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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3587-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LARRY G. PERSON,

Defendant-Appellant.

Submitted October 11, 2016 - Decided March 1, 2017

Before Judges Leone and Vernoia.

On appeal from the Superior Court of New
Jersey, Law Division, Burlington County,
Indictment No. 02-11-1493.

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

Robert D. Bernardi, Burlington County
Prosecutor, attorney for respondent (Alexis R.
Agre, Assistant Prosecutor, of counsel and on
the brief).

PER CURIAM

Defendant appeals a January 16, 2015 order denying his post-conviction relief (PCR) petition after an evidentiary hearing. We

reverse, vacate defendant's convictions, and remand for a new trial.

I.

We previously set forth the facts in our opinions on defendant's direct appeal, State v. Person, No. A-6456-04 (App. Div. Apr. 16, 2007) (slip op. at 1-8) (Person I), and on his first appeal of the denial of his PCR petition, State v. Person, No. A-2779-12 (App. Div. June 13, 2014) (slip op. at 3-9) (Person II), in which we reversed and remanded for an evidentiary hearing. We summarize the facts relevant to this appeal.

Defendant and his brother Lyle Person were charged in an indictment with robbery, assault, weapons, and conspiracy offenses. Their first jury trial resulted in a mistrial because the jury could not reach a unanimous verdict. At their second jury trial, defendant was represented by new trial counsel, whose performance is challenged in defendant's PCR petition.

The evidence during the second trial showed the charges arose out of an incident that occurred at a gas station. Maxim Samsonov worked inside the gas station's store and Sergei Minion operated the gas pumps. An individual later identified as Lyle Person entered the store and requested items that were kept in a side room. Samsonov left to retrieve the items and when he returned, Lyle Person was no longer present. Instead, a taller man armed

with a handgun and wearing a black hooded sweatshirt¹ and hat was removing money from the cash register. Samsonov said the hat was black and had "some holes where the eyes [were] supposed to be." The State subsequently alleged defendant was the man at the register.

Samsonov attempted to stop the perpetrator and Minion came to his aid. A physical struggle ensued during which Samsonov and Minion were shot. The perpetrator fled, but as a result of the physical struggle left behind his hat, sweatshirt, handgun, and sneaker. The victims never saw the perpetrator's face. Samsonov provided only a general description that the perpetrator was an African-American male with black, braided hair.

At trial, Samsonov testified, but Minion did not. Samsonov gave conflicting testimony concerning the hat recovered at the scene. He was shown a photograph of the hat, which he identified as the one worn by the perpetrator. When he was shown the hat that was admitted into evidence as the one worn by the perpetrator, Samsonov testified he did not see any eye holes in it and questioned whether it was the correct hat because it was brown and he recalled the shooter wearing a black hat.

¹ The trial witnesses described the perpetrator's outerwear as both a jacket and a sweatshirt.

Christopher Huber, a forensic scientist employed by the New Jersey State Police DNA Laboratory, had been requested to compare defendant's DNA with DNA found on the hat, sweatshirt, and sneaker.² He testified as the State's expert concerning DNA testing and analysis, and provided his opinion regarding the results of his comparison of defendant's DNA with the DNA found on the hat, sweatshirt, and sneaker.

Huber explained his methodology of DNA analysis, referred to as "source attribution," which involved comparison of thirteen sites or "loci" on a DNA chromosome from defendant's DNA with those found on the evidentiary samples. Huber explained the DNA samples from the hat, sweatshirt, and sneaker each contained a mixture of DNA from multiple sources, and therefore his conclusions were based on whether defendant's DNA was present in the mixture or could be excluded, and if present whether defendant was a major or minor contributor. Huber also provided a statistical probability as to how often any matches between defendant's DNA and the DNA obtained from the hat, sweatshirt, and sneaker would occur among African-Americans, Hispanics, and Caucasians.

On direct appeal, we summarized Huber's conclusions as follows:

² The handgun was examined without success for the presence of fingerprints.

Huber . . . opined that "[defendant was] identified as . . . the major contributor of the DNA profile found" inside the hat. The sample from the inside of the hat, which matched the control sample taken from defendant, "occurs in approximately 1 in 814 billion of the African[-]American population, 1 in 885 billion in the Caucasian population, and 1 in 3.3 trillion of the Hispanic population." In a "hypothetical world of 814 billion African-Americans," "[w]e expect to see that profile once." Additionally, defendant could not "be excluded as being a partial contributor to the mixed DNA profile found" on the outside of the hat. The number of people who could not be excluded as having contributed that profile were one in 100,000 of the African-American population, one in 68,800 of the Caucasian population, and one in 87,900 of the Hispanic population.

Huber tested the blood stains on the left and right cuff of the sweatshirt and on the sneaker, and excluded defendant from all three stains. Huber also determined that he could not exclude defendant as a contributor to the sample from the inside of the sneaker. Defendant's DNA profile was present on the collar of the sweatshirt; the specimen from the collar "occurs in approximately one in 2,100 of the African-American population, [one] in 882 of the Caucasian population and [one] in 3,850 of the Hispanic population."

[Person I, supra, slip op. at 7-8.]

Because the victims were unable to identify the perpetrator, Huber's trial testimony about the DNA provided the only evidence showing defendant participated in the crimes charged. There was no other physical evidence showing defendant was present at the crime scene.

The jury deliberated for three days. Defendant was found guilty of first-degree robbery, N.J.S.A. 2C:15-1(a)(1); two counts of third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); and conspiracy to commit second-degree robbery, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:15-1. Lyle Person was convicted of conspiracy to commit theft. On direct appeal, we affirmed defendant's convictions but vacated his sentence and remanded for resentencing. Person I, supra, slip op. at 24-26.

Defendant subsequently filed a PCR petition claiming his trial counsel was ineffective by failing to confer with a DNA expert or call a DNA expert as a witness at trial. The petition was denied without an evidentiary hearing. We reversed and remanded the matter to the PCR court for an evidentiary hearing. Person II, supra, slip op. at 12.

At the evidentiary hearing, the PCR court heard testimony from defendant, his trial counsel, Huber, and a defense forensic DNA and statistics expert, William M. Shields, Ph.D. The PCR court denied defendant's PCR petition in a written opinion, finding defendant did not prove his counsel provided ineffective assistance. The PCR court found counsel's testimony credible and that his decision not to consult with or call a DNA expert amounted

to "a carefully considered tactical decision." The PCR court also found that even if counsel's performance was deficient, defendant failed to show there was a reasonable probability that but for counsel's failure to confer with or call a DNA expert, the result of the trial would have been different.

The PCR court entered an order denying the petition. This appeal followed. On appeal, defendant makes the following argument:

POINT I

THE PCR COURT ERRED IN DENYING [DEFENDANT'S]
PETITION FOR POST-CONVICTION RELIEF.

II.

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee that a defendant in a criminal proceeding has the right to the assistance of counsel. State v. Nash, 212 N.J. 518, 541 (2013). The right to counsel includes "the right to the effective assistance of counsel." Ibid. (quoting Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 692 (1984)).

In Strickland, the Court established a two-prong test, later adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987), to determine whether a defendant has been deprived of the

effective assistance of counsel. Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; Fritz, supra, 105 N.J. at 58. Under the first prong of the Strickland standard, a petitioner must show that counsel's performance was deficient. It must be demonstrated that counsel's handling of the matter "fell below an objective standard of reasonableness" and that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, supra, 466 U.S. at 687-88, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

Under the second prong of the Strickland standard, a defendant "must show that the deficient performance prejudiced the defense." Id. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. There must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

"With respect to both prongs of the Strickland test, a defendant asserting ineffective assistance of counsel on PCR bears the burden of proving his or her right to relief 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). A failure to satisfy either prong of the Strickland standard

requires the denial of a PCR petition. Strickland, supra, 466 U.S. at 700, 104 S. Ct. at 2071, 80 L. Ed. 2d at 702; Nash, supra, 212 N.J. at 542; Fritz, supra, 105 N.J. at 52.

Where the PCR court has conducted an evidentiary hearing, "we necessarily defer to the [PCR] court's factual findings." State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014). We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005).

A.

Defendant argues the PCR court erred by concluding he failed to prove counsel's performance was deficient under the first prong of the Strickland standard. The PCR court found counsel's decision not to confer with a DNA expert prior to trial, or call a DNA expert as a witness at trial, "amount[ed] to a carefully considered tactical decision that did not amount to ineffective assistance." To be sure, counsel made a decision not to engage a DNA expert on defendant's behalf. Based on our review, however, we are satisfied the decision did not constitute an exercise of "sound trial strategy," Strickland, supra, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 695. The evidence shows counsel was uninformed about DNA evidence and as a result failed to adequately challenge the only physical evidence supporting defendant's guilt.

Where a PCR petition challenges the effectiveness of counsel, a court's "task is to fairly assess . . . trial counsel's decisions in the context of the State's case against defendant and the strengths and weaknesses of the evidence available to the defense." State v. Pierre, 223 N.J. 560, 579 (2015). The "quality of counsel's effectiveness" is based on the "totality of counsel's performance in the context of the State's . . . evidence of defendant's guilt." State v. Marshall, 123 N.J. 1, 165 (1991), cert. denied, 507 U.S. 929, 113 S. Ct. 1306, 122 L. Ed. 2d 694 (1993).

We consider counsel's decision not to consult or call a DNA expert under circumstances where proving defendant's guilt was wholly dependent on the DNA evidence. Pierre, supra, 223 N.J. at 579. The State could not prove defendant's guilt without it. The victims were unable to identify defendant as the perpetrator and the DNA evidence constituted the singular "substantive physical evidence" tying defendant to the crimes. Person I, supra, slip op. at 18. As we noted when deciding defendant's direct appeal, Huber provided uncontested testimony that the DNA found in the "hat demonstrated a virtually conclusive link between defendant and the crime scene; the [DNA found in the] sweatshirt formed a somewhat weaker, but still strong, link. The sneaker found at the

scene merely demonstrated that defendant could not be ruled out as having contributed DNA." Ibid.

"[I]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt" State v. Porter, 216 N.J. 343, 353 (2013) (quoting State v. Russo, 333 N.J. Super. 119, 139 (App. Div. 2000)). When evaluating counsel's pre-trial investigation, our inquiry is whether counsel's performance was "reasonable considering all the circumstances." State v. Savage, 120 N.J. 594, 617 (1990) (quoting Strickland, supra, 466 U.S. at 688, 104 S. Ct. at 2064, 80 L. Ed. 2d at 694). A defendant may suffer from ineffective assistance of counsel "when counsel fails to conduct an adequate pre-trial investigation." Porter, supra, 216 N.J. at 352.

"[S]trategy decisions made after [a] less than complete investigation are subject to closer scrutiny. Indeed, counsel has a duty to make 'reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" Savage, supra, 120 N.J. at 617-18 (quoting Strickland, supra, 466 U.S. at 691, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695). "A failure to do so will render the lawyer's performance deficient." Id. at 618.

Measured against these principles, the PCR court erred in finding counsel's decision not to call or consult a DNA expert and to challenge the State's DNA evidence solely through his cross-examination of the State's expert constituted a "carefully considered tactical decision that did not amount to ineffective assistance." The evidence showed counsel had no training concerning DNA evidence, never consulted a treatise or sourcebook about DNA evidence, and never consulted a DNA expert concerning the State's evidence in defendant's case. Counsel had extensive criminal trial experience, but there was no evidence he previously handled a case involving, or that was solely dependent on, DNA evidence.

Lacking training, knowledge, or experience concerning DNA evidence, counsel's investigation concerning the validity of the DNA evidence consisted of nothing more than discussions with the attorney who represented defendant during defendant's first trial and a representative from the public defender's office. Counsel testified that following those conversations, he decided not to consult or call a DNA expert, explaining:

[S]ince the previous attorney had not brought in an expert and he had told me that he thought that a cross-examination would be sufficient in this matter, and that was my conclusion and that was the public defender's conclusion that there would not be a need for our retaining an expert. And[,] as best I can

remember . . . the public defender's office or someone there . . . said to me not every case requires an expert and I said, well, I concur . . . and I said, well, I've been trying cases for awhile. [] I thought there was no need for [an expert witness] and then [defendant's prior trial counsel] said, well, [he] didn't use one and . . . kept the jury out for three days. When I tried the case I also kept the jury out for three days, and not to blow my own horn but I thought that was a remarkable performance on the other attorney's part and also on my part considering the totality of the circumstances.

Counsel testified he ultimately determined that consultation with, or use of, a DNA expert was unnecessary because he "thought that [he] could make enough hay [himself] as did the prior attorney who had a hung jury . . . [so he] emulated [defendant's prior counsel's] strategy" and "based a lot of [his] findings on how to run this trial on what had happened before."

Although the State's case against defendant was dependent upon the DNA evidence, counsel did not investigate the evidence. Counsel did not consult with any experts or learned treatises to assess the strengths or weaknesses of the evidence, the scientific validity of Huber's analysis and opinions, or whether there was any scientific or other evidential basis upon which to challenge the evidence. Counsel conferred with defendant's prior attorney and a representative from the public defender's office, but there was no showing they had any experience or expertise in DNA evidence

supporting a reasoned decision not to consult or call a DNA expert. Thus, counsel's decision rested on nothing more than his uninformed opinion that if he emulated the strategy employed by the attorney in defendant's first trial, defendant might enjoy the "success" of another mistrial.

Counsel's decision was also misinformed by his belief that if an expert concluded the DNA inculpated defendant, he would be obligated to "disclose that to the [] prosecutor." Counsel was incorrect as a matter of law. Rule 3:13-3(b)(2)(E) provides that defense counsel is obligated to turn over expert opinion reports to the State but only if the expert is called to testify at trial. State v. Mingo, 77 N.J. 576, 585 (1978). Thus, counsel's decision not to confer with a DNA expert was based on a "fundamental[] lack of knowledge which disabled counsel from making a tactical choice." State v. Bryant, 237 N.J. Super. 102, 107 (App. Div. 1988), rev'd on other grounds, 117 N.J. 495 (1989).

If counsel had not erroneously assumed he was required to provide the State with any information from a DNA expert who was adverse to defendant, he may have recognized, as we do here, that there was no reasoned tactical or strategic basis not to, at a minimum, confer with a DNA expert prior to trial. Defendant had a constitutional right to the assistance of an expert in support of his defense, State v. DiFrisco, 174 N.J. 195, 243-44 (2002), and

counsel could have consulted a DNA expert without any detriment to defendant. Under such circumstances, there was no valid strategy employed and no tactic supporting counsel's decision not to consult or call a DNA expert.

We are required to apply "a heavy measure of deference to counsel's judgments," but must assess the reasonableness of counsel's decision for "reasonableness in all the circumstances." Strickland, supra, 466 U.S. at 691, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695. "Strategic choices made after less than a complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation." Ibid.

Counsel's failure to conduct any investigation concerning the DNA evidence and his erroneous assumption he would be required to turn over to the State any adverse information provided by a DNA expert, "rob[bed counsel's purported] strategic choice of any presumption of competence." State v. Davis, 116 N.J. 341, 357 (1989). Because the DNA evidence was critical to the State's case, counsel's decision was not carefully considered, was necessarily uninformed by counsel's lack of knowledge and training, did not constitute a reasoned tactical decision supported by the requisite

investigation, and was constitutionally deficient.³ Savage, supra, 120 N.J. at 617-18; see also Pierre, supra, 223 N.J. at 583 (finding the performance of an attorney, who chose to forego evidence that could have reinforced the defendant's alibi defense, was constitutionally deficient). We are therefore convinced the court erred in finding defendant failed to establish counsel's performance was deficient under the first prong of the Strickland standard. Strickland, supra, 466 U.S. at 687-88, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

B.

We next consider defendant's argument the PCR court erred by finding he failed to prove he suffered prejudice as a result of counsel's error under the second prong of the Strickland standard. Id. at 693-94, 104 S. Ct. at 2068, 80 L. Ed. 2d at 697. The court found Shields's "technical and scientific" testimony challenged the validity and strength of the State's DNA evidence, but nevertheless concluded defendant failed to prove there was a

³ Our holding is limited to the facts presented here. We do not suggest that an attorney is required to consult or call a DNA expert whenever DNA evidence may be introduced at trial. We are convinced counsel's failure to consult or call a DNA expert here constituted deficient performance because proof of defendant's guilt rested solely on the DNA evidence, and counsel had no knowledge of or experience with DNA evidence prior to the trial, did not educate himself concerning DNA evidence prior to trial, and his cross-examination of the State's DNA expert did not sufficiently challenge the DNA evidence.

reasonable probability that had counsel consulted a DNA expert or called one at trial, the result of the trial would have been different. We disagree.

To establish prejudice under the second prong of the Strickland standard, defendant was required to demonstrate counsel's errors were "so serious as to undermine the court's confidence in the jury's verdict or result reached," State v. Chew, 179 N.J. 186, 204 (2007), or "deprive[d] . . . defendant of a fair trial, a trial whose result is reliable." Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. The strength or weakness of the evidence showing a defendant's guilt is an essential consideration in the determination of whether a defendant suffered prejudice from his counsel's errors. "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 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

Again, proof of defendant's guilt was based on the DNA evidence. At trial, it was Huber's testimony alone that supported the State's argument that the cumulative strength of the DNA evidence found on the hat, sweatshirt, and sneaker worn by the perpetrator established defendant was guilty beyond a reasonable doubt.

Counsel's cross-examination of Huber showed it was not possible to determine when the DNA found on each of the clothing items was left on them. Counsel also showed Huber was not asked to test hairs found in the hat. Counsel further established that although there were multiple sources of the DNA found in the hat, Huber was never asked to compare it to the DNA of the victims or defendant's two brothers, one of whom was his codefendant.

Counsel's cross-examination focused on the tests Huber did not perform and the DNA comparisons he did not make. The fatal flaw in counsel's cross-examination, however, was in his failure to challenge the comparisons Huber made that supported his testimony about defendant's DNA on the hat, sweatshirt, and sneaker. The PCR court correctly observed counsel "did not get into the scientific strength of the DNA analysis done by" Huber, but failed to appreciate that counsel's failure deprived defendant of a fair trial whose result is reliable. Id. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

As we found on defendant's direct appeal, Huber's testimony about the DNA found in the hat "demonstrated a virtually conclusive link between defendant and the crime scene." Person I, supra, slip op. at 18. This was the State's strongest evidence defendant was present at the crime scene. Huber testified the DNA found inside the hat would be found in only one in 814 billion African-American

men,⁴ thereby establishing a near certainty the DNA was defendant's. Counsel's cross-examination, however, did not address or challenge Huber's analysis of the DNA found in the hat or testimony about the probability the DNA was defendant's.

Shields, who was qualified without objection as an expert in forensic DNA and statistics, testified at the evidentiary hearing that the source attribution methodology employed by Huber did not permit an identification of defendant as the source of the DNA inside the hat to a reasonable degree of scientific certainty. Shields also disagreed with Huber's conclusion that defendant's DNA matched nine of the thirteen loci examined on the DNA from inside the hat, stating it is "scientifically invalid" to identify defendant as the source of the DNA because there was a mixture of DNA and because defendant's brothers were not tested. Thus, Shields directly challenged the scientific basis upon which Huber's DNA findings depended.

If Shields testified at defendant's trial, or if counsel elicited admissions from Huber consistent with Shields's testimony, the jury would have had an evidential basis to reject

⁴ Huber also testified about the statistical probabilities the DNA would be found in Caucasian and Hispanic males. We discuss only his testimony concerning the probabilities amongst African-American males because Samsonov said the perpetrator was African-American.

Huber's conclusion that defendant's DNA was found inside of the hat. Counsel, however, did not introduce any evidence challenging Huber's methodology and his cross-examination of Huber did not address it.

Huber's trial testimony that the profile of the DNA from the inside of the hat would be found in only one of 814 billion African-American men was compelling; it was uncontradicted, unchallenged, and established to a near certainty that the DNA found inside the hat was defendant's. However, Shields testified and Huber admitted at the evidentiary hearing that Huber's trial testimony failed to address the likelihood that full siblings might share the profile of the DNA found inside the hat. Shields described the probability that defendant would share the DNA profile with one of his brothers as "monstrously" different than the probability, about which Huber testified at trial, that defendant would share it with African-American males generally. Shields agreed the DNA profile would only be found in one of 814 billion African-Americans, but explained it would be shared by one in 1076 of defendant's full male siblings, including his two brothers.⁵

⁵ Huber also testified at trial the DNA found on the outside of the hat would be found in one in 100,000 African-American males and the DNA found on the collar of the sweatshirt would be found

The PCR court noted that during counsel's cross-examination, Huber admitted he did not compare the DNA found on the hat with DNA from defendant's brothers. The admissions, however, did nothing to undermine Huber's testimony the DNA from the inside of the hat was defendant's. Without testimony or evidence there was a one in 1076 probability that the DNA profile might have been shared by defendant and one of his male siblings, the jury was left only with Huber's testimony that the DNA profile found in the hat occurred in only one in 814 billion African-American males, including defendant's brothers. The jurors were therefore deprived of evidence distinguishing between the infinitesimal probability the DNA profile would occur among all African-American males including defendant's brothers, and the substantially greater probability the DNA would match occur in one of defendant's brothers.⁶

in 1 in 2,100 African-American males. Shields was not asked to address those probabilities during the PCR hearing, but it can be logically inferred from his testimony that the probabilities the DNA found on the outside of the hat and sweatshirt collar would be substantially reduced if they were limited to the likelihood the DNA profile might be present in defendant's brothers.

⁶ We recognize that a probability of one in 1076 is statistically significant and might not by itself create a reasonable doubt about the source of the DNA from inside the hat or defendant's guilt. It is, however, a probability enormously different than the one about which Huber testified at trial. In addition, the probability the DNA may have been shared by defendant's siblings

We are satisfied such evidence, which counsel's cross-examination did not elicit and which he failed to otherwise introduce, was significant. Most importantly, it would have challenged the scientific validity of Huber's methodology and therefore all of his findings and conclusions. The evidence would have also reduced the probability the DNA in the hat was defendant's from a certainty to something substantially less, and provided scientific support for the argument that the DNA may have been from defendant's brother Lyle who was positively identified as having been at the crime scene. Moreover, an adequate challenge to the State's DNA evidence from the hat would have reduced the cumulative effect of the State's remaining, and weaker, DNA evidence from the sweatshirt and sneaker.

Shields's testimony also challenged the scientific reliability of the DNA found on the collar of the perpetrator's sweatshirt. Huber testified at trial that the DNA profile obtained from the collar was a "weak mixture" of DNA but that because there were three loci that matched defendant's DNA, defendant could not be excluded as a contributor.

was of particular relevance because Samsonov's testimony suggested the hat in which the DNA was found was not the hat worn by the perpetrator, and defendant's brother Lyle was positively identified as being present at the crime scene.

During the PCR hearing, Shields challenged Huber's characterization of the DNA as a weak mixture, stating that the DNA was a "weak sample" with degraded or low levels of DNA that rendered any conclusion based on the sample unreliable and inconclusive. Shields also challenged Huber's reliance on his finding that three loci on the sample matched defendant's DNA. Shields opined that three matching loci "did not say anything about the identity of the individual who left the DNA" and that Huber's contrary conclusion was "scientifically invalid and mistaken at best."

As the PCR court observed, Shields also "took issue with [] Huber's conclusion that [defendant] could not be excluded from the sample from the sneaker that was recovered at the crime scene." Shields testified that there was an inconsistency in Huber's conclusion concerning the DNA from inside of the sneaker because it "depend[ed] on an assumption that things that can't be said to be there could be there." Shields pointed out that Huber excluded defendant as a possible contributor to the DNA in blood stains found on the sweatshirt because alleles matching defendant's were not found, but reached the opposite conclusion regarding the sample from inside of the sneaker. Counsel's cross-examination at trial did not reveal the inconsistency in Huber's findings.


We are satisfied the PCR court erred by finding defendant failed to prove prejudice under the second prong of the Strickland standard. Shields's testimony demonstrates there were numerous substantive bases upon which Huber's methodology, opinions, and credibility concerning the DNA found on each of the three items of clothing could have been contested at trial. The PCR court did not find Shields's testimony was not credible or reject his testimony on any other basis. Indeed, the court recognized that Shields challenged the scientific validity of Huber's trial testimony, but found no prejudice because counsel "address[ed] other weaknesses regarding the DNA evidence."

Because the only physical evidence tying defendant to the commission of the crimes was the DNA, it was critical that counsel contest the scientific validity of Huber's findings and conclusions. If counsel had called a DNA expert such as Shields at trial, the jury would have had evidence upon which it could have reasonably rejected all or some of Huber's findings. Alternatively, if counsel had conferred with a DNA expert prior to trial, he may have crafted his cross-examination to establish the facts about which a defense DNA expert would have otherwise testified. In any event, counsel was not sufficiently educated concerning DNA evidence to contest Huber's testimony on the issues identified by Shields.

The evidence developed during the evidentiary hearing established a reasonable probability that but for counsel's error in failing to consult or call a DNA expert, the result of the trial would have been different. Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. Defendant was not required to establish that it is more likely than not that the outcome of his trial would have been altered. Id. at 693, 104 S. Ct. at 2068, 80 L. Ed. 2d at 697. Defendant was only required to prove counsel's performance was so deficient and prejudicial as to undermine confidence in the outcome. Id. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. For the reasons noted, the PCR court erred by finding defendant failed to sustain his burden.

Reversed. Defendant's convictions are vacated and the matter is remanded for further proceedings consistent with this opinion. 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