DAVID A. GIES, ESQUIRE, P.A.
ID No. 016301986
1230 Parkway Avenue, Suite 307
Ewing, New Jersey 08628
(609) 883-3088
dgieslaw@verizon.net
Designated Counsel for
Defendant-Appellant

JENNIFER N. SELLITTI
Public Defender
Attorney for Defendant-Appellant
31 Clinton Street
P.O. Box 46003
Newark, New Jersey 07101

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0026-23T2

STATE OF NEW JERSEY,

Plaintiff/Respondent

v.

MARK LOVETT,

Defendant/Appellant

CRIMINAL ACTION

On appeal from the denial of defendant's petition for post-conviction relief

Superior Court of New Jersey
Essex County
Indictment No. 13-03-0526-I

Sat Below:
Hon. Robert Heys Gardner, J.S.C.

BRIEF AND APPENDIX (Da1-32; Da37-81) ON BEHALF OF DEFENDANT-APPELLANT
Dated: May 9, 2024

PRESENTLY CONFINED

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS

TABLE OF AUTHORITIES

TABLE TO THE APPENDIX

---

* The petition for post-conviction relief is tantamount to a complaint and as such is required to be included in the appendix pursuant to R. 2:6-1(a)(1).

** Da 33-36 is set forth in a confidential appendix submitted herewith.

*** The pages submitted as Da 39-43 and Da 62-77 are the most legible documents available.

TABLE TO THE CONFIDENTIAL APPENDIX

*** The pages submitted as Da 33-36 are the most legible and complete documents available.

PRELIMINARY STATEMENT

This appeal involves the denial of defendant's post-conviction relief (PCR) petition after an evidentiary hearing was held.

Defendant was convicted by a jury of first-degree aggravated manslaughter, among other crimes, for his purported role in a drive-by shooting which resulted in the death of a nineteen-year-old young man.

The central issue of defendant's PCR petition concerned his trial attorney's failure to conduct a pretrial investigation of his whereabouts on the night of a shooting. As part of a pretrial investigation, defendant desired his trial attorney to interview two alibi witnesses and analyze the cellular telephone data provided by the State during discovery. However, the trial attorney did neither.

The State's proofs against defendant at trial amounted to a pretrial statement of an eyewitness to the shooting which the witness recanted.

At defendant's PCR evidentiary hearing, the trial attorney testified that he did not recall any specific communications with defendant, but remembered, albeit not in detail, the cellular telephone data produced.

In spite of the testimony of the two alibi witnesses who did not testify at defendant's trial, the PCR judge denied defendant's application for relief. The PCR judge concluded that defendant failed to establish either prong of the

Strickland/Fritz test. The judge based his decision to reject defendant's request for relief on an assessment of the credibility of the alibi witnesses' testimony without addressing whether the testimony they imparted would have had an impact on the State's proofs actually presented.

PROCEDURAL HISTORY

On March 1, 2013, the grand jury, sitting in Essex County, returned indictment number 2013-03-0526 against defendant and Shawn Watford, charging them with first-degree conspiracy to commit murder in violation of N.J.S.A. 2C:5-2 and 2C:11-3a(1), (2) (count one), first-degree murder in violation of N.J.S.A. 2C:11-3a(1), (2) (count two), first-degree attempted murder in violation of N.J.S.A. 2C:5-1 and 2C:11-3a(1), (2) (count three), first-degree attempted murder in violation of N.J.S.A. 2C:5-1 and 2C:11-3a(1), (2) (count four), third-degree unlawful possession of a weapon in violation of N.J.S.A. 2C:39-5c (count five) and second-degree possession of a weapon for an unlawful purpose in violation of N.J.S.A. 2C:39-4a (count six). (Da 1 to 7).[1]

---

[1] Da – defendant's appendix.
1T - pretrial motion transcript dated December 20, 2013.
2T - pretrial motion transcript dated January 24, 2014.
3T - trial transcript dated June 17, 2014.
4T - trial transcript dated June 25, 2014.
5T - trial transcript dated June 26, 2014.
6T - trial transcript dated July 1, 2014.
7T - trial transcript dated July 2, 2014.
8T - trial transcript dated July 3, 2014.
9T - trial transcript dated July 8, 2014.
10T - trial transcript dated July 9, 2014.
11T - trial transcript dated July 10, 2014.
12T - trial transcript dated July 15, 2014.
13T - sentencing transcript dated September 18, 2014.
14T - post-conviction relief hearing transcript dated February 11, 2022.
15T - post-conviction relief hearing transcript dated April 8, 2022.
16T - post-conviction relief hearing transcript dated July 15, 2022.

The State agreed to sever defendant's trial from Watford, who later pled guilty to count one. (3T 41-11 to 42-1).

The State further agreed to dismiss count four prior to defendant's trial. (3T 44-2 to 21).

Over ten days during the summer months in 2014, defendant was tried before a judge and jury. At the conclusion of the trial, the jury found defendant not guilty of count one and count two, but guilty of the lesser-included offense of first-degree aggravated manslaughter. (Da 8; 12T 21-17 to 22-6). The jury also found defendant not guilty of count three, but guilty of the lesser-included offense of third-degree aggravated assault. (Da 9; 12T 22-9 to 23-2). The jury returned guilty verdicts on count five and count six. (Da 9-10; 12T 23-5 to 14).

On September 18, 2014, the trial judge sentenced defendant on the lesser-included offense of first-degree aggravated manslaughter to twenty-seven years in state prison subject to N.J.S.A. 2C:43-7.2, more commonly known as the No Early Release Act. (13T 39-9 to 15). On the lesser-included offense of third-degree aggravated assault, the trial judge sentenced defendant to a consecutive term of four years with a three-year period of parole ineligibility. (13T 40-2 to 10, 42-13 to 18). On count five, the trial judge sentenced defendant to a

---

17T - post-conviction relief hearing transcript dated October 21, 2022.
18T - post-conviction relief hearing transcript dated June 7, 2023.
19T - post-conviction relief hearing transcript dated June 27, 2023.

concurrent five-year term with a three-year period of parole ineligibility pursuant to N.J.S.A. 2C:43-6c. (13T 40-11 to 16). The judge merged count six into the convictions on count two and count three. (Da 12; 13T 40-17 to 18).

Defendant's direct appeal was affirmed and his petition for certification was denied. (Da 16-30).

After filing a PCR petition, which alleged his trial counsel was constitutionally ineffective because he did not conduct an adequate pretrial investigation, the same judge who presided over defendant's trial denied his request for relief. (Da 31-42, 78).

This appeal followed. (Da 79-81).

STATEMENT OF FACTS

At approximately 1:00 a.m. on Sunday, May 27, 2012, a drive-by shooting occurred on Taylor Street between Center Street and Hickory Street in Orange, New Jersey. (4T 39-12 to 18). About fifteen to twenty people were gathered on the sidewalk when an Audi sedan pulled quickly around the corner from Hickory Street and slowed as it drove by the crowd. (5T 27-2 to 4, 27-19 to 24). A person in the Audi fired a weapon out a window of the vehicle, discharging several rounds before the car sped away. (5T 27-5 to 7).

Standing in the street, Malcolm Bagley was struck by gunshot in the chest. (5T 27-13 to 14; 6T 156-18 to 157-6). He was pronounced dead at the scene.

(7T 74-13 to 16). Sitting in his burgundy Honda CRV, Andell Cumberbatch was hit by a bullet which grazed his left leg and punctured his right leg. (4T 44-5 to 7, 44-25 to 45-4, 47-1 to 7). Cumberbatch drove himself to a nearby hospital where he received treatment for his wounds and was released later the same day. (4T 45-23 to 46-8, 47-8 to 10).

Law enforcement officers photographed and processed the crime scene. (7T 73-17 to 74-1, 74-7 to 12, 75-15 to 18, 80-2 to 12, 112-23 to 113-6). They found ten shell casings that had been ejected presumably from a semi-automatic weapon. (9T 77-4 to 7). No weapon was recovered. (9T 77-15 to 22). Similarly, no physical or forensic evidence was recovered to assist the investigation in identifying the assailants. (7T 80-13 to 18, 101-9 to 11, 110-5 to 7, 137-5 to 10). Even a surveillance camera used by a nearby business failed to provide any helpful information. (6T 27-8 to 28-10; 7T 20-11 to 14, 120-24 to 121-17). Although the camera's video footage captured the Audi on Taylor Street, it was not of any assistance in identifying the car's occupants or for that matter its license plate number. (7T 20-22 to 25, 31-2 to 13).[2]

Two days after the homicide, (6T 90-22 to 91-23), without advanced notice Peter Cassidy, a detective with the City of Orange Police Department,

[2] Because the video footage was not of any assistance in identifying either the Audi's occupants or its license plate number, it is not included in the appendix.

found Kendall Jones in Orange near the scene of the shooting and escorted him to the Essex County Prosecutor's Office Homicide Task Force's place of work located in the Essex County Court Complex in Newark. (6T 67-7 to 25, 100-1 to 2). Detective Cassidy's attention was drawn to Jones after learning during the course of the investigation that Jones had been present on the night of the shooting and had some knowledge about the drive-by. (6T 104-7 to 17). The detective understood Jones to be Bagley's best friend. (5T 78-5 to 8; 6T 107-21 to 23). He recalled that Jones insisted on using a pseudonym. (5T 36-6 to 10; 6T 69-1 to 8, 103-4 to 15).

According to Detective Cassidy, during the interview Jones identified defendant by name as being "involved" in the drive-by. (6T 73-24 to 74-1). After Jones identified defendant by name, Detective Cassidy produced a single photograph which depicted defendant. (6T 74-2 to 12, 104-18 to 105-3). Jones agreed the photograph was a picture of defendant. (5T 40-9 to 19; 6T 74-13 to 22). Jones later identified Watford from an array of six photographs as the driver of the Audi. (6T 79-24 to 80-6; 8T 12-2 to 21, 13-11 to 14-4).[3]

[3] Another person who had been at the scene also gave a statement to the police. (7T 4-5 to 9). He refused to testify at trial. (7T 6-7 to 7-19). The court held him in contempt. (7T 8-3 to 17).

Detective Cassidy captured Jones' pretrial statement on a digital video disc (DVD) made after an unrecorded initial interview. (6T 67-4 to 6, 98-10 to 99-4).[4]

Within the next two weeks, (9T 25-8 to 14), George Sewell, who claimed to have observed the shooting looking through a window on the third floor of a neighboring house, told the police that he saw the Audi slow down as it neared the crowd and then heard "boom, boom, boom, boom." (9T 9-1 to 4, 9-20 to 24, 16-19 to 25, 18-1 to 12). Sewell recalled that he had seen the driver before, describing his hair, moustache, and sideburns. (9T 17-23 to 25, 18-21 to 19-6). Sewell identified a photograph of Watford as the Audi's driver. (9T 26-11 to 19, 27-2 to 25). He was unable to identify any other occupants in the car. (9T 28-10 to 14).

Thereafter defendant and Watford were arrested without incident in separate locations. (7T 40-20 to 23, 42-2 to 7). A cellular telephone was confiscated from defendant's person. (7T 36-6 to 10, 41-4 to 9). Watford

[4] The Jones' DVD pretrial statement was the only evidence attributed to a person at the scene who identified defendant as participating in the drive-by shooting. Jones, though, retracted his identification of defendant at trial. The issue here, however, does not involve whether the found Jones' retraction credible. The issue here is whether defendant's attorney was constitutionally ineffective for not investigating an alibi which defendant presented at the PCR evidentiary hearing through three witnesses, one of whom was a digital forensic examiner regarding cellular telephone tower locations. Consequently, the Jones' DVD pretrial statement is not part of the appendix either.

pleaded guilty to conspiracy to commit murder. Defendant was tried before a judge and jury.

At defendant's trial, the State presented eleven witnesses. The State called Robert Harris, of the Essex County Prosecutor's Office Crime Scene Unit, to testify as a fingerprint expert. Harris examined the ten shell casings that were recovered from the crime scene using a "cyanoacrylate chamber" which employs heat and glue to adhere to "any latent fingerprints that would be left on a shell casing, or any other object [placed] in the chamber." (7T 100-18 to 101-2). Harris also used powder on the shell casings to determine if they contained fingerprints that could identify the person responsible for the shooting. (7T 101-3 to 8). However, the expert was unable to find any viable latent fingerprints on any of the shell casings that were recovered at the scene. (7T 101-9 to 11).

In addition, the State introduced the video footage obtained from the surveillance camera of the nearby business. (7T 20-11 to 14). While portraying an Audi traveling northbound on Hickory Street and turning left onto Taylor, (7T 20-22 to 25), the video footage depicted the crowd scatter from the area. (7T 26-9 to 17). Paul Ranges, an Essex County Prosecutor's Office sergeant assigned to its Homicide Task Force, confirmed that they were unable to determine the license plate number of the Audi or identify the occupants of the car by watching the video footage. (7T 31-2 to 13).

Sergeant Ranges also testified about the use of a license plate reader to attempt to gather evidence in this case. "What our Crime Scene Unit does," he testified, "is every time they report to a homicide, they take their Crime Scene Unit truck or van and they go around the surrounding streets and the reader collects data from the vehicles that are parked on the streets." (7T 38-12 to 18). This strategy, though, did not lead the homicide investigators to any vehicles that they believed may have been connected with the shooting. (7T 38-19 to 39-2). Nor did reviewing Division of Motor Vehicle records connect defendant or Watford to the registration of an Audi automobile. (7T 39-6 to 11).

Two persons, including Sewell, who were present during the drive-by as well as several other law enforcement officers testified on behalf of the State, but none provided evidence of defendant's presence at the crime scene, let alone as the shooter. (6T 45-5 to 7; 9T 28-10 to 14).

The only evidence introduced at trial implicating defendant in the shooting came from Jones' DVD-recorded pretrial statement to Detective Cassidy. Contrary to his pretrial statement to Detective Cassidy, Jones denied that he could identify the person driving the Audi or the shooter; rather, he testified that the car's occupants, the number of which he was not able to observe, wore "black masks." (5T 28-5 to 10). Following a Gross[5] hearing, the

[5] State v. Gross, 121 N.J. 1 (1990).

trial judge determined that Jones' pretrial statement was reliable and admissible. (5T 134-15 to 18). The State played a redacted DVD version to the jury. (6T 70-9 to 18).

On the cross-examination of Detective Cassidy, the investigating police officer conceded that during the pretrial interview, Jones remembered the Audi coming from the opposite direction than seen on the surveillance camera seized from the local business. (6T 85-22 to 86-15, 90-1 to 21).

Closing arguments centered on the absence of credible evidence pointing to defendant as the shooter. (10T 23-2 to 3). Defense counsel argued that Jones did not identify defendant as the shooter at trial and that his pretrial statement to Detective Cassidy was tainted. (10T 23-4 to 18, 26-5 to 14). Defense counsel emphasized the absence of any physical and forensic evidence, (10T 27-2 to 28-8, 32-7 to 22), while highlighting that no other witnesses corroborated Jones' out-of-court identification. (10T 28-9 to 13, 28-21 to 29-5, 31-13 to 18, 34-16 to 35-6). The State, on the other hand, argued that Jones' pretrial statement was reliable because he was motivated to correctly identify the person who shot his friend. (10T 58-14 to 21).

After the jury rendered its verdict, (Da 8-11), the trial judge sentenced defendant. (Da 12-15).

On January 18, 2019, defendant timely filed a PCR petition, alleging that his trial attorney failed to adequately investigate an alibi defense which consisted of two witnesses and cellular telephone data. (Da 31-42). The PCR judge conducted an evidentiary hearing over six days between February 2022 and June 2023. (14T 3-4 to 6; 18T 3-3 to 7). Several witnesses testified, including defendant, his trial attorney, the two alibi witnesses absent from his trial and a purported digital forensic examiner with expertise in cellular telephone location tracking.

Defendant testified that he discussed trial strategy with his attorney "many times." (18T 15-1 to 6). Defendant testified that during the strategy sessions, he asked his attorney to interview two witnesses who could provide him with an alibi. (18T 17-4 to 9, 22-9 to 12). Defendant further testified that he asked his attorney to review the cellular telephone data which was provided to him in discovery. (18T 15-4 to 16-6, 22-1 to 3).

Defendant confirmed that after his conviction and appeal, he retained a private investigator to interview the two witnesses he asked his trial attorney to interview. (18T 22-25 to 23-5, 23-15 to 22, 24-3 to 6).

When defendant's trial attorney testified, he did not recall much. (14T 20-16 to 21-17). In pertinent part, defendant's trial attorney testified that he did not recall discussing with defendant any potential witnesses. (14T 21-18 to 21,

23-24 to 24-20, 25-8 to 26-11). He did, however, recall discussing with defendant the cellular telephone data. (14T 29-14 to 19). He did not have the data analyzed. (14T 31-11 to 16).

Defendant also introduced two witnesses who offered testimony regarding his whereabouts at the time of the shooting.

Gary Marceus, who had operated a taxi cab in Orange for two years as of May 2012, (15T 50-17 to 22), testified that defendant "flagged [him] down" for a ride between 12:15 a.m. and 12:30 a.m. on May 27. (15T 6-15 to 20, 7-7 to 10, 36-11 to 20). Marceus recalled that as he made a left onto Lakeside Avenue in Orange after dropping off another fare on High Street who he remembered was a Spanish man, (15T 6-24 to 7-6, 22-16 to 23-2, 42-15 to 43-1), he saw defendant who he knew as "Spazz" or "Spitta." (15T 6-21 to 23, 14-7 to 14). Marceus explained that he knew defendant as a frequent fare. (15T 14-22 to 15-2).

Marceus further testified that he thought defendant wanted a ride home, but defendant asked him to drive to the Georgia King Village in Newark which he estimated was "roughly" a fifteen-to-twenty-minute trip. (15T 7-11 to 8-2). Marceus remembered that he waited about ten-to-fifteen minutes for his fare after he let him out. (15T 8-20 to 9-7). The cabbie recalled that when defendant returned, he drove his passenger to Checkers, a fast food restaurant, near Bergen

Street in Newark. (15T 9-8 to 23). He informed that defendant exited his cab in Bloomfield around 1:30 a.m. where he said he intended to visit his "girlfriend." (15T 10-6 to 17, 48-21 to 49-17).

Chante Howard testified that she and defendant were "friends" who had been "dating" while she lived in the Georgia King Village complex where she resided in May 2012. (14T 50-15 to 51-6). Howard testified that around 12:50 a.m. on May 27 defendant visited her for about eight-to-ten minutes. (14T 51-17 to 21). She remembered that while he was in her apartment, defendant "got on his phone." (14T 51-22 to 24).

Lastly, Joshua Pilon, of Digital Forensic Corporation (DFC) located in Warrensville Heights, Ohio, testified without objection as a digital forensic examiner regarding "cell phone tower locations." (16T 28-4 to 11, 37-12 to 16). Pilon testified that by inserting the cellular telephone calls made on May 27, 2012 into a cell tower locator website, of which DFC used two, the cell tower that retrieved the call could be located as well as the range of the tower's reach. (16T 23-19 to 24-2, 44-18 to 25, 45-17 to 21). Germane to the matter at hand, Pilon confirmed that the cell phone records he reviewed were consistent with defendant's cell phone number being present on May 27, 2012 at Georgia King Village between 1:00 a.m. and 1:05 a.m., (16T 62-19 to 23, 79-20 to 24), and at the Checkers in Newark around 1:14 a.m. (16T 63-2 to 15).

Creating some confusion, though, Pilon did not prepare the DFC report exchanged between the parties. (16T 7-2 to 22, 35-22 to 36-8). The record did not reflect why DFC sent someone other than the person who prepared the report to testify. (16T 5-24 to 6-11). In any event, the parties agreed to allow Pilon to testify because he traveled to New Jersey from Ohio. (16T 4-2 to 9, 37-12 to 16).

On June 27, 2023, the PCR judge denied defendant's application. (Da 78; 19T 18-10 to 25, 19-14 to 17). The PCR judge determined that defendant "cannot claim [his] trial counsel was ineffective" because the attorney "was unaware of the existence" of any, what the judge found to be, "newly-proffered witnesses." (19T 18-6 to 9). In addition, the PCR judge found that the cellular telephone "materials" and "information" "were available … prior to the case, and/or at the time of the appeal and were not raised during the appeal," concluding defendant "failed to carry the burden under Rule 3:22-4(a)." (19T 19-1 to 13).

LEGAL ARGUMENT

POINT ONE

GIVEN THE STATE'S LESS THAN OVERWHELMING PROOFS, DEFENDANT WAS PREJUDICED BY HIS TRIAL ATTORNEY'S FAILURE TO CALL TWO WITNESSES WHOSE TESTMONY RELATED TO A MATERIAL FACT IN THE CASE.

(19T 18-10 to 25, 19-14 to 17)

Contrary to the PCR judge's rejection of the ineffectiveness claim after conducting an evidentiary hearing, defendant maintains his trial attorney's error was so serious that the jury verdict was unreliable.

A. Standard of Review.

In reviewing a PCR judge's factual findings after conducting an evidentiary hearing, this court applies a deferential standard. State v. Pierre, 223 N.J. 560, 576 (2015). While an appellate court's "reading of a cold record is a pale substitute for a trial judge's assessment of the credibility of a witness he [or she] has observed firsthand," the judge's interpretation of the law is not afforded any deference and on appeal is reviewed de novo. Id. at 575-577 (citing State v. Nash, 212 N.J. 518, 540-541 (2013)). For mixed questions of fact and law, this court affords deference to factual findings that are supported by sufficient credible evidence, but reviews de novo a trial judge's application of any legal rules to the supported factual findings. Id. at 577.

B. The Constitutional Guarantee.

The right to the effective assistance of counsel is constitutionally guaranteed under both the United States and New Jersey constitutions and is premised on the need "to protect the fundamental right to a fair trial." Pierre, 223 N.J. at 577-578 (quoting Strickland v. Washington, 466 U.S. 668, 684 (1984)). A "fair trial" is achieved where "evidence subject to an adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." Ibid. (quoting Strickland, 466 U.S. at 685). Bearing in mind the constitutional mandate to a fair trial, "[t]he benchmark for finding any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Ibid. (citing Strickland, 466 U.S. at 686).

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that the attorney's performance was deficient as measured by an objective standard of reasonableness under prevailing professional norms and that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Strickland, 466 U.S. at 687-688; State v. Fritz, 105 N.J. 42, 58 (1987).

The first or deficiency prong of the Strickland/Fritz test is satisfied when a defendant demonstrates that a trial attorney's acts or omissions fall outside the wide range of professionally competent assistance considered in light of all the circumstances of the case. Pierre, 223 N.J. at 578. Before all else, a strong presumption exists that a trial attorney's conduct falls reasonably within the wide range of professionally competent assistance. Id. at 578-579. To rebut the strong presumption that a trial attorney's conduct falls reasonably within the wide range of professionally competent assistance, a defendant who raises a claim of ineffectiveness must establish that the trial attorney's acts or omissions did not equate to sound trial strategy. Id. at 579.

The second or prejudice prong of the Strickland/Fritz test is satisfied by showing that but for counsel's deficient performance, a reasonable probability exists that the result of the proceeding would have been different. Pierre, 223 N.J. at 583. The error committed must be so serious that the reviewing court's confidence in the jury's verdict is undermined. Ibid. To put it another way, a "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. Ibid.

1. Defense counsel's failure to explain his trial strategy for not undertaking a reasonable investigation into defendant's whereabouts at the time of the shooting constitutes a deficient performance under prevailing professional norms. (19T 18-6 to 9)

In evaluating the performance of a defendant's trial attorney, the reviewing court must make "every effort … to eliminate the distorting effects of hindsight" when "reconstruct[ing] the circumstances of counsel's challenged conduct." Pierre, 223 N.J. at 579 (quoting Strickland, 466 U.S. at 689). The reviewing court must reconstruct the challenged conduct "from counsel's perspective at the time." Ibid. (quoting Strickland, 466 U.S. at 689). Always, the reviewing court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986)(quoting Strickland, 466 U.S. at 690).

Having counsel's function in mind, the reviewing court should determine whether the attorney "has done some investigation into the prosecution's case and into various defense strategies." Kimmelman, 477 U.S. at 384. A "particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Ibid. (quoting Strickland, 466 U.S. at 690-691). In short, "[a] failure to [undertake a reasonable investigation or to explain why an

investigation is unnecessary] will render the lawyer's performance deficient." State v. Savage, 120 N.J. 594, 618 (1990).

Unquestionably, "[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, 310 (2005). A trial attorney "must consider what testimony a witness can be expected to give, whether the witness's testimony will be subject to effective impeachment by prior inconsistent statements or other means, whether the witness is likely to contradict the testimony of other witnesses the attorney intends to present and thereby undermine their credibility, whether the trier of fact is likely to find the witness credible, and a variety of other tangible and intangible factors." Id. at 320-321. Still, as in Arthur, a trial attorney's strategic decisions made without adequate pretrial investigation are subject to greater scrutiny. State v. Chew, 179 N.J. 186, 217 (2004); Savage, 120 N.J. at 617-618.

Defendant testified that during pretrial discussions with his attorney regarding strategy, he told him about two alibi witnesses and asked him to analyze the cellular telephone data produced by the State during discovery. (18T 15-4 to 16-6, 17-4 to 9, 22-1 to 3, 22-9 to 12).

Defense counsel's pretrial investigation was difficult to discern from his testimony because he did not remember too many specifics about his decisions.

(14T 20-16 to 21-17). Importantly, defense counsel recalled the cellular telephone data produced by the State during discovery. (14T 29-14 to 19). Although defense counsel recalled the cellular telephone data, he did not explain why tracking the cellular telephone location was unwarranted. (14T 31-11 to 16). To be sure, he admitted that he did not know what the data revealed. (14T 30-5 to 14).

Moreover, not only did defense counsel fail to recall discussing with defendant any potential witnesses, he did not recollect any specific conversations with defendant either. (14T 21-18 to 21, 23-24 to 24-20, 25-8 to 26-11).

Notably, defense counsel did not deny that defendant told him about two alibi witnesses. (14T 21-22 to 22-1).

Consequently, any assessment of defense counsel's failure to investigate defendant's alibi should be strictly scrutinized.

Be that as it may, the PCR judge did not elaborate why defendant failed to establish his trial attorney's performance was deficient despite concluding that an evidentiary hearing was warranted. (19T 15-12 to 18). Instead, the PCR judge construed defendant's testimony, and based on a mistaken belief, found it not to be credible. (19T 5-24 to 6-11). However, the PCR judge's understanding of the record was inaccurate because it was grounded on a clearly mistaken

factual finding which served as the basis for its credibility determination of defendant's testimony. (19T 14-12 to 18, 15-1 to 11). For example, the PCR judge mistakenly found that defendant testified his trial attorney interviewed one of the alibi witnesses while neither the attorney nor the witness recalled any such pretrial meeting. (19T 14-12 to 18). A review of the record, though, reveals the PCR judge's clearly erroneous interpretation of defendant's testimony that served as an inappropriate basis for concluding defendant did not tell his trial attorney about the two alibi witnesses prior to defendant's trial. (18T 17-17 to 22, 20-25 to 21-3).

In addition, the PCR judge found that defendant did not testify the cellular telephone was on his person at the time of the shooting. (19T 15-1 to 11). Yet, Howard, one of defendant's alibi witnesses, recalled that defendant used his cellular telephone while he was at her Georgia King Village apartment around 1:00 a.m. on the night of the shooting. (14T 51-17 to 21). The digital forensic examiner corroborated that defendant's cell phone records were consistent with the presence of his cellular telephone at Howard's apartment complex during this time period. (16T 62-19 to 23, 79-20 to 24).

For that matter, Marceus, the cab driver who testified as defendant's other alibi witness, informed that when he left Howard's apartment complex with

defendant, he drove them to Checkers for a bite to eat, (15T 9-8 to 23), which the digital forensic examiner also corroborated. (16T 63-2 to 15).

Even so, by determining defendant's testimony was not credible from an inaccurate interpretation of the factual record, the PCR judge purportedly surmised that defendant's attempt to explain his whereabouts on the night of the crime was asserted through witnesses who his attorney did not know existed.

The PCR judge then rationalized that being "unaware of the existence" of these "newly-proffered witnesses," defendant's trial attorney could not have conducted a pretrial investigation of them. (19T 18-6 to 9).[6]

At any rate, defense counsel was aware of the cellular telephone data produced by the State during discovery. (14T 29-14 to 19).

That the State produced cellular telephone data during discovery presupposes questions about defendant's whereabouts at the time of the shooting for which defense counsel, who was unable to interpret the data on his own, did not investigate. (14T 30-5 to 14; 19T 14-19 to 25).

Without dispute, defense counsel's trial strategy was to attack Jones' credibility, (14T 37-4 to 10), since he was the only witness to identify defendant as the shooter. As a result, defendant's whereabouts at the time of the shooting

[6] Defendant's trial attorney did not specifically deny that he was unaware of defendant's potential alibi. (14T 21-22 to 22-1).

were critical to defense counsel's trial strategy. That being so, defense counsel's inability to recall details about discussions with defendant over his whereabouts at the time of the shooting appears contrived.

Accordingly, defense counsel's failure to explain his reasons for not undertaking a reasonable investigation into defendant's whereabouts at the time of the shooting renders the attorney's performance deficient.

2. Given the State's less than overwhelming proofs, the PCR judge's assessment of whether defendant suffered prejudice as a result of his trial attorney's deficient performance was error.
(19T 6-18 to 7-23, 8-12 to 24, 9-23 to 10-9)

As noted above, the prejudice prong of the Strickland/Fritz test is satisfied by demonstrating that but for counsel's deficient performance, a reasonable probability exists that the result of the proceeding would have been different. Pierre, 223 N.J. at 583.[7] A "reasonable probability" that a defendant was prejudiced is dependent on the "strength" of the State's evidence. Pierre, 223 N.J. at 583; L.A., 433 N.J. Super. at 16-17. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Pierre, 223 N.J. at 583 (quoting Strickland, 466 U.S. at 696).

[7] Proof of a "reasonable probability" is "somewhat lower" than that required to show a "preponderance of the evidence." Strickland, 466 U.S. at 694; State v. L.A., 433 N.J. Super. 1, 14 (App. Div. 2013).

In determining the prejudice prong of the Strickland/Fritz test based on counsel's failure to call an alibi witness, the PCR judge "must unavoidably consider whether the absent witness's testimony would address a significant fact in the case." L.A., 433 N.J. Super. at 15. In considering the impact of the testimony of an absent witness, the PCR judge should measure "the credibility of all witnesses, including the likely impeachment of the uncalled defense witnesses," "the interplay of the uncalled witnesses with the actual defense witnesses called" and "the strength of the evidence actually presented by the prosecution." Id. at 16 (citation omitted). In assessing credibility, the question is not whether the jury would have believed defendant's new evidence in the form of an alibi defense; rather, the question is whether the "nature and quality of the evidence" is such that a reasonable probability exists a jury would have rendered a more favorable verdict if the testimony had been placed before it. Ibid. (citation omitted).

In L.A., the PCR judge assessed the credibility of an absent witness after conducting an evidentiary hearing. L.A., 433 N.J. Super. at 11-12. Denying defendant's request for relief, the PCR judge found that if the testimony of the defendant's spouse had been placed before the jury, it would not have been believed because the jury would have perceived her an as interested party. Id. at 13. The appellate panel reversed, concluding that simply comparing the

credibility of the absent witness to a witness who testified at defendant's trial is not sufficient to a determination of whether a defendant was prejudiced. Id. at 17. The panel reasoned that Strickland required the PCR judge to also assess the interplay of the uncalled witness's testimony with the strength of the State's proofs. Ibid.

Contrary to L.A.'s instruction, the PCR judge here assessed the credibility of the defendant's alibi witnesses only in terms of the weight a jury would have ascribed to it. L.A., 433 N.J. Super. at 15-16 ("the assessment of an absent witness's credibility is not an end in itself"). The PCR judge did not assess its interaction with the absence of any physical or forensic evidence or Jones' uncorroborated pretrial statement which he recanted at trial. In particular, without espousing the impact Marceus's testimony may have had on the State's other evidence, the PCR judge merely questioned the cab driver's "truth[fulness] and veracity." (19T 9-23 to 10-9). The judge found it "hard to believe" that Marceus, who he inaccurately described as an "experienced" Newark cabbie at the time, did not remember certain street names. (15T 50-17 to 22; 19T 9-23 to 10-9). He found it improbable that the cabbie only remembered defendant's fare among the seven or eight other passengers he escorted on the night of the shooting. (19T 10-21 to 11-6). Be that as it may, Marceus recalled the Spanish

man who he dropped off on High Street because he was "really drunk" and "very funny." (15T 22-16 to 23-2). Presumably, the others were less memorable.

Likewise, the PCR judge found Howard's testimony not to be credible because she appeared to be coached. (19T 7-14 to 23). The judge, though, incorrectly remembered Howard's testimony. (19T 6-18 to 13). The judge erroneously professed that Howard met the private investigator at Margarita's, a bodega on Central Avenue in Newark, to give a statement about defendant's whereabouts when she actually testified that she met him at the detective agency. (14T 62-13 to 63-6). Moreover, the judge assumed Marceus left defendant at Howard's residence in Bloomfield at the end of the fare. (19T 17-2 to 11). Yet, the record clearly reflects that Howard resided at the Georgia King Village complex in Newark. (14T 50-15 to 51-6). In the end, the PCR judge's understanding of Howard's testimony was muddled at best.

In any event, the PCR judge did not address whether the information the two alibi witnesses imparted would have had an impact on the State's proofs actually presented so that a reasonable probability existed the jury would have returned a more favorable verdict.

"[F]ew defenses have greater potential for creating reasonable doubt as to a defendant's guilt in the minds of the jury [than an alibi]." State v. Porter, 216

N.J. 343, 353 (2013) (quoting State v. Mitchell, 149 N.J. Super. 259, 262 (App. Div. 1977)).

Still, the State's evidence was not overwhelming. Only Jones' pretrial statement, which he recanted at trial, identified defendant as the shooter. No forensic or physical evidence connected defendant to the shooting.

Even Sewell, presumably an eyewitness to the drive-by shooting, at best only identified Watford as the driver. (9T 22-24 to 25, 28-10 to 14). Interestingly, Sewell was present at the scene on the night of the shooting as the police officers were canvassing the street for leads. (9T 23-1 to 11). Curiously, he did not identify Watford to the police until two weeks later. (9T 23-14 to 17).

As in L.A., defendant asserts that the testimony of his two alibi witnesses addressed the material issue in the case, that is, his whereabouts on the night of the shooting. Defendant maintains that their testimony would have had an impact on the State's less than overwhelming proofs. The PCR judge's assessment of whether defendant satisfied the prejudice prong of the Strickland/Fritz test was error.

Consequently, given the State's less than overwhelming proofs, defendant was prejudiced by his trial attorney's failure to conduct a pretrial investigation of the two alibi witnesses or to have the cellular telephone data analyzed.

POINT TWO

A FUNDAMENTAL INJUSTICE RESULTED BY THE FAILURE OF DEFENDANT'S TRIAL ATTORNEY TO CONDUCT A PRETRIAL ANALYSIS OF THE CELLULAR TELEPHONE DATA PRODUCED BY THE STATE AS DISCOVERY. (19T 19-1 to 13).

The PCR judge determined that defendant's ineffectiveness claim regarding his trial attorney's failure to analyze the cellular telephone data provided by the State during discovery was barred from being raised under Rule 3:22-4(a). (19T 19-1 to 13).

Although a defendant is "generally barred [by Rule 3:22-4(a)] from presenting a claim on PCR that could have been raised at trial or on direct appeal," the rule does not require "acquiescence to a miscarriage of justice." State v. Hannah, 248 N.J. 148, 178 (2021)(quoting Nash, 212 N.J. at 546). As it happens, Rule 3:22-4(a)(2) expressly states that where "enforcement of the bar to preclude claims, including one for ineffective assistance of counsel, would result in fundamental injustice," its objective will be relaxed. Ibid. A fundamental injustice occurs "when the judicial system has denied a defendant with fair proceedings leading to a just outcome or when inadvertent errors mistakenly impacted a determination of guilt or otherwise wrought a miscarriage of justice." Id. at 179 (citations and internal quotations omitted). To demonstrate a fundamental injustice, a defendant must show that "an error or

violation played a role in the determination of guilt." Ibid. (citations and internal quotations omitted).

Defense counsel recalled the cellular telephone data. (14T 29-14 to 19). Defense counsel admitted that he did not know how to interpret it. (14T 30-5 to 14). He conceded that he did not conduct any type of pretrial investigation into the data although he was knowledgeable that defendant's whereabouts at the time of the shooting was material to the attorney's trial strategy. (14T 31-11 to 16).

How a claim of ineffectiveness for a trial attorney's failure to analyze cellular telephone data could have been raised on direct appeal is puzzling.

Moreover, while the PCR judge found that the digital forensic examiner may not have qualified as an expert witness at trial, (19T 12-23 to 13-5), the court's comments on Pilon's analysis of the data provided to him by defendant demonstrate how a pretrial investigation would have been productive. (19T 11-23 to 12-4 to 8). For example, the PCR judge observed that when the cellular telephone was produced, it did not contain the subscriber identification module (SIM) card which would have provided Pilon with additional information. (18T 4-14 to 5-9, 9-9 to 10; 19T 12-18 to 22). The record did not reveal why the SIM

card was removed, but the cellular telephone had been in the State's possession. (7T 36-6 to 10, 41-4 to 9).[8]

Regardless, as articulated above, the digital forensic examiner corroborated the testimony of defendant's alibi witnesses. Pilon testified that the cellular telephone records he reviewed were consistent with defendant's cell phone number being present on May 27, 2012 between 1:00 a.m. and 1:05 a.m. at the Georgia King Village apartment complex where Howard resided. (16T 62-19 to 23, 79-20 to 24). He also confirmed that the records were consistent with defendant's cell phone number being present on May 27, 2012 around 1:14 a.m. at the fast-food restaurant near Bergen Street in Newark where the cabbie testified he took defendant after the Georgia King Village to get something to eat. (16T 63-2 to 15).

In any case, defendant was prevented from presenting a complete defense by his trial attorney's failure to conduct a pretrial investigation of the cellular telephone data, resulting in a fundamental injustice.

[8] On April 14, 2023 the PCR judge ordered the State "immediately request an investigation into the location of the errant SIM card." (Da 61). Regardless, the SIM card was not produced. (18T 4-14 to 5-1, 8-5 to 9-21).

CONCLUSION

For the reasons stated above, the defendant respectfully requests that the order dated June 27, 2023 be reversed, the judgment of conviction and sentence dated September 18, 2014 be vacated and the matter be remanded for a new trial.

Respectfully submitted,

JENNIFER N. SELLITTI
Public Defender

By: *David A. Gies*
DAVID A. GIES
Designated Counsel

Dated: May 9, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0026-23

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Final Order Denying Post-Conviction
	:	Relief Entered in the Superior Court of New Jersey,
v.	:	Law Division, Essex County.
MARK LOVETT,	:	
Defendant-Appellant.	:	
	:	Sat below: Hon. Robert H. Gardner, J.S.C.

Brief on Behalf of Plaintiff-Respondent State of New Jersey

THEODORE N. STEPHENS, II
ESSEX COUNTY PROSECUTOR
Attorney for Plaintiff-Respondent
Essex County Veterans Courthouse
50 West Market Street
Newark, New Jersey 07102
(973) 621-4700

Lucille M. Rosano - No. 017631983
Assistant Prosecutor
Appellate Section
appellate@njecpo.org
Of counsel and on the brief

Filed: August 14, 2024

Table of Contents

Page nos.

Cases Cited

Page nos.

Cases Cited (continued)

Page nos.

Statutes Cited

Rules Cited

Counterstatement of Procedural History

On March 1, 2013, an Essex County Grand Jury returned Indictment No. 2013-3-526 charging defendant Mark Lovett[1] with the following offenses: first-degree conspiracy to commit murder, in violation of N.J.S.A. 2C:5-2 and 2C:11-3a(1), (2) (count one); first-degree murder of Malcolm Bagley, in violation of N.J.S.A. 2C:11-3a(1), (2) (count two); first-degree attempted murder of Andell Cumberbatch, in violation of N.J.S.A. 2C:5-1 and 2C:11-3a(1), (2) (count three); first-degree attempted murder of David Williamson, in violation of N.J.S.A. 2C:5-1 and 2C:11-3a(1), (2) (count four); third-degree unlawful possession of a weapon, in violation of N.J.S.A. 2C:39-5c (count five); and second-degree possession of a weapon for an unlawful purpose, in violation of N.J.S.A. 2C:39-4a (count six). (Da1-7).[2] Count four was later dismissed on the State's motion before trial. (3T44-3 to -8).

On January 24, 2014, the Honorable Alfonse J. Cifelli, J.S.C., denied the defendants' joint pre-trial motion for a Wade[3] hearing. (2T24-5 to -9). The

---

[1] Co-defendant Shawn Watford was charged in all counts of the indictment.

[2] Da – appendix to defendant's brief.
Db – defendant's brief.
The State adopts defendant's transcript designation code. (Db3 n.1).

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

State agreed to sever defendant's trial from Watford's, who later pled guilty to count one. (3T41-11 to 42-1).

Defendant was tried before the Honorable Robert H. Gardner, J.S.C., and a jury on various dates between June 25, and July 15, 2014. The jury found defendant not guilty on count one, guilty of the lesser-included offense of first-degree aggravated manslaughter under count two, guilty of the lesser-included offense of aggravated assault under count three, and guilty on counts five and six. (12T21-17 to 23-14; Da8-11).

On September 18, 2014, defendant was sentenced to an aggregate term of 27 years, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, plus a consecutive 4 years with a 3-year parole ineligibility term. (13T39-9 to 40-16; Da12-15).

Defendant filed a notice of appeal, and on June 27, 2017, this Court affirmed his conviction and sentence, and remand to the trial court to correct the judgment of conviction to include the correct final charges and aggregate sentence. (Da16-30). Defendant's petition for certification was denied on December 12, 2017. State v. Lovett, 231 N.J. 562 (2017).

On January 18, 2019, defendant filed a verified pro se petition for post-conviction relief (PCR) with exhibits. (Da31-60). Judge Gardner held an evidentiary hearing on February 11, April 8, July 15, and October 21, 2022,

and June 7, 2023. (14T, 15T, 16T 17T, 18T). On June 27, 2023, the judge denied defendant's PCR petition for the reasons expressed in his oral opinion. (19T3-1 to 19-17; Da61).

On September 5, 2023, defendant filed a notice of appeal. (Da79-81).

Counterstatement of Facts

A. Trial

On Sunday, May 27, 2012, Kendall Jones and his best friend Malcolm Bagley went to Taylor Street in Orange. (5T21-5 to 23; 5T22-16 to 25-24). They were going to meet other friends at Khalid Muhammad's house on Taylor Street before going to a party in West Orange. (5T23-13 to 24-1). Bagley drove his brother's car, a red Pontiac Grand Am, and parked it on Taylor Street. (5T22-20 to 25-24; 7T19-18 to 20-10). Andell Cumberbatch was driving a burgundy Honda CRV that night and parked behind Bagley's car. (4T39-7 to 23; 4T42-2 to 5).

Around 1:00 a.m., about fifteen to twenty people, including Jones and Bagley, were outside on Taylor Street when a light-colored Audi pulled onto the block and the front passenger, later identified as defendant, started shooting. (5T27-2 to 21). When the shooting began, Jones was seated on the car, while Bagley was standing in the street about a car-length away. (5T27-8 to 16). Bagley initially ran, but soon after, Jones saw him lying face up in the street bleeding. (5T117-22 to 24; 5T118-8 to 19). "He had bad injuries. He

was shot." (5T119-15 to 17). Although Cumberbatch was not standing outside, he was also shot. (4T45-2 to 4). While he was sitting in the Honda CRV's driver's seat, he was shot in the leg. (4T45-2 to 4).

Immediately after the shooting, Cumberbatch, while injured, drove to East Orange General Hospital. (4T45-24 to 46-14; 7T17-24 to 18-25). He was treated for a shot that grazed his left leg and went straight through his right leg. (4T47-3 to 7; 7T17-6 to 21). Cumberbatch was released from the hospital later that day. (4T47-8 to 10).

Bagley was pronounced dead at the scene. (7T13-15 to -20; 74-13 to 16). His body was next to a black Lincoln Navigator SUV in front of 175-177 Taylor Street. (7T78-21 to 25). Pieces of the Navigator's broken taillight were on the ground. (7T96-9 to 21).

The next day, Jones had the word "ambitious", Bagley's nickname, tattooed on the outside of his left forearm. (5T21-12 to 24; 5T117-2 to 21). Bagley had the word "ambitious" tattooed on the back of his right forearm. (6T137-1 to 6). That same day, Jones went back to the area of the shooting, where he usually hung out, and found Bagley's tooth on the street.[4] (5T119-17 to 24; 5T120-3 to 9).

[4] Detective Hervey Cherilien, who attended Bagley's autopsy, testified that Bagley's front right tooth was missing. (9T49-12 to 20; 9T53-15 to 21).

On the night of the shooting, George Sewell was living at 158 Taylor Street on the third floor of a three-story building, two doors down from the Taylor Supermarket. (9T7-4 to 9-4). Sewell knew Bagley and described him as "a good friend of the whole block." (9T9-20 to 22; 9T16-10). Sewell was standing at the window on the third floor when Bagley was shot. (9T9-5 to 24). A surveillance video from Taylor Supermarket showed Sewell walking around on the sidewalk in front of his house. (9T11-18 to 12-1). He was seen exiting the front door of his house, handing a syringe to someone in a car, then returning to his home. (9T14-2 to 15-6).

That night, Sewell was looking outside the window because there was a lot of noise outside. (9T17-16 to 18). While he stood at the window, he saw an Audi come down the block. (9T16-19 to 21; 9T17-3 to 9). The Audi "was coming from Hickory. [He] heard a real loud noise, [he] looked out the window and [he] [saw] the Audi going down the block and [he] heard some gunshots." (9T16-23 to 25). He testified that when the Audi slowed down to about five to six miles per hour and pulled up, he was able to see the driver. (9T17-23 to 25; 9T18-3 to 4). After hearing about three to four shots, he ran downstairs to see what was going on. (9T21-8 to 24). Once he got downstairs, he saw Bagley laying on the side of an Expedition or Navigator that had a broken taillight. (9T22-1 to 13). Sewell had seen the driver before, who he

described as having dreads, a mustache, and sideburns. (9T18-21 to 19-6). When the car drove by, he did not see anyone wearing a mask. (9T24-19 to 22). He testified that he did not see the person who was shooting the gun, but he saw flames coming from a gun from the right-hand side of the front window. (9T28-10 to 18).

Sewell was unable to speak with police on the night of the shooting because he was "shocked". On June 12, 2012, he gave a statement to Detective Peter Cassidy of the Essex County Prosecutor's Office (ECPO) Homicide Task Force and identified the driver of the Audi in photograph number three of an array shown to him by ECPO Detective Hervey Cherilien. (9T22-22 to 23; 9T23-14 to 17, 9T24-7 to 18; 9T26-1 to 28-3; 9T27-2 to 25; 9T36-12 to 17; 9T42-21 to 25). He identified the Audi on the surveillance video as the Audi that he saw that night. (9T20-11 to 19). Sewell also testified that the driver's side window of the Audi was down. (9T21-3 to 4).

ECPO Detective Paul Ranges testified that he was the on-call detective on May 27, 2012, and was assigned to investigate Bagley's death. (7T10-2 to 15). He responded to the scene where he met with ECPO Lieutenant Thomas Kelly and ECPO Detective Manuel Miranda at the scene. (7T12-5 to 10). Orange police officers were also present at the scene. (7T13-5 to 14). Upon

arriving, Detective Ranges saw Bagley's body lying in the middle of Taylor Street covered with a white blanket. (7T12-20 to 13-2).

During the course of his investigation, Detective Ranges learned that Jones identified defendant and co-defendant Watford. (7T35-4 to 14). He also discovered that defendant's two nicknames were "Spitta" or "Spitter", and "Spaz", while co-defendant's two nicknames were "Pock" and "Spot". (7T45-14 to 21).

Detective Ranges met Cumberbatch at the hospital. (7T17-1 to 23). He spoke to Cumberbatch and saw his injuries. (7T17-1 to 23). Cumberbatch's Honda CRV was towed from East Orange General Hospital by the Orange Police Department and processed by the ECPO Crime Scene Unit. (7T19-1 to 3; 7T128-12 to -16). Bagley's car was also towed from the scene. (7T20-2 to 10). A search warrant was obtained for both vehicles. (7T19-15 to 21).

ECPO Detectives Cassidy and Thomas McEnroe took a DVD-recorded statement from Kendall Jones on May 29, 2012, two days after the shooting, at the Essex County Court Complex. (6T67-1 to 24; 71-20 to 25). Jones insisted that he be identified during the statement as "John Doe" because he feared retribution for assisting the investigation. (6T69-1 to 8; 14T2-13 to 3-9, 14T24-6 to 12). At trial, portions of the recorded statement were played for

the jury, and a redacted transcript was provided for guidance. (6T70-11 to 71-8).

During the statement, Jones said that the Audi was driving about five miles an hour when the shots were fired. (14T9-9 to 14). When asked who shot the gun, Jones said "Mark Lovett", defendant's name. (6T73-25 to 74-1; 14T5-10 to -11). He explained that he had known defendant since seventh grade, for approximately six to seven years. (14T5-12 to 19). Jones further explained that he saw defendant stick his hand out of the car while holding a gun. Jones answered "yes" when asked if he got a very good look at defendant. (14T8-3 to 9-19). He also stated that he knew defendant by the nickname "Spitter." (14T12-14 to-18; 14T23-7 to 18).

Detective McEnroe showed Jones a single photograph of defendant and asked him if he recognized that person. (6T74-2 to 25; 6T104-22 to 105-3; 14T13-25 to 14-15). Jones responded by stating "That's Spitter", and said his real name was "Mark Lovett". (14T14-3 to 8). He signed and dated the photo of defendant using the name "John Doe". (6T73-25 to 74-25; 14T14-9 to -15; 14T23-2 to -19).

Additionally, Jones named "Spot", later identified as co-defendant Watford, as the driver of the Audi. (6T79-24 to 80-11; 14T7-12 to 8-1, 14T20-7 to 21-7; 14T23-20 to -23). He stated that "Spot" is always with Mark

Lovett. (14T6-16 to 22). Jones identified "Spot" as photograph number four from an array shown to him by ECPO Detective Anthony Iemmello. (8T14-4 to 15-24; 14T15-6 to 21-13). He signed and dated the photo using the name "John Doe". (8T14-4 to 15-24; 14T17-5 to 21-13). Jones did not mention face masks during the interview. (6T80-12 to -16).

Detective Ranges obtained video surveillance footage of the crime scene area for Saturday, May 26, 2012, to Sunday, May 27, 2012. (7T20-11 to 17). A 24-hour security camera was located at the Taylor Supermarket at 150 Taylor Street. (6T21-5 to 23-10; 6T27-10 to 11). Cameras 6 and 7 showed Taylor Street and Hickory Street. (6T24-3 to 19; 7T22-10 to 12). An Audi sedan is seen traveling on Taylor Street after turning off Hickory Street. (6T83-3 to 7; 6T84-22 to 25; 7T20-20 to 25; 7T25-22 to 26-8). Two women are running down Taylor Street. (7T22-16 to 23-3; 7T30-12 to 15). Jones is seen on the pulling up his t-shirt, while Bagley's body was down the street "right off of the video screen, right where you see the bright lights, just beyond that." (7T27-3 to -18).

Jones recanted his statement at trial. He acknowledged that he knew defendant from middle school but denied knowing defendant by the nickname "Spitter". (5T38-21 to 39-13; 5T40-9 to -15). Jones testified that: 1) he did not remember giving the police a statement; 2) he did not see defendant shoot

Bagley; 3) he did not see co-defendant Watford driving the Audi; 4) the driver and shooter wore tall black masks; and 5) he saw someone shooting out of the back window. (5T27-25 to 18). He also testified that he did not know anyone named "Spot", and denied telling detectives that the driver of the Audi was named "Spot". (5T123-16 to 21; 5T124-1 to 6).

The assistant prosecutor then introduced the video recording of Jones's statement, given two days after the shooting. (5T29-2 to 16). Despite admitting that he was the person in the video who identified himself as "John Doe", Jones claimed once again that he did not remember talking to detectives about the shooting. (5T29-8 to 30-2; 5T36-6 to 10).

Nevertheless, Jones identified his handwriting and the "John Doe" signature on the back of defendant's photograph. (5T39-14 to 40-17). He admitted that he wrote his name, the date, and the time on defendant's photograph. (5T39-20 to 25; 5T124-16 to 24). Jones also admitted that his handwriting and signature were on the photo display instructions form and the photo identification form, on which he wrote the name "Spot". (5T125-2 to 126-9). Despite admitting that his signature and date were on the back of Spot's photograph in his handwriting, Jones claimed he had never seen that person before and that it was not Spot. (5T126-10 to 127-3).

On May 28, 2012, Dr. Abraham Philip, an assistant medical examiner, performed an autopsy on Bagley. (6T128-4 to -10; 6T130-6 to 8). Bagley sustained a gunshot wound to the left side of his chest. (6T140-3 to -4; 141-13 to -16). Dr. Philip concluded the "cause of death was the gunshot wound to the chest" and the manner of death was homicide. (6T156-25 to 157-6).

ECPO Crime Scene Detective Robert Harris photographed the scene and recovered ten spent shell casings. (7T80-13 to 24; 7T113-5 to 6). He processed the casings for fingerprints with negative results. (7T100-14 to 15; 7T101-9 to 11). No viable fingerprints were recovered from the black Navigator next to Bagley's body. (7T109-19 to 20; 7T110-5 to 22).

Detective Harris discovered bullet holes in Cumberbatch's Honda CRV on the exterior and interior of the driver's door, and the exterior and interior of the passenger door. (7T129-20 to 25; 7T130-6 to 14; 7T131-5; 7T132-22 to 133-20). A bullet was not recovered inside because it essentially exited the vehicle. (7T135-9 to 16). A blood swab was taken from the car. (7T137-12 to 15).

ECPO Detective Robert Parsons examined the ten .223 caliber shell casings recovered at the scene. (9T54-21 to 8; 9T59-24 to 60-14). He opined that the shell casings were all the same and were fired from the same semiautomatic weapon. (9T60-17 to 20; 9T66-5 to 8; 9T67-6 to 7). Detective

Parsons also explained that when a gun is fired, there is a "muzzle flash" which is essentially fire coming out of the gun. (9T68-20 to 69-13).

Detective Parsons also examined the projectile fragments recovered from Bagley's body. (9T70-21 to 25). The fragments were not suitable for comparison purposes, so Parsons could not identify the type of weapon from which they were fired. (9T74-7 to 10). However, he testified that the lead fragment was consistent with the way a .223 caliber rifle would render a projectile. (9T74-11 to 16).

B. PCR Proceedings

1. The Evidentiary Hearing

Defendant, his trial attorney Jonathan Gordon, Gary Marceus, Chante Howard, and Joshua Pilon testified on defendant's behalf at the evidentiary hearing. The State called Eugene Koster and Sharon Bagley as rebuttal witnesses.

Jonathan Gordon testified that his trial strategy was to argue: (a) the State's primary witness Jones never identified defendant as the shooter at trial (14T14-6 to 17-10; 14T36-20 to 37-10); (b) the State's case presented no motive for the crimes (14T17-11 to 20); and (c) there was no physical or forensic evidence linking defendant to the crimes (14T17-21 to 19-15).

Gordon did not recall defendant informing him about any potential witnesses. (14T21-22 to 22-18). He did not recall what witnesses he spoke to on defendant's behalf, but he was "sure" he consulted with defendant prior to his final decision to proceed to trial. (14T23-24 to 24-9). They agreed Gordon would challenge the State's case without calling any witnesses. (14T32-7 to 22).

Gordon did not recall defendant telling him that a cab driver named Gary Marceus picked him up in Orange at 12:30 a.m. on May 27, 2012, and drove him to the Georgia King Village in Newark. He did not recall defendant telling him the make of the cab, the name of the cab company or any details about the cab ride. Gordon did not recall whether his investigator looked into Gary Marceus. Gordon would have investigated this information if it had been given to him. (14T24-17 to 20; 14T25-8 to 27-14).

Gordon did not recall defendant saying he was at a Checkers Restaurant on May 27, 2012, the date of the crime. He did not recall defendant asking him to interview restaurant employees or obtain surveillance video from the establishment. (14T29-4 to 13). Gordon remembered that he received cell phone records in discovery. (14T29-14 to 19). After discussions with defendant, he decided not to have the records reviewed by an expert. (14T32-23 to 33-4).

Gary Marceus testified that around 12:15 to 12:30 a.m. on May 27, 2012, he picked up defendant in his cab near Lake and High Streets in Orange and drove him to the Georgia King Village in Newark. The trip took about fifteen to twenty minutes, arriving about 1:00 a.m. (15T4-21; 15T6-21 to 8-6). He waited for defendant at the apartments for about ten to fifteen minutes. Defendant returned to the cab and Marceus drove him to the Checkers Restaurant off Bergen Street and Central Avenue in Newark to get food. (15T8-7 to 10-2). Marceus then took defendant to Bloomfield and dropped him off somewhere near a chicken restaurant. The trip took about thirty to forty minutes. (15T10-6 to 20; 15T49-22 to 50-8). Marceus recalled that "it was a good night" for him because he picked up over ten fares and possibly as many as thirty, but other than defendant's cab ride, he could not recall the details of any of them. (15T27-16 to 28-20).

Some years after this cab ride, Marceus learned from defendant's mother that defendant was incarcerated. Defendant's mother died about five to seven years ago. (15T11-2 to 22). At some point, Marceus was contacted by someone from Spartan Detective Agency. Marceus did not know how they got his phone number. On February 3, 2020, he gave them a statement. (15T11-23 to 12-9). Marceus knew defendant as "Spitta" or "Spazz". He did not know defendant's real name. (15T14-7 to 14; 15T19-1 to 3).

Marceus testified that the victim Malcolm Bagley was his VIP client and that he would take him to sporting events. (15T17-22 to 18-4). On cross-examination, he claimed he attended Bagley's wake but did not realize he was "part of a case" until the detective agency called him in 2020. (15T25-11 to 13; 15T26-21 to 27-1).

Chante Howard testified that she "kinda sorta" knew defendant in 2012 and they were "like friends" or "I guess you could call it dating." She did not know his real name and only knew him as "Spitta". (14T48-22; 14T50-3 to 25). Howard was alone with defendant in her apartment at the Georgia King Village in Newark around 12:00 or 12:52 a.m. and walked with him out of the building around 1:00 a.m. (14T51-1 to 52-21; 14T68-6 to 16). Howard tried to have sex with defendant for the eight minutes he was in her apartment, but he wasn't paying attention to her. (14T68-17 to 70-20).

On cross-examination, Howard stated that she never saw defendant after May 27, 2012. (14T77-24 to 78-5). No one ever told her defendant was arrested two months later in July 2012, that he was found guilty of aggravated manslaughter in July 2014 and sentenced in September 2014. (14T74-4 to 75-2). In either August or September 2019, seven years after the shooting, she saw some guys hanging out in front of a bodega who told her defendant was incarcerated for a shooting. (14T57-10 to 58-16; 14T59-11 to 60-14). She

claimed that when she was told about defendant's incarceration, she remembered she was with him for eight minutes on May 27, 2012. (14T65-2 to 17). Afterwards, in December 2019, someone's brother called her and directed her to take an Uber ride to a detective agency and give a statement. (14T61-5 to 63-17; 14T64-17 to 25).

Joshua Pilon was qualified as an expert in digital forensic cell phone tower locations. (16T28-4 to 11; 16T37-10 to 16). Pilon was employed by Digital Forensic Corporation as a forensic engineer. He testified that he had no training in historical cell phone data analysis and was only testifying about cell phone tower locations relevant to this case. (16T18-11 to 14; 16T37-18 to 25). Pilon used two databases – Open Cell ID and Cell2gps – and an Excel document with local area codes (LAC) and cell ID boxes provided by defense counsel to generate the radii of the cell towers pinged by two cell phone numbers on May 27, 2012, between 12:27 a.m. and 1:07 a.m. (16T41-9 to 19; 16T42-17 to 53-6; 16T64-24 to 65-10; 16T69-5 to 13; 16T77-8 to 13). Pilon's company was not given any subscriber information for the two cell numbers. (16T76-12 to 77-23). Pilon opined that the cell phones travelled from the area of High Street and Lakeside Avenue to Georgia King Village and then to Checkers Restaurant. (16T53-12 to 63-15).

On cross-examination, Pilon testified that the report generated by his company warned that the results "may contain a percentage of false/positive[s]", that is, "a piece of information that is wrongly flagged as correct, but is in reality false, or incorrect." (16T84-22 to 85-23). He acknowledged that he did not know the range of any of the cell towers or the orientation of any of the tower antennas. (16T93-1 to 96-14). Pilon could only approximate the general strength of the cell towers.[5] (16T99-12 to 16).

Defendant testified that Jonathan Gordon met with him at the Essex County Jail and reviewed discovery with him "many times". (18T15-1 to 6). He asked Gordon to hire an expert to review the cell phone records. Gordon said he would look into it, but never hired an expert. Defendant did not recall Gordon's reason for not hiring an expert. (18T15-14 to 16-24).

Defendant also asked Gordon to investigate Chante Howard and Gary Marceus, and to retrieve surveillance footage from the Checkers Restaurant. (18T16-25 to 17-16). Gordon said he would look into this information, but he did not investigate Howard or Marceus or the surveillance video. (18T17-17 to 19-10). Defendant said he discussed interviewing Howard with Gordon about

[5] After Pilon's testimony, Digital Forensic Corporation prepared a second report dated April 25, 2023, stating that the company was unable to extract any additional information from defendant's cell phone. No additional expert testimony was provided on defendant's behalf and the report was not offered in evidence. (18T4-23 to 6-21; 18T9-23 to 25; 18T10-11 to 17).

"50" times. (18T20-7 to 13). Defendant hired Spartan Detective Agency after his conviction to investigate Howard and Marceus and take their statements. (18T22-25 to 24-15). He also hired Digital Forensic to examine the cell phone records. (18T24-16 to 21).

To rebut Chante Howard's testimony, the State called Eugene Koster, a private detective with Spartan Detective Agency in 2019, who took Howard's statement on December 6, 2019. (14T86-7 to 87-12). In the statement, Howard said "Spitta" was at her apartment from 12:42 a.m. to 1:00 a.m. and they had sex. Her minor children were at home at the time. Howard never mentioned the name Mark Lovett during the statement. (14T88-3 to 89-6).

Sharon Bagley, the victim's mother, testified in rebuttal of Gary Marceus's testimony. She stated that she lived with her son in Orange and knew his friends and associates. (17T12-18 to 13-9; 17T14-3 to 11). Marceus was not her son's VIP cab driver, and she had never seen him before. Her son had access to her car and his brother's car. (17T14-14 to 15-9). She did not recall seeing Marceus at her son's wake or funeral, but admitted she did not know everyone who attended. (17T15-10 to 16-6; 17T21-16 to 18).

2. The PCR Court's Decision

On June 27, 2023, the PCR court entered an order denying defendant's PCR application for the reasons expressed in its oral opinion. (19T19-14 to

16; Da78). The court determined that defendant's claims as to the alibi witnesses and the cell phone expert were procedurally barred under Rule 3:22-4(a) because defendant mentioned the witnesses to Gordon and the defense had the cell records prior to trial, so the factual predicates for these grounds could have been discovered earlier through the exercise of reasonable diligence. (19T4-9 to 24; 19T11-23 to 12-8; 19T19-1 to 13).

In reaching the merits of defendant's claims, the court concluded that defendant failed to meet the two prongs of Strickland[6] by showing Gordon provided ineffective assistance and but for his errors, the result would have been different. (19T18-18 to 25). The court found Gordon and the victim's mother Sharon Bagley were credible witnesses and the remaining witnesses were not credible.

Gordon credibly testified that he could not recall certain things about the case due to the passage of years. (19T5-7 to 14). Gordon did not recall speaking to any alibi witnesses, but assuming he spoke with Howard, as defendant claimed, Gordon's decision to not call her was "for obvious sound strategic reasons, which clearly would not rise to the level of ineffective assistance of counsel." (19T5-15 to 6-11).

---

[6] Strickland v. Washington, 466 U.S. 668 (1984).

The PCR court found Howard's testimony was not credible. She knew "very little" about defendant, including his real name. The crime occurred in 2012, but she was not contacted until seven years later in 2019, when some unknown person at a bodega directed her to Sparta Detective Agency to give a statement. (19T6-18 to 7-13). Howard had to have known about the shooting in 2012 because she lived in the neighborhood. Yet in spite of her "good memory", she did not know about defendant's arraignment, trial or sentence in 2013 and 2014. (19T7-24 to 8-11). She also testified that she was sure she was with defendant at 12:52 a.m. on the night of the crime, not 12:42 a.m. as she told the private investigator. (19T7-14 to 23).

The court also found the State's witness Koster was not credible because he may have suggested the 12:42 p.m. time to Howard to create a reasonable doubt about defendant's involvement in the shooting. (19T8-12 to 24).

Gary Marceus was also not a credible witness. He recalled the specific details of defendant's cab ride on the night of the shooting but could not remember the other fares he picked up that night, or certain addresses and street names that an experienced cab driver in Newark would undoubtedly know. (19T8-25 to 9-12; 19T9-23 to 10-9; 19T10-25). The court suggested Marceus was "coached or otherwise [his] memories [were] refreshed as to this particular incident and driving the defendant in this particular case. . . ."

19T10-25 to 11-6). It was also incredible that he did not know defendant was in trouble until he spoke with defendant's mother for five to seven years after the crimes, and did not say anything about the cab ride with defendant until he was approached some eight years later by a private investigator. (19T13 to 22).

Marceus's testimony that he attended the victim's wake was disputed by Sharon Bagley, who credibly testified that she did not see him at the wake and had no reason to be show bias at this juncture in the case. (19T10-10 to 15; 19T13-11 to 14-3).

The PCR court also found Pilon, defendant's cell phone expert, was not credible and likely would not have qualified as an expert at trial. (19T12-23 to 13-5). He testified that he used certain computer programs that were not standard in the industry or reliable, and used cell phone information that was not certified to be complete. (19T11-12 to 22). Pilon did not use the cell phone records from the phone company, which he opined would have provided the cell phone's location. Those records were available at the time of the incident and the issue could have been raised on direct appeal. (19T11-23 to 12-12). Also, Pilon could not certify the accuracy of his results, gave ranges of locations only, and did not inspect the phone. When the phone was

ultimately inspected, it did not contain a SIM card which would have provided additional information. (19T12-9 to 13-10).

Lastly, the PCR court found defendant's claims that he told Gordon about the alibi witnesses and that Howard spoken to Gordon were not credible. (19T14-12 to 18; 19T17-2 to 11; 19T18-2 to 9). The two investigative reports from 2019 and 2020 showed defendant did not know about these witnesses at the time of trial. (19T18-2 to 9). In addition, defendant did not testify that he had his phone with him during the time of the crime or during the time he allegedly was elsewhere, and he never denied his involvement in the shooting. (19T14-19 to 15-11).

For all these reasons, the PCR court concluded defendant failed to meet his burden under both prongs of Strickland. (19T17-2 to 18-25; 19T19-14 to 17).

Legal Argument

Point I

The PCR Court Properly Rejected Defendant's Claims that His Trial Counsel Was Ineffective by Failing to Investigate the Alleged Alibi Witnesses and by Failing to Hire a Cell Phone Expert to Examine the Phone Records.

Defendant claims that the PCR court erred in denying his petition because he established that his trial counsel was ineffective for failing to: (a) investigate the two alleged alibi witnesses, Marceus and Howard; and (b) hire

a cell phone expert to examine the cell phone records. (Db19-28). After an extensive evidentiary hearing, the PCR court properly concluded that defendant failed to meet both prongs of Strickland by a preponderance of the credible evidence, and properly denied the petition.

A. Principles Governing PCR Petitions & Appellate Review

The governing principles in this area are well settled. PCR "is a safeguard that ensures that a defendant was not unjustly convicted." State v. McQuaid, 147 N.J. 464, 482 (1997). "PCR provides a defendant with a means to challenge the legality of a sentence or final judgment of conviction which could not have been raised on direct appeal." Ibid.; accord R. 3:22-4. It is not a mechanism to "challenge the sufficiency of evidence used to convict a defendant[,]" McQuaid, 147 N.J. at 483, or a forum to relitigate issues that have already been "expressly adjudicated[,]" R. 3:22-5.

Criminal defendants are entitled to "reasonably competent counsel." State v. Fritz, 105 N.J. 42, 56 (1987). To demonstrate that counsel was constitutionally ineffective, a defendant must prove first that counsel's performance was deficient, and second that counsel's deficient performance caused him prejudice. Strickland, 466 U.S. at 687; Fritz, 105 N.J. at 52.

Counsel's performance is presumed effective. Strickland, 466 U.S. at 689; State v. Chew, 179 N.J. 189, 203 (2004). As such, both prongs saddle the

defendant with a weighty burden. The defendant must show that "counsel's assistance was not within the range of competence demanded by attorneys in criminal cases." State v. DiFrisco, 137 N.J. 434, 457 (1994) (internal quotations omitted). Stated differently, a defendant must prove that his counsel's performance fell below an objective standard of reasonableness. Strickland, 466 U.S. at 687; State v. Chung, 210 N.J. Super. 427, 434 (App. Div. 1986).

"Judicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689. Those who challenge it must overcome the "'strong presumption'" that counsel provided reasonably effective assistance, and that counsel's decisions "followed a sound strategic approach to the case." State v. Pierre, 233 N.J. 560, 578-79 (2015) (quoting Strickland, 466 U.S. at 689). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Ibid.

A defendant must also show actual prejudice, i.e., "a 'reasonable probability' that such performance affected the outcome." State v. Rountree, 388 N.J. Super. 190, 206 (App. Div. 2006) (quoting Fritz, 105 N.J. at 58), certif. denied, 192 N.J. 66 (2007); see also Strickland, 466 U.S. at 694 ("A

reasonable probability is a probability sufficient to undermine confidence in the outcome.").

Courts considering ineffective-assistance-of-counsel claims need not address both prongs "if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697. "Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." Ibid. To that end, courts are "permitted leeway to choose to examine first whether a defendant has been prejudiced, and if not, to dismiss the claim without determining whether counsel's performance was constitutionally deficient." State v. Gaitan, 209 N.J. 339, 350 (2012).

When an evidentiary hearing is held, the appellate court "will defer to the PCR court's factual findings, given its opportunity to hear live witness testimony and . . . 'will uphold the PCR court's factual findings that are supported by sufficient credible evidence in the record.'" State v. Gideon, 244 N.J. 538, 551 (2021) (quoting State v. Nash, 212 N.J. 518, 540 (2013)). "An appellate court's reading of a cold record is a pale substitute for a trial judge's assessment of the credibility of a witness he has observed firsthand." Id. at 562 (quoting ibid.). But legal conclusions are reviewed de novo. Nash, 212 N.J. at 540-41.

B. The PCR Court Properly Rejected Defendant's Claims that His Trial Counsel Failed to Investigate the Two Alibi Witnesses and Hire a Cell Phone Expert.[7]

There is no doubt that trial counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." State v. Arthur, 184 N.J. 307, 342 (2005) (quoting Strickland, 466 U.S. at 691). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.] . . ." Strickland, 466 U.S. at 690. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. at 690-91. "In other words, counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id. at 691. Accord State v. DiFrisco, 174 N.J. 195, 220-21 (2002). A failed trial strategy does not equate to ineffectiveness. State v. Bey, 161 N.J. 233, 251 (1999).

---

[7] This subpoint responds to Point I, subpoint B, parts 1 and 2, of defendant's brief.

"[T]he existence of alibi witnesses [is] peculiarly within the knowledge of the defendant himself. If he failed to cooperate with counsel by informing him of their existence, then he cannot now complain that counsel did not know of them." State v. Gonzalez, 223 N.J. Super. 377, 392 (App. Div. 1988) (quoting People v. Elder, 391 N.E.2d 403, 411 (Ill.App. Ct. 1979)). Here, the PCR court properly found Gordon credibly testified that defendant never told him about Marceus or Howard prior to trial. Defendant had an obligation to tell Gordon about these witnesses. Gordon could not have investigated witnesses he did not know existed. The court's conclusion is further bolstered by the investigative reports of the two witnesses from 2019 and 2020 which confirmed that defendant did not know about these witnesses at the time of trial. (19T14-12 to 18; 19T17-2 to 11; 19T18-2 to 9).

The witnesses' testimony at the evidentiary hearing suggests defendant did not tell Gordon about them, as Gordon testified. Marceus and Howard did not learn about defendant's conviction and incarceration until many years after their last encounter with him on the night of the crime. Marceus testified that he had no idea defendant had been convicted and incarcerated until many years later when he heard this information from defendant's mother. (15T11-2 to 22). Howard testified that she never saw defendant after May 27, 2012. (14T77-24 to 78-5). No one told her defendant was arrested, convicted and

sentenced in 2012 to 2014. (14T74-4 to 75-2). She learned about defendant's criminal matter in August or September 2019 from someone hanging around outside a bodega. (14T57-10 to 58-16; 14T59-11 to 60-14).

It is more likely, as the PCR court found, that defendant never told Gordon about Marceus and Howard because they would not have benefitted his defense. See State v. Allegro, 193 N.J. 352, 370 (2008) ("defendant's belatedly tendered witnesses well could have been harmful to him at trial."). The failure of defendant "to offer the information when it would have been natural to do so might well cast doubt on the veracity of the witness[es'] trial testimony." Gideon, 244 N.J. at 560 (quoting State v. Silva, 131 N.J. 438, 446 (1993)).

Even assuming defendant told Gordon about Marceus and Howard, Gordon made a sound strategic decision to not investigate them because neither were credible, as the PCR court found. (19T5-15 to 6-11; 19T6-18 to 7-13; 19T8-25 to 10-9). "Determining which witnesses to call to the stand is one of the most difficult strategic decisions that any trial attorney must confront." Arthur, 184 N.J. at 320. A trial attorney must consider what testimony a witness can be expected to give, whether the witness's testimony will be subject to effective impeachment . . . , whether the witness is likely to contradict the testimony of other witnesses . . . and thereby undermine their

credibility, whether the trier of fact is likely to find the witness credible, and a variety of other tangible and intangible factors." Id. at 320-21 (citation omitted). Defense counsel's decision concerning which witnesses to call is "an art", and appellate review of that decision is "highly deferential." Id. at 321 (quoting Strickland, 466 U.S. at 689, 693).

The PCR court properly determined that Marceus and Howard were simply not credible alibi witnesses. Marceus testified that he could not recall anything about the over ten to possibly thirty fares he picked up on May 27, 2012, but he was able to remember the details of defendant's cab ride over ten years later, including times and locations. Conveniently, he recalled dropping defendant off at the Georgia King Village, where Howard lived, at 1:00 a.m., and waiting for him to return ten to fifteen minutes later, which covered the very time Howard claimed defendant was in her apartment. (15T6-21 to 9-7; 19T8-25 to 9-12; 19T9-23 to 10-25). The court correctly concluded Marceus was "coached or otherwise [his] memories [were] refreshed as to this particular incident and driving the defendant in this particular case. . . ." 19T10-25 to 11-6). It was also incredible that Marceus did not know defendant was in trouble until he spoke with defendant's mother five to seven years after the cab ride, and did not offer his assistance until he was approached some eight years later by a private investigator. (19T13 to 22).

Marceus's claim that the victim Bagley was a VIP client and that he attended his funeral was credibly contradicted by Bagley's mother's testimony. (19T10-10 to 15; 19T13-11 to 14-3). Tellingly, Marceus attended the victim's funeral but didn't realize he was "part of a case" until Spartan Detective Agency approached him. (15T25-11 to 13; 15T26-21 to 27-1).

The PCR court correctly found Howard not credible because she could only say she "kinda sorta" knew defendant in 2012 and wasn't even sure whether they were dating. (14T50-3 to 25). She knew "very little" about defendant, other than his street name. (19T6-18 to 22). She had no contact with him after May 27, 2012, and even though she claimed she was maybe dating him, she never inquired about what happened to him. She did not know he had been arrested just two months later, or that he was convicted and incarcerated two years later, and it was only happenstance that someone outside a bodega mentioned him seven years later. (14T74-4 to 75-2; 14T57-10 to 58-16; 14T59-11 to 60-14; 14T77-24 to 78-5; 19T6-23 to 7-9; 19T6-24 to 8-11). Like Marceus, she only decided to tell her alibi story to Spartan Detective Agency after being directed to do so over seven years later. (14T61-5 to 63-17; 14T64-17 to 25).

Even if trial counsel erred in failing to call Marceus and Howard, the PCR court correctly concluded that defendant failed to "affirmatively prove

prejudice." Gideon, 244 N.J. at 551 (quoting Strickland, 466 U.S. 693). "The overall strength of the evidence before the factfinder is important in analyzing the second prong of Strickland." Id. at 556 (citing Pierre, 223 N.J. at 583). "Determination of prejudice requires consideration of all the evidence presented at trial and the likely effect the evidence presented post-conviction would have had on the final result." Id. at 557. The PCR court may also consider the passage of time between the crime and the emergence of the alibi defense. Id. at 560.

The State's proofs against defendant were significant. Jones, who witnessed the shooting, gave a statement implicating defendant, who he knew as Mark Lovett, and identified a single photograph of him. Sewell testified that he saw the Audi drive by, heard gunshots and saw flames coming from a gun in the right-side front window. He later identified co-defendant Watford as the driver. Sewell also identified the Audi on surveillance video. In contrast, Marceus and Howard provided weak alibi testimony for the first time on post-conviction, over a decade after the crime. Defendant failed to meet the "exacting [prejudice] standard" by showing "a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." Id. at 561.

The PCR court also correctly concluded that defendant failed to meet both prongs of Strickland as to defendant's trial counsel's failure to hire a cell phone expert to review the cell phone records. Gordon made a strategic decision to not hire an expert after discussions with defendant. (14T29-14 to 19; 14T32-23 to 33-4). Defendant failed to present any evidence to overcome the "strong presumption" that Gordon's decision was professionally sound. Pierre, 233 N.J. at 578-79 (quoting Strickland, 466 U.S. at 689).

The PCR court properly concluded Pilon's testimony was not credible and that he likely would not have qualified as an expert at trial. (19T12-23 to 13-5). Pilon had no training in historical cell phone data analysis and could only testify about the cell phone tower locations relevant to this case. (16T18-11 to 14; 16T37-18 to 25). He used computer programs that were not standard in the industry or reliable, and incomplete and uncertified cell phone information. He could not certify the accuracy of the two programs he used or his results. (19T11-12 to 22; 19T12-9 to 17). He did not know the actual range of the cell towers or the orientation of any of the tower antennae and could only approximate the general strength of the cell tower (16T93-1 to 96-14; 16T99-12 to 16), a practice found to constitute an improper net opinion in State v. Burney, 255 N.J. 1, 23 (2023) ("the net opinion rule, a corollary of N.J.R.E. 703, forbids the admission into evidence of an expert's conclusions

that are not supported by factual evidence or other data.") (internal quotation marks and citation omitted). He candidly acknowledged the phone company records, which he did not have, would have provided better information about the cell phone's location. He did not inspect the phone, and when the phone was examined, it did not contain a SIM card. (19T11-23 to 12-3; 19T12-9 to 22). Lastly, the PCR court noted that defendant never testified that he had his cell phone with him at the time he alleged he was elsewhere. (19T14-19 to 15-11).

Because defendant presented no credible evidence that the cell phone records would have supported an alibi defense, and because the alleged alibi witnesses were also not credible, defendant failed to demonstrate that he was prejudiced given the overall strength of the State's proofs. See Gideon, 244 N.J. at 541 (the credibility of the alibi defense must be weighed against the strength of the evidence presented at trial and offered post-conviction). The PCR court's order denying defendant's petition should be affirmed.

Point II

The PCR Court Correctly Concluded that Defendant's Claim as to His Trial Counsel's Failure to Hire a Cell Phone Expert was Procedurally Barred Because It Could Have Been Raised on Direct Appeal.

The PCR court correctly ruled that defendant's ineffectiveness claim as to his trial counsel's failure to hire a cell phone expert was procedurally barred

by Rule 3:22-4(a) because the factual predicate for this ground could have been discovered earlier through the exercise of reasonable diligence and raised on direct appeal. (19T4-9 to 14; 19T11-23 to 12-8; 19T19-1 to 13). "[W]hen the trial itself provides an adequately developed record upon which to evaluate defendant's claims, appellate courts may consider the issue on direct appeal." State v. Castagna, 187 N.J. 293, 313 (2006). For this reason, the PCR court's ruling should be affirmed.

Conclusion

Based on the foregoing arguments, the State respectfully asks this Court to affirm the order denying defendant's petition for post-conviction relief.

Respectfully submitted,

Theodore N. Stephens, II
Essex County Prosecutor
Attorney for Plaintiff-Respondent

/s/ Lucille M. Rosano – No. 017631983
Assistant Prosecutor
Appellate Section

Date: August 14, 2024

DAVID A. GIES, ESQUIRE, P.A.
ID No. 016301986
1230 Parkway Avenue, Suite 307
Ewing, New Jersey 08628
(609) 883-3088
dgieslaw@verizon.net
Designated Counsel for
Defendant-Appellant

JENNIFER N. SELLITTI
Public Defender
Attorney for Defendant-Appellant
31 Clinton Street
P.O. Box 46003
Newark, New Jersey 07101

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0026-23T2

STATE OF NEW JERSEY,

Plaintiff/Respondent

v.

MARK LOVETT,

Defendant/Appellant

CRIMINAL ACTION

On appeal from the denial of defendant's petition for post-conviction relief

Superior Court of New Jersey
Essex County
Indictment No. 13-03-0526-I

Sat Below:
Hon. Robert Heys Gardner, J.S.C.

LETTER REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT

Dated: August 20, 2024

PRESENTLY CONFINED

Honorable Judges:

Please accept this Letter Reply Brief on behalf of the Appellant Mark Lovett in lieu of a more formal brief pursuant to Rule 2:6-2(b).

TABLE OF CONTENTS

PROCEDURAL HISTORY

On August 14, 2024 the State filed its opposition brief, maintaining that the performance of defendant's trial attorney was not deficient for failing to investigate defendant's whereabouts on the night of the crime by interviewing Gary Marceus, a taxi cab driver, and Chante Howard, a women who defendant had been "dating" while she lived in Newark's Georgia King Village apartment complex, because defendant did not tell him about them. (Pb 27).[1] The State also maintained that defendant's trial attorney made a strategic decision not to hire an expert witness to analyze the cellular telephone data after discussions with defendant. (Pb 32). Lastly, the State asserted that because its "proofs against defendant were significant," the PCR judge correctly determined that defendant was unable to establish the prejudice prong of the Strickland/Fritz [2] test. (Pb 30-31, 33).

STATEMENT OF FACTS

Defendant was convicted by a jury of first-degree aggravated manslaughter, among other crimes, for his purported role in a drive-by shooting

---

[1] Pb refers to the State's opposition brief filed on August 14, 2024. Db refers to defendant's merits brief filed on May 10, 2024. All other citations referenced in this letter reply brief are set forth in defendant's merits brief filed on May 10, 2024 at pages 3-4 in footnote one.

[2] Strickland v. Washington, 466 U.S. 668, 687-688 (1984); State v. Fritz, 105 N.J. 42, 58 (1987).

which resulted in the death of a nineteen-year-old young man. (Da 8-11; 5T 27-13 to 14; 6T 156-18 to 157-6; 7T 74-13 to 16). The State's proofs against defendant amounted to a recorded pretrial statement of an eyewitness to the shooting. (6T 73-24 to 74-1). At trial the eyewitness recanted. (5T 28-5 to 10). No other witnesses provided evidence of defendant's presence at the crime scene. (6T 45-5 to 7; 9T 28-10 to 14). No physical or forensic evidence assisted the police investigation in identifying the assailants. (7T 80-13 to 18, 101-9 to 11, 110-5 to 7, 137-5 to 10).

The central issue of defendant's PCR petition concerned his trial attorney's failure to conduct a pretrial investigation of his whereabouts on the night of a shooting. (Da 31-42). As part of a pretrial investigation, defendant desired his trial attorney to interview Marceus and Howard and analyze the cellular telephone data provided by the State during discovery. (18T 15-4 to 16-6, 17-4 to 9, 22-1 to 3, 22-9 to 12). At defendant's PCR evidentiary hearing, the trial attorney testified that he did not recall any specific communications with defendant, (14T 21-18 to 21, 23-24 to 24-20, 25-8 to 26-11), but remembered, albeit not in detail, the cellular telephone data produced, (14T 29-14 to 19, 31-11 to 16).

LEGAL ARGUMENT

WHERE A PCR JUDGE'S CREDIBILITY DETERMINATIONS ARE SO WIDE OF THE MARK THAT A MISTAKE MUST HAVE BEEN MADE, THIS COURT OWES NO DEFERENCE TO THE JUDGE'S FACTUAL FINDINGS OR INFERENCES DRAWN THEREFROM. (19T 6-8 to 13, 9-23 to 10-9, 10-21 to 11-6, 14-12 to 18, 17-2 to 11).

As a general rule, appellate review defers to a PCR judge's credibility determinations made after an evidentiary hearing. State v. Nash, 212 N.J. 518, 540 (2013); State v. Johnson, 42 N.J. 146, 161 (1964).

However, upon a review that appears the PCR judge's credibility determinations "went so wide of the mark that a mistake must have been made," an appellate court "may 'appraise the record as if [it] were deciding the matter at inception and make [its] own findings and conclusions.'" Snyder Realty, Inc. v. BMW of N. America, Inc., 233 N.J. Super. 65, 69 (App. Div.), certif. denied, 117 N.J. 165 (1989)(quoting Pioneer National Title Insurance Co. v. Lucas, 155 N.J. Super. 332, 338 (App. Div. 1978)).

Contrary to the State's assertion, the PCR judge's credibility assessment went wide of the mark because it was based on inaccurate factual findings. (Pb 29). For example, as defendant argued in his merits brief, (Db 21-23), not only did the PCR judge incorrectly remember Howard's testimony when determining her credibility, (14T 62-13 to 63-6; 19T 6-18 to 13), the judge's recollection of Marceus's testimony was no more accurate, (15T 22-16 to 23-2, 50-17 to 22;

19T 9-23 to 10-9, 10-21 to 11-6). Similarly, the PCR judge incorrectly recalled that the evidence revealed the cabbie's final destination with defendant as Howard's residence, which he also erroneously observed was in Bloomfield. (14T 50-15 to 51-6; 19T 17-2 to 11).

Moreover, the PCR judge erred by inferring from the evidence that defendant's trial attorney "was unaware of the existence" of the two alibi witnesses before the jury's guilty verdict. (19T 18-6 to 9). Although defense counsel's memory regarding any specific decisions or discussions was sparse, he did not deny that defendant told him about the two witnesses. (14T 20-16 to 22-1, 23-24 to 24-20, 25-8 to 26-11). Indeed, defendant testified at the PCR hearing that he asked defense counsel to interview both Howard and Marceus. (18T 17-4 to 9, 22-9 to 12). Be that as it may, the PCR judge inappropriately discredited defendant's testimony where he mistakenly found that defendant claimed defense counsel interviewed one of the alibi witnesses while neither the trial attorney nor the witness recalled any such pretrial meeting. (19T 14-12 to 18).

Accordingly, this court does not owe the PCR judge's credibility determinations any deference.

The State's argument as to defense counsel's decision not to hire an expert to analyze the cellular telephone data is not based on any specific discussions

he had with defendant either. (14T 29-14 to 19). Although defense counsel recalled the cellular telephone data, he offered no explanation as to why he did not have it analyzed. (14T 31-11 to 16). As a matter of fact, he admitted that he was unable to interpret the data on his own. (14T 30-5 to 14). That being so, the record is silent as to a credible factual basis to reasonably support a finding that defense counsel's failure to hire an expert witness to analyze the cellular telephone data was related to a sound trial strategy.

In pertinent part, because "a claimed alibi witness's credibility must be weighed against the strength of the evidence presented at trial and offered post-conviction," a credibility determination alone is not "dispositive" of the prejudice prong of the Strickland/Fritz test. State v. Gideon, 244 N.J. 538, 560-561 (2021); State v. L.A., 433 N.J. Super. 1, 17 (App. Div. 2013).

Having said that, although the prejudice prong of the Strickland/Fritz test is the "far more difficult" one to establish, the burden of proof to show that the attorney's performance affected the outcome of the proceeding is less than a preponderance of the evidence. Gideon, 244 N.J. at 550 (quoting State v. Preciose, 129 N.J. 451, 463 (1992)).

Before articulating the burden of proof on a defendant to articulate the prejudice prong, Strickland rejected the more rigorous "outcome-determinative" approach applied to motions for a new trial based upon newly discovered

evidence. Strickland, 466 U.S. at 693-694. Strickland instructed "that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. at 693. Strickland expounded that "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the erros of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." Id. at 694.

Consequently, proof of a "reasonable probability" that defendant was prejudiced by his trial attorney's deficient performance is "somewhat lower" than that required under a preponderance of the evidence standard. Ibid.

In analyzing the prejudice prong of the Strickland/Fritz test, the PCR judge erred where he assessed the credibility of defendant's two alibi witnesses in terms of the weight a jury would have ascribed to it, (19T 7-14 to 23, 9-3 to 10-9), without comparing it to the strength of the State's case. L.A., 433 N.J. Super. at 15-16. ("the assessment of an absent witness's credibility is not an end in itself"). Unlike the PCR judge, the State in its opposition brief recognized the need to compare the credibility of the alibi witnesses to the strength of its case. (Pb 31). Nevertheless, even the State did not assert its proofs were overwhelming. (Pb 31)(its "proofs against defendant were significant"). In contrast, defendant maintained that "the State's evidence was not

overwhelming," especially given Jones' recantation at trial and the absence of any forensic or physical proofs. (Db 28).

As a result of the PCR judge's failure to weigh the credibility of the claimed alibi witnesses against the strength of the State's case, the debate between the State and defendant in their respective briefs regarding the weight of the State's proofs at trial requires this court to expand its traditional scope of review.

CONCLUSION

For the reasons stated above, defendant respectfully requests that the order dated June 27, 2023 be reversed, the judgment of conviction and sentence dated September 18, 2014 be vacated and the matter be remanded for a new trial.

Respectfully submitted,

JENNIFER N. SELLITTI
Public Defender

By: *David A. Gies*
DAVID A. GIES
Designated Counsel

Dated: August 20, 2024