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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-2639-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JORGE A. CASTRO,

Defendant-Appellant.

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Submitted February 7, 2017 – Decided August 16, 2017

Before Judges Suter and Guadagno.

On appeal from Superior Court of New Jersey,  
Law Division, Union County, Indictment No.  
07-09-0852.

Joseph Krakora, Public Defender, attorney for  
appellant (Adam W. Toraya, Designated Counsel,  
on the brief).

Grace H. Park, Acting Union County Prosecutor,  
attorney for respondent (Milton S. Leibowitz,  
Special Deputy Attorney General/Acting  
Assistant Prosecutor, of counsel and on the  
brief).

PER CURIAM

Defendant Jorge Castro appeals the denial of his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

I.

In 2009, defendant was convicted by a jury of first-degree aggravated sexual assault (count one), N.J.S.A. 2C:14-2(a)(3); second-degree burglary (count two), N.J.S.A. 2C:18-2(b)(1); second-degree sexual assault (count three), N.J.S.A. 2C:14-2(c)(1); third-degree aggravated criminal sexual contact (count four), N.J.S.A. 2C:14-3(a); and fourth-degree criminal sexual conduct (count five), N.J.S.A. 2C:14-3(b), following his sexual assault of N.M. on March 28, 2007. He was sentenced in July 2009 to fourteen years in prison, with an eighty-five percent parole disqualifier on count one, and a concurrent four-year sentence on count four. Counts two and three were merged into count one, and count five was merged into court four. Defendant was sentenced to parole supervision for life, ordered to comply with Megan's Law<sup>1</sup> and to a five-year term of parole supervision pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. We affirmed defendant's conviction and sentence in an unpublished opinion where we detailed the evidence from the trial in rejecting

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<sup>1</sup> N.J.S.A. 2C:7-1 to 7-23.

defendant's claims. State v. Castro, No. A-6312-08 (App. Div. June 21, 2013).

Defendant filed a pro se PCR petition listing multiple issues. His assigned counsel filed a supplemental brief in support of the petition. The PCR petition was denied without an evidentiary hearing on November 14, 2014. Defendant appeals that order.

The PCR court rejected each of defendant's claims, concluding that an evidentiary hearing was not necessary because defendant did not present evidence to support the claims. Defendant presented "no evidence . . . [that meeting once with his trial counsel] prejudiced him." Defendant did not allege what arguments his appellate counsel should have made on his behalf but did not. Defendant provided a list of potential witnesses who he claimed should have been called at trial, but did not state "what these witnesses would have testified [to], or how their testimony would have affected the outcome." Defendant's PCR petition did not provide evidence from any proposed expert witness that would have assisted his defense. Defendant's allegation in his petition that his counsel should have challenged the DNA results at trial had "no bearing on [his] defense" that he had consensual sex with the victim. Defendant's petition provided no evidence to "buttress" his contention that "photos of the victim . . . were from a prior incident." Defendant did not offer evidence about who, how or

what mental health treatment the victim may have received to support his contention that his counsel erred in failing to obtain these records.

Relevant here, the PCR court also found that defendant's privately retained counsel was not ineffective "because he did not wait for the DNA results prior to the defendant taking a stipulated polygraph." After the DNA results were returned and at trial, defendant's defense was that he and the victim had consensual sex. However, when initially questioned by the police, defendant did not mention having sex with N.M. that day, and at the polygraph, he denied it. The PCR court noted the disparity between defendant's initial account of what occurred and his defense at trial rendered the "polygraph evidence . . . of little, if any, consequence." "[C]ounsel cannot be said to be ineffective because he did not anticipate defendant would lie about not having sex with the victim. The untruthfulness of defendant's initial version of events would have been exposed at trial even[] absent a polygraph."

Defendant presents the following issue for our consideration on appeal:

POINT I

THE TRIAL COURT ERRED IN DENYING THE  
DEFENDANT'S PETITION FOR POST-CONVICTION

RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION AT THE TRIAL LEVEL.

We are not persuaded by this argument and affirm.

II.

Defendant and N.M. had an "on-again, off-again relationship" for four years, and lived together for a few months, before they broke up.<sup>2</sup> They stayed in contact after that as shown by their phone records, even having consensual sex.

On March 28, 2007, defendant came, uninvited, to N.M.'s apartment and was seen by a neighbor knocking at her apartment door and then "put[ting] his left foot toward the door and us[ing] his left hand to hold the door open." Castro, supra, No. A-6312-08 (slip op. at 3). He pushed past the door and, following an argument, defendant sexually assaulted N.M. Id. (slip op. at 3-5). Defendant left the apartment and N.M. looked for her cell phone, and "[w]hen she could not find it, she got dressed and went to her car." Id. (slip op. at 5-6). As she exited the driveway, "[d]efendant came down the alleyway and hit the front-end of her car with the front-end of his car." Id. (slip op. at 6). Officers reported to the scene of the accident, which commenced an

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<sup>2</sup> We rely on our earlier opinion and relate only as much as is necessary to resolve the issues in this appeal.

investigation leading to defendant's conviction. We focus on defendant's PCR petition, having for these purposes no need to detail the brutal sexual assault for which defendant stands convicted.

Defendant raised multiple issues in his PCR petition, but on appeal, addresses only one.<sup>3</sup> Defendant contends the PCR court erred by rejecting his claim that his privately retained counsel should have advised him not to take a polygraph examination in July 2007 or stipulate to its admissibility at trial because, at that time, the results from the DNA testing had not been received. The DNA testing, received in November 2007, showed defendant's DNA was mixed with N.M.'s in a sample taken from N.M.'s chest after the assault.

The standard for determining whether counsel's performance was ineffective for purposes of the Sixth Amendment was formulated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42 (1987). In order to prevail on a claim of

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<sup>3</sup> Because this issue was not raised in his merits brief, it is deemed waived. Gormley v. Wood-El, 218 N.J. 72, 95 n.8 (2014); Drinker Biddle v. N.J. Dep't of Law & Pub. Safety, Div. of Law, 421 N.J. Super. 489, 496 n.5 (App. Div. 2011) (noting that claims not addressed in merits brief are deemed abandoned). See Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2017).

ineffective assistance of counsel, defendant must meet the two-prong test of establishing both that: (1) counsel's performance was deficient and he or she made errors that were so egregious that counsel was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution; and (2) the defect in performance prejudiced defendant's rights to a fair trial such that there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, supra, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 2068, 80 L. Ed. 2d at 693, 698. See Fritz, supra, 105 N.J. at 58 (adopting the Strickland ineffective assistance standard under the New Jersey Constitution). The strategic choices of trial counsel will not be questioned so long as "they are based on professional judgment." Strickland, supra, 466 U.S. at 681, 104 S. Ct. at 2061, 80 L. Ed. 2d at 689.

We agree with the PCR court's order denying defendant's request for an evidentiary hearing. Defendant's theory of defense at trial was that he and N.M. had engaged in consensual sex. "The defense of consent was not raised until after the State Police lab results were returned and revealed the presence of defendant's DNA in the dried secretions obtained from N.M." Castro, supra, No. A-6312-08 (slip op. at 29). Prior to this,

[d]efendant made statements to the police at the scene and in a handwritten statement regarding the events after he was arrested for simple assault. In each statement, defendant said N.M. invited him to her apartment; she abused him and threw wine on him; and then rammed his car. He did not mention that he had sex with N.M. in either statement.

[Id. (slip op. at 26-27).]

Then, "he flatly denied having sex with N.M. at the July 2007 polygraph examination." Id. (slip op. at 29). We rejected defendant's contention that it was improper for the prosecutor "to comment on the inconsistency between the accounts defendant provided and the defense presented at trial, or on the lack of evidence to support a defense of consent." Id. (slip op. at 28-29). We also rejected defendant's challenge to the admissibility of the polygraph results, finding that its admission did not lead to an unjust result. Id. (slip op. at 23).

We agree with the PCR court that defendant already "cemented his version[] that he did not have sex with [N.M.], well prior to the polygraph." Also, we agree with the PCR court that "[w]ith or without the polygraph evidence, the disparity between defendant's initial account and the DNA evidence from the defendant" was part of the record and that there was other independent evidence that supported defendant's conviction. A neighbor saw defendant inside the building at N.M.'s apartment



door and the DNA plainly linked defendant with N.M. at the time of the assault. Therefore, we see no reason to disturb the judge's findings, which are amply supported in the record before us.

Having failed to demonstrate prima facie evidence of ineffective assistance, the PCR court correctly concluded an evidentiary hearing was not warranted. See State v. Preciose, 129 N.J. 452, 462-63 (1992).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION