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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2954-15T4  
A-3324-15T4

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

PHILIPPE BARTHELUS,

Defendant-Respondent.

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STATE OF NEW JERSEY,

Plaintiff-Respondent/  
Cross-Appellant,

v.

PHILIPPE BARTHELUS,

Defendant-Appellant/  
Cross-Respondent.

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Submitted December 7, 2017 – Decided December 22, 2017

Before Judges Simonelli and Haas.

On appeal from Superior Court of New Jersey,  
Law Division, Union County, Indictment No. 07-  
11-1010.

Thomas K. Isenhour, Acting Union County Prosecutor, attorney for appellant State of New Jersey in A-2954-15 and respondent/cross-appellant State of New Jersey in A-3324-15 (Meredith L. Balo, Special Deputy Attorney General/Acting Assistant Prosecutor, on the brief).

Joseph E. Krakora, Public Defender, attorney for respondent Philippe Barthelus in A-2954-15 and appellant/cross-respondent Philippe Barthelus in A-3324-15 (Alison Perrone, Designated Counsel, on the briefs).

PER CURIAM

In these two consolidated appeals, the parties challenge different aspects of the Law Division's March 9, 2016 order, which addressed defendant Philippe Barthelus's petition for post-conviction relief (PCR) without an evidentiary hearing. Defendant contends the judge<sup>1</sup> incorrectly denied his motion for a new trial based on alleged newly discovered evidence. In its appeal, the State asserts the judge erred by "reversing" defendant's conviction for attempted murder because he failed to give the jury a limiting instruction concerning the testimony of a police detective. We affirm in part, reverse in part, and remand for further proceedings.

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<sup>1</sup> The same judge who presided over defendant's trial also reviewed defendant's PCR petition.

I.

We incorporate herein the procedural history and facts set forth in our prior opinion on defendant's direct appeal from his conviction on the underlying offenses. State v. Barthelus, No. A-5012-10 (App. Div. Oct. 11, 2013) (slip op. at 1-11), certif. denied, 217 N.J. 588 (2014). The following facts are pertinent to the issues raised in this appeal.

Defendant and his co-defendant Wedpens Dorsainvil<sup>2</sup> used Jamillah Payne's apartment as a "stash house" for the drugs they were selling on the street and in a nearby park. Id. at 3. Dorsainvil suspected that Payne had recently begun associating with a rival gang and was permitting those gang members, including Khalid Walker, to use the apartment. Id. at 3-5.

On the day of Payne's murder, defendant and Dorsainvil went to Payne's apartment and encountered Payne, Walker, and a number of other individuals. Id. at 4-6. According to the State's proofs, Dorsainvil shot Payne once in the chest and defendant then pushed her out of a window. Id. at 5-8. Walker was in the bathroom, and stated that two men began shooting at him through

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<sup>2</sup> Dorsainvil was tried separately on the same charges involved in this case. Id. at 3 n.1.

the bathroom door, and one bullet struck him in the leg.<sup>3</sup> Id. at 5. One of the men put a gun to Walker's head, pulled the trigger, but the gun did not go off. Id. at 6. Walker then jumped out the bathroom window. Ibid.

The jury convicted defendant of the murder of Payne, the attempted murder of Walker, and a number of other charges. Id. at 1-2. After the trial, the judge sentenced defendant to a sixty-year aggregate term on all the charges, which included forty-five years for Payne's murder, and a consecutive fifteen-year term for the attempted murder of Walker. Id. at 2. This sentence was subject to the 85% parole ineligibility provisions of the No Early Release Act, N.J.S.A. 2C:43-7.2, with mandatory periods of parole supervision upon release. Id. at 2-3. We affirmed defendant's conviction and sentence on direct appeal and, as noted above, the Supreme Court denied certification. Id. at 3.

Following a separate trial, a jury convicted Dorsainvil of conspiracy to murder Payne, and aggravated assault in connection with the shooting of Walker, as a lesser-included offense of attempted murder. State v. Dorsainvil, 435 N.J. Super. 449, 452-53 (App. Div. 2014). However, we reversed Dorsainvil's conviction

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<sup>3</sup> Walker identified defendant as one of the shooters after picking out his photograph from an array. However, the judge granted defendant's motion to suppress the identification under State v. Henderson, 208 N.J. 208 (2011).

on appeal, and remanded the matter for further proceedings. Id. at 453-54. Prior to a retrial, Dorsainvil pled guilty to Payne's murder and the attempted murder of Walker.

A.

By this time, defendant had filed a PCR petition.<sup>4</sup> Less than two weeks after Dorsainvil finalized his plea agreement, he gave defendant a written statement purporting to exculpate defendant from any involvement in Payne's murder and Walker's attempted murder.

In the statement, Dorsainvil alleged he conspired with a man named John Zepherin, who was now deceased, to murder Payne. None of the witnesses who testified at defendant's trial identified Zepherin as one of the individuals present in the apartment at the time of the shootings. Nevertheless, Dorsainvil claimed Zepherin shot Payne. Dorsainvil also asserted he attempted to pull Payne back into the apartment after she went out of the window, but was unable to do so. Dorsainvil alleged he shot at Walker through the bathroom door, and shot him once in the leg after the door opened because Walker was trying to kick him. Dorsainvil stated that

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<sup>4</sup> Defendant raised a number of issues in his petition, but only the two discussed in this opinion are relevant to the present appeal.

defendant fled the apartment as soon as the shooting started and, therefore, was not involved in either offense.

Asserting that Dorsainvil's written statement constituted newly discovered evidence, defendant asked the judge to order a new trial. In rejecting this portion of defendant's PCR petition, the judge applied the three-prong test established by the Supreme Court in State v. Carter, 85 N.J. 300, 314 (1981), to evaluate Dorsainvil's statement. The judge found that defendant met the first two prongs of the test because the statement was material to the issue of defendant's involvement in the offenses, and the information was not available earlier because Dorsainvil did not waive his Fifth Amendment privilege against self-incrimination until after he entered his plea. See *ibid.*

However, the judge ruled that the information contained in Dorsainvil's statement did not meet the third Carter prong because it would not have changed the jury's verdict due to the many inconsistencies between Dorsainvil's belated account, his and defendant's earlier admissions, and the testimony of the witnesses to the shootings at trial. See *ibid.* As the judge explained, Dorsainvil told an associate immediately after the incident, "I had to do it. I had to do it . . . I popped her." He also admitted that "they threw [Payne] out the window[,]" which was inconsistent with his new claim that Payne jumped out of the window

on her own and he tried to pull her back inside. Dorsainvil's allegations were also inconsistent with the testimony of another witness, who identified defendant as the individual who pushed Payne out the window.

The judge noted that defendant's own statements also conflicted with Dorsainvil's new assertions. Defendant originally claimed he was not even in the municipality on the day of the shootings; later asserted he was playing dice in the park when he heard the shots ring out; and then sent a letter to the judge stating that he was in the apartment, but ran when the shooting began. Based on the irreconcilable differences in defendant's and Dorsainvil's stories, coupled with the "inherently suspect" nature of Dorsainvil's "after-the-fact" exculpatory statement, the judge denied this portion of defendant's PCR petition.

B.

One of the themes defendant's attorney presented to the jury at trial was that the police improperly focused on defendant instead of investigating other suspects in the attempted murder of Walker. During her cross-examination of Detective Jorge Jimenez, the attorney attempted to advance this position by asking the detective a number of questions concerning his failure to pursue other leads. As noted above, Walker identified defendant as one of his assailants after participating in a photo array and,

once that identification was made, the police had no need to look at other suspects. However, because the judge suppressed Walker's identification of defendant, the State could not present this information to the jury.

As defense counsel continued this line of questioning, the State began to object, and noted that the attorney was opening the door to allow Detective Jimenez to disclose that he "was in possession of information that implicated [defendant] as the second shooter in that apartment[.]" During several side bar conferences on this subject, the judge cautioned defendant's attorney that if she continued to seek to demonstrate that the detective had no basis for limiting the investigation to defendant, the State would be permitted to ask the detective on redirect whether he had information that caused him to believe defendant was the second shooter.

As the cross-examination proceeded, defense counsel identified a man, L.D.,<sup>5</sup> as a potential suspect and, through her questions, attempted to demonstrate that Detective Jimenez failed to properly investigate him. On redirect, the judge permitted Detective Jimenez to testify that he did not have any information that led him to believe L.D. was the second shooter. The State

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<sup>5</sup> We use initials to refer to this individual in order to protect his privacy.



then asked the detective, "At that point were you in possession of information that [defendant] was, in fact, the second shooter in that apartment?" After the judge overruled defendant's objection, the detective replied, "Yes[,]" and the State asked no further questions about the subject.

Defense counsel did not request any limiting instruction concerning the jury's consideration of the detective's response and the judge did not issue a sua sponte charge on this testimony. In his PCR petition, defendant argued that his attorney provided him with ineffective assistance by continuing to pursue this line of questioning in the face of the judge's warning, and by opening the door to the State's introduction of improper hearsay evidence concerning the information the detective possessed.

However, the judge declined to consider defendant's ineffective assistance of counsel argument. Instead, on his own motion, the judge determined that he committed prejudicial error during the trial by not instructing the jury that the detective's statement that he possessed certain information "could not be used for the truth of the matter asserted; but solely for his state of mind of why he eliminated certain suspects versus others during the course of his investigation." In his direct appeal of his conviction for Walker's attempted murder, defendant did not challenge the failure of the judge to provide such an instruction.

Nevertheless, the judge concluded that "[t]he omission of a limiting jury instruction warrants reversal of [defendant's] conviction for the attempted murder of Khalid Walker." These consolidated appeals followed.

## II.

In his appeal, defendant argues that "the portion of the [trial] court's decision denying" his motion for a new trial based upon the alleged newly discovered evidence contained in Dorsainvil's written statement "must be reversed." The State asserts that "the trial court erred in granting a portion of defendant's petition for [PCR] and vacating defendant's conviction for attempted murder." Before addressing the parties' specific arguments, we briefly review the general principles that guide our task.

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 and make a determination on the merits only if the defendant has presented a prima facie claim of ineffective assistance, material issues of disputed facts lie outside the record, and resolution of the issues necessitates a hearing. R. 3:22-10(b); State v. Porter, 216 N.J. 343, 355 (2013). We review a judge's decision to deny a PCR

petition without an evidentiary hearing for abuse of discretion.  
State v. Preciose, 129 N.J. 451, 462 (1992).

To establish a prima facie claim of ineffective assistance of counsel, the defendant

must satisfy two prongs. First, he must demonstrate that counsel made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." An attorney's representation is deficient when it "[falls] below an objective standard of reasonableness."

Second, a defendant "must show that the deficient performance prejudiced the defense." A defendant will be prejudiced when counsel's errors are sufficiently serious to deny him a "fair trial." The prejudice standard is met if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A "reasonable probability" simply means a "probability sufficient to undermine confidence in the outcome" of the proceeding.

[State v. O'Neil, 219 N.J. 598, 611 (2014) (quoting Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984)).]

"[I]n order to establish a prima facie claim, [the defendant] 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." Cummings, 321 N.J. Super. at 170. The defendant must establish,

by a preponderance of the credible evidence, that he is entitled to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013).

A.

We turn first to defendant's appeal from the judge's denial of his motion for a new trial based on the alleged newly discovered evidence Dorsainvil provided in his written statement. Defendant asserts he met all three prongs of the Carter test because Dorsainvil's claim that defendant was not involved in either of the shootings "had the capacity to change the verdict[.]" We disagree.

To secure a new trial based upon newly discovered evidence, a "defendant must show that the evidence is 1) material, and not 'merely' cumulative, impeaching, or contradictory; 2) that the evidence was discovered after completion of the trial and was 'not discoverable by reasonable diligence beforehand'; and 3) that the evidence 'would probably change the jury's verdict if a new trial were granted.'" State v. Ways, 180 N.J. 171, 187 (2004) (quoting Carter, 85 N.J. at 314). All three prongs of the test must be established. Ibid.

"Newly discovered evidence must be reviewed with a certain degree of circumspection to ensure that it is not the product of fabrication, and, if credible and material, is of sufficient weight that it would probably alter the outcome of the verdict in a new

trial." Id. at 187-88. The "belated introduction of evidence" may detract from its credibility. Id. at 192.

Based on our review of the record, we conclude that the judge did not abuse his discretion by denying defendant's request for a new trial based on Dorsainvil's written statement. Assuming that the first two prongs of the Carter test were met, the judge correctly determined that the statement would not have changed the jury's verdict because Dorsainvil's new account completely contradicted his own admission that he shot Payne and "they" then threw her out of the window. The statement was also inconsistent with the accounts of other witnesses to the shooting. These deficiencies, coupled with the fact that Dorsainvil did not indicate his willingness to exculpate defendant until after he pled guilty to avoid a retrial, would be more likely to dissuade than persuade a jury that Dorsainvil's belated story was truthful.

Therefore, we reject defendant's contentions on this point and affirm this portion of the March 9, 2016 order.

B.

In its appeal, the State argues that the judge mistakenly "reversed" defendant's conviction for the attempted murder of Walker. We agree.

It is well established that a PCR petition "is not . . . a substitute for appeal. . . ." R. 3:22-3; See, e.g., State v.

Hess, 207 N.J. 123, 145 (2011). Therefore, a defendant "is generally barred from presenting a claim on PCR that could have been raised at trial or on direct appeal, R. 3:22-4(a)[.]" Nash, 212 N.J. at 546. Under Rule 3:22-4(a),

[a]ny ground for relief not raised in the proceedings resulting in the conviction, or in a [PCR] proceeding brought and decided prior to the adoption of this rule, or in any appeal taken in any such proceedings is barred from assertion in a [PCR] proceeding . . . unless the court on motion or at the hearing finds:

(1) that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; or

(2) that enforcement of the bar to preclude claims, including one for ineffective assistance of counsel, would result in fundamental injustice; or

(3) that denial of relief would be contrary to a new rule of constitutional law under either the Constitution of the United States or the State of New Jersey.

Here, defendant did not allege on direct appeal that the judge erred by failing to provide a sua sponte limiting instruction to the jury on Detective Jimenez's statement that he possessed information pointing to defendant as one of the men who shot at Walker. Thus, defendant was barred from raising this issue in his PCR petition and did not do so, instead asserting that his trial attorney was ineffective for pursuing the line of inquiry that led

to the admission of the detective's statement. Under these circumstances, the judge erred by, in effect, acting as an appellate court and, on his own motion during the PCR proceeding, "reversing" the defendant's attempted murder conviction because he did not give a limiting instruction on the detective's testimony.

Contrary to defendant's contentions on appeal, none of the exceptions provided in Rule 3:22-4(a) permitted the judge to ignore the bar prohibiting him from considering an issue defendant could have raised on direct appeal. Defendant filed a timely appeal from his convictions and, therefore, that avenue of review was plainly available to him. R. 3:22-4(a)(1). Thus, there would have been no "fundamental injustice" if the judge had declined to consider whether his failure to provide a limiting instruction constituted "reversible error" and, instead, considered the claim defendant did raise, namely, that his trial attorney provided ineffective assistance. R. 3:22-4(a)(2). There was also no "new rule of constitutional law" that permitted this issue to be addressed in the manner the judge employed in this case. R. 3:22-4(a)(3).

Therefore, we are constrained to reverse the judge's decision to overturn defendant's conviction for the attempted murder of Walker. However, this does not leave defendant without a possible

remedy. As noted above, defendant filed a PCR petition asserting that his trial attorney was ineffective for pursuing the line of questioning that led to Detective Jimenez's testimony that he had information pointing to defendant as one of Walker's assailants, and, after the judge raised the issue sua sponte, for failing to request a limiting instruction once the detective completed his testimony. The judge mistakenly failed to consider these contentions.<sup>6</sup>

Based upon our review, we conclude that defendant made out a prima facie case of ineffectiveness of trial counsel that warranted an evidentiary hearing on the issues involving the detective's testimony. Porter, 216 N.J. at 355. There were obviously material facts outside the record, including defense counsel's rationale for pursuing this strategy in questioning Detective Jimenez, that could not be adequately addressed solely on the trial record. Ibid. A hearing would also give the State the opportunity to present evidence of its own, and for both parties to address the legal issues of whether a limiting instruction was necessary under the circumstances of this case, and whether both prongs of the

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<sup>6</sup> In refusing to address defendant's arguments, the judge stated, "I do not reach the question of whether [defense counsel's] approach was a legitimate strategic decision or ineffectiveness of counsel. Nor do I reach the decision of whether the second prong of Strickland has been met in this regard."




Strickland test were met. Therefore, we remand this matter to the trial court for an evidentiary hearing. In remanding, we express no view on the merits of the parties' respective positions on these issues.

In sum, we reverse the portion of the March 9, 2016 order that overturned defendant's conviction for the attempted murder of Walker, and remand for further proceedings. In all other aspects, the order is affirmed.

Affirmed in part; reversed in part; and remanded for further proceedings. 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