

RECORD IMPOUNDED

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0885-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

AMALIA MIRASOLA, a/k/a
AMALIA ACEVEDO, AMALI
MIRASOLA, and AMALIA
MIRASOLAACEVEDO,

Defendant-Appellant.

Submitted May 17, 2023 – Decided June 1, 2023

Before Judges Vernoia and Natali.

On appeal from the Superior Court of New Jersey, Law
Division, Morris County, Indictment No. 11-02-0201.

Joseph E. Krakora, Public Defender, attorney for
appellant (Monique Moyse, Designated Counsel, on the
brief).

Robert J. Carroll, Morris County Prosecutor, attorney
for respondent (Tiffany M. Russo, Assistant
Prosecutor, of counsel and on the brief).

PER CURIAM

A jury convicted defendant Amalia Mirasola of first-degree murder and second-degree possession of a weapon for an unlawful purpose. The court imposed an aggregate forty-year sentence subject to the requirements of the No Early Release Act, N.J.S.A. 2C:43-7.2. We affirmed defendant's conviction and sentence on her direct appeal. State v. Mirasola, No. A-3639-12 (App. Div. Nov. 25, 2015) (slip op. at 33). The Supreme Court denied defendant's petition for certification. State v. Mirasola, 224 N.J. 526 (2016).

Defendant subsequently filed a first post-conviction relief (PCR) petition. In a July 12, 2018 order, the trial court denied the petition. We affirmed the court's order on defendant's direct appeal, State v. Mirasola, No. A-1007-18 (App. Div. Dec. 4, 2019) (slip op. at 5), and the Supreme Court denied defendant's petition for certification, State v. Mirasola, 241 N.J. 160 (2020).

On June 24, 2020, defendant filed a pro se second PCR petition generally alleging ineffective assistance of her trial and PCR counsel. Following the assignment of counsel, defendant filed an amended petition asserting PCR counsel was ineffective by failing to argue defendant was entitled to PCR because: trial counsel did not call defendant's sister-in-law as a witness to testify the victim of the murder, defendant's husband, sexually abuse their daughter;

trial counsel did not argue against the State's claim the murder was premeditated; and trial counsel "rushed" her matter. Defendant also claimed counsel on her first PCR petition was ineffective by failing to argue trial counsel did not argue defendant's medications did not permit her to show emotion at trial and trial counsel told her not to show emotion at trial. Defendant further asserted trial counsel was ineffective by failing to negotiate a plea offer on her behalf.

Following oral argument, the court entered an order denying the petition, finding it time-barred under Rule 3:22-12(a)(2) and defendant otherwise failed to demonstrate any prima facie ineffective-assistance-of-counsel claims warranting an evidentiary hearing. In a detailed and thorough written statement of reasons accompanying the order, the court determined defendant's PCR petition was time-barred under Rule 3:22-12(a)(2) because: defendant did not base her PCR claims on a new constitutional right, R. 3:22-12(a)(2)(A); defendant was aware of, or through the exercise of reasonable diligence could have discovered, the factual predicates on which she based her claims more than one year before she filed the second PCR petition, R. 3:22-12(a)(2)(B); and defendant filed the second PCR petition alleging ineffective assistance of counsel on her first petition more than one year after the court denied the first PCR petition, R. 3:22-12(a)(2)(C).

Notwithstanding its determination defendant's second PCR petition is time-barred, the court addressed the merits of defendant's claims under the two-pronged standard established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984), and adopted by our Supreme Court as the standard under the New Jersey Constitution in State v. Fritz, 105 N.J. 42, 58 (1987). Under the Strickland standard, a defendant first must show counsel's handling of the matter "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. Second, a defendant must show there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "To establish a prima facie claim of ineffective assistance of counsel, a defendant must demonstrate a reasonable likelihood of succeeding" under both prongs of the Strickland standard. State v. Preciose, 129 N.J. 451, 463 (1992).

The court found defendant did not establish a prima facie claim trial counsel was ineffective based on an alleged failure to challenge the State's claim the murder was premeditated. The court explained the record showed trial counsel argued defendant shot her husband in self-defense, and the jury's acceptance of the defense would have ruled out murder, premeditated or otherwise.

The court found defendant did not carry her burden of establishing trial counsel was ineffective by failing to call defendant's sister-in-law to testify defendant's husband sexually abused one of their daughters. The court explained defendant's claim constituted nothing more than a bald assertion because it was untethered to any competent evidence, in the form of an affidavit or certification from the sister-in-law, describing her putative testimony had she been called as a witness at trial. In support of its conclusion, the court cited Rule 3:22-10(c), which provides that "[a]ny factual assertion that provides the predicate for a claim of [PCR] must be made by an affidavit or certification pursuant to Rule 1:4-4 and based upon personal knowledge of the declarant before the court may grant an evidentiary hearing."

The court also found defendant did not make a prima facie showing her trial counsel was ineffective by failing to negotiate a plea agreement on her behalf limiting her sentencing exposure to ten to fifteen years. The court observed defendant's counsel could not compel the State to provide an acceptable plea offer and the record showed the State "never wavered from its position that [defendant] would have to plead guilty to the [i]ndictment." The court further noted the mandatory sentence for the murder is thirty years with a thirty-year period of parole ineligibility, and defendant refused opportunities

during the various pretrial proceedings to enter a plea in accordance with the State's position it would only accept a plea to the charges in the indictment.

The court further addressed defendant's claims her counsel on the first PCR petition was ineffective by failing to: pursue a diminished capacity defense; consult an expert concerning the drugs defendant was taking for her health-related issues; and address defendant's purported lack of fitness to proceed to trial. The court determined defendant failed to establish prima facie ineffective-assistance-of-counsel claims on those bases because she did not demonstrate she suffered any prejudice from counsel's purported errors as required under the second prong of the Strickland standard. See State v. Gaitan, 209 N.J. 339, 350 (2012) (internal citation omitted) ("Although a demonstration of prejudice constitutes the second part of the Strickland analysis, courts are permitted leeway to choose to examine first whether a defendant has been prejudiced, and if not, to dismiss the claim without determining whether counsel's performance was constitutionally deficient.").

The court also denied defendant's request for an evidentiary hearing. The court determined an evidentiary hearing was not warranted because defendant did not establish a prima facie claim that either her trial or first PCR counsel was ineffective. See R. 3:22-10(b) (setting the requirements for holding an

evidentiary hearing on a PCR petition, including that "[a] defendant shall be entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of" PCR).

Defendant appealed from the court's order denying her second PCR petition. She presents the following arguments for our consideration:

POINT ONE

THIS MATTER MUST BE REMANDED FOR A NEW PCR HEARING IN FRONT OF A NEW PCR COURT BECAUSE THE PCR COURT BELOW IMPROPERLY USED EVIDENCE OUTSIDE OF THE RECORD TO DENY RELIEF AND CREATED THE APPEARANCE OF BIAS.

POINT TWO

IN THE ALTERNATIVE, [DEFENDANT] IS ENTITLED TO AN EVIDENTIARY HEARING ON HER CLAIM THAT HER TRIAL AND PCR ATTORNEYS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO PRESENT HER DEFENSE ADEQUATELY, FAILING TO OBJECT TO THE SENTENCING COURT'S IMPROPER FINDINGS, FAILING TO NEGOTIATE A PLEA, OR FAILING TO RAISE THESE ISSUES IN A FIRST PCR PETITION.

We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). The de novo standard of review applies

to mixed questions of fact and law. Id. at 420. Where, as here, an evidentiary hearing has not been held, it is within our authority "to conduct a de novo review of both the factual findings and legal conclusions of the PCR court." Id. at 421. We apply that standard here.

Based on our careful review of the record, we conclude defendant's arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We affirm substantially for the reasons set forth by the PCR court in its well-reasoned written decision. We add only the following remarks.

During oral argument on defendant's PCR petition, the court addressed defendant's claim trial counsel was ineffective by failing to call defendant's sister-in-law to testify that the murder victim, defendant's husband, sexually abused one of their daughters. The court noted that in a separate proceeding involving defendant — her petition for release under the Compassionate Release Act (CRA), N.J.S.A. 30:4-123.51e — defendant's daughter denied her father ever abused her. The court further noted that in the CRA proceeding, the daughter testified defendant was a "monster" who was "physically and emotionally abusive." In its written decision on the PCR petition, the court again noted the daughter denied her father sexually abused her and the court

cited to its order and decision in the CRA proceeding stating the daughter testified her father never sexually abused her.

Defendant argues the PCR court's references to evidence presented in the separate CRA proceeding was improper, and that her second PCR petition should not have been decided based on the court's personal knowledge gleaned from a separate proceeding. Defendant also asserts the PCR court's reference to the daughter's testimony in the CRA proceeding that defendant was a "physically and emotionally abusive" "monster" establishes an appearance of bias, "tainting" the court's handling of the PCR petition. Defendant argues she is therefore entitled to a reversal of the court's denial of her PCR petition and a remand for reconsideration by a different judge. We disagree.

In the first instance, defendant's second petition for PCR was properly denied because it is time-barred under Rule 3:22-12(a)(2). Thus, the court's findings concerning the merits of defendant's ineffective-assistance-of-counsel claims, even if in error, do not require reversal of the court's order.

Additionally, defendant ignores she had the burden of satisfying both prongs of the Strickland standard to establish a prima facie ineffective assistance of counsel claim, 466 U.S. at 687. She failed to satisfy that burden on her claim trial counsel was ineffective by failing to call her sister-in-law to testify the

victim sexually abused his daughter because defendant did not present any competent evidence her sister-in-law would testify to that effect, see State v. Jones, 219 N.J. 298, 312 (2014) (explaining PCR petitions must be "accompanied by an affidavit or certification by defendant, or by others, setting forth with particularity," "facts sufficient to demonstrate counsel's alleged substandard performance"); State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999) (holding "bald assertions" are insufficient to sustain a defendant's burden of establishing a prima facie case of ineffective assistance under the Strickland standard).

It is noteworthy defendant does not challenge that finding by the PCR court on appeal. That is, defendant does not assert the PCR court erred by finding she failed to present competent evidence establishing what her sister-in-law would have testified to at trial or that the court erred by denying her PCR claim on that basis. Thus, the court's references to the daughter's testimony at the CRA proceeding is of no moment.

Moreover, to support its conclusion there is no evidence the victim sexually abused the daughter, the court cited the Division of Child Placement and Permanency's determination the sexual abuse allegation was "unfounded," and our decision on defendant's direct appeal from her conviction, stating "the

evidence [at trial] demonstrated the [sexual] abuse never occurred." Defendant does not challenge the court's reliance on those findings, and the court's reference to the daughter's testimony provided only cumulative support for the court's determination the record lacks any evidence the murder victim sexually abused the daughter. Again, for those reasons, the court's reference to the daughter's testimony at the CRA proceeding — that she was never sexually abused — is of no consequence to its denial of defendant's PCR petition.

For the same reasons, the court's awareness of the daughter's testimony in the CRA proceeding, and citation to it, did not create an impermissible bias or appearance of bias on behalf of the PCR court. Rule 1:12-1(g) provides that a judge should not sit "when there is any . . . reason which might preclude a fair and unbiased hearing . . . , or which might reasonably lead counsel or the parties to believe so." A judge should not hear or decide a case where "a reasonable, fully informed person [would] have doubts about the judge's impartiality[.]" State v. Dalal, 221 N.J. 601, 606 (2015) (quoting DeNike v. Cupo, 196 N.J. 502, 517 (2008)). "However, before the court may be disqualified on the ground of an appearance of bias, the belief that the proceedings were unfair must be objectively reasonable." State v. Marshall, 148 N.J. 89, 279 (1997).

Here, the court did not find as fact defendant was a "monster" who physically and emotionally abused her daughter, and the court did not express any opinion on the merit of those claims. The court merely accurately restated the daughter's testimony at the CRA proceeding to support its conclusion there was no competent evidence — even in the separate CRA proceeding — supporting defendant's claim the victim sexually abused his daughter.

Although the court should have limited its analysis to the evidence admitted in the second PCR proceeding, there is nothing in the court's awareness of the daughter's testimony in the other proceeding establishing an "objectively reasonable" basis to conclude the PCR proceeding was "unfair." Ibid. Since a judge who has made prior rulings adverse to a party is not disqualified from making subsequent decisions concerning the party, id. at 276; Hundred E. Credit Corp. v. Eric Shuster Corp., 212 N.J. Super. 350, 358 (App. Div. 1986), it would be incongruous to conclude the PCR court exhibited a disqualifying bias because it accurately cited testimony in a prior proceeding in which defendant was a party to support its determination there was an absence of evidence supporting defendant's claim.

Additionally, and as noted, the court denied defendant's claim trial counsel was ineffective by failing to call her sister-in-law to testify the daughter was

sexually abused because defendant failed to sustain her burden of proof, and not because of the daughter's testimony. Thus, defendant suffered no prejudice by the court's citation to the daughter's testimony at the CRA hearing. See State v. Flowers, 109 N.J. Super. 309, 312 (App. Div. 1970) (finding it necessary for a party to demonstrate "prejudice or potential bias" to succeed on a motion for judicial disqualification).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION