SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2825-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALTURIK FRANCIS,

Defendant-Appellant.

Submitted October 31, 2017 – Decided December 12, 2017

Before Judges Gilson and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Union County, Indictment Nos. 03-02-1701 and 05-06-0707.

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

Thomas K. Isenhour, Acting Union County Prosecutor, attorney for respondent (Darrell S. Coco, Special Deputy Attorney General/ Acting Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Alturik Francis appeals from an October 6, 2015 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm because defendant failed to show a prima facie case of ineffective assistance of his trial counsel.

I.

In 2009, a jury convicted defendant of three counts of first-degree murder, N.J.S.A. 2C:11-3(a)(1); three counts of first-degree felony murder, N.J.S.A. 2C:11-3(a)(3); first-degree attempted murder, N.J.S.A. 2C:11-3 and 2C:5-1; second-degree burglary, N.J.S.A. 2C:18-2; first-degree robbery, N.J.S.A. 2C:15-1; first-degree aggravated sexual assault, N.J.S.A. 2C:14-2a(3) and (4); two counts of third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d); and fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d).

Defendant was sentenced to three consecutive life sentences for the murder convictions. Defendant was also sentenced to twenty years in prison with eighty-five percent of that time ineligible for parole as prescribed by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, for his attempted murder conviction. Certain of his other convictions were merged, and his sentences on his remaining convictions were run concurrent to his sentences for murder.

Defendant's convictions arose out of a triple homicide and the attempted murder of a fourth victim. The evidence at trial established that defendant broke into an apartment where two women and two children were present. Threatening the women with a knife, defendant repeatedly raped and killed one victim and stabbed the other victim. Thereafter, defendant killed the two young children by smothering them with a pillow. The second woman survived her knife wounds and identified defendant in a photo array. That victim also identified defendant at trial.

The police questioned defendant and ultimately he confessed to the rape, murders, and attempted murder. The State also presented DNA evidence connecting defendant to the murders and rape. The surviving victim's blood was found on defendant's jeans. The murdered woman's blood was found on defendant's sweatshirt, a pair of socks, and defendant's sneakers. Defendant's semen was also found inside the cervix of the woman who he raped and murdered.

Defendant filed a direct appeal and we affirmed his convictions and sentences. State v. Francis, No. A-1741-09 (App. Div. Aug. 7, 2012). On direct appeal, defendant argued that the statements he made to the police should have been suppressed. We reviewed the five different interviews where police had questioned defendant.

Defendant had lived in the apartment below the victims with his sister and brother-in-law. Defendant was initially asked to go to the police station with his sister to give a statement as a potential witness and not as a suspect. During his first interview, defendant was not given Miranda[1] warnings and he did not make any incriminating statements. Instead, he informed the police that he had been at home and in bed at the time of the murders and assault.

Defendant's sister, however, gave an inconsistent statement informing the police that defendant had not come home until the early morning hours. Accordingly, the police began to suspect defendant and conducted a second interview. Prior to the beginning of the second interview, they gave defendant Miranda warnings, which he waived. Thereafter, police conducted three other interviews of defendant. During each interview, defendant was given his Miranda warnings, and each time he waived those rights and agreed to speak with the police. Initially, defendant denied involvement in the murders and assault, but eventually he confessed to the rape and three murders, and admitted that he had stabbed the woman who survived his assault.

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

On his direct appeal, we affirmed the admission of all of defendant's statements because the first interview was conducted while defendant was not a suspect and was not in custody. Moreover, the four follow-up interviews all occurred after defendant was given Miranda warnings at the beginning of each interview, and after he knowingly, voluntarily, and intelligently waived his rights and agreed to speak with the police. The Supreme Court denied defendant's request for certification. State v. Francis, 213 N.J. 396 (2013).

In 2013, defendant filed a petition for PCR. He was assigned counsel, and the PCR court heard oral argument. On October 6, 2015, the PCR judge, who was the same judge who had presided at trial, denied defendant's petition without an evidentiary hearing and issued a written opinion setting forth the reasons for that decision.

The PCR judge found that defendant's claim of ineffective assistance of trial counsel was procedurally barred by Rule 3:22-5. Defendant contended that his trial counsel had been ineffective in failing to call him and his sister to testify at the Miranda hearing. The PCR judge rejected that argument, reasoning that our ruling on the direct appeal foreclosed defendant from contending that his first statement was given while in custody.

The PCR judge also went on to address the substance of defendant's ineffective assistance of counsel claims and found that they were without merit. In that regard, the court found that defendant had not shown that his trial counsel was ineffective, or that he had suffered any prejudice from the alleged ineffective assistance of counsel. Defendant now appeals the denial of his PCR petition.

II.

On this appeal, defendant argues:

> POINT I — DEFENDANT'S IAC ARGUMENT WAS NOT FORECLOSED BY THE DECISION OF THE APPELLATE DIVISION ON DIRECT APPEAL.
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> POINT II — THE DEFENDANT WAS ENTITLED TO AN EVIDENTIARY HEARING WHERE HE MADE A PRIMA FACIE SHOWING THAT TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO CALL DEFENDANT'S SISTER AT THE MIRANDA HEARING, AND THE PCR COURT DETERMINED HER LACK OF CREDIBILITY WITHOUT TAKING HER TESTIMONY.
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> POINT III — THE PCR COURT COMMITTED ERROR IN FINDING THAT, HAD DEFENDANT TESTIFIED AT THE MIRANDA HEARING, THAT HE WOULD HAVE BEEN CROSS-EXAMINED ABOUT THE FACTS OF THE CASE.
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> POINT IV — THE PCR COURT ERRED IN NOT GRANTING DEFENDANT AN EVIDENTIARY HEARING ON HIS CLAIM THAT HE WAS DENIED THE RIGHT TO TESTIFY AT TRIAL DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL.

Defendant also submitted a pro se reply brief, in which he made the following additional argument:

POINT[V] — THE DEFENDANT WAS ENTITLED TO A NEW TRIAL WHERE HE MADE A PRIMA FACIE SHOWING THAT TRIAL COUNSEL FAILED TO PRESENT TESTIMONY OF KEY EXPERT WITNESS JASON KAKOSZKA; AND FAILED TO OBJECT TO THE STATE'S PROFFER OF MEDICAL EXAMINER DR. ZHONGZUE HUA.

Having reviewed the extensive record in this matter, and having considered all of defendant's arguments in light of the law, we find no merit in any of defendant's arguments and affirm the denial of his PCR petition.

Defendant's petition arises from the application of Rule 3:22-2, which permits collateral attack of a conviction based upon a claim of ineffective assistance of counsel within five years of the conviction. See R. 3:22-12(a)(1); see also Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); State v. Fritz, 105 N.J. 42, 58 (1987). To establish a claim of ineffective assistance of counsel, a defendant must satisfy the two-part Strickland test by showing: (1) "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[,]" and (2) "the deficient performance prejudiced the defense." Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693 (quoting U.S. Const. amend. VI); Fritz, supra, 105 N.J. at 58-59 (adopting the Strickland two-part test in New Jersey).

Rule 3:22-10(b) provides that a defendant is only entitled to an evidentiary hearing if he or she establishes a prima facie case in support of PCR. Moreover, there must be "material issues of disputed fact that cannot be resolved by reference to the existing record," and the court must determine that "an evidentiary hearing is necessary to resolve the claims for relief." State v. Porter, 216 N.J. 343, 354 (2013) (quoting R. 3:22-10(b)). To establish a prima facie case, a defendant must demonstrate "the reasonable likelihood of succeeding under the test set forth in Strickland." State v. Preciose, 129 N.J. 451, 463 (1992).

Defendant first claims that he received ineffective assistance of trial counsel because his counsel failed to call him and his sister to testify at the Miranda hearing. Defendant contends that he and his sister would have testified that at the time he gave his first statement to the police, he was in custody. Specifically, defendant asserts that he would have testified that he had told the police that he needed to go to work, but was ordered to go to the police station where his first interview was conducted. Defendant also claims that his sister's testimony would have corroborated his testimony.

Defendant's claim fails because he cannot show any prejudice. Defendant's and his sister's testimony would have only gone to defendant's first interview. At that interview, defendant did not

make any incriminating statements. Instead, he denied involvement and claimed that he was at home in bed during the time of the murders and assault.

After giving his first statement, defendant was interviewed four other times by the police. Before each interview, he was given his Miranda warnings, which he waived and then spoke to the police. On his direct appeal, we found that each of those interviews was properly conducted and the resulting statements were admissible. Consequently, even if the first statement could arguably be challenged, the other statements would have been admissible. See State v. Bey, 112 N.J. 45, 71 (1988) (recognizing that suppression of an unwarned statement obtained in violation of Miranda does not necessarily bar the admission of subsequent statements that were properly obtained).

On this appeal, defendant argues that had his first statement been suppressed, his other statements would have been suppressed as fruit of the poisonous tree. That argument is flawed. The police did not learn information during the first interview that facilitated the following interviews. To the contrary, defendant denied involvement in the murders and assault during the first interview. Accordingly, even if the first interview had not been admitted, the four statements where defendant confessed were admissible. See State v. Hartley, 103 N.J. 252, 274-77 (1986)

(noting that the "fruit of the poisonous tree" doctrine only applies to subsequent statements when a defendant is coerced into giving an initial statement, not when police merely fail to provide Miranda warnings before the initial statement).

Second, defendant argues that his trial counsel was ineffective for failing to properly advise him regarding his right to testify at trial. We reject this argument for two reasons.

First, the trial judge asked if defendant was going to testify. Trial counsel informed the judge that he and defendant had discussed defendant's right to testify and defendant was electing not to testify. The trial judge then confirmed with defendant that he was waiving his right to testify. Specifically, the trial judge questioned defendant and had the following exchange:

> The Court: Your lawyer has announced that you are not going to take the witness stand on your own behalf. You have received some advice from Mr. Herman and Mr. Glazer. You talked about this a number of times. Is that right?
>
> Defendant: Yes.
>
> The Court: You know you have a right not to testify in this case. You also understand that you have a right to testify?
>
> Defendant: Yes.
>
> The Court: And the decision whether you do that or not is your decision.

Defendant: Yes.

The Court: Is that right? Your attorneys have made some recommendations to you. They've talked to you about the pros and cons. You've considered the good points and the bad points of it, but the decision is yours.

Defendant: Yes.

The Court: And no one is forcing you or threatening you to get you not to take the witness stand on your own behalf?

Defendant: No.

Defendant's own testimony at trial, therefore, establishes that he knowingly, voluntarily, and intelligently waived his right to testify at trial. Therefore, he cannot now make a showing of a prima facie case of ineffective assistance of counsel in that regard.

Defendant also failed to show any prejudice resulting from his decision not to testify at trial. Defendant has not stated what he would have testified to had he elected to testify at trial. Thus, we are simply left with an assertion of innocence. In contrast to that assertion, the evidence of defendant's guilt at trial was very strong. The surviving victim identified defendant. The surviving victim also testified that before defendant murdered the other woman, that woman told her that defendant lived downstairs. There was also unrefuted DNA evidence that connected

defendant to the murders and rape. Finally, there were defendant's own admissions. Against that evidence, defendant's unsupported assertion of innocence does not establish a prima facie showing of prejudice.

Finally, in his pro se reply brief, defendant argues that his trial counsel failed to present testimony related to the DNA evidence. Specifically, he claims that his trial counsel should have called Jason Kakoszka. Defendant contends that Kakoszka was the technical analyst who actually reviewed the DNA analysis and results. The State presented the expert testimony of Dr. Charlotte Word who reviewed the DNA reports and analysis, and reached her own independent conclusions. On direct appeal, defendant challenged the admission of Dr. Word's testimony, but we rejected that argument.

The record demonstrates that counsel sought to gain a tactical advantage by establishing that Word was not the actual DNA analyst. Indeed, counsel used that fact during his summation in an attempt to undermine the reliability of her conclusions. Under the circumstances, counsel's decision not to call Kakoszka, and instead cross-examine Dr. Word, was a sound strategic decision. See State v. Hess, 207 N.J. 123, 147 (2011) (explaining that to satisfy prong one of the Strickland test, a defendant must overcome a "strong presumption" that counsel used "reasonable professional

judgment" and "sound trial strategy" in representing the defendant).

Defendant also contends that his trial counsel was ineffective in failing to object to testimony from the State's medical examiner, Dr. Zhongzue Hua. Defendant now contends that Dr. Hua relied on another doctor's autopsy report and that his trial counsel should have objected. Defendant has failed to show that there was any basis for objecting to the testimony of Dr. Hua. Defendant has also failed to show that there was any resulting prejudice.

The record in this case establishes that defendant has had extensive judicial review at various stages of his prosecution. The evidence of defendant's guilt was very strong and came from a number of independent sources. At trial, on his direct appeal, and on his PCR petition, defendant had a full and fair opportunity to present all of his arguments. The arguments he raised in his PCR petition lack merit and did not establish a prima facie showing of ineffective assistance of counsel. Accordingly, defendant was not entitled to an evidentiary hearing.

Affirmed.