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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3278-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAQUAN KEATON,

Defendant-Appellant.

Argued March 3, 2021 – Decided April 12, 2022

Before Judges Accurso and Enright.

On appeal from the Superior Court of New Jersey,
Law Division, Hudson County, Indictment No. 14-
10-1567.

David A. Gies argued the cause for appellant.

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

The opinion of the court was delivered by

ACCURSO, J.A.D.

Defendant Daquan Keaton was convicted by a jury of the murder of Lamar Glover, on an accomplice theory, and the shooting of Raymond Kozar. We affirmed his conviction on direct appeal, State v. Keaton, No. A-2649-15 (App. Div. Aug. 16, 2018) (slip op. at 3), and the Supreme Court denied his petition for certification, 237 N.J. 172 (2019). Defendant appeals the denial of his petition for post-conviction relief (PCR) without an evidentiary hearing, raising the following issues:

POINT ONE

DEFENSE COUNSEL'S FAILURE TO ADEQUATELY INVESTIGATE THE STATE'S KEY WITNESS BEFORE THE TRIAL STARTED PREJUDICED DEFENDANT'S RIGHT TO A FAIR TRIAL WHEN, AFTER THE TRIAL BEGAN, SHE LEARNED THAT THE WITNESS HAD RECANTED HER PRETRIAL IDENTIFICATION, REQUIRING THE ATTORNEY TO EFFECTUATE A NEW TRIAL STRATEGY DURING THE TRIAL.

POINT TWO

APPELLATE COUNSEL'S FAILURE TO RAISE ON DIRECT APPEAL AN ISSUE PRESERVED BELOW REGARDING THE NONDISCLOSURE OF EVIDENCE RELEVANT TO THE CREDIBILITY OF THE STATE'S KEY WITNESS WAS CONSTITUTIONALLY DEFICIENT WHERE THE ISSUE INVOLVED A CONSTITUTIONAL VIOLATION AND WAS NOT WITHOUT MERIT.

POINT THREE

THE ASSISTANT PROSECUTOR'S NON-DISCLOSURE OF EVIDENCE PERTAINING TO A MATERIAL WITNESS'S CREDIBILITY AMOUNTS TO PROSECUTORIAL MISCONDUCT AND REQUIRES DISMISSAL WITH PREJUDICE.

POINT FOUR

AN EVIDENTIARY HEARING SHOULD BE CONDUCTED TO DEVELOP THE FACTS INVOLVED IN THE STRATEGIC DECISIONS CONCEIVED BY DEFENDANT'S TRIAL ATTORNEY AND APPELLATE COUNSEL WHERE DEFENDANT DEMONSTRATED A PRIMA FACIE CASE.

Finding no merit in defendant's arguments, we affirm.

We detailed the evidence the jury heard in our prior opinion, Keaton, A-2649-15 (slip op. at 3-5) and have no need to repeat it here. Suffice it to say the State believed defendant and his accomplice, Sirheen Walker, shot into a group of men lounging in front of a bodega in Jersey City, killing Glover and wounding Kozar. Id. at 3-4. The State contended Walker fired the shots that killed Glover and defendant shot Kozar. Id. at 4. A surveillance camera on a nearby business captured only one of the shooters, a black man with "dreads" holding a gun. Id. at 3. Only one witness identified defendant as that man: Shanifah Scott, defendant's cousin. Id. at 4.

Scott gave police two recorded statements identifying defendant as the man in the video. Id. at 3-4. Although she told police she was "a hundred percent" certain it was defendant, she refused to sign photographs identifying him, claiming she did not "want to be in the middle of this" and had "a child to live for." Id. at 4. Two years later, shortly before defendant's trial, an assistant prosecutor and a detective visited Scott, the detective writing in his notes that she confirmed "her original statements . . . were in fact all true." The notes were turned over to defense counsel in pre-trial discovery.

After Scott recanted those statements at trial, and defendant learned for the first time that Scott — before her pre-trial meeting with the assistant prosecutor and his detective — had informed the assistant prosecutor during a telephone conversation that her statements were "all lies," defense counsel moved to dismiss the charges based on the failure to advise him of Scott's prior recantation.¹ The trial judge denied the motion, finding no Brady² violation because the detective was not aware of Scott's prior statement to the assistant prosecutor. Appellate counsel did not challenge that ruling on appeal, instead

¹ Scott's statements were admitted following a hearing pursuant to State v. Gross, 121 N.J. 1 (1990).

² Brady v. Maryland, 373 U.S. 83 (1963).

arguing the prosecutor's insinuation in summation that Scott recanted her statements because she feared defendant constituted prosecutorial misconduct denying him a fair trial — a claim we rejected.

In this PCR proceeding, defendant argued he was entitled to an evidentiary hearing on his counsel's failure to adequately investigate his claims resulting in her not learning until trial of Scott's recantation, as well as on appellate counsel's failure to appeal the denial of the Brady motion. The judge denied his petition.

In a cogent opinion from the bench, Judge Nelson found defendant could not establish a prima facie case of ineffective assistance of counsel under the Strickland³ standard on either claim. As to trial counsel's ineffectiveness, the judge found it undisputed that defendant's trial counsel did not interview Scott before trial, and thus only learned of her recantation when she took the stand mid-trial. Accepting defense counsel's investigation was inadequate, at least for purposes of argument, the judge found defendant could not establish the delay prejudiced him.

Specifically, the judge found defense counsel's theory of the case was misidentification. She opened by telling the jury that black men with dreads

³ Strickland v. Washington, 466 U.S. 668, 693-94 (1984).

were a common sight in Jersey City, and that the State would not be able to prove the black man with dreads in the video was defendant. After Scott recanted, defense counsel's theory of the case obviously did not change. She argued in summation the only reason defendant was ever arrested in connection with this case was Scott's statement in which she admittedly lied to the police. Defense counsel argued no other witness put defendant at the scene, and Kozar, the shooting victim, testified the man who shot him was 5'10 or 5'11, stocky, well-built like he goes to the gym regularly, with very dark, oily skin. Defense counsel underscored defendant is 5'6, and the State conceded he looks nothing like Kozar's description of the man who shot him.

Reviewing the trial transcripts, Judge Nelson found nothing to convince him the late disclosure adversely affected defense counsel's well-considered trial strategy. Thus, he concluded that assuming defendant established his "counsel's representation fell below an objective standard of reasonableness" he could not prove "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 688, 694.

Similarly, the judge found appellate counsel's failure to appeal the trial court's denial of defendant's Brady motion would not have resulted in a

reversal of his conviction because he could not establish any prejudice from the State's failure to have disclosed Scott's telephone conversation with the assistant prosecutor recanting her allegations before reaffirming them shortly before trial. See State v. Guzman, 313 N.J. Super. 363, 374 (App. Div. 1998) (holding the two-prong Strickland standard applies "to claims of ineffective assistance at both the trial level and on appeal").

Although the judge found it clear defendant established the prosecutor failed to disclose the evidence, and that the evidence was favorable to defendant, Judge Nelson found defendant could not establish the evidence was material, in the sense intended in Brady, that is that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." State v. Parsons, 341 N.J. Super. 448, 455 (App. Div. 2001) (quoting United States v. Bagley, 473 U.S. 667, 682 (1984)).

The judge likewise found defendant could not establish prosecutorial misconduct by the non-disclosure for the same reason the evidence would not have changed the result of the trial. See United States v. Higgs, 713 F.2d 39, 43-44 (3d Cir. 1983) (recognizing that "[n]o denial of due process occurs" so long as such "material is disclosed . . . in time for its effective use at trial");

State v. Feaster, 156 N.J. 1, 59 (1998) (noting "prosecutorial misconduct will not serve as the basis for reversal unless it was so egregious as to work a deprivation of a defendant's right to a fair trial"). Because the facts on the petition were not in dispute and defendant could not establish a prima facie case of ineffective assistance, Judge Nelson deemed an evidentiary hearing unnecessary. See State v. Preciose, 129 N.J. 451, 462 (1992).

Our review of the record convinces us Judge Nelson carefully considered each of defendant's claims. We agree defendant failed to demonstrate the performance of his trial or appellate counsel was substandard or that, but for any of their alleged errors, the result would have been different as required by Strickland. Accordingly, we affirm substantially for the reasons expressed by Judge Nelson in his opinion from the bench on March 12, 2020.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION