SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3590-14T4

STATE OF NEW JERSEY

Plaintiff-Respondent,

v.

FREDERICK DALTON,

Defendant-Appellant.

Submitted January 18, 2017 – Decided February 14, 2017

Before Judges Yannotti and Fasciale.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 02-01-0123.

Joseph E. Krakora, Public Defender, attorney for appellant (Steven M. Gilson, Designated Counsel, on the brief).

Joseph D. Coronato, Ocean County Prosecutor, attorney for respondent (Samuel Marzarella, Chief Appellate Attorney, of counsel; Nicholas Norcia, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Frederick Dalton appeals from an order entered by the Law Division on December 22, 2014, which denied his petition for post-conviction relief (PCR). We affirm.

I.

In January 2002, defendant was charged under Ocean County Indictment No. 02-01-0123 with first-degree murder, contrary to N.J.S.A. 2C:11-3(a); and third-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4(d). In May 2003, defendant was tried before a jury. At the trial, the State presented evidence that defendant was a married man, who had engaged in a three-year romantic relationship with Jennifer Pammer. The affair apparently was tumultuous. Defendant and Pammer fought and she called defendant's house at all hours of the day and night. Defendant's spouse learned of the affair, and the women confronted each other on several occasions.

On December 5, 2000, defendant went to the police station to make a report. An officer testified that defendant said that around 10:00 p.m. on December 4, 2000, he had arrived at a convenience store. Pammer pulled up alongside of him and began to argue. Defendant denied that he and Pammer were having a romantic relationship. He claimed Pammer was a stalker who had been harassing his family for years.

Defendant told the officer that Pammer had threatened to kill him and his family. He claimed Pammer had pulled a knife on him, but he managed to disarm her. According to defendant, Pammer grabbed for a knife that he usually kept in his waistband. Defendant gave the police a knife he said he took from Pammer. He told the officer he had just received a call from Pammer, and she had threatened suicide. The following day, defendant told the police he had received calls from Pammer's cellphone throughout the day.

The police questioned defendant's wife. Initially, she denied that defendant and Pammer were having a romantic relationship, and she showed the police a file she had compiled to document Pammer's harassment of the family. She also told the police that defendant left the house the previous evening, shortly after 9:30 p.m., to play cards with his friends. She said he returned home about 11:30 p.m.

Defendant's wife later changed her story, allegedly after the police confronted her with evidence that defendant and Pammer had been having an affair. She then told the police that defendant returned home at 1:00 a.m. on December 5, 2000. He was very upset, and he told her that he killed Pammer.

In May 2001, two people found Pammer's decomposed body near Bamber Lake. A knife was found under the body, and a French fry

was found near where the stomach would be located. Dr. Lyla Perez, a medical examiner, testified that Pammer died about three hours after she had eaten. Defendant's friend testified that on December 4, 2000, she and Pammer went to a diner for dinner, and Pammer ate a grilled cheese sandwich and French fries. They left the diner at around 10:40 p.m.

Dr. Perez identified six stab wounds on the body: two wounds to the legs, two to the chest, and two to the sides. A pathologist who testified for the defense said the cause of death could not be definitively determined due to the body's decomposition. The defense pathologist found no evidence of stab wounds on the body, but agreed Pammer's death was a homicide.

Forensic evidence included DNA analysis of a blood spot from the trunk of defendant's car, which indicated that there was a one in 7.9 billion chance that the blood was the blood of someone other than Pammer. The knife found under the body matched the description of the knife that defendant said Pammer had taken from him.

In addition, the State presented testimony from three inmates who had been incarcerated with defendant in the county jail. One inmate testified that defendant told him he killed Pammer and threw her belongings in Bamber Lake. Another inmate said defendant told him that he killed Pammer. The third inmate testified that

defendant said he and Pammer had gotten into an argument and he stabbed her. Defendant told the inmate he would try to implicate his wife in the murder.

In his defense, defendant presented testimony from three family members who stated that defendant's wife knew of the affair. They testified that defendant's wife had threatened to kill Pammer.

The jury found defendant guilty of murder and possession of a weapon for an unlawful purpose. Thereafter, the trial court denied defendant's motion for a new trial. The court merged the offenses, sentenced defendant to life imprisonment, with a thirty-year period of parole ineligibility, and imposed appropriate fines and penalties.

Defendant appealed from the judgment of conviction dated June 27, 2003. He raised the following arguments:

> POINT I
> THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE AS THERE WERE NO EXIGENT CIRCUMSTANCES JUSTIFYING THE WARRANTLESS SEIZURE OF DEFENDANT'S CAR.
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> POINT II
> THE TRIAL JUDGE'S FAILURE TO CHARGE THE JURY THAT A CONTINUING COURSE OF ILL TREATMENT COULD BE USED IN DETERMINING WHETHER THE DEFENDANT WAS GUILTY OF PASSION/PROVOCATION MANSLAUGHTER WAS ERROR AND DEPRIVED DEFENDANT OF HIS RIGHT TO A FAIR TRIAL. (Not Raised Below).
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> POINT III
> THE DEFENDANT'S SENTENCE IS EXCESSIVE.

We rejected these arguments and affirmed defendant's convictions and sentence. State v. Dalton, No. A-0457-03 (App. Div. June 13, 2005). The Supreme Court later denied defendant's petition for certification. State v. Dalton, 185 N.J. 267 (2005).

While defendant's direct appeal was pending, he filed a motion in the trial court pursuant to N.J.S.A. 2A:84A-32(a) to have DNA tests performed on various items seized during the course of the investigation of Pammer's death. The trial court denied the motion, because defendant had not satisfied the requirements for DNA testing in N.J.S.A. 2A:84A-32(a).

Defendant appealed and we affirmed the trial court's order, without prejudice to the renewal of the motion if defendant can satisfy the statutory requirements for DNA testing. State v. Dalton, No. A-0286-05 (Jan. 11, 2007) (slip op. at 16). The Supreme Court thereafter denied defendant's petition for certification. State v. Dalton, 190 N.J. 392 (2007).

In January 2006, defendant filed a pro se petition for PCR in the trial court.[1] Defendant claimed he did not have the effective assistance of trial and appellate counsel. The court

[1] Defendant had filed a PCR petition in November 2005, but the petition was dismissed without prejudice on the ground that it was non-judiciable at that time. Proceedings on the petition filed in 2006 were stayed while defendant pursued his application for DNA testing.

appointed counsel to represent defendant, and defendant filed a lengthy certification in support of his petition.

On September 16, 2014, the PCR court heard oral argument on the petition, and on December 10, 2014, the court placed an oral decision on the record. The court found that defendant's claims were barred by Rule 3:22-4(a) because they could have been raised in defendant's direct appeal.

The court also found that even if defendant's claims were not procedurally barred, PCR must be denied because defendant failed to present a prima facie case of ineffective assistance of counsel. The court memorialized its decision in an order dated December 22, 2014. This appeal followed.

On appeal, defendant argues:

> POINT I
> DEFENDANT'S PCR PETITION SHOULD NOT HAVE BEEN PROCEDURALLY BARRED.
>
> POINT II
> THE MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF TRIAL COUNSEL'S INEFFECTIVENESS.
>
> A. Trial Counsel Failed To Object to Other-Crime/Bad-Act Evidence And/Or Failed To Request A Limiting Instruction As To Them.
>
> B. Trial Counsel Was Pervasively Unprepared For Trial, Which Included His Inadequate Investigation, Inadequate Consultation With Defendant And His Failing To Obtain Full Discovery.

II.

As noted, defendant argues that the order denying PCR should be reversed and the matter remanded to the PCR court for an evidentiary hearing because he allegedly established a prima facie case of ineffective assistance of counsel.

A hearing on a PCR petition is only required when a defendant establishes "a prima facie case in support of [PCR]," the court determines that there are disputed issues of material fact "that cannot be resolved by reference to the existing record," and the court finds that "an evidentiary hearing is necessary to resolve the claims for relief." R. 3:22-10(b). See also State v. Porter, 216 N.J. 343, 355 (2013) (noting that under Rule 3:22-10(b), an evidentiary hearing on a PCR petition is only required when a defendant presents a prima facie case for relief).

Here, defendant raised a claim of ineffective assistance of counsel. To prevail on such a claim, a defendant must meet the test established by Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987).

The first prong of the Strickland test requires a defendant to show that his attorney's performance was deficient. Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. To do so, a defendant must establish that counsel's alleged acts

or omissions "were outside the wide range of professionally competent assistance." Id. at 690, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695. This requires a showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

To satisfy the second prong of Strickland, the defendant "must show that the deficient performance prejudiced the defense." Ibid. The defendant must establish "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.

In this case, defendant asserts that his trial attorney erred by failing to object to testimony from his ex-wife that she divorced defendant because he was "cruel." He also claims that his attorney erred by failing to object to testimony from one of the State's detectives, who said he had compared fingerprints found during the investigation with a database that includes fingerprints of persons convicted of a crime.

According to defendant, the detective's testimony suggested that he had a prior criminal record. Defendant does, in fact, have a prior criminal conviction. Defendant also argues that even if the testimony of his former wife and the detective was admissible,

his attorney should have asked the court for a limiting instruction regarding its use by the jury.

N.J.R.E. 404(b) provides that

> [E]vidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

We note that the testimony of defendant's former wife was merely an explanation for the reason she divorced defendant. She said he was cruel, indicating that he had been cruel to her. She did not testify that he had a general disposition for cruelty.

Moreover, the detective's testimony indicated that the fingerprints found during the investigation had been checked against a database, which included fingerprints of police officers, attorneys, and anyone convicted of a crime. The detective stated that the fingerprints were not defendant's fingerprints and they did not come "from any criminals." The detective did not state that defendant had been convicted of any particular offense.

Even if defendant's attorney erred by failing to object to the testimony or request a limiting instruction regarding its use, defendant has not shown that he was prejudiced by the error.

Defendant's claim regarding this evidence had to be considered in light of the substantial evidence of defendant's guilt presented at trial. In denying defendant's motion for a new trial, the trial judge had observed that he had "never seen . . . such overwhelming evidence of guilt" as that presented in this case. As noted previously, the evidence included testimony by defendant's former wife and three inmates in the county jail who all testified that defendant admitted he killed Pammer.

In light of that evidence, it is highly unlikely that the jury placed significant weight upon the testimony that defendant had been cruel to his former wife or the brief reference to the fingerprint database. Therefore, the record supports the PCR court's finding that defense counsel's failure to object to the testimony or seek a limiting instruction did not constitute ineffective assistance of counsel under the Strickland test.

Defendant also claims his attorney was "pervasively unprepared" for trial. He asserts that his attorney only met with him briefly a couple of times. He claims that, in these brief visits, his attorney could not have reviewed all of the evidence with him. He further alleges that counsel failed to investigate the case adequately, did not obtain discovery, appeared one day in court without evidence, and failed to make proper objections.

Defendant asserts that the cumulative effect of these errors satisfies both prongs of the Strickland test.

Where, as in this case, a defendant alleges that his attorney failed to investigate his case, he "must do more than make bald assertions." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999). The defendant must "assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." Ibid. Here, defendant provided no affidavits or certifications setting forth the material facts that an investigation would have revealed.

Furthermore, the record does not support defendant's claim that his attorney failed to obtain discovery. In his certification, defendant states that the State did not provide certain exhibits to the defense until they were introduced at trial, and his attorney failed to object to the alleged late disclosure of this evidence. Defendant did not, however, submit an affidavit or certification from his trial attorney supporting this allegation.

Defendant also asserts that the State's expert witness David Stern produced two reports concerning certain telephone calls. He claims that Stern's second report, which included a list of forty-five phone calls, was unknown to him and his attorney "prior to

or during trial." The trial transcript indicates, however, that defendant's counsel cross-examined Stern about the forty-five calls. Counsel never indicated that he had not been previously provided with a report identifying the calls.

Thus, the record does not support defendant's claim that he and his attorney did not receive Stern's second report with the forty-five calls prior to trial. In addition, defendant does not challenge the accuracy of any of the information about the calls that Stern discussed in his testimony. Even if counsel did not receive Stern's second report prior to trial, there is no indication that counsel was hampered in his ability to cross-examine Stern about the forty-five calls.

We therefore conclude that the PCR court correctly determined that an evidentiary hearing was not required on defendant's PCR petition. The existing record was sufficient to resolve defendant's claims, and the court correctly found that defendant had not established a prima facie case of ineffective assistance of counsel.

Affirmed.