SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3581-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RAHEEM A. PAMPLIN, a/k/a
RASHEEM MCAIR, TREMPLIN
PAMPLIN,

Defendant-Appellant.

Submitted March 22, 2017 – Decided August 25, 2017

Before Judges Simonelli and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 08-12-2231.

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

Gurbir S. Grewal, Bergen County Prosecutor, attorney for respondent (Elizabeth R. Rebein, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from the January 15, 2015 order of the trial court denying his petition for post-conviction relief (PCR) without granting an evidentiary hearing. We affirm.

On September 23, 2009, a Bergen County jury convicted defendant, in absentia, of second-degree possession of a controlled dangerous substance with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and -5(b)(2) (count one); second-degree employing a juvenile in a drug distribution scheme, N.J.S.A. 2C:35-6 (count two); second-degree possession of a firearm during a drug offense, N.J.S.A. 2C:39-4.1(a) (count three); and second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count four). After merger, pursuant to N.J.S.A. 2C:44-3(a), defendant was sentenced to an aggregate extended term sentence of thirty-six years with thirteen-and-one-half-years of parole ineligibility.

At trial, the State's proofs established that, along with his fifteen-year-old nephew, defendant sold fifteen bricks of heroin to an undercover police officer for $3225. Although there was no evidence that defendant physically possessed a firearm during the drug sale, defendant's nephew, who served as the lookout for the transaction and carried the drugs, had a .45 caliber Hi-Point automatic handgun in his waistband and was arrested and charged along with defendant shortly after the transaction. Defendant

gave an incriminating statement to police but denied telling his nephew to bring the gun or knowing he possessed it.[1] After the defense rested, the trial court denied defendant's motion for a judgment of acquittal on counts two, three, and four pursuant to Rule 3:18-1, and submitted the case to the jury.

Defendant filed a direct appeal, asserting the following arguments:

> POINT I
>
> THE STATE'S EVIDENCE WAS INSUFFICIENT TO PROVE POSSESSION OF THE WEAPON BY DEFENDANT. U.S. CONST. AMEND. XIV; N.J. CONST. ART. I, ¶ 1.
>
> POINT II
>
> DEFENDANT'S SENTENCE WAS EXCESSIVE. U.S. CONST. AMENDS. VIII, XIV; N.J. CONST. ART I, ¶¶ 1, 12.

We incorporate by reference the detailed recitation of the facts of the case contained in our unpublished opinion. State v. Pamplin, No. A-1008-10 (App. Div. Sept. 4, 2012). Finding that "there was sufficient evidence for the jury to conclude that defendant constructively possessed the handgun kept in his nephew's waistband[,]" we affirmed the convictions but remanded

[1] Defendant's statement was ruled admissible at trial by the court pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) following a pre-trial hearing. See N.J.R.E. 104(c).

"for resentencing based on three errors." Pamplin, supra, slip op. at 5, 10.[2] The aggregate twenty-seven-year term of imprisonment with thirteen-and-a-half-years of parole ineligibility imposed at the resentencing hearing conducted on October 12, 2012, was considered on our Excessive Sentence Oral Argument calendar, Rule 2:9-11, and affirmed by order filed August 29, 2013.[3]

Defendant filed a timely pro se petition for PCR alleging that his trial counsel was ineffective for failing "to move to [c]onsolidate Bergen [County] charges with Essex [County] matters resulting in a higher aggregate sentence and extended term." Assigned PCR counsel filed a brief on defendant's behalf arguing that: (1) trial counsel was ineffective for failing to call his juvenile codefendant, who pled guilty to a weapons possession offense, as a witness at defendant's trial to testify that he, rather than defendant, was in possession of the handgun; and (2)

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[2] Specifically, we remanded for a statement of reasons to support the imposition of a consecutive sentence on count two, the imposition of a mandatory period of parole ineligibility on count two as required under N.J.S.A. 2C:35-6, and the removal of aggravating factor eleven, N.J.S.A. 2C:44-1(a)(11), which is inapplicable when a defendant faces a presumption of incarceration. Pamplin, supra, slip op. at 10-12.

[3] With the consent of the parties, we remanded for the removal of monetary penalties erroneously imposed on count four, which had been merged into count three. The judgment of conviction was corrected by the court on October 8, 2013.

trial and appellate counsel were ineffective for failing to challenge the absence of evidence to support the weapons possession offenses. In support of the former claim, PCR counsel submitted defendant's undated certification as well as defendant's nephew's purported notarized statement, both asserting that defendant had no knowledge of the gun or his nephew's intention to use it.

In an oral decision, the PCR court rejected all of defendant's arguments. Preliminarily, the court acknowledged it "did read not only counsel's submissions, but . . . [defendant's] also." Additionally, the court noted that it did "take into consideration [defendant's] submissions[.]" The court then concluded that defendant failed to establish either the deficiency or the prejudice prong of Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984) to warrant PCR relief or an evidentiary hearing.

Regarding defendant's contention that his attorney was ineffective for failing to call his nephew as a witness at trial, the court determined that

> defendant was not present at the trial to discuss any strategy with his attorney. His attorney made a strategic decision based upon information that he had in front of him and decided that it would be in the defendant's best interest not to have . . . the codefendant called at the trial.
>
> . . . .

> Had he been called . . . I don't see how his testimony would have made a difference.

Regarding defendant's contention that his attorneys were ineffective for failing to challenge the absence of evidence to support the weapons possession offenses, the court determined that

> on the basis of the trial record[,] . . . there was enough evidence for the issue of constructive possession to go to the jury. Therefore, even if there was a failure to make a Reyes[4] motion, that motion would have been denied. Therefore, I am denying the PCR in its entirety.[5]

The PCR court entered a memorializing order on January 15, 2015, and this appeal followed.

On appeal, defendant raises the following arguments for our consideration:

> POINT I
>
> THE MATTER SHOULD BE REMANDED FOR A NEW PCR HEARING AND THE ASSIGNMENT OF NEW PCR COUNSEL BECAUSE R. 3:22-6(d) WAS VIOLATED.
>
> POINT II
>
> THE LOWER COURT ERRED IN DENYING [DEFENDANT'S] CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR

[4] State v. Reyes, 50 N.J. 454 (1967).

[5] Because the court mistakenly believed that trial counsel had failed to file a Reyes motion and mistakenly noted that defendant had only appealed his sentence, rather than his convictions, the court failed to invoke the procedural bar. See R. 3:22-5 (barring claims previously adjudicated on the merits in the proceedings resulting in the conviction or in a direct appeal).

FAILING TO CALL THE JUVENILE CO-DEFENDANT AS A WITNESS WITHOUT AN EVIDENTIARY HEARING.

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

On appeal, defendant argues that PCR counsel was ineffective because he violated Rule 3:22-6(d) by: (1) failing to list, incorporate by reference or advance defendant's sole claim set forth in his pro se petition regarding trial counsel's failure to move to consolidate his Bergen County charges with his pending

Essex County charges; and (2) arguing incorrectly to the PCR court that trial and appellate counsel failed to challenge the absence of evidence to support the weapons possession offenses. According to defendant, PCR counsel's "failure to ensure that [defendant's] initial [pro se] claim was considered by the PCR court" as well as his "lack of familiarity with the case" warrants a new PCR hearing with the assignment of new PCR counsel. Defendant also argues that the PCR court erred in denying PCR relief without an evidentiary hearing. Specifically, defendant asserts that he established a prima facie case of ineffective assistance of counsel and the court erred in ruling that counsel's failure to call the juvenile as a witness was reasonable trial strategy and that the juvenile's testimony would not have altered the outcome. We disagree.

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." Id. at 463. "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)." Ibid.

Under the Strickland standard, a defendant must make a two-part showing. 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), and the defendant must overcome a "strong presumption that counsel

rendered reasonable professional assistance." State v. Parker, 212 N.J. 269, 279 (2012) (citing Strickland, supra, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694).

"[A] defendant must also establish that the ineffectiveness of his attorney prejudiced his defense. 'The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Parker, supra, 212 N.J. at 279-80 (quoting Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). "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) (citation omitted).

"'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 prongs of an ineffective assistance of counsel claim by a preponderance of the evidence. State v. Gaitan, 209 N.J. 339, 350 (2012), cert. denied, 568 U.S. 1192, 133 S. Ct. 1454, 185 L. Ed. 2d 361 (2013). "These standards apply to claims of ineffective assistance at both the trial level and on appeal."

State v. Guzman, 313 N.J. Super. 363, 374 (App. Div.) (citing State v. Morrison, 215 N.J. Super. 540, 545-46 (App. Div.), certif. denied, 107 N.J. 642 (1987)), certif. denied, 156 N.J. 424 (1988).

We first address defendant's contention that the court erred in ruling that counsel's failure to call the juvenile as a witness was reasonable trial strategy and that the juvenile's testimony would not have altered the outcome. When a defendant asserts that his attorney failed to call an exculpatory witness, "he must assert the facts that would have been revealed, 'supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification.'" State v. Petrozelli, 351 N.J. Super. 14, 23 (App. Div. 2002) (quoting Cummings, supra, 321 N.J. Super. at 170). See also R. 3:22-10(c).

One of the most difficult strategic decisions that any trial attorney confronts is "[d]etermining 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.
>
> [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.

Here, we agree that trial counsel's failure to call the juvenile as a witness was a strategic decision that was entitled to highly deferential review by the PCR court, a standard to which the PCR court abided in rejecting defendant's ineffectiveness claim. Even assuming trial counsel was deficient in failing to call the juvenile witness, we are unable to find prejudice to the defense such that there is a "reasonable probability" the outcome of defendant's trial would have been different, or "the factfinder would have had a reasonable doubt respecting guilt." Strickland, supra, 466 U.S. at 695, 104 S. Ct. at 2068-69, 80 L. Ed. 2d at 698.

In making a prejudice finding, we 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." Id. at 695-96, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698-99. Here, the verdict had overwhelming support in the trial record.

Defendant's statement denying any knowledge of the gun was presented to the jury and was categorically rejected. Assuming the juvenile was available and testified consistent with his purported notarized statement, there is no "reasonable probability" the outcome of defendant's trial would have been different given the number of areas available for effective impeachment of the juvenile's testimony. See State v. Pierre, 223 N.J. 560 (2015) (concluding that defendant's attorney was deficient in failing to present evidence, including the testimony of absent witnesses that could have reinforced defendant's alibi, and defendant was prejudiced because there was sparse evidence implicating him in the crimes). Accordingly, defendant failed to establish a prima facie case of ineffective assistance of counsel.

Next, we turn to defendant's argument that his PCR counsel was ineffective because he violated Rule 3:22-6(d). "Rule 3:22-6(d) imposes an independent standard of professional conduct upon an attorney representing a defendant in a PCR proceeding." State v. Hicks, 411 N.J. Super. 370, 376 (App. Div. 2010). Rule 3:22-6(d) provides that assigned counsel

> should advance all of the legitimate arguments requested by the defendant that the record will support. If defendant insists upon the assertion of any grounds for relief that counsel deems to be without merit, counsel shall list such claims in the petition or amended petition or incorporate them by

> reference. Pro se briefs can also be submitted.

In State v. Rue, 175 N.J. 1 (2002), our Supreme Court pointedly noted that "PCR is a defendant's last chance to raise constitutional error that may have affected the reliability of his or her criminal conviction. It is not a pro forma ritual." Id. at 18. The Court reversed "[b]ecause Rue's counsel abandoned any notion of partisan representation by countering every one of [Rue's] claims and characterizing the entire petition as meritless[.]" Id. at 19. Specifically, Rue's PCR counsel first pointed out that he "believe[d] the client's claims [were] legally meritless[.]" Id. at 8. He then "systematically dismantled each contention" Rue raised, "rejected outright the availability" of Rue's defense, and proved that Rue's potential witnesses had "'significant credibility problem[s].'" Id. at 9-13.

Relying on Rule 3:22-6, the Court held that

> [PCR] counsel must advance the claims the client desires to forward in a petition and brief and make the best available arguments in support of them. Thereafter, as in any case in which a brief is filed, counsel may choose to stand on it at the hearing, and is not required to further engage in expository argument. In no event however, is counsel empowered to denigrate or dismiss the client's claims, to negatively evaluate them, or to render aid and support to the [S]tate's opposition. That kind of conduct contravenes our PCR rule.

[Id. at 19.]

We will assume the proscription in Rue survived the 2009 amendment of Rule 3:22-6(d).[6]

In State v. Webster, 187 N.J. 254 (2006), certif. denied, 200 N.J. 475 (2009), the Court refined Rue, stating

> Reduced to its essence, Rue provides that PCR counsel must communicate with the client, investigate the claims urged by the client, and determine whether there are additional claims that should be brought forward. Thereafter, counsel should advance all of the legitimate arguments that the record will support. If after investigation counsel can formulate no fair legal argument in support of a particular claim raised by defendant, no argument need be made on that point. Stated differently, the brief must advance the arguments that can be made in support of the petition and include defendant's remaining claims, either by listing them or incorporating them by reference so that the judge may consider them.
>
> [Webster, supra, 187 N.J. at 257.]

This case bears no resemblance to Rue and complies with the dictates of Webster. Here, at oral argument, the PCR court acknowledged that it reviewed and considered counsel's submission as well as defendant's. When the court asked whether PCR counsel wished to "supplement" or "add any[thing]" to the "papers," PCR

[6] Before 2009, Rule 3:22-6(d) provided that PCR "'counsel should advance any grounds insisted upon by defendant notwithstanding that counsel deems them without merit.'" Rue, supra, 175 N.J. at 13 (quoting Rule 3:22-6(d)(1995)).

counsel replied "I don't have to. I know the [c]ourt is aware of the arguments, so there's no need." That was sufficient to comply with Rule 3:22-6(d). The court's denial of defendant's PCR petition implicitly incorporated the court's rejection of defendant's contention in his pro se submission that his attorney was ineffective for failing to consolidate the Bergen and Essex County charges.[7] PCR counsel was still "function[ing] as an advocate for the defendant, as opposed to a friend of the court." State v. Barlow, 419 N.J. Super. 527, 536 (App. Div. 2011) (citation omitted).

We do acknowledge as defendant points out that PCR counsel incorrectly asserted that trial and appellate counsel failed to challenge the absence of evidence to support the weapons possession offenses. However, "[t]he test is not whether defense counsel could have done better, but whether he met the constitutional threshold for effectiveness." Nash, supra, 212 N.J. at 543. Moreover, defendant cannot show a reasonable probability that the result of the PCR hearing would have been different had PCR counsel

[7] We note that Rule 3:25A-1 contemplates consolidation of charges pending in different counties on motion to the presiding judge or his or her designee "for consolidation for purposes of entering a plea or for sentencing." Under the Rule, the judge is required to consider several factors in adjudicating such a motion. Because defendant was tried by a jury in absentia, it does not appear that defendant could have availed himself of such a motion.

argued differently. Indeed, defendant does not identify any arguably meritorious claim that PCR counsel failed to advance on defendant's behalf.

Affirmed.