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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1878-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LUIS MELENDEZ, a/k/a
ARTURO MELENDZ, and
PITO MELENDEZ,

Defendant-Appellant.

Submitted March 15, 2023 – Decided April 12, 2023

Before Judges Mayer and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law
Division, Hudson County, Indictment No. 11-02-0332.

Joseph E. Krakora, Public Defender, attorney for
appellant (Andrew R. Burroughs, Designated Counsel,
on the brief).

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

PER CURIAM

Defendant Luis Melendez appeals from a November 3, 2021 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

The facts leading to defendant's conviction trial are set forth in State v. Melendez, 454 N.J. Super. 445 (App. Div. 2018). We affirmed defendant's convictions for multiple drug and other offenses but reversed and remanded for retrial on the second-degree unlawful possession of a weapon conviction. The New Jersey Supreme Court affirmed our decision. State v. Melendez, 240 N.J. 268 (2020).

Defendant timely filed a pro se PCR petition and his PCR counsel supplemented defendant's submissions. The PCR judge denied defendant's petition for the reasons stated in her October 19, 2021 written decision.

Regarding defendant's claim that his trial counsel was ineffective in failing to provide complete discovery, the judge found he failed to "point to which pieces of discovery . . . he did not receive from trial counsel." Responding to defendant's claim that "he felt ill prepared for his defense at trial," the judge concluded defendant did "not state exactly which discovery material would have

helped his defense nor how that material would have affected the outcome of his trial . . . under Strickland¹ or Cronic."²

The PCR judge also rejected defendant's claim that his trial attorney deprived him of the right to testify in his own defense. Defendant contended that his trial attorney failed to prepare him to testify and therefore defendant could not make an informed decision whether to take the stand at trial. As the judge explained, if defendant chose to testify "to profess his innocence, trial counsel would have opened the door, on cross-examination, to [defendant]'s extensive criminal history."

The judge further found defendant failed to "meet his burden under the prejudice prong of Strickland" because "the State presented sufficient evidence to prove his guilt beyond a reasonable doubt." The judge noted the police found prescription pill bottles with defendant's name and a set of handcuffs engraved with defendant's former girlfriend's name in the bedroom where the drugs were found.

The judge also rejected defendant's ineffective assistance of counsel claim based on his trial attorney's failure to interview his mother as a witness. The

¹ Strickland v. Washington, 466 U.S. 668 (1984).

² United States v. Cronic, 466 U.S. 648 (1984).

judge accepted that defendant's mother would have testified that no one occupied the bedroom where the drugs were found and she did not know who owned the drugs. Nevertheless, the judge explained "the State conclusively established that [defendant] possessed the seized evidence in the apartment" based on other evidence linking defendant to the back bedroom. Because the State only needed to show that defendant "exercise[d] dominion and control over said evidence to have been in possession" of the seized items, the judge found the mother's testimony would not have altered the outcome of the trial.

Further, the judge rejected defendant's claim that his trial counsel was ineffective in failing to file various motions at defendant's request, resulting in defendant filing the motions pro se. The judge found defendant failed to "indicate which motions he requested and how the failure to file them affected the outcome of his trial."

The judge also rejected defendant's claim that his trial counsel was ineffective in failing to challenge: the validity of the search warrant during the Franks³ hearing; the photographic identification of defendant by a confidential informant; and the chain of custody of the evidence. The judge noted defendant

³ Franks v. Delaware, 438 U.S. 154 (1978).

failed to raise any specific allegations supporting his ineffective assistance of counsel claims regarding these issues.

Additionally, the judge rejected defendant's claim that his appellate counsel was ineffective in failing to raise certain issues on direct appeal. The judge found "appellate counsel cannot be considered ineffective for failing to raise all issues on direct appeal, particularly ones that lack merit and thus, do not constitute reversible error."

In summarizing the reasons for rejecting defendant's PCR petition, the judge wrote:

[Defendant]'s PCR [b]rief and [c]ertification devote[d] many pages assessing the philanthropy and effect of an ineffective assistance of counsel claim, without providing any underlying facts that trial counsel or appellate counsel were in fact ineffective. [Defendant]'s allegations disregard the burden under [Rule] 3:22 and Strickland-Cronic and as a result, are unfounded. For these same reasons, it cannot be said that [defendant]'s trial was fundamentally unfair.

The judge then addressed defendant's claim that the State's failure to disclose favorable, material evidence constituted a Brady⁴ violation. Defendant asserted the State withheld information obtained during an interview between the police and his mother regarding the drugs discovered in a back bedroom.

⁴ Brady v. Maryland, 373 U.S. 83 (1963).

During this discussion, defendant's mother told police that her son did not live in the apartment and she had no knowledge regarding the drugs found in the bedroom of her apartment.

The judge found defendant was unable to meet his burden under Brady. First, she noted defense counsel was told about the interview between the police and defendant's mother. Additionally, the judge stated the mother's lack of knowledge regarding the drugs found in the bedroom did not exculpate defendant. Further, the judge explained the interview failed to constitute material evidence because the State established defendant constructively possessed the drugs as a result of finding other items linked to defendant in the back bedroom. Lastly, the judge found "nothing said during the interview could have impeached the officers who testified as to the seizure of the evidence."

Regarding the admission of defendant's answer in his civil forfeiture case, in which he admitted ownership of money found in the back bedroom, the judge found the claim was "barred according to R[ule] 3:22-5." Additionally, she observed that the New Jersey Supreme Court decided that issue on the merits in Melendez, 240 N.J. at 285, and "considered its admission as harmless error" in light of the record as a whole. The PCR judge concluded defendant could not "re-litigate a matter already adjudicated on the merits."

Finally, in denying the PCR petition, the judge found defendant merely "raise[d] 'bald assertions' regarding all of his claims." Because defendant failed to establish a prima facie case in support of PCR relief, the judge concluded he was not entitled to an evidentiary hearing.

On appeal, defendant raises the following arguments:

POINT I

AS DEFENDANT'S DISCOVERY RIGHTS WERE VIOLATED, HE DID NOT RECEIVE A FAIR TRIAL.

POINT II

AS DEFENDANT HAD SHOWN THAT HE RECEIVED INEFFECTIVE OF ASSISTANCE OF COUNSEL, THE PCR COURT ERRED BY DENYING DEFENDANT'S PCR PETITION.

1. Trial counsel was ineffective by failing to call Emerita Melendez as an exculpatory witness.
2. Trial counsel was ineffective by failing to allow defendant to testify on his own behalf.
3. Trial counsel failed to consider defendant's mental state as to his ability to aid his defense.
4. Trial counsel's cumulative errors denied defendant his right to effective representation and a fair trial.

POINT III

APPELLATE COUNSEL'S FAILURE TO RAISE CERTAIN COGNIZABLE CLAIMS ON DIRECT

APPEAL DENIED DEFENDANT EFFECTIVE
REPRESENTATION.

POINT [IV]

AS THERE WERE GENUINE ISSUES OF
MATERIAL FACT IN DISPUTE, THE TRIAL
COURT ERRED WHEN IT DENIED DEFENDANT'S
PCR PETITION WITHOUT AN EVIDENTIARY
HEARING.

We are not persuaded by these arguments.

We first consider defendant's Brady violation argument. As a preliminary matter, this issue could, and should, have been raised on direct appeal and therefore was procedurally barred under Rule 3:22-4.

Even if the issue was not procedurally barred, defendant's due process argument based on a Brady violation fails on the merits. The State's suppression of evidence favorable to a defendant is a violation of due process "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. Three elements must be considered when deciding whether a Brady violation has occurred: "(1) the evidence at issue must be favorable to the accused, either as exculpatory or impeachment evidence; (2) the State must have suppressed the evidence, either purposely or inadvertently; and (3) the evidence must be material to the defendant's case." State v. Brown, 236 N.J. 497, 518 (2019).

Here, the judge determined there was no Brady violation because the State disclosed the mother's interview with the police to defense counsel prior to trial. The judge also found the information provided by defendant's mother, that her son did not live in the apartment, was neither material nor exculpatory because the State proved defendant constructively possessed the drugs based on other evidence found in the back bedroom.

We next address defendant's PCR contentions in support of his ineffective assistance of counsel claims. To establish an ineffective assistance of counsel claim, a defendant must satisfy the two-part test under Strickland, 466 U.S. at 687, 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 contends that his trial counsel was ineffective in failing to call his mother to testify at trial. We reject this argument.

First, defendant failed to provide any certification or affidavit from his mother. See State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999); R. 1:6-6. Defendant proffered no sworn statement demonstrating his mother's willingness to testify or indicating the substance of her testimony.

Second, even if defendant's mother was willing to testify, her testimony would not have negated the State's other evidence linking the drugs found in the back bedroom to defendant. Moreover, the suggested testimony was not

exculpatory and would not have changed the outcome of defendant's trial based on the State's other evidence.

Nor was defense counsel ineffective in failing to encourage defendant to testify at trial. A defendant's decision to testify is an "important strategic or tactical decision to be made by a defendant with the advice of counsel." State v. Coon, 314 N.J. Super. 426, 435 (App. Div. 1998). A trial attorney's advice not to testify does not constitute ineffective assistance of counsel if such advice amounts to sound trial strategy. See State v. Keys, 331 N.J. Super. 480, 496 (Law Div. 1998), aff'd o.b., 331 N.J. Super. 429 (App. Div. 2020).

Here, defendant failed to demonstrate how his attorney's failure to encourage him to testify was deficient or how the decision against testifying resulted in prejudice. Defendant had a lengthy criminal history and served time in prison. If defendant testified, he would have been subject to extensive cross-examination regarding his criminal past.

Nor was it likely, as defendant claims, that his prior convictions would have been suppressed as too remote in time. Defendant was released on parole in 2009, committed these drug and weapons offenses in 2010, and went to trial for those crimes in 2014. The ten-year clock under N.J.R.E. 609(b)(1) for considering the remoteness of prior convictions begins from the date of the

criminal conviction or release from confinement for the conviction, whichever is later. Here, the ten-year mark from defendant's 2009 release from confinement had not lapsed when this trial began in 2014.

We next review defendant's ineffective assistance of counsel claim concerning his trial counsel's failure to address his alleged mental health issues during sentencing. We reject this argument because defendant's mental health issues were unsubstantiated, bald assertions.

Defendant offered no medical evidence of his suffering from any mental health issues in 2014. At sentencing, in responding to allegations related to defendant's mental health, the judge noted defendant was "coherent" throughout the trial. The judge explained defendant had "been in front of [him] maybe 100 times and it's just a ruse to avoid the ultimate sentence." Defendant's dissatisfaction with the outcome of his trial is insufficient to support an ineffective assistance of counsel claim. See Echols, 199 N.J. at 358.

We next consider defendant's argument that his appellate counsel was ineffective in failing to raise a Brady violation on direct appeal. We disagree.

To demonstrate ineffective assistance of appellate counsel, a defendant must show that counsel's performance was deficient and that the deficient performance resulted in prejudice. State v. Guzman, 313 N.J. Super. 363, 374

(App. Div. 1998). Appellate counsel is not required to raise meritless arguments. State v. Webster, 187 N.J. 254, 257 (2006). The failure to raise arguments lacking in merit does not constitute ineffective assistance of counsel. State v. Worlock, 117 N.J. 596, 625 (1990).


As we stated previously, defendant failed to establish a Brady violation. Absent a Brady violation, defendant is unable to demonstrate that the outcome of his appeal would have been different if the Brady issue was raised on direct appeal. Thus, defendant is unable to prove his ineffective assistance of appellate counsel claim.

Because defendant failed to demonstrate a prima facie case in support of his PCR petition, he was not entitled to an evidentiary hearing. State v. Porter, 216 N.J. 343, 354 (2013); R. 3:22-10.

To the extent we have not specifically addressed any remaining arguments, it is because we find them to be without sufficient merit to warrant discussion in a written opinion. 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