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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2745-22**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RYON GREEN, a/k/a
RYON L. GREEN,

Defendant-Appellant.

Submitted May 13, 2024 – Decided May 30, 2024

Before Judges Gilson and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 12-05-0580.

Jennifer Nicole Sellitti, Public Defender, attorney for appellant (Steven M. Gilson, Designated Counsel, on the brief).

Jennifer Webb-McRae, Cumberland County Prosecutor, attorney for respondent (Stephen Christopher Sayer, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Ryon Green appeals from the March 2, 2023 order of the Law Division denying his petition for post-conviction relief (PCR) after an evidentiary hearing. We affirm.

I.

At approximately 6:30 p.m. on June 25, 2011, B.N. was working at a gas station in Deerfield Township.¹ A red Nissan Maxima pulled in for gas. There were two Black men in the car. After B.N. delivered the gas, the driver circled the building and parked by the air pump on the side of the building. Ten minutes later, the vehicle left with no use of the air pump having taken place.

Approximately two hours later, B.N. was outside the building speaking with another attendant when he saw a Black man approach with a gun. The man was dressed in black clothing and wore a black bandana over his face. Another Black man, who was also dressed in black and wore a black bandana over his face, approached B.N. from behind, poked him in the back, struck him on the left side of his face, and demanded money. B.N. and the other attendant gave money to the man with the gun while the other man riffled through B.N.'s

¹ We use initials to protect the identity of the victims and witnesses.

pockets. The two victims gave the assailants approximately \$1,000, in denominations of one- and one-hundred dollars.

As this was happening, J.B. stopped at the station for gas. He saw four men by the side of the gas station. According to J.B., two of the men were Black, one of whom was wearing a black hooded sweatshirt, tan boots, and a mask over his face and the other was wearing all black clothing with a mask over his face. He saw that one of the men had a gun. When J.B. aimed his car headlights at the group, the two men dressed in black ran to a wooded area behind a liquor store next to the gas station.

Also at the time of the robbery, S.L., another employee of the gas station, exited the liquor store and was walking toward his vehicle. He saw a 1997 or 1998 maroon Nissan Maxima parked in the parking lot of the then-closed real estate agency to the left of the gas station. S.L. saw two Black men run up to the vehicle, jump in, and drive away. According to S.L., the driver was wearing a white tank top and jeans.

At 8:27 p.m., a State trooper received a transmission about the robbery at the gas station. The dispatcher advised that the suspects were two young Black men in a 1997 or 1998 maroon-colored Nissan Maxima. From prior encounters, the trooper knew codefendant Vascell McKoy drove a vehicle that matched the

description of the suspects' car. The trooper immediately proceeded to Vascell's house, which was about three miles from the gas station.² About nine minutes later, he arrived to find a red Maxima backing out of the driveway of Vascell's house with a Black male in the driver's seat and a Black male in the front passenger's seat. The trooper followed the car and effectuated a stop.

The trooper ordered both men out of the vehicle. Defendant exited the passenger side wearing a black baseball cap, plaid button-down collared shirt with a black t-shirt underneath, gray cargo shorts, white socks, and flip-flops. Vascell exited the driver's side of the vehicle. He was wearing a white sleeveless undershirt, green basketball shorts, and white sneakers. The trooper looked into the Maxima and saw clothing and a tan work boot in the back seat.

The trooper impounded the car and took defendant and Vascell to police headquarters. A detective searched the Maxima and found \$1,064 in cash in the glove compartment in various denominations of one- and fifty-dollar bills. He also found boots in the trunk with a .22 caliber handgun inside one of the boots. There were no fingerprints on the gun, which was loaded with blanks.

² Because both Vascell McKoy and his sister Vinchel McKoy will be mentioned in this opinion, we refer to them by their first names. No disrespect is intended.

Black pants, a black belt, black sweatpants, black and white gloves, and two pairs of black boots were found during a search of Vascell's home. A search of the wooded area behind the liquor store uncovered a black knit cap, a black long-sleeved shirt, a black and paisley bandana, and a replica .9 mm handgun. There was a mix of DNA on the knit cap, with Vascell as the main secretor. Defendant was excluded as a source of DNA on the cap.

A grand jury indicted defendant, charging him with: (1) second-degree conspiracy to commit robbery, N.J.S.A. 2C:15-1(a) and N.J.S.A. 2C:5-2(a); (2) first-degree robbery, N.J.S.A. 2C:15-1(a)(2); (3) third-degree theft, N.J.S.A. 2C:20-3(a); (4) second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); (5) second-degree possession of a handgun without a permit, N.J.S.A. 2C:39-5(b); and (6) fourth-degree aggravated assault with a firearm, N.J.S.A. 2C:12-1(b)(4).

Defendant testified at trial. He denied involvement in the robbery. He testified that he and Vascell were friends and that at the time of the robbery he was dating Vascell's sister Vinchel. He testified that the day before the robbery, he received a call from Vinchel, who told him that Vascell was on his way to pick up defendant at his aunt's house, where he was then living, to bring him to Vascell's home, where Vinchel was. According to defendant, when Vascell

arrived at his aunt's house, a man named "Junior" was in the backseat of the car. Defendant did not know Junior's real name or where he lived.

The three drove back to Vascell's house where defendant remained with Vinchel. At approximately 10:00 a.m. on the morning of the robbery, defendant returned to his aunt's house to shower and pick up some belongings before returning to Vascell's home.

Defendant testified that Vascell left the house between 3:00 p.m. and 4:00 p.m., but defendant stayed behind with Vinchel. According to defendant, Vascell returned at about 8:00 p.m., intending to give defendant a ride back to his aunt's house. Defendant accepted the ride from Vascell and shortly after the car backed out of the driveway, a trooper stopped the vehicle. Defendant denied knowledge or ownership of the boots, handgun, and money found in the vehicle. Neither the victims nor the witnesses could identify the assailants.

A jury convicted defendant of all counts of the indictment. After merging certain convictions, the trial court sentenced defendant to a fifteen-year term of imprisonment with an eighty-five-percent period of parole ineligibility pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2. The court also imposed a

concurrent eight-year term of imprisonment with a four-year period of parole ineligibility on the handgun possession conviction.³

We affirmed defendant's convictions and sentence. State v. Green, A-5355-13 (App. Div. Aug. 5, 2016). The Supreme Court denied defendant's petition for certification. State v. Green, 228 N.J. 90 (2016).

Defendant subsequently filed a petition for PCR, alleging ineffective assistance of counsel. In support of the petition, defendant submitted a certification in which he claimed that his trial counsel failed to interview Vascell and Vinchel as potential alibi witnesses. In addition, he alleged that trial counsel refused to call them as witnesses despite his direction to do so. Defendant argued that both Vascell and Vinchel would have corroborated his alibi testimony and counsel's failure to call them as witnesses required reversal of his convictions, or at least an evidentiary hearing on his petition to determine if he was entitled to PCR.

³ Before trial, Vascell pled guilty to second-degree conspiracy to commit robbery, third-degree theft, and fourth-degree aggravated assault. He received a five-year prison term, with an eighty-five-percent period of parole ineligibility.

After considering defendant's submissions and a certification from defendant's trial counsel submitted by the State, the trial court entered an order denying defendant's petition without an evidentiary hearing.

We reversed. State v. Green, A-0807-19 (App. Div. May 10, 2021). We concluded that defendant presented a prima facie case for PCR that warranted an evidentiary hearing. We, therefore, remanded the matter to the Law Division for a hearing.

On remand, the trial court held an evidentiary hearing. Vinchel testified that on the day of the robbery she and defendant were dating. At the time of the hearing, they were friends but had not spoken to one another for two or three years. Although not certain of the time, Vinchel testified that defendant "was with me" at her home during the robbery. Vinchel initially thought the robbery had taken place in the morning, but subsequently approximated that Vascell picked up defendant at her house sometime between 8:00 p.m. and 9:00 p.m. to drive him back to his aunt's house.

Vinchel testified that defendant's trial counsel never spoke to her about testifying at trial and did not send an investigator to speak to her. She stated that had she been contacted, she would have been willing to testify at trial. According to Vinchel, in 2018, seven years after the robbery, she went to the

Cumberland County Prosecutor's office to report that defendant was not involved in the robbery because he was with her when it took place. She testified that she did not go to the prosecutor's office earlier because she was not aware of the law and did not know what to do.

Defendant's trial counsel also testified. He stated that he met with defendant several times during his representation and denied defendant ever asked him to interview Vascell or Vinchel as potential alibi witnesses. Counsel testified that prior to trial defendant gave him "an assessment of what happened and it didn't include an alibi witness." In addition, he testified that had defendant raised the possibility of calling Vascell and Vinchel as alibi witnesses, he would have advised that "that wasn't an avenue that would have been something to pursue" because "I didn't believe there was an alibi witness that would be helpful to us in the case."

Counsel testified that he was certain neither Vascell nor Vinchel would have been able to provide truthful and legitimate alibi testimony. He testified that Vascell's guilty plea would have undermined his credibility as an alibi witness. In addition, counsel's view of Vascell's potential value as an alibi witness, had he been considered, would have been informed by trial counsel's familiarity with Vascell from a prior case involving a codefendant.

In addition, counsel offered his opinion that the assistant prosecutor trying defendant's case was very experienced and would likely have seriously damaged the credibility of Vascell or Vinchel as alibi witnesses. He testified that "an alibi witness would be a problem for us because, and you can understand, if an alibi witness testified and that alibi witness is broken, he's done."

With respect to his evaluation of Vascell and Vinchel as alibi witnesses, counsel testified that "I wasn't making an assessment because I never intended to call an alibi witness, but I do believe it would have ended in a conviction." Counsel acknowledged that he knew "to an extent" that defendant intended to testify to an alibi, despite his advice not to pursue that defense. Counsel acknowledged that the Supreme Court had censured him multiple times in unrelated cases for "gross neglect, lack of diligence, and failure to communicate with a client."

Defendant testified that his trial counsel's strategy was to have him testify to establish an alibi defense. He recalled meeting with his counsel "at least two or three times" prior to trial and emphasizing to him that he had been with Vinchel at the time of the robbery.

On February 28, 2023, the trial court issued an oral opinion denying defendant's petition. The court found that defendant did not make his counsel

aware of the potential alibi witnesses prior to defendant taking the stand at trial. In addition, the court found that had counsel considered Vascell and Vinchel as alibi witnesses he would have made a strategic decision not to pursue an alibi defense. The court found that one of the concerns with an alibi defense identified by counsel – that an alibi witness would be vulnerable to attacks on credibility – was substantiated at the evidentiary hearing. During direct examination at the hearing, Vinchel misidentified the time of day that the robbery took place, testifying that defendant was with her on the morning of June 25, 2011. The court found that this testimony confirmed that an alibi witness poses the potential of doing more harm than good to a defendant.

The court also found that even if it was ineffective assistance for trial counsel not to call Vascell or Vinchel as alibi witnesses, the record did not establish a reasonable probability that the outcome of the trial would have been different had they testified. The court found that Vinchel "was not what [it] views [as] a very strong witness given the multiple contradictions" in her testimony at the evidentiary hearing. The court concluded that her testimony "quite arguably could have been much more harmful than helpful if it was presented at trial." The court also found that Vascell, as a codefendant who had

entered a guilty plea, presented a number of pitfalls that rendered his testimony unlikely to have resulted in an acquittal.

Thus, the court concluded, defendant did not establish he was entitled to PCR. A March 2, 2023 order memorializes the trial court's decision.

This appeal followed. Defendant makes the following argument.

TRIAL COUNSEL'S FAILURE TO INVESTIGATE
POTENTIAL ALIBI WITNESSES CONSTITUTES
INEFFECTIVE ASSISTANCE AND MANDATES
THAT DEFENDANT'S CONVICTIONS BE
REVERSED.

II.

"Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." State v. Preciose, 129 N.J. 451, 459 (1992). Under Rule 3:22-2(a), a defendant is entitled to post-conviction relief if there was a "[s]ubstantial denial in the conviction proceedings of a defendant's state or federal constitutional rights." Ibid. (citing State v. Mitchell, 126 N.J. 565, 579 (1992)). "A petitioner must establish the right to such relief by a preponderance of the credible evidence." Ibid. "To sustain that burden, specific facts" that "provide the court with an adequate basis on which to rest its decision" must be articulated. Mitchell, 126 N.J. at 579.

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee criminal defendants the right to the effective assistance of counsel. State v. O'Neil, 219 N.J. 598, 610 (2014) (citing Strickland v. Washington, 466 U.S. 668, 686 (1984); State v. Fritz, 105 N.J. 42, 58 (1987)). To succeed on a claim of ineffective assistance of counsel, the defendant must meet the two-part test established by Strickland, and adopted by our Supreme Court in Fritz. 466 U.S. at 687; 105 N.J. at 58.

Under Strickland, a defendant first must show that his or her attorney made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687. Counsel's performance is deficient if it "[falls] below an objective standard of reasonableness." Id. at 688.

A defendant also must show that counsel's "deficient performance prejudiced the defense." Id. at 687. A defendant must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. Ibid. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a

result of the alleged deficiencies." Id. at 697; State v. Marshall, 148 N.J. 89, 261 (1997). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Strickland, 466 U.S. at 697.

"We defer to trial court's factual findings made after an evidentiary hearing on a petition for PCR." State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016). "However, we do not defer to legal conclusions, which we review de novo." State v. Holland, 449 N.J. Super. 427, 434 (App. Div. 2017).

Having carefully reviewed defendant's arguments in light of the record and applicable legal principles we find no basis on which to reverse the trial court's order. The trial court found that defendant did not make his trial counsel aware of Vascell or Vinchel as potential alibi witnesses. In addition, the court found that had counsel been aware of those potential alibi witnesses, he would have made the strategic decision not to call them at trial. As the trial court concluded, such a strategic decision would have been objectively reasonable. Our Supreme Court has observed that "[d]etermining which witnesses to call to the stand is one of the most difficult strategic decisions that any trial attorney must confront." State v. Arthur, 184 N.J. 307, 320 (2005). "[A] defense 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).

As noted by the trial court, there are several sound reasons why competent counsel might have decided not to call Vascell and Vinchel as alibi witnesses. First, trial counsel testified that when they met prior to trial, defendant provided an "assessment of what happened" that did not include an alibi witness. This testimony suggests that trial counsel doubted the authenticity of potential alibi testimony. Second, trial counsel was familiar with Vascell as a codefendant from a prior matter and that familiarity would have informed his opinion of Vascell's value as an alibi witness. Third, trial counsel was weary of the potential for an experienced assistant prosecutor to damage the credibility of any alibi witness during cross-examination. This concern was corroborated during the evidentiary hearing when Vinchel offered contradictory testimony with respect to a crucial issue: the time that the robbery took place. Fourth, Vinchel was defendant's girlfriend at the time of trial, an avenue through which her and Vascell's credibility would have been challenged. Finally, Vascell had recently been convicted of robbery, a fact that would have been used by the State to challenge the truthfulness of his alibi testimony.

These factors also support the trial court's determination that testimony by Vascell and Vinchel would not have resulted in a different outcome at trial. The trial court, which had the opportunity to assess Vinchel's testimony, found she was not "a very strong witness given the multiple contradictions" in her testimony at the evidentiary hearing. Nothing in the record suggests that alibi testimony by these witnesses would have resulted in defendant's acquittal.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION