he had not presented his version of events, as later described in his testimony at trial, when he met with law enforcement authorities after his arrest. Even if we were to reject trial counsel's assertion that he posed these questions for strategic reasons, we discern no consequential prejudice flowing from that choice. The State's proofs of defendant's guilt in this case were very compelling, including evidence of defendant's DNA found under the victim's fingernails, and the testimony of three eyewitnesses who observed defendant taking part in the robbery and choking the victim to death. At a minimum, defendant fails to satisfy the necessary "prejudice" prong of the two-part test for ineffective assistance enunciated in Strickland v. Washington, 466 U.S. 668, 687 (1984).

Second, defendant's claim that his former counsel did not sufficiently prepare him to testify at trial is unavailing. As counsel testified at the PCR evidentiary hearing, it was his customary practice to begin to prepare his clients for possible

trial testimony at the outset of his representation on "day one," and to review specific factual scenarios with them. See N.J.R.E. 406 (regarding habit and routine practice). Counsel also attested to discussing with defendant the pros and cons of testifying, particularly in light of the DNA evidence undermining defendant's claim of innocence. The PCR judge found these explanations by counsel persuasive, and we have no reason to set aside that determination.

Third, notwithstanding defendant's contrary assertions, trial counsel did endeavor to show through questioning at trial that defendant's clothing did not match the clothing of the perpetrator described by the witnesses. On cross-examination of the police detective, trial counsel also pointed out that the clothing described by the eyewitnesses was not found among defendant's belongings. The fact the jury apparently was unconvinced that the clothing proofs exonerated defendant does not signify trial counsel was deficient. As the PCR judge aptly noted, the clothing-related testimony entailed ultimate credibility determinations by the jury, which counsel could not control beyond his own advocacy.

Fourth, we agree with the PCR judge that trial counsel was not deficient in failing to present testimony from a gang expert. Although in certain situations, proof of gang membership or involvement may be admitted at criminal trials, see State v.

Goodman, 415 N.J. Super. 210, 230 (App. Div. 2010), the judge who presided over this trial made it abundantly clear that he would forbid such gang-related proof. In fact, the trial judge observed there was "not a scintilla" of factual evidence to establish that the State's witnesses had lied about defendant because he was not a fellow gang member. Given that ruling, trial counsel made a reasonable strategic decision not to pursue such testimony.


Fifth, the trial court reasonably concluded that defendant had failed to sustain his substantial burden of presenting newly discovered evidence that would "probably change" the jury verdict if a new trial was granted. State v. Carter, 85 N.J. 300, 314 (1981). The proffered testimony of Williams, who the PCR judge specifically did not find credible, was essentially the same as testimony elicited at trial by another inmate named Vincent Caputo. Merely cumulative additional evidence that has been discovered post-trial does not warrant relief. Ibid. In addition, defendant's unsubstantiated claim that after trial he saw a video of the victim's roommate with a diary, which he contends may have exculpated him, is wholly speculative. Such "bald assertions" do not justify setting aside a guilty verdict. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

The balance of defendant's arguments, including his claim of cumulative error, lack sufficient merit to warrant discussion. R.

2:11-3(e)(2).

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION