

**NOT FOR PUBLICATION WITHOUT THE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

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

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1894-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JONATHAN WALKER, a/k/a
JONATHAN L. WALKER and
JONATHON WALKER,

Defendant-Appellant.

Submitted March 16, 2017 – Decided May 2, 2017

Before Judges Lihotz and Hoffman.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment Nos.
11-03-0619 and 11-05-0883.

Joseph E. Krakora, Public Defender, attorney
for appellant (Monique Moyse, Designated
Counsel, on the brief).

Carolyn A. Murray, Acting Essex County
Prosecutor, attorney for respondent (Frank J.
Ducoat, Special Deputy Attorney General/Acting
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Following an evidentiary hearing, defendant Jonathan Walker appeals from an October 27, 2015 order denying his petition for post-conviction relief (PCR). We affirm.

We derive the following facts from the record. On March 25, 2011, an Essex County grand jury returned Indictment Number 11-03-0619, charging defendant with first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2) (count one); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b) (count two); and second-degree possession of firearm for unlawful purposes, N.J.S.A. 2C:39-4(a) (count three).

Less than two months later, on May 11, 2011, an Essex County grand jury returned Indictment Number 11-05-0883, charging defendant with third-degree conspiracy to possess a controlled dangerous substance with intent to distribute, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:35-5(a)(1) (counts one and five); third-degree distribution of cocaine, N.J.S.A. 2C:35-5(a)(1), (b)(3) (count two); third-degree distribution of cocaine in a school zone, N.J.S.A. 2C:35-7 (count three); and second-degree distribution of cocaine in the area of a public housing facility, N.J.S.A. 2C:35-7.1 (count four).

Defendant entered initial pleas of not guilty to both indictments. However, on October 20, 2011, the second day of jury selection in the homicide case, defendant pled guilty to the

amended charge of aggravated manslaughter, N.J.S.A. 2C:11-4(a), and also pled guilty to count two of Indictment Number 11-03-0619. Defendant also pled guilty to count three of Indictment Number 11-05-0883.

At his plea colloquy, defendant confirmed he was satisfied with the services of his counsel, and he understood the plea agreement provided for him to receive a thirteen-year sentence. He then admitted to possessing a handgun without a permit in East Orange on July 29, 2010, and during a dispute with several individuals, using the handgun to fire one shot at Saleem Jihad, causing his death. He also admitted to selling cocaine to an undercover officer in East Orange on June 11, 2010, within 1000 feet of an elementary school. After accepting defendant's pleas, the judge dismissed all remaining charges in both Indictments.

On January 17, 2012, a different judge sentenced defendant on count one of Indictment Number 11-03-0619 to thirteen years of imprisonment, subject to the eighty-five percent period of parole ineligibility pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. On count two, defendant received a concurrent ten-year term. The judge also sentenced defendant on count three of Indictment number 11-05-0883 to a three-year term of imprisonment, concurrent to his other sentences.

Defendant did not file a direct appeal. However, on October 28, 2014, defendant filed a pro se petition for PCR, alleging his plea counsel provided ineffective assistance. In his certification supporting PCR, defendant claimed plea counsel failed to meet with him to discuss his case, including potential defenses or alibis, and he failed to provide defendant with a copy of his discovery. Defendant asserted, "At the time of the incident I had names of alibi witnesses who would have proven that it was not me who was involved in this incident, but my lawyer did not want the information, and with the passing of time, I no longer have the information." Defendant further claimed he "felt pressured to plead guilty because my attorney kept telling me I needed to plead guilty."

On September 24, 2015, the PCR judge, who had imposed sentencing, held an evidentiary hearing, where defendant and counsel testified. Counsel stated he represented defendant from the time of defendant's arrest on the murder charge through defendant's guilty plea. Counsel said he provided defendant with the discovery around the time of his arraignment. He visited defendant in prison, where they reviewed the nature of his charges, the applicable defenses, and the discovery and related documents.

According to counsel, defendant denied being involved in the matter. They discussed potential alibi witnesses, but defendant

was unable to provide "any firm information about where he was on [the] particular day of the incident." Counsel noted that in certain circumstances, an alibi witness might be worse than no alibi at all. Therefore, based on the lack of information, counsel concluded he was not comfortable presenting an alibi "in terms of trial strategy." He further noted the State had a witness who would testify defendant confessed to committing the murder, and defendant asked him to hide the murder weapon.

Counsel initially prepared the case for trial, and he attempted to move to trial quickly because the State's witness was unavailable. However, during jury selection, counsel learned the witness was in State custody and was available to testify. Because of this development, the "discussions with regards to resolving the case by plea change[d]." Counsel engaged in plea negotiations with the prosecutor, which resulted in the agreement for the thirteen-year sentence.

Counsel said defendant made the decision to plead guilty "based on everything that we were confronted with," specifically, eyewitness evidence and the testimony of the State's witness. He reviewed the plea forms with defendant, and defendant understood all of the provisions in the form. Counsel stated he never told defendant he had to plead guilty.

Defendant testified he met with counsel twice in prison during his case; the first meeting lasted forty-five minutes, and the second between twenty-five to thirty minutes. He also met with counsel briefly before his court appearances. Defendant said the discovery counsel provided during their first meeting contained missing documents, which he never received. Defendant told counsel his boss would verify he was working at the time of the incident, but counsel failed to investigate this individual. Defendant did not know how to pronounce the last name of his boss. He also offered his uncle as an alibi witness, but counsel did not contact him either.

In response to questioning by the PCR judge, defendant said his relatives had contacted counsel to provide alibi information, but counsel "act[ed] like he didn't want the information." He said he gave counsel's phone number to his uncle, but counsel never returned the uncle's calls. Defendant also acknowledged his mother could have obtained the last name of his boss.

Defendant said counsel "kept pressuring" him to take the plea. Counsel told him the State offered thirteen years, but if defendant accepted the plea deal, he would be "home in five to seven years, at the most." According to defendant, he declined to ask questions about his sentence during his plea colloquy

because he "assumed that I couldn't talk." However, defendant acknowledged he was not physically forced to sign the plea forms.

Following the hearing, on October 27, 2015, the PCR judge denied relief in an oral decision and provided an accompanying written opinion. The judge found defendant's testimony regarding his plea was not credible, noting defendant admitted counsel did not force him to sign the plea forms. The judge found counsel's testimony that he explained the plea forms to defendant was credible, as was counsel's testimony that defendant made the ultimate decision to plead guilty.

The judge further credited counsel's testimony that the alibi witnesses were not viable. She determined counsel's decision not to present an alibi, "because it would not have been a strong defense," was a "reasonable, strategic decision." She found counsel's two visits with defendant in prison were reasonable, and defendant was not pressured to take the plea. The judge also found defendant failed to prove prejudice because the State's witness would contradict the alibi testimony that defendant was at work. As such, the PCR judge concluded defendant failed to prove the test for ineffective assistance of counsel.

This appeal followed. On appeal, defendant presents the following argument:

[DEFENDANT] IS ENTITLED TO RELIEF ON HIS CLAIM
THAT HIS ATTORNEY RENDERED INEFFECTIVE
ASSISTANCE OF COUNSEL

"In reviewing a PCR court's factual findings based on live testimony, an appellate court applies a deferential standard[.]" State v. Pierre, 223 N.J. 560, 576 (2015). If sufficient credible evidence in the record supports the judge's findings, we will affirm. Ibid. However, we grant no deference to the PCR judge's interpretation of the law. State v. Harris, 181 N.J. 391, 415-16 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005). The defendant must establish the right to relief by a preponderance of credible evidence. State v. Echols, 199 N.J. 344, 357 (2009).

The United States Supreme Court set forth the standard for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), which our Supreme Court adopted in State v. Fritz, 105 N.J. 42, 58 (1987). In order to prevail on a claim of ineffective assistance of counsel, a defendant must meet a two-prong test. First, the defendant must show counsel was deficient, meaning, counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. This inquiry turns on "whether counsel's performance

was 'reasonable considering all the circumstances.'" State v. Savage, 120 N.J. 594, 617 (1990) (quoting Strickland, supra, 466 U.S. at 688, 104 S. Ct. at 2064, 80 L. Ed. 2d at 694).

"Second, the defendant must show that the deficient performance prejudiced the defense." Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. To prove prejudice, the defendant must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. "Unless both parts of the test are established, defendant's claim must fail." Echols, supra, 199 N.J. at 358.

We apply a similar standard when a defendant attempts to withdraw his or her guilty plea based on ineffective assistance. In this context, the defendant must demonstrate "(i) counsel's assistance was not 'within the range of competence demanded of attorneys in criminal cases'; and (ii) 'that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial.'" State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009) (alteration in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)).

Defendant argues the PCR judge erred by denying him relief because he proved the requisite elements for ineffective

assistance of counsel. Specifically, defendant contends counsel was ineffective for "failing to spend enough time with him, provide him with complete discovery, discuss his case, or discuss and investigate his alibi defense." Defendant asserts his two meetings with counsel, totaling one hour and fifteen minutes, were "unquestionably inadequate," and "it was unreasonable of counsel to forgo even investigating an alibi defense because of the potential testimony of a state's witness." We disagree.

First, we reject defendant's contention that counsel failed to adequately discuss his case or provide him with complete discovery. At the evidentiary hearing, counsel testified he met with defendant to explain his charges and discuss his case and potential defenses. Counsel affirmed he "personally reviewed" the discovery with defendant. The PCR judge found this testimony credible, and she determined counsel's conduct was reasonable. Given our deferential standard of review, we find no error in the determination of the PCR judge.

Furthermore, we find defendant's argument regarding the purported alibi witnesses lacks merit. "[A]ny claimed errors of counsel must amount to more than mere tactical strategy." State v. Drisco, 355 N.J. Super. 283, 290 (App. Div. 2002), certif. denied, 178 N.J. 252 (2003). However, "strategy decisions made after less than complete investigation are subject to closer

scrutiny." Savage, supra, 120 N.J. at 617-18. Counsel is deficient if he or she breaches the "duty to make 'reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" Id. at 618 (quoting Strickland, supra, 466 U.S. at 691, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695).

Nonetheless, "[w]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." Id. at 617 (quoting Strickland, supra, 466 U.S. at 691, 104 S. Ct. at 2066, 80 L. Ed. 2d at 696). "Counsel's fear that a weak alibi could cause more harm than good is the type of strategic decision that should not be second guessed on appeal." Drisco, supra, 355 N.J. at 291.

The PCR judge found counsel made a strategic decision not to present alibi witnesses. Counsel declined to pursue the option as a matter of "trial strategy," noting defendant failed to provide sufficient information, and the State had a witness who would contradict the alibi testimony. He determined a weak alibi witness could be detrimental to defendant. Instead, counsel attempted to move to trial quickly while the State's witness was unavailable. Defendant provided no evidence besides his own testimony that his alibi witnesses contacted counsel. No information regarding the

facts defendant's uncle would attest was provided. Therefore, because we agree counsel made reasonable strategic decisions, we discern no basis to disturb the PCR judge.

Last, we reject defendant's assertion that counsel failed to spend enough time with him. Ineffective assistance does not turn on "the frequency of consultation." Savage, supra, 120 N.J. at 617. Instead, "the proper inquiry is whether as a result of that consultation, counsel was able properly to investigate the case and develop a reasonable defense." Ibid. For the reasons noted, we find counsel made reasonable strategic decisions in this case. As such, we decline to reverse on this basis.

Defendant also argues his plea was involuntary because counsel pressured him to plead guilty, thereby meeting the standard for ineffective assistance. He further asserts, because counsel allegedly told him he would only have to serve five to seven years of imprisonment, his plea was not knowing and voluntary. Due process requires a defendant have full understanding of the penal consequences of his or her guilty plea. State v. Johnson, 182 N.J. 232, 236-37 (2005); State v. Manzie, 168 N.J. 113, 118 (2001).

However, defendant's plea form clearly states the prosecutor agreed to recommend a thirteen-year sentence, subject to the parole ineligibility imposed by NERA. Counsel testified he reviewed the plea forms with defendant, and he made sure defendant understood

each provision. Counsel said defendant made the decision to plead guilty; the PCR judge found this testimony credible. Moreover, defendant admitted counsel did not force him to sign the plea forms. The record of defendant's plea colloquy shows he agreed to the thirteen-year sentence. Therefore, given our deferential standard of review, we discern no basis to disturb the conclusion of the PCR judge that defendant failed to prove both prongs of Strickland.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION