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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3843-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSE FELICIANO,

Defendant-Appellant.

Submitted November 17, 2021 – Decided April 27, 2022

Before Judges Gilson and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Indictment No. 10-09-0985.

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

Robert J. Carroll, Morris County Prosecutor, attorney for respondent (John McNamara, Jr., Chief Assistant Prosecutor, on the brief).

PER CURIAM

Defendant appeals from the March 13, 2020 Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm substantially for the reasons stated in Judge Stephen J. Taylor's comprehensive opinion.

Following a 2011 trial, a jury convicted defendant of the 2009 murder of Father Edward Hinds, who was a priest at St. Patrick's Roman Catholic Church in Chatham Borough where defendant worked as a custodian. The autopsy revealed that Hinds had forty-four stab wounds all over his body. At trial, the State presented, among other evidence, cell-site location information (CSLI) obtained without a warrant from Hinds's cellphone, which defendant had stolen and disposed of after the murder. The CSLI led law enforcement officers to a baseball field and wooded area near defendant's home where officers recovered incriminating evidence, including a bag containing blood-stained rags, a small knife, and pieces of Hinds's cell phone.

Defendant was sentenced to life imprisonment without parole for the murder.¹ Defendant appealed his convictions and sentence without challenging

¹ In addition to the murder charged in count one of a seven-count indictment, defendant was convicted of the related offenses, namely, first-degree felony murder, N.J.S.A. 2C:11-3(a)(3) (count two); first-degree armed robbery, N.J.S.A. 2C:15-1(a)(1) (counts three and four); third-degree possession of a

the admission of the CSLI, and we affirmed both in an unpublished opinion, State v. Feliciano, No. A-0221-12 (App. Div. May 12, 2016) (slip op. at 2). The Supreme Court later denied defendant's petition for certification. State v. Feliciano, 227 N.J. 383 (2016).

In our unpublished opinion, we detailed the substantial evidence underlying defendant's convictions and need not repeat them here at length. See Feliciano, slip op. at 3-16. Suffice it to say that the State produced outgoing and incoming 9-1-1 calls from Hinds's cellphone made during the violent encounter that resulted in Hinds's death, and witnesses identified Hinds's and defendant's voices on the calls. Id. at 5-6. Additionally, after law enforcement obtained the incriminating phone records, in a recorded statement, defendant confessed to stabbing Hinds but claimed the stabbing occurred when he tried to end a four-year sexual relationship with Hinds, and Hinds threatened to fire him in retaliation. Id. at 8. The State repudiated defendant's claim with evidence that a recent criminal background investigation of defendant conducted at Hinds's

weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count five); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (count six); and third-degree hindering one's own apprehension, N.J.S.A. 2C:29-3(b)(1) (count seven). Following applicable mergers, on count three, defendant was sentenced to a twenty-year term of imprisonment, with an eighty-five percent period of parole ineligibility, to run concurrent with count one, and, on count seven, a five-year prison term, to run consecutive to count one.

behest uncovered prior unresolved charges involving a minor that should have resulted in defendant being fired. Id. at 9-13.

On February 5, 2018, defendant filed a pro se PCR petition, and appointed counsel subsequently filed a supporting brief. Defendant asserted several grounds for relief, including that his appellate counsel was ineffective for not appealing the admission of the CSLI and any evidence derived therefrom. Following oral argument, Judge Taylor issued an order on March 13, 2020, denying the petition. In an accompanying opinion, the judge explained that many of defendant's claims were procedurally barred because they could have been raised on direct appeal. See R. 3:22-4.²

Addressing the merits, the judge held that defendant failed to establish a prima facie claim of ineffective assistance of counsel (IAC) under the two-prong standard announced in Strickland v. Washington, 466 U.S. 668, 687-88 (1984) and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987),

² In his petition, defendant argued the grand jury proceedings were defective, the prosecutor committed misconduct during summations, the trial court erred by failing to sua sponte issue a curative instruction to address the impropriety in the prosecutor's summation, and the trial court erred by denying his motion for a new trial based on juror misconduct during voir dire. Additionally, defendant asserted his trial counsel was ineffective by failing to object to the prosecutor's summation, request a curative instruction, and submit a certification from defendant to support his new trial motion. Defendant also contended he was entitled to PCR based on cumulative error.

declaring a "defendant must show that counsel's representation fell below an objective standard of reasonableness" and that the deficient performance prejudiced the defense. Furthermore, because defendant did not make out a prima facie claim and there were no "disputes over material facts," the judge denied defendant an evidentiary hearing. See R. 3:22-10(b).

In discussing defendant's IAC claim, Judge Taylor reasoned that appellate counsel's decision not to appeal the admission of the CSLI was a reasonable exercise of professional judgment. Judge Taylor recounted that at defendant's 2011 pretrial suppression hearing, the State argued defendant did not have a reasonable expectation of privacy in the CSLI collected from Hinds's cellphone, but the motion judge disagreed and held the State needed a warrant supported by probable cause to obtain the CSLI.³

³ Parenthetically, Judge Taylor found "considerable merit" in the State's argument that defendant "lacked a reasonable expectation of privacy in the CSLI because the cellphone was stolen by [defendant]." We agree. See Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978) ("A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate.'").

However, according to Judge Taylor, the motion judge also concluded that "both probable cause and exigent circumstances" justified the State's warrantless acquisition of the data. In that regard, the motion judge explained:

Law enforcement was faced with what appeared to be an armed violent assault by an individual or individuals whose whereabouts were unknown. They had a piece of evidence that was available to them that might lead to the location of the individual who possessed the phone Certainly[,] there was a potential for that evidence, that information to be lost or destroyed. In point of fact, when the phone was actually located, it had been damaged. . . . Minutes might have made a difference in this investigation. Certainly[,] hours might have as well.

Judge Taylor described the motion judge's ruling as "prescient[]" because two years after the suppression hearing, the New Jersey Supreme Court ruled, for the first time, that law enforcement was required to obtain a warrant based on a showing of probable cause or qualify for an exception to the warrant requirement before accessing CSLI. See State v. Earls, 214 N.J. 564, 589-91 (2013) (holding the new warrant requirement will only apply "to defendant Earls and future cases"). Judge Taylor also noted that it was not until 2018 that the United States Supreme Court declared police needed a warrant or a case-specific exception to the warrant requirement to access CSLI. See Carpenter v. United States, 585 U.S. ___, 138 S. Ct. 2206, 2222-23 (2018) ("[E]ven though the

Government will generally need a warrant to access CSLI, case-specific exceptions may support a warrantless search of an individual's cell-site records under certain circumstances," including "the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence.").

Because the motion judge admitted the CSLI after applying a more stringent constitutional standard than was required at the time, and the finding of exigent circumstances "was sound and unassailable," Judge Taylor concluded it was not unreasonable for appellate counsel to forego meritless arguments regarding the CSLI's admission. See State v. Elders, 192 N.J. 224, 243 (2007) ("[A]n appellate court reviewing a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are 'supported by sufficient credible evidence in the record.'" (quoting State v. Elders, 386 N.J. Super. 208, 228 (App. Div. 2006), rev'd in part, 192 N.J. 224 (2007))).

Furthermore, Judge Taylor observed that "appellate counsel raised numerous points of claimed error on direct appeal, many of which contained sub-categories of alleged error." The judge found it noteworthy that appellate counsel's brief prompted a "seventy-one-page opinion" from this court to

address all the issues raised. Judge Taylor noted that appellate counsel is not obligated to "raise every non-frivolous claim" but should select arguments that "maximize the chances of success," as occurred here. In the absence of a "showing that the omitted arguments were clearly stronger than those presented," the judge concluded that appellate counsel "clearly exercised reasonable professional judgment" in deciding which issues to raise, and defendant failed to demonstrate appellate counsel's performance was deficient or that defendant was prejudiced by appellate counsel's omission.

On appeal, defendant raises the following single point for our consideration:

THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE THE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF APPELLATE COUNSEL'S INEFFECTIVENESS FOR FAILING TO PURSUE THE DENIAL OF HIS MOTION TO SUPPRESS THE EVIDENCE.

"We review the legal conclusions of a PCR judge de novo," State v. Reevey, 417 N.J. Super. 134, 146 (App. Div. 2010), but "we review under the abuse of discretion standard the PCR court's determination to proceed without an evidentiary hearing." State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013). Rule 3:22-10(b) provides that a defendant is entitled to an evidentiary

hearing only if: (1) the defendant establishes a prima facie PCR claim; (2) "there are material issues of disputed fact that cannot be resolved by reference to the existing record"; and (3) "an evidentiary hearing is necessary to resolve the claims for relief." Indeed, "[i]f the court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to post-conviction relief, . . . then an evidentiary hearing need not be granted." Brewster, 429 N.J. Super. at 401 (second alteration in original) (quoting State v. Marshall, 148 N.J. 89, 158 (1997)).

"To establish a prima facie case, 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." R. 3:22-10(b). Moreover, a defendant must make this showing "by a preponderance of the credible evidence." State v. Goodwin, 173 N.J. 583, 593 (2002). Furthermore, to establish a prima facie IAC claim, a defendant must demonstrate that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. Strickland, 466 U.S. at 700; Fritz, 105 N.J. at 58. This standard applies to both trial and appellate counsel. State v. Gaither, 396 N.J. Super. 508, 513 (App. Div. 2007).

When reviewing IAC claims, "[j]udicial scrutiny of counsel's performance must be highly deferential," and courts "must indulge a strong presumption" that counsel's performance was reasonable. Strickland, 466 U.S. at 689. This presumption is especially difficult to overcome when a defendant asserts appellate counsel was ineffective for not raising a particular issue because "appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." Smith v. Robbins, 528 U.S. 259, 288 (2000). And "[g]enerally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Ibid. (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

Here, we are satisfied from our review of the record and governing legal principles that Judge Taylor properly determined defendant failed to establish a prima facie IAC claim to warrant PCR or an evidentiary hearing. The record clearly shows there were no material issues of fact in dispute. See R. 3:22-10(b). Instead, the central issue in defendant's IAC claim was a question of law regarding the objective reasonableness of the decision not to appeal the CSLI's admission to establish a constitutionally significant level of deficiency and resulting prejudice. Cf. State v. O'Neal, 190 N.J. 601, 619 (2007) ("It is not

ineffective assistance of counsel for defense counsel not to file a meritless motion").

In that regard, based on our de novo review, we agree with the judge's substantive legal conclusion that defendant failed to satisfy the Strickland/Fritz two-pronged standard to warrant relief. See State v. Worlock, 117 N.J. 596, 625 (1990) ("The failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel."); see also State v. Fisher, 156 N.J. 494, 501 (1998) ("In analyzing trial counsel's performance, we are required to examine the law as it stood at the time of counsel's actions, not as it subsequently developed.").

Affirmed.

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


CLERK OF THE APPELLATE DIVISION