

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3648-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ERIC WHITE, a/k/a BUS DRIVER,

Defendant-Appellant.

Submitted October 23, 2017 – Decided November 2, 2017

Before Judges Sabatino and Whipple.

On appeal from Superior Court of New Jersey,
Law Division, Cumberland County, Indictment
No. 06-03-0291.

Joseph E. Krakora, Public Defender, attorney
for appellant (David A. Snyder, Designated
Counsel, on the brief).

Jennifer Webb-McRae, Cumberland County
Prosecutor, attorney for respondent (Stephen
C. Sayer, Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant Eric White, who was convicted in 2011 of murder and
the unlawful possession of a weapon, appeals the trial court's

denial of his petition for post-conviction relief ("PCR"). We affirm.

The State's proofs are discussed at length in this court's 2014 opinion affirming defendant's conviction and sentence. We incorporate that recitation here. State v. White, No. A-1988-11 (App. Div. Dec. 18, 2014), certif. denied, 221 N.J. 287 (2015). The homicide victim was defendant's fifty-four-year-old girlfriend. She was in the apartment when defendant, who was seventy-three years old at the time, slashed her throat. Defendant called 9-1-1 to report the situation. He was difficult to understand on the phone, apparently due to his foreign accent. Police responded to the location and discovered defendant there, looking dazed and soiled with urine. He gave an incriminating statement to the police at the station after receiving Miranda¹ warnings.

The trial court sentenced defendant on the murder to a forty-year custodial term with an eighty-five percent parole ineligibility period pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2. The weapons offense was merged for sentencing purposes.

On direct appeal, defendant's main argument was that he was deprived of his right to a speedy trial. We rejected that argument

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

because we agreed with the trial court that the delay in proceeding with the trial was substantially the result of defense motions or joint motions by the defense and the prosecutor. Id. at 24-26. We also found defendant's other arguments on appeal lacked merit. Id. at 3.

After the Supreme Court denied certification, defendant filed the present PCR petition with the trial court. Defendant contends that the two attorneys who represented him at trial were constitutionally ineffective in two respects. First, defendant faults his trial counsel for not arguing that he lacked the physical capability as an elderly man to have committed the murder of the younger victim. Second, he contends that his trial counsel, in attempting to impeach his confession, should have emphasized more vigorously his language barriers and his weakened condition.

Upon considering defendant's written submissions, the State's opposition, and oral argument, Judge Robert G. Malestein² denied the PCR petition. The judge set forth his reasons for doing so in a detailed written opinion dated February 24, 2016. The judge discerned no deprivation of defendant's constitutional right to the effective assistance of his trial counsel. To the contrary, the judge determined from the record that trial counsel had

² A different judge had presided over the trial.

"zealously and effectively" represented defendant, including their efforts to impeach the State's witnesses, highlight defendant's difficulties in communicating, and point out shortcomings in the police's investigation. The judge also noted trial counsel had used these and other points in closing arguments to the jury. The judge found without legal merit defendant's claim that his attorneys had not sufficiently emphasized these points, deeming the choice of what weight to place upon arguments raised at trial to be a "strategic decision for trial counsel." The judge found no need for an evidentiary hearing.

In his present appeal, defendant raises the following argument in his brief:

POINT ONE

THE DEFENDANT MET HIS BURDEN BY A PREPONDERANCE OF THE EVIDENCE AND ESTABLISHED A PRIMA FACIE CASE OF INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE STRICKLAND/FRITZ STANDARD. THE PCR COURT COMMITTED ERROR BY DENYING THE PCR PETITION WITHOUT GRANTING AN EVIDENTIARY HEARING.

Having duly considered this argument, we affirm the rejection of defendant's PCR petition substantially for the reasons expressed in Judge Malestein's soundly-reasoned written opinion. We add only a few comments.

Judge Malestein's analysis adhered to several well-established legal principles respecting a criminal defendant's

constitutional right to the effective assistance of counsel. To establish a deprivation of that right, a convicted defendant must demonstrate that: (1) counsel's performance was deficient, and (2) the deficient performance actually prejudiced the accused's defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); see also State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the Strickland two-part test in New Jersey).

When reviewing such claims of ineffectiveness, courts apply a strong presumption that defense counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695. "[C]omplaints 'merely of matters of trial strategy' will not serve to ground a constitutional claim of inadequacy[.]" Fritz, supra, 105 N.J. at 54 (quoting State v. Williams, 39 N.J. 471, 489, cert. denied, 374 U.S. 855, 83 S. Ct. 1924, 10 L. Ed. 2d 1075 (1963), overruled in part on other grounds by State v. Czachor, 82 N.J. 392, 402 (1980)); see also State v. Echols, 199 N.J. 344, 357-59 (2009).

"The quality of counsel's performance cannot be fairly assessed by focusing on a handful of issues while ignoring the totality of counsel's performance in the context of the State's evidence of defendant's guilt." State v. Castagna, 187 N.J. 293,

314 (2006) (citing 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)). "As a general rule, strategic miscalculations or trial mistakes are insufficient to warrant reversal 'except in those rare instances where they are of such magnitude as to thwart the fundamental guarantee of [a] fair trial.'" Id. at 314-15 (quoting State v. Buonadonna, 122 N.J. 22, 42 (1991)). "'[A]n otherwise valid conviction will not be overturned merely because the defendant is dissatisfied with his or her counsel's exercise of judgment during the trial.'" State v. Allegro, 193 N.J. 352, 367 (2008) (quoting Castagna, supra, 187 N.J. at 314).

The record here substantiates Judge Malestein's assessment that defendant's trial counsel advocated his interests at trial professionally and zealously, and that he was not prejudiced by any alleged defective performance. At multiple points before trial in extensive motion practice and at the trial itself, trial counsel pursued a contention that defendant had mental health and communication deficits. They also asserted that, as an elderly man with health problems, he was not likely to have overcome and killed the younger female victim. At trial, counsel combined those arguments with repeated attacks on the alleged insufficiency of the State's investigation, engaging in vigorous cross-examination of many of the State's witnesses.

During summation to the jury, trial counsel appropriately underscored these points, as illustrated by the following excerpts:

Eric's clearly confused. You hear on the 911 tape, he cannot remember his own house number. It even sounds like -- when you listen to the tape, see if it sounds like there's someone in the background, telling him his actual number of his house. He mixes his 'me' and 'him' and 'I' and who; he's very difficult to understand a whole sentence from Eric. The operator is constantly, during that phone call, trying to make sense out of what Eric is saying.

(Emphasis added).

. . . .

What we do know is that many people have been exonerated through DNA testing after falsely confessing something. So, we know it happens. We don't understand why it happens that people would falsely say they did something, but we know that it happens. And, that's when the people concerned are speaking the same language. God forbid you or I should go to another country and be trying to explain what we found at a murder scene in a country where we only speak a very poor version of the language. Maybe we'd have to resort to actions such as (indicating) to describe what we think, in order to explain what we've woken up to find.

(Emphasis added).

Contrary to defendant's PCR claim, trial counsel expressly suggested to the jury that a younger, stronger man would have been more likely to be able to commit the killing, arguing:

And, we can see that Eric could not have got behind her and cut her throat. But, this could have been the result of an attack by someone younger, stronger, or maybe more than one person.

(Emphasis added).

Defendant essentially asserts in his PCR petition that his trial counsel should have pressed the "confusion" and "weakness" arguments with more vehemence. As Judge Malestein correctly determined, these criticisms fall squarely within counsel's zone of discretion over trial strategy, as recognized in the case law. See, e.g., Allegro, supra, 193 N.J. at 367.

There was no need for an evidentiary hearing to be conducted here to confirm what is plainly obvious from the trial record: that defendant received the effective assistance of his trial attorneys. State v. Preciose, 129 N.J. 451, 462 (1992) (establishing that an evidentiary hearing on a PCR application is not necessary where the petition and the record fail to present a prima facie case of a constitutional deprivation).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION