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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-0336-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NEAL GRANT,

Defendant-Appellant.

Submitted April 23, 2018 – Decided May 4, 2018

Before Judges Ostrer and Rose.

On appeal from Superior Court of New Jersey,
Law Division, Essex County and Hudson County,
Indictment Nos. 00-02-0367 and 00-02-0368.

Joseph E. Krakora, Public Defender, attorney
for appellant (Richard Sparaco, Designated
Counsel, on the brief).

Robert D. Laurino, Acting Essex County
Prosecutor, attorney for respondent (Barbara
A. Rosenkrans, Special Deputy Attorney General/
Acting Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant Neal Grant appeals from an August 12, 2016 order denying his petition for post-conviction relief ("PCR") without an evidentiary hearing. We affirm.

We incorporate by reference the facts and procedural history set forth in our prior opinions. In sum, on August 20, 1999, at 7:05 a.m., defendant and his co-defendant, Leeshohn Brown, assaulted, and robbed at gunpoint, an operator of a catering truck in a parking lot in Newark. Two months later, the victim saw defendant and Brown a few blocks from the crime scene, and notified police who arrested both men.

Tried before a jury, defendant was convicted of first-degree robbery, N.J.S.A. 2C:15-1; second-degree aggravated assault, N.J.S.A. 2C:12-1(b); second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a); and third-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b).¹ In a bifurcated trial before the same jury, defendant was also convicted of possession of a handgun by a certain person, N.J.S.A. 2C:39-7(b). On direct appeal, we reversed that conviction,² but affirmed defendant's remaining convictions, and his twenty-year aggregate

¹ Brown was also convicted of the same offenses.

² The felon in possession conviction was reversed for an inadequate jury charge and remanded for trial. The disposition of that charge is not contained in the record before us.

prison term, subject to the eighty-five percent parole ineligibility period pursuant to the No Early Release Act ("NERA"), N.J.S.A. 2C:43-7.2. State v. Grant, No. A-6297-03 (App. Div. May 31, 2005) (slip op. at 6-7), certif. denied, 217 N.J. 296 (2011).

The Supreme Court granted defendant's petition for certification, and remanded the matter solely for resentencing pursuant to State v. Natale, 184 N.J. 458 (2005). State v. Grant, 185 N.J. 258 (2005). Following a hearing on remand, the trial court merged the aggravated assault and possession of a weapon for an unlawful purpose convictions with the robbery conviction and again sentenced defendant to an aggregate twenty-year term of imprisonment, subject to NERA. On appeal, we affirmed the sentence, but remanded for an adjustment of jail credits. State v. Grant, No. A-1232-10 (App. Div. July 26, 2013) (slip op. at 12-13).

Defendant's PCR was initially filed in April 2006, but was twice remanded for de novo review. Specifically, as set forth in our January 20, 2016 opinion:

The [initial] PCR judge denied [defendant's] petition without providing a written or oral statement of reasons. Defendant appealed, and in 2010, we remanded the matter, instructing the PCR judge to provide a statement of reasons for his decision. On April 10, 2010, upon learning the initial PCR judge was on military leave, we ordered the Law Division to reassign defendant's petition to a new

judge for de novo review. However, the matter was not reviewed de novo; rather, in 2014, the Law Division attempted to satisfy our 2010 order by filing with us an unsigned opinion found in the original PCR judge's files, dated "2009."

[State v. Grant, No. A-5799-08 (App. Div. Jan. 20, 2016) slip op. at 2-3 (reversing and remanding for a second de novo review because the unsigned "2009" opinion did not satisfy our order).]

Defendant's PCR petition was subsequently transferred to another vicinage because his trial counsel had become a judge in the same vicinage where defendant was tried and convicted. Applying the well-established two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984), as adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987), the present PCR court denied relief, expressing its reasoning in a cogent written opinion. In sum, the PCR judge found defendant failed to demonstrate trial counsel's performance was deficient and that counsel's performance prejudiced his defense. Fritz, 105 N.J. at 52 (citing Strickland, 466 U.S. at 687).

Defendant appeals, raising the following points for our consideration:

POINT I

DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL ATTORNEY DID NOT

REQUEST AN ACCOMPLICE LIABILITY INSTRUCTION
PRIOR TO CLOSING ARGUMENTS.

POINT II

DEFENDANT WAS ENTITLED TO AN EVIDENTIARY
HEARING ON HIS CLAIM THAT TRIAL COUNSEL FAILED
TO ADVISE HIM PROPERLY ON THE ADVANTAGES AND
DISADVANTAGES OF WAIVING HIS CONSTITUTIONAL
RIGHT TO REMAIN SILENT.

POINT III

[]DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE
OF COUNSEL IN THAT TRIAL COUNSEL FAILED TO
REQUEST THE MODEL JURY CHARGE ON PRIOR
MATERIAL INCONSISTENT STATEMENTS OF
WITNESSES.

We have carefully considered defendant's arguments, in light of
the applicable law, and conclude they lack sufficient merit to
warrant discussion in a written opinion. R. 2:11-3(e)(2). We
affirm substantially for the reasons stated in the PCR judge's
opinion. We add only the following brief comments.

Agreeing with the State's argument that defendant's claims
could have been raised on direct appeal and were, therefore, barred
pursuant to Rule 3:22-4, the PCR judge also denied defendant's
claims on the merits. While the Court has long recognized
ineffective assistance of counsel claims often are better raised
in a PCR petition rather than on direct appeal, State v. Preciose,
129 N.J. 451, 459 (1992), when the trial record contains sufficient
information to decide the claims, they are barred procedurally

pursuant to Rule 3:22-4 if not raised on direct appeal. See State v. Cerbo, 78 N.J. 595, 605 (1979) (expressing the well-settled principle that "post-conviction proceedings are not a substitute for a direct appeal.")

Here the trial record reveals defendant maintained his innocence, advancing misidentification and alibi defenses. Specifically, defendant testified he could not have committed the offenses because he was dropping off his sons at school. An accomplice liability charge, therefore, would have been inconsistent with that defense. Citing State v. Davis, 116 N.J. 341 (1989), the PCR court aptly observed defense counsel objected for strategic reasons when the State requested the accomplice liability charge at the conclusion of the trial court's complete jury instructions. We must defer to such strategic choices.

Further, the record belies defendant's claim that trial counsel failed to properly advise him about the advantages of testifying. As the PCR judge referenced, the record is replete with colloquy between the trial court and defendant, establishing defendant "understood all of his rights, was testifying of his own free will, and that he had discussed testifying with [trial counsel]." See State v. Savage, 120 N.J. 594, 631 (1990) (noting the decision whether to testify ultimately lies with the defendant, and it "is an important strategical choice, made by defendant in


consultation with counsel"); State v. Torres, 313 N.J. Super. 129, 145 (App. Div. 1998) (recognizing the right to testify at one's own trial is a fundamental right which may be waived through an intentional relinquishment).

We also agree with the PCR court's references to the trial record demonstrating the trial court instructed the jury "at length about how to judge the credibility of witnesses" and "[t]he jury was also specifically instructed on inconsistencies and discrepancies in witnesses['] testimony." Thus, defendant's claim that his counsel was ineffective by failing to request the model jury charge for prior contradictory statements finds no support in the record. As the PCR court observed, "[c]ounsel's deficiency, if any . . . would not satisfy the second prong of Strickland."

Lastly, we agree with the PCR judge that an evidentiary hearing was not necessary to assist the court in adjudicating defendant's claims. Because there was no prima facie showing of ineffective assistance of counsel, an evidentiary hearing was not necessary to resolve defendant's PCR claims. Preciose, 129 N.J. at 462-63.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION