SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3163-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

VICTOR P. RUSS, a/k/a VICTOR LINTON, VICTOR RUSH, SALIK RUSS, VICTOR RUSS, and VICTOR P. SALIK,

Defendant-Appellant.

Submitted December 20, 2022 – Decided January 12, 2023

Before Judges Messano and Paganelli.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 09-10-0951.

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

James O. Tansey, First Assistant Prosecutor of Union County, attorney for respondent (Milton S. Leibowitz, Assistant Prosecutor, of counsel and on the brief).

Appellant filed a supplemental pro se brief.

PER CURIAM

Defendant was convicted by a jury of first-degree murder and felony murder, six counts of first-degree robbery, six counts of fourth-degree aggravated assault, and related weapons offenses, all arising from a series of liquor and convenience store robberies on December 31, 2008, and during the early months of 2009. State v. Russ, No. A-0529-13 (App. Div. July 13, 2016) (slip op. at 1–2). After appropriate mergers, the judge sentenced defendant to a life term on the murder conviction with a consecutive aggregate sentence of thirty years imprisonment. Id. at 2.

Defendant's co-defendant, Jimmie Sessions, "pled guilty before trial and became a key State's witness against defendant[,]" ibid., and our earlier opinion on defendant's direct appeal "only briefly summarize[d] the substantial evidence of defendant's guilt adduced at trial," id. at 4. We affirmed defendant's convictions and sentence, remanding only for the judge to correct the judgment of conviction to reflect the appropriate period of parole ineligibility on the murder conviction pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2. Ibid. The Supreme Court denied defendant's petition for certification. State v. Russ, 228 N.J. 63 (2016).

Defendant filed a timely pro se petition for post-conviction relief (PCR) in which he alleged trial counsel provided ineffective assistance of counsel (IAC); defendant also filed an amended pro se petition adding other specific IAC claims.[1] Contemporaneously with his amended petition, defendant submitted a certification from Kevin Dorsey. Dorsey was serving time for two robberies he allegedly committed with Sessions in 2007 and 2008, and he claimed Sessions owned and brandished a .40 caliber handgun.[2]

PCR counsel was appointed to represent defendant, and a third PCR certification was filed in August 2017. Additionally, defendant filed supplemental material in support of the petition in 2019. Specifically, defendant supplied an expert's report from Spencer J. McInvaille, a digital forensic examiner and cellular analyst; a certification from Frederick Alonso Linton, defendant's brother; and a certification from Donald Andrews, who claimed to

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[1] Defendant also asserted in both petitions that appellate counsel provided ineffective assistance, but that issue is not raised on appeal, so we do not address it. See Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) ("An issue not briefed on appeal is deemed waived." (citing Jefferson Loan Co. v. Session, 397 N.J. Super. 520, 525 n.4 (App. Div. 2008))).

[2] The State's evidence at defendant's trial indicated the same .40 caliber handgun was used in four of the crimes. Russ, slip op. at 9–10. The State recovered the gun when a third party was arrested in Newark; the gun had been used in several crimes in that city. Ibid.

have spoken with Sessions frequently while both were housed at the Somerset County Jail, and who was subsequently defendant's cellmate at the Union County Jail.

The PCR judge, who was not the trial judge, heard argument on the petition and denied it in an oral decision that immediately followed. Before us, defendant contends he is entitled to an evidentiary hearing based on a prima facie IAC claim, reiterating some of the IAC claims he made before the PCR judge. Specifically, defendant alleges that counsel: failed to call Linton as a witness and produce defendant's medical records at trial; failed to investigate Andrews' information and call him as a witness; failed to produce an expert at trial to rebut the State's expert's testimony regarding cell phone towers; and abridged defendant's right to testify on his own behalf.

In a separate pro se brief, defendant raises several arguments that overlap with those asserted by his attorney. He also contends trial counsel was ineffective for not calling Dorsey and another person, Jaydipkum Patel, as witnesses, and for failing to make a motion for a judgment of acquittal.

We have considered the arguments in light of the record and applicable legal standards. We affirm.

I.

To succeed on an IAC claim, a defendant must meet the two-prong test enunciated in Strickland v. Washington, 466 U.S. 668, 687 (1984), and applied by our Court in State v. Fritz, 105 N.J. 42, 58 (1987). First, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Id. at 52 (quoting Strickland, 466 U.S. at 687). "To satisfy prong one, [a defendant] ha[s] to '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)). "[I]f counsel makes a thorough investigation of the law and facts and considers all likely options, counsel's trial strategy is 'virtually unchallengeable.'" Ibid. (alteration in original) (quoting State v. Chew, 179 N.J. 186, 217 (2004)).

Second, a defendant must show a "reasonable probability" that the deficient performance affected the outcome. Fritz, 105 N.J. 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). "[A] conviction is more readily attributable

to deficiencies in defense counsel's performance when the State has a relatively weak case than when the State has presented overwhelming evidence of guilt." State v. Gideon, 244 N.J. 538, 557 (2021).

A petitioner is not automatically entitled to an evidentiary hearing. State v. Porter, 216 N.J. 343, 355 (2013). 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.'" Porter, 216 N.J. at 355 (quoting R. 3:22-10(b)).

"[W]e review under the abuse of discretion standard the PCR court's determination to proceed without an evidentiary hearing." State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013) (citing State v. Marshall, 148 N.J. 89, 157–58 (1997)). "[W]e review de novo the PCR court's conclusions of law." State v. L.G.-M., 462 N.J. Super. 357, 365 (App. Div. 2020) (citing Nash, 212 N.J. at 541). Where, as here, the trial court does not hold an evidentiary hearing on a PCR petition, we review de novo the factual inferences the trial judge drew

from the documentary record. Id. at 361 (citing State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014)).

We apply these principles to defendant's specific IAC claims.

II.

Defendant's election not to testify

In his certifications, defendant claimed that trial counsel strongly advised him against testifying, even though defendant had an alibi for one of the crimes. Defendant said he was shopping with Beesheba Douglas all evening on December 31, 2008; therefore, he could not have committed that robbery. Defendant also asserted that after one of the State's witnesses at trial mentioned receiving information from "parole," see Russ, slip op. at 12, trial counsel advised him not to testify because defendant's prior criminal record would be exposed.

The PCR judge rejected defendant's claim. The judge cited the trial court's colloquy with defendant and concluded "trial counsel was not deficient . . . because [defendant] knowingly and voluntarily elected to exercise his

constitutional right to remain silent." Further, the PCR judge noted there was no other evidence to support defendant's alibi claim that he was with Douglas.[3]

Before us, defendant argues his various certifications were sufficient to "transcend[] his apparent waiver" of his right to testify. We disagree, and the argument requires no further discussion in a written opinion. R. 2:11-3(e)(2).

Failure to call certain witnesses

Defendant argues that trial counsel failed to properly investigate and call Andrews and Linton as witnesses at trial. In his pro se brief, defendant also names Dorsey and Patel as witnesses who should have been called at trial.

"[W]hen a petitioner claims his trial attorney inadequately investigated his case, he 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." Porter, 216 N.J. at 353 (alteration in original) (quoting State v. Cummings, 321 N.J. Super. 154, 170

[3] There is no certification or affidavit from Douglas in the appellate record. However, the State's appendix includes a copy of an email from a defense investigator to trial counsel. That email indicated the investigator had contacted Douglas, who replied she "[could not] be 100% sure" but "believe[d] . . . [defendant] was with her on New Year[']s Eve 2008 into 2009," and "although she want[ed] to help [defendant], she d[id] not have ti[]me to go to court." As we soon discuss, the strategic decision not to call a witness, much less an equivocal witness, cannot be deemed deficient performance.

(App. Div. 1999)). Deciding whether to call a witness at trial is "one of the most difficult strategic decisions that any trial attorney must confront." State v. Arthur, 184 N.J. 307, 320 (2005). The attorney's "decision concerning which witnesses to call to the stand is 'an art,' and a court's review of such a decision should be 'highly deferential.'" Id. at 321 (quoting Strickland, 466 U.S. at 689, 693).

We reject defendant's arguments regarding Dorsey and Patel. The PCR judge noted that Dorsey, who claimed to have committed robberies with Sessions in 2007 and 2008, had been incarcerated since February 2008, nearly a year before the first robbery for which defendant was charged. Dorsey's testimony would not have supported a defense of third-party guilt nor discredited Sessions' testimony that he committed the December 2008 and the 2009 robberies with defendant.

The PCR judge noted defendant failed to furnish any evidence regarding Patel's possible testimony. The failure to do so defeats defendant's IAC argument in this regard. Porter, 216 N.J. at 353.

Defendant certified that on December 12, 2008, he suffered injuries when he was involved in an accident while driving a truck in Illinois. Linton, defendant's brother, certified that in "approximately Dec[ember] . . . 2008, [he]

picked up [defendant] in Indiana/Illinois." Defendant "could barely walk at that time due to his back pain." According to Linton, defendant still had difficulty walking "up to one month later," and was "walking with a limp and stiffness in his leg." Linton asserted he would have been willing and able to testify at trial.

Defendant also furnished medical records from the emergency room of a medical facility in Mattoon, Illinois. They demonstrate defendant was involved in an accident on December 8, 2008, not December 12, and that he was diagnosed with a cervical strain and a right thigh contusion. The records reflect that after defendant underwent various diagnostic tests, he "got up and walked around" with "no more complaints." Defendant also told doctors that he did not need anything to address his pain, "fe[lt] well and want[ed] to go home."

Defendant contends trial counsel failed to appreciate the significance of Linton's testimony, in conjunction with the medical records and any possible police report of the Illinois accident. He argues this evidence would have called into question some of the State's video surveillance evidence at trial because the alleged perpetrators seen in the video footage had no limp.

The PCR judge rejected the argument, noting that the medical records showed defendant's injuries were minimal, and Linton's evidence would not have countered the significant evidence of defendant's guilt nor made any

difference in the outcome of the trial. We agree, and the argument requires no further discussion. R. 2:11-3(e)(2).

Lastly, defendant contends trial counsel was ineffective for failing to call Andrews as a witness at trial. Andrews certified to jailhouse conversations he had with Sessions, claiming Sessions told him that regardless of defendant's actual involvement with the crimes, Sessions intended to make the prosecutor believe "he was a victim of [defendant]," and "regardless of [defendant's] involvement, he would claim that it was [defendant] in order to better his (Sessions') position." Andrews was later housed with defendant and claimed that he would have been available to testify at defendant's trial about his talks with Sessions if he had been called as a witness.

The PCR judge found defense counsel's decision not to call Andrews as a witness was a sound strategic choice made after thoroughly investigating Andrews' potential testimony. The judge noted that counsel's associate interviewed Andrews at length and obtained all the same information contained in Andrews' certification. He noted that trial counsel asked for and received discovery from the Union County Prosecutor's Office regarding Andrews, including correspondence from Andrews in which he expressed a willingness to

testify against defendant. These factual findings were amply supported by the documentary evidence offered by the State.

In addition, the PCR judge noted that Sessions was subjected to vigorous cross-examination at trial, and even if Andrews were called, he would have been subject to impeachment pursuant to N.J.R.E. 609(b) regarding his prior crimes. In short, Andrews' testimony would not have made a difference in the outcome of the trial. We agree with the judge and the argument requires no further discussion. R. 2:11-3(e)(2).

The failure to call a cell phone tower expert

Defendant's final IAC claim requires explanation of some of the State's evidence at trial. The State secured communication data warrants for defendant's and Sessions' cell phones; the call records demonstrated the two men were in frequent communication around the times of the robberies. The State also secured a wiretap authorization for Sessions' phone, which resulted in the audiotaped incriminating communications between the two men.

The State's expert, Adam Durando, specialized in "the field of radio frequency engineering regarding coverage area predictions and call detail record explanation." Durando estimated the coverage areas for cell phone towers that the call records indicated were used to transmit the calls between defendant and

Sessions, although Durando acknowledged that any predicted coverage area was only "[seventy-five] percent accurate." The thrust of Durando's testimony was that when defendant and Sessions were communicating with each other by cell phones on the nights of the robberies, the cell phone signals were reflecting from cell phone towers in close proximity to the sites of the robberies. Durando was vigorously cross-examined. He acknowledged the potential inaccuracy in his estimates, and he admitted having made assumptions in his methodology that supported his opinions.[4]

McInvaille's report furnished in support of defendant's petition also criticized Durando's methodology:

> In my professional opinion, based on my analysis of this case, my training and experience, the call detail records were used in a misleading manner and were not accurately demonstrated to the court. It is my opinion that the coverage limits depicted would have been misleading as to the true operation of the network and based on flawed and inaccurate methodology.

The report, however, did not directly dispute Durando's opinion that defendant's phone and Sessions' phone interacted with each other on the nights of the

[4] We note that the Court has granted certification of our judgment in State v. Burney, in which we affirmed the trial court's admission of similar cell phone tower expert testimony. 471 N.J. Super. 297, 320–23 (App. Div. 2022). See State v. Burney, 252 N.J. 134 (2022).

robberies and were in close proximity to the robbery sites at the time. Critically, McInvaille acknowledged that Durando's methodology "expand[ed] the area of coverage" for any cell tower "in what could be considered . . . an advantage to . . .defendant." As defendant's brief acknowledges, this reference in the report "seemingly 'benefitted'" him, but nevertheless defendant claims McInvaille's report "read as a whole . . . eviscerated Durando's testimony."

In rejecting defendant's IAC claim in this regard, the PCR judge recognized that McInvaille's report "likely benefitted [defendant] given the circumstances," but reasoned that defendant failed to "meet prong two of the Strickland/Fritz test because he c[ould] not show that the outcome of his case would have been different but for the alleged ineffectiveness." We agree that defendant failed to demonstrate the absence of McInvaille's testimony resulted in any prejudice.

If he testified consistently with his report, McInvaille would not have provided any greater benefit to defendant at trial than was achieved by the effective cross-examination of Durando by defense counsel. Durando acknowledged only seventy-five percent accuracy in his estimates of the cell tower coverage areas, and he admitted that a variety of factors impacted whether, in fact, defendant's or Sessions' cell phone used the tower closest to their

respective cell phones to transmit the signal. Moreover, according to McInvaille, Durando's estimates expanded the coverage areas, meaning that defendant or Session's phones may have actually been closer to a specific tower and perhaps closer to the site of the crimes.

Under the circumstances, assuming arguendo that trial counsel should have called an expert witness like McInvaille to rebut Durando's testimony, that failure is unlikely to have affected the outcome of the trial. McInvaille's report certainly does not undermine our confidence in the correctness of the jury's verdicts. Pierre, 223 N.J. at 583 (citing Strickland, 466 U.S. at 694; Fritz, 105 N.J. at 52).

Affirmed.