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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-5052-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHARLES GOULD, a/k/a MISTER  
A. YOUNG,

Defendant-Appellant.

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Submitted September 11, 2017 – Decided September 15, 2017

Before Judges Sabatino and Ostrer.

On appeal from Superior Court of New Jersey,  
Law Division, Camden County, Indictment No.  
10-09-2503.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Peter B. Meadow, Designated  
Counsel, on the brief).

Mary Eva Colalillo, Camden County Prosecutor,  
attorney for respondent (Patrick D. Isbill,  
Assistant Prosecutor, of counsel and on the  
brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Charles Gould appeals the trial court's denial of his petition for post-conviction relief ("PCR") without an evidentiary hearing. We affirm, except to remand for a slight correction to the period of parole ineligibility expressed imprecisely within defendant's judgment of conviction.

As detailed in this court's prior opinion on direct appeal, this prosecution of defendant arose out of the shooting of a drug dealer, Brandon Adams, in an alleyway in the City of Camden on the afternoon of March 30, 2010. See State v. Gould, No. A-2756-11 (App. Div. Sept. 23, 2013).

According to the State's proofs, shortly after Adams sold drugs to others on the street for cash, defendant accosted him at gunpoint and demanded the money in his possession. Adams gave defendant the cash. Still brandishing the gun, defendant commanded Adams to take him to his remaining stash of drugs. Adams brought defendant to the alleyway, but they found no drugs stashed there. At that point, defendant fired his gun multiple times at Adams, wounding him severely. Adams survived, but he did not identify his shooter to the police.

The shooting events were observed by three eyewitnesses. Each of them identified defendant, who was known by the nickname "Mister," to the police as the man who had attacked and shot Adams. However, at the May 2011 jury trial, the eyewitnesses recanted,

causing the State to move their prior inconsistent statements identifying defendant into evidence pursuant to N.J.R.E. 803(a)(1)(A). In his own case, defendant presented testimony from Adams, who denied that defendant, a/k/a "Mister," was his attacker. The State called in rebuttal Adams' mother, who recounted that Adams had, in fact, told her after the attack that defendant was the person who had shot him.

The jury found defendant guilty of attempted murder, N.J.S.A. 2C:5-1 and 2C:11-3; robbery, N.J.S.A. 2C:15-1(a)(1); aggravated assault, N.J.S.A. 2C:12-1(b)(1), (2), (4), and (7); and various weapons offenses. The judge who presided over the trial, sentenced defendant to an aggregate twenty-five-year term of incarceration, subject to what was termed a "nineteen-and-a-half-year" period of parole ineligibility, pursuant to the No Early Release Act ("NERA"), N.J.S.A. 2C:43-7.2.

On direct appeal, defendant raised the following issues through his appellate counsel and in a pro se supplemental brief:

POINT I

THE PROSECUTOR'S MISUSE OF TESTIMONIAL HEARSAY, FROM NON-TESTIFYING ALLEGED WITNESSES WHO IMPLICATED DEFENDANT DURING THE POLICE INVESTIGATION, VIOLATED DEFENDANT'S RIGHT TO CONFRONT WITNESSES AND TO DUE PROCESS OF LAW AND A FAIR TRIAL. U.S. CONST. AMEND. XIV; N.J. CONST. (1947) ART. I, PARS. 1, 9, 10.

POINT II

DEFENDANT'S SENTENCE IS MANIFESTLY EXCESSIVE.

PRO SE SUPPLEMENTAL POINT I

THE COURT FAILED TO CONDUCT A WADE<sup>1</sup> HEARING AND TO ACKNOWLEDGE THE VARIOUS DIFFERENT DESCRIPTIONS OF THE PERPETRATOR GIVEN BY SEVERAL DIFFERENT WITNESSES AT TRIAL THUS VIOLATING DEFENDANT[']S DUE PROCESS RIGHTS.

We affirmed defendant's convictions and sentence in our unpublished opinion on direct appeal. See State v. Gould, supra, slip op. at 18. The Supreme Court denied defendant's ensuing petition for certification. See State v. Gould, 217 N.J. 304 (2014).

Thereafter, defendant filed the present PCR petition in June 2014. Defendant argued that his trial counsel was ineffective because she failed to: (1) move for the trial judge to recuse himself because of his alleged bias, (2) request Wade hearings on identification, (3) challenge the trial court's rulings of admissibility following the Gross<sup>2</sup> hearings, (4) raise issues of prosecutorial misconduct, and (5) investigate, prepare, and present the case properly.

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<sup>1</sup> United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

<sup>2</sup> State v. Gross, 216 N.J. Super. 98 (App. Div. 1987), aff'd, 121 N.J. 1 (1990).

Defendant further argued that his counsel on direct appeal was ineffective, because he allegedly failed to recognize and appeal significant errors that had occurred at the trial level.

Defendant also asserted that the trial court erred by giving flawed instructions to the jury, and that prosecutorial misconduct deprived him of his right to due process.

Oral argument on defendant's PCR petition was heard on May 22, 2015 before Judge Kathleen M. Delaney. After considering that advocacy and the parties' written submissions, the judge concluded that defendant's claims for relief were both procedurally and substantively deficient.

In her oral opinion, Judge Delaney initially noted that defendant's PCR arguments could have been raised on direct appeal, and thus were procedurally barred under Rule 3:22-4. According to the judge, "[t]here [were] no facts outside the record that the Appellate Division would have needed [in order] to address the defendant's concerns."

Turning to the merits, Judge Delaney likewise found defendant's petition unavailing. She concluded that the trial court did not err in admitting the eyewitnesses' prior inconsistent statements as substantive proof of guilt, as defendant had presented "no legal basis to challenge the [trial court's] rulings at the Gross [h]earings." Judge Delaney also discerned no evidence

of prosecutorial misconduct from the record of the trial. Hence, the judge found no basis to set aside the conviction on these asserted grounds.

As to defendant's claims of ineffective assistance of counsel, Judge Delaney was likewise satisfied that they lacked merit and no evidentiary hearing was needed to address them. She noted that "[a] defendant is not entitled to an [e]videntiary hearing if the allegations in the certification are too vague, conclusory, or speculative. Defendant does not set forth any facts to support his claims, and, therefore, defendant's submission is insufficient to establish a claim of ineffective assistance of counsel."

Rejecting defendant's argument that his trial counsel should have moved for the trial judge to recuse himself, Judge Delaney observed there was "nothing in the record which indicate[d] the trial [c]ourt was anything but fair and impartial. The defendant cannot point to a single decision by the [c]ourt that was not supported by applicable legal standards."

Judge Delaney further concluded that the out-of-court identifications admitted at trial were "not impermissibly suggestive," and defendant's trial counsel therefore did not err in failing to challenge their admission. The judge noted in this regard that this court had expressly addressed and rejected that

very argument in our decision on defendant's direct appeal, in which we specifically found that the identifications were not "impermissibly suggestive."

As to the failure to appeal the trial court's rulings from the Gross hearing, Judge Delaney determined that "defendant ha[d] not presented any evidence that the [trial] [c]ourt's findings were misguided or unlawful, and an appeal of the Gross [rulings] would not have been meritorious."

Lastly, Judge Delaney rejected defendant's assorted challenges to various other tactical decisions his former counsel made at trial. She recognized in this regard that "a Court must indulge a strong presumption that [trial] counsel's conduct falls within the wide range of reasonable professional assistance[.]" Applying that presumption, Judge Delaney detected no "acts or omissions by counsel that were not the result of reasonable, professional judgment."

In now appealing the denial of his PCR petition, defendant raises the following issues:

POINT I

THE POST-CONVICTION RELIEF COURT ERRED IN DENYING DEFENDANT'S PETITION WITHOUT THE BENEFIT OF AN EVIDENTIARY HEARING

A. DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF INEFFECTIVE ASSISTANCE OF COUNSEL.

B. DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

POINT II

DEFENDANT'S MANDATORY MINIMUM SENTENCE IS MISCALCULATED AND THEREFOR[E] ILLEGAL AND MUST BE CORRECTED.

Defendant also makes the following points in a supplemental brief:

SUPPLEMENTAL POINT ONE

THE POST CONVICTION RELIEF COURT ERRED IN DENYING DEFENDANT'S PETITION IN LIGHT OF THE FUNDAMENTAL INJUSTICE AND CONSTITUTIONAL VIOLATIONS PRESENTED THEREIN.

THE COURT ERRED BY GIVING THE JURY FATALLY FLAWED JURY INSTRUCTIONS DURING THE JURY CHARGE.

THE COURT ERRED IN FAILING TO GIVE CURATIVE INSTRUCTIONS REGARDING A DETECTIVE OFFERING A GRATUITOUS CERTAINTY OF DEFENDANT'S GUILT.

SUPPLEMENTAL POINT TWO

THE POST CONVICTION RELIEF COURT ERRED IN DENYING DEFENDANT'S PETITION WITHOUT THE BENEFIT OF AN EVIDENTIARY HEARING, HAVING MISCONSTRUED OR IGNORED VITAL FACTS.

THE COURT FAILED TO CONSIDER COUNSEL'S FAILURE TO REQUEST A WADE HEARING WHEN CONSIDERING COUNSEL'S EFFECTIVENESS.

THE COURT IGNORED EVIDENCE IN THE DEFENDANT'S POSSESSION THAT WOULD HAVE ENLIGHTENED THE COURT TO AN ERROR.



Having fully considered these arguments, we affirm the dismissal of defendant's PCR petition, substantially for the sound reasons articulated in Judge Delaney's May 22, 2015 oral opinion. We add only a few comments, along with a caveat respecting the precise calculation of defendant's period of parole ineligibility.

First, we generally endorse the trial court's observation that defendant's claims are procedurally barred, except with respect to his discrete claims relating to the alleged deficiencies of his appellate counsel and the legality of his sentence. Defendant's present arguments about the evidence admitted against him and his other claims of trial error could have and should have been raised in his direct appeal. R. 3:22-4. We disfavor the use of PCR proceedings as a substitute for direct appeal. State v. Murray, 315 N.J. Super. 535, 540 (App. Div. 1998).

Moreover, as we have already noted, defendant's specific argument that the eyewitness identifications were tainted by unduly suggestive means was rejected on direct appeal. That failed argument cannot be renewed now through a PCR petition. R. 3:22-4.

Nor do we detect any merit in the substance of defendant's arguments. His claims of prosecutorial misconduct and unfairness are not objectively borne out by the record. As the PCR judge concluded, defendant received a fair trial. The isolated matters

he complains of, including a trooper's brief testimony about his observations of one eyewitness's physical demeanor when shown a photo array, do not negate that overall conclusion. There was no imperative for curative or additional jury instructions under the circumstances presented. Nor did the prosecutor's questions in examining witnesses or his remarks in summation exceed the fair realm of zealous advocacy.

We agree with the trial court that defendant's claims of ineffective assistance of counsel failed to establish a prima facie case to warrant an evidentiary hearing. We recognize that under the Sixth Amendment of the United States Constitution, a person accused of crimes is guaranteed the effective assistance of legal counsel in his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To establish a deprivation of that right, a convicted defendant must satisfy the two-part test enunciated in Strickland by demonstrating that: (1) counsel's performance was deficient, and (2) the deficient performance actually prejudiced the accused's defense. Id. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; see also State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the Strickland two-part test in New Jersey).

In reviewing such ineffectiveness claims, courts apply a strong presumption that defense counsel "rendered adequate

assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, supra, 466 U.S. 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 42, 54 (1987) (quoting State v. Williams, 39 N.J. 471, 489 (1963), cert. denied, 374 U.S. 855, 83 S. Ct. 1924, 10 L. Ed. 2d 1075 (1963), overruled on other grounds by, State v. Czachor, 82 N.J. 392 (1980)).

Moreover, an evidentiary hearing is not necessary unless defendant establishes a prima facie claim of ineffectiveness. State v. Preciose, 129 N.J. 451, 462-63 (1992). "[B]ald assertions" of deficient performance are insufficient to support a PCR application. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.) (noting that PCR relief requires more than "bald assertions" by a defendant), certif. denied, 162 N.J. 199 (1999); see also R. 3:22-10(b); see also State v. Porter, 216 N.J. 343, 354-55 (2013) (reaffirming these principles).

Without exhaustively addressing defendant's ineffectiveness claims individually here, we are satisfied that none of them rise to a level calling for an evidentiary hearing. For example, trial counsel's decision to call Adams, who denied that defendant was his attacker, was a reasonable tactical decision within counsel's

zone of discretion, despite the rebuttal testimony presented thereafter from Adams' mother. State v. Arthur, 184 N.J. 307, 320-21 (2005) (noting a court's review of a defense attorney's decision whether to call a witness should be "highly deferential"). As Judge Delaney aptly noted, "[n]o one had a clear[er] view of the shooter than the person who was shot[, a]nd while risky, presenting him [Adams] as a witness was a reasonable decision for the defense."

We also reject defendant's claim that his conviction should be set aside because his trial counsel allegedly told him that the judge had made a negative remark about him off the record before trial. Even if this hearsay assertion about the judge's utterance of the negative remark were substantiated, that does not necessarily mean that a recusal motion would have been successful. State v. J.J., 397 N.J. Super. 91, 103 (App. Div. 2007) ("although the trial judge's comments were sometimes stern, they do not reveal bias or prejudice"), appeal dismissed, 196 N.J. 459 (2008). Moreover, trial counsel reasonably might have predicted that a failed recusal motion could have detracted from the force of his substantive arguments on other issues before the trial court. Defendant's speculative claims of ineffectiveness are simply unavailing, as he has not demonstrated a sufficient basis to reject the PCR judge's assessment that he received an overall fair trial.

Regardless of whether counsel was ineffective, defendant has failed to establish the actual prejudice required under the second prong of Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.


The remainder of defendant's claims of ineffectiveness are similarly unavailing, both with respect to his trial counsel's performance, and the advocacy of the attorney who represented him on direct appeal. We need not comment about them further. R. 2:11-3(e)(2).

Lastly, there is one minor need for correction of the sentence within the judgment of conviction. The parole ineligibility period mandated by NERA on the first-degree attempted murder conviction requires defendant to serve a minimum of eighty-five percent of his seventeen-year custodial sentence on that offense, which is properly calculated as fourteen years, five months, and eleven days. See N.J.S.A. 2C:43-7.2. In addition, the law requires defendant to serve a minimum of five years without parole on his separate "certain persons" weapons conviction. See N.J.S.A. 2C:39-7(b). The combined effect of these convictions is that defendant's aggregate period of parole ineligibility is nineteen years, five months, and eleven days. However, the judgment of conviction imprecisely states that the aggregate parole ineligibility term is "19 1/2 years," which overstates the period

by about eighteen days. The State does not dispute the correct calculation. Accordingly, we remand for the entry of a corrected judgment of conviction to reflect the proper figure.

The denial of the PCR petition is affirmed in all respects, with the proviso that the trial court enter a corrected judgment of conviction within forty-five days to reflect the accurate parole ineligibility period. 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