SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0868-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GERALD POHIDA,

Defendant-Appellant.

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Submitted September 19, 2017 – Decided April 10, 2018

Before Judges Leone and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 04-04-0497.

The Buerkle Law Firm, attorney for appellant (Scott C. Buerkle, on the brief).

Andrew C. Carey, Middlesex County Prosecutor, attorney for respondent (Joie Piderit, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Gerald J. Pohida appeals from a September 11, 2015 order denying his claim for post-conviction relief (PCR) following an evidentiary hearing. We affirm.

I.

We briefly summarize the procedural history. From June to October 2003, defendant, then forty-one years-old, engaged in sexual activities with a thirteen-year-old girl he met on the internet. Defendant requested to meet the thirteen-year-old's friends, which resulted in defendant engaging in sexual activities with a twelve-year-old girl. Defendant was arrested on October 24, 2003, and charged with two counts of first-degree kidnapping, N.J.S.A. 2C:13-1(b); first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a); two counts of second-degree sexual assault, N.J.S.A. 2C:14-2(c); two counts of third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a); and fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b).

Prior to trial, defendant's trial attorneys Alan Zegas and Mary Frances Palisano filed a number of pretrial motions, including a motion under Miranda v. Arizona, 384 U.S. 436 (1966), to suppress defendant's statement at Sayreville Police Department (SPD) headquarters on the night of his arrest. Defendant's wife Kerri Pohida testified that while he was being arrested at their house, he asked the officers if he could call his lawyer but was told to

wait. The trial court did not credit the testimony of defendant's wife, and denied the motion to suppress.

After an eight-day trial, a jury convicted defendant of all charges. He was sentenced to thirty years in prison with twenty-five-year and 85% periods of parole ineligibility under N.J.S.A. 2C:15-1(c) and N.J.S.A. 2C:43-7.2, to be served consecutively to an unrelated sentence.

On appeal, defendant argued that his motion to suppress his statement to police should have been granted because "the police did not scrupulously honor his request for counsel." On February 10, 2009, we upheld his June 14, 2006 judgment of conviction, finding "sufficient credible evidence in the record to support the judge's finding that defendant did not invoke his right to counsel when he was at home and defendant voluntarily gave a statement to the police." State v. Pohida, No. A-6266-05 (App. Div. Feb. 10, 2009) (slip op. at 14) (Pohida I), certif. denied, 199 N.J. 133 (2009).

Defendant filed a PCR petition claiming his trial attorneys were ineffective. See State v. Pohida, No. A-2408-11 (App. Div. Sep. 30, 2013) (slip op. at 6) (Pohida II). Defendant's first PCR counsel, Michael Paul, filed a brief which claimed defendant's trial attorneys were ineffective in investigating and trying the case. Defendant replaced Paul with his second PCR counsel, Michael

Simon. Simon's brief claimed the trial attorneys were ineffective in not seeking to suppress defendant's statement because the police ignored a request to cease the interrogation by defendant's pretrial counsel, Michael Campagna. Defendant cited State v. Reed, 133 N.J. 237 (1993), which held:

> when, to the knowledge of law-enforcement officers, an attorney has been retained on behalf of a person in custody on suspicion of crime and is present or readily available to assist that person, the communication of that information to the suspect is essential to making a knowing waiver of the privilege against self-incrimination, and withholding that information renders invalid the suspect's waiver of the privilege against self-incrimination.
>
> [Id. at 269.]

Reed also ruled that "whenever the attorney has communicated his presence and desire to confer with the suspect to an agent of the State in a position to contact the interrogating officers, we will impute to those officers knowledge of the attorney's presence and desire to confer with the suspect." Id. at 264.

Simon supplied certifications from Campagna and defendant's brother Wayne Pohida in support of the PCR petition.[1] Campagna certified that on the night of defendant's arrest, he called SPD

[1] Our opinion on defendant's PCR appeal misidentified Wayne's certification as being from defendant's father. Pohida II, slip op. at 14-15.

while being driven to the station and requested that any questioning of defendant should cease until he arrived. Pohida II, slip op. at 9. Wayne certified he drove Campagna to SPD headquarters that night and witnessed the phone call. Id. at 14-15.

The PCR court denied defendant's PCR petition. As to the Reed issue, the PCR court found that the certifications defendant provided regarding Campagna's call were "vague, conclusory and speculative[,]" and denied an evidentiary hearing. Id. at 10.

We reversed and remanded the matter for an evidentiary hearing solely on whether trial counsel were ineffective for not seeking to suppress defendant's confession under Reed. Id. at 17. We found that the certifications supporting defendant's argument, taken in the light most favorable to defendant, demonstrated a prima facie case for ineffective assistance of counsel warranting an evidentiary hearing. Id. at 14-16.

On remand, the PCR court held a five-day evidentiary hearing. We briefly summarize the testimony and evidence presented at the hearing.

Defendant called three fact witnesses. His now ex-wife Kerri testified as follows. On the night of October 24, 2003, defendant was arrested at their home. While being arrested, defendant instructed Kerri to call Campagna, a longtime family friend and

attorney for the Pohida family. She did not know Campagna's phone number, so she called defendant's brother Wayne and asked him to call Campagna.

Wayne testified that upon receiving the call from Kerri, he immediately called Campagna's cell phone. Campagna and Wayne testified that Campagna said he was having dinner in a restaurant, and that they made arrangements for Wayne and another brother, Glenn Pohida, to pick up Campagna at Campagna's home.

Campagna testified that he was picked up by defendant's brothers and that shortly after they started driving to SPD headquarters, he called SPD and spoke to one person, whom he believed was a dispatcher. Campagna "told them who I was, who I wanted to see, and asked if he was being questioned, to cease until I got there." Wayne testified Campagna said "he represented [defendant], he was on his way, and do not question." However, the phone records for Campagna's cell phone and Wayne's cell phone did not show an outgoing call to SPD headquarters on the night of October 24, 2003. Attempts to get the phone records for Glenn's cell phone were unsuccessful. Neither Wayne nor Campagna could recall whose cell phone was used to call SPD.[2]

[2] Glenn did not testify at the evidentiary hearing.

Wayne and Campagna testified it took fifteen to twenty minutes to drive SPD headquarters. Campagna testified as follows regarding the events that transpired upon their arrival. Campagna informed the desk officer at the door that he represented defendant and that he wanted to speak with defendant. He was told defendant was in custody and being questioned. Approximately fifteen minutes later, Campagna was brought into an interrogation room to speak to defendant, and was told by Detectives Davern and Fitzsimmons that their questioning had concluded. After conferring with defendant, and subsequently speaking to the detectives, Campagna knew that defendant had given a statement prior to Campagna's arrival at the interrogation room. However, he did not tell the detectives that he had called SPD or had to wait to see defendant, or that they had violated defendant's rights by continuing to question.

Regarding defendant's trial attorneys, Campagna testified he never spoke with Zegas about any aspect of defendant's case, including the Reed issue. Campagna testified that while he may have spoken with Palisano, he did not believe that he told her about the Reed issue. Wayne testified that he accompanied defendant to meetings at Zegas's office prior to the trial, but that it never occurred to him to tell the trial attorneys about the Campagna phone call.

Campagna testified that he referred Simon to the Pohida family to serve as defendant's second PCR counsel, and that Simon asked him about his phone call to SPD. Campagna testified he was unsure if he was aware of the call's legal significance until Simon asked him about it.

The State called several officers who were working at SPD headquarters on the night of October 24, 2003. Dispatchers Tom Fogarty and Beth Freyer each testified they had no recollection of receiving a call from Campagna or about Pohida that night. They also testified that, in their more than twenty years as dispatchers, neither had ever taken a call from an attorney requesting that police not speak to the client. Both testified that if they received such a call, they would have made sure the attorney spoke to the station commander, and they would remember it. Fogarty testified that all incoming calls to SPD came to the dispatchers, and that if the dispatchers were busy, a station commander would pick up an incoming call.

The on-duty SPD station commanders on the evening of October 24, 2003, were Sergeant Ray Szkodny and Sergeant Glenn Skarzynski, who would take over when Szkodny was on break. Neither recalled getting a call from Campagna or about Pohida that night. Each testified that, in his approximately twenty years of service, he never received a call from a lawyer asking the police to refrain

from questioning a client, and that they would remember such a call. Both testified that an attorney coming into the station would interact with the station commander at his desk by the door to SPD headquarters. Neither Szkodny nor Skarzynski could recall interacting with Campagna at the station on October 24, 2003.

Detectives Kenneth Davern and Jack Fitzsimmons questioned defendant at SPD headquarters that night. Davern testified defendant was advised of his Miranda rights, and given a pre-interview prior to the recording his statement. Fitzsimmons and Davern each testified that they were not informed before or during the pre-interview or the statement that Campagna had called or was at the station, and that if so informed they would have stopped the interview. The detectives testified they were informed Campagna was at SPD headquarters when Sergeant Richard Sloan knocked on the door after defendant had completed his statement. Fitzsimmons testified Campagna did not say he had called the police station that night. Fitzsimmons' contemporaneous police report stated that when Sloan said Campagna had arrived, "the interview of [defendant] ceased, and his attorney was escorted into the conference room, where he was able to meet with his client."

Sergeant Sloan testified he was taking inventory of evidence seized from defendant's residence when he received a call which he believed came from a station commander, that an attorney had

arrived at the station to see defendant. Sloan testified he immediately met Campagna and immediately brought him to the interview room where defendant's interview had been completed.

The State also called defendant's trial attorneys. Zegas testified as follows. Shortly after he substituted onto the case he spoke to Campagna. He was aware of Campagna's visit to SPD headquarters on the night of defendant's arrest, and asked Campagna questions regarding Campagna's contact with SPD and arrival at the station, and whether defendant had been questioned in violation of his rights. In response, Campagna told Zegas that when he arrived at SPD headquarters, he was informed the questioning of defendant "was over." Campagna never suggested he contacted SPD prior to his arrival at the station. If he had, Zegas would have moved to suppress on that basis.

Zegas testified that he met with Wayne, who never claimed he overheard Campagna calling SPD. Moreover, Zegas also testified that defendant was "very active in his defense," and that defendant never mentioned Campagna's alleged call to SPD, including when the defense team "went over the statement very carefully with [defendant]."

Palisano testified that shortly after defendant's initial meeting with the firm, Zegas told her that he had spoken to Campagna, who said he had not arrived at the police station in

time to intervene before defendant gave his statement. Palisano testified that Zegas used this sequence of events as an example of why their firm's practice was to always call and then fax a letter of representation to police departments in similar circumstances. Palisano testified that she was familiar with Reed, and that if Campagna had called or been made to wait at the police station prior to speaking with defendant, she would have moved to suppress on that basis.

The State subpoenaed second PCR counsel Simon, who testified as follows. He substituted in to handle defendant's PCR petition after being referred by Campagna. Shortly thereafter, he attended a meeting where Campagna introduced him to members of defendant's family. During that September 2010 meeting, Campagna claimed that he called SPD and requested they cease questioning defendant, and that SPD had not honored his request. Campagna must have been the source of this information, which Simon used in the PCR brief, because there was no other evidence through which he could have independently discovered it.

Defendant testified as a rebuttal witness that he sent his first PCR counsel Paul a letter dated August 4, 2010, in which he specifically raised the Reed issue. Paul died in 2014. A paralegal who had worked for Paul testified he was unable to locate

in Paul's files or on his computer a copy of the letter defendant claims to have sent.

On cross-examination, defendant testified as follows. When he met with Campagna on the night of his arrest at SPD headquarters, Campagna did not inform him that he had called SPD or been made to wait before seeing defendant. Defendant recalled first learning of Campagna's alleged phone call from his brother David Pohida during a prison visit. Thereafter, defendant discovered the Reed issue while doing legal research in the prison library. Defendant did not raise the Reed issue to his lawyers or judges between 2006 and 2010 because it was his understanding the issue could only be raised at PCR, not on direct appeal. Defendant never spoke to Campagna directly about the Reed issue.

In a September 11, 2015 written decision, the PCR court denied defendant's petition. The court found insufficient evidence to substantiate the claim that Campagna called SPD and requested the police stop questioning defendant until Campagna arrived. Thus, the court concluded there was no Reed issue and defendant's trial counsel were not ineffective for not raising a Reed issue.

Defendant appeals, arguing:

> I. THE TESTIMONY ELICITED FROM MICHAEL SIMON RELATED TO THE GENESIS OF HIS LEGAL THEORIES VIOLATED THE ATTORNEY WORK-PRODUCT PRIVILEGE.

a. Mr. Simon's testimony cannot be justified by N.J.R.E. 504(2)(c).

b. Mr. Pohida did not make a knowing and voluntary waiver of the attorney-client privilege.

II. THE CROSS-EXAMINATION OF GERALD POHIDA INFRINGED UPON ATTORNEY WORK PRODUCT AND THE ATTORNEY-CLIENT PRIVILEGE.

a. The State's cross-examination of Gerald Pohida infringed upon defendant's attorney work product privilege.

b. The State's cross-examination of Gerald Pohida violated the attorney-client privilege.

III. THE COURT'S EXAMINATION OF WAYNE POHIDA CALLED FOR TESTIMONY FOR WHICH HE HAD NO PERSONAL KNOWLEDGE.

IV. THE COURT'S FINDING WAS AGAINST THE WEIGHT OF THE EVIDENCE.

V. THE COURT'S DECISION WAS INCONSISTENT AND THE MATTER SHOULD BE REMANDED FOR CLARIFICATION.

II.

Defendant claimed his trial attorneys were ineffective for failing to discover Campagna's alleged phone call to SPD and to file a motion to suppress under Reed. To show ineffective assistance of counsel, defendant had to meet the two-pronged test of Strickland v. Washington, 466 U.S. 668 (1984), adopted in State v. Fritz, 105 N.J. 42 (1987). "The defendant must demonstrate first that counsel's performance was deficient, i.e., that

'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' In making that demonstration, a defendant must overcome a strong presumption that counsel rendered reasonable professional assistance." State v. Parker, 212 N.J. 269, 279 (2012) (quoting Strickland, 466 U.S. at 687).

Second, "a defendant must also establish that the ineffectiveness of his attorney prejudiced his defense. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 279-80 (quoting Strickland, 466 U.S. at 694). "A defendant asserting ineffective assistance of counsel on PCR bears the burden of proving his or her right to relief by a preponderance of the evidence." State v. Gaitan, 209 N.J. 339, 376 (2012).

We first address defendant's claim that the PCR court's decision was against the weight of the evidence. We review any legal conclusions de novo. State v. Nash, 212 N.J. 518, 540-41 (2013). Where a PCR court has held an evidentiary hearing, the appellate standard or review "is necessarily deferential to a PCR court's factual findings based on its review of live witness testimony." Id. at 540. "An appellate court's reading of a cold record is a pale substitute for a trial judge's assessment of the

credibility of a witness he has observed firsthand." Ibid. "In such circumstances we will uphold the PCR court's findings that are supported by sufficient credible evidence in the record." Ibid.

"We defer to the findings of the PCR court in weighing witness testimony when those findings are supported by sufficient credible evidence in the record." Id. at 553. A reviewing court may not set aside a factfinder's conclusion "as against the weight of the evidence unless, having due regard to the opportunity of the [factfinder] to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a manifest denial of justice under the law." See R. 3:20-1; see also State v. Armour, 446 N.J. Super. 295, 305-06 (App. Div. 2016), certif. denied, 228 N.J. 239 (2016); R. 2:10-1. We must hew to our standard of review.

Defendant's brief acknowledges that the PCR court credited the testimony of the police officers and discredited Wayne and Campagna, and that "without making a direct finding that Campagna is lying, the [c]ourt clearly conclude[d] that no such phone call occurred." The court found there was "insufficient evidence to substantiate this claim." The court also found "Campagna simply arrived at the [SPD headquarters] too late, after [defendant] had concluded his statement."

We find no manifest denial of justice. The only testimony that Campagna called SPD was from defendant's brother Wayne and from Campagna, whom the PCR court found was not only defendant's lawyer but "the Pohida family lawyer and a close family friend." See State v. Scott, 229 N.J. 469, 481 (2017) (ruling the bias or interest of a witness bears upon his credibility). Their cellphone records had no record of such a call, and there was no evidence they used the only other available phone, belonging to defendant's brother Glenn. Campagna claimed he demanded that the police not question defendant, but he made no such claim to the station commander he encountered when he entered SPD headquarters, to Sergeant Sloan who escorted him to the interview room, to the detectives conducting the interview, or to defendant, even though all of them told him defendant had been questioned. It is undisputed Campagna did not mention his alleged call or the improper questioning to Wayne and Glenn that night, to defendant's trial attorneys, or indeed to anyone involved in the case for over six years.

Defendant claims the State was unable to directly contradict the testimony of Campagna and Wayne that Campagna called SPD demanding the police not question defendant. To the contrary, the two SPD dispatchers who would have received any call, and the two SPD station commanders who would have handled such a call,

testified that they had no memory of such a call from Campagna, and that they would remember if an attorney had called demanding the police stop questioning his client. The dispatchers testified they would have immediately brought such a call to the attention of the station commanders, and the station commanders, the escorting sergeant, and the detectives all testified such a demand would have caused them to stop the questioning immediately.

Defendant notes the station commanders, Sergeants Szkodny and Skarzynski, also testified that they did not remember Campagna showing up at the station that night. However, Campagna testified that all he did on arrival was to say he represented defendant and wanted to speak with him. Although the station commanders said they would remember that too, the PCR court could find that would have been far less memorable than an attorney calling up during an interrogation demanding the police stop questioning his client.

The PCR court could properly credit the officers' consistent testimony that such a phone call never occurred. Accordingly, the PCR court's factual findings were supported by sufficient credible evidence.

III.

Defendant also argues that the PCR court's written decision was inconsistent and should be remanded for clarification. He cites a statement in the written decision: "The Court accepts Mr.

Campagna's testimony that he made this phone call, despite the lack of physical proof and that Mr. Campagna could not recall whose phone he used." Defendant argues that the commonly-accepted meaning of the word "accept" is "to consider as true." Defendant argues this statement cannot be reconciled with the court's conclusion that no such phone call occurred.

The State argues that "accepts" meant the PCR court accepted that Campagna believed his statements were true. We believe that, read in context, the PCR court's use of "accept" indicated that it acknowledged Campagna's testimony but discredited it "without making a direct finding that Campagna is lying," as defendant concedes.

The PCR court's decision first noted there was no evidence supporting the claims of Campagna and Wayne. The decision stated that "[t]he phone records of Mr. Campagna and Wayne reflect no such call was made to the police station," and that no records could be obtained for Glenn's phone.

Thereafter, the PCR court's decision found Campagna's claim not credible. The decision stated that "[i]t is unreasonable to believe that when Mr. Zegas and Ms. Palisano took over representation of the Defendant, Mr. Campagna failed to inform them of this supposed Reed issue." The court found that Campagna, "certainly would have shared this information not only with Mr.

Zegas and Ms. Palisano, but with Defendant's family as well, especially considering Mr. Campagna drove home from the police station that evening with the Defendant's two brothers." The court credited Zegas' testimony that when he asked Campagna about the events of that night, Campagna merely stated, "by the time I got to see [defendant], it was over." As such, the court concluded that "Campagna's silence [in response to Zegas] on any police wrongdoing is akin to an express affirmation that all was handled properly."

Moreover, the PCR court noted that if Campagna, in speaking with defendant, had discovered the detectives had continued to question defendant after Campagna's call, and Campagna had told defendant, "it is highly unreasonable to believe that the defendant would not have brought this to the Court's attention."

The PCR court found "insufficient evidence to substantiate [defendant's] claim" that "Campagna telephoned [SPD] to cease questioning." The court also found that "Defendant's statement had already concluded" before "Campagna's arrival at the police station." The court concluded: "Therefore, there is no State v. Reed issue, and Mr. Zegas and Ms. Palisano were not ineffective for failing to raise such issue at the suppression hearing."

Thus, any initial ambiguity that arose as a result of the PCR court's statement that it "accepts Mr. Campagna's testimony that

he made this phone call," was quickly and unambiguously dispelled. Defendant acknowledges as much in his brief, stating "the [c]ourt clearly concluded that no such phone call occurred." Thus, a remand for clarification is not warranted.

IV.

As the PCR court believed the police officers and disbelieved defendant's evidence that Campagna called SPD or otherwise tried to stop the questioning before the questioning was concluded, defendant failed to establish the factual predicate of his ineffectiveness claim. Moreover, even assuming the alleged call had occurred, defendant would still have to show the trial attorneys were deficient in their investigation into a potential Reed issue based on a call no one told them about. Despite being questioned by the trial attorneys, Campagna and Wayne denied telling them about the alleged call and the PCR court credited the trial attorneys' testimony they were unaware of any such call. The court found "it was not necessary for Mr. Zegas to ask additional follow-up questions to Mr. Campagna, as the Defense now argues, because Mr. Campagna's silence on any police wrongdoing is akin to an express affirmation that all was handled properly."

The extent of trial counsel's investigation "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." State v.

Perry, 124 N.J. 128, 154 (1991) (quoting Strickland, 466 U.S. at 691). Moreover,

> [t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.
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> [State v. DiFrisco, 174 N.J. 195, 228 (2002) (quoting Strickland, 466 U.S. at 691).]

"Thus, when the 'defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.'" State v. Martini, 160 N.J. 248, 266 (1999) (quoting Strickland, 466 U.S. at 691). The trial attorneys "cannot be faulted for failing to expend time or resources analyzing events about which they were never alerted." DiFrisco, 174 N.J. at 228 (finding counsel's investigation was not deficient where "neither defendant's family nor defendant mentioned [the alleged information] in interviews with the defense team").

In addition, defendant also had to prove prejudice. If a trial "counsel's failure to litigate a [suppression] claim competently is the principal allegation of ineffectiveness, the

defendant must also prove that his [suppression] claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." Perry, 124 N.J. at 153 (quoting Kimmelman v. Morrison, 477 U.S. 365, 375 (1986)).

In his statement to the detectives, defendant admitted meeting the thirteen-year-old, but denied engaging in any sexual activity with her. The State argues that other evidence established the meeting and the sex occurred, and that the evidence of defendant's guilt of all the crimes was overwhelming. As defendant failed to prove the trial attorneys were deficient, we, like the PCR court, need not determine whether he proved prejudice.

V.

Defendant argues that testimony elicited from second PCR counsel Simon during the evidentiary hearing violated his attorney-client privilege, and intruded upon the attorney work-product privilege. We disagree.

"[C]ommunications between lawyer and his client in the course of that relationship and in professional confidence, are privileged." N.J.R.E. 504(1) (quoting N.J.S.A. 2A:84A-20(1)). However, this privilege does not extend "to a communication relevant to an issue of breach of duty by the lawyer to his client[.]" N.J.R.E. 504(2)(c) (quoting N.J.S.A. 2A:84A-20(2)(c)).

Under this exception, the privilege "does not extend to communications relevant to an ineffective-assistance-of-counsel claim." State v. Bey, 161 N.J. 233, 296 (1999).

The PCR court suggested this exception applied and waived the privilege as to all prior counsel.[3] Simon's communications with Campagna were relevant to an issue of breach of duty by Zegas and Palisano, but Simon was not the lawyer whom defendant accused of breach of duty. We need not reach whether the exception extends beyond the lawyer accused of ineffectiveness because defendant waived the attorney-client privilege before Simon testified.

Current PCR counsel initially objected to the State's subpoena of Simon because his testimony would not be "relevant with regards to the trial counsel's work." The PCR court responded that Campagna had testified about his communications with Simon.[4]

When Simon appeared in court, current PCR counsel asked the PCR court to instruct Simon on attorney-client issues. The prosecutor wondered if defendant "would be willing to waive the privilege." Current PCR counsel and defendant conferred off the

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[3] The PCR court also stated that the remand for an evidentiary hearing required a broad inquiry into the Reed issue. However, nothing in our opinion remanding the case, or in the law governing PCR petitions, removed the need to respect applicable privileges. See N.J.R.E. 101(a)(1).

[4] Defendant does not renew the relevance objection on appeal.

record. The court asked if defendant "was willing to waive?" Current PCR counsel responded that defendant waived the privilege:

> Your Honor, I have spoken to my client . . . I said this before, I'm not too sure how Mr. Simon's testimony is relevant to the PCR issue before the Court . . . . That being said, my client has no problem with waiving the attorney/client privilege with regard to Mr. Simon's representation of him as to the PCR.

Simon then testified without objection. When current PCR counsel asked a question about what defendant told Simon about his first PCR attorney Paul, current PCR counsel reiterated that defendant "has waived" the privilege. The prosecutor never asked Simon about any "communications between lawyer [Simon] and his client" defendant. N.J.R.E. 504(1).

On appeal, however, defendant claims his waiver of the privilege was not "knowing and voluntary" because the PCR court did not directly address him and ask if he wished to waive the privilege, tell him he had no obligation to do so, warn him of the risks, or ask if he was doing so without coercion or duress. However, there is nothing in the record to indicate that defendant was unaware of any risk or his right not to waive, that current PCR counsel coerced him in open court, or that if asked he would have made a different decision than what counsel announced in front of him after consulting with him.

Defendant notes the court's statement days earlier, after Campagna raised his conversations with Simon, that Simon "might be an interesting witness." However, review of the record shows the court did not coerce defendant to waive the privilege; as defendant admits, the court believed "a waiver from [defendant] was not necessary."

Moreover, defendant fails to cite any authority that such an inquiry is required for an effective waiver of attorney-client privilege. Although it is the client's decision whether to waive the attorney-client privilege, "an attorney or agent may exercise this power [when] acting with a client's authority." State v. Davis, 116 N.J. 341, 362 (1989). The attorney-client privilege is a statutory right, not a constitutional right. Even for "substantial rights that implicate the Constitution but are not explicitly identified therein," effective waivers only "require defense counsel to explain the ramifications of waiver to the client before acting on that waiver in court. However, an on-the-record waiver by the client is not required." State v. Buonadonna, 122 N.J. 22, 35 (1991).

Indeed, the attorney-client privilege can be waived in a variety of ways, without an on-the-record inquiry by the court. See State v. Mauti, 208 N.J. 519, 531-32 (2012). The privilege can be waived if the defendant "contracted" to do so, or "made

disclosure of any part of the privileged matter or consented to such a disclosure made by anyone." N.J.R.E. 530 (quoting N.J.S.A. 2A:84A-29). "In addition to the explicit contract and disclosure waiver provisions of that rule, our courts have also recognized that a privilege may be waived 'implicitly' where a party puts a confidential communication 'in issue' in a litigation. Mauti, 208 N.J. at 532 (quoting Kinsella v. Kinsella, 150 N.J. 276, 300 (1997) (citation omitted)).

Defendant waived the privilege implicitly as well as explicitly. By calling his former counsel Campagna as a witness, "defendant waived the attorney-client privilege" as to Campagna's conversations. Bey, 161 N.J. at 296. Defendant did not object when Campagna testified about his conversations with Simon, putting those conversations in issue. A "client cannot 'use the privilege as a sword rather than a shield,' and thereby 'divulge whatever information is favorable to [the client's] position and assert the privilege to preclude disclosure of the detrimental facts.'" In re Grand Jury Subpoena Issued to Galasso, 389 N.J. Super. 281, 298 (App. Div. 2006) (quoting United Jersey Bank v. Wolosoff, 196 N.J. Super. 553, 567 (App. Div. 1984)); see Kinsella, 150 N.J. at 301 (citing Wolosoff).

Defendant also contends Simon's testimony violated the work-product doctrine. However, defendant did not mention the work-

product doctrine in the PCR court. Therefore, he must show plain error. Under the plain error standard, "defendant has the burden to show that there is an error, that the error is 'clear' or 'obvious,' and that the error has affected 'substantial rights.'" State v. Chew, 150 N.J. 30, 82 (1997) (quoting United States v. Olano, 507 U.S. 725, 734 (1993)). To show such an effect, defendant has the burden of proving the error was "clearly capable of producing an unjust result[.]" R. 2:10-2.

Defendant cites Hickman v. Taylor, 329 U.S. 495 (1947), which originated the work-product doctrine, but "[t]hat was a civil case arising in the federal courts and, though it was admittedly concerned with pretrial discovery of written statements of prospective witnesses, it did not enunciate any constitutional principle and has no controlling force" in state criminal cases. State v. Montague, 55 N.J. 387, 401 (1970).

Defendant also cites Rule 4:10-2(c), but that is "the civil work product privilege." Galasso, 389 N.J. Super. at 299. Rule 4:10-2 has no applicability to criminal cases. Compare R. 4:1 ("The rules in Part IV . . . govern the practice and procedure of civil actions") with R. 3:1-1 ("The rules in Part III govern the practice and procedure in all indictable . . . proceedings").

"In New Jersey, the attorney work product privilege applicable to criminal cases is codified in R. 3:13-3(c)," now

Rule 3:13-3(d) in the criminal discovery rule. State v. DeMarco, 275 N.J. Super. 311, 317 (App. Div. 1994). Rule 3:13-3(d) provides:

> (d) Documents Not Subject to Discovery. This rule does not require discovery of a party's work product consisting of internal reports, memoranda or documents made by that party or the party's attorney or agents, in connection with the investigation, prosecution or defense of the matter nor does it require discovery by the State of records or statements, signed or unsigned, of defendant made to defendant's attorney or agents.

By its terms, the criminal work-product rule protects from discovery only "documents," such as "internal reports, memoranda," "records or statements." Ibid. Therefore, the criminal work-product rule does not address whether an attorney can be called as a witness, which is instead governed by the attorney-client privilege and the rules of evidence.

Defendant relies on the final sentence of inapplicable civil work-product rule:

> (c) Trial Preparation; Materials. Subject to the provisions of R. 4:10-2(d), a party may obtain discovery of documents, electronically stored information, and tangible things otherwise discoverable under R. 4:10-2(a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the

> case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.
>
> [R. 4:10-2(c) (emphasis added).]

Even if the civil work-product rule applied to this criminal case, its final sentence only limits the "discovery of such materials," namely "documents, electronically stored information, and tangible things." Ibid.; see Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 374 (App. Div. 2010) ("The work product privilege offers qualified protection from disclosure of documents"). By its terms, the civil rule too does not govern whether an attorney may be called as a witness.[5]

Defendant cites Halbach v. Boyman, 377 N.J. Super. 202 (App. Div. 2005), where we ruled an attorney objecting to being questioned "about his legal theories and strategies" in representing himself pro se was "entitled to the protections

[5] Defendant also cites the federal civil work-product rule, but it similarly covers "documents and tangible things." Fed. R. Civ. P. 26(b)(3)(A); see In re EchoStar Commc'ns. Corp., 448 F.3d 1294, 1301 (Fed. Cir. 2006) ("Unlike the attorney-client privilege, which protects all communication whether written or oral, work-product immunity protects documents and tangible things, such as memorandums, letters, and e-mails.").

afforded by Rule 4:10-2(c)." Id. at 206-09. Even assuming Halbach properly extended the civil work-product rule beyond documents and tangible things, the civil rule does not apply to criminal cases, and the language relied on by defendant and Halbach does not appear in the criminal work-product rule. Moreover, no case has expanded the criminal work-product rule beyond its plain language. Thus, defendant cannot show that any error was clear or obvious under the law "at the time of appellate consideration." Johnson v. United States, 520 U.S. 461, 468 (1997); see Chew, 150 N.J. at 82.

In any event, the PCR court ensured Simon was not questioned about his mental impressions, conclusions, opinions, or legal theories regarding defendant's defense to the criminal charges. Moreover, defendant has not shown that Simon was questioned about his mental impressions, conclusions, opinions, or legal theories regarding the Reed issue. Defendant cites questions asking whether Campagna told Simon about his alleged call to SPD, but those questions merely addressed a factual issue about which Campagna had already testified.

Defendant complains Simon contradicted Campagna. However, defendant cannot call one of his attorneys as his main witness, have him give his version of his conversation with another attorney, and use the work-product rule to prevent that version from being questioned. "'[A] litigant cannot use the work product

doctrine as both a sword and shield by selectively using the privileged [information or documents] to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion.'" In re Grand Jury Proceedings, 616 F.3d 1172, 1185 n.24 (10th Cir. 2010) (alteration in original) (citation omitted). A criminal defendant cannot "advance the work product doctrine to sustain a unilateral testimonial use of work product materials" while preventing the prosecution from rebutting it. United States v. Nobles, 422 U.S. 225, 239-40 (1975); see State v. Mingo, 77 N.J. 576, 585 (1978).

In any event, defendant cannot show prejudice. In its opinion, the PCR court made no mention of this contradiction. Indeed, the court's opinion did not mention Simon or any of his testimony. The court gave numerous reasons for discrediting Campagna, none of which involved Simon's testimony. Thus, defendant has failed to show plain error. See Bey, 161 N.J. at 296 (finding no violation of the attorney-client privilege where the allegedly privileged communications "neither were referred to by the PCR court in its opinion nor are the bases for any conclusions by this Court").

VI.

Defendant also claims the PCR court erred in allowing his brother Wayne to be questioned about how Simon learned of

Campagna's alleged telephone call. However, defendant did not object to any of the questions he now cites. Therefore, defendant must show plain error. Again, defendant cannot show plain error because the PCR court's opinion does not even mention Simon or his testimony, let alone Wayne's testimony about Simon.

In any event, defendant's claim fails. Wayne was asked about his affidavit, submitted with Simon's PCR brief, which stated that Campagna made the alleged call while Wayne drove him to SPD headquarters. Wayne testified the affidavit was prepared by Simon's office. The PCR court asked how Simon knew what occurred on the drive. Wayne said "I'm going to assume," and the court interrupted, telling Wayne it did not "like you assuming." Wayne testified he "really believe[d]" Simon spoke with Campagna. When Wayne said he would "have to use assume," the court explained it was proper for Wayne to "make an inference. . . . If you didn't tell it to [Simon], then somebody had to. And it had to be you, [Campagna], or the other [person] in the car, your brother [Glenn]." Wayne testified he was "assuming Mr. Campagna explained it to [Simon] first," because Simon already knew the events of the drive when he questioned Wayne. Wayne said "[t]hat's how I believe it happened, Your Honor."

Defendant argues the PCR court asked Wayne to testify about matters of which he had no personal knowledge. N.J.R.E. 602 states

"a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." However, a non-expert "witness' testimony in the form of opinions or inferences may be admitted if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue." N.J.R.E. 701; see State v. Chen, 208 N.J. 307, 319 (2011).

Wayne inferred that, as Simon knew Wayne drove Campagna to the police station, and as Wayne did not tell Simon, Campagna must have told Simon. This was a rational inference based on Wayne's perception. Moreover, this information was relevant to determining the veracity of Campagna's testimony that Simon learned of Campagna's alleged phone call to SPD independently. Thus, Wayne's testimony was properly admitted pursuant to N.J.R.E. 701; see State v. Johnson, 309 N.J. Super. 237, 263 (App. Div. 1998).

VII.

Defendant additionally argues when the State cross-examined him, his work-product and attorney-client privileges were violated. Current defense counsel sought to call defendant for the limited purpose of authenticating the letter he allegedly wrote raising the Reed issue to Paul, his deceased first PCR

counsel. The court ruled the prosecutor could cross-examine defendant on how the Reed issue arose and whether it was revealed to his earlier counsel.

Defendant claims that during his cross-examination, his attorney-client privilege was violated by questions about whether Campagna told him at SPD headquarters on the night of his arrest that Campagna had called SPD, that Campagna had been made to wait, or that there was a problem. However, defendant called Campagna to testify about this and other issues, thereby placing their otherwise protected communications in issue. "By allowing [Campagna] to testify, defendant waived the attorney-client privilege." Bey, 161 N.J. at 296. Defendant cannot use his attorney-client privilege as a shield because he "create[d] the 'need' for disclosure of those confiden[tial communications] to the adversary." Mauti, 208 N.J. at 532.

Defendant raises two new issues on appeal. First, defendant claims the prosecutor violated his attorney-client privilege by asking him if he told his appellate counsel about the Reed issue. However, defendant did not object to the prosecutor's questions or claim attorney-client privilege regarding appellate counsel.

Second, defendant claims the prosecutor violated his "work product privilege" by eliciting that he learned about the Reed issue by doing research in the prison law library, and that he did

not tell the court or counsel because he understood he could not raise the issue on direct appeal, only on PCR. However, he did not object to the prosecutor's questions or ever raise a work-product argument.

Thus, defendant must show plain error. He cites Rule 4:10-2(c) and Halbach's dicta that "[e]ven a non-lawyer 'who creates work-product material before hiring an attorney' is entitled to invoke the work product privilege." 377 N.J. Super. at 208 (citation omitted). Even assuming Halbach properly extended the civil work-product rule beyond attorney work-product, the civil rule does not apply to criminal cases. The prosecutor's question did not violate the criminal work-product rule because it did not seek "documents," such as "internal reports, memoranda," "records or statements." R. 3:13-3(d). No case has expanded the criminal work-product rule in the manner suggested by Halbach. Thus, defendant cannot show that any error was clear or obvious under the law "at the time of appellate consideration." Johnson, 520 U.S. at 468.

In any event, the PCR court's opinion did not mention defendant's prison research or his appellate counsel. The court said it could not "ignore the fact that the Defendant remained silent for half a decade," but that was the least of the PCR court's numerous reasons for discrediting the testimony of

Campagna and Wayne that Campagna called SPD and demanded questioning cease. Thus, defendant has not shown any error was "clearly capable of producing an unjust result[.]" R. 2:10-2.

Affirmed.