NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2314-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ISAAC A. YOUNG,

Defendant-Appellant.

APPROVED FOR PUBLICATION

February 13, 2023

APPELLATE DIVISION

Argued December 7, 2022 – Decided February 13, 2023

Before Judges Currier, Bishop-Thompson and Puglisi.

On appeal from the Superior Court of New Jersey, Law Division, Salem County, Indictment No. 13-09-0524.

Louis M. Barbone argued the cause for appellant (Jacobs & Barbone, PA, attorneys; Justin T. Loughry, on the briefs).

Lauren Bonfiglio, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Lauren Bonfiglio, of counsel and on the brief).

The opinion of the court was delivered by

PUGLISI, J.S.C. (temporarily assigned).

Defendant Isaac A. Young appeals the Law Division's March 12, 2021 denial of his first petition for post-conviction relief (PCR) without an evidentiary hearing. Having reviewed the facts in light of the applicable law, we affirm.

I.

The detailed facts in this case are set forth in our opinion addressing defendant's direct appeal, and we incorporate them by reference. State v. Young, 448 N.J. Super. 206, 214-17 (App. Div. 2017).

We discern the following facts relevant to this appeal. Defendant was the executive director of the housing authority for the City of Salem, having been appointed by city mayor Robert Davis, who was his friend. In March 2012, defendant came into possession of documents the Division of Child Protection and Permanency (DCPP) had sent to the city police chief, regarding allegations of child abuse against Charles Washington, a city councilman and Davis's political adversary. In addition to showing the documents to others in his office, defendant gave copies to a city police officer, Sergeant Leon Daniels, to distribute.

According to Daniels, defendant summoned him to his office in June 2012 and gave him ten to twenty copies of the DCPP documents, envelopes and a sheet of stamps, and a voter registration list with certain names underlined in

red. Defendant instructed Daniels to mail the documents to the individuals indicated, and he did so.

Upon learning of the distribution, Washington called the police chief to his house and showed him the documents and envelopes, which the chief recognized as containing Daniels's handwriting. The chief reported the incident to the Salem County Prosecutor's Office (SCPO), which launched an investigation.

The SCPO obtained and executed a search warrant for the Housing Authority office. That same day, defendant appeared in the SCPO office accompanied by his attorney, waived his Miranda[1] rights and gave a sworn statement. Defendant stated that he received the DCPP documents in an anonymous mailing and made copies to show co-workers and bring to meetings. He denied mailing the documents to anyone, seeing the envelopes, or giving the documents to anyone for distribution, and specifically denied giving any copies to Daniels, saying, "No, he already had it."

Defendant went to Daniels's house later that day and asked him what he had told the SCPO. Daniels said he had told the truth and defendant should do the same, to which defendant responded he would return to the SCPO and "come clean."

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

Over a month later, defendant returned to the SCPO with a different attorney and gave a second sworn statement. Contrary to his first statement, defendant admitted he gave Daniels copies of the documents, stamps and envelopes, and the voter registration list. He said he had done so at Daniels's request, so Daniels could send them to "his fellow police officers." He also admitted to showing copies of the documents to Housing Authority employees.

On November 28, 2012, defendant was charged with fourth-degree permitting or encouraging the release of a confidential child abuse record, N.J.S.A. 9:6-8.10b; third-degree hindering apprehension by giving a false statement to law enforcement, later amended to a disorderly persons offense, N.J.S.A. 2C:29-3(b)(4); and fourth-degree false swearing by inconsistent statements, N.J.S.A. 2C:28-2(a) and (c).

Defendant testified at his first trial, at which his second attorney continued to represent him. He said he received the DCPP documents in an anonymous mailing and gave Daniels copies and envelopes at Daniels's request but did not tell Daniels to mail the documents. He attempted to explain his two prior inconsistent sworn statements, claiming that in the first statement he told detectives he had not given the documents to anyone because he did not think their question included Daniels because he was a police officer. Defendant said he gave the second statement to "clarify things" from his first statement.

Defense counsel first raised a retraction defense after the close of evidence during the charge conference. Because Rule 3:12-1 requires a defendant to provide the State notice of a retraction defense no later than seven days before the initial case disposition conference, the judge declared a mistrial.

Defendant did not testify during the second trial, and his testimony from the first trial was permitted for the limited purpose of impeachment. Both counsel consented to a "false in one, false in all" jury charge and the judge read that model jury instruction. The jury returned a guilty verdict on all charges, and defendant was sentenced to concurrent terms of three years' probation on each count.

We affirmed the convictions for hindering and false swearing but vacated the conviction for release of a child abuse record. Young, 448 N.J. Super. at 228. In July 2018, defendant was resentenced on the remaining two convictions to concurrent terms of three years' probation, which he had already completed.

Defendant filed a petition for PCR alleging ineffective assistance of both his counsel. He asserted counsels' advice regarding his first and second interviews demonstrated deficient professional performance that caused him extreme prejudice in the trial. He further claimed trial counsel's failure to object to certain prosecutorial requests and evidence led to adverse jury instructions

and resulted in prejudice. Defendant presented an expert report to support his contentions.

After hearing oral argument, the PCR judge denied the petition in a comprehensive and well-reasoned decision. This appeal followed.

Defendant presents the following issues for our consideration:

> POINT I
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> INSISTING THAT THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ARISES NO EARLIER THAN THE COMMENCEMENT OF ADVERSARY JUDICIAL PROCEEDINGS, CAN RESULT, IN A GIVEN CASE, IN INTOLERABLE UNFAIRNESS; AT MINIMUM OUR COURT IN PRACTICE SKETCHES AN EXPANDED SCOPE FOR THAT RIGHT TO COUNSEL AND EFFECTIVE ASSISTANCE OF COUNSEL IN ORDER TO AVOID UNFAIR AND INSTITUTIONALLY UNACCEPTABLE RESULTS; AND THAT APPROACH SHOULD EMBRACE THE PRESENT CASE.
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> POINT II
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> THE MOTION JUDGE ERRED IN REFUSING TO CONSIDER PETITIONER'S EXPERT'S REPORT AND DECLARING IT TO BE INADMISSIBLE OR IMMATERIAL; THE MOTION JUDGE ERRONEOUSLY DECLARED A NEW RULE THAT COURTS CONDUCTING PCR HEARINGS CANNOT ADMIT A LAWYER'S EXPERT OPINION ON THE APPROACH AND METHODS THAT COMPETENT PRACTITIONERS MUST AND DO EMPLOY IN A GIVEN TYPE OF REPRESENTATION. RELEVANT PRECEDENTS SAY OTHERWISE AND PERMIT LAWYER

EXPERT TESTIMONY ON CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

POINT III

AS PETITIONER'S EXPERT UNDERSCORES, TRIAL COUNSEL'S PERFORMANCE BOTH FOR THE ABORTED (MISTRIED) FIRST TRIAL ROUND AND THE SECOND PROCEEDING WHICH WENT TO GUILTY VERDICTS--EVINCED SERIOUS DEFICIENCIES WHICH SUBSTANTIALLY CONTRIBUTED TO HIS CONVICTION; CERTAIN OF THOSE DEFICIENCIES STANDING ALONE SUFFICED TO CAUSE PREJUDICE WITHIN THE MEANING OF STRICKLAND, AND SURELY ALL OF THE MISTAKES COLLECTIVELY SUBSTANTIALLY PREJUDICED THE DEFENSE.

We review the legal conclusions of a PCR judge de novo. State v. Harris, 181 N.J. 391, 420-21 (2004) (citing Mickens-Thomas v. Vaughn, 355 F.3d 294, 303 (3d Cir. 2004)). Additionally, where no evidentiary hearing has been held, we "may exercise de novo review over the factual inferences drawn from the documentary record by the [PCR judge]." Id. at 421 (citing Zettlemoyer v. Fulcomer, 923 F.2d 284, 291 n.5 (3d Cir. 1991)).

Applying that standard, we conclude the PCR judge correctly denied defendant's petition substantially for the reasons expressed in her thorough written decision.

II.

A defendant must prove two elements to establish a PCR claim that trial counsel was constitutionally ineffective: first, "counsel's performance was deficient[,]" that is, "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and second, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 687, 694 (1984); accord State v. Fritz, 105 N.J. 42, 52, 60-61 (1987).

Under the first prong, a defendant must demonstrate "counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. Thus, "th[e] test requires [a] defendant to identify specific acts or omissions that are outside the wide range of reasonable professional assistance." State v. Jack, 144 N.J. 240, 249 (1996) (citation and internal quotation marks omitted). "'Reasonable competence' does not require the best of attorneys, but certainly not one so ineffective as to make the idea of a fair trial meaningless." State v. Davis, 116 N.J. 341, 351 (1989). A defendant must "overcome a 'strong presumption' that counsel exercised 'reasonable professional judgment' and 'sound trial strategy' in fulfilling his responsibilities." State v. Nash, 212 N.J. 518, 542 (2013) (quoting State v. Hess, 207 N.J. 123, 147 (2011) (internal quotations omitted)).

To meet the second prong, "[a] defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. A defendant must demonstrate "how specific errors of counsel undermined the reliability of the finding of guilt." United States v. Cronic, 466 U.S. 648, 659 n.26 (1984).

"A petitioner must establish the right to [post-conviction] relief by a preponderance of the credible evidence." State v. Preciose, 129 N.J. 451, 459 (1992) (citing State v. Mitchell, 126 N.J. 565, 579 (1992)). To sustain that burden, the petitioner must set forth specific facts that "provide the court with an adequate basis on which to rest its decision." Mitchell, 126 N.J. at 579.

PCR courts are not required to conduct evidentiary hearings unless the defendant establishes a prima facie case and "there are material issues of disputed fact that cannot be resolved by reference to the existing record." R. 3:22-10(b). "To establish such a prima facie case, the defendant must demonstrate a reasonable likelihood that his or her claim will ultimately succeed on the merits." State v. Marshall, 148 N.J. 89, 158 (1997). Bald assertions are insufficient to establish a prima facie case of ineffective assistance of counsel. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

Defendant presents an issue that has not been addressed in a published decision: whether a defendant may bring a petition for PCR based on ineffective assistance of counsel for conduct occurring prior to the defendant's being charged. Because the constitutional right to effective assistance of counsel does not attach until charge, accusation or indictment, we hold that a defendant may not do so.

The Sixth Amendment to the United States Constitution and the New Jersey Constitution both fundamentally provide that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI; see also N.J. Const. art. I, ¶ 10. While the text of the federal and state constitutions is nearly identical, our courts have held that in certain contexts, our "'State Constitution affords greater protection of the right to counsel than is provided under the federal constitution.'" State v. Quixal, 431 N.J. Super. 502, 508 (App. Div. 2013) (quoting State v. Sanchez, 129 N.J. 261, 274 (1992)).

Even so, under both federal and state constitutions, the right to counsel attaches at the "initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Kirby v. Illinois, 406 U.S. 682, 689 (1972); accord State v. Tucker, 137 N.J. 259, 290 (1994); see also Davis v. United States, 512 U.S. 452,

456-57 (1994) (noting that "before proceedings are initiated a suspect in a criminal investigation has no constitutional right to the assistance of counsel"). As the PCR judge noted, our Supreme Court has also "adopted verbatim" the federal standard for right of effective assistance of counsel.

"As the Supreme Court has explained, that interpretation 'is consistent not only with the literal language of the Amendment, which requires the existence of both a criminal [prosecution] and an accused,' but also with the 'core purpose' of the right to counsel, which is 'to assure aid at trial.'" State v. A.O., 198 N.J. 69, 81-82 (2009) (alteration in original) (quoting United States v. Gouveia, 467 U.S. 180, 188 (1984)).

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the '**criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable.
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> [Kirby, 406 U.S. at 689-90.]

Here, counsel points to A.O. in support of his argument that we should expand the constitutional right to effective assistance of counsel to the pre-

indictment stage. The PCR judge rejected defendant's reliance on A.O. as misplaced, and we agree. In A.O., the defendant was suspected of sexually assaulting a minor. Without counsel present, he met with detectives and agreed to take a polygraph examination, which he failed. A.O., 198 N.J. at 73-74. Prior to taking the examination, the defendant signed a stipulation agreeing the polygraph examiner was an expert, consenting to the admissibility of the expert testimony, waiving the right to call a rebuttal witness, and agreeing to the admissibility of the examination results. Id. at 73. Because there was no physical evidence, the State's case rested on testimony and relied heavily on the polygraph examination, which resulted in conviction. Id. at 74.

In addressing the admissibility of the polygraph examination, the Court noted the defendant had not been formally charged at the time he signed the stipulation, and therefore "the Sixth Amendment does not afford him a basis for relief." Id. at 82 (citing State v. P.Z., 152 N.J. 86, 110 (1997)). Rather, given the general inadmissibility of a polygraph examination, the Court found "[t]he sweeping waiver of trial rights . . . without the assistance of a lawyer, compromise[d] the integrity of the criminal trial process." A.O., 198 N.J. at 74.

Although a defendant may volunteer to take a polygraph examination, "its admissibility is a distinctly separate question" in which "[d]efendants typically rely on counsel to object to otherwise inadmissible evidence, attack a witness's

expertise, and decide the most effective way to challenge evidence before a jury." Id. at 89 (internal citation omitted). Because the stipulation "operated to eliminate counsel's role," the Court in its "supervisory authority" barred the introduction of polygraph evidence based on an uncounseled stipulation. Id. at 89-90.

While our Supreme Court afforded relief, it expressly rejected doing so under the protections of the Sixth Amendment. Here, defendant's voluntary statements did not impact or waive any trial rights. Because the Sixth Amendment right to counsel had not yet attached, defendant cannot raise a PCR claim based on ineffective assistance of counsel for representation during the investigation.

Accordingly, we decline to address the substance of defendant's claims, but note that the PCR judge determined defendant failed to demonstrate that counsel's performance was constitutionally deficient. She found counsel "could have concluded that by giving a truthful statement, defendant had a better chance of avoiding charges in the first place, receiving more lenient treatment if charges were filed, and having a better chance of acquittal if the case proceeded to trial."

The PCR judge further determined defendant failed to demonstrate counsel's ineffectiveness caused him prejudice. She noted that even without giving the second statement, defendant still could have been charged with

hindering his own apprehension and false swearing based on his first statement. We see no reason to disturb the judge's decision.

Defendant next argues error in the PCR judge's decision declining to consider his expert report. "If . . . specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." N.J.R.E. 702. The specialized knowledge "must relate to a relevant subject beyond the ken of the fact trier." State v. Moore, 273 N.J. Super. 118, 127 (App. Div. 1994) (citing State v. Kelly, 97 N.J. 178, 208 (1984)). In addition, "[t]he subject matter must be so esoteric that it is beyond common judgment and experience so the fact trier cannot form a valid judgment as to the fact in issue without such [proposed] testimony." Ibid. (citing Butler v. Acme Markets, Inc., 89 N.J. 270, 283 (1982)).

In analyzing claims of ineffective assistance of counsel, "it is not an expert's opinion that is relevant but the reasoning of the attorney." Moore, 273 N.J. Super. at 128 (citing Preciose, 129 N.J. at 462). Because expert testimony is based on the need to assist an average juror, it is generally not admissible as to questions of law decided by the court. See Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 1 on N.J.R.E. 702 (2022). A PCR judge is not required to consider expert testimony, as we found "it calumnious to suggest

that a trial court must even consider such an expert's opinion on the issue of ineffective assistance of appellate counsel." Moore, 273 N.J. Super. at 127-28.

Here, defendant's expert report opined on the decisions made by pre-charge and trial counsel, how their decisions deviated from the professional standard of care, and why the Strickland prongs have been met. The PCR judge determined that, for the reasons articulated in Moore, the proffered expert testimony was inadmissible because the Strickland factors are mixed questions of law and fact, and "questions of law are for the court alone and are not appropriate objects of expert testimony."

Defendant points to State v. Ferguson, in which the PCR judge considered testimony from the defendant's expert. 255 N.J. Super. 530 (App. Div. 1992). In that case, the defendant alleged ineffective assistance of counsel during his juvenile waiver hearing, and the expert testified about "the extent of available correctional facilities and programs for juveniles convicted of murder," and explained how waiver hearings are typically conducted, pointing out counsel's failure to show defendant's amenability to rehabilitation. Id. at 541-42.

Defendant also cites a federal case, Marshall v. Hendricks, in which the district court considered expert testimony in a petition for habeas corpus. 313 F. Supp. 2d 423 (D.N.J. 2004). There, the expert testified about trial counsel's

performance during the penalty phase, which resulted in defendant's death sentence. Id. at 429-30, 447.

While expert testimony is generally inadmissible on a question of law decided by the court, a trial judge may in sound discretion admit such testimony. We recognize a PCR judge may want to hear expert testimony about a juvenile waiver hearing, which is conducted in the Family Part; likewise, a federal judge may find it beneficial to hear expert testimony about a state death penalty hearing. Here, the PCR judge determined that defendant's expert report would not assist her in assessing the claims of ineffective assistance of counsel, and she did not abuse her discretion in declining to consider it.

Defendant further argues trial counsel's deficient performance during both trials "substantially contributed to his conviction." Defendant asserts counsel erred in his first trial by failing to timely notify the prosecution of his retraction defense, resulting in a mistrial which provided the State with a "dry run preview of the defense" and a "third statement," which was used to impeach him during the second trial. He argues counsel erred in the second trial by consenting to the "false in one, false in all" jury instruction, to which he was "plainly and uniquely vulnerable" because of his prior conflicting statements.

We affirmed the propriety of the jury charge on direct appeal. Young, 448 N.J. Super. at 228. The PCR judge found this claim procedurally barred as

having been adjudicated on the merits but went on to substantively address it, finding it to be objectively reasonable trial strategy. As the PCR judge noted, the charge was applicable to both sides and defense counsel also benefitted from it, given his strategy to attack Daniels's credibility. She further found there was no prejudice or harm caused by defense counsel's agreeing to the charge, because even if he had not done so, the trial court would have overruled the objection.

Because the PCR judge determined defendant had not established a prima facie case of ineffective assistance of counsel, she found defendant was not entitled to an evidentiary hearing. See Preciose, 129 N.J. at 462. We find no reason to disturb the court's decision.

To the extent that we have not specifically addressed any remaining arguments, it is because we consider them sufficiently without merit to require 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