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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3699-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMES HABEL,

Defendant-Appellant.

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Argued May 31, 2023 – Decided July 12, 2023

Before Judges Gilson and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 13-06-1087.

Edward C. Bertuccio argued the cause for appellant (Kalavruzos, Mumola, Hartman, Lento & Duff, LLC, attorneys; Edward C. Bertuccio, of counsel and on the briefs).

Monica do Outeiro, Assistant Prosecutor, argued the cause for respondent (Raymond S. Santiago, Monmouth County Prosecutor, attorney; Monica do Outeiro, of counsel and on the brief).

## PER CURIAM

Defendant James Habel appeals from a July 21, 2021 order denying his petition for post-conviction relief (PCR) following an evidentiary hearing. He argues that the PCR court erred when it found that there was no evidence that his trial counsel had a "side-switching" conflict of interest making his representation ineffective. Defendant also contends that the PCR court erred in not drawing an adverse inference against the State and not admitting a newspaper article into evidence at the PCR hearing. Discerning no merit in those arguments, we affirm.

### I.

Defendant is the former superintendent of schools for Wall Township. In June 2013, a Monmouth County grand jury indicted him for fourteen crimes related to his alleged acceptance of payments for unreported vacation-day absences and falsifying or tampering with records related to his district-issued automobile. Defendant retained Robert Honecker, Jr., an attorney then in private practice, to represent him. From 2003 to 2005, Honecker had served as First Assistant Prosecutor and later Acting Prosecutor of Monmouth County.

In March 2015, a jury convicted defendant of five crimes: second-degree official misconduct, N.J.S.A. 2C:30-2(a); and four counts of falsifying or

tampering with records, N.J.S.A. 2C:21-4(a). After the verdict, defendant retained new counsel who filed a motion for a new trial, arguing, among other things, that Honecker had a non-waivable conflict of interest because he had "switched sides" in violation of RPC 1.11. Specifically, defendant contended that in 2005 Honecker had been involved in overseeing investigations relating to the Wall school district and defendant, and those investigations formed the basis for the charges on which defendant was indicted in 2013. The trial court denied defendant's motion for a new trial, finding that it was untimely and not supported by competent evidence.

In December 2015, defendant was sentenced to five years in prison with no parole eligibility. He filed a direct appeal, making numerous arguments seeking to reverse his convictions and sentence. Two of the arguments raised by defendant on his direct appeal related to his contention that Honecker had a side-switching conflict of interest. Defendant argued that the conflict of interest required reversal of his convictions and a new trial and that it made Honecker ineffective in his assistance as counsel.

We rejected defendant's arguments and affirmed his convictions and sentence. State v. Habel (Habel I), No. A-1473-15 (App. Div. Apr. 10, 2018). Concerning the alleged conflict of interest, we agreed with the trial court that

defendant's motion for a new trial was not timely under Rule 3:20-2. We also held that the trial court "correctly ruled that defendant provided no competent factual information establishing his right to relief" based on the alleged conflict of interest. Habel I, slip op. at 9-10. In that regard, we noted that "no evidence reveals that the investigation conducted while Honecker was at the Prosecutor's Office had any relation to the charges for which defendant was indicted." Id. at 12. We also held that "[t]he inclusion of Honecker on the 'witness list' did not create a disqualifying conflict." Id. at 15. Furthermore, we ruled that the introduction of an email defendant sent, and on which Honecker was copied, did not create a disqualifying conflict. Ibid.

On the direct appeal, we did not rule on defendant's claim that Honecker provided ineffective assistance due to the alleged conflict of interest. Instead, we stated that such a claim was "better suited for a [PCR] application." Id. at 16. In making that ruling, we pointed out that defendant had not waived his attorney-client privilege and "effectively preclud[ed] Honecker from providing information that may have shed more light on the conflict issue." Id. at 14. The Supreme Court denied defendant's petition for certification. State v. Habel, 236 N.J. 558 (2019).

In May 2019, defendant filed a petition for PCR. He argued that Honecker provided ineffective assistance at trial because of the side-switching conflict of interest. At oral argument on the petition, defendant, through counsel, represented for the first time that he would waive his attorney-client privilege if the court granted a hearing on his application. The PCR court granted defendant's request for an evidentiary hearing, limited to the issue of whether Honecker had a conflict of interest due to his prior role as First Assistant Prosecutor and Acting Prosecutor of Monmouth County from 2003 to 2005.<sup>1</sup>

A three-day PCR evidentiary hearing was conducted in May 2021. Judge Michael Guadagno, retired and on recall, heard testimony from four witnesses: defendant, David Lucas, Barry Serebnick, and Thomas Campo. The State and defendant also submitted various documents into evidence. On July 21, 2021, Judge Guadagno issued a written opinion and order denying defendant's PCR petition.

The judge found that the State's witnesses, Serebnick and Campo, provided credible testimony. Relying on their testimony, Judge Guadagno

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<sup>1</sup> The PCR court also disqualified two assistant prosecutors from representing the State at the evidentiary hearing because they might be potential witnesses. On leave granted, we reversed that order. State v. Habel (Habel II), No. A-4004-19 (App. Div. Dec. 18, 2020).

found that there was no evidence that the Monmouth County Prosecutor's Office had been investigating defendant in 2005 when Honecker was First Assistant or Acting Monmouth County Prosecutor. Judge Guadagno also found that defendant's testimony about the alleged conflict was "hesitant," "unsure," and "not credible."

In making his rulings, Judge Guadagno noted that defendant had the opportunity to call Honecker as a witness at the PCR hearing but chose not to call him. In that regard, the judge stated that had Honecker been called, defendant's PCR counsel could have questioned Honecker about a newspaper article that had quoted Honecker. The judge also noted that at the PCR hearing he had sustained objections and not admitted the newspaper article as hearsay, but he had also pointed out to PCR counsel that he could call Honecker. Thus, Judge Guadagno found that "[t]he only conclusion that can be drawn is that defendant and his counsel made a tactical decision not to call Honecker and [pointed] a legally feeble finger at the State."

In addition, Judge Guadagno found that "[t]he State had no obligation to call Honecker." Accordingly, the judge rejected defendant's request to draw an adverse inference against the State in accordance with State v. Clawans, 38 N.J. 162 (1962). In rejecting that adverse inference, Judge Guadagno reviewed the

four Clawans factors and found that none of them supported drawing an adverse inference against the State.

## II.

On this appeal, defendant presents four arguments for our consideration:

POINT I – [DEFENDANT'S] TRIAL COUNSEL COMMITTED A VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT AND VIOLATED STATUTORY LAW AND CASE LAW PROHIBITING SIDE-SWITCHING FROM PRIOR GOVERNMENT EMPLOYMENT WHERE HE PRESIDED OVER THE SAME INVESTIGATION OF [DEFENDANT] THAT HE DEFENDED HIM AGAINST AT TRIAL, WHICH REQUIRES THE REVERSAL OF [DEFENDANT'S] CONVICTIONS AND THE REMAND FOR A NEW TRIAL BY THE PCR COURT.

POINT II – THE PCR COURT SHOULD HAVE INVOKED A CLAWANS INFERENCE IN FAVOR OF [DEFENDANT] AND AGAINST THE STATE AND ORDERED A NEW TRIAL.

POINT III – THE PCR COURT SHOULD HAVE ADMITTED THE NEWSPAPER ARTICLE AS EVIDENCE.

POINT IV – [DEFENDANT] PROVED THE STRICKLAND/FRITZ REQUIREMENTS DURING THE PCR HEARING. [DEFENDANT'S] RELIEF SHOULD BE GRANTED.

Defendant's arguments were all considered, analyzed, and rejected by Judge Guadagno based on the evidence adduced at the PCR hearing. We agree

with the rulings made by Judge Guadagno because his factual and credibility findings were supported by substantial credible evidence and his legal conclusions, which were based on well-established law, were correct. Accordingly, we affirm substantially for the reasons explained by Judge Guadagno in his thorough and well-reasoned written opinion. We add a few brief comments.

Defendant's first and fourth arguments on this appeal essentially take issue with the factual and credibility findings made by Judge Guadagno. When a PCR court conducts an evidentiary hearing, we review factual and credibility findings on a deferential standard and only reverse them if they are not supported by substantial credible evidence. See State v. Pierre, 223 N.J. 560, 576 (2015) (citing State v. Harris, 181 N.J. 391, 415 (2004)). Once Judge Guadagno found that there was no evidence of a conflict of interest, he correctly concluded that defendant could not make a showing of ineffective assistance of counsel. Honecker left the Monmouth County Prosecutor's Office in 2005. Defendant was indicted in 2013. The credible testimony at the PCR evidentiary hearing established that the Monmouth County Prosecutor's Office was not investigating defendant in 2005 and, thereafter, when defendant was investigated for the charges that resulted in his indictment in 2013, Honecker was not involved in



that investigation. In short, there was no basis to find that Honecker had a conflict of interest resulting in ineffective assistance of counsel.

"[A] defendant may be entitled to [a Clawans charge] if the State fails to present a witness who is within its control, unavailable to the defense, and likely to give favorable testimony to the defendant." State v. Dabas, 215 N.J. 114, 140 (2013) (citing Clawans, 38 N.J. at 170-75). An adverse inference is only properly drawn when the non-testifying witness was (1) "within the power of the party to produce"; (2) the testimony would have been superior to other available evidence; (3) the witness was available; and (4) the witness was not a person who "by his [or her] position would be likely to be so prejudiced against the party that the latter could not be expected to obtain unbiased truth" from that witness. Clawans, 38 N.J. at 171.

Judge Guadagno found that none of the factors supporting an adverse inference were established by defendant. Most fundamentally, Judge Guadagno found that defendant could have called Honecker but choose not to call him. The judge also found that the State had no obligation to call Honecker. Those fact findings were amply supported by the substantial credible evidence at the hearing, and we discern no error of law.

Finally, we discern no abuse of discretion in Judge Guadagno's decision to not admit the newspaper article. Newspaper articles are "indisputably hearsay." State v. Loftin, 146 N.J. 295, 382 (1996) (quoting State v. Koedatich, 112 N.J. 225, 289 (1988)). Defendant argues that the newspaper article should have been admitted as an admission of a party or declaration against interest under N.J.R.E. 803(b)(1) and N.J.R.E. 803(c)(25). Judge Guadagno correctly found that Honecker was not a party and his statements in the newspaper article were not against his interest. Those findings were supported by substantial credible evidence and are grounded on well-established law.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION