SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0972-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SHAHID D. ALLEN,

Defendant-Appellant.

Submitted November 15, 2017 – Decided January 10, 2018

Before Judges Alvarez and Nugent.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 99-09-2948.

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

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

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Shahid D. Allen appeals from the July 11, 2016 Law Division order denying his second petition for post-conviction relief (PCR). We affirm.

A jury found defendant guilty of first-degree murder, N.J.S.A. 2C:11-3(a) (count one); third-degree possession of a handgun without a permit, N.J.S.A. 2C:39-5(b) (count two); and second-degree possession of a weapon for unlawful purposes, N.J.S.A. 2C:39-4(a) (count three). Judge Donald S. Goldman, who presided over the trial, sentenced defendant to an aggregate sixty-year term of imprisonment subject to thirty years of parole ineligibility after appropriate mergers. On appeal, we affirmed the judgment of conviction. State v. Allen, No. A-3336-00 (App. Div. Nov. 27, 2002). The Supreme Court denied certification on June 23, 2003. State v. Allen, 177 N.J. 223 (2003).

At trial, a witness testified that she saw defendant and the victim, Sabir Kendrick, arguing about money and drugs. During the course of the confrontation, the witness heard defendant threaten the victim that if he was not paid his money, he would "blow [him] away." Later that evening, between 1:00 and 1:15 a.m., the eyewitness, while in her apartment in the company of others, heard the sound of gunshots. A second witness present in the apartment heard men arguing outside in a parking lot, and minutes later heard numerous gunshots. That second eyewitness saw defendant,

whom she had known for years, shooting a gun. He then got into a brown Maxima station wagon. Meanwhile, the occupant of another apartment in that complex heard gunshots and saw four men running. Two drove off in a first car. While the driver of a second vehicle was attempting to start it, the fourth man stood on the passenger's side shooting a weapon. Although she could not make out the man's face, he had dreadlocks. Apparently, at the time of the shooting, defendant wore his hair in dreadlocks.

As he lay on the sidewalk after the shooting, Kendrick told a police officer that he had been shot by "Alpo" and that "Black" was with him. Black was defendant's street name. He also told the officer that he was cold and "hurting," and asked her if he was going to die. Kendrick succumbed to seventeen gunshot wounds.

The first eyewitness picked defendant's photograph from an array she was shown the following day as the person she heard arguing with the victim. The day of the shooting, the second eyewitness, also selected defendant's picture. At trial, she identified defendant as the shooter.

Following the Court's denial of defendant's petition for certification from his direct appeal, he filed a timely first PCR petition. In support of his claim of ineffective assistance of counsel, defendant alleged that there were two alibi witnesses his

attorney failed to call: Abdul Jackson and Malik Crenshaw. We quote from Judge Goldman's decision on the first PCR application:

> Petitioner contends that his trial counsel erred by not calling the supposed alibi witnesses Abdul Jackson and Malik Crenshaw. The fact is that Abdul Jackson was present the first day of jury selection, interviewed by both the State and defense investigators but never called as a witness. Petitioner here utterly fails to submit any information to show that Jackson and Crenshaw were ready, willing, and able to provide an alibi at the time of trial. In fact, he is unable to show that even now 8 years later that they are so willing. He also says that there might have been witnesses or a security camera tape that might have shown him at a skating rink, at an Exxon gas station, or at a White Castle restaurant at a crucial time; however, he has not provided statements of such witnesses' nor shown that such a security tape ever existed, much less tha[t] it might be exculpatory. Of course, he never . . . gave an alibi notice . . . .
>
> Even as the trial started, it was unclear whether there was a real alibi defense. According to the interview Abdul Jackson gave to State investigators, the latest time that Jackson saw Petitioner was 12:00 or 12:30 a.m., some 45 to 75 minutes before the shooting. Malik Crenshaw was never produced and neither defense counsel nor his investigators were ever able to find and interview him. In fact, counsel was warned that it would be "terribly risky to [refer to an alibi in opening statements] because the State may discover evidence that blows the alibi out of the water before you really have a chance to present it . . ." Nevertheless, Petitioner was given the opportunity to instruct his counsel to do so anyway. Moreover, over objection, Petitioner was

allowed to call his mother, who might have shed some light on Petitioner's whereabouts but after permission was granted and after consultation with Petitioner, she was not called. . . .

[T]he record is replete with references to a defense investigator. . . . Abdul Jackson was produced. The record shows that the Petitioner's family was present during substantial parts of the trial if not the entire trial. Yet there is nothing presented to corroborate Petitioner's bold statement that "no investigation" was done.

In fact, even to this day, neither Shahid Allen nor his current (or past) PCR counsel have been able to produce either Abdul Jackson or Malik Crenshaw to prove what they might have said at trial nor that what they said would have been helpful. To this day, Petitioner has never disclosed where he claimed to be if not at the murder scene and who, if anyone, was with him at that time. His counsel even said, "Your Honor, based upon the time period that the discovery indicates this incident happened, there may not be anybody in particular that I could say Mr. Allen was with." Under the second prong of the Strickland – Cronic – Fritz test, Petitioner has failed to show that if these witnesses had ever been found that "the result of the proceeding would have been different." State v. Preciose, [] 129 N.J. [451,] 463-64 [(1972)] (quoting Strickland, 466 U.S. 668 (1984)).

Clearly if the so-called alibi witnesses merely placed the Petitioner within striking distance of the murder scene, they would not be alibi witnesses at all. To the contrary, such witnesses would actually provide inculpatory and not exculpatory evidence. Defense counsel is a highly skilled litigator

> who I submit knows the pitfalls of presenting a "bad alibi" to a jury.

Judge Goldman's 2008 decision denying PCR was affirmed in State v. Allen, No. A-1482-08 (App. Div. Dec. 29, 2009). The Supreme Court denied certification on September 15, 2010. State v. Allen, 203 N.J. 438 (2010).

On April 15, 2015, defendant filed a second PCR petition. In support of the application, he provided a September 22, 2014 statement taken from Watkins by a private investigator, as well as an affidavit of Rockmand Jackson signed February 6, 2015. In his statement, Watkins said that on the night of the murder, he and Jackson picked defendant up at his home at approximately 7:00 or 7:30 at night to go to a party at a skating rink attended by approximately 200 people. He claimed Jackson phoned him a couple of days after the shooting with the news defendant had been arrested. Watkins also claimed that Jackson said defendant's attorney would contact him. Watkins said he had numerous discussions with the family regarding this information but was never contacted about testifying.

In his affidavit, Jackson stated that he and Crenshaw were on their way to the skating rink when they saw defendant standing on the corner. They stopped and asked him if he was interested in accompanying them, and the three men went to the skating rink,

remaining there until around 1:00 a.m. Jackson said he too was in touch with defendant's family, spoke to the public defender's office about his information, actually appeared in the courtroom at the start of the trial where he saw defendant's attorney, and was interviewed by the prosecutor. He was informed that he would not be called.

The judge who denied this second application did so because the petition was not filed within a year of denial of the first PCR petition. See R. 3:22-12(a)(2). He also relied upon Rule 3:22-5 because Judge Goldman had previously addressed the issue of the alleged alibi witnesses. The judge concluded that the application lacked any merit.

On this appeal, defendant argues:

> POINT I
> DEFENDANT'S SECOND PCR PETITION SHOULD NOT HAVE BEEN PROCEDURALLY BARRED.
>
> POINT II
> THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF FIRST PCR COUNSEL'S INEFFECTIVENESS FOR FAILING TO INVESTIGATE TWO ALIBI WITNESSES.

Additionally, defendant contends in his uncounseled brief:

> POINT ONE:
> THE PCR COURT ERRED IN PROCEDURALLY BARRED [sic] PETITIONER'S SECOND POST CONVICTION RELIEF.

POINT TWO:
THE PCR COURT ERRED IN DENYING DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF.

POINT THREE:
THE PCR COURT ERRED IN DENYING DEFENDANT AN EVIDENTIARY HEARING ON HIS PETITION FOR POST CONVICTION RELIEF.

POINT FOUR:
THIS COURT SHOULD REMAND THIS MATTER FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF TRIAL COUNSEL, FIRST PCR COUNSEL, AND APPELLATE COUNSEL, INEFFECTIVENESS FOR FAILING TO CALL AND INVESTIGATE TWO ALIBI WITNESSES, AND SUBMIT ALIBI NOTICE.

POINT FIVE:
INEFFECTIVE ASSISTANCE OF SECOND PCR COUNSEL, IN FAILING TO ARGUE (D) OF POINT I, COUNSEL FAILED TO CHALLENGE ASPECTS OF THE CASE.

Defendant does not address the fifth point in his brief, we therefore presume it is abandoned. Gormley v. Wood-El, 218 N.J. 72, 95 n.8 (2014); Dep't of Envtl. Prot. v. Alloway Tp., 438 N.J. Super. 501, 505 n.2 (App. Div. 2015).

In his pro se brief, defendant engages in a more broad brush attack on the representation he received during the trial, including the manner in which his attorney questioned witnesses regarding ballistics evidence. Generally, he states that because the representation he received at trial and on his first PCR were so ineffective, the time bars should be set aside as the errors rise to a constitutional magnitude.

We note that defendant does not identify the shortcomings of PCR counsel in an intelligible manner. A defendant, in order to obtain relief on ineffective assistance of counsel grounds, must show not only the particular manner in which counsel's performance was deficient, but also that the deficiency prejudiced his right to a fair trial, or in this instance, his right to effective representation during the first PCR hearing. See Strickland, 466 U.S. at 687; State v. Fritz, 105 N.J. 42, 58 (1987). Without even an approximation of the necessary showing of deficient performance and resulting prejudice, the claim does not warrant further discussion in a written opinion. R. 2:11-3(e)(2).

The main thrust of the claims on appeal are barred by Rule 3:22-5. That rule clearly states that "[a] prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting . . . in any post-conviction proceeding brought pursuant to this rule . . . or in any appeal taken from such proceedings." Judge Goldman clearly and definitively rejected defendant's claims regarding alibi witnesses in 2008. His decision was affirmed on appeal, and the Supreme Court did not grant certification.

An additional bar to consideration of defendant's claims can be found in Rule 3:22-12(a)(2). That rule states that a second petition for post-conviction relief must be filed within a year

of the date of denial of the first application for post-conviction relief where ineffective assistance of counsel is alleged. In this case, defendant filed his second petition for post-conviction relief several years after the first petition was denied. Even if we were to calculate the dates from the Court's denial of the petition for certification in 2010, defendant's second application for PCR relief was not filed until April 23, 2015. Defendant does not even attempt to address this years-long delay.

Finally, defendant simply fails to meet the Strickland-Fritz standard with regard to the purported alibi witnesses. The eyewitness testimony presented at trial casts doubt on the viability of the defense. At least Jackson was present in the courtroom, and it is clear from Judge Goldman's written decision on PCR, based in part on his recollection of the trial, that defense counsel's decision not to call Jackson was a strategic decision, which we do not disturb. State v. Marshall, 148 N.J. 89, 312 (1997) (citing State v. Purnell, 126 N.J. 518, 536 (1992)). The basis for the attorney's election, that the alibi testimony was very weak, and could in fact backfire by making the State's case appear stronger, establishes that the omission did not prejudice the outcome. Ibid.

Having considered all the points defendant has raised in light of the record, and the applicable law, we are satisfied that

the application of the time bars was proper. The omission of the alibi witnesses did not prejudice the outcome and had been previously addressed.

Affirmed.