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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-5128-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANTHONY AFANADOR,

Defendant-Appellant.

Submitted January 18, 2018 – Decided February 1, 2018

Before Judges Nugent and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Cumberland County, Indictment
No. 09-12-1019.

Joseph E. Krakora, Public Defender, attorney
for appellant (Karen A. Lodeserto, Designated
Counsel, on the brief).

Jennifer Webb-McRae, Cumberland County
Prosecutor, attorney for respondent (Andre R.
Araujo, Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Convicted by a jury of first-degree robbery and a weapons
offense, sentenced to an extended term of thirty years subject to

the No Early Release Act, N.J.S.A. 2C:43-7.2, and his judgment of conviction having been affirmed on direct appeal, State v. Afanador, No. A-6171-10 (App. Div. June 26, 2013), certif. denied, 217 N.J. 285 (2014), defendant filed this petition for post-conviction relief (PCR). The trial court denied the petition without an evidentiary hearing. Defendant appealed, raising a single issue:

POINT ONE

DEFENDANT IS ENTITLED TO POST-CONVICTION RELIEF BECAUSE TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBTAIN VIEWABLE SURVEILLANCE FOOTAGE OF THE ROBBERY.

Finding no merit in defendant's argument, we affirm.

The following facts, as recounted in our decision affirming defendant's conviction and sentence on direct appeal, are relevant to this appeal:

On August 31, 2009, around 2:00 a.m., Abdoul Toure, an employee of the Riggins Gas Station in Vineland, while lying down on the couch in the business office located in the rear of the convenience store part of the station, was approached by a male armed with a handgun. The male had a bandana over his nose, but the bandana did not conceal a red mark on the right side of his face. The perpetrator was wearing a black hooded sweatshirt or hoodie. He told Toure, "Give me all the money." Toure recognized the man, whom he later identified as defendant, by the red mark, his voice, height, and build, including "flat-type shoulders," as "Cheesy," who regularly frequented the gas station and

had been there one and one-half hours earlier to purchase cigarettes.

Toure was surprised at defendant's request. He attempted to look defendant directly in his eyes and responded, "Really?" At that point, defendant took \$720 from Toure's pocket and ran away. Vineland police responded shortly thereafter and took a report from Toure.

There was video equipment at the station which monitored the outside and interior of the store. The cameras did not capture the actual robbery, but did capture a hooded individual wearing a black mask enter through the office door, remove a handgun and point it in the direction of Toure, who was lying on the couch. However, the identity of the perpetrator could not be discerned from the video. Toure, approximately one week after the robbery, identified defendant from a photo array.

Also, one week following the robbery, Shawn Land, who had contacted police to report that a female had damaged his car, informed the police about the gas station robbery. Land told police that two weeks before the gas station robbery, defendant, whom he had known for about three weeks at that point, asked him to be the getaway driver for a robbery at the gas station. He told defendant he didn't want to get involved. Defendant then showed him a silver and red revolver which appeared real to him. Land knew defendant by both his real name, Anthony Afanador, and by his nickname, "Cheesy."

Defendant did not testify, but his uncle, Elvin Torres, testified on his behalf. According to Torres, at the time the robbery was being committed, defendant, who lived with him, was at home. He testified

defendant borrowed his vehicle earlier that evening and drove two family members home. When defendant returned around 1:15 a.m., he took the keys from him because defendant had some alcohol and smoke on his breath. He and defendant then both fell asleep in the living room until 5:30 a.m.

Torres did not advise police defendant had been with him at the time the robbery was being committed until eight months later. He explained he had been upset with defendant that night because defendant had taken his vehicle, a Ford Escape. He recorded the time defendant took the car to protect himself in case he was questioned by the police about the car. Although police requested that Torres turn over the note several times, he did not do so, explaining "[i]t's only a piece of paper, wrote down, boom. I shuffled it through my bills[.]"

[Alfanador, slip op. at 3-5.]

In his PCR petition, which included a petition for discovery, defendant claimed his trial counsel was ineffective because he failed to conduct an adequate pre-trial investigation, was inept when cross-examining witnesses, and had no coherent plan of defense. He also claimed his right to cross-examine witnesses was infringed by the prosecutor, who arbitrarily withheld, or failed to preserve, videotapes from the gas station.

In a written opinion dated November 30, 2015, Judge Cristen P. D'Arrigo denied defendant's petition without an evidentiary hearing and also denied defendant's discovery petition. In his opinion, Judge D'Arrigo rejected, among other arguments,

defendant's claim that his attorney should have requested video surveillance, filed a motion to suppress testimony regarding the videotapes, objected to testimony based on the surveillance, and requested an adverse inference charge for failure to preserve the entire surveillance video. The judge explained the pre-robbery surveillance was produced by the State in pre-trial discovery. The robbery surveillance, however, was not produced because the State was unable to play the surveillance video. The surveillance video had been provided to the State by the victim but the State could not play it. Judge D'Arrigo concluded there was no actual failure by trial counsel to request appropriate discovery. Rather, defense counsel relied upon the State's representation that the surveillance video could not be replayed.

Judge D'Arrigo also rejected defendant's contention his trial counsel was ineffective for not vigorously pursuing the contents of the unplayable video. In rejecting this argument, the judge wrote:

First of all, at trial, the defense attorney utilized the [S]tate's inability to play that tape to his advantage in attempting to raise reasonable doubt in the jury's mind about what the tape might have shown and casting suspicion on the prosecution's inability to play it. Had defense counsel solved the issue with regard to getting the tape to play, he would have been deprived of that argument. The attempt to get the tape to play was a calculated risk that had little

upside. At best the tape would be inconclusive. At worst it would have been confirmatory of the officer's testimony of their recollection of the tape played at the store the night of the robbery. The decision to pursue or not pursue the technical issues regarding the tape was a classic strategic decision.

But, Petitioner argues that it could have contained exculpatory images or if available, could have been used to impeach the testimony of the witnesses including the victim's statement of the red mark on his face/neck. Ignoring the strategic decision and the downside risk, the possibility of the tape containing exculpatory information or information valuable to cross-examination was put to rest by the prosecutor's ability, albeit late ability, to actually play the tape. The court having viewed the tape as part of these proceedings finds that there are no exculpatory images or information contained in that tape. Nor does the tape contain images with the clarity to identify specific characteristics that would be necessary to impeach the victim's description of the perpetrator. The angle, distance, lighting, location, and lack of definition of the images make it of little value except: to confirm that the robbery took place; the basic description of the perpetrator (height, build, clothing¹); the time at which it took place; and the direction from which the perpetrator approached and fled the scene. Indeed the location where the perpetrator actually took the money from the clerk is not captured on


¹ Petitioner claims that the tape could have shown that the perpetrator and the defendant wore different shoes by comparing the images from the tape when the petitioner was in the store earlier and those of the perpetrator an hour and half later. The images on the second tape do not contain enough definition to make such comparisons.

the recording because it was screened from view. Therefore, even if the argument could satisfy the first prong of Strickland², it could not have survived the second because had defense counsel more vigorously pursued the technical problems and actually solved them, it would not have changed the outcome of the trial.

As previously noted, the sole issue defendant raises on appeal is that his trial counsel was ineffective for failing to obtain viewable surveillance footage of the robbery. We reject this argument substantially for the reasons expressed by Judge D'Arrigo in his written opinion. Defendant's arguments are without sufficient merit to warrant further 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.


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² Strickland v. Washington, 466 U.S. 608, 687 (1984).