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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3431-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

STEVEN J. BRIZAK,

Defendant-Appellant.

Argued December 5, 2022 — Decided December 16, 2022

Before Judges Whipple, Mawla, and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 11-04-0338.

Jay V. Surgent argued the cause for appellant (Weiner Law Group, LLP, attorneys; Jay V. Surgent, on the brief).

Andre R. Araujo argued the cause for respondent (Jennifer Webb-McRae, Cumberland County Prosecutor, attorney; Andre R. Araujo, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Steven J. Brizak appeals from a June 16, 2021 order, entered following an evidentiary hearing denying his petition for post-conviction relief (PCR). We affirm.

We discussed the underlying facts of this case when we affirmed defendant's convictions and remanded his sentence for reconsideration. State v. Brizak, No. A-3461-12 (App. Div. Sept. 11, 2015) (slip op. at 4-8) (Brizak I). To summarize, on Christmas Day, 2010 at 4:48 p.m., defendant robbed a CVS of painkiller medication. The pharmacist was familiar with defendant and identified him to police. When the State presented its case to a grand jury, a detective testified the robber left boot prints at the scene of the crime similar to the boots defendant was wearing when he was arrested.

Pre-trial, defendant moved for a Wade¹ hearing, challenging the identification procedure police used with the eyewitness. The trial court denied defendant's motion, finding the photo array shown to the eyewitness was confirmatory rather than for identification purposes and the show up was not suggestive. We affirmed the ruling. Brizak I, slip op. at 17.

At trial, the State presented evidence showing police recovered a starter pistol near the scene, which did not yield fingerprints. The eyewitness and an

¹ United States v. Wade, 388 U.S. 218 (1967).

officer testified about the identification process. Defendant called his brother, who testified he and defendant only left the house the day of the robbery to go to Wawa at 7:00 p.m. Defendant's wife testified defendant only left the house in the evening to get ice cream. The jury convicted defendant of first-degree robbery, N.J.S.A. 2C:15-1(a)(2); second-degree robbery, N.J.S.A. 2C:15-1; third-degree theft of a controlled dangerous substance (CDS), N.J.S.A. 2C:20-3(a); and fourth-degree possession of an imitation firearm for an unlawful purpose, N.J.S.A. 2C:39-4(e).

At sentencing, defendant argued he should be sentenced one degree lower on the first-degree robbery because of the character of the offense and mitigating circumstances. Namely, defendant claims by "showing a fake weapon, getting something and immediately leaving," he did not cause or threatened to cause serious harm. The judge rejected the argument reasoning N.J.S.A. 2C:44-1(f)(2) was inapplicable, and found aggravating factor nine, N.J.S.A. 2C:44-1(a)(9), and mitigating factors seven and nine, N.J.S.A. 2C:44-1(b)(7) and (9). The judge sentenced defendant to concurrent terms as follows: Ten years for the first-degree robbery subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2; three years for third-degree theft of CDS; and eighteen months for the fourth-degree possession of an imitation firearm for unlawful purposes.

We concluded the judge's finding regarding N.J.S.A. 2C:44-1(f)(2) "was an incorrect statement of the applicable law." Brizak I, slip op. at 16. We remanded for resentencing because we were "unable to discern the impact the judge's statement had on his ultimate decision to deny defendant's request to be sentenced to a term appropriate for a second-degree offense as permitted by N.J.S.A. 2C:44-1[(f)](2)." Ibid.

At resentencing, the judge found aggravating factors three, N.J.S.A. 2C:44-1(a)(3), and nine, N.J.S.A. 2C:44-1(a)(9); and mitigating factors seven, N.J.S.A. 2C:44-1(b)(7), eight, N.J.S.A. 2C:44-1(b)(8), nine, N.J.S.A. 2C:44-1(b)(9), and ten, N.J.S.A. 2C:44-1(b)(10). Applying N.J.S.A. 2C:44-1(f)(2), the judge declined to downgrade the sentence on the first-degree robbery conviction because the mitigating factors did not substantially outweigh the aggravating factors, and sentenced defendant identically as the original sentence.

Defendant filed a PCR petition, alleging ineffective assistance of trial counsel for: Failing to present alibi and character witnesses at trial; failing to present experts regarding the boot print left at the scene and a partial print discovered on the starter pistol; misapplication of the Henderson² standard, failing to obtain a Wade hearing, and not retaining an identification expert and

² State v. Henderson, 208 N.J. 208 (2011).

an expert to testify to the photo enhancement of defendant's picture; failing to properly cross-examine the State's witnesses; not requesting a transcript of the grand jury proceedings, thereby denying defendant the ability to file a motion to dismiss the indictment; and not moving for bail pending appeal. The court denied defendant's petition without an evidentiary hearing, reasoning he had not made a prima facie case of ineffective assistance of counsel.

We reversed, noting defendant had presented a certification from an expert showing the boot print and fingerprint did not belong to defendant. State v. Brizak, No. A-5728-17 (App. Div. Oct. 1, 2019) (slip op. at 10-11) (Brizak II). We noted "the State introduced evidence that this forensic evidence was inconclusive, not exculpatory." Id. at 10. Further, "[d]efendant also presented affidavits from character witnesses. The State presented a certification from . . . [trial] counsel mistakenly stating that character evidence could not have been introduced because defendant did not testify." Ibid. "Additionally, defendant presented certifications from several witnesses who spoke to or saw defendant at about the same time . . . the robbery occurred. In his certification, trial counsel alleged it was trial strategy not to present these witnesses, who defendant categorizes as 'alibi' witnesses." Id. at 10-11.

We concluded as follows:

An evidentiary hearing was necessary to assess credibility and further develop the facts underlying the actions and strategies of defendant's trial attorney in connection with defendant's claims of ineffective assistance and his allegations that an expert forensic witness, character witnesses, and witnesses who had contact with defendant should have been called to testify in his defense. Trial counsel's certification, with a mistaken legal interpretation,^[3] was insufficient to rebut the conflicting certifications presented by potential defense witnesses. See R. 3:22-10(b). Given the State's burden of proof, the PCR court misapplied its discretion in reasoning that the strength of the witness's identification overwhelmed the benefit of these witnesses to defendant.

[Id. at 10.]

The PCR judge heard testimony from trial counsel, an expert regarding the gun and boot evidence, defendant's wife, two brothers,⁴ a co-worker, a family friend, and the assistant prosecutor who tried the matter. Trial counsel testified he met with defendant and his family prior to trial, filed a motion seeking a Wade hearing, and appealed from the trial court's ruling on the motion. He

³ Trial counsel certified he did not call character witnesses because their testimony would not be "relevant or even allowed under the New Jersey Rules of Evidence."

⁴ The judge reviewed a sworn statement from one of defendant's brothers, who died following the trial.

explained defendant had a prescription for painkillers, so his trial strategy was to avoid the jury learning about this fact by calling character witnesses who could be cross-examined on the issue, thereby prejudicing the defense by corroborating the State's evidence. The PCR judge credited this testimony and concluded counsel "made the decision to try the case conservatively, . . . [and] not open the door to cross-examination that was unnecessary"

Trial counsel testified neither defendant nor his family advised him there were alibi witnesses. Indeed, at trial, witnesses testified they were with defendant on the day of the incident, but as the PCR judge explained, there was no "actual alibi witness, . . . someone who had eyes on [defendant at] . . . 4:48 p.m. on Christmas Day, the time of the robbery. There were phone calls made before [and] . . . after, all from a cellphone, not from a home phone." Furthermore, "the testimony . . . was that he was on and off the phone all day, and he would take those phone calls in another room."

Counsel explained he did not retain an expert to evaluate the boot and fingerprint evidence because the State's evidence in this regard did not implicate defendant. The PCR judge recounted "the expert who testified at the evidentiary hearing indicated . . . the fingerprint[] found on the starter pistol, . . . was . . . under the grip. The grip had to come off . . . to see that fingerprint. There was

no print on the outside of the pistol that could be connected to [defendant]." Although the judge found the expert credible, the testimony would have bolstered the State's case at trial because he testified "the left boot could have been a match for the boot that was seized [from defendant]. The right boot was not. The evidence presented at trial from the [S]tate's boot expert was that they were inconclusive."

The judge found trial counsel exercised sound trial strategy by not calling character witnesses, because the State's evidence contained no motive for defendant to commit the robbery. Therefore, "if . . . evidence were somehow brought out that [defendant] had prescriptions for these painkillers, . . . that he was filling it in various pharmacies, that motive exists." The judge concluded trial counsel testified credibly, had good trial strategies, and had not "laid up . . . on this trial in any manner."

Although the judge found defendant's wife credible, he noted she testified with the benefit of "almost ten years of hindsight, with ten years of pondering this case." Her testimony confirmed she was not with defendant at the time of the robbery, and if trial counsel had asked "[m]ore specific questions [at trial, it] would have opened up to more cross-examination." Likewise, the judge found the co-worker's testimony that he was on the phone with defendant at

various times the day of crime, though "very credibl[e,]" would not have helped because he was not on the phone with defendant when he committed the crime. He reached the same conclusion regarding the deceased brother's affidavit and noted the brother who testified he was with defendant at 5:00 p.m. was not with him "exactly at the time of the offense." Also, a family friend testified regarding defendant's good character, but also "knew he used prescription painkillers."

The PCR judge found the assistant prosecutor testified "very credibly." The prosecutor explained although he thought the court would admit the evidence of defendant's prescription painkillers under N.J.R.E. 404(a), "[h]e also tried the case . . . conservatively[, and d]id not attempt to introduce . . . [the] character evidence" The judge found this bolstered the conclusion trial counsel's approach to the case "was a good strategy."

The judge rejected defendant's argument trial counsel was ineffective at sentencing. He noted defendant received the minimum sentence for his offense, "[s]o whatever factors mitigated toward . . . defendant were clearly granted."

The PCR judge concluded defendant did not meet the first Strickland⁵ prong because trial counsel "was able to explain precisely the reason for not calling [the alibi, character, and expert] witnesses" Further, the judge noted

⁵ Strickland v. Washington, 466 N.J. 668 (1984).

the Wade hearing was not a basis to grant PCR because we ruled the identification evidence was properly admitted when we affirmed defendant's convictions. Trial counsel was not ineffective for failing to move to dismiss the indictment because the State's evidence regarding the boot was inconclusive, and "the forensic expert presented at the evidentiary hearing corroborated" the testimony presented to the grand jury. The judge concluded "even if the first [Strickland] prong was met, the second prong cannot be overcome because the eyewitness testimony in this case was so strong against . . . defendant that it would not have made a difference in the ultimate outcome of the trial."

Defendant raises the following points on appeal:

POINT I

THE COURT BELOW ERRED IN DENYING THE [PCR] AS DEFENDANT WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO EFFECTIVE TRIAL COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND BY ARTICLE I, PARAGRAPH 10 OF THE NEW JERSEY CONSTITUTION AND DENIED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS DUE TO: A) TRIAL COUNSEL'S FAILURE TO PROPERLY INVESTIGATE AND PRESENT ALIBI WITNESSES AT TRIAL; B) TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT CHARACTER WITNESSES AT TRIAL; C) TRIAL COUNSEL'S FAILURE TO HIRE AN EXPERT AS TO THE BOOT PRINT LEFT AT THE SCENE; D) TRIAL

COUNSEL'S FAILURE TO HIRE AN EXPERT AS TO THE PARTIAL PRINT ON THE STARTER PISTOL; E) TRIAL COUNSEL'S FAILURE TO PRESENT AN IDENTIFICATION EXPERT IN THIS IDENTIFICATION CASE; F) TRIAL COUNSEL'S FAILURE IN NOT MOVING TO DISMISS THE INDICTMENT DUE TO A FALSITY AS TO THE BOOT PRINT MATCHING DEFENDANT'S BOOT; AND G) TRIAL COUNSEL'S INEFFECTIVENESS AT SENTENCING AS DEFENDANT SHOULD HAVE BEEN SENTENCED ONE DEGREE LOWER AS A SECOND[-]DEGREE OFFENDER.

I. THE LAW REGARDING INEFFECTIVE COUNSEL.

SUBPOINT A. TRIAL COUNSEL'S FAILURE TO PROPERLY INVESTIGATE AND PRESENT ALIBI WITNESSES AT TRIAL.

1. THE LAW ON ALIBI WITNESSES.

2. THE PCR JUDGE'S DECISION AS TO ALIBI WITNESS [DEFENDANT'S WIFE].

3. THE PCR JUDGE'S DECISION AS TO DEFENSE WITNESSES [TWO OF DEFENDANT'S CO-WORKERS⁶].

4. THE DEFENSE WITNESS [DEFENDANT'S BROTHER].

⁶ Only one co-worker testified at the evidentiary hearing.

SUBPOINT B. THE COURT BELOW ERRED IN DENYING PCR . . . AS DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT AND BY ARTICLE I, PARAGRAPH 10 OF THE NEW JERSEY CONSTITUTION AND DENIED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS DUE TO TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT CHARACTER WITNESSES AT TRIAL.

1. THE PCR COURT'S DECISION AS TO THE CHARACTER WITNESSES.

SUBPOINT C. THE COURT BELOW ERRED IN DENYING PCR . . . AS DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT AND BY ARTICLE I, PARAGRAPH 10 OF THE NEW JERSEY CONSTITUTION AND DENIED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS DUE TO TRIAL COUNSEL'S FAILURE TO HIRE AN EXPERT AS TO THE BOOT PRINT LEFT AT THE CRIME SCENE.

1. THE PCR COURT'S DECISION ON THE BOOT PRINT EVIDENCE.

SUBPOINT D. TRIAL COUNSEL'S FAILURE TO HIRE AN EXPERT AS TO THE PARTIAL PRINT ON THE STARTER PISTOL.

1. THE PCR COURT'S DECISION ON THE FINGERPRINT EVIDENCE.

SUBPOINT E. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO PRESENT AN IDENTIFICATION EXPERT IN THIS IDENTIFICATION CASE.

1. THE PCR COURT'S DECISION AS TO AN IDENTIFICATION EXPERT.

SUBPOINT F. TRIAL COUNSEL WAS INEFFECTIVE IN NOT MOVING TO DISMISS THE INDICTMENT DUE TO A FALSITY IN THE GRAND JURY PRESENTATION AS TO THE BOOT PRINT MATCHING DEFENDANT'S BOOT.

1. THE PCR COURT'S DECISION AS TO THE FAILURE TO MOVE TO DISMISS THE INDICTMENT.

SUBPOINT G. TRIAL COUNSEL WAS INEFFECTIVE AT SENTENCING AS DEFENDANT SHOULD HAVE BEEN SENTENCED ONE DEGREE LOWER AS A SECOND[-]DEGREE OFFENDER.

1. THE PCR COURT'S
DECISION ON THE
INEFFECTIVENESS AT
SENTENCING.

I.

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." State v. Nash, 212 N.J. 518, 540 (2013). 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." State v. Pierre, 223 N.J. 560, 576 (2015) (citations omitted). 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).

To establish a prima facie claim of ineffective assistance of counsel, the defendant is obliged to show not only the particular manner in which counsel's performance was deficient, but also that the deficiency prejudiced his right to a fair trial. Strickland, 466 U.S. at 687; State v. Fritz, 105 N.J. 42, 58 (1987). "[C]omplaints 'merely of matters of trial strategy' will not serve to ground a constitutional claim of inadequacy" Fritz, 105 N.J. at 54 (quoting State v. Williams, 39 N.J. 471, 489 (1963)). Prejudice is not presumed, id. at 52, and a

defendant must demonstrate "how specific errors of counsel undermined the reliability" of the proceeding. United States v. Cronic, 466 U.S. 648, 659 n.26 (1984).

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. "[A] defense attorney's decision concerning which witnesses to call to the stand is 'an art[]' and a court's review of such a decision should be 'highly deferential.'" State v. Arthur, 184 N.J. 307, 321 (2005) (internal citation omitted) (quoting Strickland, 466 U.S. at 689, 693). The decision whether to call a witness is generally informed by the testimony expected to be elicited and the possibility of impeachment. Ibid.

Pursuant to these principles and our thorough review of the record, we affirm substantially for the reasons expressed in the PCR judge's oral opinion. We add the following comments.

The record supports the conclusion the alibi and character witness issues were squarely a matter of trial strategy and, as the PCR judge found, the absence of this testimony does not convince us it deprived defendant of a fair trial. We are persuaded the alibi and character testimony would have prejudiced defendant, who was on trial for robbery of painkillers, by having the jury learn

about his prescription for the same substances. The risk of prejudice was even greater when we consider the proposed expert testimony, which would have corroborated the State's case. Clearly, trial counsel was not ineffective for having prevented prejudicial and corroborative evidence from coming to light.

Defendant's arguments related to counsel's alleged failure to dismiss the indictment and the sentence were not the reasons why we remanded for an evidentiary hearing. Indeed, we found merit only in defendant's arguments relating to trial counsel's decisions regarding the witnesses called to testify. Brizak II, slip op. at 12. Regardless, the PCR judge reached these claims, and we discern neither an abuse of discretion, nor a mistake of law, requiring our further comment or intervention.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION