

**NOT FOR PUBLICATION WITHOUT THE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-0140-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PERRY ALSTON a/k/a
PERRY AUSTIN, ALSTON PERRY,

Defendant-Appellant.

Submitted January 24, 2018 – Decided February 21, 2018

Before Judges Alvarez and Nugent.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Indictment No.
08-12-3640.

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

Mary Eva Colalillo, Camden County Prosecutor,
attorney for respondent (Natalie A. Schmid
Drummond, Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

On June 7, 2016, the Honorable Frederick J. Schuck rendered
a thorough and thoughtful oral decision denying defendant Perry

Alston's petition for post-conviction relief (PCR). After our consideration of the arguments made on appeal and review of the record, we affirm for the reasons stated by Judge Schuck.

Defendant and a co-defendant were tried on a multi-count indictment charging, among other offenses, first-degree robbery, N.J.S.A. 2C:15(a)(1), and third-degree possession with intent to distribute, N.J.S.A. 2C:35-10.5. Defendant, who represented himself during the trial, was acquitted of the latter offense. He was, however, convicted of the first-degree robbery and the remaining offenses.

After denying the State's motion to sentence defendant as a persistent offender to a discretionary extended term, N.J.S.A. 2C:44-3, the trial judge sentenced defendant to an aggregate nineteen-year term of incarceration. The term was subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

The underlying incident occurred on August 27, 2008, when a police officer on routine patrol happened upon three men standing behind a methadone clinic. Two of them, defendant and his co-defendant, immediately ran upon seeing the uniformed officer. Defendant dropped a pocket knife while being pursued. The amount of money that the third man said had been stolen from him was found in defendant's pocket; the bills were crumpled into a ball.

Defendant and his co-defendant claimed they had been engaged in a drug deal with the third man, while he claimed he was robbed.

The trial judge conducted a lengthy Crisafi¹ hearing. Defendant said he wanted to represent himself because:

[T]he State is in a crisis and money is tight and things is really not up to par.

. . . I understand that [the Office of Public Defender] have big caseloads and when the issue at hand, when you're dealing with life, I don't want to be able to -- be able to go back and say that [defense counsel] made a mistake because he didn't have enough time.

I want to be able to say that I did everything myself possibly, human possibly, to defend myself. So, I don't have no reason to blame anyone when -- if I win, I win. If I lose, I have nobody to blame but myself.

So, therefore, I'm asking you to give me that opportunity to do so. I -- I have plenty of time to go down to the library and have -- do research. I'm in the library five days a week and I stay updated on cases. . . .

. . . .

. . . And I know that if I lose, that it can cost me 60 to life. . . . I need to protect -- to defend myself.

And if you're telling me that you're going to give me 60 years, I don't want to leave any table unturned, any table. I want to fight vigorously, hard, and I'm not going to stop at any time until the end and the best man win. . . .

¹ State v. Crisafi, 128 N.J. 499 (1992).

. . . .

. . . I think I can do a better job than [defense counsel] when it comes to representing myself. But, if I make mistakes, then that's a chance I might have to take. But, I would -- I can be able to live with that. I won't be able to live with getting 60 to life because a person has too much things on their plate and they really wanted to help me but they didn't have the time to do it.

Despite prolonged questioning by the trial judge, defendant remained unshaken in his conviction that he wanted to represent himself.

The judge's explanation of the rights that defendant was waiving if he represented himself, and the risks he was assuming, included the ability to claim ineffective assistance of counsel if convicted. The judge also explained that because defendant and the co-defendant were being tried together, and the offenses included a charge of conspiracy, there were particular difficulties involved. The judge described the role of standby counsel, which defendant requested, and that standby counsel would not be able to interfere during the trial or influence trial strategy.

Ultimately, the judge found that defendant had made an unequivocal request to represent himself and utilize standby counsel. Defendant made the decision knowingly and intelligently, with full disclosure of the potential consequences.

The Crisafi hearing was conducted fifteen days prior to trial. Defendant did not file any motions, although some which had been previously scheduled were addressed before jury selection. This included a Sands/Brunson hearing, a Rule 104 hearing about the admissibility of certain statements made by the victim, and the marking of exhibits.

Defendant's direct appeal was denied. State v. Alston, No. A-2292-10 (App. Div. Aug. 21, 2013). Certification was denied by the Supreme Court. State v. Alston, 217 N.J. 294 (2014).

In his denial of PCR, Judge Schuck first reviewed the familiar standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). He then addressed whether defense counsel's services – both before defendant assumed his own representation and while acting as standby counsel – fell within the range of competent representation. Since, despite making numerous claims of steps his lawyer should have taken, defendant did not identify any overlooked information, benefit, or favorable effect on the outcome, the judge found he did not demonstrate that the representation fell below competent representation.

The judge considered it was noteworthy that defendant contended that but for his attorney's failure to communicate, he would have never had to fire him and proceed pro se. The judge

observed that it was defendant's choice to represent himself, and that his waiver of counsel was knowing and intelligent.

The judge also observed that defendant's contention that counsel failed to discuss any plea offer was refuted by a letter from the Office of Public Defender addressed to defendant, months prior to his termination of his lawyer's services, stating that "[n]o more agreements will be discussed because you have indicated you want a trial and you are scheduled for a trial." [Emphasis added.] We were not provided with a transcript of the pretrial conference at which the matter was placed on the trial list, nor do we know the date it was conducted.

Additionally, in his PCR petition, defendant reiterated his claim of innocence, that the incident was not a robbery but a drug deal gone wrong. Judge Schuck said that under those circumstances, it was not likely that defendant would have accepted a plea bargain in any event.

Judge Schuck also reviewed federal and state precedents with regard to the appointment of standby counsel. He stated that in New Jersey standby counsel is appointed to "act as a safety net" and "to allow the trial to proceed without the undue delays likely to arise when a layperson represents his own case[,]" citing State v. Ortisi, 308 N.J. Super. 573, 591 (App. Div. 1998) (citation omitted). The appointment of standby counsel is discretionary

under federal and state law, and a delicate balance must be maintained between allowing a defendant to exercise the privilege of representing himself and extending the protection afforded by standby counsel. Thus, contrary to defendant's assertions in his petition, defense counsel had no obligation to intercede during the trial and make objections or argue a mitigating factor at sentencing as defendant claimed.

With regard to appellate counsel, the judge noted that defendant did not have a constitutional right to have appellate counsel raise every nonfrivolous issue he requested on appeal. Thus, defendant's assertion that appellate counsel should have contended the Crisafi hearing was inadequate, an argument without merit, did not establish that appellate counsel was ineffective. Applying the Strickland test, the judge held that counsel's representation was not inadequate, and that it had no prejudicial effect on the outcome. The judge denied the petition.

Now on appeal, defendant raises the following points:

POINT I:

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S PETITION FOR POST CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO DETERMINE THE MERITS OF HIS CONTENTION THAT HE WAS DENIED THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. The Prevailing Legal Principles Regarding Claims Of Ineffective Assistance Of Counsel, Evidentiary

Hearings And Petitions For Post Conviction Relief.

B. Trial Counsel Rendered Ineffective Legal Representation By Virtue Of His Failure To Investigate Defendant's Matter Or File Any Pre-trial Motions, To Explain The Strengths and Weaknesses Of The State's Case To Defendant, And To Engage In Plea Negotiations.

C. Standby Counsel Rendered Ineffective Legal Representation By Virtue Of His Failure To Object To The Admittance Of The Victim's Hearsay Statements And To Present Mitigating Evidence At Sentencing.

D. Appellate Counsel Rendered Ineffective Legal Representation By Virtue Of His Failure To Raise The Issue That The Court's Warnings To Defendant About Waiving His Right To Counsel Were Inadequate.


E. Defendant Is Entitled To A Remand To The Trial Court To Afford Him An Evidentiary Hearing To Determine The Merits Of His Contention That He Was Denied The Effective Assistance Of Trial, Standby, and Appellate Counsel.

We add the following brief comments to Judge Schuck's decision. Defendant was advised on the record that if he represented himself, he would be waiving his right to claim ineffective assistance of counsel. He raises the issue nonetheless. The argument that but for his trial counsel's ineffectiveness, defendant would not have had to represent himself, seems but a device fashioned to sidestep his waiver.

The only additional observation we make is that it follows as night does the day that defendant's meritless claims did not establish a prima facie case entitling him to an evidentiary hearing. See R. 3:22-10(b); State v. Preciose, 129 N.J. 451, 462 (1992).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION