

RECORD IMPOUNDED

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1832-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

R.S.,

Defendant-Appellant.

Submitted March 22, 2018 – Decided April 10, 2018

Before Judges Haas and Gooden Brown.

On appeal from Superior Court of New Jersey,
Law Division, Salem County, Indictment No. 10-
07-0389.

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

John T. Lenahan, Salem County Prosecutor,
attorney for respondent (David M. Galemba,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant appeals from the September 7, 2016 Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

A jury convicted defendant of two counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a) (counts one and two); second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a) (count three); and third-degree aggravated criminal sexual contact, N.J.S.A. 2C:13-3(a) (count four). The trial court merged count four into count one, and sentenced defendant on counts one and two to concurrent fifteen-year prison terms, subject to an 85% period of parole ineligibility pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2, with a five-year period of parole supervision upon release. The court imposed a consecutive five-year term on count three. We affirmed defendant's conviction and sentence on direct appeal, and the Supreme Court denied certification. State v. R.S., No. A-2795-12 (App. Div. Jan. 28, 2015), certif. denied, 222 N.J. 15 (2015).

Defendant then filed a petition for PCR, contending that trial counsel rendered ineffective assistance by failing to: (1) engage in a discussion with defendant concerning the attorney's tactical decision to question the victim about her alleged bias against defendant on cross-examination; and (2) conduct an

investigation into the victim's prior sexual assault history and use that information to undermine her credibility at trial.

In a thorough written opinion, Judge Linda Lawhun considered both of these contentions and denied defendant's petition. The judge concluded that defendant failed to satisfy the two-prong test of Strickland v. Washington, 466 U.S. 668, 687 (1984), which requires a showing that trial counsel's performance was deficient and that, but for the deficient performance, the result would have been different.

The judge found that defendant's first contention was nothing more than an attack on the strategy employed by his trial attorney. At trial, the defense advanced the position that the victim, who was defendant's step-daughter,¹ conspired with defendant's wife to concoct a story falsely accusing defendant of sexual assault as part of a scheme to get him out of the house. In his brief in support of PCR, defendant's PCR attorney argued that the trial attorney did not discuss this strategy with defendant before raising it. However, defendant did not make this allegation in a certification in support of PCR, and Judge Lawhun found that this claim was nothing more than a bald assertion that was not supported by the record. The judge also observed that defendant was present

¹ The victim "was almost twelve years old" when the sexual assaults involved in this case began. R.S. (slip op. at 4).

at a pre-trial hearing where defendant's attorney laid out this strategy.

Turning to defendant's second argument, he asserted that his attorney failed to object when the prosecutor asked the victim at trial whether she was "a virgin" at the time of defendant's assaults, and the victim replied that she was. Defendant alleged that the victim's testimony was false because she had been sexually assaulted by another individual earlier in her childhood. Defendant argued that his attorney was ineffective because he did not object to this testimony, and did not properly question the victim about the prior sexual assault.

Judge Lawhun rejected this argument. The judge noted that, on direct appeal, defendant argued that his conviction should be reversed because the prosecutor's question, and his subsequent statement to the jury concerning it in summation, were improper. R.S., (slip op. at 2). Although we stated that "the prosecutor's question about [the victim's] prior sexual history was impermissible under the Rape Shield Statute, N.J.S.A. 2C:14-7[,]" we concluded that "this error was not 'clearly capable of producing an unjust result[.]'" Id. at 22 (alteration in original) (quoting R. 2:10-2).

Under these circumstances, Judge Lawhun found that defendant did not demonstrate that the result would have been different if

his attorney had objected and, therefore, he did not meet the second Strickland prong. In addition, the judge noted that had defendant attempted to question the victim about the prior sexual assault, this testimony would have been barred by the Rape Shield Statute.

Defendant now appeals from the denial of his petition and raises the following arguments:

POINT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR [PCR] WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION AT THE TRIAL LEVEL.

A. THE PREVAILING LEGAL PRINCIPLES REGARDING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, EVIDENTIARY HEARINGS AND PETITIONS FOR [PCR].

B. THE DEFENDANT DID NOT RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL AS A RESULT OF COUNSEL'S FAILURE TO COMPREHENSIVELY DISCUSS A CRITICAL DECISION WITH HIM PRIOR TO TRIAL, WHICH RESULTED IN THE STATE ELICITING CERTAIN REBUTTAL TESTIMONY WHICH IRREPARABLY PREJUDICED HIS DEFENSE, ENSURING HE WOULD BE CONVICTED BY THE JURY.

C. THE DEFENDANT DID NOT RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL AS A RESULT OF TRIAL COUNSEL'S FAILURE TO APPROPRIATELY RESPOND TO TESTIMONY ELICITED FROM THE VICTIM BY THE STATE THAT SHE WAS A VIRGIN, AS WELL AS TO THE STATE'S SUMMATION EMPHASIZING THE DEFENDANT "TOOK HER VIRGINITY."

When petitioning for PCR, the defendant must establish, by a preponderance of the credible evidence, that he or she is entitled to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013); State v. Preciose, 129 N.J. 451, 459 (1992). To sustain that burden, the defendant must allege and articulate specific facts that "provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing and the defendant "must do more than make bald assertions that he was denied the effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). In addition, a defendant must present facts "supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." Ibid. Accordingly, trial courts should grant evidentiary hearings and make a determination on the merits only if the defendant has presented a prima facie claim of ineffective assistance. Preciose, 129 N.J. at 462.

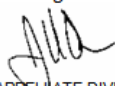
To establish a prima facie claim of ineffective assistance of counsel, the defendant is obliged to show not only the particular manner in which counsel's performance was deficient, but also that the deficiency prejudiced his right to a fair trial. Strickland, 466 U.S. at 687; State v. Fritz, 105 N.J. 42, 58

(1987). There is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. Further, because prejudice is not presumed, Fritz, 105 N.J. at 52, the defendant must demonstrate "how specific errors of counsel undermined the reliability" of the proceeding. United States v. Cronic, 466 U.S. 648, 659 n.26 (1984). Moreover, such acts or omissions of counsel must amount to more than mere tactical strategy. Strickland, 466 U.S. at 689.

We have considered defendant's contentions in light of the record and applicable legal principles and conclude that they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We affirm substantially for the reasons expressed by Judge Lawhun in her well-reasoned written opinion.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION