

RECORD IMPOUNDED

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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-0219-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FELIX A. MERCADO,

Defendant-Appellant.

Submitted December 19, 2017 – Decided April 19, 2018

Before Judges Fasciale and Summers.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Indictment No.
09-06-0956.

Joseph E. Krakora, Public Defender, attorney
for appellant (Andrew P. Slowinski, 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

A jury convicted defendant Felix A. Mercado on three counts
of first-degree aggravated sexual assault; three counts of second-

degree sexual assault; one count of third-degree endangering the welfare of a child; and one count of third-degree aggravated criminal sexual contact. In his direct appeal, we affirmed the convictions, but remanded and directed the judge to determine the applicable parole ineligibility period pertaining to one of the aggravated sexual assault convictions and to amend the judgment of conviction (JOC) if warranted. State v. Mercado, No. A-3394-11 (App. Div. Jan. 22, 2015). Defendant then filed a post-conviction relief (PCR) petition alleging that trial counsel provided ineffective assistance of counsel by: meeting with him for a limited time; not hiring an investigator to assist in trial preparation; not objecting at trial, which allowed testimony to go unchallenged; and not objecting to the State's expert's testimony.

Judge Collen M. Flynn denied PCR without an evidentiary hearing, issuing an order and written opinion dismissing the petition. Applying the well-known PCR standard articulated in Strickland v. Washington, 466 U.S. 668, 687, 694 (1984) and State v. Fritz, 105 N.J. 42, 58 (1987), the judge found that defendant failed to set forth a prima facie case of ineffective assistance of counsel.

As to defendant's claim that counsel met with him a limited number of times, Judge Flynn determined that such a claim can

serve as a basis for counsel's ineffectiveness, State v. Savage, 120 N.J. 594, 617 (1990), but defendant neither explained what he meant by claiming to have "limited time" with counsel nor indicated how more time with counsel would have changed the outcome of the trial. Moreover, the judge found that since the defense presented two witnesses who attacked the credibility of defendant's accusers by substantiating his testimony that the allegations against him were fabricated, counsel developed a reasonable defense. With the same reasoning, the judge rejected the claim that counsel failed to hire an investigator because it was a vague allegation without any indication to what an investigator could have done to alter his conviction, and the witnesses he presented supported his defense, which the jury apparently determined was not credible.

Judge Flynn found no merit to defendant's remaining arguments that counsel failed to object to the testimony of the State's witnesses. As to the lay witnesses, the judge maintained defendant made broad assertions without citing any specific testimony that was inadmissible and how it prejudiced his trial. Besides, the judge pointed to several times in the record where counsel made objections to witnesses' testimony that were denied. With respect to the State's expert witness, Dr. Jamila Irons-Johnson, who testified about the child sexual abuse accommodation syndrome (CSAAS), the behaviors in sexually abused children, the judge

determined there was no reasonable basis to object to her testimony; she was properly qualified and her testimony was within the bounds set forth in State v. W.B., 205 N.J. 588, 611 (2011) (recognizing that a CSAAS expert cannot opine that a child victim was abused).

On appeal, defendant argues:

POINT I

THE PCR COURT'S DECISION SHOULD BE REVERSED AND THIS MATTER REMANDED TO THE LAW DIVISION AS DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN PRESENTING HIS PETITION FOR PCR IN THE LAW DIVISION. (NOT RAISED BELOW)

POINT II

THE PCR COURT'S DECISION SHOULD BE REVERSED AS DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, PARAGRAPH 10 OF THE NEW JERSEY CONSTITUTION.

[A.] TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO MEET WITH DEFENDANT SUFFICIENTLY BEFORE TRIAL.

[B.] TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO THE STATE'S INTRODUCTION OF EXPERT TESTIMONY ON CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME.


[C.] TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO RETAIN AN INVESTIGATOR TO ASSIST IN TRIAL PREPARATION.

Having considered these arguments in light of the record and applicable legal standards, defendant's arguments lack sufficient merit to warrant discussion in a written opinion, R. 2:11-3(e)(2), and we affirm substantially for the reasons set forth by Judge Flynn in her cogent decision. We add only the following.

A court reviewing a PCR petition based on claims of ineffective assistance has the discretion to grant an evidentiary hearing if a defendant establishes a prima facie showing in support of the requested relief. State v. Preciose, 129 N.J. 451, 462 (1992). The mere raising of a claim for PCR does not entitle a defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). The court should only conduct a hearing if there are disputed issues as to material facts regarding entitlement to PCR that cannot be resolved based on the existing record. State v. Porter, 216 N.J. 343, 354 (2013). Because here there are no such disputed facts and defendant failed to set forth a prima facie case of ineffective assistance of counsel, an evidentiary hearing was not warranted.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION