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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3982-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

THOMAS NEVIUS,

Defendant-Appellant.

Submitted January 10, 2017 – Decided February 14, 2017

Before Judges Fasciale and Gilson.

On appeal from Superior Court of New Jersey,
Law Division, Cumberland County, Indictment
No. 04-10-0985.

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

Jennifer Webb-McRae, Cumberland County
Prosecutor, attorney for respondent (David M.
Galemba, Assistant Prosecutor, of counsel and
on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Thomas Nevius appeals from a February 2, 2015 order
denying his petition for post-conviction relief (PCR) without an

evidentiary hearing. He also appeals from a March 10, 2015 order denying his motion for reconsideration. We affirm both orders essentially for the reasons explained by Judge Robert G. Malestein in the written opinions he issued on February 2, 2015, and March 10, 2015.

I.

In February 2008, a jury convicted defendant of first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2); felony murder, N.J.S.A. 2C:11-3(a)(3); second-degree burglary, N.J.S.A. 2C:18-2; and third-degree conspiracy to commit burglary, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:18-2. In April 2008, defendant was sentenced to an aggregate of sixty-five years in prison, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

Defendant filed a direct appeal and, in 2012, we affirmed defendant's conviction and sentence. At that time, we issued a comprehensive fifty-four-page opinion detailing the reasons for that affirmance. State v. Nevius, 426 N.J. Super. 379 (App. Div. 2012). Defendant's petition for certification to the New Jersey Supreme Court was denied. State v. Nevius, 213 N.J. 568 (2013).

Defendant's convictions arose out of the death of R.W. in 2002. The facts of the case were established at trial and detailed in the opinion that we issued in 2012. We will only summarize some of the more relevant facts here.

On July 30, 2002, R.W. was found dead in her one-bedroom apartment in Vineland. An autopsy report concluded that she had been stabbed and strangled. Following an investigation, co-defendant William Boston and defendant were charged with R.W.'s murder. Boston lived next door and defendant had been visiting with Boston on the day of the murder.

Evidence at trial linked defendant to the murder both through the testimony of a witness and forensic evidence. A witness testified that he saw defendant and Boston attempt to break into the victim's apartment on the evening of the murder. An expert for the State testified that a palm print recovered from the nightstand in the victim's bedroom matched a print provided by defendant. The police also found a bloodstained white t-shirt, size XXXL, on the bed near the victim's body.

A forensic expert for the State testified that defendant's DNA matched certain parts of the DNA found on the t-shirt and, thus, he could not exclude defendant as the contributor of the DNA material. That expert went on to testify that the DNA found could be expected to be found in one of 480 million African-Americans, one of 786 million Caucasians, and one of 1.46 billion Hispanics. Following defendant's arrest, the police also found an XXXL t-shirt in defendant's home that was similar to the size and type

of t-shirt found at the murder scene. Based on this and other evidence, the jury convicted defendant of the murder and burglary.

In March 2013, defendant filed a petition for PCR and he was assigned counsel. The Law Division heard oral argument in January 2015. On February 2, 2015, the Law Division denied the petition without an evidentiary hearing and issued a twenty-five-page written opinion explaining the reasons for the denial.

On February 23, 2015, defendant filed a motion for reconsideration. The Law Division denied that motion in an order supported by a written opinion issued on March 10, 2015. Defendant now appeals the denial of his petition for PCR.

II.

On this appeal, counsel for defendant makes the following two arguments:

POINT I – THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF COUNSEL'S INEFFECTIVENESS FOR INADEQUATE INVESTIGATION

POINT II – THIS MATTER MUST BE REMANDED FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CLAIMS NOT ADDRESSED BY THE PCR COURT. (Not Raised Below)

Defendant has also filed a brief that he prepared wherein he raises an additional five arguments:

POINT I – THE PCR COURT ERRED WHEN IT DENIED DEFENDANT OUTRIGHT RELIEF OR AN EVIDENTIARY HEARING, BECAUSE THE PCR COURT'S DETERMINATION

OF FACTS ARE CLEARLY MISTAKEN AND SO WILDLY OFF THE RECORD THAT THE INTEREST OF JUSTICE DEMANDS INTERVENTION AND CORRECTION

POINT II — THE PCR COURT ERRED WHEN IT SUBSTITUTED ITS OWN FACTUAL FINDINGS FOR THOSE OF THE TRIAL RECORD, PARTICULARLY BASED ON THE AVAILABILITY OF A COMPLETE TRIAL TRANSCRIPT, WHEN IT DENIED THE DEFENDANT'S BRADY VIOLATION ISSUES, BECAUSE OF THE EGREGIOUS PROSECUTORIAL MISCONDUCT CLAIMS RAISED BY DEFENDANT, THE PCR COURT'S FACT FINDING AND DECISION MUST BE REVERSED BECAUSE THE DEFENDANT MADE A PRIMA FACIE SHOWING OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

POINT III — THE PCR COURT ERRED WHEN IT SUBSTITUTED ITS OWN FACTUAL FINDING FOR THOSE OF THE TRIAL RECORD PARTICULARLY BASED ON THE AVAILABILITY OF A COMPLETE TRIAL TRANSCRIPT, WHEN IT DENIED THE DEFENDANT'S PERJURED TESTIMONY/FALSE EVIDENCE CLAIMS. BECAUSE OF THE EGREGIOUS PROSECUTORIAL MISCONDUCT CLAIMS RAISED BY THE DEFENDANT, THE PCR COURT'S FACT FINDING AND CONCLUSION CANNOT BE AFFORDED 'NO SPECIAL DEFERENCE' AND THEREFORE MUST BE REVERSED, BECAUSE THE DEFENDANT MADE A PRIMA FACIE SHOWING OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

POINT IV — THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS VIOLATED BY THE STATE'S USE OF HEARSAY TESTIMONY ABOUT HOW (A.F.I.S.), THE AUTOMATIVE FINGERPRINT IDENTIFICATION SYSTEM CLASSIFIED THE PRINTS COLLECTED FROM THE CRIME SCENE

A. THE DEFENDANT'S RIGHT TO CONFRONTATION WAS VIOLATED BY OFFICER DAVID VAI'S TESTIMONY THAT (A.F.I.S.) CONCLUDED THAT THE PRINTS COLLECTED FROM THE CRIME SCENE WERE CLASSIFIED AS "NOT SUFFICIENT"

B. THE PROSECUTION VIOLATED MELENDEZ-DIAZ V. MASSACHUSETTS BY PRESENTING TESTIMONY FROM

(LESLIE L. WANKO) A SUPPOSED LABORATORY SUPERVISOR ABOUT THE ANALYSIS AND CONCLUSIONS OF A TEST PERFORMED BY A SUPPOSED TRAINEE SPECIALIST AND BECAUSE OF THE UNREASONABLE FINDINGS MADE BY THE PCR COURT DENYING THE DEFENDANT OF HIS CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL THOSE FINDINGS AND CONCLUSIONS MUST BE REVERSED

POINT V — APPELLATE COUNSEL'S FAILURE TO INVESTIGATE DEFENDANT'S TRIAL FILE AND TRIAL RECORD AND RAISE ON DIRECT APPEAL PROSECUTORIAL MISCONDUCT, BRADY VIOLATION, PERJURED TESTIMONY/FALSE EVIDENCE, AND CONFRONTATION VIOLATION WAS CLEARLY INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

We review a claim of ineffective assistance of counsel under the two-prong test established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and subsequently adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). First, a "defendant must show that counsel's performance was deficient." Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; see also State v. Nuñez-Valdéz, 200 N.J. 129, 138 (2009). Second, "a defendant must show [there exists] a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698; see also State v. L.A., 433 N.J. Super. 1, 14 (App. Div. 2013). "A reasonable probability is a probability sufficient to undermine

confidence in the outcome." Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

Rule 3:22-10(b) provides that a defendant is only entitled to an evidentiary hearing on a PCR petition if he establishes a prima facie case in support of PCR, "there are material issues of disputed fact that cannot be resolved by reference to the existing record," and the court determines that "an evidentiary hearing is necessary to resolve the claims for relief." See also State v. Porter, 216 N.J. 343, 354 (2013).

The primary argument raised by defendant's PCR counsel is that defendant's standby trial counsel was ineffective for failing to have the defense expert test all areas of the t-shirt that the State tested. Defendant elected to represent himself at trial. Pretrial, however, he had counsel and the court assigned his counsel to act as stand-by counsel during the trial. Before trial defendant's counsel retained and worked with a forensic expert.

Defendant now contends that his standby counsel only instructed the defense expert to examine the bloodstains on the t-shirt. The State's forensic expert, in comparison, tested the bloodstains, as well as the neck and armpit area and found in the latter area DNA indicative of defendant's DNA. Defendant goes on to argue that this left his defense with a distinct disadvantage in attempting to rebut the evidence presented by the State.

The PCR judge rejected this argument reasoning that defendant had not met his burden of establishing a prima facie case of ineffective assistance of counsel. In that regard, the PCR judge reasoned that defendant's claim was a failure to investigate assertion. The flaw the PCR judge found was that defendant provided no evidence that additional testing would have allowed the defense expert to dispute the State's expert. In other words, defendant presented nothing to the PCR court to show that the State's DNA evidence was flawed or that additional testing by defense expert would have disclosed a flaw in the State's testing.

We agree with the PCR judge. Without presenting evidence that additional testing would have revealed something contrary to the State's position, defendant is asking the court to speculate. Such speculation does not form the basis for a prima facie case of ineffective assistance of counsel. See R. 3:22-10(e)(2) (providing that a court shall not grant an evidentiary hearing if defendant's "allegations are too vague, conclusory or speculative"); see also Fritz, supra, 105 N.J. at 64 (explaining, "purely speculative deficiencies in representation are insufficient to justify reversal").

In addition to failing to establish a prima facie case of ineffective assistance of standby counsel, defendant has also failed to establish the second prong of the Strickland test. Even

without the DNA evidence, there was other evidence linking defendant to the crime scene and the crime. Defendant himself admitted that he was with Boston next door to the victim's house on the day of the murder. Another witness saw Boston and defendant attempting to break into the window of the victim's house. Defendant's palm print was found in the apartment on the victim's nightstand. That evidence was in stark contrast to defendant's testimony at trial that he never went inside the victim's apartment. Furthermore, the bloody t-shirt found near the victim's body was similar in size and type to the t-shirt found at defendant's home.


Defendant also argues that the PCR court failed to consider all of his arguments. Having reviewed the thorough twenty-five-page opinion issued by the PCR court in comparison to the argument set forth by PCR counsel and defendant himself, we reject this argument for two reasons. The PCR court did consider certain additional arguments raised by defendant and explained the reasons why those arguments were rejected. We agree with the PCR judge's analysis and see no need to reiterate the reasons set forth in the PCR judge's written opinion. See R. 2:11-3(e)(2).

Second, the PCR judge noted that certain arguments lacked merit and did not warrant an in-depth discussion. Here, again, we agree with the PCR judge. The remainder of defendant's

arguments, including all of the arguments set forth in his pro se supplemental brief, lack sufficient merit to warrant a discussion in a written opinion. Ibid. The record establishes that defendant has had full and ample reviews on both his direct appeal and his PCR petition.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION