

# RECORD IMPOUNDED

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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1638-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

D.T.A.,

Defendant-Appellant.

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Submitted November 1, 2022 – Decided January 20, 2023

Before Judges Geiger and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 14-03-0192.

Joseph E. Krakora, Public Defender, attorney for appellant (Karen A. Lodeserto, Designated Counsel, on the brief).

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Timothy Kerrigan, Senior Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant D.T.A. (Dameon)<sup>1</sup> appeals from a June 16, 2020 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We are asked to consider whether the PCR court erred in not finding ineffective assistance of defendant's trial counsel because 1) counsel conceded to the jury defendant was guilty of second-degree charges and challenged only the first-degree charge; and 2) counsel failed to make a Reyes<sup>2</sup> motion with respect to the two second-degree charges.

We conclude defendant has failed to demonstrate ineffective assistance of trial counsel; instead, counsel employed a litigation strategy, wholly understood by, and agreed to by defendant, to concede guilt on the two second-degree offenses after an unsuccessful motion to suppress defendant's confession, in an effort to challenge the first-degree offense. Defendant and his counsel focused on arguing the first-degree offense did not occur. We find no reason to disturb the findings of the PCR court and affirm.

Defendant lived in Paterson with his wife Janet, and two children. Defendant and Janet had one child who was thirteen months old at the time of

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<sup>1</sup> We use pseudonyms throughout this opinion to protect the identity of the minor victim. R. 1:38-3(c)(9).

<sup>2</sup> State v. Reyes, 50 N.J. 454 (1967).

the incident. Janet also had another child from a previous relationship, Gabby, who was three years old. Gabby's bed was located in the living room of their marital home.

At trial, Janet testified she went to bed early one evening because she had to wake up early for work. When she went to sleep, defendant was still awake watching television in the living room, which was not uncommon. After an hour, she woke up and went into the living room where she saw defendant kneeling next to Gabby's bed with his face near her "private area." Janet observed Gabby laying across the bed with her legs open, no underwear on, and Vaseline on the bed. Janet examined Gabby's private area and noticed it was "shiny." Gabby told Janet that her vagina hurt. Janet asked Gabby what defendant used to touch her vagina and she said his tongue.

Defendant initially denied any sexual contact with Gabby. Gabby again indicated defendant touched her vagina; that he tackled her, told her to hold still and then "put his tail on my tail." Gabby demonstrated what she meant by the word "tail" by hitting defendant on his penis. Defendant eventually admitted to having been masturbating when Janet entered the living room. Janet then called the police. Gabby was taken to a hospital where she was examined.

The prosecutor's office interviewed both defendant and Janet. Defendant waived his Miranda<sup>3</sup> rights and participated in the police interview without counsel. At first, defendant denied any sexual contact, stating he had been masturbating when he heard Gabby crying and merely went to check on her. Eventually, defendant admitted to detectives "[i]t's exactly what [Gabby] said, I put my tongue on my daughter." Defendant admitted to removing Gabby's underwear, and rubbing his penis on Gabby's vagina, but denied engaging in penetration. After the interview, he was arrested and charged. About a month later Gabby's medical testing did not reveal signs of injury.

Defendant was indicted on first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1), second-degree sexual assault, N.J.S.A. 2C:14-2(b), and second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a).

Defendant's motion for a bench trial was denied. A jury trial resulted in convictions on all three counts. Defendant was sentenced to sixteen years with no early release for first-degree sexual assault and a concurrent four-year term for second-degree endangering welfare of a child.

The crux of the defense at trial was the State failed to establish beyond a reasonable doubt that defendant engaged in penetration, a necessary element

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<sup>3</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

elevating the offense of second-degree sexual assault to first-degree aggravated sexual assault. During his opening statement, defense counsel stated defendant "did something very wrong. He touched his three-year-old stepdaughter [Gabby] in a sexual way . . . that's the truth. He admitted to it." Counsel stated, "there is no doubt [defendant] is guilty of a crime here."

Trial counsel then explained:

We're here because in addition to charging [defendant] with crimes that he did commit, law enforcement charged him with something that he didn't do, they charged him with first-degree aggravated sexual assault.

Trial counsel further explained first-degree aggravated sexual assault is "a crime that requires an act of penetration, and a crime that [defendant] did not commit." Trial counsel explained, following defendant's confession, law enforcement charged him with an offense he did not admit to, without waiting to receive forensic testing results for DNA evidence on Gabby's vagina and underwear, which came back negative.

When the State rested, defense counsel made a Reyes motion and asked the court to dismiss the first-degree aggravated sexual assault count but did not make a Reyes motion as to counts two and three. The trial court denied the Reyes motion.

Following the verdict, defendant filed a direct appeal, arguing the trial court erred by 1) denying his motion for a bench trial, and 2) the aggravating factors applied by the court at sentencing. We affirmed the trial court's findings and rulings. State v. D.T.A., No. A-2977-16 (App. Div. Nov. 13, 2018). The defendant then filed the petition for PCR.

"Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." State v. Pierre, 223 N.J. 560, 576 (2015) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). Appellate court "review is necessarily deferential to a PCR court's factual findings based on its review of live witness testimony." State v. Nash, 212 N.J. 518, 540 (2013). However, a PCR court's interpretation of the law is reviewed de novo. Id. at 540-41. For mixed questions of law and fact, an appellate court grants deference to the court's factual findings and reviews de novo the PCR court's application of the legal rules to those facts. State v. Harris, 181 N.J. 391, 416 (2004).

Both the Sixth Amendment of the United States Constitution and Article I, Paragraph 10 of our State Constitution guarantee the right to effective assistance of counsel at all stages of criminal proceedings. Strickland v. Washington, 466 U.S. 668, 686; State v. Fritz, 105 N.J. 42, 58 (1987). Our Supreme Court has adopted the two-part test articulated in Strickland to

determine whether a defendant has received ineffective assistance of counsel. Fritz, 105 N.J. at 58. A defendant may seek PCR if the defendant shows (1) "[defendant's] counsel's performance was deficient[.]" and (2) this "deficient performance prejudiced the defense." Id. at 52 (quoting Strickland, 466 U.S. at 687).

A defendant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Reviewing courts employ a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689; State v. Hess, 207 N.J. 123, 147 (2011).

Secondly, the defendant must demonstrate "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. This second prong is particularly demanding and requires "the error committed must be so serious as to undermine the court's confidence in the jury's verdict or the result reached." State v. Allegro, 193 N.J. 352, 367 (2008) (quoting State v. Castagna, 187 N.J. 293, 315 (2006)). This "is an exacting standard." State v. Gideon, 244 N.J. 538, 551 (2021) (quoting Allegro, 193 N.J. at 367). "Prejudice is not to be presumed" but must be

affirmatively proven by the defendant. Gideon, 244 N.J. at 551. Furthermore, when trial counsel and the accused agree to trial strategy in advance, there is a strong presumption of effective assistance. Castagna, 187 N.J. at 316.

The PCR court held an evidentiary hearing and made detailed findings of fact based on testimonial evidence elicited from trial counsel and defendant. It concluded "the record supports that defendant was fully informed of the factual and legal ramification of the first-degree versus the second-degree crime." It also found defendant actively defended his client in pretrial hearings, met with defendant between six to eight times, attempted to suppress defendant's confession, and when the suppression motion failed, moved for a bench trial which also failed, then opted for the next best trial strategy.

Both defendant and counsel testified counsel encouraged defendant to accept a plea bargain, which defendant admitted he refused. Defense counsel explained he had "extensive discussions" with defendant about the benefits of a plea bargain, including more favorable sentencing, which he recalled being either eight or nine years with at least eighty-five percent time served prior to parole eligibility. Counsel explained to defendant a plea bargain would have effectively the same result as "'winning the trial' [on the first degree] only to potentially have the exact same result" in terms of time served, given the trial



strategy to concede the second-degree lesser offenses, but cautioned "obviously at trial there would be a risk of losing on . . . the first[-]degree charge."

The PCR court noted defendant "never indicated to the [trial] court that he was dissatisfied in any way with counsel's representation, nor did defendant express any confusion or reluctance during the trial." Based on these factual determinations the court concluded defendant was fully informed and agreed to the trial strategy, which fell within the ambit of reasonable and competent representation.

On appeal, defendant argues he was denied effective legal representation because his counsel's strategy conceded second-degree lesser offenses in opening and closing statements. He claims trial counsel's opening statement conceding fault on the second-degree offenses had a prejudicial impact which indoctrinated the jury to the idea of defendant's guilt, and that prejudice led the jury to find defendant guilty on the first-degree offense. Defendant also argues trial counsel's closing summation had a similarly "devastating" impact on his trial, and "allowed the jury to instantly view him as a child molester." Defendant asserts he did not agree to this trial strategy and argues "under no circumstances should a trial attorney advocate for a jury to convict a client of any charges."

The State argues trial counsel's defense efforts were "hamstrung by defendant's decision to waive his Miranda rights during the investigative phase and confess to police on video that he had sexually touched his three-year-old stepdaughter." It argues despite trial counsel's best efforts to keep defendant's confession out during a Miranda hearing, because the evidence was deemed admissible, and because a bench trial was denied, defense counsel was faced with the task of "defending at trial a man who the jury would know had admitted to law enforcement that he had sexually touched his three-year old stepdaughter." When faced with this task, the State argues defense counsel effectively represented defendant by formulating the strategy to concede the second-degree offenses, but challenging the first-degree offense, which required the element of penetration, because testimonial or documentary evidence were not dispositive on the element of penetration.

Defendant's arguments regarding ineffective assistance of counsel are belied by the record in this case. Although defense counsel's strategy was high risk, testimony at the PCR evidentiary hearing demonstrates defendant was fully apprised of the risk, and wholly agreed with this trial strategy after efforts to suppress his confession failed, his request for a bench trial was denied, and because he refused to plea.

Given the PCR court's conclusions of law based on thorough factual and credible findings, it did not err in concluding trial counsel was effective and we decline to disturb those findings.

Defendant also argues conceding guilt on the second-degree offenses made it too easy for the State to succeed on its burden on both counts. Defendant argues effective assistance required trial counsel "to argue for the dismissal of all charges in the indictment" and move, at the close of the State's evidence, to dismiss every count in the indictment pursuant to a Reyes motion.

The PCR court found the proofs against defendant in this case were "overwhelming" stating "defendant's confession alone was sufficient to prove all elements of count two and count three of the indictment." Trial counsel began exploring conceding counts two and three only after the unsuccessful Miranda motion, when it became clear the confession would be admissible, as a strategy to not lose credibility with the jury.

An attorney's failure to file a motion does not constitute per se ineffective assistance pursuant to the Strickland-Fritz standard. State v. Goodwin, 173 N.J. 583, 597 (2002). To satisfy Strickland-Fritz, a defendant must prove the motion would have been granted had it been filed. Ibid. (citing State v. Fisher, 156 N.J. 494, 501 (1998)). Furthermore, "the reasonableness of counsel's performance is

to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." Id. at 598 (quoting Kimmelman v. Morrison, 477 U.S. 365 (1986)).

The PCR court, with the benefit of counsel's testimony, evaluated the perspective of trial counsel at the time of trial and found "trial counsel did not argue a Reyes motion on counts two and three because this was part of trial counsel's strategic plan." The PCR court concluded trial counsel's decision to discredit the first-degree offense, in light of "overwhelming" credible evidence on the second-degree offenses, was reasonable and agreed upon by both "defendant and his trial attorney."

Defendant does not explain how raising a Reyes motion on the second-degree offenses, in light of their joint strategy to concede those offenses, would be internally consistent, nor does defendant cite support for the proposition trial counsel was obligated to make the Reyes motion. The PCR court found the unsuccessful suppression motion informed trial strategy, which defendant and counsel agreed to; part of the strategy included conceding the second-degree offenses to "bolster" defendant's credibility in challenging the first-degree offenses. To the extent they pursued this strategy, the PCR court correctly found

trial counsel was effective, even though the trial strategy was ultimately unsuccessful. We discern no basis to upset the denial of PCR.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION