

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2298-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DARON J. SIMMS,

Defendant-Appellant.

Submitted January 24, 2023 – Decided May 25, 2023

Before Judges Summers and Geiger.

On appeal from the Superior Court of New Jersey,
Law Division, Monmouth County, Indictment No.
14-11-1987.

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

Raymond S. Santiago, Monmouth County Prosecutor,
attorney for respondent (Lisa Sarnoff Gochman,
Designated Counsel, on the brief).

PER CURIAM

Following a jury trial, defendant Daron J. Simms was found guilty of first-degree robbery. We affirmed his conviction on direct appeal. State v. Daron J. Simms, No. A-4423-16 (App. Div. Dec. 28, 2018) (slip op. at 12), certif. denied, 238 N.J. 427 (2019).

Defendant subsequently filed a post-conviction relief (PCR) petition, alleging his trial counsel failed to: (1) meet with him sufficiently to prepare a trial strategy; (2) hire a private investigator to interview the victim, V.L., for credibility, motive, and inconsistencies; and (3) investigate the police officer who interviewed V.L. and conducted the photo array. The PCR judge, who did not preside over defendant's trial, issued an order and twenty-page written decision dismissing the petition without an evidentiary hearing.

On appeal, defendant limits his challenge to his claim that trial counsel failed to hire a private investigator to interview V.L. for credibility, motive, and inconsistencies. Having reviewed the record and considering the applicable legal standards, we affirm substantially for the reasons set forth by PCR judge in his well-reasoned written decision.

I

The procedural history and trial evidence are detailed in our unpublished decision, Simms, and in the PCR judge's written decision. A brief summary of the relevant facts and proceedings will suffice here.

In July 2014, a man in a ski mask attempted to rob a pizzeria. V.L., the cashier, identified defendant as the robber because he was a regular patron of the pizzeria and recognized defendant based on his height, build, and voice. Police obtained a recording of the robbery from the shop's surveillance cameras, which was played to the jury.

Two days after the attempted robbery, V.L. took a photo with his cell phone of a man he believed was a friend of the assailant because they had often come into the pizzeria together. He then showed it to the investigating police officer, who recognized the friend.

A couple of days later, V.L. identified the assailant in photos on the Facebook pages of the assailant's friend and patrons of the pizzeria and then showed them to the police. V.L. told them he never saw defendant in the pizzeria after the robbery, despite defendant's prior frequent visits.

In a pretrial Wade hearing,¹ the trial judge determined that the State could present testimony regarding V.L.'s identification of defendant through the Facebook photos and his showing of the photos to the police. However, V.L.'s identification of defendant in a police-conducted photo array was found to be inadmissible because it was conducted without an interpreter and, thus, was unreliable.

Following trial, the jury found defendant guilty of first-degree robbery. He was sentenced to prison term of twelve years subject to the No Early Release Act, N.J.S.A. 2C:43-7.2.

II

To show ineffective assistance of counsel, defendant must meet the two-pronged test 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 (1987). "First, the defendant must show that counsel's performance was deficient." State v. Taccetta, 200 N.J. 183, 193 (2009) (quoting Fritz, 105 N.J. at 52). "Second,

¹ A Wade hearing is conducted for the purpose of determining whether an out-of-court identification was made in unduly suggestive circumstances and, if so, whether or not any ensuing in-court identification procedure would be fatally tainted thereby. State v. Henderson, 208 N.J. 208, 238 (2011); see United States v. Wade, 388 U.S. 218 (1967).

the defendant must show that the deficient performance prejudiced the defense." Ibid.

Before us, defendant argues he presented a prima facie case of ineffective assistance based on "[trial] counsel's failure to effectively communicate with [him], combined with his failure to investigate his case and interview the victim regarding inconsistent statements, and his immigration status, led to his conviction." Defendant argued before the PCR court that trial counsel should have hired a private investigator to interview V.L. so counsel could argue more effectively on the motion to bar V.L.'s identification. Applying Strickland and citing State v. Marshall, 148 N.J. 89, 158 (1997), the PCR judge properly rejected this argument as "too vague, conclusory, or speculative" to warrant an evidentiary hearing or relief.

Defendant failed to establish how more effective communication with his counsel or the hiring of an investigator would have resulted in a successful motion. His allegations were nothing more than bald assertions. See State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999) (holding a petitioner "must allege facts sufficient to demonstrate counsel's alleged substandard performance"); State v. Jones, 219 N.J. 298, 312 (2014) (holding PCR petitions must be "accompanied by an affidavit or certification by the

defendant, or by others, setting forth with particularity the facts that he wished to present").

Defendant also contends there was a lack of strategic planning between himself and trial counsel. However, he provides no specific example of a difference between their strategies. "Mere improvident strategy, bad tactics or mistake do not amount to ineffective assistance of counsel unless, taken as a whole, the trial was a mockery of justice." State v. Bonet, 132 N.J. Super. 186, 191 (App. Div. 1975) (citations omitted). Trial counsel's extensive cross-examination of V.L., and defendant's disagreement with counsel's strategy does not equate to ineffective assistance. Therefore, defendant has not met the first prong of the Strickland test. As to the second prong, defendant does not show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

Moreover, on direct appeal, we rejected defendant's attack on the credibility of V.L.'s identification. We concluded:

[T]he judge did not abuse her discretion in denying defendant the ability to question V.L. at trial regarding the existence of an alleged agreement with the State that it would assist him in getting a U-visa in consideration for his trial testimony. Given the highly

prejudicial effect of informing the jury that V.L. was an undocumented immigrant, it was appropriate for the judge to evaluate the credibility of the alleged agreement to make sure that a baseless assertion by the defense would not infect the jury's fair consideration of the evidence. As Sanchez-Medina [, 231 N.J. 452 (2018)] indicates, it is within the trial judge's province to determine if evidence of immigration status is probative and has an undue prejudicial effect.

Consequently, defendant's current argument that counsel failed to adequately question V.L.'s credibility cannot be re-litigated through the lens of a PCR claim. See R. 3:22-5 ("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 post-conviction proceeding brought pursuant to this rule or prior to the adoption thereof, or in any appeal taken from such proceedings.").


Because defendant failed to present a prima facie case of ineffective assistance of trial counsel concerning V.L.'s identification, the PCR court correctly denied his petition without an evidentiary hearing. See Marshall, 148 N.J. at 158 (citing State v. Preciose, 129 N.J. 451, 463 (1992)) (holding an evidentiary hearing for PCR is only required when the petitioner has made a prima facie showing of entitlement to such relief by demonstrating "a

reasonable likelihood that his or her claim will ultimately succeed on the merits.").

To the extent we have not addressed any arguments raised by defendant, they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION