

**RECORD IMPOUNDED**

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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-0623-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

R.L.,

Defendant-Appellant.

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Submitted December 14, 2017 – Decided March 5, 2018

Before Judges Simonelli and Rothstadt.

On appeal from Superior Court of New Jersey,  
Law Division, Monmouth County, Indictment No.  
10-05-0834.

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

Christopher S. Porrino, Attorney General,  
attorney for respondent (Carol M. Henderson,  
Assistant Attorney General, of counsel and on  
the brief).

PER CURIAM

Defendant, R.L., appeals from the denial of his petition for  
post-conviction relief (PCR) without an evidentiary hearing. For  
the reasons that follow, we affirm.

Defendant was convicted by a jury of sexual assault, N.J.S.A. 2C:14-2(b), and endangering the welfare of a child, N.J.S.A. 2C:24-4(a). The sentencing court imposed an aggregate sentence of seven years imprisonment, subject to a No Early Release Act, N.J.S.A. 2C:43-7.2, parole disqualifier. The trial court later denied defendant's motion for a new trial.

Defendant appealed and we affirmed his convictions and sentence in an unpublished opinion. State v. R.L., No. A-1990-11 (App. Div. Mar. 10, 2014). The Supreme Court denied his petition for certification, State v. R.L., 219 N.J. 628 (2014).

The facts underlying defendant's convictions are set forth in our earlier opinion and need not be repeated at length here. R.L., slip op. at 4-7.

Defendant filed a PCR petition on January 22, 2015, in which he argued his trial counsel provided ineffective assistance by failing to "use all of [defendant's] witnesses[,]" and "did not ask questions" that defendant had given counsel in a letter. He also argued that there was insufficient evidence of his guilt, the matter "should have never [gone] to trial," and his due process rights were violated.

A brief and amended petition were submitted on behalf of defendant in August 2015. In this brief, defendant argued that he was deprived of effective assistance of trial counsel "where

counsel did not properly prepare or investigate his case, present necessary witnesses[, ] and allowed evidence into the case prejudicial to [defendant]."

The prejudicial evidence to which defendant referred related to his trial counsel's strategic decision to elicit from a witness – a therapist – the child-victim's statement that she understood defendant was incarcerated and that the child hoped defendant would remain in jail. The witness did not know who told the child that defendant was in jail, nor did the witness know whether it was true. In a sidebar conference with the trial court, counsel acknowledged that he wished to use the statement as evidence of influence and bias. In fact, counsel relied upon the statement in his summation to infer that others, who were biased against defendant, told the victim about defendant's incarceration and influenced the child to shape her accusations against defendant to insure defendant's continued incarceration.

The PCR court denied defendant's petition by order dated June 15, 2016. On the same date, the court issued a nineteen-page written decision setting forth its reasons for denying defendant's petition without an evidentiary hearing. In the court's decision, it found that many of defendant's arguments were procedurally barred by Rule 3:22-4 and Rule 3:22-5 because they were previously addressed in our earlier opinion affirming his conviction, or they

were issues he could have raised on appeal but did not. Addressing defendant's remaining arguments, the PCR court found defendant did not establish a prima facie claim of ineffective assistance of counsel. Quoting our opinion in State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999), the PCR court found defendant's petition was supported only by "bald allegations," and "only conclusory statements asserting that prior counsel was ineffective for . . . permitt[ing] prejudicial information to be heard by the jury (i.e. that defendant was incarcerated) . . . ." The PCR court concluded that defendant did not establish his claim that counsel's "conduct (1) fell below an objective standard of reasonableness or (2) demonstrate[d] how the result of the proceedings would have been different." It held that defendant was not entitled to an evidentiary hearing and denied his petition. This appeal followed.

Defendant presents the following issue for our consideration in his appeal.

POINT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL.

Defendant only argues that contrary to the PCR court's conclusion, trial counsel's decision to elicit testimony about the child victim's statement to the therapist regarding defendant being incarcerated established a prima facie claim of ineffective assistance that warranted an evidentiary hearing. According to defendant, "[t]he practical effect of such testimony was so prejudicially inflammatory and detrimental to the defense that it could only have effectively sealed the defendant's fate in the eyes of the jurors." We are not persuaded by defendant's arguments and affirm.

The standard for determining whether counsel's performance was ineffective for purposes of the Sixth Amendment was formulated in Strickland v. Washington, 466 U.S. 668 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42 (1987). In order to prevail on a claim of ineffective assistance of counsel, defendant must meet the two-prong test of establishing both that: (1) counsel's performance was deficient and he or she made errors that were so egregious that counsel was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution; and (2) the defect in performance prejudiced defendant's rights to a fair trial such that there exists a "reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 687, 694.

In reviewing claims of ineffective assistance of counsel, courts apply a strong presumption that defense counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. "[C]omplaints 'merely of matters of trial strategy' will not serve to ground a constitutional claim of inadequacy . . . ." Fritz, 105 N.J. at 54 (quoting State v. Williams, 39 N.J. 471, 489 (1963), overruled in part on other grounds by, State v. Czachor, 82 N.J. 392, 402 (1980)).

PCR claims arising from trial counsel's strategic decisions cannot be considered in isolation nor does a miscalculation automatically establish ineffectiveness. "The quality of counsel's performance cannot be fairly assessed by focusing on a handful of issues while ignoring the totality of counsel's performance in the context of the State's evidence of defendant's guilt." State v. Castagna, 187 N.J. 293, 314 (2006). Generally, "strategic miscalculations or trial mistakes are insufficient to warrant reversal 'except in those rare instances where they are of such magnitude as to thwart the fundamental guarantee of [a] fair trial.'" Id. at 314-15 (quoting State v. Buonadonna, 122 N.J. 22, 42 (1991)).

"[A]n otherwise valid conviction will not be overturned merely because the defendant is dissatisfied with his or her counsel's exercise of judgment during the trial." State v. Allegro, 193 N.J. 352, 367 (2008) (quoting Castagna, 187 N.J. at 314). Although the parameters of such conduct are not easily defined, "there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance [and that, t]o rebut that strong presumption, a defendant must establish that trial counsel's actions did not equate to sound trial strategy." Allegro, 193 N.J. at 366 (alteration in original) (quoting Castagna, 187 N.J. at 314). Critically important to the analysis is that the conduct must be judged "on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 366-67 (quoting Castagna, 187 N.J. at 314).

We conclude from our review of the record that defendant failed to make a prima facie showing of ineffectiveness of trial counsel within the Strickland-Fritz test. We are satisfied that trial strategy was the dominant consideration in allowing the witness to testify about the child's statement regarding defendant's incarceration. In light of the fact that the theme of defendant's defense was that the child's accusations were untrue and motivated by others, the reference to defendant's

incarceration was clearly part of counsel's reasonable trial strategy.

Even if the introduction of the statement was not strategic, as the PCR court determined, defendant did not prove that without the challenged testimony, the result of the trial would have been different. See State v. Goodwin, 173 N.J. 583, 597 (2002) (addressing counsel's failure to file a suppression motion and stating in those instances, in which prejudice is not presumed, defendant must satisfy both Strickland prongs). While we recognize that a jury's knowledge of a defendant's incarcerated status may, in some instances, undermine the presumption of innocence to which each defendant in a criminal matter is entitled, "passing reference[s] to a defendant's incarcerated status" do not automatically diminish the presumption. State v. Martini, 131 N.J. 176, 236 (1993) (citing State v. Childs, 204 N.J. Super. 639, 651-52 (App. Div. 1985)), overruled in part on other grounds by, State v. Fortin, 178 N.J. 540 (2004). Even a direct question regarding the custodial status of a defendant is not automatic grounds for a mistrial, nor for a sua sponte curative instruction. Martini, 131 N.J. at 235-38; see also Childs, 204 N.J. Super. at 651-52.

Having concluded that trial counsel used the reference to defendant's incarceration to pursue a defense to the accusations



made against defendant, albeit unsuccessful, we agree with the PCR court that an evidentiary hearing was not warranted. See State v. Preciose, 129 N.J. 451, 462-63 (1992).

Affirmed.

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



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