

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-0252-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

R.H.,

Defendant-Appellant.

Submitted May 24, 2023 – Decided June 22, 2023

Before Judges Mayer and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment Nos. 12-06-0516 and 15-10-0645.

Joseph E. Krakora, Public Defender, attorney for appellant (Amira R. Scurato, Designated Counsel, on the brief).

William A. Daniel, Union County Prosecutor, attorney for respondent (Meredith L. Balo, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant R.H.¹ appeals from the April 20, 2021 order denying his petition for post-conviction relief (PCR) following an evidentiary hearing. We affirm.

I.

The underlying facts are set forth at length in our prior opinion on defendant's direct appeal from his 2016 convictions for first-degree armed robbery, N.J.S.A. 2C:15-1, two counts of certain persons not to have weapons, N.J.S.A. 2C:39-7(a) and (b), and other weapons offenses. See State v. R.H., No. A-4916-15 (App. Div. Mar. 29, 2019) (slip op. at 1-33), certif. denied, 240 N.J. 79 (2019). Therefore, we need only summarize those facts to give context to defendant's arguments and our decision.

At approximately 8:00 p.m. on January 4, 2012, defendant's victim and her driving instructor stopped at a bank in Elizabeth so the victim could withdraw money from an ATM to pay for her driving lesson. While the victim was in the ATM vestibule, defendant entered behind her and demanded money. When she refused, defendant showed her a gun and the victim gave defendant the \$100 she had just withdrawn from the ATM. At defendant's direction, she

¹ Because defendant previously served as a confidential informant, his initials are used to preserve his anonymity.

withdrew an additional \$200. The victim testified she thought defendant's gun was genuine and he was going to kill her.

A detective from the Elizabeth Police Department was able to identify defendant from the bank's still photos and surveillance video of the incident and arrested him. During defendant's custodial interview, he admitted he was the person seen in the photos and surveillance footage. He also stated he initially went to the bank with a man named "Rock" to sell drugs to the victim so he could use the money to buy more drugs. Defendant claimed he entered the ATM vestibule to ensure the victim gave him the correct amount of money but then ordered her to "take another [\$200] out." He explained he robbed her because he was a drug addict. After the interview, detectives accompanied defendant to his mother's home and defendant turned over a BB gun and some clothing items used during the robbery.

At trial, defendant gave a different explanation of the January 4 incident. He testified he and Rock went to the bank to meet a woman (the victim) who agreed to pay \$250 to procure fraudulent documentation, including a New Jersey driver's license and a social security card. Defendant stated he went into the ATM vestibule to speak to the woman and after she gave him \$100, he informed her the total due was \$250, so she withdrew more money.

Defendant also testified he had a gun in his hand while in the ATM vestibule

because [there] . . . was an individual outside when I first pulled up, all black on, walking back and forth, walking towards the door and then walk[ing] back off. So I pulled the gun out because I didn't know whether or not [the person was] trying to . . . play me out or he was with her.

Defendant stated he told the woman to wait while he retrieved the social security card from Rock, and \$50 change from the sale. When he returned to Rock's car, he saw the woman, the individual dressed in black, and another person enter a car and drive off. According to his testimony, defendant gave Rock \$250 and kept \$50 for himself.

Defendant also testified he was being sarcastic during his police interview when he said he robbed the victim because he was a drug addict. He explained he had a prior relationship with the two detectives who interviewed him because he was a confidential informant. Defendant also stated the detectives tried to "trick [him] into saying what they . . . wanted [him] to say."

The victim testified in rebuttal that she never sought to obtain fraudulent identification from defendant. She stated she had her "green card and [her] social so [she did not] need to go to somebody for a fake license." The victim also confirmed defendant approached her in the ATM vestibule and demanded

money from her and when she responded, "no," he showed her a gun.

The jury convicted defendant on all counts. He was sentenced to an aggregate prison term of forty years, which included a thirty-year prison term for robbery, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, and a consecutive ten-year term with a five-year parole ineligibility period for one of his certain persons convictions. We affirmed defendant's convictions, but remanded "for a new sentencing hearing, to allow the parties to fully address [certain] sentencing issues." R.H., slip op. at 33. Following our second remand in February 2020,² the trial court imposed an aggregate thirty-year sentence, subject to NERA, and subsequently denied defendant's motion to reconsider the sentence.

Also in February 2020, defendant filed a timely PCR petition. PCR counsel filed a supplemental brief months later. Defendant contended, in part, that trial counsel was ineffective because she failed to: investigate "the man [who was standing] outside the ATM" vestibule during the robbery; have his wife testify at trial; and challenge certain identification documents the State introduced into evidence, including the victim's passport.

In January and April 2021, Judge Regina Caulfield heard argument on

² State v. R.H., No. A-5710-18 (App. Div. Feb. 11, 2020).

defendant's PCR petition. During a proceeding on April 20, 2021, the judge heard testimony from defendant, his wife, and defendant's trial counsel.

Regarding his ineffective assistance of counsel claims, defendant testified he provided trial counsel with his wife's contact information so she could testify at his trial. Defendant explained that surveillance video "clearly show[ed]" he was "dropped off in front of the [ATM] vestibule by [his] wife, Elonna Cook" on the night of the January 4, 2012 incident. He also stated he "didn't want to take the stand" at trial, but his attorney told him to testify as it "was the only way that [he] could stand a chance." Defendant further testified his attorney told him to lie on the witness stand about what occurred on January 4.

Defendant's wife, Elonna Cook, testified at the PCR hearing that she drove defendant to the bank on January 4, but she could not see from where she was parked what happened inside the ATM vestibule. She also testified that prior to the trial, she spoke with defendant's trial counsel once or twice but was never interviewed about the January 4 incident.

Defendant's trial counsel testified she had an investigator interview Cook prior to trial and was "disappointed with what [Cook] had to say." Counsel also stated if she thought Cook's testimony would have helped defendant, she "absolutely" would have called her as a witness, but "what she provided was

useless." Additionally, trial counsel denied telling defendant to lie on the witness stand.

At the conclusion of the evidentiary hearing, Judge Caulfield found defendant and his wife were not credible. However, the judge credited the testimony provided by defendant's trial counsel.

In addressing defendant's ineffective assistance of counsel claims, the judge observed that during the trial, defendant "didn't say anything about [Rahim Larry] Johnson," the man who purportedly stood outside the ATM vestibule during the January 4 robbery and caused defendant to brandish a gun to scare him off. The judge found defendant "never said [he] knew the person" "nor [was] there any kind of certification from Mr. Johnson" presented during the PCR hearing. Judge Caulfield also found it

very convenient now for this name to [come] up when [defendant] had every opportunity at the trial to say, "this guy was outside. I know it's Mr. Johnson. . . . That's a bad guy. I saw him out there. That's why . . . I pulled the gun out." And . . . years later, he's coming up with the name? . . . It's just . . . not believable.

As to trial counsel's failure to call Cook to testify at the trial, the judge concluded the timeline Cook gave about when she drove defendant to the bank did not match the robbery timeline. Also, her testimony conflicted with defendant's trial testimony that he and Rock drove to the bank together. Judge

Caulfield rejected Cook's testimony as "not credible," and found it was "inconsistent," "not responsive" and "tailored" for defendant's benefit.

The judge also found Cook admitted during her testimony that after she dropped defendant off at the bank, she did not "know what happened" in the ATM vestibule and "didn't see anything." Judge Caulfield further concluded if Cook had testified at trial, "[h]er bias would have been obvious" and the jury could have considered Cook's recent criminal history when weighing her testimony. Thus, Judge Caulfield found if trial counsel called Cook to testify at defendant's trial, her testimony "would have hurt" defendant.

The judge also rejected defendant's argument that trial counsel should have challenged certain identification documents the State produced at trial from the victim, including the victim's passport. The judge found defendant's contention that such a challenge would have supported his claim that he tried to sell the victim fraudulent documents to replace her outdated ones was belied by the trial record. The judge pointed to the victim's testimony about the status of her identification documents at the time of the robbery. Additionally, the judge recalled "there was no testimony about the [victim's] passport being expired."

Finally, Judge Caulfield accepted trial counsel's testimony that she had an investigator speak to Cook prior to the trial and after reading the investigator's

report, she chose not to call Cook to testify because the information Cook provided was "useless." Moreover, the judge credited trial counsel's testimony that she did not instruct defendant to lie on the stand. Further, the judge found that during defendant's trial, his attorney "fought hard for [him]" and "did an exceptional job" on his behalf.

Based on her conclusions, Judge Caulfield found defendant failed to show trial counsel's performance was deficient or that her representation prejudiced the outcome of defendant's trial. Thus, she denied defendant's PCR petition.

II.

On appeal, defendant raises the following arguments for our consideration:

POINT I

BECAUSE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, THE PCR COURT ERRED IN DENYING DEFENDANT'S PETITION FOR PCR.

A. LEGAL STANDARDS GOVERNING APPLICATIONS FOR POST-CONVICTION RELIEF.

B. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL MS. COOK, FOR FAILING TO INVESTIGATE THE MAN OUTSIDE THE ATM, AND FOR FAILING TO CHALLENGE THE DOCUMENTS IN EVIDENCE.

When seeking PCR, a defendant must establish, by a preponderance of the

credible evidence, that he is entitled to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013); State v. Preciose, 129 N.J. 451, 459 (1992). To sustain that burden, 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). The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing and the defendant "must do more than make bald assertions that he was denied the effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

We accord substantial deference to a PCR court's findings after an evidentiary hearing, particularly when they "are substantially influenced by [the court's] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy," State v. Johnson, 42 N.J. 146, 161 (1964) (citation omitted), as long as those findings "are supported by sufficient credible evidence in the record," Nash, 212 N.J. at 540 (citations omitted). We review the PCR court's legal conclusions de novo. Id. at 540-41.

To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy both prongs of the test set forth in Strickland v. Washington, 466

U.S. 668, 687 (1984) by a preponderance of the evidence.³ First, the defendant must show "counsel's performance was deficient." Id. at 687. This requires demonstrating that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Ibid. The United States Constitution requires "reasonably effective assistance," so an attorney's performance will not be deemed deficient if counsel acted "within the range of competence demanded of attorneys in criminal cases." Ibid. (citation omitted). Therefore, "[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-88.

When assessing the first Strickland prong, "[j]udicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight." Id. at 689. "Merely because a trial strategy fails does not mean that counsel was ineffective." State v. Bey, 161 N.J. 233, 251 (1999) (citation omitted). Thus, a trial court "must indulge a strong presumption that counsel's conduct falls within the wide range of

³ The New Jersey Supreme Court adopted the Strickland test in State v. Fritz, 105 N.J. 42, 58 (1987).

reasonable professional assistance," and "the defendant must overcome the presumption that, under the circumstances, the challenged action [by counsel] 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). Further, the court must not focus on the defendant's dissatisfaction with counsel's "exercise of judgment during the trial," "while ignoring the totality of counsel's performance in the context of the State's evidence of [the] defendant's guilt." State v. Castagna, 187 N.J. 293, 314 (2006) (citations omitted).

Under the second prong of the Strickland test, the defendant must show "the deficient performance prejudiced the defense." 466 U.S. at 687. This means "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Ibid. It is insufficient for the defendant to show the errors "had some conceivable effect on the outcome." Id. at 693. Ultimately, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if [it] had no effect on the judgment." Id. at 691 (citation omitted).

An ineffective assistance of counsel claim may arise from counsel's failure to conduct an adequate pre-trial investigation. Preciose, 129 N.J. at 464; State v. Savage, 120 N.J. 594, 621-22 (1990). "[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). "[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." Porter, 216 N.J. at 353 (citation omitted). Counsel is not constitutionally ineffective by failing to call witnesses at a hearing whose testimony would not change the outcome. Bey, 161 N.J. at 262.

It also is well settled that "[d]etermining which witnesses to call to the stand is one of the most difficult strategic decisions that any trial attorney must confront." State v. Pierre, 223 N.J. 560, 579 (2015) (citation omitted). "[L]ike other aspects of trial representation, 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) (quoting Strickland, 466 U.S. at 689, 693).

Guided by these principles and having considered the record, we are

convinced defendant's arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). Moreover, his arguments generally amount to quarrels with the judge's fact finding, which we are in no position to reject, given our standard of review. See State v. McNeil-Thomas, 238 N.J. 256, 271-72 (2019). We therefore affirm the April 20, 2021 order, essentially for the reasons expressed by Judge Caulfield in her cogent oral opinion.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION