

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3619-13T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BRIAN M. RICHARDSON,

Defendant-Appellant.

Submitted October 11, 2016 – Decided February 13, 2017

Before Judges Guadagno and Suter.

On appeal from the Superior Court of New
Jersey, Law Division, Passaic County,
Indictment No. 05-11-1604.

Joseph E. Krakora, Public Defender, attorney
for appellant (Lee March Grayson, Designated
Counsel, on the brief).

Camelia M. Valdes, Passaic County
Prosecutor, attorney for respondent (Marc A.
Festa, Senior Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

Defendant Brian M. Richardson appeals from an order denying
his petition for post-conviction relief (PCR). Defendant was

convicted after trial of the murder, armed robbery, and felony murder of Christopher Wilson, the aggravated assault of Levar McKay, and various weapons charges. Defendant was sentenced to sixty years in prison on the murder count, with eighty-five percent of that time to be served before he becomes eligible for parole pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, a consecutive term of eight years with four years of parole ineligibility on the aggravated assault charge, and two concurrent terms of eighteen years with eighty-five percent parole ineligibility on the armed robbery and felony murder charges. Defendant appealed his convictions and sentences. We affirmed, State v. Richardson, No. A-5881-07 (App. Div.), and the Supreme Court denied certification. 205 N.J. 77 (2010).

In 2011, defendant filed a PCR petition alleging his trial counsel provided ineffective assistance. After two days of oral argument, the PCR judge denied the petition on the record, later supplemented by a written decision.

On appeal, defendant raises the following arguments:

POINT I

POST-CONVICTION RELIEF SHOULD HAVE BEEN GRANTED BECAUSE TRIAL COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO OBJECT TO INAPPROPRIATE COMMENTS MADE BY THE PROSECUTOR DURING SUMMATION.

POINT II

BECAUSE THE DEFENDANT MADE A PRIMA FACIE SHOWING OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, THE PCR COURT MISAPPLIED ITS DISCRETION BY DENYING POST-CONVICTION RELIEF WITHOUT CONDUCTING A FULL EVIDENTIARY HEARING.

A. TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE BECAUSE HE FAILED TO REMOVE JUROR NUMBER THIRTEEN AFTER THE DEFENDANT TOLD HIM THAT HE KNEW THE JUROR, WHO LIVED NEAR HIS MOTHER'S HOME WHERE HE RESIDED, AND HAD BEEN INVOLVED IN A DISPUTE WITH THE JUROR AND HER HUSBAND.

B. TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE BECAUSE HE DID NOT PROVIDE THE DEFENDANT WITH DISCOVERY CONSISTING OF A STORE VIDEO SURVEILLANCE RECORDING AND OTHERWISE FAILED TO PROPERLY ADVISE HIM ABOUT WHAT THE VIDEO ALLEGEDLY DEPICTED, THEREBY MISLEADING THE DEFENDANT INTO REJECTING THE STATE'S PLEA OFFER.

C. TRIAL COUNSEL WAS DEFICIENT BECAUSE HE FAILED TO EFFECTIVELY ARGUE FOR A WADE^[1] HEARING TO CONTEST AN IMPROPER IDENTIFICATION PROCEDURE UTILIZED WITH AN ALLEGED WITNESS.

POINT III

AN EVIDENTIARY HEARING SHOULD HAVE BEEN CONDUCTED BECAUSE THE CERTIFICATION BY STATE WITNESS ANTHONY MITCHELL PRESENTED NEW EVIDENCE WHICH, IF FOUND CREDIBLE, WOULD

¹ United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

EITHER EXCULPATE THE DEFENDANT OR WARRANT A NEW TRIAL.

POINT IV

REMAND FOR AN EVIDENTIARY HEARING IS REQUIRED BECAUSE TRIAL COUNSEL WAS INEFFECTIVE AND THE AGGREGATE OF ERRORS DENIED THE DEFENDANT A FAIR TRIAL.

The PCR judge found that four of the eight points raised in defendant's petition were adjudicated on direct appeal and were thus precluded by Rules 3:22-4 and 3:22-5. In spite of this procedural bar, the PCR judge addressed all of the defendant's arguments on the merits and rejected them.

As to defendant's first claim, we agree that he raised the issue of the prosecution's allegedly inappropriate comments on direct appeal. In rejecting this claim, we held that defendant's argument lacked sufficient merit to warrant discussion in a written opinion. Richardson, supra, slip op. at 8 (citing R. 2:11-3(e)(2)).

"[A] post-conviction proceeding may not be used as a substitute for an appeal from the judgment of conviction." State v. Smith, 43 N.J. 67, 74 (1964), cert. denied, 379 U.S. 1005, 85 S. Ct. 731, 13 L. Ed. 2d 706 (1965). While alleged errors which deny fundamental fairness in a constitutional sense may be raised for the first time in a PCR proceeding, "an issue, . . . once decided, may not be relitigated." Ibid.

We are satisfied that none of the comments identified by defendant were "clearly and unmistakably improper," or "substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense." State v. Timmendequas, 161 N.J. 515, 575 (1999), cert. denied, 534 U.S. 858, 122 S. Ct. 136, 151 L. Ed. 2d 89 (2001).

Defendant next claims his trial counsel was ineffective in failing to seek the removal of juror number thirteen, and that the PCR judge erred in not granting an evidentiary hearing on the matter. Defendant alleges that juror thirteen lived three doors away from his mother, and that he had been rude to the juror in the past and had a dispute with her husband. Defendant claims that at first he did not recognize juror thirteen, but after speaking on the phone with his mother who told him the identity of juror thirteen, he advised his trial counsel the following day that juror thirteen would not "be able to decide on the case fairly" if she recognized him. Defendant claims he asked trial counsel to attempt to remove juror thirteen after trial had begun and counsel responded that the juror might not decide the case as there were two alternates. No action was taken at that time. After two of the fourteen empaneled jurors were dismissed, juror thirteen was part of the final twelve that rendered a guilty verdict against defendant. The PCR judge

rejected defendant's argument, noting he failed to raise the issue at trial and his claim was "unsubstantiated and meritless."

Defendant submitted a supplemental pro se brief in his direct appeal, arguing the trial judge committed reversible error by failing to conduct additional questioning of the jury panel to ascertain the impact of statements allegedly made during jury selection by a prospective juror who was dismissed. Defendant was clearly aware of the issue involving juror thirteen and it could have been raised on direct appeal. Moreover, the allegation is not supported by any certification and does not warrant an evidentiary hearing.

Defendant next alleges his trial counsel failed to provide him with the opportunity to view a surveillance video from a liquor store depicting defendant with a gun in his waistband. The video was played by the State at trial. Defendant now claims that, had he viewed the video prior to trial, he would have accepted the State's plea offer. Defendant claims his trial counsel told him that the video did not contain any incriminating evidence.

The PCR judge rejected defendant's claim that he was unaware of the video and held that even if he saw the video for the first time at trial, it would not have affected his decision

to reject the plea offer. The judge noted that defendant made no attempt to pursue the plea offer after he saw the video at trial. Moreover, four witnesses connected defendant to possession of the gun used in the murder; for his argument to have any credence, defendant would have to establish he was unaware of both the video and the eyewitness testimony. We agree with the judge's findings.

The Sixth Amendment's guarantee of effective assistance of counsel extends to all "critical" stages of the criminal proceedings including plea negotiations. Missouri v. Frye, 566 U.S. 134, 144, 132 S. Ct. 1399, 1407-08, 182 L. Ed. 2d 379, 390 (2012). "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." Lafler v. Cooper, 566 U.S. 156, 168, 132 S. Ct. 1376, 1387, 182 L. Ed. 2d 398, 410 (2012).

For defendant to obtain relief based on ineffective assistance, he is obliged to show not only the particular manner in which counsel's performance was deficient, but also that the deficiency prejudiced his right to a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To establish prejudice under Strickland, a defendant must "show 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, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. In the context of a plea bargain, a defendant must show the outcome of the plea process would have been different with competent advice. Frye, supra, 566 U.S. at 148, 132 S. Ct. at 1409, 182 L. Ed. 2d at 392.

Even if defendant had made a showing that his counsel's performance was deficient for not showing him the surveillance video, he fails to satisfy the prejudice prong of Strickland, as he cannot show a "reasonable probability" that the outcome would have been different, i.e., he would have accepted the plea offer.

Defendant also contends that trial counsel was ineffective for failing to successfully argue for a Wade hearing to challenge the identification procedures used with respect to Giselle Bulwin's identification of defendant in a photo array. Specifically, defendant objected to the fact that Bulwin testified she had never seen him before, but nonetheless "recognized [him] because of [his] lips." However, trial counsel did argue for a Wade hearing, albeit unsuccessfully, on the grounds of the identification procedures used. The trial judge denied the motion, satisfied that the array was not "unduly suggestive," consisting of African-American men who were remarkably similar looking:

I'm certainly not persuaded that I should now conduct a Wade hearing at this point because I don't know that this necessarily involves undue suggestibility. At most, if there is anything, it is not an exact rendition of the procedure that's to be followed, but it doesn't indicate to me suggestibility in any way, whether the person looked at all the photographs together or one at . . . a time. And the array is a remarkably good array, so I'm not inclined to do a Wade hearing.

Defendant argues that the photo array was suggestive because Bulwin was shown all of the photographs at once, rather than sequentially as suggested by the Attorney General's Guidelines, and because Bulwin commented on defendant's mouth or lips in identifying him.

We are satisfied defendant has failed to demonstrate the requisite level of undue suggestibility. Bulwin testified to being only a few feet away from defendant, in a well-lit area, when defendant threatened to shoot her. Considering the deference we give to a trial court's findings, defendant has not established error in denying a Wade hearing. There is no showing that trial counsel, who made an unsuccessful argument for a Wade hearing, provided representation that "fell below an objective standard of reasonableness," as required by the first prong of Strickland. Strickland, supra, 466 U.S. at 688, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. Accordingly, defendant was

not deprived of a fair trial under the Sixth Amendment. See id. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

Defendant further contends that an evidentiary hearing should have been conducted before making the determination that Anthony Mitchell's certification exculpating defendant lacked credibility. The PCR judge declined to conduct a hearing on the matter, finding Mitchell to have "zero credibility" and his recantation to be "not worth the paper it's printed on." Mitchell made a statement about three weeks after Wilson's killing, implicating defendant. At that time, Mitchell was facing a homicide charge from an unrelated incident. Mitchell was called by the State as a witness at defendant's trial. Mitchell attempted to recant his prior statement, stating that he lied to the police regarding defendant's involvement in the robbery and shooting. Subsequently, Mitchell prepared a certification in support of defendant's PCR petition, claiming for the first time that his "close friend" Jamar Smith (a/k/a "Marty Barnes") was the actual shooter, and that he initially implicated defendant "based on [his] willingness to help out a close friend who had a promising career in sports."

A recantation is viewed as "inherently suspect," State v. Baldwin, 47 N.J. 379, 400, cert. denied, 385 U.S. 980, 87 S. Ct. 527, 17 L. Ed. 2d 442 (1966), "untrustworthy," State v. Carter,

69 N.J. 420, 427 (1976), and "a particularly unreliable form of proof." State v. Puchalski, 45 N.J. 97, 107 (1965).

"Consequently, the burden of proof rests on those presenting such testimony to establish that it is probably true and the trial testimony probably false." Carter, supra, 69 N.J. at 427.

Mitchell's certification is not so much a recantation of his trial testimony, as an enhanced repudiation of his initial statement to police implicating defendant. To warrant an evidentiary hearing on this certification, defendant must make a showing that Mitchell's current statement is probably true and his prior versions are false. Mitchell's initial statement to police clearly implicated defendant in killing Wilson. His attempt to recant that statement at trial was not accepted by the jury and was inconsistent with the testimony of Giselle Bulwin and the three witnesses who observed the actual shooting, Lorelly Arevalo, Hector Ortiz, and Angel Perdomo.

Mitchell claimed he lied to the prosecutor on three occasions and that he had no problem with lying when it was "convenient" to do so. The trial judge determined that Mitchell's trial testimony lacked credibility and his initial statement to the police implicating defendant was reliable.

Mitchell's certification can be considered newly discovered evidence if it is "(1) material to the issue and not merely

cumulative or impeaching or contradictory; (2) discovered since the trial and not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury's verdict if a new trial were granted." State v. Carter, 85 N.J. 300, 314 (1981). "All three prongs of this tripartite test must be met before the evidence can be said to justify a new trial." State v. Engel, 249 N.J. Super. 336, 402 (App. Div.), certif. denied, 130 N.J. 393 (1991).

The PCR judge's conclusion that Mitchell's latest version of July 23, 2005 events was not credible is amply supported by the record. Additionally, defendant has failed to establish that this evidence would have seriously impugned the other trial testimony as to give rise to the conclusion that there resulted a possible miscarriage of justice. See Puchalski, supra, 45 N.J. at 107-08. Accordingly, the judge properly denied the petition without a hearing.

Defendant's remaining arguments including his cumulative error claim lack sufficient merit to warrant further discussion in our 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