SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0296-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TERRY CORNELIOUS JONES,

Defendant-Appellant.

Submitted January 9, 2018 – Decided February 26, 2018

Before Judges Yannotti and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Union County, Indictment No. 03-12-1276.

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

Ann M. Luvera, Acting Union County Prosecutor, attorney for respondent (N. Christine Mansour, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from an order entered by the Law Division on May 31, 2016, which denied his petition for post-conviction relief (PCR). We affirm.

I.

A Union County grand jury charged defendant with two counts of second-degree sexual assault, contrary to N.J.S.A. 2C:14-2(c)(1) (counts one and three); and two counts of fourth-degree criminal sexual contact, contrary to N.J.S.A. 2C:14-3(b) (counts two and four). Defendant was tried before a jury, which found him guilty on all counts.

The trial court sentenced defendant on counts one and three to consecutive, seven-year custodial terms, each subject to an eighty-five percent period of parole ineligibility pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2. The court also imposed concurrent eighteen-month prison terms on counts two and four.

Defendant appealed. We affirmed defendant's convictions and sentences. State v. Jones, No. A-2557-05 (App. Div. May 7, 2008) (slip op. at 14). Defendant filed a petition for certification with the Supreme Court. The Court denied defendant's petition. State v. Jones, 196 N.J. 344 (2008).

In October 2008, defendant filed a PCR petition. He claimed he had been denied the effective assistance of trial counsel. He

claimed his attorney was deficient because he failed to call his female acquaintance Bernadette Brame (Brame) as a witness; did not advise him adequately about his right to testify and defend himself at trial; failed to obtain and present medical evidence and telephone records to support his defense; and did not adequately cross-examine the victim. He also alleged he was entitled to forty days of additional jail credits for the time he was incarcerated in Florida while awaiting extradition to New Jersey.

The PCR court found that defendant had not presented a prima facie case of ineffective assistance of counsel, and therefore defendant was not entitled to an evidentiary hearing. The court also found that defendant was barred by Rule 3:22-4 from raising the issue regarding jail credits because that issue should have been raised on direct appeal. The court entered an order denying the petition.

Defendant appealed. We affirmed the court's determination that an evidentiary hearing was not required on the claim of ineffective assistance of counsel, but reversed the court's refusal to consider defendant's claim that he was entitled to additional jail credits. State v. Jones, No. A-2492-09 (App. Div. May 2, 2012) (slip op. at 10-11).

The Supreme Court granted defendant's petition for certification, limited to the issue of whether defendant was entitled to an evidentiary hearing on his PCR petition. State v. Jones, 212 N.J. 458 (2012). Thereafter, the Court reversed our judgment and remanded the matter to the trial court for an evidentiary hearing on defendant's three claims of ineffective assistance of counsel. State v. Jones, 219 N.J. 298, 316-17 (2014).

On remand, the PCR court conducted the evidentiary hearing in conformance with the Court's instructions. Brame, defendant, and defendant's trial attorney testified at the hearing. Thereafter, the court filed an order denying PCR. In an accompanying statement of reasons, the court found that defendant's attorney had testified credibly. The court determined that defendant failed to show that he had been denied the effective assistance of counsel.

The court found that defendant's trial attorney made a sound strategic decision not to call Brame as an alibi witness and not to introduce certain phone records. The court also found that counsel had adequately advised defendant on whether defendant should testify. The court stated that counsel had "adequately warned [defendant] of the problems his prior record may present to his defense and credibility."

This appeal followed. On appeal, defendant argues his convictions should be reversed because his trial attorney was ineffective. He contends his trial attorney erred by failing to: (1) procure the appearance of an alibi witness; (2) obtain and introduce phone records that would have supported his claim that the victim had fabricated the sexual assault charges; and (3) advise defendant properly on whether he should testify.

II.

We note initially that the scope of our review of the findings of fact of the PCR court, based on its consideration of live witness testimony, is deferential. State v. Nash, 212 N.J. 518, 540 (2013). The court's findings of fact must be upheld on appeal if supported by sufficient credible evidence in the record. Ibid. (citing State v. Elders, 192 N.J. 224, 244 (2007); State v. Harris, 181 N.J. 391, 415 (2004)). We must give deference to factual findings that are "substantially influenced" by the court's "opportunity to hear and see the witnesses." Ibid. (quoting State v. Johnson, 42 N.J. 146, 161 (1964)).

We also note that in a criminal proceeding, the accused is entitled to the assistance of counsel. U.S. Const. amend. VI; N.J. Const. art. I. § 10. "[T]he right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466

U.S. 668, 686 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970)). To establish constitutional ineffectiveness, a defendant must satisfy the two-prong test established in Strickland and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987).

Under Strickland, the defendant must first show that "counsel's performance was deficient." Strickland, 466 U.S. at 687. The defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Ibid. The defendant must show that counsel's "representation fell below an objective standard of reasonableness." Id. at 688. The defendant is required to overcome the strong presumption that counsel exercised "reasonable professional judgment" and "sound trial strategy" in representing defendant. Id. at 689-90.

The defendant also must show that counsel's "deficient performance prejudiced the defense." Id. at 688. The defendant must establish that "counsel's errors were so serious as to deprive [him or her] of a fair trial, a trial whose result is reliable." Id. at 687. It is not sufficient for a defendant to show that counsel's errors may have had some "conceivable effect on the outcome of the proceeding." Id. at 693. The defendant must show a

reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." Ibid.

III.

We briefly summarize the relevant facts, as recounted by the Supreme Court in its opinion. Jones, 219 N.J. at 303-06. In January 2003, K.A. moved from Florida to defendant's home in New Jersey. Id. at 303. K.A. was nineteen years old at the time. Ibid. She came to New Jersey to distance herself from her boyfriend in Florida, reside in defendant's home, and attend a local college. Ibid.

Defendant was her mother's former boyfriend. Ibid. K.A. had known defendant for years and viewed him as a father figure. Ibid. Defendant's brother Denard Williams and Williams's six-year-old son also resided with defendant. Ibid. "[C]onflict[s] arose over K.A.'s desire to use her own car to come and go with friends as she wished, [which was] contrary to defendant's rules governing [her] behavior." Ibid.

K.A. testified that on March 18 and 22, 2003, defendant sexually assaulted her. Ibid. She stated that on both dates, he entered her room around 4:00 a.m. Ibid. According to K.A.,

defendant was drunk, ignored her protests, and held her down as he penetrated her. Ibid. K.A. said defendant used a condom each time. Ibid. She testified that after the first sexual assault, she did not go to the police and only told her boyfriend at the time. Ibid. K.A. said she was frightened and did not think she would be believed. Ibid. She did, however, report the second assault to the police. Ibid. She went to the local police headquarters without changing her clothes. Ibid.

K.A. brought a used condom to the police station and said she had removed it from defendant's trash, wrapped it in a napkin, and transported it in her purse. Id. at 304. She told the detective who interviewed her about the second assault, but did not mention the first incident until a few months before the trial, which was about two years later. Ibid.

K.A. was transported to a hospital, where she was examined. Ibid. A sexual assault nurse examiner testified that she "discovered faint bruising and scratches on K.A.'s upper arms but no vaginal injuries." Ibid. The nurse explained that vaginal abrasion "is rare in sexual assault cases, except in instances of gang rape or penetration with an object." Ibid. Tests of K.A.'s clothes for blood or semen were negative. Ibid. Other tests showed that defendant's and K.A.'s DNA were found on the condom. Ibid.

An "anomalous peak" also was found, which a DNA expert testified could have been the result of contamination or possibly the DNA of a third person. Ibid.

Defendant was arrested, and the police seized a bedspread from K.A.'s room, and a towel that K.A. said defendant was wearing when he entered the room. Ibid. The bedspread and towel tested positive for semen, but DNA tests were not performed on these articles. Ibid. Defendant waived his Miranda rights.[1] He said K.A.'s allegations were impossible, but after he was told about the condom, he said "this could have happened" because he had been drinking. Ibid.

Defendant's defense was that K.A. had fabricated the allegations because defendant was going to send her back to Florida due to "tensions over the use of her car and her desire for more freedom to go out with friends." Id. at 304-05. Defendant did not testify, but his brother testified about the conflicts between defendant and K.A. Id. at 305.

Williams said he did not hear anything on the night of the first incident. Ibid. Williams was not at home on the night of the second incident. Ibid. He also said he did not notice any change

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

in defendant's and K.A.'s behavior between the first and second alleged incidents. Ibid.

Brame did not testify, but she had provided a recorded statement to the prosecutor's office. Ibid. Brame said she was with defendant on the evening of March 21, 2003, and they went back to his house at around 2:00 or 3:00 a.m. on March 22, 2003. Ibid. Brame reported that previously, defendant and K.A. had been arguing over her behavior, K.A.'s bags were packed, and defendant had threatened to send her back to Florida. Ibid.

Brame also reported that when she and defendant returned to the house in the morning hours of March 22, defendant and K.A. got into an argument. Ibid. According to Brame, defendant called K.A.'s mother and told her he was going to send K.A. back to Florida the next day. Ibid. Brame stated that she and defendant had sexual relations in a bedroom on the third floor during the early morning hours of March 22. Ibid. She said defendant used a condom and threw it in the trash afterwards. Ibid.

At the trial, defendant's attorney informed the court that he was waiting for an unidentified witness. Ibid. A notice of alibi had previously been filed with respect to Brame's testimony. Ibid. The unidentified witness did not appear and the court

indicated it was unwilling to delay the trial. Id. at 306. Defendant did not seek a continuance and the defense rested. Ibid.

Prior to trial, defense counsel had attempted to obtain telephone records showing calls placed to K.A.'s mother from defendant's cell phone. Ibid. Defendant presented phone records to the PCR court. Ibid. These phone records showed a sixty-six minute call which was initiated at 10:26 p.m. on March 21, 2003, and a second call lasting one minute, which was initiated at 4:38 a.m. on March 22, 2003. Ibid. Defendant's counsel said the phone records were relevant to rebut anticipated testimony by K.A.'s mother that defendant had not called her about sending K.A. back to Florida. Ibid. The State did not, however, call K.A.'s mother as a witness.

IV.

At the evidentiary hearing on remand, Brame testified that on March 21, 2003, defendant picked her up between 11:00 and 11:30 p.m., and they went to a social club for drinks. They left the club around 3:00 a.m., and returned to defendant's home. Brame and defendant went to defendant's bedroom on the third floor. On the second floor, Brame saw K.A. and Williams's son.

Brame testified that defendant and K.A. had "a continuing falling out." She said defendant threatened to send K.A. back to

Florida, used his cell phone to call K.A.'s mother, and told K.A.'s mother he had purchased a train ticket for K.A. Brame said between 5:00 and 6:00 a.m., she and defendant had sex. According to Brame, defendant used one of the condoms he had beside his bed. She said she left defendant's home no later than 7:00 a.m. She learned of K.A.'s allegations when persons from the prosecutor's office contacted her and asked her to provide a statement and a DNA sample.

Brame further testified that she spoke with defendant's trial attorney by phone and said she would be available to testify for defendant. Counsel was not sure when she would be needed, but was sure he would need her. She testified that she gave defendant's attorney her new number, address, "and everything." Counsel did not call or issue a subpoena to her.

Defendant's attorney testified that he filed a notice of alibi, which named Brame. He recalled meeting with her, but could not recall when or where. He decided there "was a lot more downside" than "upside" in presenting her testimony. He said that he assumed a substantial amount of her DNA would be found on the condom, but he recalled tests had excluded her DNA on the condom. He was also concerned about the impact of "the timing of her coming forward" and "things like that."

Defendant's attorney stated that he probably made the decision not to call Brame after the State rested. He testified that he would not have decided not to call Brame as a witness without advising defendant and giving him an opportunity to override that decision. He said the unidentified witness mentioned at the trial could have been Brame. He acknowledged, however, he never told the court he had any potential witness other than Williams and Brame.

Defendant's attorney was asked whether Brame would have testified consistently with the statement she gave to the police. He replied that she would have. He said she would have testified that she had sex with defendant, but the "condom would have pretty much made her extremely unbelievable." He also noted the lateness of her coming forward as well as "all of the other circumstances she was aware of."

Defendant's attorney further testified about defendant's decision not to testify. He recalled that defendant had "one blemish" and it was a fourth-degree offense, which had something to do "with spanking of a child." He stated that the prosecutor had agreed to sanitize the conviction, but gave no further indication as to whether the State would try to use the conviction "going forward."

He stated that he believed he discussed testifying with defendant. He said he felt that even if the conviction was sanitized and "otherwise insulated from admission," the jury would nevertheless learn that defendant had been convicted of a fourth-degree offense and sentenced to six months in jail. Counsel stated this would be "completely inconsistent" with the defense strategy of trying to portray defendant as an "upstanding guy."

On cross-examination, counsel was asked about the phone records. He acknowledged the records indicated that calls were made to Florida on March 21 and 22, 2003. The call on March 21 lasted sixty-six minutes and was made at 10:26 p.m. Two calls were made on March 22, one at 4:38 a.m., and one at 11:09 a.m. The calls lasted one minute and three minutes, respectively.

Counsel was asked if the calls would have corroborated the defense theory that defendant had contacted K.A.'s mother in Florida. He noted that there were no audio recordings of the calls. He said a call of one minute means no one answered, and a call of three minutes could mean the call went to voicemail.

Counsel testified the phone records could have indicated that some effort had been made to make a phone call, but he did not believe the records were significant because there was "no substance" to them. Counsel also stated that he did not believe

the State was going to present testimony from K.A.'s mother, although he wished the State had done so. Counsel stated that defendant had talked to him about the phone records, but he did not have a recollection of having seen them. He stated that he thought at some point the defense made an effort to get the records.

Defendant testified that he had discussed Brame with his attorney and she was "definitely going to be a witness." He said she stayed "all night" with him on March 21, 2003, and he called K.A.'s mother at around 4:00 or 4:30 a.m. on March 22, 2013. Defendant said he told his attorney he had sex with Brame that night. He also discussed the phone records with counsel.

Defendant stated that he told his attorney he made the call on March 21 to inform K.A.'s mother he planned to send K.A. back to Florida the next day. He claimed he spoke with K.A.'s mother on the morning of March 22 to confirm he was going to put K.A. on the train. The conversation was brief because K.A.'s mother was on her way to work.

Defendant further testified that he intended to testify, but was deterred from doing so because he feared the jury would learn of his fourth-degree conviction, which arose from his disciplining of his young daughter. He said counsel never explained to him that

the conviction would be sanitized. He said he did not know of any other witnesses to be called other than Brame. He denied he sexually assaulted K.A. and said it was "just one big lie." He stated that K.A. did not follow the rules of his house, and started to run with "the wrong crowd." He claimed that when he came home, there were drug dealers in the house. According to defendant, K.A. did not respect him or his brother, who is a school teacher.

The judge filed an order denying defendant's petition, for the reasons set forth in an accompanying statement. The judge found that defendant's attorney was a "credible and believable witness." The judge determined that counsel's testimony was more credible than defendant's and Brame's testimony.

The judge found that defense counsel made a valid strategic decision not to call Brame as a witness because there were "more downsides than upsides" to her testimony. The judge noted that a major factor in counsel's decision was that Brame had been eliminated as a possible contributor to the DNA found on the condom K.A. brought to the police.

The judge further found that defense counsel had advised defendant he had a right to testify in his own defense, and discussed the possibility of sanitizing defendant's prior conviction. Counsel discussed with defendant the potential for

opening the door to the facts and circumstances of defendant's fourth-degree conviction for endangering the welfare of a child. Defendant's attorney believed admission of this evidence would be inconsistent with his strategy of presenting defendant as a reputable and upstanding man because the jury would learn that defendant had been convicted of a crime and served time in jail. The judge wrote, "[u]ltimately, after being fully informed by counsel of the consequences of his choice, [defendant] voluntarily decided not to testify in his defense."

In addition, the judge found that defendant's attorney did not err by deciding not to introduce the phone records. The defense theory was that K.A. fabricated the allegations against defendant after he called her mother and told her he intended to send her back to Florida due to her unacceptable behavior. The judge noted that defendant's attorney decided not to use the records because there was no guarantee they would corroborate defendant's version of the events, and counsel was able to introduce the defense theory through the testimony of defendant's brother.

Moreover, the records "do not speak for themselves." Without defendant's and Brame's testimony, "the records were largely irrelevant." Their only purpose was to corroborate the testimony of those two witnesses, which was otherwise not sufficiently

probative to outweigh the possible negative effects of presenting their testimony.

The judge concluded that trial counsel made strategically sound decisions in opting not to call Brame and not seeking to introduce the phone records at trial. The judge also concluded that defense counsel had adequately advised defendant concerning his right to testify and warned him of the problems his prior criminal record would present to his defense and credibility. The judge determined that counsel's actions did not fall below an objective standard of reasonableness and did not prejudice defendant in any way.

V.

On appeal, defendant argues that his convictions should be reversed because the testimony at the remand hearing established that he was denied the effective assistance of trial counsel.

A. Counsel's Decision Not To Call Brame As A Witness

Defendant contends the PCR court erred by finding that defense counsel made a valid strategic decision not to call Brame as a witness. Defendant contends Brame would have corroborated his defense. According to defendant, Brame would have provided an alibi for one of the two alleged sexual assaults, and a motive for K.A. to make false accusations of sexual misconduct.

He further argues that Brame's testimony would have provided an explanation for the "puzzling" condition of the condom that K.A. provided to the police. He contends the State's DNA expert indicated that the DNA on the condom could have been from three persons, and because there was a combination of DNA on the condom, the State's expert could only conclude that some of the DNA was K.A.'s and some defendant's.

Defendant further argues that Brame's testimony that she and defendant had sexual relations during the morning hours of March 22, 2003, would have supplied an explanation for the possible presence of DNA on the condom from a third person. He asserts the presence of K.A.'s DNA on the condom could have been due to an accident of her handling the item, or K.A.'s deliberate attempt to place her own DNA on the condom.

Defendant therefore argues that the record does not support defense counsel's assertion that there was more "downsides than upsides" to presenting Brame's testimony. Defendant argues that defense counsel stated he recalled that Brame had been excluded as a potential source of the DNA. Defendant asserts the judge erroneously "embraced" that statement because only his and K.A.'s DNA had been tested.

We are not persuaded by these arguments. As noted, defendant asserts Brame was not eliminated as a potential source of the DNA on the condom. That may be so, but there also was no evidence that Brame was, in fact, a source of the DNA. Thus, the State could have used the DNA evidence to effectively challenge Brame's assertion that she had sex with defendant in the morning hours of March 22.

Moreover, as defense counsel explained, Brame was late in coming forward with her statement. She did not provide the police with a statement until October 2004, which was approximately one year after defendant was charged, even though she knew he was arrested a week after his arrest. The State could have used Brame's late reporting in challenging Brame's credibility.

In addition, Williams had testified about the conflicts between defendant and K.A. He also testified that he had seen K.A.'s packed bags before March 18, and said K.A. did not want to return to Florida. Furthermore, testimony from Brame on these issues would have been cumulative. As counsel determined, any benefits that could be derived from this testimony would not have outweighed it negative aspects.

We are convinced there is sufficient credible evidence in the record to support the court's conclusion that defendant's attorney

was not deficient in deciding not to have Brame testify at trial. The record supports the court's determination that counsel's made a valid strategic decision not to call Brame as a witness, and defendant was not prejudiced by this decision.

B. Decision Not To Introduce Phone Records

Next, defendant argues the court erred by downplaying the significance of the phone records. He asserts that they would have undermined K.A.'s trial testimony. Defendant contends he entered K.A.'s room between 4:00 and 5:00 a.m. on March 22, and spent twenty-five to forty-five minutes lecturing her on parent/child relationships.

According to K.A., defendant then sexually assaulted her. Defendant said she screamed and he penetrated her for a minute. He claims the phone records showed that he called K.A.'s mother at 4:38 a.m. on March 22. He claims this evidence would have substantially discredited K.A.'s version of the events.

Defendant further argues that the phone records supported the defense theory that K.A.'s accusations were made in retaliation for defendant's decision to send her back to Florida. He asserts this is "especially persuasive" because K.A. only went to the police shortly after the call was made, even though she claimed to have first been assaulted several days earlier.

In addition, defendant contends the phone records would have corroborated Brame's version of the events that when she and defendant returned to defendant's home at around 3:00 a.m., defendant and K.A. got into an argument which "culminated" in defendant calling K.A.'s mother to say he was sending her back to Florida by train.

We are not persuaded by these arguments. As the judge noted, Williams had testified about the conflicts between defendant and K.A. regarding K.A.'s behavior, and how she did not want to return to Florida. The phone records would only show that calls had been made, not what was discussed.

Moreover, the phone call of March 21 was approximately sixty-six minutes, and the call on March 22 was for one minute. Defense counsel testified that a one-minute call indicated the call may not have been answered. The phone records would not have corroborated defendant's claim that he spoke with K.A.'s mother while she was on her way to work.

The judge also found that the phone records were largely irrelevant. The judge noted that the only purpose for presenting this evidence would have been to corroborate the testimony of defendant, Williams, and Brame. As noted, defendant did not testify

and counsel chose not to call Brame. The phone records also did not add anything of significance to Williams's testimony.

We are therefore convinced that there is sufficient credible evidence in the record to support the judge's determination that defense counsel made a sound strategic decision in not presenting the phone records and defendant suffered no prejudice as a result of that decision.

C. Advising Defendant On His Right To Testify

Defendant also argues that defense counsel erred by failing to advise him adequately regarding his right to testify at trial. He concedes that in deciding whether to testify, a defendant with a prior criminal conviction must weigh the impact the conviction will have on the jury against the benefits that his testimony may contribute to the defense.

He notes that under State v. Brunson, 132 N.J. 377, 391 (1993), a prior criminal conviction must be sanitized to lessen the risk that the defendant will be prejudiced, particularly if the prior offense is similar to the one for which the defendant is being tried. In Brunson, the Court held that when a defendant has been convicted of an offense that is the same or similar to the offense for which the defendant is on trial, the State may impeach the defendant by introducing evidence limited to the degree

of the crime for which defendant was convicted and the date of the offense. Ibid. Defendant further notes that he was previously convicted for endangering the welfare of a child, and that the assistant prosecutor stated on the record that the conviction must be sanitized. He contends counsel did not explain the Brunson rule to him.

Defendant asserts that if he had testified, there is a reasonable probability the outcome of the trial would have been different. He states that the jury heard K.A.'s version of the incidents and it did not hear his side of the story. He contends there were no other witnesses who testified on his behalf as to what actually occurred.

We find no merit in these arguments. As noted previously, the court found that the testimony of defense counsel was credible and more believable than any contrary testimony by defendant. Defendant's counsel testified that he advised defendant his prior conviction would be sanitized but there remained a risk that the details of that conviction might be revealed.

More importantly, defense counsel stated it was his defense strategy to present defendant as an upstanding "kind of guy." He said it would be "completely inconsistent" with this strategy if

defendant testified, and the State elicited the fact that he was previously convicted of a crime and served six months in jail.

We therefore conclude that the record supports the judge's finding that defense counsel adequately advised defendant regarding his right to testify, and defendant voluntarily elected not to exercise that right.

Affirmed.