

**NOT FOR PUBLICATION WITHOUT THE
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-1629-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TIQUAN WHITEHURST,

Defendant-Appellant.

Submitted March 21, 2022 – Decided April 12, 2022

Before Judges Messano and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 07-06-1973.

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

Theodore N. Stephens II, Acting Essex County Prosecutor, attorney for respondent (Lucille M. Rosano, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Tiquan Whitehurst appeals from the July 9, 2020 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

This appeal is before us for a fourth time. In 2008, a jury convicted defendant of the first-degree murders of Joseph Cox and Charles Jackson, N.J.S.A. 2C:11-3(a)(1) and (2), and related weapons offenses. At sentencing, defendant received two consecutive life terms, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2. We affirmed defendant's convictions on direct appeal and remanded for re-sentencing on the State's cross-appeal. State v. Whitehurst, No. A-5035-08 (App. Div. Jan. 6, 2012) (Whitehurst I). The Supreme Court denied defendant's petition for certification. 210 N.J. 479 (2012).

Because we addressed the trial evidence at length in Whitehurst I, we only recount a summary of the incident leading to defendant's charges.

[F]irst responders to a motor vehicle accident found both victims in the front[]seat of a car with mortal gunshot wounds and defendant unconscious in the backseat with a gun, later identified as the murder weapon, either in his hand or nearby. In a dying declaration, one victim told an EMT the "guy in the back seat shot me." Expert forensic testimony opined both victims were shot from behind at close range, and defendant's cellphone records revealed a series of twenty-two calls that day to one of the victim's phones. Defendant did not testify or present any witnesses at trial.

[State v. Whitehurst, No. A-0511-15 (App. Div. Apr. 25, 2017) (slip op. at 1-2) (Whitehurst II) (internal citations omitted) (quoting Whitehurst I, slip op. at 4-5).]

In 2012, defendant filed a petition for post-conviction relief (PCR), alleging ineffective assistance of counsel (IAC). In 2015, the PCR judge, who was not the trial judge, denied the petition without an evidentiary hearing. Whitehurst II, slip op. at 3. On appeal, we rejected most of defendant's arguments and affirmed the denial of the petition. Id. at slip op. at 6-7, 9. However, we concluded a remand was necessary to resolve an IAC claim defendant presented for the first time on appeal in his pro se supplemental brief, stating:

[D]efendant argues PCR counsel was ineffective because he failed to bring to the PCR judge's attention the record of calls made to police on the evening of the murders. According to one entry in the "Event Chronology" [(EC)]¹ in the appendix to defendant's pro se brief, a caller claimed "suspects [were] on foot."² Defendant contends this record would have provided

¹ An Event Chronology is a computer printout generated by a police dispatcher memorializing information received from anonymous caller(s) reporting an incident.

² In a subsequent opinion, we referred to this call as "the 911 call," State v. Whitehurst, No. A-2566-17 (App. Div. Apr. 9, 2019) (slip op. at 3 n.1, 4) (Whitehurst III); we continue that practice for purposes of this opinion.

valuable support for the "third-party guilt" defense asserted at trial.

[Id. at slip op. at 3 (third alteration in original).]

Based on the limited record presented by defendant, we stated:

[W]e cannot conclude on the record before us that PCR counsel in this case failed to discharge his responsibilities under Rule 3:22-6(d). PCR counsel requested more time to prepare because trial counsel, who was under suspension, had failed to respond to repeated requests to turn over his file, but the judge earlier had denied the request. Apparently, shortly before the hearing, trial counsel did produce the file, which PCR counsel characterized as lacking everything but the State's motion for an extended term. PCR counsel relied, in large part, upon discovery provided by the prosecutor. At the hearing, PCR counsel supplied a certification . . . signed the same day as the hearing.

Under these circumstances, it is apparent that PCR counsel was unable to fully investigate and assess the [EC] and have a meaningful discussion with his client regarding the document. These limitations were not the result of PCR counsel's ineffective assistance.

[Id. at slip op. at 8.]

Thus, we remanded the matter "to permit defendant to supplement his petition and provide further briefing and oral argument regarding the [EC]." Ibid.

Unfortunately, the remand proceeding that followed our decision in Whitehurst II was inadequate; we noted as much in Whitehurst III, stating:

PCR counsel, who was not the original PCR counsel, supplied only an unverified amended petition and defendant's unsigned certification. Defendant said that he and original PCR counsel became "aware of the 911 call on[e] week . . . prior to the [first] PCR hearing" Defendant averred that the 911 call "proves that other individuals than myself were in the back seat of the automobile and fled upon the car crashing." Defendant claimed trial counsel and PCR counsel provided ineffective assistance by not "adequately investigat[ing] this issue."

At the remand hearing, PCR counsel simply asked the judge to consider the arguments made in his brief, as well as the issues "raised by the petitioner," and requested an evidentiary hearing. The prosecutor similarly relied on his papers.

[Id. at slip op. at 4-5 (alterations and omissions in original).]

The PCR judge presiding over defendant's remanded application found defendant failed to satisfy either prong of the Strickland/Fritz³ test for demonstrating IAC, and again denied defendant's petition.

Defendant appealed from this remand decision. In 2019, we reversed and remanded for another hearing, directing a third PCR attorney be appointed because second PCR "counsel's performance failed to meet the standards

³ Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 58 (1987).

imposed by Rule 3:22-6(d)." Id. at slip op. at 9 (quoting State v. Hicks, 411 N.J. Super. 370, 377 (App. Div. 2010)). We added:

We do not speculate as to the circumstances surrounding the [EC] and whether trial counsel, if he had the document, would have used it in some way, even if only to further his investigation. It suffices to say, however, that third-party guilt was the defense at trial. Trial counsel argued that all of the forensic evidence revealed nothing other than defendant's presence in the car. He noted that according to the State's ballistic expert, when found, the murder weapon evidenced a malfunction that prevented it from firing again unless someone manually ejected the bullet in the chamber. Defense counsel argued that defendant was an intended target of the unidentified shooter, spared only by this malfunction.

Defense counsel [also] explained that one of the two shell casings found at the scene was outside the car and a distance from where the crash occurred. He noted that police found a single sneaker on the street some distance from the car, and that defendant had both shoes on his feet.

[Id. at slip op. 10-11.]

In May 2020, Judge John I. Gizzo heard argument on the remand before reserving decision on the issues raised. On July 9, the judge issued an order, accompanied by an eighteen-page opinion, denying defendant's PCR petition. Preliminarily, the judge observed that defendant continued to argue: trial counsel was ineffective "for not introducing the [EC] at trial and failing to

investigate information contained in that document"; and PCR counsel was ineffective for failing to produce the EC to the judge previously assigned to defendant's PCR matters.

Rejecting these arguments, Judge Gizzo confirmed he reviewed the trial record and found "the trial transcripts reveal that the [EC] was actually in possession of . . . trial counsel, before the trial began." The judge continued, "[t]here is no doubt that trial counsel had possession of the [EC] at trial as evidenced by the prosecutor's reference to it as marked exhibit S-4 upon her direct examination of [an officer]." Judge Gizzo also concluded trial counsel argued "during opening arguments, that the physical evidence showed that some other person killed the two victims before emergency personnel arrived . . . and that the victim driver never specifically named or gestured to [defendant] when he told emergency responders that, [']the guy in the back seat shot us.[']"

Judge Gizzo further concluded

trial counsel extensively cross-examined all first responders present at the scene about the position of defendant's body and the handgun in the back seat of the car. . . . During summations, trial counsel argued that the totality of the evidence proved third-party guilt Upon further review of the record, the [defendant] indicated that he was satisfied with trial counsel, [counsel] answered all [his] questions, and [defendant] acknowledged that . . . trial counsel discussed all aspects of the case.

The judge further determined

trial counsel's initial strategy to use a third-party guilt defense as [he] did is sufficient and does not suggest incompetence or deficiency. . . . The record demonstrates that trial counsel went to great lengths to advance the defense's theory of the case that someone other than [defendant] shot Mr. Cox and Mr. Jackson Since the main argument now being made centers around the [EC] and since we now know that trial counsel had said document at trial, any further pursuit of this red herring would not yield a different outcome. [Defendant]'s arguments invite speculation, which this [c]ourt is not inclined to entertain.

Additionally, the judge concluded defendant's assertion that the outcome of the case would have been different if the EC was used was "speculative and conclusory at a minimum," given that the record was "replete with evidence, albeit mostly circumstantial, that [defendant] was the shooter in this case." The judge also determined, "[d]espite a vigorous defense and thorough cross examination of the numerous state witnesses, the jury rejected the defendant's theory of the case that an unknown fourth person was in the car and fired the fatal shots that claimed the lives of [the victims]." Accordingly, the judge found defendant failed to satisfy either prong of the Strickland/Fritz test and denied defendant's PCR petition.

On appeal, defendant raises a single contention for our consideration:

THIS MATTER MUST BE REMANDED FOR AN
EVIDENTIARY HEARING BECAUSE
DEFENDANT ESTABLISHED A PRIMA FACIE
CASE OF TRIAL COUNSEL'S INEFFECTIVENESS
FOR FAILING TO PURSUE THIRD-PARTY GUILT.

We conclude this argument lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We add the following brief remarks.

"[W]here the [PCR] court does not hold an evidentiary hearing, we may exercise de novo review over the factual inferences the trial court has drawn from the documentary record." State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014) (citation omitted). Additionally, we review a PCR court's legal conclusions de novo. State v. Harris, 181 N.J. 391, 415-16 (2004) (citing Toll Bros., Inc. v. Twp. of W. Windsor, 173 N.J. 502, 549 (2002)).

To succeed on a claim of ineffective assistance, defendant must establish, first, that "counsel's representation fell below an objective standard of reasonableness" and, second, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694; see also Fritz, 105 N.J. at 58 (adopting the Strickland two-part test in New Jersey). "[T]here is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional

assistance[,] [and t]o rebut that strong presumption, a defendant must establish that trial counsel's actions did not equate to 'sound trial strategy.'" State v. Castagna, 187 N.J. 293, 314 (2006) (quoting Strickland, 466 U.S. at 689). In that vein, we are cognizant that deciding which witnesses to call to the stand is "an art," and we must be "highly deferential" to such choices. State v. Arthur, 184 N.J. 307, 321 (2005) (quoting Strickland, 466 U.S. at 689, 693).

To establish a prima facie case of ineffective assistance of counsel, a defendant must present legally competent evidence rather than "bald assertions." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). The petitioner must allege specific facts sufficient to support a prima facie claim. Ibid. Such facts must be presented by the petitioner in the form of admissible evidence. In short, the relevant facts must be shown through "affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." Ibid.; see also R. 3:22-10(c). And even if there is a showing that counsel was deficient, a "defendant must demonstrate a reasonable likelihood that his or her claim will ultimately succeed on the merits." State v. Marshall, 148 N.J. 89, 158 (1997) (quoting State v. Preciose, 129 N.J. 451, 463 (1992)).


Simply raising a PCR claim does not entitle a defendant to an evidentiary hearing. Cummings, 321 N.J. Super. at 170 (citing Preciose, 129 N.J. at 462).

Instead, an evidentiary hearing is required only when: a defendant establishes a prima facie case in support of PCR; the court determines there are disputed issues of material fact that cannot be resolved by review of the existing record; and the court determines that an evidentiary hearing is required to resolve the claims asserted. State v. Porter, 216 N.J. 343, 354 (2013) (citing R. 3:22-10(b)). We review a judge's decision to deny a PCR petition without an evidentiary hearing for abuse of discretion. Preciose, 129 N.J. at 462.

Governed by these standards and mindful the record now shows trial counsel possessed the EC prior to trial but elected not to utilize it during the trial, instead using other tactics to press defendant's third-party guilt defense, we agree with Judge Gizzo's determination that defendant failed to satisfy either prong of the Strickland/Fritz test and was unable to demonstrate a reasonable likelihood his PCR claim would ultimately succeed on the merits. Accordingly, defendant was not entitled to an evidentiary hearing.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION