SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0991-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SHAWN SOUTHERLAND,
a/k/a KEITH DAVIS,
and SHAWN OBEE,

Defendant-Appellant.

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Submitted December 14, 2022 – Decided July 21, 2023

Before Judges Mayer and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 09-10-1750.

Shawn Southerland, appellant pro se.

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Stephanie Davis Elson, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Shawn Southerland appeals from the September 21, 2021 Law Division order denying his motion for a new trial based on newly discovered evidence. We affirm.

In 2009, defendant was found guilty of murder, N.J.S.A. 2C:11-3a(1) or N.J.S.A. 2C:11-3a(2); and two counts of hindering apprehension, N.J.S.A. 2C:29-3b(1) following a bench trial. By way of a pre-trial motion, the State sought to admit statements made by defendant to the victim's brother made during a telephone conversation between the two men. The victim's brother allowed police officers to overhear their conversation on speakerphone. In a June 23, 2011 order, the trial court granted the State's motion to admit defendant's statements overheard by the police officers. Defendant moved to suppress the statements overheard by the police officers, which the judge denied in a December 13, 2011 order. Defendant's motion for reconsideration denied on January 18, 2012.

At trial, defendant decided to represent himself and the trial judge directed his assigned public defender to serve as standby counsel. At the conclusion of the testimony, defendant moved for an acquittal, or in the alternative, a new trial and the judge denied both motions. The judge sentenced to thirty years in prison on the murder charge.

Defendant filed a direct appeal challenging his conviction and sentence. In an earlier unpublished opinion, we affirmed defendant's conviction and sentence. See State v. Southerland (Southerland I), No. A-4663-11 (App. Div. Jan. 30, 2015). The Supreme Court denied his petition for certification. State v. Southerland, 221 N.J. 566 (2015).

Thereafter, defendant filed a petition for post-conviction relief (PCR). In a second unpublished opinion, we affirmed the denial of defendant's first petition for PCR without an evidentiary hearing substantially for the reasons expressed by Judge Sheila Venable. State v. Southerland (Southerland II), No. A-3299-15 (App. Div. March 19, 2018) (slip op. at 2). Applying the Strickland-Fritz[1] test, we concluded defense counsel's representation of defendant during the plea negotiations was not. We also concluded that defendant's reluctance to have standby counsel aid in his defense at trial did not permit the right to challenge the effectiveness of that counsel when defendant expressly terminated that attorney. Defendant after being questioned by the judge stated he wished to represent himself at trial. The Supreme Court denied defendant's petition for

[1] Strickland v. Washington, 466 U.S. 668, 687 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 49 (1987).

certification seeking review of our denial of his PCR petition. State v. Southerland, 235 N.J. 351 (2018).

In our prior opinions, we set forth at length the facts leading to defendant's conviction and sentence, see Southerland I, slip op. at 6-14, 29, and the denial of his first PCR petition, see Southerland II, slip op. at 1. We need not repeat the facts stated in those opinions.

Defendant also challenged his conviction and sentence in federal court. In March 2019, defendant's petition for habeas corpus filed with the United States District Court for the District of New Jersey was denied after finding there was no Fourth Amendment violation in the officer's listening to the conversation with the victim's brother's consent. Southerland v. Nogan, No. 18-9469 (JLL) (D.N.J. Mar. 26, 2019) (slip op. 1, 16-19). The United States Court of Appeals for the Third Circuit denied review of defendant's petition for habeas corpus. Southerland v. Adm'r E. Jersey State Prison, No. 19-1784 (3d Cir. Oct. 4, 2019) (slip op. at 1-2).

On July 29, 2019, defendant filed his second PCR petition, which was denied on September 3, 2019. In his second PCR petition, defendant reiterated his claim of ineffective assistance by appellate counsel in failing to challenge the admission of the officer's testimony regarding the overheard phone

conversation between defendant and the victim's brother. Judge Venable denied the petition because the claim against appellate counsel was not cognizable under Rule 3:22-4(b)(2), which limits the issues that can be raised in a second PCR petition, and because defendant raised the same arguments that were rejected on direct appeal and in his first PCR petition.

On September 23, 2019, defendant filed a motion for a new trial based on newly discovered evidence. Four days later, he filed a motion for reconsideration from the denial of his second PCR petition. On February 27, 2020, defendant filed a motion for evidentiary hearing.

Defendant's motion for reconsideration of his second PCR petition was denied on March 12, 2020. In a written opinion denying defendant's motion, Judge Venable repeated her reasons for the denial of his second PCR petition. As to defendant's motion for a new trial, because the admission of the officer's testimony regarding the overheard phone conversation had been fully addressed and adjudicated on direct appeal and in defendant's first PCR petition, the judge held defendant failed to assert any "interest of justice" to warrant a new trial. The judge denied defendant's motion relying on the reasons stated in our

affirmance of defendant's earlier appeals and in her denial of his first petition. Defendant also appealed this denial.[2]

Defendant also made a common law request for discovery items related to consensual authorization and interception and 2007 Bayonne Police Department Records. The Hudson County Prosecutor's Office (HCPO) supervising assistant prosecutor notified defendant the HCPO did not have records responsive to his request.

Defendant then filed a civil complaint against the New Jersey Attorney General and the HCPO for common law access to records. In response, HCPO's chief litigation counsel certified after examining defendant's appellate files and PCR petitions, phone conversation between defendant and the victim's brother "had been adjudicated and decided multiple times by the [c]ourt." He further certified "after searching through five boxes of [defendant's] criminal case file, folder by folder, that there was nothing that resembles a consent, or

[2] In a third unpublished opinion, we affirmed the September 3, 2019 denial of defendant's second PCR petition and the March 12, 2020 denial of his motion for a new trial and reconsideration substantially for the reasons expressed by Judge Venable in her written decisions that accompanied the challenged orders. State v. Southerland (Southerland III), No. A-3064-19 (App. Div. Feb. 16, 2022) (slip. op. at 7). The Supreme Court denied his petition for certification. State v. Southerland, 253 N.J. 48 (2023).

authorization to intercept a telephone call. That it [did] not exist, and it never existed."

In June 2021, defendant filed a third PCR petition and moved for reconsideration of the order denying a new trial based on newly discovered evidence. Defendant argued the newly discovered evidence was the chief litigation counsel's certification that contradicted the trial court's findings regarding the victim's brother's consent. In addition, the PCR court denied defendant's motion without addressing any of his claims and failed to make any findings of fact.

On September 21, 2021, Judge Martha Lynes denied defendant's motion for reconsideration, relying on the reasons expressed for the denial of defendant's third PCR petition, because there was no finding of an "interest of justice" requiring a new trial. This appeal followed.

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

> POINT I
>
> THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL WITHOUT [] FINDINGS OF FACT AND CONCLUSION[S] OF LAW THEREFORE, DEFENDANT[']S CLAIMS WERE NOT ADDRESSED BY THE COURT[,] BECAUSE THE RECORD IS LAID BARE. THIS COURT SHOULD EXERCISE ITS ORIGINAL JURISDICTION[,]

REVERSE DEFENDANT'S CONVICTIONS AND ORDER A NEW TRIAL

POINT II

IT WAS FLAGRANT MISCONDUCT AND DENIAL OF JUSTICE FOR HCPO ATTORNEYS TO MISLEAD AND MISREPRESENT TO THE NEW COURT'S CONSENT EXCEPTION TO JUSTIFY THEIR SEIZURE WHICH WARRANTS REVERSAL OF DEFENDANT'S CONVICTIONS[,] DISMISSAL OF THE INDICTMENT WITH PREJUDICE[,] OR/AND NEW TRIAL.

POINT III

UNDER THE KIMMELMAN-STRICKLAND[3] TEST, THE REPRESENTATION PROVIDED TO [DEFENDANT] ON DIRECT APPEAL FELL BELOW AN [] OBJECTIVE STANDARD OF REASONABLENESS.

A. UNDER THE KIMMELMAN-STRICKLAND TEST, [DEFENDANT'S] ATTORNEY ON DIRECT APPEAL FAILURE TO RENDER EFFECTIVE ASSISTANCE RESULTED IN PREJUDICE TOWARD AND INJURY TO [DEFENDANT].

1. [DEFENDANT'S] ATTORNEY ON DIRECT APPEAL FAILURE TO RENDER EFFECTIVE ASSISTANCE RESULTED IN PREJUDICE AND INJURY TOWARD [DEFENDANT] BECAUSE THERE IS A REASONABLE PROBABILITY [DEFENDANT'S] CONVICTION WOULD HAVE

[3] Kimmelman v. Morrison, 477 U.S. 365, 374-75 (1986); Strickland v. Washington, 466 U.S. 668, 688 (1984).

BEEN OVERTURNED ON DIRECT APPEAL BECAUSE THE STATEMENTS THAT WERE UNLAWFULLY SEIZED AND ITS FRUIT WERE MATERIAL AND DIRECTLY CONTRIBUTED TO THE VERDICT.

B. DEFENDANT'S ATTORNEY ON DIRECT APPEAL FAILURE TO RENDER EFFECTIVE ASSISTANCE VIOLATED DUE PROCESS BECAUSE THE END RESULT WOULD HAVE BEEN FAVORABLE TO DEFENDANT.

We find that defendant's arguments lack sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(2). We add the following brief comments.

Rule 3:22-5 provides that "[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 appeal taken from such proceedings." Specifically, this procedural bar applies "'if the issue raised is identical or substantially equivalent to that adjudicated previously on direct appeal.'" State v. Marshall IV, 173 N.J. 343, 35 (2002) (quoting State v. Marshall III, 148 N.J. 89, 150 (1997)).

Guided by these well-established principles, we see no reason to disturb Judge Lynes's decision. Here, defendant patently attempts to relitigate issues reviewed and rejected by this court in prior appeals, arguments raised and rejected in earlier trial proceedings, or arguments equivalent to arguments

previously adjudicated. We decline to consider argument previously raised and rejected. We affirm substantially for the reasons expressed by Judge Lynes.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION