

RECORD IMPOUNDED

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1832-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HENRY W. GRANDERSON,
a/k/a MUHAMMAD BILAH,

Defendant-Appellant.

Submitted February 1, 2023 – Decided February 17, 2023

Before Judges Mayer and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law
Division, Hudson County, Indictment No. 14-01-0154.

Joseph E. Krakora, Public Defender, attorney for
appellant (John J. Bannan, Designated Counsel, on the
brief).

Esther Suarez, Hudson County Prosecutor, attorney for
respondent (Colleen Kristan Signorelli, Assistant
Prosecutor, on the brief).

PER CURIAM

Defendant Henry Granderson appeals from an October 21, 2021 order denying his petition for post-conviction relief (PCR). We affirm.

Defendant, a piano teacher, was convicted of sexually abusing one of his students on various dates between 2011 and 2013. The facts underlying defendant's criminal conduct and conviction are set forth in our prior opinion. State v. Granderson, No. A-3415-15 (App. Div. Jan. 25, 2018) (slip op. at 1-5).

A jury convicted defendant in September 2015 on six counts related to the sexual assault of a child. On January 29, 2016, he was sentenced to thirty-four years in prison. Defendant filed a direct appeal, and we affirmed the conviction and sentence. Ibid.

On October 1, 2020, defendant filed a PCR petition alleging ineffective assistance of counsel against his trial and appellate attorneys. Defendant asserts his trial counsel denied him the right to testify in his own defense and failed to file a motion pursuant to State v. Sands, 76 N.J. 127 (1978). He further claims his appellate counsel failed to notify him his appeal was unsuccessful, denying him the opportunity to file a petition for certification. The PCR judge conducted an evidentiary hearing on September 30, 2021.

Defendant's two trial attorneys, Genesis Peduto and Scott Finkenauer, testified.¹ At the hearing, Peduto, who practiced law for twenty-two years, explained she told defendant that his 1999 conviction for fourth-degree child abuse might be admissible if he testified at trial. According to Peduto, defendant decided not to testify because "God was going to be with him, God was going to be helping him." She testified that defendant would not have made a good witness and believed "[h]e would have been convicted faster" if he testified. Peduto advised defendant against testifying based on the strength of the State's case and the lack of any evidence to contradict the State's proofs.

According to Peduto, defendant never told her that he elected not to testify based on his prior conviction. If defendant had done so, Peduto testified she would have filed a Sands motion to determine whether defendant's 1999 conviction would be admissible at trial.

Finkenauer, who practiced law for thirty years, agreed with Peduto that defendant should not testify, but stated it was defendant's decision whether to testify. According to Finkenauer, he would have filed a Sands motion if defendant chose to testify or expressed any uncertainty whether he should

¹ Defendant's appellate counsel, John Douard from the Office of the Public Defender, did not testify because he passed away in 2020.

testify. Finkenauer told the PCR judge that it was his practice to make informal oral Sands motions rather than file formal written motions. Finkenauer did not specifically recall if he had a discussion with defendant about testifying at trial. He also believed defendant would have been unable to present credible or believable testimony to the jury.

On the other hand, defendant testified that he discussed whether to testify at trial with both attorneys. Defendant claimed his decision not to testify was based on counsels' advice that his prior conviction might be admissible at trial. According to defendant, both defense counsel were "stalwart about [him] not testifying." Defendant told the PCR judge that he wanted to testify at trial because he was innocent but did not testify because his attorneys told him not to do so.

On October 21, 2021, the PCR judge denied defendant's petition. After considering the testimony adduced during the evidentiary hearing, the judge concluded defendant failed to prove his ineffective assistance of counsel claims. The judge found the testimony of Peduto and Finkenauer credible and defendant's testimony incredible.

The judge found defendant's trial counsel would have filed a Sands motion if defendant "was adamant about testifying." However, he determined a Sands

motion was unnecessary because defendant declined to testify. The judge also concluded there were reasons other than defendant's past conviction that led trial counsel to advise defendant not to testify. The reasons included defendant's "inability to present a coherent story" and defendant's discussion of "God, planets, and irrelevant other factors in explaining his story."

Further, the judge noted defendant was advised at trial of his right to testify in his own defense, acknowledged that right, and made the ultimate decision not to testify. The PCR judge stated:

the decision whether or not to testify was made by [defendant] and the decision by him, with the reasonable strategy advice of highly experienced counsel, was a strategic one supported by reasonable professional judgment that he would not be appealing to a jury and this would negatively influence a jury's ultimate decision. Therefore, I find that [defendant] has not met his burden by a preponderance of the . . . credible evidence [] under the first [Strickland]² prong.

The PCR judge declined to find the strategy decisions by defendant's trial counsel "were outside the wide range [of] professionally competent assistance." Because defendant failed to satisfy Strickland's first prong, the judge concluded "further analysis of the second prong [under Strickland] [was] not . . . necessary."

² Strickland v. Washington, 466 U.S. 668 (1984).

Nevertheless, the PCR judge addressed the second Strickland prong. Under these facts, the judge found the decision by trial counsel not to file a Sands motion did not constitute a serious error so as to deprive defendant of a fair trial.

The PCR judge also rejected defendant's argument that his appellate counsel was ineffective because counsel failed to communicate with him. Defendant asserted that had his appellate counsel contacted him, he would have discussed the issues to be appealed and notified counsel of his intent to file a petition for certification if he did not prevail on appeal.

The judge held defendant failed to explain how appellate counsel's raising only certain issues on appeal was deficient or exactly how such a failure resulted in prejudice. The judge also found no evidence that defendant was not notified about the outcome of the appeal.

The judge further held defendant failed to demonstrate he communicated an intent to file a petition with the New Jersey Supreme Court if the appeal was denied. Additionally, the judge noted there was no certification or testimony to substantiate defendant's claim that the State's highest court would have granted certification or that the outcome of his case, if a petition had been filed and granted, would have been different.

Also, because defendant's appellate attorney died in 2020, the judge explained that counsel was unable to address the alleged appeal deficiencies. Thus, the judge held defendant did not meet his burden under Strickland to demonstrate ineffectiveness by his appellate counsel.

On appeal, defendant raises the following arguments:

POINT I

BECAUSE [DEFENDANT] RECEIVED
INEFFECTIVE ASSISTANCE OF COUNSEL, THE
PCR COURT ERRED IN DENYING
[DEFENDANT]'S PETITION FOR PCR.

(A) Legal Standards Governing Applications For Post-
Conviction Relief.

(B) Defense Counsel was Ineffective, For Among Other
Reasons, in Advising Defendant on His Right to
Testify.

(C) Defendant was Denied the Effective Assistance of
Appellate Counsel.

POINT II

THE DEFENDANT WAS DEPRIVED OF HIS
CONSTITUTIONAL RIGHT TO PRESENT A
DEFENSE.

POINT III

THE DEFENDANT IS DESERVING OF A RE-
SENTENCING UNDER TORRES.

POINT IV

THE CUMULATIVE EFFECT OF THE ERRORS COMPLAINED OF RENDERED THE TRIAL UNFAIR.

Where the court conducts an evidentiary hearing on a defendant's PCR petition, our review "is necessarily deferential to [the] PCR court's factual findings based on its review of live witness testimony." State v. Nash, 212 N.J. 518, 540 (2013). We "will uphold the PCR court's findings that are supported by sufficient credible evidence in the record." State v. Pierre, 223 N.J. 560, 576 (2015) (quoting Nash, 212 N.J. at 540).

We first consider defendant's argument that his trial and appellate counsel were ineffective. To establish an ineffective assistance of counsel claim, a defendant must satisfy the two-part test under Strickland v. Washington, 466 U.S. 668, 687 (1984), adopted by New Jersey in State v. Fritz, 105 N.J. 42, 58 (1987).

First, a defendant must show "counsel's performance was deficient," such that counsel's performance falls below an objective standard of "reasonableness under prevailing professional norms." Strickland, 466 U.S. at 687-88. A court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. To overcome this

presumption, the defendant must demonstrate "counsel's actions did not equate to 'sound trial strategy.'" State v. Echols, 199 N.J. 344, 358 (2009) (quoting Strickland, 466 U.S. at 689); see also State v. Cooper, 410 N.J. Super. 43, 57 (App. Div. 2009) ("Decisions as to trial strategy or tactics are virtually unassailable on ineffective assistance of counsel grounds.").

Under the second Strickland prong, a defendant must demonstrate that deficiencies in counsel's performance prejudiced the right to a fair trial. Strickland, 466 U.S. at 687; Fritz, 105 N.J. at 58. "Prejudice is not to be presumed. . . . The defendant must 'affirmatively prove prejudice.'" State v. Gideon, 244 N.J. 538, 551 (2021) (citations omitted) (quoting Strickland, 466 U.S. at 693). Failure to satisfy either prong of Strickland defeats a claim of ineffectiveness and requires the denial of a PCR petition. Strickland, 466 U.S. at 700.

Defendant claims his trial counsel were ineffective by insisting he not testify at trial. A criminal defendant has a constitutional right to testify on his own behalf and "[t]he decision whether to testify rests with the defendant." State v. Bey, 161 N.J. 233, 269 (1999) (citing State v. Savage, 120 N.J. 594, 626-28 (1990)). Counsel must inform the defendant of the right to testify and "may not merely rely on their own trial strategy." Id. at 269-70. A defendant's decision

whether to testify is an "important strategic or tactical decision" for a defendant to make with the advice of counsel. State v. Coon, 314 N.J. Super. 426, 435 (App. Div. 1998).

Here, based on the credible testimony provided by defense counsel during the evidentiary hearing, the PCR judge found counsel informed defendant of the right to testify at trial. Additionally, at the time of trial, the trial judge confirmed that defendant understood his right to testify and expressly waived that right.

We are satisfied the record supports the PCR judge's factual findings that defense counsel provided appropriate and professional advice regarding whether defendant should testify at trial. Defendant's trial attorneys explained their strategic reasons for counseling against defendant testifying at trial. Based on their advice, defendant made his own decision not to testify. There is no evidence on this record that a decision to have defendant testify at trial would have resulted in a different outcome.

We also reject defendant's argument that his trial attorneys were ineffective in failing to file a Sands motion regarding the admissibility of his prior conviction. In State v. Sands, the New Jersey Supreme Court held:

[a] trial judge shall admit evidence of criminal convictions to affect credibility of a criminal defendant unless in his discretion he finds that its probative force because of its remoteness, giving due consideration to

relevant circumstances such as the nature of the crime, and intervening incarcerations and convictions, is substantially outweighed so that its admission will create undue prejudice.

[76 N.J. at 147.]

Where a defendant claims defense counsel was ineffective in failing to file a Sands motion, the defendant must satisfy both Strickland prongs and demonstrate the motion would have been meritorious. See State v. Goodwin, 173 N.J. 583, 597 (2002).

Based on the testimony provided by defense counsel during the evidentiary hearing, the filing of a Sands motion was unnecessary because defendant decided not to testify at trial. For the reasons stated by the PCR judge, defendant failed to establish the failure to file a Sands motion satisfied either prong under the Strickland analysis.

We also reject defendant's ineffective assistance of counsel claim as to his appellate counsel. Defendant contends he was unable to raise additional issues on appeal and timely file a petition for certification due to counsel's alleged failure to communicate.

If counsel fails to file a direct appeal upon a defendant's request, prejudice is presumed, and the court may find ineffective assistance of counsel. State v. Perkins, 449 N.J. Super. 309, 311 (App. Div. 2017).

Here, defendant failed to demonstrate that he informed his appellate counsel of issues to be included on appeal or his desire to file a petition for certification in the event he lost the appeal. Also, defendant never identified the issues he claimed should have been raised on appeal.

Additionally, defendant failed to establish that claims which could have been asserted in a petition for certification were likely to succeed before the New Jersey Supreme Court. See State v. Porter, 216 N.J. 343, 355 (2013). The issues addressed on defendant's direct appeal (i.e., admissibility of the victim's statement to police and the imposition of an excessive sentence) were not particularly novel to support the granting of a petition for certification. See R. 2:12-4 (identifying the grounds for granting certification).

For these reasons, the judge properly concluded defendant failed to satisfy his burden of demonstrating ineffective assistance of appellate counsel under Strickland.

We next consider and reject defendant's claim that he was deprived of his constitutional right to present a defense. In asserting this claim, defendant contends his trial counsel failed to "conduct a proper investigation" because they did not interview all relevant trial witnesses, including him, and his testimony would have proved his innocence.

A defendant is guaranteed under the Sixth Amendment the effective assistance of legal counsel in his defense. Strickland, 466 U.S. at 687; see also N.J. Const. art. I, ¶ 10. This guarantee provides defendants with the "meaningful opportunity to present a complete defense." State v. Garron, 177 N.J. 147, 168 (2003) (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)). "[T]he right of an accused to present witnesses in his own defense 'is a fundamental element of due process of law.'" State v. Garcia, 195 N.J. 192, 202 (2008) (quoting Taylor v. Illinois, 484 U.S. 400, 409 (1988)).

On this record, defendant waived the right to testify and, therefore, was not "denied" the right to present a defense. Nothing precluded defendant from testifying on his own behalf notwithstanding the sage advice of his trial attorneys. Also, defendant's allegations are nothing more than a bald assertion in the absence of an affidavit or certification explaining who his trial attorneys should have interviewed or what else they should have done to conduct a "proper investigation" as part of his defense.

We next consider defendant's request for resentencing under State v. Torres, 246 N.J. 246, 268-70 (2021). Defendant contends the matter should be

remanded to consider the fairness of the consecutive sentences consistent with the Court's decision in Torres.³ We reject defendant's argument on this point.

Here, defendant was sentenced in 2016, nearly five years prior to the Court's decision in Torres. Nothing in Torres created a new rule of law requiring retroactive application of that decision. Rather, Torres reemphasized the existing requirement that sentencing courts explain the overall fairness of a consecutive sentence consistent with State v. Yarbough.⁴ Id. at 252-53. Because Torres did not depart from existing law, there is no need to remand for resentencing.

Further, we reviewed the overall fairness of the consecutive sentence on defendant's direct appeal. We found no abuse of discretion in the sentencing judge's imposition of consecutive sentences. Granderson, slip op. at 11-12.

We next consider defendant's argument for a remand based on cumulative errors. We reject this argument.

³ Torres was decided on May 11, 2021. The PCR judge conducted the evidentiary hearing on September 30, 2021. Defendant could have raised the Torres issue during oral argument on his PCR application but failed to do so. Also, defendant never supplemented his written legal arguments to the PCR judge to assert a claim for resentencing under Torres.

⁴ 100 N.J. 627 (1985).

When a defendant alleges multiple errors, "the predicate for relief for cumulative error must be that the probable effect of the cumulative error was to render the underlying trial unfair." State v. Wakefield, 190 N.J. 397, 538 (2007). Even where a defendant alleges multiple errors, "the theory of cumulative error will still not apply where no error was prejudicial and the trial was fair." State v. Weaver, 219 N.J. 131, 155 (2014).

Because we are satisfied that defendant failed to demonstrate any errors by his trial and appellate counsel, there was no cumulative effect denying defendant's right to a fair trial.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION