

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-0397-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROBERT L. HAYES, JR.,

Defendant-Appellant.

Submitted October 31, 2022 – Decided November 23, 2022

Before Judges Smith and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 13-06-0880.

Joseph E. Krakora, Public Defender, attorney for appellant (Steven M. Gilson, Designated Counsel, on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent (Steven A. Yomtov, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Robert Hayes appeals from an August 30, 2021 order denying his petition for post-conviction relief (PCR) following an evidentiary hearing. Defendant challenges the trial court's decision denying his ineffective assistance of appellate counsel claim concerning appellate counsel's failure to appeal the denial of his motion for a mistrial. We affirm.

I.

This matter stems from the brutal murder of P.R.,¹ who was strangled to death and then set on fire in an attempt to destroy evidence. On April 8, 2010, A.W., P.R.'s daughter, called 911 after discovering the half-naked and burned body of her mother in P.R.'s bedroom in her home in Old Bridge Township. Police responded to the scene to begin their investigation and found P.R.'s body, kneeling against the bed with her wrists tied together. They noted the perpetrator had tried to cover up the crime by setting the bed on fire, leaving the top-half of P.R.'s body badly burned. P.R.'s autopsy revealed she died as a result of asphyxia due to strangulation and smothering.

A.W. advised Sergeant Paul Miller she believed "Rob" had killed her mother. She told him Rob lived next door in a vacant home, which was under

¹ To protect the identity of the victim, we identify her and her family members by their initials. See R. 1:38-3(c)(12) (excluding from public access the names and addresses of sexual offense victims).

renovation and up for sale. According to A.W., P.R. was a religious woman who tried to help Rob by having him do work at her home. However, P.R. subsequently expressed to A.W. she feared Rob because he would "push himself too much on to her," stalk, yell, and curse at her when she rejected his advances. P.R. also indicated Rob spit on her car. According to A.W., in an effort to rebut his advances, P.R. told Rob she was "married to the Lord."

Police also talked to other witnesses including P.R.'s neighbors, acquaintances, and the owner of the vacant home where Rob stayed, who all provided information concerning unsettling interactions between P.R. and Rob. Based on a combination of the witnesses' accounts and criminal history records, police were able to ascertain Rob was defendant Robert L. Hayes. Thereafter, police arrested defendant on an unrelated charge because he had outstanding warrants. During his detention, police collected physical evidence—clothes and fingernail clippings—and a buccal swab.

The lab results showed P.R.'s DNA and blood was found on defendant's clothes and underwear. Defendant was subsequently indicted and charged with first-degree murder, N.J.S.A. 2C:11-3(a)(1) or (2) (count one); first-degree felony murder, N.J.S.A. 2C:11-3(a)(3) (count two); first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(3) (count three); first-degree aggravated

sexual assault, N.J.S.A. 2C:14-2(a)(6) (count four); second-degree burglary, N.J.S.A. 2C:18-2 (count five); second-degree arson, N.J.S.A. 2C:17-1(a) (count six); third-degree arson, N.J.S.A. 2C:17-1(b)(2) (count seven); third-degree hindering apprehension or prosecution, N.J.S.A. 2C:29-3(b)(1) (count eight); third-degree hindering investigation, N.J.S.A. 2C:29-3(b)(4) (count nine); and second-degree desecration of human remains, N.J.S.A. 2C:22-1(a)(1) and/or (2) (count ten).

Prior to trial, defendant filed two motions which were later the focus of the direct appeal. The first application was a motion to suppress physical evidence police collected from defendant. The trial court denied the motion. Defendant also moved to suppress certain statements defendant made to police. The trial court granted this motion in part and denied it in part.

Central to defendant's PCR application is the trial court's rulings on January 6, 2014, concerning the State's motion in limine to admit certain hearsay statements.² The court ruled A.W. could not testify that "[P.R.] told [A.W.] that she would always tell [d]efendant that she was married to the Lord." The court also barred A.W.'s testimony that when she discovered P.R.'s body, she

² The trial judge ruled on the admission or exclusion of approximately thirty different statements, only a few of which are relevant for the purposes of this appeal.

immediately suspected defendant "[b]ecause [P.R.] told [her] about several incidents where [d]efendant had acted aggressively towards her" However, the court allowed M.C., A.W.'s fiancé, to testify P.R. told him that "[d]efendant brought her a cake for Valentine's Day, which she gave back because she told him 'I'm married to the Lord'"

During the prosecutor's direct examination, A.W. mentioned P.R.'s statement, she was "married to the Lord," three times before defendant's counsel raised an objection. The court then issued a curative instruction to the jury, striking A.W.'s testimony regarding the phrase she was "married to the Lord."³ At another point during direct examination, A.W.—in response to the prosecutor asking her what she told law enforcement when they asked her if she knew anyone who might have killed P.R.—stated, "I only knew of the defendant by the name Rob, so I told them that there had been a guy named Rob staying [in a vacant neighboring property]." Defendant's counsel did not immediately object to this statement. Later that day, defendant's counsel moved for mistrial because A.W. testified in "direct contravention to the court order [of January 6, 2014]." In denying the motion, the trial judge explained that while A.W. had mentioned

³ Before the court issued the instruction, the judge reminded both counsel at sidebar A.W.'s statement subject to the curative instruction was going to come out later in M.C.'s testimony.

on direct examination she suspected defendant, she did not violate the order because she did not mention the basis of that suspicion. Specifically, the court noted the order limited A.W.'s testimony so as to exclude the basis of her suspicion (defendant acting aggressively toward P.R.), but not the fact she immediately suspected defendant.

After the trial resumed, defendant himself complained to the court regarding A.W.'s statements about P.R. being "married to the Lord," and A.W. suspecting defendant when she discovered her mother's body. The trial court noted he issued a curative instruction concerning the first statement and placed his reasons on the record for denying the motion for a mistrial.

Defendant later pled guilty during the trial. He expressed he wanted to reserve the right to appeal the motions the trial court had denied. When asked to specify, defendant stated he wanted to appeal the motions that had to do with "hard core evidence in this case," which his counsel explained meant the "motion to suppress and the Miranda^[4] ruling . . . but mainly the motion to suppress the clothing . . . [since] [t]hat [was] the crux of the case." Defendant ultimately pled guilty to murder, N.J.S.A. 2C:11-3(a)(1) and (2); second-degree burglary, N.J.S.A. 2C:18-2; aggravated arson, N.J.S.A. 2C:17-1(a); and desecration of

⁴ Miranda v. Arizona, 384 U.S. 436 (1966).

human remains, N.J.S.A. 2C:22-1(a)(1) and (2). Defendant was sentenced to thirty years in prison, followed by five years of parole supervision. On the plea form his counsel completed, defendant indicated he explicitly reserved the right to appeal the motions to suppress physical evidence and the statements he made to the police. The court accepted defendant's guilty plea after confirming he entered it freely and voluntarily. Defendant also acknowledged he was satisfied with his counsel's services and advice during the trial.

On direct appeal, defendant raised the two issues he explicitly preserved on the plea form. We affirmed the trial court's decision. State v. Hayes, No. A-5586-13 (App. Div. Mar. 5, 2018). Defendant asked appellate counsel, Lon Taylor, to appeal the denial of the motion for a mistrial, but counsel did not raise it. Defendant filed a petition for certification with the Supreme Court, which was denied. State v. Hayes, 235 N.J. 317 (2018).

Defendant subsequently filed a PCR and raised three issues. First, defendant argued the trial court erred in denying his motion for a mistrial. Second, he argued trial counsel failed to properly present the mistrial motion. Finally, he argued he was denied effective assistance of appellate counsel, who failed to appeal the mistrial motion on direct appeal. The only issue on this appeal is the ineffective assistance of appellate counsel claim.

The PCR court granted an evidentiary hearing, but limited testimony to the issue of ineffective assistance of appellate counsel. Taylor—now retired—testified he had twenty years of experience in the appellate section of the Office of the Public Defender and had represented hundreds of criminal defendants during his career. When reviewing files, he spent most of his preparation time reviewing trial transcripts, indictments, and plea forms to find "legitimate" issues to appeal. Taylor noted the plea process is a quid pro quo in which a criminal defendant waives many rights, including the right to appeal certain issues in exchange for a more lenient sentence. Therefore, in raising the two issues on appeal, he explained he focused on the motions to suppress because defendant explicitly reserved them following his guilty plea, and they were the strongest issues to raise. Taylor testified he advised defendant he would not raise the motion for mistrial on direct appeal because defendant waived it by not explicitly reserving it. Furthermore, even though he did not consider it to be meritless, Taylor thought "it was not nearly as strong as the issues he raised." Therefore, to avoid "bog[ging] down his appellate brief with 'lesser' points . . . he did not raise [the mistrial issue]." The PCR court found Taylor to be credible because he "answered questions directly, showed good recall, and was upfront when unable to remember facts pertinent to a question."

The PCR court denied defendant's application on all three issues. The court opined appellate counsel did not have to raise every non-frivolous issue on appeal but had the discretion to choose among the issues that would increase the likelihood of success. Based on Taylor's testimony that he only raised the strongest issues on appeal, the trial court concluded that he "was more than competent" and, therefore, had not been ineffective in his representation of defendant. Taylor testified he tries to find "legitimate" issues to appeal and indicated he appealed the two issues expressly reserved on defendant's plea form. Taylor further testified he believes attorneys lose credibility if they raise unconvincing issues alongside compelling ones.

The PCR court noted a mistrial is an extraordinary remedy and should only be employed when there has been an obvious failure of justice. At trial, the court issued a curative instruction to counter any prejudice to defendant following A.W.'s testimony regarding P.R. telling defendant she was "married to the Lord." Moreover, the jury was going to hear the same testimony from another witness. Based on this, the PCR court indicated, "the overwhelming evidence against [defendant] in this case, including DNA evidence whose admissibility the Appellate Division affirmed on direct appeal, makes it

improbable that [A.W.'s] challenged testimony would have made any difference had this case reached jury deliberation."

The court further rejected defendant's argument regarding appellate counsel's ineffective assistance for failing to raise the mistrial issue on appeal. The court agreed with Taylor's testimony the suppression of physical evidence was "the most important issue in [defendant's] case because the physical evidence was how the State obtained DNA evidence against petitioner." The PCR court noted Taylor properly raised this issue on appeal along with challenges to defendant's incriminating statements made to law enforcement. The court determined defendant's argument Taylor failed to raise the mistrial motion was not persuasive as A.W.'s testimony was "fleeting," the court gave a curative instruction addressing the testimony, and the jury was going to hear part of A.W.'s testimony through a different witness in any event. The court noted that even if Taylor had raised the issue, there was no reasonable probability that it would have impacted the outcome of the appeal. Accordingly, the court determined defendant failed to establish his ineffective assistance of appellate counsel claim.

Following the court's denial of his PCR application, defendant appealed and, as noted above, only raised the issue regarding the ineffective assistance of

appellate counsel in failing to appeal the mistrial issue. Specifically, defendant raises the following point for our consideration:

POINT I

APPELLATE COUNSEL'S INEFFECTIVENESS,
FOR NOT PURSUING THE DENIAL OF
DEFENDANT'S MISTRIAL MOTION, MANDATES
THAT DEFENDANT'S CONVICTIONS BE
REVERSED.

The State counters that defendant's appellate counsel was not constitutionally ineffective and appropriately raised defendant's best arguments on appeal. Moreover, the State contends defendant waived this issue by not preserving it in his conditional plea. The State further submits the trial court correctly denied the application for a mistrial because the circumstances did not warrant the extraordinary remedy given the judge's curative instruction coupled with the plethora of evidence admitted against defendant establishing his guilt.

II.

"Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." State v. Pierre, 223 N.J. 560, 576 (2015) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). PCR provides "a built-in 'safeguard that ensures that a defendant was not unjustly convicted.'" State v. Nash, 212 N.J. 518, 540 (2013) (quoting State v. McQuaid, 147 N.J. 464, 482 (1997)). A

petition for PCR is not a substitute for a direct appeal. State v. Mitchell, 126 N.J. 565, 583-84 (1992) (citing State v. Cerbo, 78 N.J. 595, 605 (1979), and State v. Cacamis, 230 N.J. Super. 1, 5 (App. Div. 1988)).

To establish a prima facie claim of ineffective assistance of counsel, a defendant must show: (1) counsel's performance was deficient; and (2) the deficiency prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 52 (1987) (adopting Strickland). Defendant is also entitled to the effective assistance of counsel on direct appeal. State v. O'Neil, 219 N.J. 598, 610 (2014).

Our review of a PCR claim after a court has held an evidentiary hearing "is necessarily deferential to [the] PCR court's factual findings based on its review of live witness testimony." Nash, 212 N.J. at 540. Where an evidentiary hearing has been held, we should not disturb "the PCR court's findings that are supported by sufficient credible evidence in the record." Pierre, 223 N.J. at 576 (quoting Nash, 212 N.J. at 540). We review any legal conclusions of the trial court de novo. Nash, 212 N.J. at 540-41; State v. Harris, 181 N.J. 391, 419 (2004). 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).

We are unpersuaded by defendant's argument that appellate counsel's performance was ineffective in this matter. Defendant simply argues appellate counsel was deficient by failing to pursue the mistrial issue on appeal. However, appellate counsel has no duty to raise every non-frivolous argument available to a defendant. State v. Gaither, 396 N.J. Super. 508, 515 (App. Div. 2007) (citing Jones v. Barnes, 463 U.S. 745, 753-54 (1983)). "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones, 463 U.S. at 751-52.⁵

⁵ The Court further noted:

One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. . . . The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.

Taylor testified his vast experience in representing hundreds of criminal defendants taught him to focus on the strongest issues, which maximizes the chances of success instead of bogging a brief down with lesser points. Based on his review of the record, Taylor believed the mistrial motion was weaker than the issues concerning the motions to suppress the physical evidence and statements defendant made to police. As noted by the PCR court, Taylor's decision to focus on the stronger issues optimized defendant's chances of success and was well within counsel's discretion as an experienced appellate practitioner. Taylor's belief the mistrial motion would weaken and distract from the stronger issues is supported by the PCR court's decision at the conclusion of the evidentiary hearing:

(1) [A.W.'s] challenged testimony was fleeting, (2) the [c]ourt's curative instruction regarding part of [A.W.'s] challenged testimony countered its prejudice to [p]etitioner, (3) the jury was already going to hear part of [A.W.'s] challenged testimony through a different witness, and crucially (4) [A.W.'s] challenged testimony was less prejudicial to [p]etitioner than the evidence Taylor did challenge on appeal.

Considering Taylor's experience and performance in raising the suppression issues on appeal, the trial court's evaluation of his decision to forego the mistrial

[Id. at 752 (second alteration in original)(citing Jackson, Advocacy Before the Supreme Court, 25 Temple L.Q. 115, 119 (1951)).]

motion was supported by sufficient credible evidence in the record. Accordingly, defendant failed to meet the first prong under the Strickland standard.

Defendant also fails to meet the second prong of the Strickland standard. To meet the second prong, defendant must show "counsel's errors were so serious as to deprive the defendant of a fair [hearing]." Strickland, 466 U.S. at 687. With regard to claims of ineffective assistance of appellate counsel, defendant must show that "there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Gaither, 396 N.J. Super. at 514. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Smith v. Robbins, 528 U.S. 259, 288 (2000) (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). As Taylor explained, the mistrial motion was the weakest of the three issues and would only have diluted the two stronger arguments regarding the motions to suppress. The PCR court noted that even if Taylor raised the mistrial issue on appeal, there is no reasonable probability the outcome would have been different. We agree for the reasons set forth in the trial court's comprehensive opinion.

In short, we find defendant's argument unavailing based on the findings made by the PCR court. After conducting an evidentiary hearing, the PCR court found appellate counsel to be credible, and his actions were not deficient with respect to failing to raise the mistrial issue on appeal. Moreover, defendant has not shown there is a reasonable probability the result of the direct appeal would have been different. We discern no error in the PCR court's determination that appellate counsel made an appropriate strategic decision to appeal the motion to suppress physical evidence and defendant's statements to police. Accordingly, we affirm for the reasons set forth by the PCR court.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION