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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0078-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANTWINE RIVERA, a/k/a  
ANTWINE JABAR,

Defendant-Appellant.

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Submitted March 15, 2023 – Decided June 8, 2023

Before Judges Mayer and Bishop-Thompson.

On appeal from the Superior Court of New Jersey,  
Law Division, Cumberland County, Indictment No.  
13-01-0049.

Kelly Anderson Smith, attorney for appellant.

Jennifer Webb-McRae, Cumberland County  
Prosecutor, attorney for respondent (Stephen C. Sayer,  
Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from a July 29, 2021 Law Division order entered following an evidentiary hearing denying his petition for post-conviction relief (PCR). Having reviewed the record and applicable legal principles, we affirm.

I.

On January 16, 2013, a grand jury indicted defendant on the following offenses: first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2) (count one); second-degree possession of a weapon for unlawful purpose, N.J.S.A. 2C:39-4(a) (count two); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b) (count three); and second-degree possession of a weapon by a convicted person, N.J.S.A. 2C:39-7(b)(1) (count four).

In 2014, defendant was convicted by a jury on all counts. Defendant moved for a new trial, which the trial judge denied. At sentencing, the judge imposed an aggregate term of sixty-years, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, and subject to the Graves Act, N.J.S.A. 2C:43-6, on count one with a five-year period of parole ineligibility. On counts three and four, defendant was sentenced to a ten-year prison term on each charge also subject to the Graves Act and a period of parole ineligibility of five years to run concurrent to the sentence on count one.

We affirmed defendant's conviction and sentence on direct appeal, State v. Rivera, No. A-3854-13 (App. Div. Apr. 13, 2016) (slip op. at 1-5), and the Supreme Court denied defendant's petition for certification, State v. Rivera, 227 N.J. 128 (2016).

On direct appeal, defendant asserted he was entitled to a new trial based on newly discovered evidence regarding the credibility and licensure of the medical examiner and lead trial counsel's conflict of interest.

We concluded the trial court did not abuse its discretion in denying defendant's motion for a new trial. Rivera, No. A-3854-13, slip op at 24. We determined information forwarded to defense counsel by the State concerning the medical examiner's misrepresentations and nondisclosures on his employment application, the surrender of his medical license in New Mexico and Michigan in March 2011, and subsequent resignation from the Southern Regional Medical Examiner for the State's Department of Criminal Justice (DCJ) on February 18, 2014 was material for potential impeachment purposes. However, if defense counsel used that material, it might have harmed the defense strategy by discrediting the medical examiner. Id. at 9. We explained:

At trial, defendant relied on the medical examiner's testimony. The defense did not object to the medical examiner's qualifications or his testimony. Defense counsel's cross-examination primarily had the medical

examiner repeat his conclusion that [the victim] was shot in his chest, not in his back, as A.B. claimed. In summation, defense counsel repeatedly relied on the medical examiner's conclusion to show A.B. was not credible.

[Id. at 10.]

We further noted that, in his motion for a new trial, defendant continued to rely on the medical examiner's testimony as "'[c]entral to [his] argument' about the weight of the evidence." Therefore, we found "defendant [had] not shown a reasonable probability the result would have been different had he possessed the information to impeach the medical examiner." Id. at 11.

Defendant also asserted his lead defense counsel had a conflict of interest because he represented another defendant, Leroy H. Ford, Jr., who was arrested twenty-one hours after the shooting involving defendant. In defendant's motion for a new trial, defense counsel attached an unsworn and uncertified affidavit by defendant that he asked lead trial counsel to call Ford as a witness. The judge was willing to hold a N.J.R.E. 104 hearing regarding the relevance of Ford's testimony, but lead defense counsel withdrew the request, explaining to defendant that he currently represented Ford and "it would be a conflict of interest" to call him.

At trial, lead defense counsel attempted to call Officer Daniel Ayars as a witness, although he had not been identified on the defense witness list. Prior to the court conducting a Rule 104 hearing, defense counsel declined to call Ayars to testify.

On direct appeal, we agreed with the trial court that the issue of the conflict of interest was not ripe because "neither this court nor the trial court could properly consider defendant's unsworn statement." Id. at 16. Additionally, we noted "setting aside defendant's unsworn statement, the record did not show a conflict of interest." Id. at 17. Defendant had not shown that lead defense counsel still represented Ford at the time of defendant's trial in January 2014. Accordingly, we were satisfied the trial court properly rejected defendant's claim that lead defense counsel had a conflict of interest. Id. at 18.

In February 2017, defendant timely filed his PCR petition and restated his arguments presented on direct appeal challenging defense counsel's conflict of interest and the medical examiner's testimony as supporting his ineffective assistance of counsel (IAC) claim. Defendant further asserted defense counsel's conduct during the trial amounted to IAC because he failed to: review the "strengths and weaknesses" of defendant's case prior to defendant's

rejection of the plea offer which resulted in a more severe prison term; properly investigate his case and call witnesses who could have aided in his defense; exclude or challenge the medical examiner's testimony; challenge the "biased and hearsay" testimony of Det. Bruce Cornish; and challenge the "untruthful, conflicting and unreliable" testimony of two of the State's witnesses. Defendant argued almost two years after sentencing, Cornish was the subject of an administrative disciplinary proceedings because "a good faith basis existed to believe that [he] exhibited a lack of candor in the preparation of official police reports." Lastly, defendant asserted he was entitled to an evidentiary hearing based on newly discovered evidence related to police misconduct allegations against Cornish.

Following oral argument, on December 17, 2018, the PCR court rejected defendant's claim regarding defense counsel's conflict of interest and the medical examiner's licensure and credibility, concluding the issues were decided on direct appeal and therefore barred. In an oral opinion, the court found defendant's contention regarding IAC based conflict of interest argument were addressed by this court on direct appeal "in spite of" defendant's unsigned certification.

The court determined an evidentiary hearing was warranted to address defendant's claims regarding the plea offers, the extent of trial preparation and discovery reviewed by counsel with defendant, and the reason for not calling alibi witnesses at trial.

During two days of testimony, the court heard from several witnesses. The court found the assistant prosecutor credible because of his "clear" memory of the plea offers made by the State. The court noted the assistant prosecutor's "official offer" was a twelve-years subject to NERA, however the offer could have been reduced to a ten-years subject to NERA offer with the prosecutor's permission. However, the assistant prosecutor confirmed defense counsel never made a counteroffer after the twelve-year NERA was offered.

As to defendant's alibi witnesses, the assistant prosecutor testified he was never advised by lead defense counsel or co-counsel of any alibi witnesses.

The court also considered the testimony of defendant's lead defense counsel. The court found counsel credible based upon his candor in responding to questions about defendant's case. Counsel testified defendant stated he was unwilling to plead to a "flat sentence" because he had pleaded to a "four flat" in another case. According to lead counsel, defendant instructed

him not to make a counteroffer to the State's plea offer of twelve years subject to NERA.

Defense counsel also testified he did not contact, investigate, or obtain statements from Sharrod Jones, Joseph Jones,<sup>1</sup> or Joshua Hannah as alibi witnesses at the time of trial. Nor did he recall discussing Joseph or Hannah with defendant.

According to counsel, "the State was fully aware of [defendant's] weak case." They "ha[d] wonderful testimony from [Sharrod] Jones or other people [which was] not going to sway the State in any sort of way." Defense counsel was aware Sharrod had a criminal record and was not inclined to have him testify despite defendant's desire to the contrary. Additionally, defense counsel testified that Sharrod's sworn statement in support of defendant's PCR petition indicated that he was not present at the time of the shooting and did not see the shooter which would have factored in counsel's decision in determining Sharrod's usefulness as a witness. Defense counsel stated, based on his experience, "alibis and witness statements tend to muddy the water" and

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<sup>1</sup> Sharrod and Joseph are brothers. We refer to the witnesses by their first names to avoid any confusion caused by their common last name. No disrespect is intended.



it was sometimes better not to do investigations of alibi witnesses. He therefore made the decision not to use them.

Sharrod, defendant's cousin, was in prison at the time of trial on possession of weapon and shooting charges. He testified he was never contacted by trial counsel or an investigator. During the PCR hearing, he testified he did not see the shooting, and did not know who was present, including defendant at the time of the shooting.

Hannah, defendant's brother, also testified that he was not contacted by trial counsel or an investigator. He stated that at the time of the incident, he and defendant were at their mother's home. At the hearing, when confronted with a witness's trial testimony he was at the shooting, he responded the witness either "lied" or was "incorrect."

Lastly, the court considered defendant's testimony noting it was elicited in a "narrative" and "elaborate" format. Defendant testified that he told his initial trial counsel that he would take the plea offer of a "twelve to eighty-five." Defendant also stated defense counsel did not review discovery or discuss trial strategy with him.

Thereafter, on July 29, 2021, the court denied defendant's PCR petition. In a cogent oral opinion, the court discredited defendant's testimony that he

told trial counsel he "would take a plea offer of "twelve [to] eighty-five." The judge stated:

Again, the defense in this case was that [defense counsel] did [not] make any effort to defend [defendant]. Presented with a client that wants to take a plea, that would have happened. The plea would have occurred. I do find credible that [defendant] told [trial counsel] he was [not] taking a plea. That is consistent with what occurred.

The court also noted the "better offer" would be a "ten [t]o eighty-five, a ten NERA sentence." The court credited defense counsel's testimony that defendant was not willing to take any plea offer which gave "credence to the reason [trial counsel] did not present defendant with any counter offers." The PCR court found defense counsel's actions reasonable as they related to trial counsel's relay of the State's plea offers.

The PCR court further determined defendant had not demonstrated IAC related to trial strategy and the review of discovery. The court explained:

[Defendant] argue[d] that trial counsel never reviewed discovery or trial strategy with [him]. Again, this [c]ourt does not find that to be the case. There were several factors to go into that finding. First is that the defendant's testimony was that he pressed [trial counsel] several times to call witnesses. [Trial counsel] determined that . . . was not . . . appropriate for various strategic reasons. The proffer made to him by the defendant was not something that he felt was appropriate or their testimony would help. Second, . .

. his prior experience with alibi witnesses was that it would muddy the waters and cause more problems.

As to the alibi witnesses, the court determined that even if defense counsel had called these witnesses or investigated their alibi testimony, the witnesses would not have aided defendant's case. The court found that two witnesses were related to defendant and concluded neither testimony would have "swayed" the jury to render a not guilty verdict.

Consequently, the judge found defendant had not satisfied the two-part test outlined in Strickland v. Washington, 466 U.S. 668, 687 (1984) and State v. Fritz, 105 N.J. 42, 52 (1987). This appeal followed.

## II.

On appeal, defendant presents the following points for our consideration:

### POINT I

THE PCR COURT IMPROPERLY ASSESSED AND DISMISSED THE TESTIMONIES OF DEFENDANT'S ALIBI WITNESSES AS WELL AS IMPROPERLY DENIED DEFENDANT'S PCR MOTION.

### POINT II

THE TRIAL COURT DENIED DEFENDANT DUE PROCESS BY FAILING TO PROPERLY CONDUCT AN EVIDENTIARY HEARING AS TO ALL OF DEFENDANT'S ISSUES RAISED IN HIS PCR PETITION AND BRIEF.

### POINT III

THE TRIAL COURT ERRED IN FAILING TO GRANT AN EVIDENTIARY HEARING AS TO THE ISSUE OF A CONFLICT OF INTEREST AS AN INEFFECTIVE ASSISTANCE OF COUNSEL ISSUE.

### POINT IV

THE CUMULATIVE ERRORS COMMITTED BY TRIAL COUNSEL AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL AND THE DENIAL OF A FAIR TRIAL THAT RESULTED IN A MANIFEST INJUSTICE.

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). 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). However, we defer to the PCR court's evaluation of the demeanor of the witnesses and other factors affecting credibility. Harris, 181 N.J. at 420-21.

To establish a prima facie claim of ineffective assistance of counsel, a defendant must show: (1) counsel's performance was deficient; and (2) the

deficiency prejudiced the defense. Strickland, 466 U.S. at 687; Fritz, 105 N.J. at 52.

When petitioning for PCR, a defendant must establish by a preponderance of the credible evidence that he or she is entitled to the requested relief. State v. Preciose, 129 N.J. 451, 459 (1992) (citation omitted). The defendant must allege and articulate specific facts that "provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

To meet the first prong of the Strickland/Fritz test, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed defendant by the Sixth Amendment." 466 U.S. at 687. A defendant, in other words, "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689. (citation omitted).

Furthermore, in determining whether defense counsel's representation was deficient, "[j]udicial scrutiny . . . must be highly deferential,' and must avoid viewing the performance under the 'distorting effects of hindsight.'" State v. Norman, 151 N.J. 5, 37 (1997) (quoting Strickland, 466 U.S. at 689). Moreover, "[t]he 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 [a] defendant's guilt." State v. Castagna, 187 N.J. 293, 314 (2006) (citing State v. Marshall, 123 N.J. 1, 65 (1991)).

The second prong of the Strickland test requires the defendant to show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687. Defendant bears the burden of showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. The second Strickland prong is particularly demanding. "[T]he error committed must be so serious as to undermine the court's confidence in the jury's verdict or the result reached." State v. Allegro, 193 N.J. 352, 367 (2008) (quoting Castagna, 187 N.J. at 315).

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.

### III.

Defendant argues the PCR court erred in rejecting his petition because the record shows defense counsel was ineffective in failing to investigate witnesses, obtain statements from witness or call three alibi witnesses. Defendant contends he suffered prejudiced because he was deprived of the alibi witnesses' testimony that he was not present at the shooting. The record belies defendant's contention; and thus, we are not persuaded.

An IAC claim may occur when counsel fails to conduct an adequate pre-trial investigation. Preciose, 129 N.J. at 464; State v. Savage, 120 N.J. 594, 621-22 (1990); State v. Petrozelli, 351 N.J. Super. 14, 23 (App. Div. 2002). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." State v. Porter, 216 N.J. 343, 353 (2013) (alteration in original) (citations omitted). Counsel's failure to do so will "render the lawyer's performance deficient." State v. Chew, 179 N.J. 186, 217 (2004) (quoting Savage, 120 N.J. at 618). "Failure to investigate an alibi defense is a serious deficiency that can result in the reversal of a conviction." Porter, 216 N.J. at 353. "Indeed," "few defenses

have greater potential for creating reasonable doubt as to a defendant's guilt in the minds of the jury [than an alibi].'" Ibid. (alteration in original) (quoting State v. Mitchell, 149 N.J. Super. 259, 262 (App. Div. 1977)). "[W]hen a petitioner claims his trial attorney inadequately investigated his case, he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." Ibid. (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)).

We are satisfied the PCR court did not err in concluding lead defense counsel appropriately exercised his judgment in not calling the alibi witnesses. The record demonstrates that defendant did not discuss Joseph and Hannah with trial counsel as potential witnesses and they were not made known until after defendant's conviction. Moreover, Hannah's proffered alibi testimony was contradictory to the testimony of another witness's presented at the time of trial. Lastly, Sharrod's proposed testimony could not have altered the outcome of the trial since he could not testify who was present at the time of the shooting or identify the shooter. Consequently, the absence of their testimony did not result in prejudice to defendant. Defense counsel also testified he had no recollection of defendant discussing alibi witnesses at the time of trial.



Having heard the witnesses' testimony and reviewed the trial record, the PCR court found defendant did not overcome the "strong presumption of adequate assistance" under Strickland, and we discern no reason to disturb the decision denying PCR relief. Pierre, 223 N.J. at 576.

On appeal, defendant renews the same arguments rejected by the PCR court, adding that he was entitled to an evidentiary hearing on all the claims. We reject defendant's arguments.

The PCR court properly found defendant's claims regarding defense counsel's conflict of interest and failure to challenge the medical examiner's licensure and credibility were procedurally barred under Rule 3:22-5. The Rule provides:

[a] prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any post-conviction proceeding brought pursuant to this rule . . . or in any appeal taken from such proceedings.

[R. 3:22-5.]

"It is . . . clear that an issue considered on direct appeal cannot thereafter be reconsidered by way of a post-conviction application." Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 3:22-3 (2023).

As noted above, we previously addressed and rejected defendant's PCR arguments on direct appeal. A PCR petition is not "an opportunity to relitigate cases already decided on the merits." Preciose, 129 N.J. at 459.

To the extent we have not addressed a particular argument, it is because either our disposition makes it unnecessary, or the argument was 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.



CLERK OF THE APPELLATE DIVISION