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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-5650-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LEMONT O. LOVE,

Defendant-Appellant.

Submitted February 28, 2017 – Decided March 24, 2017

Before Judges Reisner and Rothstadt.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Indictment No.
01-08-0901.

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

Andrew C. Carey, Middlesex County Prosecutor,
attorney for respondent (Nancy A. Hulett,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant Lemont Love appeals from the denial of his petition for post-conviction relief (PCR) after an evidentiary hearing. For the reasons that follow, we affirm.

A jury convicted defendant of committing second-degree eluding, N.J.S.A. 2C:29-2(b); fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a)(2); third-degree resisting arrest, N.J.S.A. 2C:29-2(a); and fourth-degree unlawful taking of a means of conveyance, N.J.S.A. 2C:20-10(b). The sentencing court dismissed the fourth-degree taking of a means of conveyance and imposed an aggregate sentence of seven years in prison. That sentence was to run consecutive to another seven-year sentence defendant received for violating probation.

Defendant filed a motion for a new trial, which the court denied. He appealed from his conviction and sentence. We affirmed his conviction, but remanded for re-sentencing. State v. Love, No. A-6579-03 (App. Div. May 31, 2006) (slip op. at 6-8), certif. denied, 188 N.J. 356 (2006). On August 14, 2006, the trial court re-sentenced defendant to four years imprisonment for violating his probation and a consecutive six year period for the conviction in this case.

The facts underlying defendant's convictions are set forth in our earlier opinion and can be summarized as follows. Defendant was arrested for eluding police officers on May 16, 2001, while

operating a motorcycle, after an officer observed defendant commit a moving violation, and then ignored the officer's signal to stop. His eluding involved a high-speed chase. When police found him later on the side of the road and attempted to arrest him, defendant escaped by running into nearby woods. Prior to running away, defendant struggled with an officer who knew defendant from prior encounters and recognized defendant through his motorcycle helmet's face-shield. Police and a canine eventually tracked defendant to his home, which was near the site where the officer initially located defendant. The officers later found defendant's credentials in the motorcycle and determined that the vehicle belonged to one of defendant's brothers and the brother's girlfriend. At defendant's ensuing trial, his attorney argued that there was no evidence, such as DNA or fingerprints, that established it was defendant, rather than one of his brothers or someone else who eluded police that day.

Defendant filed an initial PCR petition in 2004 that was stayed pending his appeal. In his petition, he argued trial counsel failed to call alibi witnesses or introduce exculpatory evidence at trial and failed to establish a racial profiling defense. After his appeal, he re-filed the original PCR in 2006 and an additional pro se brief and affidavit. In those submissions he argued:

POINT I

DEFENDANT WAS DENIED HIS RIGHT TO A FAIR TRIAL BASED UPON A PREEXISTING BIAS BY A RACIALLY UNBALANCED JURY (raised below);

POINT II

MISREPRESENTATION OF FACTUALLY INACCURATE TRIAL STRATEGY BY DEFENSE COUNSEL DENIED DEFENDANT OF HIS RIGHT TO A FAIR TRIAL (raised below);

POINT III

PERJURY COMMITTED BY SEVERAL OF THE STATE'S WITNESSES PROVIDED THE JURY WITH FACTUALLY INACCURATE INFORMATION WHICH CONSTITUTED REVERSIBLE ERROR (raised below);

POINT IV

PROSECUTORIAL MISCONDUCT WAS COMMITTED DURING CLOSING ARGUMENT AS WELL AS BY THE WITHHOLDING OF EVIDENCE FAVORABLE TO THE DEFENDANT.

Despite defendant's attempt to pursue his petition, the matter was never considered by the court. As a result, defendant re-filed his PCR petition on September 16, 2011. Referring to his earlier submission, defendant again argued "ineffective assistance of counsel [and] racial profiling." A brief and amended petition were submitted on behalf of defendant in October 2012. In that brief, defendant raised the following additional claims:

POINT I

THE FAILURE OF DEFENSE COUNSEL TO PRESENT EXCULPATORY EVIDENCE AT TRIAL WAS INEFFECTIVE ASSISTANCE OF COUNSEL; COUNSEL'S ERRORS

MATERIALLY CONTRIBUTED TO THE CONVICTION AND
A NEW TRIAL MUST BE ORDERED;

POINT II

PETITIONER FILED HIS ORIGINAL PRO SE
APPLICATION FOR POST-CONVICTION RELIEF WITHIN
FIVE YEARS OF SENTENCING; THE TIME-BAR OF RULE
3:22-12 IS NOT APPLICABLE;

POINT III

PETITIONER HAS ESTABLISHED HIS RIGHT TO POST-
CONVICTION RELIEF BY A PREPONDERANCE OF THE
EVIDENCE; AT A MINIMUM, HE HAS SHOWN A PRIMA
FACIE CASE TO WARRANT AN EVIDENTIARY HEARING.

In response to defendant's petition, the PCR court conducted a hearing at which defendant presented testimony from his immediate family members to support his contention that his trial counsel failed to adduce exculpatory evidence at trial. Defendant's father, Robert Love, testified that his deceased son, Jerrold, was the owner of the motorcycle. The father stated that he never saw defendant on the motorcycle on the day defendant was arrested. He explained that defendant was with him and his wife, or just with his wife, the entire day. According to defendant's father, he, his wife, and defendant were together at an attorney's office early that day, defendant and his mother later went to the Department of Motor Vehicle (DMV), and then to distribute food to hungry people in the neighborhood, before returning home prior to the police's arrival. The father stated that he did not join them

for the food distribution because he was sick. He testified he told trial counsel about the day's events and defendant's whereabouts, but counsel stated "he didn't need [any] witnesses because they didn't have [any] evidence to hold him in the first place, and he said, the second place, that he had it in the bag and he didn't need [any] witnesses and no way they could have found him guilty."

The father also described the one motorcycle helmet used by his sons and stated that the shield was not movable and was tinted.¹ He also testified that on the day police arrested defendant, they did so only after determining that their original suspect, Jerrold, had been at work all day.

On cross-examination, the State questioned defendant's father about a letter he wrote to support defendant's motion for a new trial. According to the father, he dictated the letter to his wife, and did not sign it, and he confirmed that the letter did not include the fact that defendant went to the DMV on May 16, 2001 to get his motorcycle permit.²

¹ The father's testimony and the helmet he identified were intended to contradict the officer's testimony at trial that he was able to identify defendant through the helmet's visor.

² In an attempt to further impeach the father, the State confronted him with a complaint from May 16, 2001, that the police filed against defendant's father for yelling profanities at them.

Defendant's brother, Andre Love, testified that he and his brother Jerrold worked for a tree service all day on the day defendant was arrested. He stated that when they got home, Jerrold realized his motorcycle was missing, so he called the police to report it stolen. According to Andre, when the police arrived at the home, they attempted to arrest Jerrold.

Defendant's mother testified about the meeting with the attorney she attended with her husband and defendant and that she went to the DMV with defendant that day so he could get his motorcycle permit. After going to the DMV, she and defendant went to deliver food to needy people in Neptune. At some point after they returned home, her husband told her that the police were outside. The mother testified that defendant was in the house while this happened. She also explained that while the police were at the house, defendant's friend Kevin Captan entered the house and told her about the number of police officers outside. She stated defendant and Captan subsequently left the house while the police were still there. On cross-examination, the State questioned defendant's mother about an interview she gave to an

He had no recollection of this event. Court records showed that he paid a fine to dispose of the complaint in municipal court. The father still maintained that he had no recollection of that complaint.

investigator in 2012. In that interview, she did not mention that she went to the DMV with defendant on May 16, 2001.³

Defendant testified at the hearing that he wanted his trial attorney to call his parents, his brothers, Captan and Christine Schmidutz, Jerrold's girlfriend and co-owner of the motorcycle, who reported the motorcycle stolen. Defendant wanted the witnesses to testify because they could have established that defendant was home while the incident happened. Defendant also wanted his trial attorney to introduce medical records from the county jail to show that he did not have any scratches on him when he was arrested, which would refute the officer's trial testimony that defendant had scrapes on his knee and arm when he was arrested. The medical record stated that defendant "has no injuries[.]"⁴ Defendant also testified that he wanted to have his trial attorney enter the helmet into evidence, because it would have proven that the officer

³ The State also attempted to impeach defendant's mother by confronting her with a complaint against that had been filed against her regarding an incident that occurred with her son Jerrold. Jerrold violated a temporary restraining order, and Mrs. Love did not let the police into her house. The complaint alleged that, during the incident, Mrs. Love said to the police, "So you can shoot him in the back like the Troopers on the Turnpike?"

⁴ Defendant insisted that there was testimony at trial that the motorcycle crashed going 60 or 100 miles-per-hour. However, there was no testimony at trial that the motorcycle crashed – only that defendant had surface scratches from when the officer tried to handcuff defendant.

could not have identified him through the face shield, because it was tinted. Counsel told him that there was no need to call any other witnesses because the State could not prove its case.

The State called defendant's former trial counsel, Troy Smith. Smith testified that he believed he did not call defendant's parents as a "tactical decision" because the State could have impeached their testimony. Similarly, he recalled that calling Captan as a witness would have raised credibility issues as well. Smith testified that he did not think Andre added anything to defendant's case, so he did not call him to testify. He reiterated that it was his "trial strategy" to not call any of the witnesses. Smith confirmed that he had multiple conversations with defendant's mother but he did not formally interview her. He also testified that had defendant insisted on calling the witnesses at trial, he would have had them testify. Smith did not remember anything about the medical records that defendant claimed he wanted to enter into evidence nor did he recall speaking to defendant about the need to introduce the helmet at trial. In any event, they would not have helped defendant because Smith knew defendant did not crash the motorcycle and there was not an issue about the helmet's visor being moveable or tinted.

After considering the evidence and counsels' oral arguments, the PCR court denied defendant's petition by order dated July 2,

2015, supported by an eighteen-page written opinion. First, the PCR court determined that defendant's claims about the exculpatory evidence and the alibi witnesses were procedurally barred because "they should have been raised on direct appeal." Second, as to the merits of defendant's claim, the PCR court found that had the witnesses who testified been called by trial counsel, their testimony "would not have affected the outcome of the trial," especially since none of them placed defendant at "a distant location from the incident." The court compared their testimony to evidence adduced at trial, including the facts that a canine tracked defendant to his house, and defendant's wallet was in the motorcycle. The court also noted that when defendant turned himself in, he was wearing clothing similar to that worn by the suspect. Significantly, defendant's family members essentially confirmed that defendant's brother could not have been operating the motorcycle and his brother reported the vehicle stolen, making it more likely that defendant had it in his possession. The court also found that defendant's trial counsel investigated the witnesses, and none of their testimony "provide anything close to an air-tight alibi" for defendant.

Regarding defendant's medical records, the PCR court found that introducing those records would not have affected the outcome of the trial. The court observed that trial counsel's "decision

not to present the medical records was a tactical decision because he knew [defendant] did not injure himself from a crash, and the records would not prove anything."

Finally, the PCR court discounted the evidentiary value of the helmet. The judge found it unreliable that the shield no longer worked which defendant "attributed . . . to the apparent crash, which was never determined to have actually occurred." Further, the color of the face shield was not disputed at trial, so the judge found that there was "clearly a question as to if the helmet had been altered."

On appeal, defendant presents the following issues for our consideration:

POINT I

THE DEFENDANT'S PCR PETITION SHOULD NOT HAVE BEEN PROCEDURALLY BARRED.

POINT II

THE DEFENDANT'S CONVICTIONS MUST BE REVERSED DUE TO TRIAL COUNSEL'S INEFFECTIVENESS; IN THE ALTERNATIVE, THIS MATTER MUST BE REMANDED FOR THE PCR COURT'S ASSESSMENT OF THE WITNESSES' CREDIBILITY (PARTIALLY RAISED BELOW).

A. TRIAL COUNSEL FAILED TO CALL EXCULPATORY WITNESSES.

B. TRIAL COUNSEL FAILED TO PRODUCE THE MOTORCYCLE HELMET.

C. TRIAL COUNSEL FAILED TO
PRODUCE THE DEFENDANT'S MEDICAL
RECORDS.

In our review of a denial of a PCR petition, where, as here, the court conducts an evidentiary hearing, we must uphold the judge's factual findings, "so long as those findings are supported by sufficient credible evidence in the record." State v. Rockford, 213 N.J. 424, 440 (2013) (quoting State v. Robinson, 200 N.J. 1, 15 (2009)). We defer to a trial judge's findings that are "substantially influenced by [the trial judge's] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Ibid. (alteration in original) (quoting Robinson, supra, 200 N.J. at 15). We owe particular deference to the trial judge's credibility determinations. See State v. Locurto, 157 N.J. 463, 470-71 (1999) (quoting State v. Johnson, 42 N.J. 146, 161-62 (1964)).

At the outset, we agree with defendant that his claims were not procedurally barred by Rule 3:22-4, as claims of ineffective assistance of counsel based upon trial counsel's failure to call exculpatory witnesses "are particularly suited for post-conviction review because they often cannot reasonably be raised in a prior proceeding." State v. Preciose, 129 N.J. 451, 460 (1992). We are not persuaded, however, by any of his remaining arguments and

affirm substantially for the reasons expressed by the PCR court in its thorough and comprehensive written decision.

The standard for determining whether counsel's performance was ineffective for purposes of the Sixth Amendment was formulated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42 (1987). In order to prevail on a claim of ineffective assistance of counsel, defendant must meet the two-prong test of establishing both that: (1) counsel's performance was deficient and he or she made errors that were so egregious that counsel was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution; and (2) the defect in performance prejudiced defendant's rights to a fair trial such that 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 687, 694, 104 S. Ct. at 2064, 2068, 80 L. Ed. 2d at 693, 698.


We conclude from our review of the record that defendant failed to establish ineffectiveness of trial counsel within the Strickland-Fritz test. We, like the PCR court, believe that counsel's decision to forgo calling defendant's family members and friend was part of his overall trial strategy. Moreover, had counsel called any or all of the witnesses or presented the other

evidence suggested by defendant, the outcome of his trial would not have been different. We only note that, contrary to defendant's contention, there is no need to remand this matter for credibility findings as "the reasons supporting [PCR court's] determinations of the witnesses' relative credibility [can] be inferred from, and are well-supported by, the account of the facts and witnesses' testimony presented in [the PCR court's] decision."

Locurto, supra, 157 N.J. at 474.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION