SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0197-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SHAUN D. CLIFTON-SHORT,

Defendant-Appellant.

Submitted October 11, 2016 – Decided March 1, 2017

Before Judges Ostrer and Leone.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 08-03-0985.

Joseph E. Krakora, Public Defender, attorney for appellant (David A. Gies, Designated Counsel, on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent (Garima Joshi, Deputy Attorney General, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant appeals the July 21, 2014 denial of his petition for post-conviction relief (PCR). We affirm.

I.

We take our facts from our September 13, 2012 opinion affirming defendant's judgments of conviction:

> In the early morning hours of January 31, 2007, a murder occurred at a gas station in Orange, New Jersey. No one witnessed the incident, and the station's manager discovered the murdered employee inside an office in the back of the station's outside kiosk. The victim was found covered in blood, and the medical examiner on the scene concluded the victim died of "[m]ultiple blunt force trauma to the head" in a homicide.
>
> One day later, defendant and another man[1] were arrested in connection with a separate incident, a robbery at a Dunkin' Donuts. After two individuals were injured there, surveillance tape showed two persons, later identified as defendant and his brother, walking toward the Dunkin' Donuts, then running away from it a few minutes later. During the course of their subsequent arrest, police found a hammer in the pocket of [defendant].
>
> Homicide investigator Christine Witkowski, who had been called to the murder scene two nights earlier, questioned defendant about the Dunkin' Donuts robbery and also questioned him about the gas station incident. Defendant told Witkowski that he and his brother went to the gas station . . . . He claimed the attendant repeatedly told him and his brother to leave the station or else he would call the police. When they did not

[1] Although defendant referred to the man as his "brother," they were cousins.

immediately leave, defendant claimed the attendant took a hammer and swung it at him, narrowly missing. Defendant then took the hammer from the attendant, striking him until the attendant fell to the floor. The attendant got up, and a more lengthy physical confrontation ensued, with the parties hitting each other multiple times. The attendant eventually was knocked unconscious. He and his brother then left the gas station with the hammer in their possession.

. . . .

Defendant moved to suppress the statement he provided to police, claiming it was the product of coercion. The court denied the motion, finding defendant knowingly and voluntarily waived his Miranda[2] rights. Defendant also filed a pro se motion to suppress evidence obtained when he was stopped, along with his brother, on February 1, 2007. He argued he was illegally stopped and searched, and therefore all evidence obtained during the search and seizure should be suppressed. The court denied this motion.

Both at the time the court conducted the Miranda hearing and just before the testimonial stage of the trial commenced, defendant sought removal of his trial counsel. The court granted defendant's second motion to represent himself, but also appointed trial counsel as standby counsel. The court subsequently denied defendant's motions for a substitute standby counsel and for a continuance to allow him time to prepare his case.

In addition to the suppression motions and the motions to relieve his attorney, defendant filed additional motions: (1) to sever the two cases, (2) for a bill of particulars, (3) for a continuance to seek funding for a DNA expert, (4) to adjourn the trial date, (5) to dismiss the indictment for

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

> failure to provide an arraignment, (6) for Grand Jury voting record, (7) to suppress crime scene and autopsy reports, (8) to dismiss Counts Eight and Nine of the indictment, and (9) to suppress an out-of-court identification. During trial, the court denied or rendered moot each of these motions.
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> [State v. Clifton-Short, No. A-5817-08 (App. Div. Sept. 13, 2012) (slip op. at 2–5), certif. denied, 213 N.J. 536 (2013).]

Regarding the gas station incident, the jury convicted defendant of first-degree murder, N.J.S.A. 2C:11-3(a)(1), first-degree felony murder, N.J.S.A. 2C:11-3(a)(3), first-degree robbery, N.J.S.A. 2C:15-1, and other offenses. Regarding the Dunkin' Donuts incident, the jury convicted defendant of first-degree attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3, second-degree aggravated assault, N.J.S.A. 2C:12-1(b), first-degree robbery, N.J.S.A. 2C:15-1, and other offenses.

At sentencing, the court imposed a life sentence with a thirty-year parole disqualifier on the first-degree murder conviction and the first-degree felony murder conviction and a consecutive fifty-two-year sentence with an eighty-five percent parole disqualifier under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, on the first-degree attempted murder conviction, the second-degree aggravated assault conviction, and the first-degree robbery convictions.

On direct appeal, we affirmed the convictions and sentences except for remanding for correction of the judgment of conviction "to reflect merger of the murder and felony murder convictions and to also enter the correct NERA period of parole ineligibility" on the murder conviction, which the trial court did on remand. Clifton-Short, supra, (slip op. at 2, 25).

On July 10, 2013, defendant filed a PCR petition. After hearing oral argument, the PCR court denied the petition. Defendant appeals.

II.

PCR counsel makes the following arguments on appeal:

> POINT ONE - THE DEFENDANT'S TRIAL ATTORNEY WAS CONSTITUTIONALLY INEFFECTIVE WHERE HE DID NOT TIMELY RETAIN AN EXPERT WITNESS TO EVALUATE THE PHYSICAL EVIDENCE. (U.S. CONST. AMEND. VI, XIV; N.J. CONST. ART. I, para. 10 (1947)).
>
> POINT TWO - AN EVIDENTIARY HEARING IS REQUIRED WHERE THE DEFENDANT ASSERTS A PRIMA FACIE CASE INVOLVING FACTS WHICH ARE NOT PART OF THE TRIAL RECORD.
>
> POINT THREE - THE DEFENDANT INCORPORATES HEREIN ALL OF THE ARGUMENTS FOR POST-CONVICTION RELIEF SET FORTH IN THE PCR BRIEF FILED BY HIS PCR ATTORNEY.[3]

[3] Those arguments were: (1) "[t]he trial court erred where it did not charge the jury with passion/provocation manslaughter"; (2) "[t]he defendant's trial attorney was constitutionally ineffective where he did not adequately review the pretrial discovery or communicate with the defendant so as to obtain the knowledge of the facts of the case in order to proper[l]y represent him"; (3)

In his pro se supplemental brief, defendant argues:

> POINT I — PCR JUDGE ERRONEOUSLY DENIED THE DEFENDANT'S ISSUE CLAIMING PROSECUTORIAL MISCONDUCT IN REGARDS TO MULTIPLE KEY DISCOVERY EVIDENCE WHICH WAS WITHHELD BY THE STATE. THUS VIOLATING THE DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS.
>
> > A. THE STATE CONDUCTED PROSECUTORIAL MISCONDUCT BY WITHHOLDING MATERIAL EVIDENCE FAVORABLE TO THE DEFENDANT THROUGHOUT THE CASE AND REFUSED TO TURN IT OVER, THUS VIOLATING THE DEFENDANT'S FOURTEENTH AMEND. RIGHT TO DUE PROCESS.
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> POINT II — PCR JUDGE ERRONEOUSLY DENIED THE DEFENDANT'S ISSUE OF TRIAL ATTORNEY INEFFECTIVENESS. TRIAL ATTORNEY'S FAILURE TO PROPERLY REPRESENT THE DEFENDANT WHEN HE FAILED TO COLLECT COMPLETE AND MATERIAL DISCOVERY OR PURSUE POTENTIAL WITNESSES PREJUDICED THE DEFENDANT AND DENIED THE DEFENDANT OF A FAIR TRIAL.
>
> > A. DEFENDANT'S TRIAL ATTORNEY FAILED TO OBTAIN FAVORABLE MATERIAL SURVEILLANCE VIDEO, FAILED TO INVESTIGATE THE WITNESS WHO WAS PRESENT AT THE SCENE OF THE CRIME, FAILED TO CALL THE WITNESS TO TESTIFY, AND FAILED TO PROVIDE ANY TYPE OF DEFENSE FOR THE DEFENDANT. ALL OF WHICH GREATLY PREJUDICED THE

"[t]he defendant's trial attorney was constitutionally ineffective where he did not move to dismiss the indictment"; (4) "[t]he State's pretrial actions amounted to prosecutorial misconduct where it did not furnish all discovery to the defendant"; (5) "[t]he defendant's trial attorney was constitutionally ineffective where he did not object to the State's prosecutorial misconduct."

DEFENDANT AND DENIED HIM OF A FAIR TRIAL.

POINT III — PCR JUDGE ERRONEOUSLY DENIED THE DEFENDANT'S ISSUE IN REGARDS TO THE TRIAL ATTORNEY'S LACK OF REPRESENTATION AND CASE PREPARATION, THUS REQUIRING THE DEFENDANT TO REPRESENT HIMSELF IN FILING MOTIONS AND REQUESTING WITHHELD MATERIAL EVIDENCE FROM THE STATE.

A. THE TRIAL ATTORNEY'S LACK OF KNOWLEDGE AND PREPARATION IN THE DEFENDANT'S CASE FORCED THE DEFENDANT TO PROCEED PRO-SE WHEN REQUESTING WITHHELD DISCOVERY AND FILING MOTIONS, ALL DUE TO THE TRIAL ATTORNEY'S INEFFECTIVENESS AND ABYSMAL REPRESENTATION. THUS DENYING THE DEFENDANT HIS U.S. CONSTITUTIONAL RIGHT TO RECEIVE AN "EFFECTIVE ASSISTANCE OF COUNSEL" DURING CRIMINAL PROCEEDING.

POINT IV — PCR JUDGE ERRED IN DENYING THE DEFENDANT'S ISSUE OF TRIAL ATTORNEY'S INEFFECTIVENESS FOR FAILING TO FILE SUPPRESSION MOTION, WHICH DENIED THE DEFENDANT HIS FOURTEENTH AMENDMENT U.S. CONSTITUTIONAL RIGHT TO DUE PROCESS AND THE RIGHT TO A FAIR TRIAL.

A. TRIAL ATTORNEY'S FAILURE TO FILE A SUPPRESSION MOTION DENIED THE DEFENDANT HIS SIXTH AND FOURTEENTH AMENDMENT U.S. CONSTITUTIONAL RIGHTS AS WELL AS DENIED HIS RIGHT TO A FAIR TRIAL.

POINT V — THE PCR JUDGE ERRONEOUSLY DENIED THE DEFENDANT'S ISSUE CLAIMING TRIAL ATTORNEY INEFFECTIVENESS IN NEGLECTFULLY FAILING TO OBTAIN MISSING OR WITHHELD DNA LAB REPORTS, THUS VIOLATING THE DEFENDANT'S SIXTH AMENDMENT

U.S. CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

> A. TRIAL ATTORNEY'S LACK OF KNOWLEDGE AND UNINTEREST IN THE DEFENDANT'S MISSING LAB REPORTS CAUSED AN OVERSIGHT IN POTENTIALLY OUTCOME DETERMINATIVE EVIDENCE, VIOLATING THE DEFENDANT'S SIXTH AMENDMENT U.S. CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

POINT VI — PCR JUDGE ERRED IN DENYING THE DEFENDANT'S ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO TRIAL ATTORNEY'S FAILURE TO OBJECT TO THE HIGHLY PREJUDICIAL INTRODUCTION OF EVIDENCE BY THE STATE, THUS VIOLATING THE DEFENDANT'S SIXTH AMENDMENT CONFRONTATION CLAUSE, AS WELL AS THE DEFENDANT'S SIXTH AMENDMENT U.S. CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

> A. TRIAL ATTORNEY'S FAILURE TO OBJECT TO THE INTRODUCTION OF FORENSIC ANALYST, JULIE WHELDON'S TESTIMONIAL DNA LAB REPORT WITHOUT HER PRESENT TO TESTIFY ON SAID REPORT WAS HIGHLY PREJUDICIAL, VIOLATING THE DEFENDANT'S SIXTH AMENDMENT CONFRONTATION CLAUSE AS WELL AS THE DEFENDANT'S SIXTH AMENDMENT U.S. CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

POINT VII — PCR JUDGE ERRONEOUSLY RULED ON THE DEFENDANT'S ISSUE CLAIMING TRIAL ATTORNEY'S INEFFECTIVENESS FOR FAILING TO ADDRESS TAMPERING AND CROSS-CONTAMINATION OF DNA EVIDENCE, WHICH VIOLATED THE DEFENDANT'S FOURTH AMENDMENT U.S. CONSTITUTIONAL RIGHT TO A FAIR TRIAL. INSTEAD, PCR JUDGE ERRONEOUSLY DENIED THE DEFENDANT'S ISSUE, RULING ON A MATTER THAT WAS NOT THE ISSUE OR THE POINT OF ARGUMENT BY THE DEFENDANT.

A. DEFENDANT'S TRIAL ATTORNEY PROVED INEFFECTIVE AND VIOLATED THE DEFENDANT'S FOURTEENTH AMENDMENT U.S. CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN HE FAILED TO INVESTIGATE THE TAMPERING AND CROSS-CONTAMINATION OF DNA EVIDENCE IN THE DNA REPORTS.

POINT VIII — PCR JUDGE ERRONEOUSLY DENIED THE DEFENDANT'S POINT CLAIMING TRIAL ATTORNEY FAILED TO INVESTIGATE, ADDRESS, AND ATTACK THE DNA CHAIN OF CUSTODY LINKS REGARDING TWO STATE FORENSIC ANALYST SUPERVISORS, WHO PHYSICALLY HANDLED DNA EVIDENCE, THAT WERE MISSING FROM THE STATE'S WITNESS LIST, THUS VIOLATING THE DEFENDANT'S CONFRONTATION CLAUSE, HIS U.S. CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AND RIGHT TO A FAIR TRIAL. (U.S. CONST. AMENDS. VI, XIV; N.J. CONST. (1947) ART. 1 PAR. 10).

A. TRIAL ATTORNEY FAILED TO INVESTIGATE AND ADDRESS THE DNA CHAIN OF CUSTODY LINKS REGARDING TWO FORENSIC ANALYST SUPERVISORS, WHO PHYSICALLY HANDLED THE DNA EVIDENCE, THAT WERE MISSING FROM THE STATE'S WITNESS LIST, THUS VIOLATING THE DEFENDANT'S CONFRONTATION CLAUSE, HIS U.S. CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AND RIGHT TO A FAIR TRIAL. (U.S. CONST. AMENDS. VI, XIV; N.J. CONST. (1947) ART. 1 PAR. 10).

POINT IX — PCR JUDGE ERRONEOUSLY DENIED THE DEFENDANT'S PETITION THAT THE TRIAL ATTORNEY'S MANY EGREGIOUS ERRORS AND INACTIVE ADVOCACY CUMULATIVELY DENIED THE DEFENDANT ADEQUATE REPRESENTATION, RIGHT TO A FAIR TRIAL, AND HIS CONSTITUTIONAL RIGHT TO DUE PROCESS. (U.S. CONST. AMENDS. VI, XIV).

A. TRIAL ATTORNEY'S MANY EGREGIOUS ERRORS AND INACTIVE ADVOCACY CUMULATIVELY DENIED THE DEFENDANT ADEQUATE REPRESENTATION, THE RIGHT TO A FAIR TRIAL, AND THE DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS. (U.S. CONST. AMENDS. VI, XIV).

III.

Where the PCR court has not held an evidentiary hearing, we "conduct a de novo review." State v. Harris, 181 N.J. 391, 420-21 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005). We must hew to our standard of review.

Nearly all of defendant's claims allege ineffective assistance of counsel. To show ineffective assistance of counsel, a defendant must satisfy the two-pronged test of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and State v. Fritz, 105 N.J. 42 (1987). "The defendant must demonstrate first that counsel's performance was deficient, i.e., that 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" State v. Parker, 212 N.J. 269, 279 (2012) (quoting Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693). The "defendant must overcome a strong presumption that counsel rendered reasonable professional assistance." Ibid. Second, "a defendant must also establish that the ineffectiveness

of his attorney prejudiced his defense. 'The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 279-80 (quoting Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698).

"A defendant shall be entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of post-conviction relief . . . . To establish a prima facie case, defendant must demonstrate a reasonable likelihood that his or her claim . . . will ultimately succeed on the merits." R. 3:22-10(b). The court shall not grant an evidentiary hearing "if the defendant's allegations are too vague, conclusory or speculative." R. 3:22-10(e)(2). "Rather, defendant must allege specific facts and evidence supporting his allegations." State v. Porter, 216 N.J. 343, 355 (2013).

> [I]n order to establish a prima facie claim, a petitioner must do more than make bald assertions that he was denied the effective assistance of counsel. He must allege facts sufficient to demonstrate counsel's alleged substandard performance. Thus, when a petitioner claims his trial attorney inadequately investigated his case, he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification.

[Ibid. (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999)).]

IV.

At trial, the State called two DNA experts. Lynn Crutchley, a Forensic Scientist for the DNA Unit of the New Jersey State Police, testified the Dunkin' Donuts clerk's DNA was found on defendant's sneakers, the gas station attendant's DNA was found on the jacket and a glove defendant was wearing when arrested, and the attendant's DNA was found on a jacket his brother was wearing when arrested. Another DNA expert from the same unit, Evelyn Moses, testified the attendant's DNA was found on defendant's blue jeans and sweatshirt.

PCR counsel argues trial counsel was ineffective in failing to obtain a defense DNA expert.[4] If a "defendant asserts that his attorney failed to call witnesses who would have exculpated him, he must assert the facts that would have been revealed, 'supported by affidavits or certifications.'" State v. Petrozelli, 351 N.J. Super. 14, 23 (App. Div. 2002) (quoting Cummings, supra, 321 N.J. Super. at 170). Defendant did not supply an affidavit or

[4] The trial court denied as untimely defendant's pro se motion on the eve of trial for a continuance to obtain a DNA expert. On direct appeal, we found it was not reversible error to deny defendant's pro se requests for continuances. Clifton-Short, supra, (slip op. at 22-23).

certification from a DNA expert. Defendant's argument that trial counsel "could have potentially secured a contrary opinion as to the DNA findings" is simply "speculative." R. 3:22-10(e)(2); see State v. Marshall, 148 N.J. 89, 158, 163, 254, cert. denied, 522 U.S. 850, 118 S. Ct. 140, 139 L. Ed. 2d 88 (1997).

Defendant and PCR counsel argue trial counsel failed to investigate whether the State's DNA analysis was "flawed or compromised" because the clothing of defendant and his brother was not collected until they arrived at headquarters, allowing for opportunity for cross-contamination while they were transported to headquarters. However, he presented no evidence of cross-contamination or even that the two suspects were transported together. Once seized at the station, defendant's clothing was kept on a separate table from his brother's clothing.

Defendant argues trial counsel failed to investigate irregularities in the DNA evidence, the chain of custody, and possible tampering. However, he failed to provide "affidavits or certifications," which "assert the facts that an investigation would have revealed." Cummings, supra, 321 N.J. Super. at 170. As the PCR court found, defendant proffered "no basis" to believe "the State's DNA testing was flawed or compromised in any respect."

V.

Defendant argues the State purposely withheld evidence, specifically surveillance videos which the State denied it possessed. As the PCR court noted, "[t]his issue was fully addressed by the trial court." Thus, defendant's claim of prosecutorial misconduct is barred because it was previously litigated and because it could have been raised on direct appeal. R. 3:22-4(a)(1), -5.

Even if we consider this as a claim of ineffectiveness, it lacks merit. The State represented that "officers went to various banks and . . . commercial establishments looking for video. And they viewed those videos and they did not retain anything" with the exception of two tapes that "showed the defendant and his accomplice," which were "turned over [to defendant]. All other tapes were false leads and nothing was retained.

Our discovery rules only require the State to turn over "photographs [and] video and sound recordings" if they "are within the possession, custody or control of the prosecutor." R. 3:13-3(b)(1)(E). Similarly, under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the State only has a "constitutional obligation to provide criminal defendants with exculpatory evidence in the State's possession." Marshall, supra, 148 N.J. at 154.

Neither the prosecutor nor the police ever took possession of the surveillance videos belonging to the banks and other commercial establishments. There was no evidence that the videos were "favorable to the defense" or that there was "a 'reasonable probability that, had the [videos] been disclosed to the defense, the result of the proceeding would have been different.'" State v. Martini, 160 N.J. 248, 268-69 (1999) (citations omitted).[5] "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." State v. Marshall, 123 N.J. 1, 109 (1991) (quoting Arizona v. Youngblood, 488 U.S. 51, 57-58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281, 289 (1988)). There was no evidence the police acted in bad faith in not seizing or preserving the videos. See State v. Mustaro, 411 N.J. Super. 91, 103 (App. Div. 2009).

We also reject defendant's remaining claims concerning discovery. Defendant insisted at trial that he did not have full discovery, producing a list of items he allegedly had not received. The trial court, trial counsel, the prosecutor, and defendant reviewed all the items on the list. As the PCR court found: "The

[5] In a certification accompanying his pro se appellate brief, defendant claims the videos were favorable. We will not consider a certification not presented to the PCR court. R. 2:5-4(a).

list was exhaustively addressed by the trial judge on two separate days. The alleged missing items simply do not, and never did, exist. Failure to procure non-existent discovery does not rise to ineffectiveness of counsel."

VI.

Defendant also claims trial counsel was ineffective for not investigating, interviewing, and calling as a witness a security guard who, after the robbery at Dunkin' Donuts, was contacted by one of the victims, and called 9-1-1. Again, defendant failed to provide "affidavits or certifications" which "assert the facts that would have been revealed." Petrozelli, supra, 351 N.J. Super. at 23 (quoting Cummings, supra, 321 N.J. Super. at 170).

Similarly, there was no merit to defendant's general claims that trial counsel did not investigate and uncover evidence, because defendant did not provide "affidavits or certifications" which "assert the facts that an investigation would have revealed." Cummings, supra, 321 N.J. Super. at 170.

VII.

The PCR court also properly rejected defendant's claim that trial counsel failed to investigate and obtain a DNA lab report allegedly missing from discovery. Defendant notes the lab reports he received for items from the gas station (C07-02772) and the Dunkin' Donuts (C07-02773) each have a notation "compare to . . .

C07-02771." When defendant inquired about the "2771" lab report, the State represented to the trial court that the only lab reports related to defendant's crimes were the "2772" and "2773" reports, and that the "2771" report concerned an unrelated homicide. The court accepted the State's representation. As the PCR court observed, "[t]his item . . . was exhaustively addressed by the trial judge on two occasions. There is simply no factual basis for defendant's conclusions."

Defendant did not appeal the trial court's decision to accept the State's representation, and such a claim is barred on PCR. R. 3:22-4(a)(1), -5. In any event, defendant has not provided any affidavit or certification, or otherwise shown that the 2771 report was relevant or favorable to him. See Martini, supra, 160 N.J. at 268-69; Cummings, supra, 321 N.J. Super. at 170.

VIII.

Defendant argues trial counsel was ineffective for not filing a motion to suppress the evidence seized when defendant was stopped by police after the Dunkin' Donuts robbery. However, after defendant chose to represent himself, he filed such a suppression motion, which the trial court denied. Clifton-Short, supra, (slip op. at 4). Defendant appealed and challenged that denial, claiming the court erred in not holding a full suppression hearing. Id. (slip op. at 9 n.3). We affirmed, ruling the argument was "without

sufficient merit to warrant discussion in a written opinion." Id. (slip op. at 23). Defendant is barred from again challenging the suppression ruling on PCR review. R. 3:22-5.

Defendant does not allege how the result of the suppression motion would have been different if trial counsel had brought it. In any event, when a defendant claims trial counsel was ineffective for "fail[ing] to file a suppression motion, the defendant not only must satisfy both parts of the Strickland test but also must prove that his Fourth Amendment claim is meritorious." State v. Fisher, 156 N.J. 494, 501 (1998). "It is not ineffective assistance of counsel for defense counsel not to file a meritless motion[.]" State v. O'Neal, 190 N.J. 601, 619 (2007).

IX.

Defendant contends the PCR court erred in denying his claim that trial counsel failed to adequately represent him, forcing him to represent himself. Defendant argues trial counsel failed to adequately prepare, investigate, and obtain missing discovery. However, we have rejected defendant's specific claims of failure to investigate, to obtain discovery, and to file pretrial motions. Defendant's general allegations of inadequate representation "are too vague, conclusory, or speculative to warrant an evidentiary hearing." Marshall, supra, 148 N.J. at 158.

In addition, the record contradicts defendant's general allegations. The trial transcript shows defendant communicated extensively with trial counsel and the court about discovery. As we noted on direct appeal, the trial court found defendant "had vast knowledge of his case." Clifton-Short, supra, (slip op. at 21). Moreover, trial counsel stated he discussed defendant's proposed pre-trial motions with defendant, told defendant they were without merit, and correctly predicted they would be denied. The PCR court properly concluded that "[f]ailure to file meritless motions . . . cannot be the basis for a legitimate complaint."

Defendant argues trial counsel "never visited" him and, during rare visits, defendant observed him sleeping. However, trial counsel informed the trial court that when he "went to the jail, [defendant] walked out on our meeting . . . one time; he didn't communicate with me, another time; and then I went back and then he told me he really didn't want to talk to me, but he would and that kind of thing."

Defendant alleges trial counsel should have engaged in conferences with the prosecutor. However, a trial prosecutor related that, in addition to trial counsel's "visits to [defendant] himself, he's been in the Prosecutor's Office. He's met with [the other trial prosecutor] and with myself. We've had telephone conversations. We've had in-face meetings where we've gone through

the evidence . . . together and discussed it." The trial court found that "[c]ounsel met with his client at the jail, and had conferences with the Assistant Prosecutors." The PCR court noted trial counsel "was successful in obtaining a much more favorable plea offer than [defendant's] prior attorney."

The trial court repeatedly found defendant created this issue with trial counsel to manipulate the system and disrupt and derail the orderly conduct of his trial. The court expressed its "hope that if a Higher Court does review this record, that they read between the lines and see really what this defendant is trying to do." We have reviewed the record and see that defendant tried to manipulate the judicial system at every turn, and that his counsel nonetheless continuously advocated for defendant both as trial counsel and as standby counsel. We find no merit to defendant's claim that trial counsel forced defendant to represent himself.

X.

Defendant's remaining claims allege ineffective assistance of counsel after he waived his right to counsel. However, "a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" Faretta v. California, 422 U.S. 806, 834 n.46, 95 S. Ct. 2525, 2541 n.46, 45 L. Ed. 2d 562, 581 n.46 (1975). Thus, a defendant's choice of "self-

representation[] constitutes a waiver of any future ineffective assistance of counsel claims under the Strickland/Fritz test in respect of those matters in which the defendant represents himself." State v. Figueroa, 186 N.J. 589, 595 (2006).

The trial court's appointment of trial counsel as standby counsel did not affect defendant's waiver of any future ineffectiveness claims. As the court warned defendant, he could not claim standby counsel was ineffective. "[T]here is no constitutional right to partial or hybrid representation." Id. at 594; accord McKaskle v. Wiggins, 465 U.S. 168, 183, 104 S. Ct. 944, 953, 79 L. Ed. 2d 122, 136 (1984). "[W]ithout a constitutional right to standby counsel, a defendant is not entitled to relief for the ineffectiveness of standby counsel." United States v. Oliver, 630 F.3d 397, 414 (5th Cir. 2011) (quoting United States v. Morrison, 153 F.3d 34, 55 (2d Cir. 1998)), cert. denied, 565 U.S. 1063, 132 S. Ct. 758, 181 L. Ed. 2d 490 (2011); accord Rishor v. Ferguson, 822 F.3d 482, 500 (9th Cir. 2016); Simpson v. Battaglia, 458 F.3d 585, 597 (7th Cir. 2006); 3 Wayne R. LaFave et al., Criminal Procedure § 11.5(f), at 888-89 (4th ed. 2015) ("[T]he defendant cannot raise an ineffective assistance claim based on standby's performance or lack thereof.").

Defendant's claims ring particularly hollow because he objected to having any assistance from standby counsel. Moreover,

he protested the appointment of standby counsel by absenting himself from the courtroom during the State's case. On direct appeal, we rejected defendant's challenges to the trial court's appointment of standby counsel and its decision to continue the trial in defendant's absence, upholding the court's finding "that defendant was simply attempting to delay the proceedings with his actions." Clifton-Short, supra, (slip op. at 18-23).

Defendant's manipulative actions did not resuscitate a right to challenge the effectiveness of counsel he had foresworn. State v. Ortisi, 308 N.J. Super. 573, 591-92 (App. Div.) (holding a defendant who "voluntarily absent[ed] himself from trial" and "ordered standby counsel not to participate in the trial . . . should not be heard to complain"), certif. denied, 156 N.J. 383 (1998). "A defendant does not have a constitutional right to choreograph special appearances by counsel." McKaskle, supra, 465 U.S. at 183, 104 S. Ct. at 953, 79 L. Ed. 2d at 136; accord State v. Buhl, 269 N.J. Super. 344, 364 (App. Div.), certif. denied, 135 N.J. 468 (1994); see also State v. Crisafi, 128 N.J. 499, 517-18 (1992) (holding a defendant who "sought to manipulate the system by wavering between assigned counsel and self-representation . . . 'cannot have it both ways'" (citation omitted)). In any event, defendant's claims are meritless.

A.

Defendant claims standby counsel was ineffective because he did not object to the testimony of Evelyn Moses because she did not participate in the DNA analysis. On December 8, 2008, the State called Moses, a supervisor in the State Police's DNA unit, as one of its DNA experts. Moses described the procedures of DNA analysis. She explained that lab report C07-02772 was prepared by one of the individuals she previously supervised, Julie Wheldon; and that Wheldon's report indicated DNA from the victim on defendant's jeans and sweatshirt. While Moses admitted on cross-examination that she did not complete the actual testing herself, she testified she supervised Wheldon and reviewed and "initialed every page" of the report Wheldon prepared.

Defendant argues Moses's 2008 testimony was improper under case law postdating his trial. He relies on Williams v. Illinois, 567 U.S. 50, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012), which produced no majority opinion. Our Supreme Court found "the fractured holdings of Williams provide little guidance in understanding when testimony by a laboratory supervisor or co-analyst about a forensic report violates the Confrontation Clause." State v. Michaels, 219 N.J. 1, 29, cert. denied, __ U.S. __, 135 S. Ct. 761, 190 L. Ed. 2d 635 (2014). Our Court "turn[ed] for more reliable guidance in that respect to pre-Williams

Confrontation Clause law," id. at 32, namely Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), and Bullcoming v. New Mexico, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011), which also postdate the 2008 trial here.

Based on those cases, the Court in Michaels recently held:

> [A] truly independent reviewer or supervisor of testing results can testify to those results and to his or her conclusions about those results, without violating a defendant's confrontation rights, if the testifying witness is knowledgeable about the testing process, has independently verified the correctness of the machine-tested processes and results, and has formed an independent conclusion about the results.
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> [Michaels, supra, 219 N.J. at 45-46; accord State v. Bass, 224 N.J. 285, 315 (2016).]

Here, Moses was a supervisor and reviewer of the testing results and was knowledgeable about the testing process. However, it is unclear whether she "did in fact perform[] an independent review of testing data and processes, rather than merely read from or vouch for another analyst's report or conclusions." State v. Roach, 219 N.J. 58, 61 (2014) (applying Michaels and finding "the testifying analyst engaged in an independent review of DNA testing through which she personally verified the correctness of a DNA profile" performed by another analyst and reached her own

conclusions), cert. denied, __ U.S. __, 135 S. Ct. 2348, 192 L. Ed. 2d 148 (2015).

We need not determine whether Moses's testimony was admissible under Melendez-Diaz, Bullcoming, Williams, or Michaels because all of those cases announced new principles of law after this 2008 trial. "In analyzing trial counsel's performance, we examine the law as it stood at the time of counsel's actions, not as it subsequently developed." State v. Goodwin, 173 N.J. 583, 597 (2002). At the time of trial, the "accepted rule governing the admission of scientific evidence" followed for decades "by at least 35 States and six Federal Courts of Appeals" provided that "scientific analysis could be introduced into evidence without testimony from the 'analyst' who produced it." Melendez-Diaz, supra, 557 U.S. at 330, 129 S. Ct. at 2543, 174 L. Ed. 2d at 333 (Kennedy, J., dissenting).

Even after Melendez-Diaz, there was no established requirement that a witness testifying as a surrogate for the analyst had to conduct an independent analysis. Bullcoming, supra, 564 U.S. at 674, 131 S. Ct. at 2723, 180 L. Ed. 2d at 630 (Kennedy, J., dissenting) (faulting the majority for "extending [Melendez-Diaz's] holding to instances" where a surrogate witness testifies). In her influential Bullcoming concurrence, Justice Sotomayor predicted: "It would be a different case if, for example,

a supervisor who observed an analyst conducting a test testified about the results or a report about such results," without suggesting that an independent analysis was required. Id. at 673, 131 S. Ct. at 2722, 180 L. Ed. 2d at 629 (Sotomayor, J., concurring); see Michaels, supra, 219 N.J. at 24 ("Justice Sotomayor's opinion foreshadowed many of the questions that courts such as ours have had to wrestle with.").

Although Melendez-Diaz had less impact in New Jersey, as we had already "recognized the accused's right to confront the author of a [blood alcohol content] certificate," New Jersey "courts ha[d] yet to consider" the use of surrogate witnesses and did not suggest they had to independently reach their own conclusions until at least 2011. State v. Rehmann, 419 N.J. Super. 451, 453, 455, 457-59 (App. Div. 2011) (allowing the State to "rel[y] upon the testimony of an expert who supervised but did not actually perform the test" who "drew his own conclusions").

Thus, when this case was tried in 2008, "given the [S]tate of [New Jersey] and United States Supreme Court Confrontation Clause jurisprudence at the time, there was not a reasonable probability that a Confrontation Clause objection would have been sustained by the trial court." See Flournoy v. Small, 681 F.3d 1000, 1005-06 (9th Cir. 2012), cert. denied, __ U.S. __, 133 S. Ct. 880, 184 L. Ed. 2d 688 (2013). "[C]ounsel's stewardship must

be judged under the existing law at the time of trial and counsel cannot be deemed ineffective for failing to predict future developments or changes in the law." Bakalekos v. Furlow, 385 S.W.3d 810, 821 (Ark. 2011) (quoting Pennsylvania v. Todaro, 701 A.2d 1343, 1346 (Pa. 1997)); accord United States v. Davies, 394 F.3d 182, 189 (3d Cir. 2005).

Therefore, we decline to find standby counsel ineffective for not predicting a change of law that was divined only after three fractured opinions from the United States Supreme Court, and exegesis by the New Jersey courts many years after trial.

In any event, defendant cannot show prejudice from Moses's testimony. "Had a confrontation argument been raised before the State concluded its case, inquiry could have been made as to which analyst or analysts defendant wanted produced." Michaels, supra, 219 N.J. at 37. Even if Wheldon could not be produced, Moses may have been able to perform an independent analysis of the test she supervised. Crutchley's testimony would still have been admissible to show the victims' DNA had been found on defendant's jacket and sneakers.

Moreover, defendant's confession was the State's most critical piece of evidence. Defendant confessed to killing the gas station attendant with the hammer and to committing the Dunkin' Donuts robbery and assaults. His confessions were corroborated

by the video surveillance at the Dunkin' Donuts and by his possession on arrest of the hammer used in both crimes. At trial, defendant disputed the confession but did not dispute the DNA results, instead testifying his brother borrowed his clothes before the crimes and committed the crimes without him.[6] Thus, even setting aside Moses's testimony, there was overwhelming evidence of guilt. Defendant has failed to show a reasonable probability that the results of trial would have been different.

B.

PCR counsel incorporates the argument that the trial court erred by not charging the jury on passion/provocation manslaughter. However, in his direct appeal, defendant argued the court's failure to instruct on passion/provocation manslaughter was plain error. Clifton-Short, supra, (slip op. at 13). We rejected this claim, ruling any error was invited. Id. (slip op. at 14). Defendant cannot relitigate this claim of trial court error. R. 3:22-5.

On direct appeal, we also stated:

> Insofar as defendant's argument that his counsel's failure at trial to request a passion/provocation manslaughter charge constituted ineffective assistance of counsel, such a claim is more appropriate for post-conviction relief, as its resolution requires the court to consider matters outside

[6] We note no DNA profile evidence was found on the hammer.

> of the record. State v. Preciose, 129 N.J. 451, 459-60 (1992).
>
> [Clifton-Short, supra, (slip op. at 14).]

In the PCR court, defendant argued standby counsel was ineffective for not requesting a passion/provocation instruction. However, there was no evidence to justify requesting such an instruction. See, e.g., State v. Funderburg, 225 N.J. 66, 80 (2016) (requiring the defendant be actually impassioned). Even defendant's statement to police, which he testified was false, "would at most support the theory that [he] acted in self-defense; it would likely not support a theory that [he] was actually impassioned." Id. at 82-83. "'[T]o justify a lesser included offense instruction, a rational basis must exist in the evidence for a jury to acquit the defendant of the greater offense as well as to convict the defendant of the lesser, unindicted offense.'" Id. at 81 (citation omitted). Because the evidence did not support a rational basis for such an instruction, defendant cannot show prejudice. Thus, even if he could claim standby counsel was ineffective, his claim fails.

XI.

The remaining claims raised in defendant's pro se brief, or incorporated into PCR counsel's brief, lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

We agree with the PCR court that defendant failed on all of his claims to show a prima facie case of "'a reasonable probability that . . . the result of the proceeding would have been different.'" Parker, supra, 212 N.J. at 279-80 (citation omitted). The PCR court thus did not need to consider whether trial counsel's conduct was deficient or to hold an evidentiary hearing. Marshall, supra, 148 N.J. at 261. We also reject defendant's claim of cumulative error.

Affirmed.