

RECORD IMPOUNDED

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1866-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SHAWN CUSTIS,

Defendant-Appellant.

Submitted March 20, 2023 – Decided March 28, 2023

Before Judges Haas and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 14-01-0204.

Joseph E. Krakora, Public Defender, attorney for appellant (Steven M. Gilson, Designated Counsel, on the brief).

Theodore N. Stephens II, Acting Essex County Prosecutor, attorney for respondent (Frank J. Ducoat, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the briefs).

Appellant filed a supplemental pro se brief.

PER CURIAM

Defendant appeals from the February 7, 2022 Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

Following a lengthy jury trial, defendant was convicted of first-degree robbery, second-degree aggravated assault, second-degree burglary and related offenses charged in a 2014 indictment. He was sentenced in 2016 to an aggregate extended term of life imprisonment, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, with additional consecutive and concurrent terms. We affirmed his convictions and sentence in an unpublished opinion, State v. Custis, No. A-5132-15 (App. Div. Dec. 21, 2018) (slip op. at 3),¹ and the Supreme Court denied certification, State v. Custis, 238 N.J. 428 (2019).

In our decision, we summarized the facts underlying the convictions as follows:

The offenses were committed in the course of a home invasion, in which the perpetrator broke into the victim's residence during the day when she was at home with her preschool-aged daughter and infant son. The invasion and the brutal physical attack upon the victim were recorded on "nanny-cam" equipment at the residence. A portion of that video was broadcast on

¹ We "direct[ed] the trial court to amend the judgment to merge the aggravated assault conviction into the robbery conviction." Custis, slip op. at 3.

local television stations, prompting women who personally knew defendant to come forward and identify him as the attacker shown on the video.

Defendant was thereafter arrested when leaving his girlfriend's New York City apartment building. A search of those premises uncovered evidence tying him to the home invasion and robbery. This prosecution ensued, resulting in the jury's guilty verdict.

[Custis, slip op. at 1.]

In the appeal, we considered but rejected the following challenges:

(1) the trial court should have suppressed the items seized from his girlfriend's apartment without valid consent to perform a search of the premises; (2) the identifications of the four women based on the nanny-cam video footage were unreliable and inadmissible; (3) the jury received inadequate instructions on identification; (4) the victim's ultimate identification of him was tainted and improperly admitted; (5) two prosecution witnesses gratuitously and prejudicially referred to their fear of defendant; [and] (6) the court unfairly allowed a government agent to provide opinion testimony about a footwear match

[Id. at 2-3.]

In his timely pro se PCR petition, among other things, defendant argued his trial attorney was ineffective for not "object[ing] to the introduction of the video evidence" from the nanny-cam "as it was not independently authenticated prior to admission at trial." Following oral argument conducted on February 4, 2022, the PCR judge denied defendant's petition in an order entered on February

7, 2022. In an accompanying written opinion, the judge applied the governing legal principles and concluded defendant failed to show that either counsel's performance fell below the objective standard of reasonableness set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 49-58 (1987), or that the outcome would have been different without the purported deficient performance as required under the second prong of the Strickland/Fritz test. Specifically, the judge found "[t]he video was properly authenticated at trial by the [v]ictim." Thus, the judge concluded "an evidentiary hearing was not necessary because [defendant] did not establish a prima facie claim" of ineffective assistance of counsel (IAC).

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

THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF TRIAL COUNSEL'S INEFFECTIVENESS FOR NOT OBJECTING TO THE ADMISSION OF THE UNAUTHENTICATED NANNY-CAM DEPICTING THE PERPETRATOR'S HOME INVASION.

In a hand-written pro se supplemental brief, defendant makes the following arguments:

POINT I

THE POLICE DID NOT HAVE CON[S]ENT TO SEARCH.

POINT II

THE FOUR WOMEN['S] UNRELIABLE IDENTIFICATIONS OF DEFENDANT WERE IMPROPER AND HIGHLY PREJUDICIAL, FURTHER, AN IDENTIFICATION INSTRUCTION WAS NECESSARY . . . IN ORDER FOR THE JURY TO CRITICALLY EVALUATE THE RELIABILITY OR LACK THEREOF.

POINT III

THE TRIAL COURT ERRED IN ADMITTING THE VICTIM[']S IN[-]COURT IDENTIFICATION "WITHOUT" A HEARING ON WHETHER THE VICTIM'S IN-COURT IDENTIFICATION HAD BEEN TAINTED BY YEARS OF PROSECUTION OF DEFENDANT AND COURT PROCEEDINGS.

POINT IV

THE TESTIMONY BY TWO WITNESS[ES] THAT THEY W[ERE] AFRAID OF THE DEFENDANT WAS INADMISSIBLE, UNDULY PREJUDICIAL CHARACTER EVIDENCE.

POINT V

THE TESTIMONY BY A FOOTWEAR EXPERT REGARDED AN INAPPROPRIATE SUBJECT OF EXPERT OPINION TESTIMONY.

POINT VI

EVEN IF ANY[]ONE OF THE COMPLAINED[-]OF
ERRORS WOULD BE INSUFFICIENT TO
WARRANT REVERSAL, THE [CUMULATIVE]
EFFECT OF THESE ERRORS WAS TO DENY
DEFENDANT DUE PROCESS AND A FAIR TRIAL.

We first address the point raised in defendant's counseled brief. "[W]e review under the abuse of discretion standard the PCR court's determination to proceed without an evidentiary hearing." State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013). However, "it is within our authority 'to conduct a de novo review of both the factual findings and legal conclusions of the PCR court'" where, as here, no evidentiary hearing was conducted. State v. Reevey, 417 N.J. Super. 134, 146-47 (App. Div. 2010) (quoting State v. Harris, 181 N.J. 391, 421 (2004)).

The mere raising of a PCR claim does not entitle a defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). Rather, "view[ing] the facts in the light most favorable to a defendant," State v. Preciose, 129 N.J. 451, 463 (1992), PCR judges should grant evidentiary hearings in their discretion only if the defendant has presented a prima facie claim of IAC, material issues of disputed fact lie outside the record, and resolution of those issues necessitates a hearing. R. 3:22-10(b); State v. Porter, 216 N.J. 343, 355 (2013); State v. Marshall, 148 N.J. 89, 158 (1997).

To establish a prima facie IAC claim, a defendant must demonstrate "by a preponderance of the credible evidence," State v. Echols, 199 N.J. 344, 357 (2009), that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense, Strickland, 466 U.S. at 687; Fritz, 105 N.J. at 58. When reviewing IAC claims, "[j]udicial scrutiny of counsel's performance must be highly deferential," and courts "must indulge a strong presumption" that counsel's performance was reasonable. Strickland, 466 U.S. at 689.

If the court finds error on counsel's part, "[t]he 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). A defendant must establish both prongs of the Strickland/Fritz test to obtain a reversal of the challenged conviction. Strickland, 466 U.S. at 697; Fritz, 105 N.J. at 58. However, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which . . . will often be so, that course should be followed." Strickland, 466 U.S. at 697.

Defendant argues his attorney was ineffective for failing to object to the introduction of the nanny-cam video depicting the home invasion without proper authentication. "[A] videotape containing relevant evidence is 'generally

admissible'" provided that it is properly authenticated. State v. Loftin, 287 N.J. Super. 76, 98 (App. Div. 1996) (quoting State v. Wilson, 135 N.J. 4, 16-17 (1994)). "Authentication of a videotape is much like that of a photograph, that is, testimony must establish that the videotape is an accurate reproduction of that which it purports to represent and the reproduction is of the scene at the time the incident took place." Ibid.

Defendant is correct that his attorney did not object to the introduction of the nanny-cam video, which was admitted into evidence. Instead, defense counsel used the video to augment a viable, albeit unsuccessful, misidentification defense. Nonetheless, evaluating defendant's claim under the prejudice prong of the Strickland/Fritz test, we are satisfied that any objection to the introduction of the video on authentication grounds would have been futile and would not have affected the outcome of defendant's trial.

Our de novo review reveals that although the video was not played during the victim's testimony, the victim identified the video, identified photographs taken from the video, and testified that she had watched the video with the prosecutor before the trial. Therefore, an objection to the video on authentication grounds would have led the prosecutor to ask the victim additional questions to support the claim that the video was an accurate

depiction "of the scene at the time the incident took place." Loftin, 287 N.J. Super. at 98. Indeed, there is no basis in the record to conclude that the victim's responses would not have sufficed to authenticate the video had there been an objection to its admissibility. In any event, even without the video, the seizure of defendant's pants at the New York apartment stained with the victim's blood constituted compelling evidence of defendant's guilt. Therefore, defendant has failed to establish a prima facie IAC claim to warrant PCR or an evidentiary hearing.

Turning to defendant's pro se claims, they are barred by Rule 3:22-5. 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." Because a PCR petition is "neither a substitute for direct appeal nor an opportunity to relitigate cases already decided on the merits," Preciose, 129 N.J. at 459 (first citing R. 3:22-3; and then citing R. 3:22-5), this procedural bar applies "if the issue raised is identical or substantially equivalent to that adjudicated previously on direct appeal," State v. Marshall (Marshall IV), 173 N.J. 343, 351 (2002) (quoting State v. Marshall (Marshall III), 148 N.J. 89, 150 (1997)).

Defendant's pro se claims are identical to those raised in his direct appeal. Because the claims have already been thoroughly reviewed and rejected, they are procedurally barred. See Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 3:22-3 (2023) ("It is . . . clear that an issue considered on direct appeal cannot thereafter be reconsidered by way of a post-conviction application.").

Affirmed.

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



CLERK OF THE APPELLATE DIVISION