

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-2175-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

J.H.,

Defendant-Appellant.

Submitted April 25, 2022 – Decided May 2, 2022

Before Judges Fasciale and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Warren County, Indictment No. 15-07-0353.

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

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

PER CURIAM

Defendant J.H.¹ was convicted by a jury of third-degree endangering the welfare of a child through sexual conduct, N.J.S.A. 2C:24-4(a)(1). The court sentenced defendant to a five-year prison term, and we affirmed defendant's conviction on his direct appeal. State v. J.H., No. A-5275-16 (App. Div. July 15, 2019) (slip. op. at 14). Defendant appeals from a January 25, 2021 order denying his post-conviction relief (PCR) petition without an evidentiary hearing. We affirm.

I.

We summarized the trial record in our opinion affirming defendant's conviction on direct appeal. Id. at 3-6. We restate portions of that summary, and facts gleaned from the PCR record, to provide context for defendant's arguments on appeal.

M.F. testified at trial he was fourteen on February 26, 2015, when he observed "a naked man masturbating on the front porch of a house located across" an alleyway from M.F.'s home. Id. at 3. M.F. testified the man gestured for M.F. to come over to the man's porch, but M.F. went directly into his own

¹ We employ initials to identify defendant and the witnesses, including the juvenile victim, to protect the victim's privacy and because his identity is excluded from public access under Rule 1:38-3(c)(12).

home and reported what he had seen to his mother, stepfather, siblings and a family friend, J.P., who lived at M.F.'s home. Ibid.

About ten minutes after M.F. first saw the naked man on the porch, J.P. went outside and saw "a man's head kind of bob in and out of the [front] doorway" of the home with the front porch, and J.P. "occasionally heard, 'suck it.'" Ibid. (alteration in original). J.P. testified the man masturbated while standing in the doorframe of the home and retreated inside the home after stepping onto the porch to urinate by the door. Ibid. Neither J.P. nor M.F. identified defendant as the individual they observed masturbating. Ibid.

During their execution of a search warrant at defendant's home, officers confiscated a surveillance camera system that made recordings from within the home. Id. at 4. An examination of the system revealed a recording made at around the time of the incidents described by M.F. and J.P. Ibid. The recording was played for the jury and showed "a naked man viewed solely with his back to the camera without his face visible – due to the camera's positioning – crack[] open a door," and "several times" the man "lean[ed] down to look outside while standing in the doorway, apparently touch[ing] his genitals and then close[] the door." Id. at 5. The detective who confiscated the surveillance recording system

and recovered the recording testified defendant was the naked individual shown in the doorway. Ibid.

In a ruling we affirmed on defendant's direct appeal, the trial court denied defendant's motion for acquittal based on his claim there was insufficient evidence establishing his identity as the perpetrator of the charged offense because neither M.F. nor J.P. identified him as the man they saw masturbating. Ibid. The trial court found a jury could reasonably infer defendant was the individual seen by M.F. on the front porch based on the detective's identification of defendant in the recording, "which provided a 'temporal and physical connection to the time and place of the alleged [criminal] conduct" for which defendant was charged.² Id. at 5-6.

Defendant did not present any witnesses at trial. The jury convicted defendant of third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(1). The court imposed a five-year custodial sentence subject to the

² On defendant's direct appeal, we rejected his claim it was error to allow the detective to identify defendant as the individual depicted in the recording. Id. at 11-12. We also concluded "[t]he jury . . . was able to make its own independent assessment of the video and defendant's appearance in court to determine whether defendant was the man who endangered the welfare of M.F." Id. at 12.

requirements of Megan's Law, N.J.S.A. 2C:7-1 to -23, and directed defendant serve the special sentence of parole supervision for life, N.J.S.A. 2C:43-6.4.

Following our affirmance of his conviction and sentence on his direct appeal, defendant filed a pro se PCR petition. In a certification supporting his petition, defendant broadly asserted trial counsel was ineffective by failing to: file a motion for a speedy trial; pursue defenses to mitigate defendant's guilt and procure a "more" favorable plea offer; meet with defendant to discuss available defenses and gather information that would prove defendant's innocence or assist in obtaining a favorable plea offer; keep defendant informed about developments in the case; and attack the credibility of the State's witnesses and effectively cross-examine the witnesses. In the brief submitted on defendant's behalf after the assignment of counsel, defendant argued trial counsel was ineffective by failing to move for a speedy trial, communicate with defendant, and obtain discovery. The brief further asserted trial counsel's performance was deficient because he conceded in his opening statement defendant was depicted in the surveillance recording and counsel did not effectively cross-examine the State's witnesses. Defendant's PCR counsel argued defendant was entitled to an evidentiary hearing on his ineffective-assistance-of-counsel claims.

In an opinion from the bench following oral argument, the PCR court noted the difficulties the State's evidence presented for defendant's trial counsel. The court cited the testimony of M.F. and J.P. concerning their observations of a naked man masturbating at the front door of the house in which defendant resided. The court also observed trial counsel's task was "further complicate[d]" by the recording from inside defendant's home made on the afternoon M.F. testified he observed the naked man on the front porch. The court noted the recording depicted a naked man – who the detective identified as defendant – going in and out of the front door of defendant's home.

The court found defendant failed to demonstrate his counsel was ineffective by acknowledging during his opening statement that the jury would see a recording of defendant masturbating in his house. The court observed that trial counsel was not ineffective by attempting during his opening statement to provide an innocent context for the recording recovered from defendant's home showing him naked and masturbating in his home.

The judge also rejected plaintiff's claim his counsel was ineffective by failing to move for a speedy trial, adequately meet and confer with defendant, and obtain a favorable plea agreement from the State. The court therefore concluded defendant failed to sustain his burden of establishing a prima facie

ineffective-assistance-of-counsel claim and denied the petition without an evidentiary hearing.

The court entered an order denying the petition. This appeal followed.

Defendant presents the following arguments for our consideration:

POINT ONE

THE PCR COURT ERRED IN DENYING [DEFENDANT] AN EVIDENTIARY HEARING AS TESTIMONY IS NEEDED FROM PRIOR COUNSEL EXPLAINING WHY HE FAILED TO FILE A MOTION FOR A SPEEDY TRIAL.

POINT TWO

THE PCR COURT ERRED IN DENYING [DEFENDANT] AN EVIDENTIARY HEARING AS TESTIMONY IS NEEDED FROM PRIOR COUNSEL EXPLAINING WHY HE ADMITTED TO THE JURY DURING OPENING STATEMENTS THAT HIS CLIENT WAS MASTURBATING.

POINT THREE

THIS MATTER SHOULD BE REMANDED TO THE PCR COURT FOR FURTHER CONSIDERATION AND DETERMINATION OF ALL THE ISSUES RAISED IN THE PCR PETITION[.]

II.

We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004). The de novo standard of review also applies to mixed

questions of fact and law. Id. at 420. Where an evidentiary hearing has not been held, it is within our authority "to conduct a de novo review of both the factual findings and legal conclusions of the PCR court." Id. at 421. We apply these standards here.

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee that a defendant in a criminal proceeding has the right to the assistance of counsel in his or her defense. The right to counsel includes "the right to the effective assistance of counsel." State v. Nash, 212 N.J. 518, 541 (2013) (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)).

In Strickland, the Court established a two-part test, later adopted by our Supreme Court in State v. Fritz, as the standard under our state constitution, to determine whether a defendant has been deprived of the effective assistance of counsel. Strickland, 466 U.S. at 687; Fritz, 105 N.J. 42, 58 (1987). Under the first prong of the Strickland standard, a petitioner must show that counsel's performance was deficient. It must be demonstrated that counsel's handling of the matter "fell below an objective standard of reasonableness" and that "counsel made errors so serious that counsel was not functioning as the 'counsel'

guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687-88.

Under the second prong of the Strickland standard, a defendant "must show that the deficient performance prejudiced the defense." Id. at 687. There must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A petitioner must demonstrate that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. "The error committed must be so serious as to undermine the court's confidence in the jury's verdict or result reached." State v. Chew, 179 N.J. 186, 204 (2004) (citing Strickland, 466 U.S. at 694).

"With respect to both prongs of the Strickland test, a defendant asserting ineffective assistance of counsel on PCR bears the burden of proving his or her right to relief by a preponderance of the evidence." State v. Gaitan, 209 N.J. 339, 350 (2012) (citing State v. Echols, 199 N.J. 344, 357 (2009); State v. Goodwin, 173 N.J. 583, 593 (2002)). A failure to satisfy either prong of the Strickland standard requires the denial of a petition for PCR. Strickland, 466 U.S. at 700; Nash, 212 N.J. at 542; Fritz, 105 N.J. at 52.

A.

Defendant first argues the PCR court erred by rejecting the claim his trial counsel was ineffective by failing to move for dismissal based on a violation of his right to a speedy trial. Defendant asserts he was arrested on February 26, 2015, he thereafter made repeated requests of counsel to "obtain a speedy resolution" of his case, and his trial did not begin until two years later on February 27, 2017. Defendant contends the two-year period following his arrest and prior to his trial constituted "a substantial delay considering the facts of the case and limited witnesses[,]" and the lack of any complex issues or scientific evidence.

Defendant further notes that in Barker v. Wingo the Supreme Court established the following four criteria that must be weighed in deciding a motion to dismiss on speedy trial grounds: the length of delay in bringing the matter to trial; the reason for delay; the defendant's assertion of his right to a speedy trial, and the prejudice to the defendant. 407 U.S. 514, 519 (1972); see also State v. Szima, 70 N.J. 196, 200-01 (1976) (adopting the Barker factors as the standard for determining a speedy trial claim under Article I, paragraph 10 of the New Jersey Constitution). After generally describing the factors, defendant argues

only that his trial counsel should have filed a speedy trial motion because two years elapsed between the date of his arrest and the commencement of his trial.

"The Sixth Amendment protects a defendant's right to a speedy trial after arrest or indictment." State v. May, 362 N.J. Super. 572, 595 (App. Div. 2003) (quoting State v. Long, 119 N.J. 439, 469 (1990)). The Barker four-part standard must be applied to determine when a violation of a defendant's right to a speedy trial contravenes due process. A court applying the Barker standard must consider and balance the four factors, State v. Tsetsekas, 411 N.J. 1, 8 (App. Div. 2009), based on a "case-by-case analysis" because the "facts of an individual case are the best indicators of whether a right to a speedy trial has been violated," State v. Cahill, 213 N.J. 253, 270-71 (2013). "But the question of how long" a delay of a trial is "too long 'cannot be answered by sole reference to the lapse of a specified period of time.'" State v. Detrick, 192 N.J. Super. 424, 426 (App. Div. 1983) (quoting State v. Smith, 131 N.J. Super. 354, 360 (App. Div. 1974)).

Under the Strickland standard applicable to his PCR claim, defendant bore the burden of presenting competent evidence establishing counsel's performance was deficient and there is a reasonable probability that but for counsel's alleged errors, the result of the proceeding would have been different. Gaitan, 209 N.J.

at 350. Where a defendant claims counsel was ineffective by failing to file a motion, it must also be shown the motion would have been meritorious. See State v. O'Neal, 190 N.J. 601, 619 (2007) (holding "[i]t is not ineffective assistance of counsel for defense counsel not to file a meritless motion"); see also State v. Worlock, 117 N.J. 596, 625 (1990) (finding "[t]he failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel").

As our Supreme Court has explained, "[a]lthough a demonstration of prejudice constitutes the second part of the Strickland analysis, courts are permitted leeway to choose to examine first whether a defendant has been prejudiced, and if not, to dismiss the claim without determining whether counsel's performance was constitutionally deficient." Gaitan, 209 N.J. at 350 (citation omitted). We choose to consider first the prejudice prong of the Strickland standard here.

Defendant's claim his counsel's performance was deficient by failing to file a speedy trial motion is untethered to any evidence, argument, or showing there is a reasonable probability a motion to dismiss on speedy trial grounds would have been meritorious had it been made by counsel. Other than arguing in conclusory fashion the two-year period between his arrest and his trial was

"substantial" and warranted the filing of a speedy trial motion, defendant failed to present competent evidence addressing any of the Barker factors or demonstrating a reasonable probability a dismissal motion would have been meritorious or would have changed the outcome of the proceeding.

Defendant did not present any evidence concerning the reasons for the delay in bringing his matter to trial, and he made no showing, and did not argue, he suffered prejudice because of the delay. See, e.g., Doggett v. United States, 505 U.S. 647, 656 (1992) (explaining legitimate delays, "however great," will not violate a defendant's speedy trial right if it does not specifically prejudice defendant's defense). In contrast, the State presented un rebutted evidence demonstrating a substantial portion of the two-year period between defendant's arrest and trial were the product of delays caused by, and requested by, defendant. See Long, 119 N.J. at 470 (holding "[a]ny delay that defendant caused or requested would not weigh in favor of finding a speedy trial violation" (quoting State v. Gallegan, 117 N.J. 345, 355 (1989))).

Because the length of the delay upon which defendant exclusively relies does not alone establish a violation of his speedy trial rights, see Detrick, 192 N.J. Super. at 426; see also State v. Fulford, 349 N.J. Super. 183, 195 (App. Div. 2002) (explaining "[e]xcept in the most egregious cases, the length of the delay

and absence of any explanation for the delay cannot alone justify a" dismissal on speedy trial grounds), and because defendant failed to present any evidence or argument demonstrating a reasonable probability a speedy trial motion would have been meritorious, defendant failed to sustain his burden of demonstrating prejudice under the second prong of the Strickland standard. See Strickland, 466 U.S. at 687, 694. Further, defendant's conclusory assertions about his counsel's failure to file a motion to dismiss on speedy trial grounds are insufficient to sustain his burden of establishing a prima facie ineffective assistance of counsel claim. See State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

Defendant's failure to sustain his burden of establishing prejudice alone requires rejection of his PCR claim that his counsel was ineffective by failing to move for dismissal on speedy trial grounds. Strickland, 466 U.S. at 700; Nash, 212 N.J. at 542. However, because defendant failed to demonstrate a dismissal motion would have been meritorious, he also did not sustain his burden of establishing his counsel's performance was deficient under the first prong of the Strickland standard. O'Neal, 190 N.J. at 619; Worlock, 117 N.J. at 625. The court therefore correctly determined defendant failed to present a prima facie claim of ineffective assistance of counsel under the Strickland standard on the

claim his counsel was ineffective by failing to move for dismissal on speedy trial grounds.

B.

Defendant further claims his counsel was ineffective by making an opening statement in which he conceded defendant was "in his home naked and masturbating." Defendant claims he was prejudiced by the concession because the issue of whether he was "in fact masturbating" was for the jury to decide based on the M.F.'s and J.P.'s testimony and by viewing the surveillance system recording. Defendant argues his counsel helped the State prove its case by admitting he masturbated in his home, "which corroborated [M.F.'s] testimony." Defendant claims he is entitled to an evidentiary hearing at which trial counsel should explain why the concession was made to the jury in the opening statement.

We consider defendant's argument under the Strickland standard, which requires "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. "To 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 our assessment of defendant's

ineffective-assistance-of-counsel claim, we "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. "The quality of counsel's performance cannot be fairly assessed by focusing on a handful of issues while ignoring the totality of counsel's performance in the context of the State's evidence of defendant's guilt." Castagna, 187 N.J. at 314.

As the PCR court correctly recognized, defendant's claim counsel's performance was deficient by acknowledging defendant was depicted in the recording ignores the admissibility of the recording, and the State's intention to rely on it during trial. The recording constituted evidence that could not be avoided, and which trial counsel opted to address in his opening statement following the State's reference to the recording in its opening statement. As part of a strategy evident from a complete review of the trial record, counsel sought in his opening statement to diffuse the import of the recording by pointing out that although it disturbingly depicted defendant masturbating, it showed only that defendant masturbated inside his home.

During trial, counsel further developed evidence that the time stamps on the recording demonstrated defendant was actually inside the doorway of his home at the precise time M.F. testified defendant was on the porch masturbating.

Thus, counsel attempted to utilize the time stamps on the recording, and evidence establishing the time of a call M.F.'s mother made to 9-1-1, to undermine M.F.'s testimony defendant was on the porch and did what M.F. reported. In summation, counsel affirmatively relied on the recording, arguing M.F.'s version of the events was not credible because, based on the time stamps on the recording and the time of M.F.'s call to 9-1-1, the recording established defendant was actually inside the doorway of his home and not on the porch masturbating as M.F. said.

Defendant argues counsel's opening statement conceded defendant's identity as the naked individual in the house at the time of the alleged incident. The concession was of no moment, however, because the evidence was otherwise overwhelming defendant was the individual depicted. The recording was obtained from a video surveillance system inside defendant's home and, as we noted in our decision on defendant's direct appeal, there was no evidence anyone else resided in the home with him. Confronted with those facts, counsel's acknowledgement defendant was depicted in the recording constituted no more than a recognition of a fact unworthy of any dispute in favor of a more credible argument M.F.'s version of the events was belied by a recording showing defendant masturbating inside his home.

Defendant makes no showing his counsel's strategy "fell 'outside the range of professionally competent assistance' considered in light of all the circumstances of the case," Castagna, 187 N.J. at 314 (quoting Strickland, 466 U.S. at 690), or that it "did not equate to 'sound trial strategy,'" ibid. (quoting Strickland, 466 U.S. at 689). Defendant's dissatisfaction with his "counsel's exercise of judgment during the trial" does not satisfy his burden of establishing his counsel's performance was deficient under the first prong of the Strickland standard. Ibid. Moreover, even if counsel's concession during his opening statement constituted a "strategic miscalculation or trial mistake," id. at 315, defendant makes no showing it was "of such magnitude as to thwart the fundamental guarantee of [a] fair trial," ibid. (alternation in original) (quoting State v. Buonadonna, 122 N.J. 22, 42 (1991)). Defendant therefore failed to satisfy his burden under Strickland's first prong on his claim his counsel was ineffective during his opening statement.

Defendant also failed to satisfy his burden under Strickland's second prong. He does not point to any evidence establishing that but for counsel's purported error, there is a reasonable probability the result of his trial would have been different. Strickland, 466 U.S. at 694. And we discern no such

reasonable probability existed based on our review of the trial record. The PCR court therefore correctly rejected the claim.

C.

Defendant also argues the PCR court erred by failing to address his claims counsel was ineffective by failing to: effectively cross-examine M.F. and J.P. "regarding their credibility and expose to the jury that they were fabricating their testimony about [defendant] masturbating on his front porch[;]" and by failing to communicate with him. To be sure, the PCR court should have made findings of fact and conclusions of law supporting its rejection of those claims, see R. 1:7-4(a), but based on our de novo review of the record, see Harris, 181 N.J. at 419-20, we discern no purpose in remanding for the court to do so.

The claims are supported solely by conclusory assertions trial counsel should have done more and should have done things differently. Defendant does not make any showing, or present any evidence, demonstrating counsel's cross examination of the witnesses or his communication with defendant "fell below an objective standard of reasonableness" or constituted "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687-88. The record is bereft of any showing, or any attempt to show, that but for the purported errors, there is

reasonable probability the result of defendant's trial would have been different. Id. at 694. Thus, had the PCR court expressly addressed the claims, it would have been compelled to conclude, as we do based on our review of the record, that defendant failed to establish a prima facie case of ineffective assistance of counsel.

D.

Defendant also asserts the PCR court erred by denying his petition without an evidentiary hearing. An evidentiary hearing on a PCR claim is required only where a defendant establishes a "prima facie case in support of post-conviction relief," a court determines "there are material issues of disputed fact that cannot be resolved by reference to the existing record, and . . . an evidentiary hearing is necessary to resolve the claims for relief." R. 3:22-10(b). To establish a prima facie PCR claim, a "defendant must demonstrate a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits." Ibid.; see also State v. Preciose, 129 N.J. 451, 462-63 (1992).

As we have explained, defendant failed to present evidence establishing a prima facie claim of ineffective assistance of counsel on his claims that trial counsel was ineffective by acknowledging in his opening statement defendant

would be seen on a recording masturbating in his home, and by not moving for a speedy trial. The court therefore correctly denied his request for an evidentiary hearing. Ibid.

To the extent we have not expressly addressed any of defendant's remaining arguments, we find they are without sufficient merit to warrant discussion in a written opinion. 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.



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