SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0445-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DORRELL MERRETT,

Defendant-Appellant.

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Submitted March 9, 2022 – Decided June 13, 2022

Before Judges Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 06-04-0386.

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

William A. Daniel, Union County Prosecutor, attorney for respondent (Albert Cernadas, Jr., Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant appeals from the May 17, 2019 order denying his second petition for post-conviction relief (PCR) following an evidentiary hearing. After carefully reviewing the record in view of the governing principles of law, we affirm substantially for the reasons set forth in Judge Lara K. DiFabrizio's thorough and thoughtful written opinion.

In 2008, defendant was tried before a jury and convicted of murder, robbery, and related weapons offense. We reviewed at length the history of this case and the pertinent trial evidence in our opinion on defendant's direct appeal. State v. Merrett, No. A-5443-07 (App. Div. Feb. 10, 2011) (slip op. at 1), certif. denied, 207 N.J. 64 (2011). To briefly summarize, in 2005 defendant was convicted of acting as an accomplice to a local street gang leader in the homicide of Leon Wilks. Id. at 1–5. The State's evidence included defendant's videotaped confession and testimony from defendant's former girlfriend, to whom he made incriminating statements after the murder. Id. at 8–9. We reiterate the following from our opinion on direct appeal:

> The record overwhelmingly supports a finding of co-conspirator liability for murder. Defendant admitted to the police multiple times that he knew in advance that Brown and Wilkerson intended to kill Wilks. He knew that they were armed with guns. He knew Brown was a gang leader who did not change course once he had decided on a plan of action and who expected his associates to follow through on his plans. And he

> admitted playing his part in the murder, including luring Wilks to the basement and agreeing to kill the witness, Hammonds.
>
> [Id. at 19–20].

Defendant was sentenced to a thirty-year prison term without the possibility of parole. Id. at 2. In 2011, we affirmed his conviction on direct appeal. id. at 22.

Defendant's first PCR petition was denied on February 7, 2014. On March 23, 2016, we affirmed the denial of the first PCR petition. State v. Merrett, No. A-5571-13 (App. Div. Mar. 23, 2016) (slip op. at 13).

Defendant filed his second PCR petition—the matter now before us—on June 30, 2016, alleging ineffective assistance of appellate counsel and PCR counsel. Judge DiFabrizio convened a limited evidentiary hearing in January 2019. She rejected the State's contention that the second petition was untimely and ruled on the merits that defendant failed to establish the grounds for post-conviction relief. This appeal follows.

Defendant raises the following contentions for our consideration in his counselled brief:

POINT I

THE CLAIMS IN DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF WERE NOT PROCEDURALLY BARRED.

POINT II

IT WAS ERROR FOR THE COURT TO DENY DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF.

A. LEGAL PRINCIPLES.

B. FAILURE TO KEEP DEFENDANT FULLY INFORMED OF STATUS OF THE CASE.

C. FAILURE TO PROPERLY PREPARE FOR TRIAL.

D. FAILURE TO OBJECT TO THE EXPERT TESTIMONY OF JENNINGS REGARDING GANGS.

E. TRIAL COUNSEL'S INSISTENCE THAT DEFENDANT NOT TESTIFY ON HIS OWN.

Defendant raises the following additional contentions in a pro se brief:

POINT I

TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF.

A. LEGAL PRINCIPLES

B. FAILURE TO KEEP THE DEFENDANT FULLY INFORMED OF THE STATUS OF THE CASE.

Because we affirm for the reasons explained in Judge DiFabrizio's comprehensive twenty-four-page written opinion, we need not re-address defendant's arguments, but add the following comments.

Post-conviction relief serves the same function as a federal writ of habeas corpus. State v. Preciose, 129 N.J. 451, 459 (1992). When petitioning for PCR, a defendant must establish by a preponderance of the credible evidence that he or she is entitled to the requested relief. Ibid. The defendant must allege and articulate specific facts that "provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

Both the Sixth Amendment of the United States Constitution and Article 1, paragraph 10 of the State Constitution guarantee the right to effective assistance of counsel at all stages of criminal proceedings. Strickland v. Washington, 466 U.S. 668, 686 (1984) (citing McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)).

To demonstrate ineffectiveness of counsel, "[f]irst, the defendant must show that counsel's performance was deficient . . . . Second, the defendant must show that the deficient performance prejudiced the defense." Id. at 687. In State v. Fritz, our Supreme Court adopted the two-part test articulated in Strickland. 105 N.J. 42, 58 (1987). To meet the first prong of the Strickland test, a defendant

must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Strickland, 466 U.S. at 687. Reviewing courts indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. The fact that a trial strategy fails to obtain the optimal outcome for a defendant is insufficient to show that counsel was ineffective. State v. DiFrisco, 174 N.J. 195, 220 (2002) (citing State v. Bey, 161 N.J. 233, 251 (1999)).

The second prong of the Strickland test requires the defendant to show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. Put differently, counsel's errors must create a "reasonable probability" that the outcome of the proceedings would have been different if counsel had not made the errors. Id. at 694. The second Strickland prong is particularly demanding: "[t]he error committed must be so serious as to undermine the court's confidence in the jury's verdict or the result reached." State v. Allegro, 193 N.J. 352, 367 (2008) (alteration in original) (quoting State v. Castagna, 187 N.J. 293, 315 (2006)). "Prejudice is not to be presumed," but must be affirmatively proven by the defendant. State v. Gideon, 244 N.J. 538, 551 (2021) (citing Fritz, 105 N.J. at 52; and then citing Strickland, 466 U.S. at 693).

The Strickland/Fritz two-pronged standard also applies to claims of ineffective assistance of appellate counsel. See State v. Morrison, 215 N.J. Super. 540, 547 (App. Div. 1987). The hallmark of effective appellate advocacy is the ability to "winnow[] out weaker arguments on appeal and focus[] on one central issue if possible, or at most, on a few key issues." Jones v. Barnes, 463 U.S. 745, 751–52 (1983). Importantly for purposes of this appeal, it is well-settled that failure to pursue a meritless claim does not constitute ineffective assistance. See State v. Webster, 187 N.J. 254, 256 (2006). Appellate counsel does not have an obligation to raise spurious issues on appeal. Ibid.

Rule 3:22-6(d) prescribes the duties of PCR counsel, and provides in pertinent part:

> Counsel should advance all of the legitimate arguments requested by the defendant that the record will support. If defendant insists upon the assertion of any grounds for relief that counsel deems to be without merit, counsel shall list such claims in the petition or amended petition or incorporate them by reference.

Accordingly, "Rule 3:22-6(d) imposes an independent standard of professional conduct upon an attorney representing a defendant in a PCR proceeding." State v. Hicks, 411 N.J. Super. 370, 376 (App. Div. 2010). The remedy for counsel's failure to satisfy Rule 3:22-6(d) is a new PCR hearing. Ibid. However, "[t]his

relief is not predicated upon a finding of ineffective assistance of counsel under the relevant constitutional standard." Ibid.

Short of obtaining immediate relief, a defendant may prove that an evidentiary hearing is warranted to develop the factual record in connection with an ineffective assistance claim. Preciose, 129 N.J. at 462–63. A defendant is entitled to an evidentiary hearing only when (1) he or she is able to prove a prima facie case of ineffective assistance of counsel, (2) there are material issues of disputed fact that must be resolved with evidence outside of the record, and (3) the hearing is necessary to resolve the claims for relief. R. 3:22-10(b). A defendant must "do more than make bald assertions that he was denied the effective assistance of counsel" to establish a prima facie case entitling him to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999); see also State v. Porter, 216 N.J. 343, 355 (2013) (quoting State v. Marshall, 148 N.J. 89, 158 (1997)) ("[A] defendant is not entitled to an evidentiary hearing if the 'allegations are too vague, conclusory, or speculative to warrant an evidentiary hearing[.]'").

Importantly for purposes of this appeal, we review the denial of a PCR petition with "deference to the trial court's factual findings . . . 'when supported by adequate, substantial and credible evidence.'" State v. Harris, 181 N.J. 391,

415 (2004) (quoting Toll Bros., Inc. v. Twp. of W. Windsor, 173 N.J. 502, 549 (2002)).

Applying these legal principles, we agree with Judge DiFabrizio that defendant failed to meet the demands of the Strickland/Fritz test.

Defendant claims that his counsel was ineffective for failing to advise him that his co-defendant had pled guilty, information defendant now asserts would have impacted his decision to go to trial. Specifically, defendant asserts that he only rejected the State's plea offer because it contained a provision that would have required him to provide truthful testimony against his co-defendants who were gang members.

Judge DiFabrizio rejected that argument, as do we. At the PCR hearing, Judge DiFabrizio heard testimony from defendant and his prior trial counsel. The judge found that prior counsel was forthright and testified without evasion or embellishment. Conversely, Judge DiFabrizio found that defendant was not credible, noting that defendant contradicted himself and appeared evasive. Accordingly, she found that defendant's contention that he was not advised that Wilkerson had pled guilty, prior to his own trial, was not credible. We defer to that factual finding. Harris, 181 N.J. at 415.

We likewise reject defendant's contention that trial counsel failed to adequately cross-examine two witnesses, Nikita Davis and Markeyah Jennings. Defendant contends that counsel failed to cross-examine these witnesses about what defendant describes as their "prior inconsistent statements." Judge DiFabrizio carefully compared Davis's statement with her trial testimony and concluded that contrary to defendant's interpretation, her testimony was not inconsistent with her statement. Judge DiFabrizio likewise determined that Ms. Jennings testimony was not inconsistent with her prior statement. We defer to those findings. Ibid.

Judge DiFabrizio further determined that defense counsel effectively cross-examined both witnesses, thus refuting defendant's contention of ineffective assistance of counsel.

We also agree with Judge DiFabrizio that defendant failed to establish that his trial counsel rendered ineffective assistance by failing to object to testimony concerning the Bloods street gang, and specifically to testimony that explained to the jury the meaning of certain gang phrases and terminology. During her testimony, Ms. Jennings defined certain terms used by the defendants and others involved in the offense, such as "bum home" and "earn their stripes." She was

familiar with those terms based on her experience with the Bloods and also living with a member of that street gang.

Opinion testimony of lay witnesses concerning street slang is permissible. See State v. Johnson, 309 N.J. Super. 237, 263 (App. Div. 1998). Accordingly, we agree with Judge DiFabrizio that defendant suffered no unfair prejudice from Ms. Jennings's testimony regarding gang involvement.

Finally, we reject defendant's claim that his trial counsel coerced him not to testify at trial. That claim is refuted by the colloquy conducted by the trial court regarding defendant's decision not to testify. The trial court advised defendant that he had a right to testify on his own behalf and that, if he did, he would be subject to cross-examination. When asked whether he had reached a decision whether or not to testify, defendant replied, "[n]ot to testify." Importantly, defendant acknowledged that no one pressured or forced him into that decision. We add that defendant has also failed to establish that had he testified, the result of the trial would have been different.

To the extent we have not addressed them, any remaining arguments raised by defendant in his counselled or pro se brief 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