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

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1831-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DARWIN RODRIGUEZ-FERREIRA,

Defendant-Appellant.

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Argued June 6, 2017 – Decided July 20, 2017

Before Judges Koblitz and Summers.

On appeal from the Superior Court of  
New Jersey, Law Division, Hudson County  
Indictment No. 10-10-1807.

Charles Alvarez argued the cause for appellant  
(Peter R. Willis, L.L.P., attorneys; Peter R.  
Willis, on the brief).

Stephanie Davis Elson, Hudson County Assistant  
Prosecutor, argued the cause for respondent  
(Esther Suarez, Hudson County Prosecutor,  
attorney; Ms. Elson, of counsel and on the  
brief).

PER CURIAM

Defendant Darwin Rodriguez-Ferreira appeals from an October

26, 2015 order denying post-conviction relief (PCR) without an evidentiary hearing. He argues trial counsel was ineffective in not requesting a hearing to challenge the scientific reliability of certain DNA evidence presented by the forensic unit of New York City's Office of the Chief Medical Examiner (NYOCME). We agree that the evidence was sufficiently novel to raise the question of why defense counsel did not request a pre-trial N.J.R.E. 104 Frye<sup>1</sup> hearing and reverse and remand for an evidentiary hearing.

The trial revealed the following facts. On August 16, 2008, at approximately 5:00 a.m., Mark Kendall left his home in Jersey City to buy cigarettes. About thirty minutes later, Kendall's neighbor was awoken by people arguing loudly and heard someone say, "What you doing?" A few minutes after the commotion ended, she peered out the window of her second-floor apartment onto the street and saw one person lying motionless on the ground and the shadow of a second person quickly walking across the street into Pershing Field Park.

Kendall died in the street from multiple stab wounds. The police investigation discovered a pair of "Nike" sandals, one in front of Kendall's residence and another in Pershing Field. Kendall's cell-phone was found on his person.

The police found an exchange of calls between Kendall and an

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<sup>1</sup> Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

individual named "Darwin" that occurred within forty minutes of the time Kendall was discovered wounded on the ground. Two numbers for a "Darwin" were stored on Kendall's cell-phone contact list. "Darwin's" number was registered to defendant's mother, with whom defendant lived in Jersey City, a few blocks from the murder scene. Two blocks from the scene, a bloody twelve-inch knife wrapped in boxer shorts was found. About eight hours after Kendall was attacked, the police discovered bloodstains on the floor of defendant's home. The day after Kendall was killed, defendant flew out of the country on a one-way ticket.

DNA testing of the blood on the knife, the right foot Nike sandal, and the blood stain swabs taken from defendant's mother's home matched Kendall's DNA profile. One of the tested bloodstain samples from defendant's home had a mixture of DNA. "Kendall [was] identified as the source of the major DNA profile obtained." The minor DNA in this bloodstain sample was not attributable to defendant.

With respect to the DNA results of the boxer shorts wrapped around the knife, a NYOCME criminalist testified that she conducted a "Low Copy Number" DNA test, which is conducted when the DNA sample has a lower starting amount of DNA and "typically that's going to be on a touched object." The criminalist explained that she "scraped the inside waistband . . . looking for skin cells[,]"

to determine its "wearer." Upon testing the skin cells, she was able to develop a DNA profile, and concluded that defendant's DNA profile matched as "the major contributor . . . to the sample taken from the scrapings of the boxer shorts." Also, she tested a blood sample from the boxer shorts, and testified it "was a mixture of DNA from [Kendall and defendant]." She opined that "[s]ince [she] was able to determine that there was DNA present on the inner scrapings of the boxer shorts . . . it's possible that [defendant] wore those boxer shorts[,] or "[defendant] could have just touched them or come in contact with them."

On June 3, 2011, the jury returned a verdict convicting defendant of knowing and purposeful murder, N.J.S.A. 2C:11-3(a)(1) and (2), fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d), and third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d). Defendant was sentenced to a thirty-year term with a thirty-year parole disqualifier on the murder conviction, and to a consecutive eighteen-month term on the unlawful possession of a weapon conviction. The count for possession of a weapon for an unlawful purpose was merged into the count for murder.

We affirmed defendant's direct appeal, and remanded to the trial court to articulate its reasons for imposing the consecutive sentence. State v. Rodriguez-Ferreira, A-0855-11 (App. Div. May

7), (slip op. at 7-8), certif. denied, 220 N.J. 43 (2014).

Defendant contended in his PCR petition that trial counsel was ineffective because of counsel's failure to request a Frye hearing challenging the testimony of the NYOCME criminalist regarding the Low Copy Number DNA test results linking the boxer shorts that wrapped the murder weapon to defendant.

The PCR court, which had also conducted the trial, denied defendant's PCR petition, finding defendant was not entitled to an evidentiary hearing because he failed to establish a prima facie case of ineffective assistance of counsel under the test set forth in Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984).

The court noted: "Even if trial counsel was deficient with respect to his failure to request a Frye hearing . . . . [defendant] has failed under prong two of Strickland, which requires a showing that 'the deficient performance prejudiced the defense.'" The court stated: "[Defendant] would have needed to show that had trial counsel requested a Frye hearing, the Low Copy Number DNA testing evidence would have been inadmissible, thereby leading to [defendant's] acquittal."

On appeal defendant raised the following points:

POINT I: THE PCR COURT SHOULD HAVE GRANTED THE DEFENDANT A FRYE HEARING BECAUSE TRIAL COUNSEL'S FAILURE TO CHALLENGE THE ADMISSIBILITY OF THE DNA TEST RESULTS OBTAINED

WITH A METHOD ONLY PERFORMED IN NEW YORK  
CONSTITUTED INEFFECTIVE ASSISTANCE OF  
COUNSEL. AT MINIMUM, DEFENDANT'S CLAIM OF  
INEFFECTIVE ASSISTANCE OF COUNSEL SHOULD NOT  
HAVE BEEN DISMISSED WITHOUT AN EVIDENTIARY  
HEARING.

- a. High Sensitivity Analysis, also known as Low Copy Number Testing
- b. Trial Counsel's performance fell below an objective standard of reasonableness
- c. Standard DNA Analysis
- d. Standard DNA Testing
- e. Science behind Low Copy Number testing
- f. Requirements for the Admission of Expert Testimony
- g. Low copy number testing does not have general acceptance in the pertinent scientific community
- h. This Court has Ordered Similar Hearings When Considering the Admissibility of Scientific Evidence in Criminal Cases

To prevail on PCR, a defendant must "identify specific acts or omissions that are outside the 'wide range of reasonable professional assistance' and . . . show prejudice by demonstrating 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" State v. Jack, 144 N.J. 240, 249 (1996) (quoting Strickland, supra, 466 U.S. at 689, 694, 104 S. Ct. at 2065, 2068, 80 L. Ed. 2d at 694, 698). An evidentiary hearing is needed where the defendant comes forward with facts that would, if believed, make a prima facie showing of both deficient performance and resulting prejudice. State v. Preciose, 129 N.J. 451, 462-63 (1992).

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

"As a general principle, 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" State v. Difrisko, 174 N.J. 195, 223 (2002) (quoting State v. Martini, 160 N.J. 248, 266 (1999)). When claiming defense counsel inadequately investigated, the defendant "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." Cummings, supra, 321 N.J. Super. at 170 (citing R. 1:6-6).

The mere raising of a claim for PCR does not entitle a defendant to an evidentiary hearing. Ibid. "A petitioner must establish the right to such relief by a preponderance of the credible evidence." Preciose, supra, 129 N.J. at 459.

When determining whether to grant an evidentiary hearing, the PCR court must consider the facts in the light most favorable to the defendant. Id. at 462-63. A hearing should be conducted if there are disputed material facts. State v. Porter, 216 N.J. 343, 354 (2013) (quoting Rule 3:22-10(b)).

Defendant relied on a comprehensive New York trial court decision, New York v. Collins, 15 N.Y.S. 3d 564, 570-76, 587 (N.Y. Sup. Ct. 2015), rendered a few months before this PCR decision, where the New York court found Low Copy Number DNA testing inadmissible after a lengthy Frye hearing. Defendant also pointed to scholarly articles published in the scientific community raising concerns about Low Copy Number DNA testing. Other New York courts, before the 2015 Collins decision, have admitted Low Copy Number DNA. See New York v. Megnath, 898 N.Y.S. 2d 408, 415 (N.Y. Sup. Ct. 2010) (admitting the evidence after a Frye hearing); see also New York v. Garcia, 963 N.Y.S. 2d 517, 523 (N.Y. Sup. Ct. 2013) (admitting the evidence without a Frye hearing).

No reported New Jersey case has found Low Copy Number DNA results admissible in court. At the PCR hearing on remand, defense counsel should explain what efforts were made to investigate this form of DNA testing and why no Frye hearing was requested. If this explanation is unsatisfactory, the court should then hold a Frye hearing to determine whether the evidence is admissible given today's scientific knowledge. The Low Copy DNA results were damning evidence linking defendant to the bloody knife found two blocks from the scene of the murder. If the evidence is not deemed admissible, defendant is entitled to a new trial.



Reversed and remanded for a plenary PCR hearing. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION