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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0396-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

THOMAS H. OUTLAND, a/k/a
THOMAS GO OUTLAND,
ISLAM GOODWIN, and
THOMAS H. JAMISON,

Defendant-Appellant.

Submitted February 27, 2023 – Decided March 13, 2023

Before Judges Mawla and Marczyk.

On appeal from the Superior Court of New Jersey, Law
Division, Union County, Indictment No. 14-08-0751.

Joseph E. Krakora, Public Defender, attorney for
appellant (John J. Bannan, Designated Counsel, on the
brief).

William A. Daniel, Union County Prosecutor, attorney
for respondent (Milton S. Leibowitz, Assistant
Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Thomas H. Outland appeals from the August 12, 2021 order denying his petition for post-conviction relief (PCR) following an evidentiary hearing. Based on our review of the record and the applicable legal principles, we affirm.

I.

We derive the following facts from our reported decision on defendant's direct appeal:

Defendant worked next door to a check cashing establishment and often took coffee in the morning to Claudia Cardenas, the check cashing employee. She worked in the rear where the safety deposit box was located, protected by a system of two security doors. Exterior video footage taken on the date of the robbery, April 30, 2014, depicts defendant¹ walking towards and joining two hooded figures while holding a white object, similar in appearance to a paper cup. The group moves together towards the check cashing store and disappears inside. Moments later, the two hooded figures run out. Shortly thereafter, police cars arrive.

Cardenas testified that on the morning of the robbery, defendant called in to her, and, as was her custom, she unlocked the outer security door to get the coffee. As she did so, a man forced the second security door open and punched her. She saw another man; both of their faces were covered by hoodies. Cardenas was punched in the face again and pushed down onto the floor. Approximately \$35,000 was taken from the safe.

When she next raised her head, Cardenas saw defendant near the door. She asked him to call the police, and he told her to calm down because the men were dangerous. A customer entered the store, and Cardenas again asked defendant to call 9-1-1, which he did.

After the State rested, defendant moved the 9-1-1 recording into evidence and played the tape to the jury. Over the State's objection, the judge found the tape admissible as a present sense impression exception to the hearsay rule, N.J.R.E. 803(c)(1), and the excited utterance exception, N.J.R.E. 803(c)(2). The judge also ruled that if defendant played the tape to the jury, in rebuttal the State could play redacted portions of defendant's two recorded statements to police, and proffer his prior convictions.

Defense counsel played the 9-1-1 tape. In rebuttal, the State moved into evidence defendant's sanitized criminal history of four prior indictable offenses and service of state prison time, and the two redacted statements.

In the statements, defendant denied culpability, but discussed in detail how easy it would be to plan a robbery at the check cashing store because the employees were so "lax" about security, and their patterns of behavior so well established. He added, "if it was me and I knew that she opened the door like that, I could plan. I know how to plan around shit[.]"

[State v. Outland, 458 N.J. Super. 357, 362-63 (App. Div. 2019) (alteration in original).]

Following a seven-day jury trial, defendant was convicted of conspiracy to commit robbery, N.J.S.A. 2C:5-2 and 2C:15-1, and second-degree robbery, N.J.S.A. 2C:15-1. The jury also acquitted defendant of third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(7). On June 24, 2016, the sentencing court merged defendant's conspiracy and robbery convictions and imposed a sixteen-year extended prison term subject to the No Early Release Act, N.J.S.A. 2C:43-7.2. See N.J.S.A. 2C:44-3(a).

Defendant filed a direct appeal and we affirmed his convictions. Outland, 458 N.J. Super. at 373. Our Supreme Court denied defendant's petition for certification. State v. Outland, 239 N.J. 503 (2019). The Supreme Court of the United States also denied defendant's writ for certiorari. Outland v. N.J., 140 S. Ct. 1151 (2020).

Thereafter, on June 10, 2020, defendant filed a petition for PCR. Defendant argued trial counsel was ineffective because she failed to consult with him concerning his right to testify at trial; failed to adequately investigate and prepare his case for trial; failed to utilize his phone records in lieu of the 9-1-1 tape (and, as a result, the State was able to introduce defendant's criminal record); failed to ensure defendant was present at every stage of trial; and

appellate counsel failed to properly raise these issues on direct appeal. The PCR judge granted defendant's motion for an evidentiary hearing.

Defendant's trial counsel, Michelle Cox, was called as the State's only witness. She testified she visited the scene of the crime with defendant and also discussed the strengths and weaknesses of his case with him. She and defendant also discussed trial strategy after reviewing the discovery. She stated she informed defendant of the strategic advantages and disadvantages for introducing the 9-1-1 call. She explained,

for me as an attorney, [it] was to get the jury to hear [defendant]'s voice, his demeanor. . . . [A]nd when I personally reviewed the 9-1-1 call, I thought it was very good evidence for [defendant]. I thought that he sounded sincere [and] I thought he . . . sounded credible on the 9-1-1 call.

So, . . . I think the advantage was to . . . both humanize him again for allowing the jury to hear his voice, and then also to corroborate his story and . . . the fact that he . . . was actually a victim of the robbery.

Cox further explained the 9-1-1 tape allowed defendant to "get his story out without having to take the stand." She further stated she did not force defendant to utilize the 9-1-1 call, and defendant never expressed he wanted to introduce his phone records as opposed to the 9-1-1 audio. Moreover, she did not recall defendant ever disagreeing with the decision to introduce the 9-1-1 call.

Cox testified she discussed with defendant the advantages and disadvantages of testifying before a jury. She stated she would have discussed, on a regular basis throughout trial, whether defendant wanted to testify. She agreed it was defendant's right to testify. She maintained she would have had him testify if he wanted—even though she would have counseled him against it. She recalled defendant was present for status conferences, but not for in-chambers discussions prior to trial. However, she recalled all substantive discussions and decisions with the court were made on the record.

Defendant testified on his own behalf at the PCR hearing. He acknowledged he had a good relationship with Cox. He claimed he was not present during sidebar conferences, but later recalled he could hear the sidebar conversations at trial using headphones. Defendant stated he was not present for any in-chambers discussion between the attorneys and the trial judge.

Addressing the introduction of the 9-1-1 call, he stated:

Well, in the beginning I was on board with it, because [trial counsel] told me we ha[ve] to prove that I actually made the call. So, I was . . . on board in the beginning. That was before the State tried to get my prior [convictions] introduced. Once that was finalized, and I . . . found out that my priors would be used, that's when I . . . no longer wanted [it] to [be used].

He conceded he was in court when the 9-1-1 audio was discussed on the record and when Cox made the decision to play the audio at trial. Although he did not object, he explained he "just shut down" since Cox was not listening to him because he had previously told her he wanted to rely on the phone records. Defendant also stated he did not testify in his own defense because trial counsel "didn't call [him] as a witness," even though he expressed his desire of taking the stand.

As discussed more fully below, the court denied the PCR application, and this appeal followed. Defendant reprises many of the same arguments made before the PCR court. Specifically, defendant raises the following points 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 [PCR].

(B) Defense Counsel was Ineffective, For Among Other Reasons, Failing to Seek Admission of Phone Records in Lieu of the [9-1-1] Tape.

(C) Defense Counsel was Ineffective in Advising Defendant on His Right to Testify.

(D) Defense Counsel was Ineffective for Failing to Ensure that Defendant was Present at Every Stage of His Trial.

(E) Defendant was Denied the Effective Assistance of Appellate Counsel.

POINT II

THE DEFENDANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO TESTIFY ON HIS OWN BEHALF.

POINT III

THE DEFENDANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

POINT IV

THE DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT OF DUE PROCESS BY BEING IMPROPERLY EXCLUDED FROM THE TRIAL PROCEEDINGS.

POINT V

THE CUMULATIVE EFFECT OF THE ERRORS COMPLAINED OF RENDERED THE TRIAL UNFAIR.¹

¹ In Points II, III, and IV, defendant addresses the constitutional companion arguments of the ineffective assistance of counsel arguments set forth in Point

II.

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) (quoting Nash, 212 N.J. at 540). 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).

"Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." Pierre, 223 N.J. at 576 (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). PCR provides "a built-in 'safeguard that ensures that a defendant was not unjustly convicted.'" Nash, 212 N.J. at 540 (quoting State v. McQuaid, 147 N.J. 464, 482 (1997)). A petition for PCR is not a substitute for a direct appeal. State v. Mitchell, 126 N.J. 565, 583-84 (1992) (citing State v. Cerbo, 78 N.J. 595, 605 (1979)).

I. Defendant made essentially the same arguments in these points, and therefore we address them together in this opinion.

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 v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 52 (1987) (adopting Strickland).

III.

The PCR court issued a thorough and comprehensive opinion denying defendant's petition for PCR. The court noted it found Cox's testimony "credible" and every decision made at trial was "tactical and discussed with [d]efendant." The court further reiterated, "[i]t is very clear by the record, trial transcripts, defendant's testimony, and trial counsel's testimony that the trial strategy was tactical and every stage was consented to by [d]efendant."

The court initially addressed defendant's claims regarding his lack of presence "at every stage of the trial." The court held "even if . . . [d]efendant was excluded from preliminary and informal discussions regarding the [9-1-1] call and the jury charge, his lack of presence [was] not out of the ordinary. While [d]efendant may have wanted to be a part of every discussion, the [c]ourt recognizes that is not always possible." The court also concluded "[e]verything that was spoken about outside of the presence of . . . [d]efendant was then brought to his attention, evidenced by the record"

Concerning the decision whether defendant would testify, the PCR court noted it was unpersuaded by defendant's allegation trial counsel disregarded his wishes. The court characterized defendant's claim as "disingenuous" based on the totality of the record and the testimony at the PCR hearing. Rather, the court believed the decision not to have him testify at trial was a joint strategy but it "did not go the way he wanted."

Furthermore, the court opined "[d]efendant's decision not to testify was clearly a tactical move by both [d]efendant and trial counsel." The PCR court referenced our opinion on direct appeal where we noted, "[b]y playing the tape to the jury . . . defendant avoided the riskier process of testifying, while ensuring that the jury heard the sound of his voice and the emotion conveyed during the 9-1-1 call." Outland, 458 N.J. Super. at 370-71.

The court opined "trial counsel's decision to introduce the [9-1-1] call was an effective mechanism for defendant to plead his innocence." The court cited to the trial record where trial counsel conferred with defendant to introduce the 9-1-1 call and concluded:

[w]hile the context of the conversation is unknown, it is more than likely that trial counsel informed and obtained consent to move forward with introducing the [9-1-1] call. The record clearly shows that trial counsel wanted to obtain the permission of [d]efendant prior to proceeding with moving forward with the [9-1-1] call.

Based on the evidentiary hearing, the judge found trial counsel's testimony to be "credible, [straight-]forward, and not only was her relationship with [d]efendant good . . . but every decision made during the trial was tactical and discussed with [d]efendant." The judge also referenced Cox's years of experience as a public defender and involvement in a litany of criminal trials.

The court found defendant's claim for ineffective assistance of appellate counsel to be meritless because the "claims [preserved] judicial economy and allowed appellate counsel to focus on issues that would have allocated [d]efendant a reversal." Moreover, trial and appellate counsel neither cumulatively, nor singularly, rendered ineffective assistance of counsel.

We affirm substantially for the reasons set forth in the PCR court's opinion. We add the following.

A.

Trial counsel made a reasonable, strategic decision to introduce the 9-1-1 call.² Cox moved to admit the 9-1-1 call "to get the jury to hear [defendant]'s

² A defendant must "overcome a 'strong presumption' that counsel exercised 'reasonable professional judgment' and 'sound trial strategy' in fulfilling [their] responsibilities." Nash, 212 N.J. at 542 (2013) (quoting State v. Hess, 207 N.J. 123, 147 (2011) (internal quotations omitted)). "Merely because a trial strategy fails does not mean that counsel was ineffective." State v. Bey, 161 N.J. 233, 251 (1999). Thus, a reviewing court "must indulge a strong presumption that

voice, his demeanor[,]” and to show defendant had not conspired in the robbery without subjecting him to cross-examination. Assuming the jury concluded the 9-1-1 call was genuine, the evidence could have ultimately exonerated defendant. At trial, the record also reflects defendant was aware of the decision to admit the 9-1-1 call and that the jury would be informed of his prior convictions. The following exchange occurred between the court and defense counsel:

THE COURT: I allowed in the [9-1-1] call but I also disclosed that it would be subject to impeachment by [defendant]'s sanitized convictions and that the State I believe was also intending to offer certain portions of two statements made by [defendant] to the police, subject to [the N.J.R.E.] 104(c) hearing.

And so I asked both [trial counsel] and [defendant] to discuss that aspect and to see if they still wanted the [9-1-1] call admitted.

[TRIAL COUNSEL]: Judge, we did have that discussion and decided that we do indeed want the

counsel's conduct falls within the wide range of 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).

[c]ourt to admit or we do intend to have the [9-1-1 call played] in front of the jury.

The next day, the following exchange took place:

THE COURT: All right. We're finally here, but where does that leave us? You want some time now that we know what's going to come in and if the [9-1-1] call comes in? You want some time to speak to [defendant] about that?

[TRIAL COUNSEL]: Just briefly if I could.

THE COURT: Sure, . . . that's the key question. We can't do anything without that. So let us know when you're ready.

[TRIAL COUNSEL]: Thank you.

. . . .

THE COURT: All right. We're on the record. [Trial counsel], after speaking to [defendant], what's the defense's strategy?

[TRIAL COUNSEL]: Judge, the defense still intends to move forward with the [9-1-1].

Defendant had multiple opportunities to discuss this tactical approach with trial counsel, and there is no indication he objected or wanted to proceed solely with use of the phone records. That is, he understood the jury would be informed of a sanitized version of his prior convictions, and the purpose of

admitting the call was to show the jury he had "no opportunity to deliberate or fabricate" the robbery.

The PCR court found Cox credible regarding her discussions with defendant concerning the decision to utilize the 9-1-1 tape. Defendant contends the court did not explain why it believed Cox's testimony and rejected defendant's testimony regarding the utilization of the 9-1-1 tape. We disagree. The PCR court discussed in great detail the extensive record in its opinion. Moreover, it specifically referenced the discussion held on the record in defendant's presence where counsel represented she conferred with defendant and noted, "the defense still intends to move forward" with introducing the 9-1-1 tape. This corroborated Cox's testimony she discussed the strategy of introducing the tape. Similarly, the PCR court found defendant's testimony "disingenuous" because it determined defendant was aware of the discussions on the record about the use of the 9-1-1 tape, and it found defendant was bringing the claim because the otherwise reasonable strategy did not work. We agree defendant's "buyer's remorse" is not a basis for the PCR petition.

B.

"[A] criminal defendant is entitled to testify on [their] own behalf under Article I, paragraphs [one] and [ten] of our State Constitution." State v. Savage,

120 N.J. 594, 628 (1990). "As with any other constitutionally-based right, a defendant must knowingly waive the right." State v. Ball, 381 N.J. Super. 545, 556 (App. Div. 2005). However, when a defendant is represented by counsel, the court need not engage in a voir dire on the record to establish defendant's waiver. State v. Bogus, 223 N.J. Super. 409, 424 (App. Div. 1988) (citations omitted). Nevertheless, "the better practice [is] for a trial court to inquire of counsel whether [they have] advised a defendant . . . of [their] right to testify." Savage, 120 N.J. at 631. Further, "[i]t is the responsibility of a defendant's counsel, not the trial court, to advise defendant on whether or not to testify and to explain the tactical advantages and disadvantages of doing so or of not doing so." Bogus, 223 N.J. Super. at 423. Pursuant to these principles, we are satisfied based on the PCR court's findings defendant was apprised of this right and waived his right to testify.

C.

Rule 3:16(b) provides unless a defendant's presence is waived, they "shall be present at every stage of the trial, including the impaneling of the jury and the return of the verdict" A defendant has the right to be present in the courtroom during every "critical stage" of the trial, "if his presence would contribute to the fairness of the procedure." State v. Zenquis, 251 N.J. Super.

358, 363-64 (App. Div. 1991). We are unpersuaded by defendant's contention he was not present for certain "critical stages" of the trial. Although there were in-chamber conferences, the record is replete with the substantive arguments and rulings on every issue in the underlying case, and defendant has not identified the discussion of any significant issue which did not take place on the record in his presence, which impacted the outcome of this case.

D.

Defendant is also entitled to the effective assistance of counsel on direct appeal. State v. O'Neil, 219 N.J. 598, 610 (2014); see also State v. Morrison (extending the Strickland standard to the assessment of claims of ineffectiveness of appellate counsel). 215 N.J. Super. 540, 545-46 (App. Div. 1987). Appellate counsel has no duty to raise every non-frivolous argument available to a defendant. Jones v. Barnes, 463 U.S. 745, 751 (1983). "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751-52. Defendant claims appellate counsel should have presented the arguments raised in this PCR appeal. However, as discussed above, none of defendant's arguments warrant reversal, and defendant has not established a prima facie case to support an ineffective assistance of


appellate counsel claim. Therefore, there was no basis for appellate counsel to advance arguments regarding these issues on appeal.

IV.

Finally, to the extent that we have not addressed any of defendant's remaining arguments, we conclude they lack 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