

RECORD IMPOUNDED

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1800-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

H. G.,

Defendant-Appellant.

Submitted October 24, 2022 – Decided February 8, 2023

Before Judges Currier and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 12-02-0268.

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

Grace C. MacAulay, Camden County Prosecutor, attorney for respondent (Natalie A. Schmid Drummond, Assistant Prosecutor, of counsel and on the briefs).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant appeals from an October 22, 2020 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

I.

The procedural history and trial evidence are detailed in our unpublished affirming defendant's conviction and sentence on direct appeal, State v. H.G., No. A-2439-14 (App. Div. Oct. 26, 2016), and in the PCR judge's written decision dated October 22, 2020.

A summary will suffice here. A Camden County Grand Jury returned an indictment which charged defendant with second-degree sexual assault, N.J.S.A. 2C:14-2(c)(3)(a) (count one); six counts of second-degree sexual assault, N.J.S.A. 2C:14-2(c)(1) (counts two, three, six, seven, eight, and sixteen); two counts of third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(7) (counts four and ten); three counts of third-degree terroristic threats, N.J.S.A. 2C:12-3(a) (counts five, twelve, and seventeen); first-degree kidnapping, N.J.S.A. 2C:13-1(b)(1) or (2) (count nine); third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2) (count eleven); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count thirteen); fourth-degree unlawful

possession of a weapon, N.J.S.A. 2C:39-5(d) (count fourteen); and first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(7) (count fifteen).

A jury found defendant guilty on counts one, two, six, and seven (sexual assault); count nine (kidnapping); count ten (the lesser-included offense of simple assault); count twelve (terroristic threats); count thirteen (possession of a weapon for an unlawful purpose); and count fourteen (unlawful possession of a weapon).

Defendant filed a pro se PCR petition. PCR counsel was appointed, and an amended PCR petition was filed which raised four claims of ineffective assistance of counsel. Defendant contended trial counsel failed to: arrange forensic testing on defendant's vehicle; call defendant as a witness to testify at trial; call J. R. and H. G., III as witnesses; and secure the admission of certain medical records of S.R. which allegedly proved S.R. had made a prior false allegation of sexual assault. S.R., defendant's stepdaughter and mother of several of his children, resided in an apartment with her children, defendant, and her mother, J.R. Defendant was granted leave to file a supplemental brief and presented an additional twenty-three claims which reiterated the four claims raised by PCR counsel.

On October 22, 2020, the PCR judge, who did not preside over defendant's trial, issued an order and twenty-two-page written decision, denying defendant's petition without an evidentiary hearing. The judge concluded defendant "failed to establish a prima facie case of ineffective assistance of counsel claims" or "a basis for relief on any of the other claims in his petition." The PCR judge also determined defendant failed to "make the showing needed for a new trial based on newly discovered evidence" and as such, defendant's motion for a new trial was denied.

The judge determined defendant failed to establish a prima facie case of ineffective assistance of counsel under the two-prong test of Strickland v. Washington, 466 U.S. 668, 687, 694 (1984), and State v. Fritz, 105 N.J. 42, 58 (1987). Since the judge found there was no prima facie evidence of ineffective assistance of counsel, defendant was not entitled to an evidentiary hearing. State v. Preciose, 129 N.J. 451, 462 (1992); State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

II.

On appeal, defendant raises the following arguments in his counseled brief:

POINT I

THE PCR COURT ERRED IN DENYING DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO ASCERTAIN THE MERITS OF HIS CONTENTION THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AND THAT THE DENIAL MATERIALLY CONTRIBUTED TO HIS CONVICTION.

A. The Prevailing Legal Principles Regarding Claims of Ineffective Assistance of Counsel, Evidentiary Hearings and Petitions for Post-Conviction Relief.

B. The PCR Court Erred in Rejecting Defendant's Argument that Counsel Rendered Ineffective Legal Representation by Failing to Investigate Defendant's Vehicle for DNA Materials. Defendant Proved a Prima Facie [C]ase of Ineffective Assistance of Counsel and was Entitled to an Evidentiary Hearing to Further Develop a Record.

C. The PCR Court Erred in Rejecting Defendant's Contention that he was Denied the Effective Assistance of Counsel when his Trial Counsel Failed to Sufficiently Advise Defendant Regarding Whether to Testify at Trial. Defendant Proved a Prima Facie [C]ase of Ineffective Assistance of Counsel and was Entitled to an Evidentiary Hearing to Further Develop a Record.

D. The PCR Court Erred in Rejecting Defendant's Claim that he was Denied the Effective Assistance of Counsel when Trial

Counsel Failed to Call J.R. and H.G., III to Testify at Trial. Defendant Proved a Prima Facie [C]ase of Ineffective Assistance of Counsel and was Entitled to an Evidentiary Hearing to Further Develop a Record.

E. The PCR Court Erred in Rejecting Defendant's Claim that he was Denied the Effective Assistance of Counsel when Trial Counsel Failed to Investigate S.R.'s Prior False Allegation of Sexual Assault and [U]se that Allegation as Impeachment Evidence Against S.R. at Trial. Defendant Proved a Prima Facie [C]ase of Ineffective Assistance of Counsel and was Entitled to an Evidentiary Hearing to Further Develop a Record.

POINT II

TRIAL COUNSEL'S CUMULATIVE ERRORS DENIED DEFENDANT HIS RIGHT TO EFFECTIVE LEGAL REPRESENTATION.

Defendant's pro se supplemental brief, with thirty-three-point headings, reiterates the arguments presented in counsel's brief. Defendant asserts trial counsel was ineffective because counsel failed to: present results of a DYFS investigation which exonerated defendant; obtain an expert witness to impeach S.R.'s testimony based on her medical condition and medication; challenge the "surreptitious" police recording of defendant. In addition, defendant contended counsel continue to represent him even after defendant filed numerous "ethics grievances", counsel did not communicate various plea offers during "plea-

bargaining" negotiations; and counsel was deficient in advising defendant not to testify.

Defendant also asserts the trial court deprived him of a fair trial because counsel improperly coerced defendant to withdraw his motion to proceed pro se, permitted the prosecutor to proceed with perjurious testimony and made "inflammatory" comments during closing arguments. Lastly, defendant asserts appellant counsel was "wholly ineffective."

Having reviewed the record considering the applicable legal standards, we are unpersuaded by defendant's arguments and affirm substantially for the reasons set forth by the PCR judge in the well-reasoned written decision.

III.

"We review the legal conclusions of a PCR judge de novo," State v. Reevey, 417 N.J. Super. 134, 146 (App. Div. 2010) (citations omitted), but "we review under the abuse of discretion standard the PCR [judge's] determination to proceed without an evidentiary hearing." State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013). The de novo standard of review applies to mixed questions of fact and law. State v. Harris, 181 N.J. 391, 420 (2004). 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.

To establish a prima facie claim of ineffective assistance of counsel, defendant is required to meet the standards set forth in Strickland, 466 U.S. at 687 and Fritz, 105 N.J. at 58. Under the first prong, defendant must show that "counsel's performance was deficient," and that "there exists 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Preciose, 129 N.J. at 463-64 (quoting Strickland, 466 U.S. at 694; see also State v. Allegro, 193 N.J. 352, 366 (2008)).

Under the second prong of the Strickland standard, a defendant must "affirmatively prove" "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." State v. Gideon, 244 N.J. 538, 551 (2021) (quoting Strickland, 466 U.S. at 694). A petitioner 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. "The error committed must be so serious as to undermine the court's confidence in the jury's verdict or result reached." State v. Chew, 179 N.J. 186, 204 (2004) (citing Strickland, 466 U.S. at 694).

Based upon our review of the record and the application of these foundational principles, we are satisfied the PCR judge properly determined that defendant failed to establish, by a preponderance of the credible evidence, that he is entitled to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013); Preciose, 129 N.J. at 459. To sustain that burden, the defendant must allege and articulate specific facts that "provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

The mere assertion of a PCR claim does not entitle defendant to an evidentiary hearing and defendant "must do more than make bald assertions that he was denied the effective assistance of counsel." Cummings, 321 N.J. Super. at 170. Rather, trial courts should grant evidentiary hearings and make a determination on the merits only if the defendant has presented a prima facie claim of ineffective assistance, material issues of disputed facts lie outside the record, and resolution of the issues necessitates a hearing. R. 3:22-10(b); State v. Porter, 216 N.J. 343, 355 (2013).

A.

DNA Testing of Defendant's Vehicle

In his PCR petition, defendant asserts defense counsel was ineffective in failing to arrange for DNA testing of his vehicle before it was sold. After

considering the trial record and the parties' arguments, the PCR judge determined defendant's contention lacked merit. The judge found defendant provided "no factual basis" that trial counsel was aware of defendant's biological daughter's allegation she was sexually assaulted in the back of defendant's vehicle before [it] was sold and crushed." The judge also found since the vehicle was sold and crushed before the return of the indictment, there was no opportunity for defense counsel to conduct any forensic investigation of the vehicle. The judge concluded defendant's argument was "far too speculative." The judge explained

Any forensic testing of the back seat of the vehicle that failed to uncover the presence of defendant's semen would not have necessarily undermined the credibility of his daughter's account of the sexual assault in the back of the vehicle. [Defendant's daughter] reported the assault to the police approximately one month after it took place, leaving ample time for defendant to have cleaned the back seat of the vehicle to remove forensic evidence of the sexual assault.

The judge also referred to defendant's internally inconsistent argument that the State "tested" his vehicle which yielded "negative results." The judge similarly determined defendant's contention was unsupported by competent evidence in the form of an affidavit or certification based on personal knowledge. Cummings, 321 N.J. Super. at 170; accord R. 3:22-10(c). Thus,

defendant's "bald assertion and speculative" assertion was insufficient to support a PCR application. Ibid.; see also Porter, 216 N.J. at 356-57. We are satisfied the PCR court denied defendant's claim since he failed to sustain that burden.

B.

Defendant Not Testifying at Trial

Defendant also contended trial counsel's failure to call him as a witness was a "grave constitutional error." The judge also found this contention lacked merit and determined: PCR counsel did not cite cases which supported the contention "predicated on [trial counsel] advising a defendant, even one whose credibility could not be impeached by the admission of prior convictions, not to testify;" "there [was] no proffer from the defense as to the substance of the testimony defendant would have provided;" and counsel consulted defendant regarding testifying at trial

We likewise find defendant's contention is nothing more than a "bald assertion," and fell short of establishing a prima facie claim of ineffective assistance. See Cummings, 321 N.J. Super. at 154. Having reviewed the record, we are satisfied defendant's decision not to testify after consultation with counsel and colloquy with the trial judge was ultimately his choice. The fact defendant voluntarily chose not to testify and was found guilty is not

determinative of counsel's advice regarding the potential consequences of testifying constituted ineffective assistance.

Even assuming counsel was ineffective in his advice to defendant regarding defendant's decision not to testify, there is no basis to conclude defendant was prejudiced under Strickland's second prong. Had defendant had testified, there is no reasonable probability defendant's testimony contradicting S.R. and his biological daughter's version of events would have changed the outcome.

We discern no basis to disturb the PCR judge's ruling on this issue. Our examination of defendant's claim and review of the record convinces us defendant has not established by a preponderance of evidence a prima facie case of ineffective assistance of trial counsel when he chose not to testify at his trial and, thus, there was no need for an evidentiary hearing. Nash, 212 N.J. at 526-27. There were no disputed issues of material facts regarding defendant's decision to exercise his right not to testify that prevented the PCR judge from resolving defendant's claim. See Porter, 216 N.J. at 354.

C.

Counsel's Failure to Call J.R. and H.G., III as Witnesses

We are also unpersuaded by defendant's contentions related to trial counsel's strategic decision not to call J.R. and H.G., III, son of defendant and J.R., as witnesses. Defendant contends nearly nine years ago, defense investigators obtained exculpatory statements from J.R. and H.G., III at the time they resided with defendant and the victims. In the investigation report, J.R. described S.R., as a "habitual liar" and allegedly "plot[ted] to . . . claim a doctor in a psychiatric facility had raped her." In another investigation report, H.G., III stated "he [did] not believe [S.R.'s] allegations against [defendant]."

The PCR court noted defendant failed to present an affidavit or certification setting forth the substance of the testimony to be provided by J.R. and H.G., III. The judge found defendant's contention was yet another bald assertion.

While not explicitly cited by the PCR court, the court considered the following factors "(1) the credibility of all witnesses, including the likely impeachment of the uncalled defense witnesses; (2) the interplay of the uncalled witnesses with the actual defense witnesses called; and (3) the strength of the evidence actually presented by the prosecution" as articulated in State v. L.A., 433 N.J. Super. 1, 16-17 (App. Div. 2013) (quoting McCauley-Bey v. Delo, 97

F.3d 1104, 1106 (8th Cir. 1996)) and the proffers made by trial counsel at the time of trial.

The PCR judge also concluded even if he considered the witnesses's nine-year-old statements as current sworn statements, the outcome of trial would not have been different since defendant "failed to show that trial counsel's strategic decision not to call either of these witnesses to testify at trial was objectively unreasonable." We discern from the record trial counsel made the critical decision not to call J.R. after the potential testimony was "explored at length" at trial. At the time of trial, J.R. was serving a five-year probationary sentence following a conviction for second-degree witness tampering involving S.R. We find the judge sensibly concluded "trial counsel's decision not to call J.R. as a defense witness due to her obvious bias would have been within the bounds of objective reasonableness."

The PCR judge found defendant's claim regarding H.G., III also lacked merit. The judge determined the testimony was also inadmissible because of his "obvious bias" as defendant's son. The judge therefore concluded trial counsel's strategic decision did not "possibly amount" to ineffective assistance of counsel. We find no cause to disturb the PCR judge's ruling.

D.

Failure to Investigate S.R.'s Prior Sexual Assault Allegation

Defendant claims trial counsel was ineffective in failing to obtain S.R.'s medical records to prove S.R. had made a prior false allegation of sexual assault. The PCR judge found S.R. did not "accuse anyone of sexual assault" and no report was filed. As such, the judge concluded based on the lack of an accusation and report, "trial counsel's failure to seek admission of the information in the medical records [did not] constitute ineffective assistance of counsel." Since counts fifteen through seventeen regarding S.R. were dismissed when the State declined to retry defendant on those charges, the judge found defendant suffered no prejudice. Based on the record, we are satisfied the PCR judge did not err in concluding defendant did not establish "the jury would have reached a different result on the kidnapping and related charges had the evidence regarding the alleged prior false accusation of sexual assault by S.R. been admitted into evidence."

Lastly, defendant raises twenty-nine arguments on appeal which are iterations of the arguments presented in his original and supplemental PCR petitions. We are likewise satisfied the judge addressed each of defendant's arguments in the reasoned decision.

To the extent we have not discussed them expressly, all other arguments raised by defendants lack sufficient merit to warrant discussion. 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