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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0872-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JEREMY GRANT, a/k/a
JAY GRANT,

Defendant-Appellant.

Submitted January 24, 2023 – Decided May 31, 2023

Before Judges Rose and Gummer.

On appeal from the Superior Court of New Jersey, Law
Division, Somerset County, Indictment No.
12-03-0208.

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

John P. McDonald, Somerset County Prosecutor,
attorney for respondent (Gerard J. Tyrrell, Assistant
Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Jeremy Grant appeals from an October 26, 2021 order denying his post-conviction relief (PCR) petition. The PCR judge issued the order after conducting an evidentiary hearing regarding trial counsel's purported failure to call potential alibi witnesses to testify at trial. We affirm.

I.

A jury convicted defendant of first-degree robbery and third-degree possession of a weapon for an unlawful purpose. The trial judge sentenced defendant to an aggregate fifteen-year prison term subject to the No Early Release Act, N.J.S.A. 2C:43-7.2. On direct appeal, we affirmed defendant's convictions and sentence. See State v. Grant, No. A-5470-13 (App. Div. Mar. 13, 2017) (slip op. at 32). We incorporate by reference the facts and procedural history set forth in our prior opinion. Id. at 1-9. The Supreme Court subsequently denied defendant's petition for certification. See State v. Grant, No. A-5470-13 (Oct. 11, 2017).

Defendant filed a pro se PCR petition. He listed eight bases for his petition: prosecutorial misconduct before the trial jury; prosecutorial misconduct before the grand jury; ineffective assistance of counsel; the trial judge failed to charge the jury on a lesser-included offense; the prosecutor committed discovery violations; the prosecutor engaged in "trial by ambush"; a

violation of an N.J.R.E. 404(b) ruling; and a Brady violation.¹ Defendant described his ineffective-assistance-of-counsel claim as his "attorney did not object to any violations of court rules and client rights during trial that would have changed outcome of verdict."

Defendant thereafter was assigned counsel, who filed an amended petition in which he referenced and expressly incorporated defendant's pro se petition. PCR counsel added trial counsel had been ineffective "for not conducting any investigation whatsoever pre-trial through trial and sentencing" and for "fail[ing] to procure alibi witnesses." PCR counsel also submitted two letter briefs. In his first letter brief, PCR counsel focused on the ineffective-assistance claim, arguing trial counsel had "failed to investigate and prepare pre-trial through sentencing"; "was asked to utilize alibi witnesses and failed to do so"; "failed to visit the crime scene," resulting in counsel being "caught unaware" at trial when a police officer testified about the layout of the apartment complex; and performed "so far below the accepted standards of professional conduct and reasonableness that [she had] denied [defendant] effective assistance of counsel." PCR counsel also contended defendant was entitled to an evidentiary hearing. He attached defendant's pro se petition as exhibit A to the first brief.

¹ Brady v. Maryland, 373 U.S. 83 (1963).

In his second letter brief, PCR counsel focused on other issues, including defendant's statement to police and the purported failure of an Office of the Public Defender (OPD) investigator to interview a witness to obtain information, which, according to PCR counsel, "would have been crucial as to an alibi." PCR Counsel indicated he was submitting the brief because defendant wanted to make an additional argument, stating "[a]fter reviewing the legal brief submitted in this petition, the [d]efendant requested that the following information be included as part of the legal argument under Point I, Part B."

The initial PCR judge found defendant had presented a prima facie case of ineffective assistance of counsel for failure to call potential alibi witnesses and granted defendant's request for an evidentiary hearing "for the sole and limited purpose to resolve whether it was ineffective-assistance-of-counsel to fail to call the potential alibi witnesses." He otherwise denied defendant's petition, noting the arguments defendant had raised in his pro se submission, other than the ineffective-assistance argument, "could likely have been raised in a prior proceeding."

Another PCR judge conducted the evidentiary hearing. During the two-day hearing, defendant, his trial counsel, and two purported alibi witnesses, Valerie Cobb and Janel Wright, testified. Defendant testified he had not been

at the scene of the robbery on the day of the incident because he had spent that day and night at Cobb's house. According to defendant, other people were at Cobb's house. He testified he had talked to his trial counsel about calling "certain people" as witnesses and had stressed to her the importance of calling alibi witnesses. He wanted to call as alibi witnesses Cobb, Wright, and another woman who lived in the building where the robbery had taken place. During cross-examination, defendant admitted he had discussed with his trial counsel the potential risks in calling Cobb as an alibi witness, including her extensive criminal record and recent stroke.

In her testimony, Cobb confirmed that after the robbery, she had had a stroke that affected her memory and admitted she had approximately nineteen felony convictions, had served time in prison, and had a long history of drug addiction, although she had been sober for a number of years. She testified she had spoken with the OPD's investigator and with trial counsel about testifying. On the day of the robbery, Cobb was "a complete addict," was in the middle of a three-day cocaine "binge," had spent most of the day in her room, and "was getting high and was up all night." She recalled having several people at her apartment that day, including defendant and his girlfriend, who had spent the night in her daughter's bedroom. Cobb remembered defendant had arrived that

day around noon but did not remember what day of the week it was. She asserted she had taken a video of defendant on her phone that day but had since lost the video. She identified a photograph of defendant, claiming it had been taken at her house on the day of the robbery.

Janel Wright, who is Cobb's daughter, described defendant as being "like family" but had no recollection of him getting arrested in 2012. She testified she had last seen him sometime in February 2012. She remembered defendant attending a family get-together at her mother's house on a day in February of 2012. She recalled defendant arriving during the day and giving him permission to sleep in her bedroom that night because she was going out for the night. She did not remember the date or day of the week on which the get-together had been held nor what time she had left the house that night.

The State called as a witness Chanel Hudson, defendant's trial counsel. She testified she had believed the State had a "strong" case against defendant due to defendant's incriminating statement to police, the victim's identification of defendant in a photo array, and text messages exchanged between defendant and his co-defendant. According to Hudson, her strategy focused on discounting the victim's identification of defendant, suppressing defendant's statement to police, and arguing the robbery was in the second, not first degree.

As to the alibi witnesses, Hudson had "credibility concerns." She testified that "over time that alibi started to become not a viable defense . . . primarily because . . . of trying to get the witnesses to really stick to . . . their stories" According to Hudson, the potential alibi witnesses "were a little noncommittal about . . . be[ing] nailed down to a time frame or a time . . . that [defendant] was actually there." She attempted to obtain a copy of the video of defendant attending the get-together but was given "the runaround." Ultimately, Cobb told Hudson she had lost the video. According to Hudson, defendant's girlfriend told the investigator she could not recall where defendant was on the day of the robbery or if he was at Cobb's house. Wright initially told the investigator she had no recollection of defendant being with her at Cobb's house on the day of the robbery but later said he was there. Hudson testified that after comparing the potential alibi witnesses' statements to the text messages between defendant and his co-defendant and defendant's statement to police, she concluded she could not present the alibi defense "with a straight face."

According to Hudson, defendant was "very involved in his defense." She believed "[t]here was no way that [she] would be able to abandon an alibi defense without [defendant] questioning that." She testified she and defendant had "spent a lot of time . . . talking about potential defenses. Talking about why

defenses – specifically, why an alibi defense would not work and why we would be pursuing . . . different defenses." She did not recall defendant disagreeing with that strategy; she remembered that he had agreed with not calling the alibi witnesses.

Following the presentation of testimony and argument of counsel, the judge denied the petition on the record, concluding that "to call such alleged alibi witnesses would have . . . destroyed any chance [defense counsel] had of getting a second-degree or third-[degree conviction] and that was the only thing available to her." The judge later issued an order and comprehensive written opinion.

In his written opinion, the judge made extensive credibility determinations. The judge found defendant's credibility "weak." The judge described Cobb's testimony about the day of the robbery as "both specific and hazy" and believed her credibility "would have been attacked significantly at trial." The judge did "not view Ms. Cobb as providing significant evidence of a potential alibi so as to overcome the mountain of evidence indicating the defendant's guilt." He believed Wright was "credible but [found] little in her testimony to suggest that she could have influenced the jury as an alibi witness." The judge found Hudson to be "highly credible with an encyclopedic

recollection" of the case. He agreed with her conclusion that it would have been difficult to present an alibi defense "with a straight face" given the "mountain of evidence" against defendant.

Denying defendant's petition, the judge found defendant had failed to satisfy either prong under Strickland v. Washington, 466 U.S. 668 (1984). The judge found "absolutely no evidence that Ms. Hudson's performance was deficient." He also found defendant had not demonstrated prejudice or that the proposed alibi testimony would likely change the verdict in a new trial, considering the strength of the State's case, the weakness of the proposed alibi testimony, and the "significant issues of credibility" of the proposed alibi witnesses.

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

POINT I

THE PCR COURT ERRED WHEN IT FOUND THAT TRIAL COUNSEL'S DECISION NOT TO PRESENT AN ALIBI DEFENSE WAS A SOUND TRIAL STRATEGY.

POINT II

AS DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF PCR COUNSEL WHO FAILED TO INVESTIGATE AND BRIEF HIS REMAINING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AS REQUIRED UNDER STATE V. RUE,

175 N.J. 1 (2002), THIS MATTER SHOULD BE REMANDED WHERE DEFENDANT CAN BE ASSIGNED COMPETENT PCR COUNSEL TO PROPERLY INVESTIGATE AND BRIEF ALL OF HIS CLAIMS. (Not raised below)

To obtain relief on ineffective-assistance-of-counsel grounds, a defendant must show counsel's performance was deficient and that the deficiency prejudiced the defense. Strickland, 466 U.S. at 687; State v. Fritz, 105 N.J. 42, 58 (1987). To satisfy the first prong, a defendant "must prove an objectively deficient performance by defense counsel." State v. Allegro, 193 N.J. 352, 366 (2008); see also State v. Gideon, 244 N.J. 538, 550 (2021). A defendant must "overcome a 'strong presumption' that counsel exercised 'reasonable professional judgment' and 'sound trial strategy' in fulfilling his responsibilities." State v. Nash, 212 N.J. 518, 542 (2013) (quoting State v. Hess, 207 N.J. 123, 147 (2011)). "[I]f counsel makes a thorough investigation of the law and facts and considers all likely options, counsel's trial strategy is 'virtually unchallengeable.'" Ibid. (quoting State v. Chew, 179 N.J. 186, 217 (2004)). "Mere dissatisfaction with a 'counsel's exercise of judgment' is insufficient to warrant overturning a conviction." Ibid. (quoting State v. Echols, 199 N.J. 344, 358 (2009) (internal quotations omitted)).

To satisfy the second prong, a defendant must prove the deficient performance so prejudiced the defense that "it is reasonably probable that the result would be altered." Allegro, 193 N.J. at 366; see also Gideon, 244 N.J. at 550-51. "Prejudice is not to be presumed. . . . The defendant must 'affirmatively prove prejudice.'" Gideon, 244 N.J. at 551 (quoting Strickland, 466 U.S. at 693).

We defer to a "trial court's factual findings made after an evidentiary hearing on a petition for PCR," State v. Blake, 444 N.J. Super. 285, 299 (App. Div. 2016), unless the findings are not supported by adequate, substantial, and credible evidence, State v. Harris, 181 N.J. 391, 415 (2004). We review de novo a PCR judge's conclusions of law. State v. L.G.-M., 462 N.J. Super. 357, 365 (App. Div. 2020).

Given that deferential standard and the record developed during the evidential hearing, we have no basis to reject the judge's determination that defendant failed to establish ineffective assistance of counsel based on his trial counsel's strategic decision not to call the purported alibi witnesses. As our Court has recognized,

Determining which witnesses to call to the stand is one of the most difficult strategic decisions that any trial attorney must confront. A trial attorney must consider what testimony a witness can be expected to give, whether the witness's testimony will be subject to effective impeachment by prior inconsistent statements

or other means, whether the witness is likely to contradict the testimony of other witnesses the attorney intends to present and thereby undermine their credibility, whether the trier of fact is likely to find the witness credible, and a variety of other tangible and intangible factors. . . . Therefore, like other aspects of trial representation, a defense attorney's decision concerning which witnesses to call to the stand is "an art," Strickland, [466 U.S. at 693], and a court's review of such a decision should be "highly deferential," id. at 689.

[State v. Arthur, 184 N.J. 307, 320-21 (2005) (citation omitted.)]

Defendant's argument that his PCR counsel rendered ineffective assistance by not briefing all the issues defendant had identified in his pro se submission is equally without merit. Rule 3:22-6(d) provides:

Assigned counsel may not seek to withdraw on the ground of lack of merit of the petition. Counsel should advance all of the legitimate arguments requested by the defendant that the record will support. If defendant insists upon the assertion of any grounds for relief that counsel deems to be without merit, counsel shall list such claims in the petition or amended petition or incorporate them by reference.

Our Court has explained counsel's obligation:

[C]ounsel should advance all of the legitimate arguments that the record will support. If after investigation counsel can formulate no fair legal argument in support of a particular claim raised by defendant, no argument need be made on that point. Stated differently, the brief must advance the

arguments that can be made in support of the petition and include defendant's remaining claims, either by listing them or incorporating them by reference so that the judge may consider them. That procedure, which will serve to preserve defendant's contentions for federal exhaustion purposes, is all that is required.

[State v. Webster, 187 N.J. 254, 257-58 (2006).]

Defendant's PCR counsel met his obligation by following that procedure. He expressly "incorporated" defendant's pro se petition in the amended petition and attached defendant's pro se petition as exhibit A to his initial brief. Moreover, the first PCR judge, who listed each of the arguments defendant had raised in his pro se submission, clearly considered and rejected those arguments. Cf. id. at 258 (remanding the case to the PCR judge because it was not clear to the Court the judge had considered the defendant's arguments when PCR counsel's brief had not referred to or incorporated the defendant's pro se arguments and the PCR judge had not commented on them); see also State v. Rue, 175 N.J. 1, 19 (2002).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION