RECORD IMPOUNDED

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION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-5819-13T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN HELLER,

Defendant-Appellant.

Submitted February 7, 2017 – Decided August 10, 2017

Before Judges Suter and Guadagno.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 06-04-0336.

Joseph E. Krakora, Public Defender, attorney for appellant (John Vincent Saykanic, Designated Counsel, on the brief).

Grace H. Park, Acting Union County Prosecutor, attorney for respondent (Meredith L. Balo, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

In 2006, a grand jury sitting in Union County charged defendant John Heller with aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1) (count one); sexual assault, N.J.S.A. 2C:14-2(b) (count two); and endangering the welfare of a child, N.J.S.A. 2C:24-4(a) (count three). The charges arose from the events of July 1, 2005, when defendant sexually assaulted the six-year-old daughter of an acquaintance while babysitting the child.

Defendant was tried to a jury and convicted of all three counts. Prior to sentencing, defendant dismissed his trial counsel and retained new counsel who moved for judgment of acquittal, or alternatively, for a new trial on the grounds that defendant was incompetent to stand trial and had been denied the effective assistance of counsel because his trial attorney had failed to recognize his incompetence, investigate his mental illness, and assert defenses of insanity and diminished capacity. The motion was denied.

At sentencing, the judge merged count two with count one and sentenced defendant to twelve years subject to the No Early Release Act, N.J.S.A. 2C:43-7.2. The judge imposed a concurrent eight-year term on count three. Defendant was also sentenced to mandatory parole supervision and community supervision for life, to comply with Megan's Law requirements, and assessed appropriate fines and penalties.

Defendant appealed, claiming his trial counsel failed to investigate or assert an insanity defense or a defense of mental disease or defect; defendant was not competent to stand trial or to testify on his own behalf; even if competent to stand trial, defendant was not capable of making a knowing, intelligent, and voluntary waiver of an insanity or diminished capacity defense; the trial judge erred in admitting statements of the child/victim; the jury selection was flawed; the State failed to prove the element of penetration under count one; the trial judge failed to distinguish digital penetration from touching; the trial judge erred in refusing the jurors' request for the written elements of the charges; and defendant should have received a lesser sentence and a minimum term as the mitigating factors substantially outweighed any aggravating factors.

We rejected these arguments and affirmed defendant's convictions and sentence. State v. Heller, No. A-4685-07 (App. Div. Aug. 31, 2010). Defendant's petition for certification was denied. 205 N.J. 81 (2011).

Defendant filed a petition for post-conviction relief (PCR) alleging the same arguments raised on his direct appeal: ineffective assistance of his trial counsel for failure to investigate or assert the defenses of insanity and diminished capacity; trial counsel's failure to raise defendant's

competency to testify; trial counsel's failure to question defendant as to his right to remain silent or his ability to testify in his own defense in a competent manner; and even if defendant was competent to stand trial he was incapable of making a knowing, intelligent, and voluntarily waiver of the insanity or diminished capacity defenses.

After hearing oral argument, the PCR judge ordered an evidentiary hearing. On April 9, 2014, defendant's first attorney, Joseph Spagnoli, testified that defendant retained him shortly after his arrest. After defendant told Spagnoli he was with his brother in Roselle Park, not in Hillside where the crime was alleged to have occurred, Spagnoli urged defendant to assert an alibi defense. After Spagnoli ordered cellphone site records in hopes of corroborating defendant's alibi, the cellphone site records indicated defendant's cellphone had been used near the scene of the crime in Hillside, not in Roselle Park as defendant had claimed.

When Spagnoli confronted defendant about the discrepancy in his story, defendant admitted that he had committed the crime. Spagnoli then filed a motion to withdraw from the case because he felt that his rapport with defendant had dissipated. Spagnoli testified that defendant never told him about his psychiatric history, his prior psychiatric hospitalizations, or

that he had been seeing a psychiatrist for over a decade prior to his arrest. Spagnoli testified that, in his opinion, there was no basis for a diminished capacity defense because defendant was able to talk with him extensively about the case and was more than able to aid his own defense.

Joseph Depa testified that he replaced Spagnoli as trial counsel. Depa discussed defendant's mental state and his psychotropic medication regimen, but defendant and his family described defendant's illness as a "nervous condition" and the concept of mental illness was never broached. Depa testified that defendant and his family never told him that defendant suffered from bipolar disorder, manic depressive disorder, or schizophrenia. Depa explained that he did not pursue an insanity defense as it was inconsistent with the alibi defense which he considered "workable."

When the PCR judge questioned Depa about defendant's mental health, he testified that any time defendant's mental health

> came up in relation to the presentation of a defense, it was clear neither [defendant] or his mother wanted to connect one with the other. The medication was for something they thought was not significant in terms of the charges or the trial for the charges and really never got to the point of whether or not it would []underpin a defense because []it just was not significant, I'd need not worry about it, and he had an alibi.

Joan Heller, defendant's mother, testified defendant was first institutionalized in 1983 for acting erratically. Defendant was again institutionalized twice in 1989 and again in 2000 and 2002. She testified she informed Spagnoli and Depa that defendant suffered from bipolar disorder but both failed to discuss defenses relating to insanity, diminished capacity, or incompetency to stand trial.

On May 12, 2014, the PCR judge entered an order accompanied by an eighteen-page written decision denying defendant's petition. The judge found the testimony of Spagnoli and Depa "extremely credible." By contrast, the judge found Joan Heller's testimony "extremely incredible" and concluded that she had an "obvious bias and interest in seeing her son's conviction vacated."

The judge found that defendant failed to establish a claim of ineffective assistance of either trial counsel as he did not satisfy the first prong of the test set forth in <u>Strickland v. Washington</u>, 466 <u>U.S.</u> 668, 694, 104 <u>S. Ct.</u> 2052, 2068, 80 <u>L. Ed.</u> 2d 674, 697-98 (1984):

> Petitioner and the members of his family insisted that Mr. Depa raise the alibi defense and intentionally withheld evidence regarding petitioner's mental health history that would have given Mr. Spagnoli and/or Mr. Depa reason to consider an alternative defense strategy at trial. In view of these circumstances, the

> court finds it was reasonable for Mr. Spagnoli and Mr. Depa to forego an investigation of petitioner's mental health history and its potential influence on his culpability in this matter.

On appeal, defendant repeats these claims of error:

> POINT I
>
> THE DENIAL OF THE POST-CONVICTION RELIEF APPLICATION SHOULD BE REVERSED AND DEFENDANT'S CONVICTIONS VACATED AS DEFENDANT WAS DEPRIVED OF HIS SIXTH AMENDMENT AND NEW JERSEY STATE CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DUE TO HIS TRIAL COUNSEL'S (AND FIRST COUNSEL'S) FAILURE TO INVESTIGATE OR ASSERT AN INSANITY DEFENSE UNDER N.J.S.A. 2C:4-1 AND 2.
>
>> JUDGE MEGA'S DECISION DENYING POST-CONVICTION RELIEF.
>>
>> THE LAW CONCERNING POST-CONVICTION RELIEF APPLICATIONS.
>>
>> THE LAW REGARDING INEFFECTIVE COUNSEL.
>>
>> INEFFECTIVENESS REGARDING MENTAL DEFICIENCY OR INSANITY DEFENSES.
>
> POINT II
>
> THE COURT BELOW ERRED IN DENYING THE PCR PETITION AS THE DEFENDANT WAS DEPRIVED OF HIS SIXTH AMENDMENT AND NEW JERSEY STATE CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DUE TO HIS TRIAL COUNSEL'S (AND FIRST COUNSEL'S) FAILURE TO INVESTIGATE OR ASSERT THE DEFENSE OF DIMINISHED CAPACITY (MENTAL DISEASE OR DEFECT) (U.S. CONST. AMEND. VI; N.J. CONST. (1947) ART. 1, PAR. 10).

POINT III

THE COURT BELOW ERRED IN DENYING THE PCR PETITION AS THE DEFENDANT WAS DEPRIVED OF HIS SIXTH AMENDMENT AND STATE CONSTITUTIONAL RIGHT TO EFFECTIVE COUNSEL AND DUE PROCESS RIGHT TO A FAIR TRIAL AS THE DEFENDANT WAS NOT COMPETENT TO STAND TRIAL; TRIAL COUNSEL SHOULD HAVE RAISED THE ISSUE OF DEFENDANT'S COMPETENCY TO TESTIFY (PARTICULARLY SO SOON AFTER THE DEATH OF HIS FATHER) AND DUE TO MEDICATION THAT THE DEFENDANT WAS TAKING WHEN HE TESTIFIED (U.S. CONST. AMEND. VI; N.J. CONST. (1947) ART. 1, PAR. 10).

POINT IV

THE COURT BELOW ERRED IN DENYING THE PCR PETITION AND THE DEFENDANT'S CONVICTIONS MUST BE VACATED SINCE DEFENDANT WAS INCOMPETENT TO TESTIFY IN HIS OWN BEHALF; THE DEFENDANT WAS NEVER QUESTIONED AS TO HIS RIGHT TO REMAIN SILENT OR AS TO HIS ABILITY TO TESTIFY IN HIS OWN DEFENSE IN A COMPETENT MANNER IN VIOLATION OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

POINT V

THE COURT BELOW ERRED IN DENYING THE PCR PETITION AND THE DEFENDANT'S CONVICTIONS MUST BE VACATED SINCE, EVEN IF HE IS DEEMED TO HAVE BEEN COMPETENT TO STAND TRIAL, HE WAS NEVERTHELESS INCAPABLE OF MAKING A KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER OF THE INSANITY OR DIMINISHED CAPACITY DEFENSES; DEFENDANT'S DUE PROCESS AND FAIR TRIAL RIGHTS WERE VIOLATED.

As a preliminary matter, we note that defendant's arguments raised before the PCR judge were procedurally barred pursuant to

Rule 3:22-5. The Rule provides that "[a] prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any post-conviction proceeding brought pursuant to this rule or prior to the adoption thereof, or in any appeal taken from such proceedings." Ibid. This bar applies when a defendant attempts to raise arguments that are "'identical or substantially equivalent' to th[e] issue[s] previously adjudicated on [the] merits." State v. McQuaid, 147 N.J. 464, 484 (1997) (first quoting State v. Bontempo, 170 N.J. Super. 220, 234 (Law Div. 1979), then citing Picard v. Connor, 404 U.S. 270, 276-77, 92 S. Ct. 509, 512-13, 30 L. Ed. 2d 438, 444 (1971)). Here, defendant's arguments in the PCR petition are "identical or substantially equivalent" to those we have already adjudicated.

Defendant argued that he was incompetent to testify on his own behalf; that he was never questioned as to his ability to testify in his own defense; and that trial counsel was ineffective for failing to raise the issue of his competency. Defendant also argues that he was incapable of making a knowing, intelligent, and voluntary waiver of the insanity or diminished capacity defenses.

In our prior opinion, we concluded that the record "did not raise a bona fide doubt as to [defendant's] competence." Heller,

supra, slip op. at 14. We also considered defendant's arguments concerning his capability of "waiving" the defenses of insanity and diminished capacity, as well as his ability to testify. Id. at 10-15. After weighing these issues, we concluded that defendant's arguments lacked merit. Ibid. Because we previously adjudicated these issues, and because the issues raised in defendant's appeal are identical to issues he raised on direct appeal, we conclude that defendant's arguments are procedurally barred.

Even if we were to consider the arguments raised here, they lack sufficient merit to warrant discussion beyond the following brief comments. R. 2:11-3(e)(2).

Defendant's primary contention on appeal is that his trial attorney was ineffective because he failed to take investigatory steps that would have led him to assert the defenses of insanity and diminished capacity, or would have led him to assert that defendant was incompetent to stand trial. After weighing the credibility of the testifying witnesses, the PCR judge found that "it was reasonable for Mr. Spagnoli and Mr. Depa to forego an investigation of petitioner's mental health history and its potential influence on his culpability in this matter."

We are satisfied that Spagnoli and Depa took proper investigatory steps that led them to conclude that defendant

would not benefit from the defenses of insanity and diminished capacity, and that defendant was competent to testify. The attorneys met with defendant on several occasions prior to trial, both privately and with members of his family. From these meetings, the attorneys concluded that defendant could assist in his own defense. Although Spagnoli did not ask defendant about his medication and mental health status, defendant and his family never informed him of these issues. Depa did ask defendant about his mental health status and medication but was rebuffed whenever the line of inquiry arose, and was told defendant suffered only from a "nervous condition."

Although Joan Heller testified that she and defendant told Depa that defendant suffered from bipolar disorder, the court did not find her testimony credible and instead relied on Depa's testimony, which was that neither defendant nor his family informed him of such a condition. We are satisfied that the judge's conclusion that defendant and his family actively discouraged Depa's investigation into his mental health status, and directed him to focus solely on the alibi defense is amply supported by the record. "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."

Strickland, supra, 466 U.S. at 691, 104 S. Ct. at 2061, 80 L. Ed. 2d at 696.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION