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APPROVAL OF THE APPELLATE DIVISION**

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-0212-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARK BROWNE, a/k/a  
MICHAEL BROWNE, CHRIS  
C. BROWN, MARK BROWN,  
CHRISTOPHER M. BROWN,  
CHRISTOPHER COLLINS,  
JAY, and UNCLE PETE,

Defendant-Appellant.

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Submitted October 24, 2022 – Decided November 7, 2022

Before Judges Mawla and Smith.

On appeal from the Superior Court of New Jersey, Law  
Division, Hudson County, Indictment No. 13-08-1529.

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

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

PER CURIAM

Defendant Mark Browne was tried by a jury and convicted of second-degree manslaughter, N.J.S.A. 2C:11-4(b)(1). He was sentenced to an extended term of eighteen years with an eighty-five percent parole disqualifier, after the court found four aggravating and no mitigating factors. We affirmed the conviction and sentence on appeal. State v. Browne, No. A-2874-16 (App. Div. July 24, 2019) (slip op. at 2), certif. denied, 230 N.J. 405 (2020). Defendant now appeals from a June 29, 2021 order denying his petition for post-conviction relief (PCR). We affirm.

We previously set forth the facts of defendant's crime, which involved defendant and a group of individuals beating, stabbing, binding, and gagging the victim, Darryl Williams, and leaving him for dead in a North Bergen U-Haul lot, next to a highway intersection. Id. at 2-5. The police investigation recovered evidence the victim was beaten in a Newark apartment prior to being driven to the lot. Id. at 2-3. After the State rested its case, defendant indicated he had an alibi witness, Sharo Willis, who "would have provided him with an alibi for the time period when the victim was being abandoned near the U-Haul."

Id. at 8. The trial judge denied the late notice of alibi, and finding no abuse of discretion, we affirmed. Id. at 11.

In challenging his sentence on appeal, defendant argued the court failed to find mitigating factor twelve, N.J.S.A. 2C:44-1(b)(12), because "he provided information about . . . plot[s] to kill an FBI agent and . . . the" judge's wife. Id. at 15. We found no abuse of discretion in the sentencing decision. Id. at 16.

Defendant filed a PCR petition alleging ineffective assistance of trial counsel. He certified he informed counsel about the alibi approximately three and one-half months before trial and counsel assured him he would contact Willis to verify the alibi. He certified "there was no indication [trial counsel] had made any contact with . . . Willis[]" and when defendant asked counsel, he did not confirm he had contacted her. "On the eve of trial, [counsel] stated . . . Willis was not an alibi witness because she could not confirm [defendant] was not present during the incident[,] which caused the death of . . . Williams." Defendant claimed he insisted counsel call the witness and counsel did so reluctantly, but the court denied the request. He claimed: "Had I been made aware of the need to supply notice of alibi to the [S]tate by [counsel] I would have gladly provided the necessary information."

Defendant's petition also reiterated the argument regarding the mitigating factor and claimed trial counsel was ineffective for failing to argue for the factor at sentencing. The petition also argued appellate counsel was ineffective for not raising trial counsel's deficiencies on the appeal.

Judge John A. Young, Jr., who also served as the trial and sentencing judge, denied defendant's PCR petition in a written opinion. He found no grounds for ineffective assistance of trial counsel regarding the alibi issue because, although counsel had Willis's name prior to trial,

this witness would not speak with counsel[,] trial counsel was personally courting family members attempting to get the witness to speak with him, and . . . he believed the testimony did not provide a full alibi because it only alleged [defendant] was not present when [the v]ictim was left in the U[-]Haul, but it did not remove him from the initial attack.

The judge concluded "counsel's decision not to call an alibi witness, who they were having difficulty speaking with and were unsure whether his testimony would in-fact provide an alibi, does not fall below an 'objective standard of reasonableness.'"

The judge also noted defendant did not provide additional information regarding what the witness's testimony would be and "the proposed testimony does not allege . . . [defendant] was not present for the preparation of the attack

on the victim or that he did not participate in the attack on the victim." Further, there was "[o]verwhelming eyewitness testimony from a co-conspirator . . . introduced during the trial." The judge was unpersuaded there was a reasonable probability the witness testimony would have changed the result of the trial.

Judge Young rejected defendant's sentencing-related argument, noting "no evidence has been presented . . . other than [defendant]'s bald assertions that if his counsel had argued for mitigating factor twelve the [c]ourt would have found it in his favor[]" and reduced his sentence. He further rejected the argument appellate counsel was ineffective, noting such claims are typically brought through a PCR petition and "[a]ppellate counsel's decision not to litigate the issue of trial counsel's ineffectiveness [did] not fall below an objective standard of reasonableness."

Defendant raises the following arguments on appeal:

POINT I[:] DEFENDANT RECEIVED  
INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL  
FOR FAILURE TO COMPLY WITH THE COURT  
RULES REGARDING NOTICE OF AN ALIBI  
WITNESS, AND FOR FAILING TO PRESENT  
AVAILABLE PROOF OF MITIGATION AT TIME  
OF SENTENCE.

(a) APPLICABLE LAW

(b) DEFENDANT WAS DENIED  
EFFECTIVE ASSISTANCE OF COUNSEL

FOR FAILURE TO COMPLY WITH COURT RULES GOVERNING THE NOTICE OF AN ALIBI WITNESS.

(c) DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL FOR COUNSEL'S FAILURE TO PRESENT EVIDENCE OF DEFENDANT'S COOPERATION WITH LAW ENFORCEMENT AS MITIGATION AT THE TIME OF SENTENCE.

A PCR petition is neither "a substitute for direct appeal . . . nor an opportunity to relitigate cases already decided on the merits . . . ." State v. Preciose, 129 N.J. 451, 459 (1992) (citation omitted). When a petitioner claims ineffective assistance of counsel as a basis for relief, they must show counsel's performance was deficient, and but for those errors, they would not have been convicted. See Strickland v. Washington, 466 U.S. 668, 687, 694 (1984); State v. Fritz, 105 N.J. 42, 52 (1987).

There is a strong presumption counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. Further, because prejudice is not presumed, Fritz, 105 N.J. at 52, the defendant must demonstrate "how specific errors of counsel undermined the reliability of the" proceeding. United States v. Cronin, 466 U.S. 648, 659 n.26 (1984).

A defendant is also entitled to effective assistance of appellate counsel, but "appellate counsel does not have a constitutional duty to raise every nonfrivolous issue requested by the defendant." State v. Morrison, 215 N.J. Super. 540, 549 (App. Div. 1987) (citing Jones v. Barnes, 463 U.S. 745 (1983)). Appellate counsel will not be found ineffective for failure to raise a meritless issue or errors an appellate court would deem harmless. See State v. Echols, 199 N.J. 344, 361 (2009); State v. Harris, 181 N.J. 391, 499 (2004); State v. Reyes, 140 N.J. 344, 365 (1995).

We review a PCR court's decision to proceed without an evidentiary hearing for abuse of discretion. State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013) (citing State v. Marshall, 148 N.J. 89, 157-58 (1997)). A defendant is entitled to an evidentiary hearing if they present a prima facie case supporting PCR, the court determines there are material issues of fact that cannot be resolved based on the existing record, and the court finds an evidentiary hearing is required to resolve the claims presented. R. 3:22-10(b); see also State v. Porter, 216 N.J. 343, 354 (2013) (citing R. 3:22-10(b)). The court must "view the facts in the light most favorable to a defendant . . . ." Preciose, 129 N.J. at 462-63. A defendant "must do more than make bald assertions," and must instead "allege facts sufficient to demonstrate counsel's alleged substandard

performance." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). "[V]ague, conclusory, or speculative" allegations will not suffice. Porter, 216 N.J. at 355 (quoting Marshall, 148 N.J. at 158).

The "[f]ailure to investigate an alibi defense is a serious deficiency that can result in the reversal of a conviction." Id. at 353. "[F]ew defenses have greater potential for creating reasonable doubt as to a defendant's guilt in the minds of the jury [than an alibi]." Ibid. (second alteration in original) (quoting State v. Mitchell, 149 N.J. Super. 259, 262 (App. Div. 1977)). "[W]hen a petitioner claims [their] trial attorney inadequately investigated [their] case, [they] must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." Cummings, 321 N.J. Super. at 170.

Having considered the arguments raised on this appeal pursuant to these principles, we affirm substantially for the reasons expressed in Judge Young's thorough and well-written opinion. We add the following comments.

Notwithstanding the late notice of alibi, we are unconvinced trial counsel was ineffective because even if the alibi notice was timely made, it would not have affected the outcome considering the witness would not cooperate and her testimony would not have exculpated defendant. Counsel was not ineffective at



sentencing, because defendant described his cooperation with law enforcement in unrelated matters at the sentencing hearing, which did not convince the judge to apply the mitigating factor considering he found "the aggravating factors substantially and completely outweigh the lack of any mitigating factors in this case." Having previously affirmed the sentence, we are likewise unconvinced defendant's cooperation would have led to a different outcome sentence-wise. Finally, appellate counsel was not ineffective for not raising these arguments on appeal because we are unpersuaded we would have decided the case differently given the gravity of defendant's offense and the substantial evidence supporting his conviction.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION