SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1807-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TERRENCE MILLER,

Defendant-Appellant.

Submitted December 13, 2017 — Decided January 22, 2018

Before Judges Alvarez and Geiger.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 07-10-1136.

Joseph E. Krakora, Public Defender, attorney for appellant (Thomas G. Hand, Designated Counsel, on the brief).

Angelo J. Onofri, Mercer County Prosecutor, attorney for respondent (Juda Babuschak Opacki, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Terrence Miller appeals from a September 18, 2015 opinion and order denying his petition for post-conviction relief (PCR). We affirm.

Because the issues raised in defendant's petition relate to both the underlying facts and procedural history, we set them forth in some detail. The underlying facts were described by our Supreme Court in State v. Miller, 216 N.J. 40, 48 (2013).

> This case arose from surveillance conducted by the Trenton Police Department on August 4, 2006. Acting on an informant's tip that an individual was selling drugs at a particular location, a police officer observed a woman approach the suspect under surveillance. The officer watched through binoculars as the suspect crossed the street, walked to the window of a residence and reached into an area next to an air conditioner that was installed in the window. The suspect then returned to the woman and handed her an object for which she gave him money in exchange.
>
> The officer called for an arrest unit. While waiting for that unit's arrival, the officer observed a man, later identified as Joseph McKinney, approach the suspect. The suspect crossed the street again, approached the same window and retrieved objects adjacent to the air conditioner. The man returned to McKinney, handed him the objects and collected money from him. The suspect then left the scene.
>
> As two officers from an arrest unit arrived, McKinney threw "a quantity of off-white rock-like substance" on the ground, and the officers arrested him. The officers retrieved the bag, which contained 0.09 grams of crack cocaine. Ten minutes later, the officer who had conducted the surveillance saw a man, whom he identified as the same suspect he had seen exiting a Cadillac in which he was a passenger, on the same corner previously under surveillance. Officers arrested the

> suspect, later identified as defendant. The officers retrieved a bag from the area near the air conditioner, which contained 7.29 grams of crack cocaine. One of the officers conducted a search incident to arrest and found $790 in defendant's possession.

On January 16, 2007, a Mercer County grand jury charged defendant with two counts of third-degree possession of cocaine, N.J.S.A. 2C:35-10(a)(1), two counts of third-degree possession of cocaine with intent to distribute, N.J.S.A. 2C:35-5(a)(1), two counts of second-degree possession of cocaine with intent to distribute on or near a public park, N.J.S.A. 2C:35-7.1(a), one count of third-degree distribution of cocaine, N.J.S.A. 2C:35-5(a)(1), and one count of second-degree distribution of cocaine on or near a public park, N.J.S.A. 2C:35-7.1(a). The State dismissed three counts prior to trial.

Defendant was initially represented by private counsel, but was subsequently appointed a public defender. Shortly before trial was scheduled to begin, a different Assistant Deputy Public Defender was substituted to represent defendant. As described by the appellate panel on direct appeal,

> [d]efendant was actively represented by counsel from the Public Defender's Office in pretrial proceedings long before the scheduled trial date. Defendant and his attorneys had at least two weeks' notice that trial would begin on Monday, December 10, 2007. For reasons not revealed in our record, managing attorneys at the Public Defender's Office

> substituted a different Assistant Deputy Public Defender for the staff attorney who had represented defendant in earlier proceedings. At no time did either of the two Assistant Deputy Public Defenders assigned, or the managing attorneys, state to the trial court that they were unprepared to proceed, or request more time to investigate or gather evidence for presentation of a defense.
>
> On December 10, 2007, newly-assigned counsel requested an adjournment because defendant wished to meet with him in "a calmer setting so that [they could] discuss and plan this particular matter." Counsel stated he had received the file the previous week and had time to review it and prepare for trial. His goal in requesting an adjournment was to develop "rapport" with his client. The trial judge denied the request.
>
> . . . .
>
> The trial court's ruling resulted in immediately proceeding to a suppression hearing, which was completed that morning.
>
> [State v. Miller, 420 N.J. Super. 75, 79-81 (App. Div. 2011), aff'd, 216 N.J. 40 (2013).]

Defendant had moved to suppress the physical evidence seized during the investigation. The trial court conducted a testimonial motion hearing the day before the jury was selected. At that hearing, Trenton Police Officer William Mulryne gave detailed testimony regarding the underlying facts. Id. at 81-82. During cross-examination, trial counsel challenged Mulryne's ability to observe the purported drug sales.

Defense counsel cross-examined Mulryne, challenging his line of sight to the location of the alleged transactions. Using Mulryne's police report and a photograph of the scene taken by defendant after his arrest, defense counsel questioned Mulryne about his ability to see the individuals involved in the transactions through the branches of trees and other vegetation. He also questioned Mulryne about his reported use of binoculars during the surveillance, although he claimed to be no more than seventy-five feet away. In addition, defense counsel cross-examined Mulryne about the failure of the police to arrest the woman who had engaged in the first transaction and to obtain evidence from her.

Defendant was the only other witness at the suppression hearing. He testified he was not at the scene of the drug transactions but was downtown shopping for clothes at that time. On cross-examination, he said a person he only knew by a familiar name, not his true name, had given him a ride to the delicatessen and would support his testimony that he was downtown that day. The trial judge questioned defendant about his prior criminal record of five indictable convictions. Based on credibility findings in favor of the police officer and against defendant, the judge denied defendant's motion to suppress evidence.

After hearing defendant's testimony, the prosecutor expressed concern that the defense had not provided notice before the trial of a possible alibi defense, as required by Rule 3:12-2. But the prosecutor did not move to bar an alibi defense, and neither attorney requested an adjournment to investigate such a defense.

[Id. at 82.]

Jury selection began the next morning. In our earlier opinion, we recounted the timeline of events and trial testimony.

> After the suppression hearing was concluded during the morning, defense counsel had the remainder of Monday, December 10, to meet with defendant and to plan for the trial beginning the following day. The court had already informed counsel that only the prosecution would need to present evidence the next day. Defense counsel had two additional days to prepare for a defense case because prior judicial commitments prevented the judge from hearing the trial again until Friday of that week.
>
> On Tuesday, December 11, a jury was selected in the morning session. During the afternoon, counsel made opening statements, Officer Mulryne testified before the jury in similar fashion as at the suppression hearing, and defense counsel again cross-examined him about his line of sight and his ability to see and identify the individuals involved in the street transactions.
>
> The State then called one of the officers who had arrested McKinney and defendant. His direct testimony was brief, as was his cross-examination. He testified that he and other officers stopped and arrested McKinney at a location away from the area where the alleged transactions had occurred. As the police approached, McKinney dropped an object to the ground, which the police recovered and found to contain rock cocaine. The officer also testified that he communicated with Officer Mulryne by radio, and then he participated in defendant's arrest at a corner on Martin Luther King Boulevard. He said defendant's arrest occurred about seven minutes after McKinney's arrest, and he found $790 on defendant's person. The officer further testified he found a bag containing rock

cocaine concealed on the side of the air conditioner.

Defense counsel cross-examined the second officer about the denominations and nature of the money recovered from defendant, implying that the money was not in a form expected from street sales of illegal drugs. He also questioned the officer about the location of drugs recovered from the air conditioner and the access of other persons to the air conditioner. After the State rested and the jury was excused for the day, defense counsel moved for a judgment of acquittal, which the court denied.

Following the two intervening off-days, the trial resumed on Friday, December 14. Defense counsel came ready with three witnesses for the defense. McKinney testified first and admitted he had on his person a quantity of cocaine when he was arrested on that day. He denied that defendant had sold him the cocaine, testifying as follows:

> DEFENSE COUNSEL: And in fact today it is your testimony that Mr. Miller did not sell you that [cocaine]?
>
> MCKINNEY: He never sold me a thing. He don't sell drugs.

On cross-examination, McKinney testified he bought the cocaine on Calhoun Street from a man named "Wooden Head Willie." The prosecutor confronted McKinney with a statement he had given to the police at the time of his arrest, in which he described the location where he had purchased the cocaine as "Willow and Barber Street." McKinney was further impeached through other details in his earlier statement to the police, and he admitted having been convicted in 1986 of two counts of distribution of a controlled

dangerous substance and in 1987 of endangering the welfare of a child.

Valerie Dawkins was the next defense witness. Counsel began direct examination by revealing that Dawkins had been convicted in 1998 of forgery. Dawkins testified she saw defendant outside her apartment located on Martin Luther King Boulevard between two and three o'clock on the day of his arrest, but she did not see him "on the corner engaging in any conversations with any individual" during that afternoon. According to Dawkins, defendant got out of his car and entered the delicatessen carrying "some bags in his hand." The next thing she saw was an unmarked car come up to the corner, some men entered the delicatessen, and they came out a few minutes later with defendant. At some point, more officers arrived in another unmarked car, and those officers searched the alleys on the other side of the street. One officer came out of an alley and said: "I got it." According to Dawkins, defendant immediately said: "That's not mine," to which an officer responded: "It's yours now."

Cynthia White was the third witness called by the defense. White did not have a criminal record. On the day of the arrest, she was in the area around the corner from the delicatessen waiting for her son's father, who had called to say he was coming to give her money for their son. White stated that at about 2:00 to 2:30 that afternoon, she saw defendant get out of a black Cadillac and go inside a store. She testified that "[a]fter a couple of hours standing out there the cops came out there. And they went inside the store and brought him out the store." She described defendant's demeanor at this point as "annoyed" and "mouth[ing] off" to the police officers. The prosecutor's cross-examination included the following testimony:

> PROSECUTOR: How did you come to give a statement to Mr. Miller; how does he know you?
>
> WHITE: Well, actually, a couple of months after that happened, I seen Mr. Miller downtown. He was passing out flyers on his—one of his matches, his boxing matches. And I asked what happened on that day, and he begin to tell me. And so he asked me, you know, I said, well, that is wrong, you know, the cops is always harassing people. And he asked me, well, you was there, you know I wasn't doing nothing wrong. I said no, I didn't see you do anything wrong. So actually, yes, I did write that statement, because I don't believe nobody should be behind bars who does not deserve it.

White further testified that she herself had been harassed by the police "a couple of times."

Defendant elected not to testify at the trial. Defense counsel made a closing argument to the jury based on the testimony of defense witnesses and cross-examination of the police officers. He argued that Officer Mulryne did not have clear sight of the area where the alleged drug sales had occurred, and he had incorrectly identified defendant as the person involved. He also argued that any person could have concealed the bag of rock cocaine in the air conditioner.

[Id. at 82-85.]

The jury convicted defendant of two counts of third-degree possession of cocaine, two counts of possession of cocaine with intent to distribute, and one count of third-degree distribution of cocaine. Defendant filed pro se motions for a new trial and

judgment of acquittal arguing the verdict was against the weight of the evidence. The motions were returnable on June 30, 2008, the date scheduled for sentencing. At the sentencing hearing, defendant's original attorney, who had replaced trial counsel, stated he was unaware of the motions. The judge denied the motion for a new trial. The record does not reflect any ruling on the motion for a verdict of acquittal. Miller, 216 N.J. at 53 n.3.

After appropriate merger of several counts, defendant was sentenced to two concurrent five year prison terms, subject to a two-year period of parole ineligibility, along with appropriate fines, penalties, and assessments. Although the judgment of conviction states the sentence on count four was an extended term pursuant to N.J.S.A. 2C:44-3(a), at sentencing, the judge stated he was denying the State's motion for a discretionary extended term.

Defendant appealed his conviction, raising the following issues on direct appeal:

> POINT ONE
>
> THE TRIAL COURT'S DENIAL OF DEFENDANT'S REQUEST FOR AN ADJOURNMENT DEPRIVED THE DEFENDANT OF A FAIR TRIAL AND DUE PROCESS OF LAW.
>
> POINT TWO
>
> THE INSTRUCTION ON DEFENDANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT SUGGESTED THAT HE HAD

> AN OBLIGATION TO TESTIFY AND THEREBY VIOLATED HIS STATE AND FEDERAL RIGHTS TO REMAIN SILENT. (Not Raised Below)

In a split decision, the majority noted defendant's second point had recently been rejected by our Supreme Court in State v. Dashawn Miller, 205 N.J. 109, 126-27 (2011), and focused on Point One. The majority recognized "due process requires sufficient time for defense counsel and defendant to confer and prepare, but what is sufficient time is determined by whether defendant has been prejudiced." Miller, 420 N.J. Super. at 86. The constitutional issue "is whether defendant was thus deprived of effective assistance of counsel, or otherwise prejudiced in violation of his due process rights." Id. at 88. "In the absence of a showing of prejudice, . . . defendant is not automatically entitled to a new trial simply because he had seemingly inadequate contact with his attorney." Ibid. The majority then analyzed whether the trial was per se unfair:

> The second Assistant Deputy Public Defender in this case stated he had received the file "last week, with an opportunity . . . to review and prepare." In addition, his use of the police report and a photograph provided by defendant showed that he had conferred with defendant and had prepared a strategy for the suppression hearing and trial.
>
> The trial itself was not beginning until the next day, and the court's schedule gave defense counsel an intervening afternoon and two additional days to meet with defendant,

> to plan further strategy, and to seek witnesses and evidence for the defense. Denial of an adjournment on December 10 only resulted in proceeding that day to a suppression hearing with doubtful significance in the case. Defense counsel never claimed he was unprepared or needed an adjournment for anything other than to develop "rapport" with his client and to allay his client's "concerns."
>
> [Id. at 90.]

The majority concluded the facts did "not establish that [defendant] received less than effective assistance of counsel or was otherwise prejudiced at the suppression hearing or at trial." Id. at 93.

> The record before us does not demonstrate prejudice in the representation provided by the Assistant Deputy Public Defender or otherwise at trial. Despite the passage of time, defendant has not produced any evidence that particular witnesses or evidence were overlooked because the suppression hearing began the same day and the trial the following day after he first met his substituted trial attorney. He has not demonstrated any aspect of the hearing or trial that would have been conducted differently if only defendant had met earlier with his new attorney.
>
> Considering the substantial post-trial delay until sentencing, defendant had further opportunity to present evidence to the trial court that his defense had been prejudiced. He made no such showing.
>
> [Id. at 95.]

In affirming the conviction, the majority made clear it was not determining whether defendant may subsequently present evidence in a PCR proceeding "alleging ineffective assistance of counsel or other due process violation." Id. at 95-96.

Defendant appealed to the Supreme Court as a matter of right pursuant to Rule 2:2-1(a)(2). After briefing and oral argument, the Court remanded the matter to the trial court to develop a factual record with respect to defendant's opportunity to confer with his counsel before the trial court's hearing on the suppression motion. Miller, 216 N.J. at 46-47. Following an evidentiary hearing, the judge on remand submitted factual findings to the Supreme Court. The Court affirmed the Appellate Division, holding "that when a defendant seeking an adjournment asserts an inadequate opportunity to confer with new counsel, the trial court should consider the factors enumerated in [State v. Hayes, 205 N.J. 522, 538 (2011)], carefully weighing the competing interests raised by the factual setting of the individual case." Id. at 47. The Court "reiterate[ed] the rule articulated in Hayes: a trial court's abuse of discretion in denying an adjournment request does not require reversal absent a showing of prejudice." Ibid. (citing Hayes, 205 N.J. at 537-39). Applied here, the Court concluded the Hayes balancing test did not warrant the reversal of defendant's conviction.

> The judge's denial of the adjournment, however, did not constitute an abuse of discretion, in light of the history of the case, the defendant's brief meeting with his counsel before the pretrial hearing and the newly-appointed attorney's representation that he was prepared to proceed. We hold that the trial court's decision offended neither constitutional norms nor principles of fundamental fairness.
>
> [Id. 47-48.]

Following his failed direct appeal, defendant filed a pro se PCR petition on November 18, 2013. The petition was denied on January 21, 2014, "due to defendant's failure to exhaust his appeals pursuant to R. 3:22-3." Following denial of defendant's petition for certiorari on February 24, 2014, Miller v. New Jersey, ___ U.S. ___, 134 S. Ct. 1329 (2014), defendant resubmitted his PCR petition, which claimed ineffective assistance of trial and appellate counsel. Counsel was appointed to represent defendant.

Judge Timothy P. Lydon conducted a two-day testimonial hearing on June 24, 2015 and August 13, 2015. Testimony was taken from defendant and three defense witnesses: Alonzo Leary, Robert Littlejohn, and trial counsel Michael Anthony Amantia.

Leary testified that sometime in August 2006, defendant called him for a ride. Leary's testimony was contradictory regarding where he allegedly picked defendant up and dropped him off, how long he was with defendant, and what store defendant

visited. When confronted with these inconsistencies, Leary stated that he had dropped defendant off places many times on prior occasions and was "cloudy" as to which time the State was referring to.

Judge Lydon concluded that Leary's testimony was "unreliable." The judge explained:

> Mr. Leary was defensive and visibly uncomfortable at times. He made numerous remarks throughout the hearing that gradually eroded any confidence in his testimony. When he was asked to provide specific details, he hesitated and showed concern that he would compromise the [d]efendant's case. For example, Mr. Leary initially objected to answering questions about Mr. Bey's investigative report. He grew increasingly frustrated as the hearing continued and at one point emphasized that he did not want to be "the reason why anybody goes to jail."
>
> His account of the events that transpired on that day was beset with confusion and contradiction. In fact, it is not clear to discern the substance of the testimony that Mr. Leary would provide at trial. He waivered repeatedly between the locations where he ultimately dropped off the [d]efendant. . . . As his testimony progressed, he continued to vacillate. . . .
>
> Mr. Leary's equivocation impairs his credibility. His failure to provide a coherent recounting of the day's events renders his value as an alibi witness a nullity.

The judge found Leary's uncertainty suggested he had confused defendant's arrest with another incident involving defendant and

the police. The judge also found Leary's testimony "problematic because it conflict[ed] with the [d]efendant's testimony." The judge found this disparity "significant because it affects the merit and credibility of the [d]efendant's alibi."

Defendant's other witness, Littlejohn, simply testified that he made arrangements to play chess with defendant near Martin Luther King, Jr. Boulevard on the afternoon he was arrested. Although he was found credible, the judge concluded Littlejohn

> did not present any testimony that provided meaningful support for the defendant's alibi . . . . The defendant asserts that Mr. Littlejohn's testimony could have explained the [d]efendant's presence in the area the day he was arrested. Although the [d]efendant's point is valid, Mr. Littlejohn's testimony in no way precludes the possibility that the [d]efendant engaged in drug transactions. Mr. Littlejohn did not address or corrobortate the crucial aspects of the [d]efendant's alibi, including [d]efendant's location at the time of the drug transactions or verify the [d]efendant's activities earlier in the day.

The judge also analyzed Mulryne's statement that he observed a "narcotics transaction" under McLean. The judge characterized it as "merely an 'off the cuff remark' that was not elicited as an expert opinion." He determined that any potential prejudice that accrued from Mulryne's remark was "minimal" or "negligible" since "it was not truly in dispute that the officer observed a drug transaction." Instead, "[d]efendant provided an alibi

defense and claimed Officer Mulryne identified the wrong individual."

On September 18, 2015, Judge Lydon issued a comprehensive twenty-four page opinion denying defendant's petition.

Defendant raises the following issues in this appeal:

> POINT I
>
> THE TRIAL COURT ERRED IN DENYING MILLER'S PETITION BECAUSE MILLER'S TRIAL COUNSEL WAS NOT PREPARED TO TRY THE CASE ON SHORT NOTICE WITHOUT ADEQUATE INVESTIGATION.
>
> A. Trial Counsel was ineffective Because He Admitted He Was Not Prepared To Try The Case.
>
> B. Miller Was Prejudiced Because The Testimony of Leary And Littlejohn Would Have Impacted The Result.
>
> POINT II
>
> THE TRIAL COURT ERRED IN DENYING MILLER'S PETITION BECAUSE MILLER'S INITIAL ATTORNEYS FAILED TO PROPERLY INVESTIGATE, WHICH RESULTED IN MILLER'S TRIAL COUNSEL HAVING TO TRY A CASE ON SHORT NOTICE WITHOUT ADEQUATE INVESTIGATION. (Partially Raised Below)
>
> POINT III
>
> THE TRIAL COURT VIOLATED MILLER'S RIGHTS TO DUE PROCESS OF LAW AND FUNDAMENTAL FAIRNESS WHEN IT FORCED MILLER TO GO TO TRIAL WITH AN ATTORNEY WHO HAD FAILED TO PERFORM AN ADEQUATE INVESTIGATION. (Not Raised Below)

POINT IV

THE TRIAL COURT ERRED IN FINDING THAT OFFICER MULRYNE'S TESTIMONY DID NOT VIOLATE STATE V. MCLEAN, 205 N.J. 438 (2011).

Under the Sixth Amendment of the United States Constitution, a criminal defendant is guaranteed the effective assistance of legal counsel in his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). The standard for determining whether counsel's performance was ineffective for purposes of the Sixth Amendment was formulated in Strickland, and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42 (l987). In general, in order to prevail on a claim of ineffective assistance of counsel, defendant must demonstrate that: (l) "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" to the United States Constitution; and (2) the errors 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." Id. at 687.

"Although a demonstration of prejudice constitutes the second part of the Strickland analysis," courts may "choose to examine first whether a defendant has been prejudiced, and if not, to dismiss the claim without determining whether counsel's performance was constitutionally deficient." State v. Gaitan, 209 N.J. 339, 350 (2012) (citations omitted). "With respect to both prongs of the Strickland test, 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." Ibid. (citing State v. Echols, 199 N.J. 344, 357 (2009); State v. Goodwin, 173 N.J. 583, 593 (2002)).

"Judicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689. In reviewing such claims, 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. This deference is paid only after "counsel thoroughly investigates law and facts, considering all possible options." State v. Savage, 120 N.J. 594, 617 (1990). However, complaints relating merely to strategic decisions "will not serve to ground a constitutional claim of inadequacy of representation by counsel." Fritz, 105 N.J. at 54 (citing State v. Williams, 39 N.J. 471, 489 (1963);

State v. Knight, 63 N.J. 187 (1973); State v. Bonet, 132 N.J. Super. 186 (App. Div. 1975)).

The second Strickland-Fritz prong requires a defendant to show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. The defendant must show there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. This determination is made in consideration of "the totality of the evidence before the judge or jury." State v. L.A., 433 N.J. Super. 1, 14 (App. Div. 2013) (quoting Strickland, 466 U.S. at 695).

Prejudice may be presumed but only "in cases exemplified by egregious shortcomings in the professional performance of counsel." Fritz, 105 N.J. at 61. Inadequate attorney preparation, on its own, is insufficient to warrant a presumption of prejudice. Id. at 61-62. Defendant must establish a reasonable probability that the trial verdict would have been different but for trial counsel's ineffectiveness. Id. at 52.

"Our standard of review is necessarily deferential to a PCR court's factual findings based on its review of live witness testimony." State v. Nash, 212 N.J. 518, 540 (2013). For that reason, "we will uphold the PCR court's findings that are supported

by sufficient credible evidence in the record." Ibid. (citing State v. Harris, 181 N.J. 391, 415 (2004); State v. Elders, 192 N.J. 224, 244 (2007)). However, a reviewing court "need not defer to a PCR court's interpretation of the law; a legal conclusion is reviewed de novo." Id. at 540-41 (citing Harris, 181 N.J. at 415-16).

Regarding the first prong of the Strickland-Fritz test, defendant claims counsel was deficient because he failed to investigate all available defenses. Namely, that defendant had an alibi and the money found on his person could be explained due to the fact that he had just cashed a paycheck before being arrested. Defendant argues counsel's decisions should not be considered strategic given his alleged failure to investigate.

As to the second prong of the Strickland-Fritz test, defendant argues he was prejudiced because evidence of defendant's cashing of a check and the testimony of witnesses that should have been called, but were not called, would have impacted the result of the trial.

We affirm the denial of defendant's petition substantially for the reasons stated by Judge Lydon in his thorough and well-reasoned written opinion. We add only the following comments.

"In addressing an ineffective assistance claim based on a counsel's failure to call an absent witness, a PCR court must

unavoidably consider whether the absent witnesses's testimony would address a significant fact in the case, and assess the absent witnesses's credibility." L.A., 433 N.J. Super. at 15. "In considering the impact of the absent witness, a court should consider: '(1) the credibility of all witnesses, including the likely impeachment of the uncalled defense witnesses; (2) the interplay of the uncalled witnesses with the actual defense witnesses called; and (3) the strength of the evidence actually presented by the prosecution.'" Id. at 16-17 (quoting McCauley-Bey v. Delo, 97 F.3d 1104, 1106 (8th. Cir. 1996)).

The record amply supports Judge Lydon's assessment of the credibility and substantive impact of the witnesses who testified during the PCR hearing, and the interplay of that testimony with the trial testimony. The record also supports his analysis of negligible impact of Mulryne's testimony that he observed a "narcotics transaction" under McLean.

The record further supports the conclusion that defendant did not meet his burden under the second prong of the Strickland-Fritz test. Defendant did not demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

To the extent defendant argues on PCR that the trial court's denial of a request for an adjournment of the suppression hearing and trial prevented trial counsel from adequately preparing to try the case, that issue was decided on the merits in his direct appeal. Defendant is procedurally barred from re-raising issues on PCR that were decided on the merits on direct appeal. R. 3:22-5; State v. Marshall, 148 N.J. 89, 147-52 (1997); State v. McQuaid, 147 N.J. 464, 484 (1997); State v. Preciose, 129 N.J. 451, 476 (1992).

Affirmed.