

**RECORD IMPOUNDED**

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2215-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

A.R.,

Defendant-Appellant.

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Submitted January 22, 2018 – Decided March 8, 2018

Before Judges O'Connor and Vernoia.

On appeal from Superior Court of New Jersey,  
Law Division, Cumberland County, Indictment  
No. 09-12-0992.

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

Jennifer Webb-McRae, Cumberland County  
Prosecutor, attorney for respondent (Kim L.  
Barfield, Assistant Prosecutor, of counsel and  
on the brief).

PER CURIAM

Defendant A.R.<sup>1</sup> appeals from a September 26, 2016 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. Having reviewed the record in light of the applicable law, we affirm.

I.

The underlying facts in this case are set forth at length in our opinion on defendant's direct appeal, State v. A.R., A-3286-11 (App. Div. Oct. 29, 2013), certif. denied, 224 N.J. 124 (2016). We therefore limit our recitation of the facts to those relevant to defendant's PCR petition.

The indictment alleged defendant sexually assaulted his daughter Ann from December 1994, when she was eight years old, until February 2002, when she was sixteen. It also charged him with sexually assaulting and offensively touching his younger daughter Alice during a one-year period beginning on August 1, 2002, when she was twelve years old. The daughters first reported the assaults to the police in 2009, when Ann was twenty-three and Alice was eighteen.

At trial, the State primarily relied on the testimony of Ann, Alice and their brother Arnold. Ann testified defendant sexually assaulted her on almost a daily basis from the time she was eight

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<sup>1</sup> We employ initials and pseudonyms throughout this opinion to protect the privacy of the victims.

or ten years old until she was approximately sixteen. Alice testified Ann and defendant had a relationship that was like that of a married couple. Alice saw defendant and Ann kiss "like a making-out kiss," and go into the bedroom of their home alone. Arnold explained he once saw defendant on top of Ann as she laid naked on a couch, when she was only eight to ten years old. During the following years, defendant directed that Arnold serve as a look-out when defendant and Ann had sexual relations in empty movie theaters where defendant, Ann and Arnold performed late evening janitorial services.

Alice testified that when she turned twelve, defendant began to sexually abuse her. She explained that defendant used his hand to "rub it up [her] skirt," "used to feel up on [her]," and, on one occasion, he put her on top of him, pushed her underwear to the side, and rubbed his penis on her.

The trial testimony showed the children had numerous opportunities over the years to report the sexual assaults and abuse, but did not. Ann explained that the Division of Youth and Family Services (DYFS)<sup>2</sup> "was always in [the family's] life," and that she spoke with DYFS caseworkers at different times during the

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<sup>2</sup> Effective June 29, 2012, the name of the Division of Youth and Family Services was changed to the Division of Child Protection and Permanency. L. 2012, c. 16.

period she was being assaulted, but never reported defendant's assaults. She particularly recalled speaking to a DYFS caseworker named "Diana," and stating defendant never abused her.

Ann recalled she underwent a physical examination arranged by DYFS and never disclosed defendant's ongoing sexual assaults to the doctor. She admitted that in 2004, when she was eighteen years old, she was interviewed by a local police detective who asked if defendant ever touched her, and she said "no." Ann testified she never reported the assaults to any school officials or to her husband.

Alice also testified that she spoke with DYFS caseworkers over the years and never disclosed defendant's assaultive conduct. More particularly, she acknowledged that she spoke with DYFS caseworkers once in 2004 and twice in 2005, and did not report defendant's actions. She admitted DYFS was involved with her family for a "good number of years," and she never made a disclosure because she was "never asked."

Arnold testified that in 2004 and 2005, he spoke with a local police detective and reported defendant's relationship with Ann. Arnold also testified defendant physically abused him and regularly threatened to beat him if he reported defendant's conduct.

In 2009, Alice first disclosed to Ann that defendant had sexually assaulted her. With Ann's support, Alice reported defendant's actions to the police. At that time, Ann also reported defendant's sexual assaults upon her.

A jury convicted defendant of two counts of second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a), second-degree sexual assault, N.J.S.A. 2C:14-2(b), and the petty disorderly persons offense of offensive touching, N.J.S.A. 2C:33-4(b). The court imposed an aggregate sentence of twenty years subject to the requirements of the No Early Release Act, N.J.S.A. 2C:43-7.2, parole supervision for life, N.J.S.A. 2C:43-6.4, and compliance with the requirements of Megan's Law, N.J.S.A. 2C:7-1 to -23. We affirmed defendant's conviction and sentence on direct appeal. A.R., A-3286-11 (slip op. at 19), and his petition for certification was denied, A.R., 224 N.J. 124.

Defendant filed a pro se verified PCR and memoranda<sup>3</sup> alleging ineffective assistance of his trial counsel and errors by the trial court. Defendant's assigned counsel subsequently submitted

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<sup>3</sup> During oral argument on the PCR petition, defendant's counsel suggested defendant filed multiple pro se submissions. The record on appeal includes only a February 10, 2016 three-page Verified Petition For Post Conviction Relief with an attached eight-page handwritten legal memorandum, and a July 30, 2016 twenty-nine page handwritten legal memorandum.

a brief to the PCR court joining in defendant's arguments and asserting that trial counsel was ineffective by failing to interview two witnesses: Danner Hardwed,<sup>4</sup> an Atlantic County DYFS caseworker, and Willfredo Reyes,<sup>5</sup> who defendant claimed knew the family and was aware defendant's wife had animosity and jealousy towards defendant and caused their children to fabricate the abuse allegations.

At oral argument on the PCR application, defendant's counsel advised the court that after having "numerous conversations" with defendant, his "only issue is that there were two witnesses that this [t]rial [a]ttorney failed to call" that "would have aided his defense." Counsel represented that defendant said Reyes would have told the jury that defendant did not sexually assault his daughters, and Hardwed would have testified that she would have taken the children away in 2002 if it had been reported defendant committed any of the alleged acts.

The court addressed issues asserted in defendant's pro se submissions. For example, defendant generally asserted his trial

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<sup>4</sup> The record and briefs variously refer to "Danner Hardwed" and "Diana Harwed." We understand the references to be to the same person.

<sup>5</sup> The record and briefs variously refer to "Willfredo Reyes" and "Wilfredo Reyes." We understand the references to be to the same person.

counsel was ineffective by failing to introduce evidence presented during a 2002 DYFS investigation and in a 2007 trial. The court observed that defendant failed to precisely identify the investigation and proceeding, did not identify any alleged relevant evidence that would have been admissible at his trial, and failed to make any demonstration that introduction of evidence from the investigation and proceeding would have favorably affected the outcome of his trial. The court stated it could not properly grant a PCR petition or order an evidentiary hearing on defendant's PCR petition based only on speculation as to what occurred during the referenced 2002 investigation and 2007 proceeding. The court further observed that a decision by counsel not to introduce evidence concerning a prior DYFS investigation at trial may have constituted a carefully considered trial strategy.

The court further denied the PCR petition because defendant failed to present evidence showing what the purported witnesses, Hardwed and Reyes, would have testified about and how their putative testimony would have changed the result of defendant's trial. The court determined defendant failed to establish a prima facie showing of ineffective assistance of counsel, and denied defendant's PCR petition.

On appeal, defendant presents the following arguments for our consideration:

POINT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL AS A RESULT OF TRIAL COUNSEL'S FAILURE TO CALL CERTAIN WITNESSES ON HIS BEHALF.

POINT II

SINCE THE DEFENDANT FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION FROM POST CONVICTION RELIEF COUNSEL, THE MATTER SHOULD BE REMANDED TO THE TRIAL COURT TO ASSIGN NEW POST CONVICTION RELIEF COUNSEL TO REPRESENT HIM, TO PERMIT THE FILING OF SUPPLEMENTAL SUBMISSIONS ON HIS BEHALF, AND TO CONDUCT A NEW HEARING RELATING THERETO. (NOT RAISED BELOW).

II.

We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). The de novo standard of review applies to mixed questions of fact and law. Id. at 420. Where an evidentiary hearing has not been held, it is within our authority "to conduct a de novo review of both the factual findings and legal conclusions of the PCR court." Id. at 421. We apply that standard here.



To prevail on a claim of ineffective assistance of counsel raised under the United States Constitution, a defendant must satisfy the two-part test established by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). Under the first prong of the Strickland standard, a petitioner must show counsel's performance was deficient. It must be demonstrated that counsel's handling of the matter "fell below an objective standard of reasonableness" and that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687-88.

Under the second prong of the standard, a defendant "must show that the deficient performance prejudiced the defense." Id. at 687. There must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A petitioner must demonstrate that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. "The error committed must be so serious as to undermine the court's confidence in the jury's verdict or result reached." State v. Chew, 179 N.J. 186, 204 (2004) (citing Strickland, 466 U.S. at 694).

We review a judge's decision to deny a PCR petition without an evidentiary hearing for abuse of discretion. State v. Preciose, 129 N.J. 451, 462 (1992). A hearing is required only when (1) a defendant establishes a prima facie case in support of PCR, (2) the court determines that there are disputed issues of material fact that cannot be resolved by review of the existing record, and (3) the court determines that an evidentiary hearing is required to resolve the claims asserted. State v. Porter, 216 N.J. 343, 354 (2013) (citing R. 3:22-10(b)). "A prima facie case is established when a defendant demonstrates 'a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits.'" Id. at 355 (quoting R. 3:22-10(b)).

"[T]o establish a prima facie claim a defendant must do more than make bald assertions that he was denied effective assistance of counsel." Ibid. (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)). PCR petitions must be "accompanied by an affidavit or certification by defendant, or by others, setting forth with particularity[,]" State v. Jones, 219 N.J. 298, 312 (2014), "facts sufficient to demonstrate counsel's alleged substandard performance," Porter, 216 N.J. at 355 (quoting Cummings, 321 N.J. Super. at 170); see also R. 3:22-10(c) (requiring that factual predicates for PCR claims "must be made

by an affidavit or certification pursuant to Rule 1:4-4 and based on personal knowledge of the declarant"). When a defendant asserts that his attorney failed to call exculpatory witnesses, "he must assert the facts that would have been revealed, 'supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification.'" State v. Petrozelli, 351 N.J. Super. 14, 23 (App. Div. 2002) (quoting Cummings, 321 N.J. Super. at 170).

Defendant claims his counsel was ineffective by failing to call Hardwed and Reyes as witnesses at trial. Our Supreme Court has observed that "[d]etermining which witnesses" to call to testify "is one of the most difficult strategic decisions that any trial attorney must confront." State v. Arthur, 184 N.J. 307, 320 (2005). "[A] defense attorney's decision concerning which witnesses to call to the stand is 'an art,' and a court's review of such a decision should be 'highly deferential[.]'" Id. at 321 (quoting Strickland, 466 U.S. at 689, 693).

Defendant fails to demonstrate his trial counsel was ineffective by failing to call Hardwed and Reyes as witnesses at trial. His claim is founded solely on the bald and conclusory assertion they would have provided testimony that would have changed the outcome of his trial. The assertion is unsupported by an affidavit or certification based on personal knowledge

establishing what would have been revealed if they had testified. See Petrozelli, 351 N.J. Super. at 23; see also State v. Bey, 161 N.J. 233, 262 (1999) (finding claim based on defendant's speculation is insufficient for grant of post-conviction relief).

Defendant also failed to present any facts supported by an affidavit or certification establishing a reasonable probability that had the witnesses testified at trial, the result would have been different. See Strickland, 466 U.S. at 694; see, e.g., Bey, 161 N.J. at 262 (finding trial counsel is not ineffective by failing to call witnesses whose testimony would not have changed the outcome). Even accepting defendant's supported conclusory assertions, defendant failed to demonstrate any probability the putative testimony of the witnesses would have changed the trial outcome. Defendant alleges Hardwed would have established that DYFS's involvement and investigations between 1994 and 2003 revealed allegations against defendant were unsubstantiated, and that Ann did not report defendant's sexual assaults during that time. Such testimony would not have changed the result of defendant's trial, however, because Ann testified she spoke with different DYFS representatives during the years defendant sexually assaulted her, never disclosed defendant's actions, and told a DYFS caseworker that defendant did not sexually assault her.

Defendant argues that if Reyes testified, he would have established the children's mother was "abusive to Ann and was known to make false sexual allegations against defendant involving Ann." Ann testified her mother was physically and mentally abusive toward her during the years defendant sexually assaulted her, and therefore any testimony from Reyes concerning the mother's abuse would have added little to Ann's testimony, which was based on Ann's personal knowledge. Also, defendant does not claim Reyes had personal knowledge of the mother's purported false allegations that defendant was sexually assaulting Ann and, thus, Reyes would have been unable to testify to such alleged facts at trial.

A defendant must establish both prongs of the Strickland standard in order to obtain a reversal of the challenged conviction. Strickland, 466 U.S. at 687; State v. Nash, 212 N.J. 518, 542 (2013); Fritz, 105 N.J. at 52. As the PCR court aptly determined here, defendant failed to sustain his burden of establishing a prima facie claim of ineffective assistance of counsel under both prongs of the Strickland standard. The court correctly denied defendant's PCR petition.

Defendant also argues PCR counsel was ineffective by failing to independently review defendant's case and assert available meritorious arguments on defendant's behalf. Defendant argues PCR counsel did not provide effective representation because his brief

in the PCR court contained arguments based solely on trial counsel's failure to call Hardwed and Reyes as witnesses. Defendant contends "it is inconceivable that" in a seven-day trial PCR counsel could not find a "bona fide issue [that] could be raised on defendant's behalf which was factually and legally supported by [the] record."

PCR counsel is obligated to communicate with the defendant, investigate the defendant's claims, and "determine whether there are additional claims that should be brought forward." State v. Webster, 187 N.J. 254, 257 (2006). PCR counsel is required to "advance all of the legitimate arguments that the record will support," but need not advance an argument where investigation does not support a "fair legal argument in support of a particular claim." Ibid. PCR counsel's brief "must advance arguments that can be made in support of the petition and include defendant's remaining claims, either by listing them or incorporating them by reference so that the judge may consider them." Ibid.

Defendant relies on State v. Hicks, 411 N.J. Super. 370, 374 (App. Div. 2010), where we held that a PCR counsel's performance was deficient because the record showed PCR counsel failed to conduct "an independent evaluation of defendant's case to determine whether there were other grounds to attack [the] defendant's conviction." The record showed PCR counsel

demonstrated a "fundamental ignorance of the salient facts underpinning [the] defendant's conviction," and our review of the record led "us to question whether PCR counsel even reviewed the file." Ibid.

Unlike in Hicks, where it was clear PCR counsel failed to satisfy his obligations, there is nothing in the record suggesting PCR counsel did not conduct an independent review of the trial record to formulate the legal arguments supporting defendant's petition or otherwise failed to satisfy his obligations under Rule 3:22-6(d). At argument, PCR counsel represented that he spoke with defendant numerous times about the petition and they decided to focus on trial counsel's failure to call Hardwed and Reyes as the basis for the ineffective assistance claim. Nonetheless, PCR counsel's brief incorporated all of the claims defendant asserted in his pro se submissions. In addition, although defendant argues that PCR counsel's performance was deficient, he fails to identify a single meritorious claim supporting his PCR petition that PCR counsel failed to advance before the PCR court. See State v. Worlock, 117 N.J. 696, 625 (1990) ("The failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel.").

We have considered all of defendant's remaining contentions and they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION