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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2523-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DASHAND D. CHASE,
a/k/a DESHAND CHASE,

Defendant-Appellant.

Submitted May 17, 2023 – Decided June 21, 2023

Before Judges Vernoia and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment Nos. 10-01-0139, 11-03-0681 and 12-03-0734.

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

William E. Reynolds, Atlantic County Prosecutor, attorney for respondent (Mario C. Formica, Deputy First Assistant Prosecutor, of counsel and on the brief; Linda A. Shashoua, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Dashand D. Chase appeals from a May 6, 2020 Law Division order, entered following our remand, which denied his post-conviction relief (PCR) petition without an evidentiary hearing. Because we are satisfied the court complied with our remand instructions and correctly denied defendant's petition, we affirm.

I.

We briefly summarize the relevant facts, which are provided in greater detail in our unpublished opinion affirming defendant's conviction and, initially, his sentence. See State v. Chase (Chase I), No. A-1209-12 (App. Div. Aug. 14, 2015) (slip op. at 2-7). We then address the procedural history related to defendant's PCR petition.

On August 4, 2009, Barbara Parks arrived at Bally's Casino in Atlantic City to attend a training seminar. She got out of her car, holding her briefcase, pocketbook, and cellphone, and was immediately approached by two men, who she identified at trial as defendant and Tony L. Burnham, each wearing a black ski mask and a dark-colored hooded sweatshirt. Parks got back in her car and screamed while the men told her to "shut the fuck up." According to Parks, defendant pointed a gun in her face and Burnham punched her in the jaw and

took her briefcase, cellphone, and pocketbook. Both Chase and Burnham then fled in a gray Honda while Parks ran through the garage screaming and covered in blood.

Defendant was charged in three separate indictments with first and second-degree robbery, witness tampering, and related charges. Except for a single charge of first-degree conspiracy to commit armed robbery, on which the jury hung, defendant was convicted on all the remaining counts in the indictments.

At trial, Parks testified she was robbed by two men in hooded sweatshirts and ski masks: a taller man with a dark complexion armed with a handgun; and a shorter man with a lighter complexion who punched her in the face. On cross-examination, Burnham's counsel introduced part of a recorded statement Parks provided to Detective Edward Riegel approximately three hours after the robbery in which she described the two robbers as having "similar complexion[s]." Parks otherwise testified consistent with her statement to Detective Riegel.

The State also introduced into evidence a post-incident report by Richard Caswell, a security operations specialist at Bally's. According to that report, and contrary to her testimony and statement to Detective Riegel, Parks informed

Caswell she "had been punched in the mouth and a gun put to her head by the same individual[.]" More specifically, Caswell's report recounted Parks stating, "one of the males punched her in the face, leaving her mouth bloody and put a gun to her head as the other male reached into the vehicle and took her belongings from the vehicle."

In addition, Quinn Boyd, who was incarcerated with defendant at the Atlantic County jail, testified he committed the robbery and defendant was uninvolved. Boyd had initially sent letters to the prosecutor's office exonerating defendant, but later provided taped statements in which he asserted defendant bribed him to write the letters and threatened to kill Boyd's mother if he did not comply. In his recorded statement, which he recanted at trial, Boyd claimed that defendant admitted to having committed the robbery and "told [Boyd] he punched the woman in the face."

In closing, Burnham's counsel contended Burnham could not have been the unarmed assailant, as theorized by the State, because he and defendant did not have similar complexions. Defendant's counsel similarly argued Parks's post-incident statements and testimony were insufficient to identify him as either of the assailants. On this point, defendant asserted Parks inconsistently testified with respect to the assailants' skin tones and her post-incident

statements did not describe either assailant as having tattoos or facial hair similar to defendant's, both of which he maintained would have been visible to Parks despite the assailants being hooded and masked. Additionally, defendant's counsel observed that although defendant's DNA was discovered on a mask and one of the sweatshirts, it was not found on the weapon, thereby undermining the State's theory he was the armed assailant.

The trial judge, who was also the PCR judge, instructed the jury on the following charges: conspiracy to commit armed robbery; first-degree robbery; second-degree robbery; possession of an imitation firearm; witness tampering; and bribery of a witness. In doing so, he instructed the jury to consider each offense and each defendant independently. To distinguish first and second-degree robbery, which he charged separately, the judge provided the following instruction consistent with Model Jury Charges (Criminal), "Robbery in the First Degree (N.J.S.A. 2C:15-1)" (rev. Sept. 10, 2012):

If you find the State has proven, beyond a reasonable doubt, that the [d]efendant committed the crime of robbery, as I defined that crime to you, but if you find the State has not proven, beyond a reasonable doubt, that the [d]efendant was armed with or used to purposely threaten immediate use of a deadly weapon or purposely engaged in conduct or gestures which would lead a reasonable person to believe that the [d]efendant possessed such a weapon at the time of the commission of the robbery, then you must find the

[d]efendant guilty of robbery in the second degree. If you find the State has proven, beyond a reasonable doubt, [d]efendant[] committed the crime of robbery and armed with a deadly weapon, as I just described that for you, then you must find the [d]efendant guilty of robbery in the first degree.

As noted, the jury convicted defendant of both first and second-degree robbery, among other offenses. After merging the second-degree robbery conviction into the first-degree conviction, the judge sentenced defendant to an aggregate sentence of fifty years imprisonment with approximately twenty-nine years of parole ineligibility. As noted, we affirmed defendant's convictions and sentence on direct appeal, Chase I, slip op. at 1, and the Supreme Court denied certification, State v. Chase, 224 N.J. 246 (2016).

Subsequently, on a joint application to reconsider defendant's sentence, the court resentenced defendant to an aggregate twenty-five-year term of imprisonment with a period of parole ineligibility in excess of sixteen years as required by the No Early Release Act, N.J.S.A. 2C:43-7.2. The court also assessed applicable fines and penalties. An excessive sentencing panel of our court affirmed defendant's sentence but remanded the matter for the court to amend the judgment of conviction "to include the proper number of jail credits . . . and/or gap-time credits"

Defendant filed a pro se PCR petition which he supplemented with a letter brief and appendix. Defendant was appointed PCR counsel but subsequently requested that the court permit him to prosecute his pro se petition without the assistance of appointed counsel. The court granted defendant's application and heard oral arguments, after which it denied his petition in a written decision and accompanying order.

In its written opinion, the court first determined defendant's petition was timely filed. It then comprehensively addressed each argument raised by defendant's PCR counsel individually and concluded defendant failed to satisfy either prong of the two-part test for ineffective assistance of counsel established in Strickland v. Washington, 466 U.S. 668 (1984).¹ In addition, the court determined defendant failed to establish he was entitled to relief under United States v. Cronic, 466 U.S. 648 (1984).

As to defendant's pro se arguments, the court concluded the claims were procedurally barred under Rule 3:22-3, as defendant should have raised them on

¹ To establish ineffective assistance of counsel, a convicted defendant must satisfy the two-part test enunciated in Strickland, 466 U.S. at 687, by demonstrating that: (1) counsel's performance was deficient, and (2) the deficient performance actually prejudiced the accused's defense. The Strickland test has been adopted for application under our State constitution in New Jersey. State v. Fritz, 105 N.J. 42, 58 (1987).

direct appeal. In addition, the court determined defendant failed to raise properly, or establish, a claim for ineffective assistance of counsel with respect to certain of those pro se claims. Finally, relying on State v. Preciose, 129 N.J. 451, 462 (1992), the court concluded that because defendant failed to establish a prima facie case for ineffective assistance of counsel, an evidentiary hearing was not warranted.

Defendant moved for reconsideration, which the court denied in a letter opinion and order. Defendant appealed and we affirmed the PCR court's decision with a single exception based on one of defendant's pro se arguments. See State v. Chase (Chase II), No. A-0400-18 (App. Div. Nov. 21, 2019) (slip. op. at 3). Specifically, defendant contended that based on State v. McKinney, 223 N.J. 475 (2015), his trial counsel was ineffective by agreeing at the charge conference that the jury should be instructed on second-degree robbery when "[t]he underlying crime allegedly committed by defendant constituted first-degree robbery . . . [and] there existed no rational basis for a second-degree robbery [charge] as evidenced by the victim's testimony" Chase II, slip. op. at 3. He also argued his appellate counsel was constitutionally ineffective for failing to raise the issue on direct appeal. Ibid.

We declined to address defendant's argument with respect to his appellate counsel, as we determined, "based on the record on appeal, it does not appear . . . defendant raised before the PCR judge the ineffectiveness of his appellate counsel" "and thus that claim [was] not properly before us." Id. at 3, n.4. As to any alleged ineffectiveness with respect to trial counsel's failure to object to inclusion of a second-degree robbery charge, however, we concluded that argument was "not a claim typically raised on direct appeal as it involves evidence and allegations outside of the record," and thus was not procedurally barred by Rule 3:22-3. Chase II, slip op. at 4. We therefore remanded for consideration of that argument. Ibid.

In doing so, however, we acknowledged the distinctions between the facts here and those presented in McKinney, specifically that in McKinney all counsel and the court agreed that second-degree robbery should not be included in the jury charge. 223 N.J. at 484. Nevertheless, as we understood defendant's claims, he maintained the inclusion of the second-degree charge could have led to jury confusion. Chase II, slip op. at 4.

On remand, the same PCR judge, after considering the parties' submissions and oral arguments, entered an order denying defendant's petition without an evidentiary hearing. The judge explained his reasoning in a written

opinion in which he concluded defendant failed to establish his counsel was constitutionally ineffective or that he suffered any prejudice by his counsel's failure to object to the second-degree robbery charge.

With respect to Strickland's performance prong, the judge concluded counsel's acceptance of that charge was not ineffective because defendant "was charged with second-degree robbery by a separate count in the indictment" and, unlike in McKinney, "the inclusion of that second-degree robbery charge was not as a lesser-included offense." He also explained "the jurors were instructed to consider the evidence as it pertained to two forms of robbery that were suggested by the evidence" and "were free to return a verdict of either guilty or not guilty as to each separate count of the indictment." Additionally, the judge determined that even if defendant had satisfied Strickland's performance prong, he failed to establish counsel's failure to object was so prejudicial as to render the conviction unreliable.

The judge also rejected defendant's reliance on McKinney. He explained that case involved circumstances, not present here, in which the defendant was not charged with second-degree robbery, the parties agreed second-degree robbery would not be given as a lesser-included offense of the first-degree

robbery charge, and the trial judge failed to provide a complete curative instructive. See 223 N.J. at 484-85.

Before us, defendant argues:

THIS MATTER MUST BE REMANDED FOR AN
EVIDENTIARY HEARING BECAUSE
DEFENDANT ESTABLISHED A PRIMA FACIE
CASE OF TRIAL COUNSEL'S INEFFECTIVENESS
FOR FAILURE TO OBJECT TO THE TRIAL
COURT'S ERRONEOUS SECOND-DEGREE
ROBBERY CHARGE TO THE JURY.

II.

We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004). The de novo standard of review also applies to mixed questions of fact and law. Id. at 420. Where, as here, an evidentiary hearing has not been held, it is within our authority "to conduct a de novo review of both the factual findings and legal conclusions of the PCR court." Id. at 421. We apply these standards in the matter before us.

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantees a defendant in a criminal proceeding the right to the assistance of counsel. The right to counsel includes "the right to the effective assistance of counsel." State v. Nash, 212 N.J. 518, 541 (2013) (quoting Strickland, 466 U.S. at 686).

As noted, in Strickland, the Court established a two-part test to determine whether a defendant has been deprived of the effective assistance of counsel. Strickland, 466 U.S. at 687; Fritz, 105 N.J. at 58. Under the first prong, defendant must demonstrate counsel's handling of the matter "fell below an objective standard of reasonableness" and "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Strickland, 466 U.S. at 687-88. When considering a defendant's proofs, however, a court must show "extreme deference" in assessing defense counsel's performance, Fritz, 105 N.J. at 52, and "indulge a strong presumption that [it] falls within the wide range of reasonable professional assistance," Strickland, 466 U.S. at 689. Further, an attorney is not ineffective by failing to make an argument that lacks merit or would be unsuccessful. See State v. O'Neal, 190 N.J. 601, 619 (2007); State v. Worlock, 117 N.J. 596, 625 (1990). To establish prejudice under the second prong, a defendant must demonstrate 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.

"With respect to both prongs of the Strickland test, a defendant asserting ineffective assistance of counsel on PCR bears the burden of proving [their] right to relief by a preponderance of the evidence." State v. Gaitan, 209 N.J.

339, 350 (2012); see also State v. Goodwin, 173 N.J. 583, 593 (2002). A failure to satisfy either prong of the Strickland standard requires the denial of a PCR petition. Nash, 212 N.J. at 542; Fritz, 105 N.J. at 52.

Finally, an evidentiary hearing for a PCR petition is not always required. See Preciose, 129 N.J. at 462. Trial courts should grant an evidentiary hearing when necessary "to resolve ineffective assistance of counsel claims if a defendant has presented a prima facie claim in support of PCR and the facts supporting the claim are outside the trial record." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). "[I]n order to establish a prima facie claim, a petitioner must do more than make bald assertions that he was denied the effective assistance of counsel. He must allege facts sufficient to demonstrate counsel's alleged substandard performance." Ibid.

Against these legal principles and standard of review, we agree with the PCR judge's conclusion that defendant failed to establish a prima facie case of ineffective assistance of counsel. First, we note defendant's claim of ineffectiveness is fatally vague, because he asserts only that inclusion of the second-degree robbery charge "fuel[ed] unnecessary and irreparable jury confusion." Defendant does not explain how the second-degree robbery charge was erroneous in light of the evidence adduced at trial or how it caused

"irreparable jury confusion" considering the trial judge instructed the jury on the distinction between first and second-degree robbery and directed the jury to consider each offense separately. Nor has defendant even raised, let alone, established he suffered prejudice as a result of the allegedly erroneous instruction.

Putting those evidentiary deficiencies aside, we also are satisfied the judge reached the correct legal conclusion that counsel was not ineffective for failing to object to the instructions on first-degree armed robbery and second-degree robbery, as both charges were supported by the trial evidence. As noted, the State theorized defendant and Burnham effectuated the robbery through physical force, striking the victim, and by threatening use of a deadly weapon. Although Parks testified defendant was the armed assailant and Burnham punched her in the mouth, Caswell's report indicated Parks informed him that it was the same individual who held the gun and struck her. To the extent that report suggests defendant was the armed assailant who punched Parks, it was supported by Boyd's recanted statement in which he asserted defendant admitted to having struck her. Additionally, counsel for both defendants vigorously challenged Parks's accuracy in identifying her assailants.

Based on the evidence adduced at trial, including the DNA evidence which did not identify who held the imitation firearm, and the parties' arguments, the jury could reasonably have concluded defendant was armed, struck Parks, or both. Any objection to jury instructions on those charges therefore would have been rejected, and counsel's failure to object cannot satisfy Strickland's performance prong. See Worlock, 117 N.J. at 625 ("The failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel.") (citing Strickland, 466 U.S. at 688).

We also find defendant's reliance on McKinney unpersuasive, as the facts in that case are clearly distinguishable. As noted, in McKinney, the trial judge mistakenly instructed the jury as to first and second-degree robbery, when only first-degree robbery had been charged in the indictment and the parties agreed "the jury would not consider any lesser-included offenses for first-degree robbery." 223 N.J. at 484. Although the judge in that case issued a curative instruction, he did not clarify that if the jury found the defendant did not commit robbery with a weapon, then the jury should find him not guilty of first-degree robbery. Id. at 500. The Supreme Court reversed the defendant's conviction, as it concluded "[t]he confusion caused by the trial court introducing second-degree robbery into the charge and failing to adequately resolve that confusion

had the clear capacity to permit defendants to be found guilty of first-degree robbery without a finding that they were armed." Id. at 501-02.

Here, the judge did not commit the same mistake as occurred in McKinney. Rather, he clearly distinguished first from second-degree robbery and instructed the jury it could find defendant guilty of first-degree robbery only if it determined he was armed. We also note the judge merged the second-degree and first-degree robbery convictions at sentencing.

In sum, defendant failed to present a prima facie ineffective assistance of counsel claim under Strickland. As such, the PCR judge correctly denied defendant's petition without an evidentiary hearing. Cummings, 321 N.J. Super. at 170.

To the extent we have not expressly addressed any arguments made in support of defendant's appeal, we have determined they are 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