

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5542-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

A.R.,

Defendant-Appellant.

Submitted December 14, 2017 — Decided February 1, 2018

Before Judges Simonelli and Gooden Brown.

On appeal from Superior Court of New Jersey,
Law Division, Monmouth County, Indictment No.
08-05-1104.

Joseph E. Krakora, Public Defender, attorney
for appellant (David A. Gies, Designated
Counsel, on the briefs).

Christopher J. Gramiccioni, Monmouth County
Prosecutor, attorney for respondent (Monica do
Outeiro, Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant A.R. appeals from the April 1, 2016 Law Division order, which denied his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

The underlying facts of this case are set forth in State v. A.R., 213 N.J. 542 (2013), and incorporated herein. The following facts are pertinent to our review.

Following a jury trial, defendant was convicted of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1); second-degree sexual assault, N.J.S.A. 2C:14-2(b); and endangering the welfare of a child, N.J.S.A. 2C:24-4(a). The charges stemmed from defendant's sexual assault of his nine-year old great niece, T.P. The State relied primarily on defendant's and T.P.'s video-recorded statements, which were admitted in evidence and played at trial. In his statement, defendant admitted to engaging in sexual conduct with T.P.

Defendant testified at trial and acknowledged making the statement. However, he denied the allegations and asserted his confession was false and that he simply repeated everything a detective said to him. During summation, defense counsel encouraged the jury to review defendant's video-recorded statement and emphasized that defendant was tired and acted "like somebody who's beaten down." Defense counsel also questioned whether

defendant was trying to divert the attention of the investigators from the allegations as suggested by the detective in his trial testimony and urged the jury to find that defendant was not thinking clearly during the interview. Further, defense counsel did not object when the jury requested to review the video-recorded statements in the jury room during deliberations. In response to the trial court's inquiry regarding the use of the video player in the jury room, defense counsel stated, "I consider it . . . the equivalent of statement[s] on paper [that] are marked into evidence and brought back there. They might be able to look at that."

We determined that the jury's unfettered access to both video-recorded statements during deliberation outside defendant's presence violated the rule announced in State v. Burr, 195 N.J. 119 (2008). On that basis, we reversed defendant's conviction. State v. A.R., No. A-3405-08 (App. Div. Aug. 10, 2011).

The Supreme Court reversed our judgment and reinstated defendant's conviction. A.R., 213 N.J. at 563-64. The Court determined the procedure utilized in this case did not comport with the rule announced in Burr and State v. Michaels, 264 N.J. Super. 579 (App. Div. 1993), but held "[t]he trial error was plainly invited and does not warrant reversal of defendant's conviction." Id. at 561. The Court found that defense counsel utilized defendant's video-recorded statement "as part of her

defense strategy by encouraging the jury to thoroughly consider it in its deliberations[;]" "did not object to the jury's unfettered access" to both video-recorded statements in the jury room; and "provided a rationale for support of such access." Id. at 563. The Court held:

In applying the invited-error doctrine, we must acknowledge the strength of the evidence adduced by the State in support of defendant's conviction and the nature of the error. Here, the error did not constitute structural error and we conclude it did not compromise the fairness of the trial. Instead, the error related to the procedural protections imposed in Burr and, as such, does not constitute a 'fundamental miscarriage of justice.' In the end, the evidence of defendant's guilt and the nature of the error invited by defendant require reversal of the judgment of the Appellate Division and reinstatement of the conviction.

[Id. at 563 (quoting N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 342, (2010)).]

Defendant filed a PCR petition, arguing, in relevant part, that trial counsel rendered ineffective assistance by failing to object to, and discuss with him, the jury's request for unfettered access to the video-recorded statements during deliberations. In denying the petition, the PCR judge relied on the Court's findings in A.R. and concluded defendant failed to prove the two prongs of Strickland v. Washington, 466 U.S. 668 (1984) — that counsel's performance was deficient and the deficient performance prejudiced

the defense. The PCR judge found the Court had determined that the jury's unfettered access to the video-recorded statements, while procedurally flawed, was part of defense counsel's trial strategy, and counsel's trial strategy, while invited error, did not deprive defendant of a fair trial and would not have changed the outcome of the proceedings. On appeal, defendant reiterates the arguments made to the PCR judge.

The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). Rather, trial courts should grant evidentiary hearings and make a determination on the merits only if the defendant has presented a prima facie claim of ineffective assistance, material issues of disputed facts lie outside the record, and resolution of the issues necessitates a hearing. R. 3:22-10(b); State v. Porter, 216 N.J. 343, 355 (2013). We review a judge's decision to deny a PCR petition without an evidentiary hearing for abuse of discretion. State v. Preciose, 129 N.J. 451, 462 (1992).

To establish a prima facie claim of ineffective assistance of counsel, the

defendant must satisfy two prongs. First, he must demonstrate that counsel made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." An attorney's

representation is deficient when it "[falls] below an objective standard of reasonableness."

Second, a defendant "must show that the deficient performance prejudiced the defense." A defendant will be prejudiced when counsel's errors are sufficiently serious to deny him a "fair trial." The prejudice standard is met if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A "reasonable probability" simply means a "probability sufficient to undermine confidence in the outcome" of the proceeding.

[State v. O'Neil, 219 N.J. 598, 611 (2014) (quoting Strickland, 466 U.S. at 687-88, 694).]

"[I]n order to establish a prima facie claim, [the defendant] must do more than make bald assertions that he was denied the effective assistance of counsel. He must allege facts sufficient to demonstrate counsel's alleged substandard performance." Cummings, 321 N.J. Super. at 170. The defendant must establish, by a preponderance of the credible evidence, that he is entitled to the required relief. State v. Nash, 212 N.J. 518, 541 (2013).

"[A]n otherwise valid conviction will not be upset because of ordinary dissatisfaction with counsel's exercise of judgment in his conduct of the trial. To warrant reversal, counsel must have been so inadequate as to render the trial a farce or mockery of justice." State v. Coruzzi, 189 N.J. Super. 273, 320 (App.

Div. 1993) (citations omitted). Simple mistakes, bad strategy, or bad tactics "do not amount to ineffective assistance of counsel unless, taken as a whole, the trial was a mockery of justice." State v. Bonet, 132 N.J. Super. 186, 191 (App. Div. 1975). "Merely because a trial strategy fails does not mean that counsel was ineffective." State v. Bey, 161 N.J. 233, 251 (1999) (citation omitted). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" State v. Sheika, 337 N.J. Super. 228, 241 (App. Div. 2001) (quoting Strickland, 466 U.S. at 689).

Here, the defendant failed to present a prima facie claim of ineffective assistance of counsel to warrant an evidentiary hearing. The Court has established that defense counsel's trial strategy, while invited error, did not compromise the fairness of the trial or constitute a fundamental miscarriage-of-justice. Accordingly, defendant cannot show that defense counsel's error was so serious as to deny him a fair trial, or that, but for counsel's error, the outcome of the trial would have been different.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION