SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3120-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DARRELL R. CRONE, a/k/a DARRYL GRIER, DARNELL RASHAWN, DARRELL R. GREER, and DARRELL G. CRONE,

Defendant-Appellant.

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Submitted January 18, 2023 – Decided July 28, 2023

Before Judges Messano and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 14-09-2774.

Jill R. Cohen, attorney for appellant.

Grace C. MacAulay, Camden County Prosecutor, attorney for respondent (Rachel M. Lamb, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Darrell R. Crone appeals from a May 20, 2021 Law Division order denying his "motion" for post-conviction relief (PCR) without a hearing. Having considered defendant's contentions in view of the record and the governing legal standards, we order a limited remand for an evidentiary hearing on defendant's claims that are supported by sworn affidavits. We otherwise affirm the order denying defendant's PCR motion.

I.

A bifurcated jury convicted defendant of aggravated manslaughter, attempted murder, related weapons offenses, and certain persons not to have weapons for the shooting death of Timothy Loper and firing a gun into a crowd outside a club in Camden during the early morning hours of December 1, 2013. Defendant was sentenced to an aggregate prison term of seventy years; including an eighty-five-percent parole disqualifier subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, on the aggravated manslaughter and attempted murder convictions.

We summarize the facts that are pertinent to this appeal. Surveillance footage from a parking lot camera captured the final shot and the shooter leaving the scene in an older model SUV. The lead detective, John Hunsinger of the Camden County Prosecutor's Office, narrated the unclear video footage for the

jury. He also explained the investigative steps undertaken by police that led to identifying defendant as the suspect and the registered owner of the Suburban depicted in the video. No weapon was recovered, but police seized shell casings and a silver bracelet at the scene. Defendant's mother identified a photograph of defendant taken from video footage inside the club on the evening of the incident. That footage was markedly clearer than the parking lot footage. Local news outlets broadcasted defendant's photograph; he turned himself in a few days later.

The State also presented the testimony of a single eyewitness, Dominique Ferrell-Sheppard, who identified defendant pursuant to a sequential photo array. Defendant did not move pretrial to suppress Ferrell-Sheppard's out-of-court identification. When questioned by the court following the prosecutor's opening statement, trial counsel claimed he "didn't want to keep the photo identification out because when [Ferrell-Sheppard] was shown it the first time she didn't pick [his] client out." Trial counsel further stated: "I want it to come in. I want it to be shown that she looked and didn't pick him out."

On cross-examination of Tera Alford-Davis, the bartender on duty the night of the incident, trial counsel questioned whether defendant ever brought guns into the club. The following exchange ensued:

[TRIAL COUNSEL]: [W]hen you say my client came in there often, did you ever see him come in with any weapons?

[ALFORD-DAVIS]: I'm sorry?

[TRIAL COUNSEL]: Did you ever see my client with any weapons on him any time he came in?

[ALFORD-DAVIS]: Yes.

[TRIAL COUNSEL]: Any guns?

[ALFORD-DAVIS]: I saw him with weapons before.

[TRIAL COUNSEL]: You did?

[ALFORD-DAVIS]: Yes.

[TRIAL COUNSEL]: In the club?

[ALFORD-DAVIS]: In the club.

[TRIAL COUNSEL]: Wasn't everybody wanded?

[ALFORD-DAVIS]: No, not hardly.

[TRIAL COUNSEL]: So, . . . if the bouncers had previously said that everybody was wanded, then they would be lying?

[ALFORD-DAVIS]: Absolutely. Absolutely.

Alford-Davis later acknowledged she did not observe defendant with a weapon on the night of the incident. At the conclusion of Alford-Davis's

testimony, the trial court sua sponte issued a limiting instruction pursuant to N.J.R.E. 404(b), and reiterated the instruction in its final jury charge.

Near the end of the State's case, the prosecutor provided the defense a photograph of defendant, who was wearing a silver bracelet, and another individual. The victim's relative, who had attended the trial, discovered the photograph on a Facebook page earlier that morning. Within hours, the State tracked down the other individual and he testified at an N.J.R.E. 104 hearing. Over trial counsel's objection, the court admitted the photograph in evidence, finding counsel did not articulate that he would have done anything differently had he been provided the photograph earlier in the case.

At the conclusion of the State's case, trial counsel made an unsuccessful Reyes[1] motion. Defendant did not testify or call any witnesses on his behalf. Nor did he introduce any documents into evidence.

After the judgment of conviction (JOC) was entered on July 27, 2015, defendant retained his present attorney, who filed a direct appeal. Defendant challenged his convictions, raising several points for the first time on appeal. He also claimed his attorney's cumulative errors asserted ineffective assistance of trial counsel. Defendant did not challenge the imposition of his sentence. We

[1] State v. Reyes, 50 N.J. 454, 458-59 (1967).

rejected defendant's contentions and affirmed his convictions, declining to reach his claims against trial counsel. State v. Crone, No. A-0420-15 (App. Div. Aug. 5, 2016) (slip op. at 13-14). The Court denied defendant's ensuing petition for certification. 237 N.J. 565 (2019).

At some point, defendant's attorney moved for PCR. However, there is no indication in the record that defendant filed a verified petition in support of his claims as required under Rule 3:22-8. Nor is the filing date of the PCR motion clear from the record provided on appeal. PCR counsel's notice of motion is dated June 23, 2020; her certification, which is styled as a "petition," is dated July 15, 2020; and her brief is dated November 22, 2020 – none of which is stamped filed. Nonetheless both parties assert the PCR motion was filed on November 22, 2020 – five years and four months after the July 27, 2015 JOC was entered.

However, the untimeliness of defendant's motion was not addressed by the parties or the PCR court. See R. 3:22-12(a)(1) (providing a PCR petition shall not be filed "more than [five] years after the date of entry . . . of the judgment of conviction that is being challenged" unless the defendant "alleges facts showing that the delay . . . was due to [the] defendant's excusable neglect and that there is a reasonable probability that if the defendant's factual assertions are

found to be true[,] enforcement of the time bar would result in a fundamental injustice"); see also State v. Brown, 455 N.J. Super. 460, 470 (App. Div. 2018) (holding a "PCR judge has an independent, non-delegable duty to question the timeliness of the petition, and to require that defendant submit competent evidence to satisfy the standards for relaxing the rule's time restrictions pursuant to Rule 3:22-12"). Because it does not appear from the record that the State objected to the procedural defects before the PCR court, nor does the State raise those issues on appeal, we consider defendant's contentions on the merits.

In her brief, PCR counsel asserted trial counsel provided ineffective assistance of counsel (IAC) by failing to: move to suppress Ferrell-Sheppard's out-of-court identification; request lesser included offenses on the attempted murder charge; introduce into evidence Ferrell-Sheppard's prior inconsistent statements; request an N.J.R.E. 104 hearing regarding the admissibility of the "unclear and indiscernible" parking lot surveillance footage; object to Hunsinger's narration of the video footage; investigate and consider possible defenses that defendant "was not in his Suburban that evening"; refrain from asking Alford-Davis whether defendant had brought weapons into the club on prior occasions; and request an adjournment regarding the late production of the photograph depicting defendant wearing a silver bracelet. Apparently citing

twenty purported errors, PCR counsel argued trial counsel's cumulative errors rendered his performance ineffective.[2]

In support of defendant's contention that trial counsel failed to investigate his claims and identify defenses, PCR counsel annexed the sworn affidavits of Ronnie McPherson, dated January 22, 2020, and Khareem Roberts, dated March 10, 2016. Both witnesses asserted that defendant was driving a black Infiniti automobile on the night of the incident.

In his handwritten affidavit, Roberts claimed he and defendant "met up that night . . . near the corner of Spruce Street" and that defendant was "driving a[n] all black [I]nfinit[i] car with windows." Roberts "met a female in the bar," and borrowed defendant's car, "which was parked three cars down from Spruce Street." Roberts and the woman returned and gave defendant his keys to the car. Roberts did not indicate whether he attempted to provide this information to trial counsel.

McPherson's affidavit was typed, with blank spaces for his name, address, car model, and license number. That information is handwritten. McPherson claimed defendant was driving his black Infiniti on the night of the incident

[2] Defendant's appendix includes portions of PCR counsel's brief. It does not, however, include all twenty errors asserted.

"because [defendant's] vehicle was in the shop." McPherson did not provide an answer for paragraph six, which states: "Anything else you would like to add as to why you did not come forward earlier."

Defendant's five-page typed statement also was annexed to counsel's PCR brief. The affidavit is signed but undated. Among other things, defendant asserted he asked trial counsel to interview and present the testimony of McPherson and Roberts, primarily for the reasons stated in their affidavits. Defendant claimed trial counsel declined to call McPherson because the bouncer had "already said" that he "saw [defendant] driving a 'black car' [on] the night of the murder." But defendant protested, stating McPherson also "mention[ed]" that defendant's "[b]urgundy (SUV) truck was in the shop so there would be no way that I used my truck in the crime."

Defendant also contended trial counsel was ineffective by not calling Jakeya Johnson, who was with Ferrell-Sheppard at the time of the shooting. Apparently referencing Johnson's statement to police, defendant asserted her description of the shooter varied from that of Ferrell-Sheppard and "puts the [S]tate['s] case in jeopardy." Defendant further asserted he "told counsel to ask for a mistrial" following the late disclosure of the Facebook photograph. Defendant claimed he would have called his wife, "to combat the information."

Defendant did not annex to his PCR brief affidavits of his wife or Johnson. However, the brief annexed the January 12, 2021 certification of defendant's "expert," Edward J. Crisonino, Esq., asserting trial counsel's representation "was constitutionally deficient."

Immediately following oral argument, the PCR judge, who also was the trial judge, rendered a lengthy decision on the record. The judge first found certain claims were procedurally barred under Rule 3:22-5 because they were decided on direct appeal, or under Rule 3:22-4 because they could have been asserted on direct appeal. The judge nonetheless considered the issues raised in view of the Strickland/Fritz framework applicable to IAC claims.[3]

First addressing trial counsel's failure to object to Hunsinger's narration of the surveillance video footage, the judge found the issue was raised on direct appeal. The judge also rejected defendant's claim on the merits, finding defendant failed to demonstrate he would have been successful had trial counsel objected to the narration. The judge noted we found Hunsinger's testimony was

[3] Strickland v. Washington, 466 U.S. 668, 687 (1984) (recognizing to establish an IAC claim, a defendant must demonstrate: (1) "counsel's performance was deficient"; and (2) "the deficient performance prejudiced the defense"); State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the Strickland two-part test in New Jersey).

permissible under N.J.R.E. 701 and the Court's decision in State v. McLean, 205 N.J. 438 (2011). See Crone, slip op. at 9-10. Further, because Hunsinger did not identify defendant during his narration of the video, the judge distinguished the present matter from the circumstances presented to the Court in State v. Singh, 245 N.J. 1, 17-18 (2021) (finding the officer's two references to the individual as "the defendant" constituted improper lay opinion but nonetheless holding the error in admitting the testimony was harmless "given the fleeting nature of the comment and the fact that the detective referenced defendant as 'the suspect' for the majority of his testimony").

Similarly, the judge rejected defendant's claim that trial counsel failed to request a jury charge on the lesser-included offenses of attempted murder. Because the claim could have been asserted on direct appeal, the judge found it was procedurally barred. Noting counsel maintained throughout the trial that "defendant was not involved in the brawl that occurred outside of the tavern," the judge also rejected the claim on the merits.

Turning to trial counsel's failure to file a Wade[4] motion, the judge, considered both Strickland prongs. Pertinent to the first prong, the judge found the record revealed trial counsel's "strategic decision . . . to show that the witness

[4] United States v. Wade, 388 U.S. 218 (1967).

was unable to identify . . . defendant initially when shown the photo array." The judge noted trial counsel "conducted extensive cross-examination" of the witness, including her initial failure to identify defendant. Finding defendant "failed to demonstrate a scintilla of evidence to make a threshold showing of suggestiveness as required under State v. Henderson, 208 N.J. 208 (2011)," or otherwise support his speculative claim, the judge was convinced defendant could not satisfy the second Strickland prong.

The judge also found defendant failed to make a prima facie showing of IAC on his claims that trial counsel failed to effectively cross-examine Ferrell-Sheppard and failed to request an N.J.R.E. 104 hearing regarding the quality of the parking lot surveillance footage. Similarly, the judge found defendant's "blanket claim of cumulative errors" did not establish an IAC claim. Dismissing Crisonino's certification, the judge found the determination of a prima facie IAC claim rests with the PCR court.

Because defendant failed to provide sworn statements of his wife, Johnson, and another potential witness, the judge summarily rejected defendant's claim that trial counsel failed to present their testimony on his behalf at trial. Referencing the affidavits of McPherson and Roberts that were filed in support of PCR counsel's brief, the judge found defendant "failed to demonstrate

that the outcome of the trial would have been different had these two witnesses testified that . . . defendant was operating a black Infiniti the night of the shooting." Instead, the judge found defendant "simply ma[de] a bald assertion."

The judge recounted the evidence adduced at trial, including that "defendant was the registered owner of a 2000 Chevrolet Suburban which was similar to the vehicle the shooter was seen arriving and leaving the scene in." Weighing the affidavits against "the overwhelming amount of evidence" adduced at trial including surveillance videos, photographs of defendant entering the bar, and an eyewitness identification, the judge found it was "sheer speculation that . . . the verdict would have been different in this matter." The judge found "absolutely no evidence that . . . these witnesses reached out to trial counsel, and he refused to interview or even talk to them." The judge thus denied defendant's request for an evidentiary hearing on this issue.

On appeal, defendant reprises the following overlapping arguments for our consideration:

> I. DEFENDANT ESTABLISHED THAT HE WAS ENTITLED TO AN EVIDENTIARY HEARING AND THE [PCR] COURT ERRED IN DENYING THE PETITION FOR [PCR].
>
> II. THE [PCR] COURT FAILED TO RECOGNIZE THE SIGNIFICANCE OF COUNSEL NOT FILING A WADE MOTION BEFORE TRIAL.

III. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT PRESENTING A DEFENSE, AND NOT PROPERLY INVESTIGATING THE CASE.

IV. [TRIAL] COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE WHEN HE ELICITED EVIDENCE FROM A STATE'S WITNESS THAT DEFENDANT FREQUENTLY CARRIES A GUN.

V. THE [PCR] COURT ERRED IN RULING THAT THERE WAS NO DIFFERENCE IN THE EVIDENCE RULES[] BETWEEN USING A STATEMENT TO IMPEACH AND INTRODUCING IT AS SUBSTANTIVE EVIDENCE.

VI. THE PCR COURT RULED THAT THE APPELLATE COURT HAD ALREADY RULED ON WHETHER OR NOT THE DETECTIVE COULD NARRATE THE VIDEO. [THE PCR COURT] IGNORED DEFENDANT'S ARGUMENT THAT COUNSEL FAILED TO OBJECT TO THE NARRATION AND FAILED TO OBJECT TO THE ADMISSIBILITY OF THE VIDEO.

VII. [TRIAL] COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO EXPLAIN HIS OBJECTION TO LATE EVIDENCE, THAT THE COURT WOULD HAVE EXCLUDED.

VIII. [TRIAL] COUNSEL WAS INEFFECTIVE FOR NOT REQUESTING LESSER INCLUDED OFFENSES OF ATTEMPTED MURDER.

IX. THE [PCR] COURT ERRED IN NOT ADDRESSING THE ADDITIONAL ERRORS RAISED IN THE MOTION FOR [PCR].

II.

When petitioning for PCR, the defendant must establish "by a preponderance of the credible evidence" entitlement to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). Our rules anticipate the need to hold an evidentiary hearing on a PCR petition, "only upon the establishment of a prima facie case in support of post-conviction relief." R. 3:22-10(b). "A prima facie case is established when a defendant demonstrates 'a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits.'" State v. Porter, 216 N.J. 343, 355 (2013) (emphasis added) (quoting R. 3:22-10(b)).

To succeed on an IAC claim, a defendant must initially show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Fritz, 105 N.J. at 52 (quoting Strickland, 466 U.S. at 687). Secondly, a defendant must show by a "reasonable probability" that the deficient performance affected the outcome. Id. at 58. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Pierre, 223 N.J. 560, 583 (2015) (quoting Strickland, 466 U.S. at 694; Fritz, 105 N.J. at 52).

To satisfy the first Strickland prong, "a defendant must overcome a 'strong presumption' that counsel exercised 'reasonable professional judgment' and 'sound trial strategy' in fulfilling his [or her] responsibilities." State v. Hess, 207 N.J. 123, 147 (2011) (quoting Strickland, 466 U.S. at 689-90). "[I]f counsel makes a thorough investigation of the law and facts and considers all likely options, counsel's trial strategy is 'virtually unchallengeable.'" State v. Chew, 179 N.J. 186, 217 (2004) (quoting Strickland, 466 U.S. at 690-91).

Nonetheless, "[c]ertain factual questions, 'including those relating to the nature and content of off-the-record conferences between defendant and [the] trial attorney,' are critical to IAC claims and can 'only be resolved by meticulous analysis and weighing of factual allegations, including assessments of credibility.'" Porter, 216 N.J. at 355 (second alteration in original) (quoting State v. Pyatt, 316 N.J. Super. 46, 51 (App. Div. 1998)). "These determinations are 'best made' through an evidentiary hearing." Ibid.

A PCR petitioner asserting that his trial attorney inadequately investigated a potential witness "must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." Id. at 353 (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)). "Even

a suspicious or questionable affidavit supporting a PCR petition 'must be tested for credibility and cannot be summarily rejected.'" Id. at 355 (emphasis added) (quoting State v. Allen, 398 N.J. Super. 247, 258 (App. Div. 2008)).

When an issue has been determined on the merits in a prior appeal it cannot be relitigated in a later appeal of the same case, even if of constitutional dimension. R. 3:22-5; State v. McQuaid, 147 N.J. 464, 484 (1997). The Rule 3:22-5 bar will preclude a PCR argument if the issue "'is identical or substantially equivalent'" to the issue previously adjudicated on its merits. McQuaid, 147 N.J. at 484 (quoting State v. Bontempo, 170 N.J. Super. 220, 234 (Law Div. 1979)). The procedural bar is consistent with New Jersey's public policy, which aims "to promote finality in judicial proceedings." Id. at 483. An issue that could have been raised on direct appeal is similarly barred on a petition for PCR. R. 3:22-4(a); see also Nash, 212 N.J. at 546 (recognizing R. 3:22-4(a) bars a petitioner from asserting a PCR claim that could have been raised on direct appeal).

Applying these principles, certain claims were not procedurally barred. On direct appeal, we only considered whether Detective Hunsinger's testimony "exceed[ed] the bounds of permissible lay opinion." See Crone, slip op. at 9-10. We did not consider whether trial counsel was ineffective in failing to object

to his testimony. Thus, defendant's IAC claim was not procedurally barred pursuant to Rule 3:22-5.

Similarly, we reject the PCR judge's finding that defendant's IAC challenge to trial counsel's failure to request lesser-included offenses on the attempted murder charge was procedurally barred under Rule 3:22-4. Indeed, on direct appeal, we recognized that "[t]o the extent defendant argue[d] his trial counsel rendered [IAC], the record [wa]s not sufficiently developed and [wa]s better suited for a [PCR] application." Crone, slip op. at 14.

Nonetheless, we have considered defendant's contentions on the merits of these claims – and the remainder of his claims that were not supported by a sworn statement – in view of the applicable law, and conclude they lack sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(2). We affirm substantially for the reasons set forth by the PCR judge.

We part company, however, with the PCR judge's determination that an evidentiary hearing was not warranted on defendant's claims that were supported by the sworn affidavits of McPherson and Roberts – and defendant. Rather than "viewing the facts alleged" in those affidavits "in the light most favorable to . . . defendant," Porter, 216 N.J. at 355, the judge summarily rejected their

accounts, thereby erroneously making credibility determinations without conducting an evidentiary hearing to test the veracity of the averments. See ibid.

Much of the State's case was predicated on convincing the jury that defendant arrived at, and left from, the club in a Chevrolet Suburban. The proposed testimony of McPherson and Roberts would undercut that assertion. We conclude defendant presented a prima facie case for PCR on his discrete claim that trial counsel failed to interview these two witnesses.

We therefore remand the matter to the Law Division to conduct an evidentiary hearing in accordance with this opinion. We express no view on the merits of any of defendant's contentions. We further order that because the PCR judge made unwarranted credibility assessments on the limited record before her, the hearing on remand should be conducted by a different judge. See R. 1:12-1(d); Pressler and Verniero, Current N.J. Court Rules, cmt. 4 on R. 1:12-1 (2023) (stating "the appellate court has the authority to direct that a different judge consider the matter on remand in order to preserve the appearance of a fair and unprejudiced hearing").

Affirmed in part and remanded in part for an evidentiary hearing consistent with this opinion. We do not retain jurisdiction.