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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-1214-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ELONZIO ODUMS, a/k/a, ELONZIO
ODUMS, JR., ALONZO ODUMS,
ELONZO BO ODUMS, ROBERT MOORE,
ALPHONSO ODUMS, ALPHONSO MOORE,
ELONZIO II, TYRONE MOORE,
ALFONSO ODUMS, ELONZIO ODUM,
ELONZO B. ODUM, ELONZIO
ODUM II, ELONZO ODUMS, ALONZO
B. ODOMS, and ELANZIO ODUMS,

Defendant-Appellant.

Submitted February 13, 2018 – Decided March 5, 2018

Before Judges Hoffman and Gilson.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No.
12-06-1579.

Joseph E. Krakora, Public Defender, attorney
for appellant (Rasheedah Terry, 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).

PER CURIAM

Defendant Elonzio Odums appeals from the October 5, 2016 Law Division order denying his petition for post-conviction relief (PCR). We affirm.

This case arose from the sale of prescription drugs in Newark in February 2012. We outlined the relevant facts, and the appellate issues defendant raised, in our prior opinion affirming defendant's convictions for third-degree conspiracy, N.J.S.A. 2C:5-2 (count one), and third-degree possession of a controlled dangerous substance – Xanax, Oxycodone, and Percocet – with the intent to distribute, N.J.S.A. 2C:35-5(a)(1) and (b)(3) (counts three, six, and nine). See State v. Odums, No. A-5202-13 (App. Div. Dec. 16, 2015). The trial court merged the conspiracy into the drug possession counts, then sentenced defendant to three concurrent extended terms of eight-years imprisonment with four-years parole ineligibility on the three drug possession counts. On defendant's direct appeal, we rejected his arguments regarding the inadmissibility of Detective Christopher Cavallo's testimony

and evidence pertaining to defendant's possession of non-controlled substances.¹ Odums, slip op. at 8, 10.

On January 14, 2016, defendant filed a petition for PCR. Defendant argued ineffective assistance of counsel regarding trial counsel's (1) failure to object to Detective Cavallo's testimony, (2) failure to object to evidence pertaining to defendant's possession of non-controlled substances, and (3) failure to argue that Oxycodone and Percocet are identical for purposes of the drug possession charges. The PCR court rejected defendant's first two arguments, reasoning they were raised and adjudicated on direct appeal and therefore barred by Rule 3:22-5. The PCR court agreed with defendant's third argument, and therefore vacated one of defendant's three convictions and sentences; however, it noted there was no impact on overall sentencing because the sentences were concurrent.

On this appeal, defendant presents the following arguments:

POINT I. THE PCR COURT'S ORDER THAT DENIED DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF MUST BE REVERSED OR THE MATTER REMANDED BECAUSE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN THE PROCEEDINGS BELOW.

A. Pre-Trial Counsel Provided Ineffective Assistance of Counsel Because Counsel Failed To Warn Defendant That He Faced A

¹ On direct appeal, defendant also argued errors in the jury charge, verdict, and his sentence; those claims are not at issue in the instant appeal.

Mandatory Extended Term At The Time Defendant Decided To Proceed To Trial (Not raised below).

- B. Trial Counsel Provided Ineffective Assistance of Counsel Because Counsel Failed to Investigate Police Officer Paul Braswell's Background (Not raised below).
- C. Trial Counsel Provided Ineffective Assistance of Counsel Because Counsel Failed to Ask the Court to Amend Count One Because Its Description Contains Duplicate Drugs (Not raised below).
- D. Trial Counsel Provided Ineffective Assistance of Counsel Because Counsel Failed to Object to the Admission of Other Wrong or Acts Evidence.
- E. Trial Counsel Provided Ineffective Assistance of Counsel Because Counsel Failed to Object to the Improper Opinion Testimony Provided by Police Officer Christopher Cavallo.
- F. Sentencing [Counsel] Provided Ineffective Assistance of Counsel Because Counsel Failed to Challenge the Trial Court's Imposition of Multiple Extended Terms (Not raised below).
- G. Appellate Counsel and Post-Conviction Relief Counsel Provided Ineffective Assistance of Counsel To The Extent They Failed To Raise The Claims Set Forth Above In the Proceedings Below (Not raised below).

POINT II. THE PCR COURT ABUSED ITS DISCRETION WHEN IT APPLIED THE PROCEDURAL BAR CONTAINED IN [RULE] 3:22-5 TO DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

POINT III. THE PCR COURT ABUSED ITS DISCRETION WHEN IT DENIED DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

Regarding Points I. D and E, we agree with the PCR court that the issues were raised and adjudicated on direct appeal and therefore barred by Rule 3:22-5. Rule 3:22-5 provides a "prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any post-conviction proceeding" Thus, the application of that standard requires the "[p]reclusion of consideration of an argument presented in post-conviction relief proceedings . . . if the issue raised is identical or substantially equivalent to that adjudicated previously on direct appeal." State v. Marshall, 173 N.J. 343, 351 (2002) (citation omitted).

Defendant made the following arguments on direct appeal: "The improper admission of other crimes evidence was plain error which unduly prejudiced defendant and denied him a fair trial" and "[t]he testimony of Detective Cavallo constituted improper lay opinion which usurped the province of the jury." Odums, slip op. at 5. We thoroughly addressed and rejected those arguments on direct appeal. Id. at 6-10. Defendant's assertions of ineffective assistance of counsel under Points I. D and E in the instant appeal are an attempt to re-litigate the arguments he raised on direct

appeal. We therefore agree with the PCR court's decision to decline to consider those issues under Rule 3:22-5.

Defendant failed to raise the remaining points to the PCR court; regardless, we find defendant failed to show any prejudice under the Strickland/Fritz² test and therefore reject defendant's remaining claims. We briefly address each of those points in turn.

To establish a prima facie case of ineffective assistance of counsel, a defendant must satisfy the two-prong test articulated in Strickland, 466 U.S. at 687, and adopted by the New Jersey Supreme Court in Fritz, 105 N.J. at 58. "First, the defendant must show . . . counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Fritz, 105 N.J. at 52 (quoting Strickland, 466 U.S. at 687). The defendant must then show counsel's "deficient performance prejudiced the defense." Ibid. To show prejudice, the defendant must establish by "a reasonable probability" that the deficient performance "materially contributed to defendant's conviction." Id. at 58.

"An attorney is entitled to 'a strong presumption' that he or she provided reasonably effective assistance, and a 'defendant

² Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 58 (1987).

must overcome the presumption that' the attorney's decisions followed a sound strategic approach to the case." State v. Pierre, 223 N.J. 560, 578-79 (2015) (quoting Strickland, 466 U.S. at 689). "[A] petitioner must do more than make bald assertions that he [or she] was denied the effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). "[H]e [or she] must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." Ibid.

Defendant argues his pre-trial counsel provided ineffective assistance of counsel by advising him that he was subject only to a discretionary extended term, rather than a mandatory extended term. However, defendant failed to certify whether the State offered a plea agreement or what he would have done differently had he known he was subject to a mandatory extended term rather than a discretionary extended term. Defendant failed to establish the alleged misinformation prejudiced his case in any way, and therefore failed to establish the second prong of the Strickland/Fritz test.

We note defendant is free to file a second PCR petition regarding that issue, but must do so before July 19, 2018 to avoid the time bar under Rule 3:22-12(a)(1). Should defendant choose

to file a second PCR petition and provide the proper supporting affidavit or certification, he may be entitled to a hearing³ to establish whether the State offered a plea agreement, whether trial counsel gave inaccurate advice, and whether defendant would have accepted a plea agreement. See State v. Taccetta, 351 N.J. Super. 196, 201 (App. Div. 2002).

Defendant next argues his trial counsel provided ineffective assistance of counsel by failing to investigate misconduct allegations involving a police officer who transported evidence in the case to the lab for analysis. Again, defendant presented only bald assertions that the officer was investigated for misconduct, and failed to present any evidence the officer was ever actually terminated or charged with evidence tampering. See Cummings, 321 N.J. Super. at 170. Moreover, defendant presented no evidence that the officer did anything wrong in transporting the evidence against defendant.

³ A plenary hearing would not be required if other available evidence, such as a hearing transcript, conclusively contradicts the assertions made in support of a future PCR petition. See State v. Porter, 216 N.J. 343, 354 (2013) ("The judge deciding a PCR claim should conduct an evidentiary hearing when there are disputed issues of material facts related to the defendant's entitlement to PCR, particularly when the dispute regards events and conversations that occur off the record or outside the presence of the judge.").

Defendant next argues his trial counsel provided ineffective assistance of counsel by failing to request an amendment to the conspiracy count description. We find that even if failing to request an amended description was an error on defense counsel's part, the error did not materially contribute to defendant's conviction. See Fritz, 105 N.J. at 58. The court merged the conspiracy count with the drug possession counts; therefore, the court did not sentence defendant separately on the conspiracy count. Furthermore, the court already vacated one of the drug possession counts. Accordingly, we find defendant failed to establish a prima facie case of ineffective assistance of counsel.

Defendant next argues his trial counsel provided ineffective assistance of counsel by failing to challenge the trial court's imposition of multiple extended terms. Defendant contends N.J.S.A. 2C:44-5(a)(2) prohibits the imposition of multiple extended terms. However, N.J.S.A. 2C:44-5(a)(2) only prohibits multiple discretionary extended terms, or a discretionary extended term in addition to a mandatory extended term, but not multiple mandatory extended terms. See State v. Robinson, 217 N.J. 594, 597, 612 (2014) (citing State v. Connell, 208 N.J. Super. 688, 697 (App. Div. 1986)). Defendant's sentence consisted of multiple mandatory extended terms, and was therefore valid; any objection by defense counsel would have been futile.

Defendant next argues his appellate and PCR counsel provided ineffective assistance of counsel by failing to raise the additional claims listed under Point I. Because none of defendant's additional claims establish a prima facie case of ineffective assistance of counsel, appellate and PCR counsel's failure to raise those claims was not itself ineffective assistance of counsel.

Lastly, defendant argues he established a prima facie case for ineffective assistance of counsel; as a result, the PCR court should have held an evidentiary hearing. Rule 3:22-10(b) provides a defendant is only entitled to an evidentiary hearing if he or she establishes a prima facie case in support of PCR. Moreover, there must be "material issues of disputed fact that cannot be resolved by reference to the existing record," and the court must determine that "an evidentiary hearing is necessary to resolve the claims for relief." Porter, 216 N.J. at 354 (quoting R. 3:22-10(b)). "To establish a prima facie claim of ineffective assistance of counsel, a defendant must demonstrate the reasonable likelihood of succeeding under the test set forth in Strickland, . . . which we adopted in Fritz." State v. Preciose, 129 N.J. 451, 463 (1992) (internal citations omitted).

As noted, defendant failed to establish a prima facie case for any of his ineffective assistance of counsel claims, as he

made only bald assertions unsupported by any evidence. See
Cummings, 321 N.J. Super. at 170. Accordingly, the PCR court did
not abuse its discretion in denying an evidentiary hearing.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION