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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2150-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MELANIE McGUIRE,

Defendant-Appellant.

Argued March 1, 2017 – Decided August 7, 2017

Before Judges Fuentes, Carroll and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 05-10-0164.

Michael A. Priarone, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Mr. Priarone, on the brief).

Daniel I. Bornstein, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Mr. Bornstein, of counsel and on the brief).

PER CURIAM

Defendant appeals from the October 2, 2014 order of the trial court denying her petition for post-conviction relief (PCR) without granting an evidentiary hearing. We affirm.

I.

Following a twenty-six-day jury trial, defendant was convicted of murder, N.J.S.A. 2C:11-3, second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a), second-degree desecration of human remains, N.J.S.A. 2C:22-1, and third-degree perjury, N.J.S.A. 2C:28-1. She was sentenced to an aggregate term of life in prison, subject to the provisions of the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, plus five years with a two-and-a-half year period of parole ineligibility. We previously related the facts in detail in our affirmance on direct appeal of defendant's 2007 convictions and sentence. State v. McGuire, 419 N.J. Super. 88 (App. Div.), certif. denied, 208 N.J. 335 (2011). We note only the following salient facts to provide context for this appeal.

Defendant, a nurse, plied her husband with chloral hydrate, fatally shot him, and desecrated his body by cutting it into three sections, draining the blood and wrapping the body parts in plastic garbage bags, which were then packed into three matching suitcases and thrown into the Chesapeake Bay where they were subsequently found in May 2004. The State's evidence was largely circumstantial

and included incriminating internet searches related to fatal poisons, gun laws and murder on computers seized from defendant's home; expert testimony linking the plastic garbage bags containing the decedent's remains to garbage bags found in defendant's home; evidence that defendant had purchased a handgun and filled a forged prescription for chloral hydrate a few days before her husband's disappearance; and evidence that defendant was having an affair with a co-worker and planning to leave her husband.

In 2011, defendant filed a timely pro se PCR petition and was assigned counsel who moved to compel discovery to support the petition. Specifically, PCR counsel requested samples of the garbage bags containing the decedent's body and the garbage bags taken from defendant's home. Defendant sought to have the garbage bags re-tested by her expert to demonstrate that the bags came from different batches in order to establish a prima facie ineffective assistance of counsel (IAC) claim through trial counsel's failure to perform the testing. In addition, PCR counsel requested a copy of the hard drive from a laptop computer recovered from the decedent's car. Defendant sought to conduct a search of the decedent's laptop computer for incriminating internet searches similar to those found on the desktop computers recovered from defendant's home to establish that the incriminating searches

originated with the decedent and trial counsel was ineffective for failing to conduct the analysis.

Judge Bradley J. Ferencz acknowledged that State v. Marshall, 148 N.J. 89, 270 (1997), conferred "discretionary authority" on the PCR court to order the State to supply defendant with relevant, non-privileged discovery upon defendant's "presentation of good cause[,]" but ultimately denied defendant's motion to compel discovery in a cogent written decision. Judge Ferencz concluded that "even if the [d]efense were to re-examine the evidence and determine that the bags were from different batches, or similar searches were made on the laptop, the defense [could] still not prove that trial counsel's failure to conduct these tests was ineffective assistance of counsel."

Judge Ferencz explained:

> Consider the fact that if trial counsel had the garbage bags tested originally, those tests may have demonstrated that the bags were of the same batch. Then, the defense would have no expert to rebut the findings of the State's two experts because they could not ethically then send an expert to swear to testimony they knew to be false, or at least disingenuous. Trial counsel made the reasonable strategic decision to not risk their own expert finding conclusive, indisputable evidence that the bags were the same. Instead, counsel [chose] to attack the credibility and conclusions of the State's expert in [an] attempt to undermine their findings and find reasonable doubt in the

> State's case. And under Strickland,[1] that reasonable decision would not amount to ineffective assistance of counsel. It in fact was a sound strategic position for counsel to take. Accordingly, if this issue were to come before the [c]ourt on post-conviction relief, even with expert findings that the bags were from different batches, the [c]ourt could not find that it was ineffective assistance of counsel for trial counsel to make the competent and good strategic decision not to have their expert re-test the bags.
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> The same holds true of the laptop hard drive. At the time of trial[,] defense counsel recognized that there was a very good chance that the laptop would show . . . no incriminating internet searches. Instead [of] foreclosing his argument, defense counsel legitimately chose to argue the inference that [the] laptop could have contained similar searches. And the absence of proof, along with the defense computer expert's testimony that the searches were conducted close in time to hits for [the decedent's] favorite websites, was favorable testimony to the defense that supported their theory of the case. Therefore no matter what the defense finds as a result of new investigation of the requested items, it was still reasonable trial strategy at the time of trial and nothing the defense can offer from further investigation will buttress their ineffective assistance claim.

As to the substantive PCR claims, defendant argued to the PCR court that she was denied effective assistance of counsel because trial counsel failed to consult and retain appropriate expert

[1] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

witnesses and failed to call fact witnesses critical to her defense. Defendant submitted various certifications to support her claims. Regarding the expert witnesses, defendant argued that trial counsel failed to call (1) a ballistics expert to counter the State's evidence that the gun she purchased was consistent with the bullets recovered from the decedent's body; (2) a pharmacologist to present an alternate theory for the presence of chloral hydrate in the decedent's car to counter the State's theory that defendant used the sedative to sedate the decedent before shooting him; and (3) an expert in luminol to rebut the State's contention that defendant could have rid her apartment of all traces of blood resulting from the murder and dismemberment of the decedent. In addition, defendant argued that trial counsel failed to authorize her computer expert to review the entire internet search history of her home desktop computer to find incriminating searches attributable to the decedent. Defendant also argued that trial counsel failed to retain additional experts because a provision in the supplemental retainer agreement, which reduced the attorney's fee with the retention of additional experts, created a conflict of interest and a disincentive to trial counsel retaining additional experts.

Regarding the fact witnesses, defendant argued that trial counsel failed to call (1) her neighbor to testify to the heated

argument she overheard in defendant's apartment; (2) the maintenance supervisor of her apartment complex to testify to the lease requirement that walls be returned to white upon termination of the lease; and (3) co-workers from her workplace, Reproductive Medical Associates (RMA), to testify that the patient information computer database could be accessed remotely to create doubt that she forged the prescription for chloral hydrate. Defendant also argued that trial counsel failed to present evidence of the decedent's training in pharmacology to support a claim that he was using chloral hydrate to combat steroid use. Defendant asserted that her claims, individually or cumulatively, warranted an evidentiary hearing.

In a comprehensive and well-reasoned written decision, Judge Ferencz determined that defendant failed to establish a prima facie case of ineffective assistance of counsel under Strickland, supra, to warrant relief or an evidentiary hearing. Judge Ferencz concluded defendant failed to show that trial counsel's representation fell below an objective standard of reasonableness, and failed to establish a reasonable probability that, but for counsel's alleged unprofessional errors, the outcome of her trial would have been different had the witnesses or the evidence been presented to the jury.

Initially, Judge Ferencz recounted that, at trial, there were sixty-four witnesses presented by the State and sixteen additional witnesses presented by the defense. "Twenty-one of the witnesses who testified were qualified by the [c]ourt as experts in a variety of fields and specialties." Judge Ferencz then addressed defendant's arguments seriatim. First, in rejecting defendant's argument that trial counsel was ineffective for failing to call a ballistics expert to contradict the testimony of the State's experts, Judge Ferencz stated:

> During trial, the State called two ballistics experts who testified that the two bullets recovered from the victim's body were .38 Special caliber and had been fired from the same firearm, which had six lands and grooves that were inclined to the right. [Defendant] claims that in preparation for the instant petition for post-conviction relief, she consulted Dr. Peter De Forest, an expert in the field of ballistics. Dr. De Forest, unlike the State's experts at trial, "entered the specific model number of the gun [defendant] purchased" into a search of the FBI's general rifling class characteristics, producing results for "three Taurus .38 Specials, Model 85B2," all of which "fired bullets with five, not six, lands and grooves." [Defendant] maintains that if her trial attorneys had consulted with an expert such as Dr. De Forest, the expert might have established that the particular gun she purchased most likely had five lands and grooves, whereas the bullets recovered from the victim's body had six.
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> However, . . . [o]n direct appeal, [defendant] made this argument and attempted

to supplement the record with information obtained from the website of the manufacturer of the gun she purchased, Taurus International Manufacturing, Inc. (TIMI). In response, the State provided the Affidavit of Robert Morrison, President and Chief Executive Officer of TIMI. . . .

Mr. Morrison attested . . . parts and tools containing five and six lands and grooves are, and always have been, used interchangeably in the production of Model 85 handguns; . . . all Model 85 handguns have either five or six lands and grooves, but because the factory sometimes uses tools and parts that [have] five lands and grooves, and sometimes uses tools and parts that have six lands and grooves, there is no way of knowing whether the revolver at issue has five lands and grooves or six lands and grooves; . . . because neither the tooling nor the barrels used in the Model 85 are serialized, it is not possible to determine the number of lands and grooves which were cut into the barrel of the revolver at issue . . . without examining the weapon itself; . . . defendant's revolver could have had either five or six lands and grooves when it left the factory; . . . although the manufacturer's website indicates that the revolver at issue . . . had five grooves, the "technical information listed on TIMI's website is subject to change and should not be relied on as accurate;" and . . . the TIMI website is "under constant revision," and data on the site contains erroneous information. . . .

Without the availability of [defendant's] gun for inspection, which is the only way to accurately determine the number of lands and grooves it contained, expert testimony such as that of Dr. De Forest lends no credence to [defendant's] claim[.]

Next, in rejecting defendant's argument that trial counsel was ineffective for failing to call a pharmacologist to present an alternate theory for the presence of chloral hydrate in the decedent's car, Judge Ferencz noted:

> [Defendant] asserts that in an interview with the police, the victim's sister . . . "[t]old police that she was concerned about her brother's health" because "he had been showing signs of what she believed might be steroid abuse," such as weight gain, balding, and an enlarged head. [Defendant] argues that her trial attorneys should have consulted an expert such as Dr. David Benjamin, a forensic pharmacologist and toxicologist, who speculates that if the victim was using GHB (gamma hydroxyl-butryrate) for body building or other purposes, then he could also have been taking chloral hydrate to counteract the symptoms of GHB withdrawal. . . .
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> [However], there was no evidence presented from which a jury could infer that the victim was using steroids or GHB. Moreover, the victim's sister testified that she "had no knowledge of any drug use by [the victim]," that he "was not in too good of shape anymore," and although he had purchased a "weight set" the year before, she did not know if he ever "used it." . . . Therefore, it is unlikely that an expert witness would have been permitted to testify to a wild speculation that has no support in the record.

In rejecting defendant's argument that trial counsel was ineffective for failing to call an expert in luminol, Judge Ferencz recounted that, "[d]uring trial, the State addressed the fact that no bloodstains or other biological evidence was found in the

McGuire apartment by eliciting testimony from forensic scientists" that "blood and tissue can be cleaned up[.]" Judge Ferencz pointed out that trial counsel subjected these forensic scientists to withering cross-examination "in order to highlight the fact that scientists and forensic investigators have the technological capability to detect even trace quantities of DNA from blood or tissue that would otherwise be undetectable to the naked eye."

Judge Ferencz explained:

> [Defendant's] trial counsel engaged in . . . extensive cross-examination for the purpose of convincing the jury that the murder and dismemberment of [the victim] could not have occurred inside the McGuire apartment, since multiple searches, utilizing the most technologically advanced tools available to a forensic scientist, yielded no DNA evidence. Accordingly, calling an additional witness such as Dr. Benjamin for the purpose of testifying to one such tool by name, i.e., luminol, would have been unnecessary and perhaps even redundant. . . . [T]he decision not to call an expert on luminol was a sound trial strategy counsel carefully employed as the evidence needed was already before the jury, and therefore [defendant] is unable to prove that her counsel was ineffective pursuant to State v. Arthur, 184 N.J. 307 (2005).

In rejecting defendant's argument that trial counsel was ineffective for not authorizing her computer expert to review the entire internet search history of her home desktop computer, Judge Ferencz elaborated:

[Defendant] contends that if her trial attorneys had authorized a search of the entire internet history, rather than a limited search confined to the six-day period reviewed by the State's expert, they would have discovered that on January 21, 2004, someone performed searches for "poison your wife" and "poison," and someone accessed websites with the following titles: "www.unfaithfulwife.net"; www.poisonprevention.org"; and www.poison.org".

However, this argument also fails to establish a prima facie case of ineffective assistance of counsel. First, the existence of those searches on the computer in no way proves that [the victim] conducted them, or that [defendant] did not. As the State's computer experts testified, "one of the most difficult parts of computer forensics is trying to put someone at the keyboard," and that there is "no way of knowing whether someone else in the household jumped on the computer for a few minutes to do a search and then let the prior person return to what they were doing." . . .

Lastly, and most significantly, [defendant] fails to appreciate that the decision to limit the search to the six-day timeframe prior to the murder was most likely a strategic one. At trial, [defendant's] counsel was able to challenge the State's contentions regarding the incriminating searches found on the computer by presenting an expert of their own. This defense witness testified that some of these incriminating searches were made within minutes of other searches, thus supporting defense counsel's argument that the searches were more likely to have been conducted by [the victim]. Authorizing a search of the entire internet history on the McGuire computer could have undercut this defense insofar as it could have

> revealed other incriminating evidence linking [defendant] to the crime. This was a risk trial counsel most likely did not wish to take, and accordingly the decision to limit the search constituted sound trial strategy pursuant to State v. Arthur[, supra].

In addressing defendant's supplemental retainer agreement conflict of interest argument, Judge Ferencz distinguished State v. Norman, 151 N.J. 5 (1977), cert. denied, 534 U.S. 919, 122 S. Ct. 269, 151 L. Ed. 2d 197 (2001), where our Supreme Court granted defendant's PCR petition. There, the Court recognized that "the unusual fee arrangement" whereby defendant's attorney fees were paid by a co-defendant who could be implicated by the defendant's testimony created "a significant conflict [of interest] and strong likelihood of prejudice." Id. at 34-36.

Here, Judge Ferencz expounded:

> Under the terms of the supplemental agreement, [defendant] contends, "the cost of retaining experts diminishes the size of the fee for the attorney," arguably creating a disincentive for her trial counsel to expend the funds on additional witnesses and investigation and producing an inherent conflict of interest.
>
> Nevertheless, there is no legal authority that supports [defendant's] argument that a retainer agreement of this sort creates a conflict of interest and rises to the level of constitutional ineffective assistance of counsel. . . . Moreover, [defendant] is unable to show that she suffered any prejudice from the retainer agreement. In the first instance, the supplemental agreement was signed on March 9, 2007, after [defendant's]

> trial was already underway. At this point, the State and [d]efense would have already completed their review of discovery and their pretrial investigation, and would have submitted their respective lists of witnesses. However, even assuming that the [d]efense would have pursued additional witnesses as [defendant] argues, she has not included any certification from her trial counsel indicating that they were concerned that hiring additional expert witnesses could reduce the pool of money from which they would be paid, or that they actually failed to retain additional experts because of insufficient funds. Accordingly, [defendant's] argument is too vague and speculative to warrant an evidentiary hearing. Moreover, should [defendant] have run out of funds, counsel could have petitioned the Office of the Public Defender for ancillary services.

Turning to defendant's argument that trial counsel was ineffective for failing to call her neighbor as a witness to corroborate her account "that she had gotten into a heated argument with the victim which caused him to leave the apartment and abandon her and her children[,]" Judge Ferencz concluded that given "the weak testimony [her neighbor] would have provided," trial counsel's decision constituted sound trial strategy. According to Judge Ferencz, although her neighbor told police "she was awakened in the early morning hours because she heard a loud argument[,]" her neighbor "could not recall the exact date when she heard this argument, nor could she identify precisely where it was coming from," nor the identity of "the second voice as

being positively male or female[.]" Moreover, her neighbor "stated that because she did not speak fluent English, she could not understand everything that was said."

Judge Ferencz explained that instead of calling her neighbor to the stand,

> defense counsel cleverly elicited parts of [her neighbor's] statement that inured to the [benefit of the] defense through the testimony of Sergeant Dalrymple. Specifically, defense counsel highlighted for the jury, through Sgt. Dalrymple, the fact that [her neighbor] heard an argument coming from the McGuire apartment, and urged the jurors to draw an inference that this corroborated the [defendant's] version of what occurred. Defense counsel's strategy in not calling [her neighbor], who would then be subject to rigorous cross-examination, but rather eliciting the helpful aspects of her statement, was reasonable under the circumstances. Indeed, [her neighbor's] testimony may have led a jury to believe that [defendant] had fought with the victim and that the argument precipitated the murder.

Likewise, Judge Ferencz rejected defendant's contention that trial counsel was ineffective for failing to call the maintenance supervisor of defendant's apartment complex "to testify to the lease requirement that walls must be returned to a white or eggshell color before a tenant vacates an apartment." Judge Ferencz acknowledged that defendant believed "the testimony . . . together with the written lease agreement, could have neutralized [the] inference and rebutted the State's contention that

[defendant] repainted the walls" in order to "conceal the evidence of her crimes."

However, Judge Ferencz pointed out:

> What was significant in [defendant's] case was not that the walls had been re-painted, but the fact that the entire Woodbridge apartment had been bleached, scrubbed and painstakingly cleaned to eliminate all traces of DNA evidence. As most lease agreements require tenants to leave the premises in "broom clean" condition, this fact would certainly have been raised by the State on cross-examination of [the Maintenance Supervisor] to highlight the excessiveness of [defendant's] "cleaning." Therefore, defense counsel's decision not to call [the Maintenance Supervisor] as a witness was a sound strategy in light of the fact that his testimony would have done very little, if anything, to help the [d]efense, and would, in fact, have opened the door to potentially more incriminating testimony.

Similarly, Judge Ferencz rejected defendant's argument that trial counsel was ineffective for failing to call co-workers from RMA to testify that the patient information computer database could be accessed remotely. Although defendant maintained that this information would have "undermined the State's argument that only [she] had access to the patient information necessary to produce [the chloral hydrate] prescription," and would have shown that "it could have been written by [the victim,]" Judge Ferencz highlighted the flaw in defendant's logic thusly:

> First, eliciting such testimony from the RMA witnesses would not have proven that [the

victim] accessed the information, since it was password-protected and accessible only by the doctors and nurses who worked for RMA. Instead, this testimony would have confirmed that [defendant] had additional ways of obtaining the patient's information, outside of [RMA's] offices. However, even assuming that [the victim] had somehow gained access to the remote database, this evidence still would not account for the fact that [defendant] was the one with access to the RMA prescription forms, and that nurses at RMA routinely filled such forms out. In addition, this testimony would also not account for the plethora of evidence presented showing that [defendant] was the one who filled the prescription. Of particular note is the fact that (1) [defendant] was a fertility nurse at RMA with access to the RMA prescription pads; (2) the prescription for chloral hydrate was signed by . . . [defendant's] paramour, and filled in the name of one of [her paramour's] fertility patients; (3) the forged prescription was filled at the Walgreens pharmacy on the same day the victim disappeared; (4) the Walgreens pharmacy was located approximately eight minutes away from the daycare facility where [defendant] routinely brought her sons; (5) records indicate that the prescription was filled approximately twelve minutes after [defendant] dropped her sons off at daycare . . . .

Given the overwhelming evidence proving that it was [defendant] who forged and filled the prescription for chloral hydrate, it is unreasonable to believe that presenting testimony from the RMA witnesses to a jury would have persuaded them otherwise.

Finally, in rejecting defendant's contention that trial counsel was ineffective for failing to present evidence of the decedent's training in pharmacology, Judge Ferencz noted:

> [Defendant] maintains that had her trial counsel properly investigated, they would have discovered that [the victim] attended the Rutgers University School of Pharmacy from 1991 to 1994, which would have given him the "pharmacological knowledge to prescribe chloral hydrate for symptoms of GHB withdrawal" as well as "the technical expertise to write the prescription." [Defendant] contends that had this information been presented to the jury, it would have undermined the State's argument that only she would have known the sedative properties of chloral hydrate or had the ability to forge such a prescription.
>
> However, it is unlikely that presentation of this evidence would have refuted the State's proofs that [defendant] was the one who filled the forged prescription for chloral hydrate. Moreover, it is unreasonable to think that the jury would have been persuaded by the evidence, given the fact that nothing in the record suggests that [the victim] was using GHB or suffering from GHB withdrawal. Regardless of any "pharmacological knowledge" [the victim] may have obtained ten years prior to his murder, the record is replete with evidence that [defendant] had not only the training to prepare and fill the prescription, but also the motive and the access to do so. Moreover, any "pharmacological knowledge" on the part of [the victim] does not explain the internet searches discovered on the McGuire computer, which included search results for not only "chloral hydrate," but also "undetectable poisons," "how to purchase hunting rifles in [New Jersey]," "gun laws in Pennsylvania," and "how to commit murder."

This appeal followed. Defendant presents the following arguments for our consideration:

> I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO EXAMINE AND TEST A COMPUTER AND GARBAGE BAGS HELD AS EVIDENCE BY THE STATE.
>
> II. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S PETITION FOR POST CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING ON DEFENDANT'S CLAIMS.

II.

We review the PCR court's findings of fact under a clear error standard, and conclusions of law under a de novo standard. See 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). Where the PCR court's findings of fact are based on "live witness testimony" we review such findings to determine whether they are supported by sufficient credible evidence in the record. State v. Nash, 212 N.J. 518, 540 (2013). However, where, as in this case, "no evidentiary hearing has been held, we 'may exercise de novo review over the factual inferences drawn from the documentary record by the [PCR judge].'" State v. Reevey, 417 N.J. Super. 134, 146-47 (App. Div. 2010) (quoting Harris, supra, 181 N.J. at 421), certif. denied, 206 N.J. 64 (2011). While "[a]ssessing IAC

claims involves matters of fact, . . . the ultimate determination is one of law[.]" Harris, supra, 181 N.J. at 419.

Defendant renews the arguments presented to the PCR court and asserts that the court erred in denying her motion for discovery and an evidentiary hearing on her claims of ineffective assistance of trial counsel. We disagree. Judge Ferencz thoughtfully addressed each of defendant's arguments in his comprehensive written decisions. After reviewing these arguments in light of the record and applicable legal principles, we conclude they are without merit. We affirm substantially for the reasons set forth in Judge Ferencz' decisions. We add only the following brief comments.

"[O]ur Court Rules . . . do not contain any provision authorizing discovery in PCR proceedings." Marshall, supra, 148 N.J. at 268. "PCR is not a device for investigating possible claims, but a means for vindicating actual claims[,]" and thus "[t]here is no postconviction right to fish through official files for belated grounds of attack on the judgment, or to confirm mere speculation or hope that a basis for collateral relief may exist." Id. at 270 (quotations and citations omitted). Nonetheless, "where a defendant presents the PCR court with good cause to order the State to supply the defendant with discovery that is relevant to

the defendant's case and not privileged, the court has the discretionary authority to grant relief." Ibid.

The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999). Rather, trial courts should grant evidentiary hearings only if the defendant has presented a prima facie claim of ineffective assistance, material issues of disputed fact lie outside the record, and resolution of the issues necessitate a hearing. R. 3:22-10(b); State v. Porter, 216 N.J. 343, 355 (2013), certif. denied, 228 N.J. 502 (2017). "Rule 3:22-10 recognizes judicial discretion to conduct such hearings." State v. Preciose, 129 N.J. 451, 462 (1992).

A PCR court deciding whether to grant an evidentiary hearing "should view the facts in the light most favorable to a defendant to determine whether a defendant has established a prima facie claim." Preciose, supra, 129 N.J. at 462-63. "To establish a prima facie claim of ineffective assistance of counsel, a defendant must demonstrate the reasonable likelihood of succeeding under the test set forth in [Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698], and United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), which [our

Supreme Court] adopted in State v. Fritz, 105 N.J. 42, 58 (1987)." Id. at 463.

Under the Strickland standard, a defendant must make a two-part showing. Supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. A defendant must show that trial counsel's performance was both deficient and prejudicial. State v. Martini, 160 N.J. 248, 264 (1999). The performance of counsel is "deficient" if it falls "below an objective standard of reasonableness" measured by "prevailing professional norms." Strickland, supra, 466 U.S. at 687-88, 104 S. Ct. at 2064-65, 80 L. Ed. 2d at 693-94. This standard of "reasonable competence," Fritz, supra, 105 N.J. at 60, "does not require the best of attorneys[.]" State v. Davis, 116 N.J. 341, 351 (1989).

A defendant must also show that the deficient performance prejudiced the defense. "'This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" Fritz, supra, 105 N.J. at 52 (quoting Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693). In determining whether defense counsel's alleged deficient performance prejudiced the defense, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, supra, 466 U.S. at 693, 104 S. Ct. at 2067, 80 L. Ed. 2d at 697.

Rather, defendant bears the burden of showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698; see also Harris, supra, 181 N.J. at 432. In making a prejudice finding, the PCR court must consider "the totality of the evidence before the judge or jury" and "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." Strickland, supra, 466 U.S. at 695-96, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698-99.

"'Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.'" Fritz, supra, 105 N.J. at 52 (quoting Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693). Defendant bears the burden of proving both elements of an ineffective assistance of counsel claim by a preponderance of the evidence. State v. Gaitan, 209 N.J. 339, 350 (2012), cert. denied, ___ U.S. ___, 133 S. Ct. 1454, 185 L. Ed. 2d 361 (2013).

Because of the inherent difficulties in evaluating a defense counsel's tactical decisions from his or her perspective during

trial, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, supra, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. at 694-95 (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 164, 100 L. Ed. 83, 93 (1955)). It is well established that "[i]n matters of trial strategy, we accord great deference to the decisions of counsel[.]" State v. Biegenwald, 126 N.J. 1, 56 (1991).

It is axiomatic that one of the most difficult strategic decisions that any trial attorney must confront is determining which witnesses to call to the stand. State v. Arthur, 184 N.J. 307, 320 (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.
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> [Id. at 320-21.]

Therefore, like other aspects of trial representation, a defense attorney's decision concerning which witnesses to call to

the stand is "an art," and a court's review of such a decision should be "highly deferential." Strickland, supra, 466 U.S. at 689, 693, 104 S. Ct. at 2065, 2067, 80 L. Ed. 2d at 694, 697. Judged by these standards, we agree that defendant failed to demonstrate "good cause" to compel the State to supply defendant with discovery, Marshall, supra, 148 N.J. at 270, and failed to establish a prima facie case of ineffective assistance of counsel under Strickland to warrant an evidentiary hearing. Preciose, supra, 129 N.J. at 462.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION