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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2291-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANDRE SCOTT,

Defendant-Appellant.

Submitted January 30, 2018 – Decided February 21, 2018

Before Judges Hoffman and Mayer.

On appeal from Superior Court of New Jersey,
Law Division, Burlington County, Indictment
No. 09-05-0432.

Joseph E. Krakora, Public Defender, attorney
for appellant (Janet A. Allegro, Designated
Counsel, on the briefs).

Scott A. Coffina, Burlington County
Prosecutor, attorney for respondent (Nicole
Handy, Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant Andre Scott appeals from an October 3, 2016 order
of the Law Division denying his petition for post-conviction relief

(PCR) without an evidentiary hearing. Defendant contends that his trial counsel was ineffective for failing to: (1) request a Rule 104 hearing on certain evidence submitted by the State; (2) properly investigate and interview witnesses; and (3) request a cooperating witness jury instruction. We disagree and affirm.

Defendant was convicted of first-degree murder, N.J.S.A. 2C:11-3(a)(1) and N.J.S.A. 2C:11-3(a)(2), and sentenced to thirty years' imprisonment with no parole eligibility. Defendant appealed his conviction, and we affirmed. State v. Scott, No. A-6169-10 (App. Div. Aug. 21, 2014). The Supreme Court denied defendant's petition for certification. State v. Scott, 223 N.J. 282 (2015).

The following facts are relevant to the disposition of defendant's appeal. On November 2, 2008, defendant was recording music at a studio in Burlington City with Roy Davis and Jeffrey Douglas. After leaving the studio, defendant and Davis got into a fight. Davis threatened defendant with a glass bottle. In response, defendant took out a pocket knife and stabbed Davis four times. Davis died from those injuries.

Douglas spoke to police after the incident. Initially, Douglas told the police that defendant and Davis were attacked by strangers. The police disbelieved Douglas's account of the

incident. After consulting with an attorney, Douglas gave a second account to the police stating it was defendant who stabbed Davis.

During the trial, defendant and Douglas testified. Defendant testified that he acted in self-defense. He stated Davis swung a bottle at him and, in response, he stabbed Davis. According to defendant, Davis hit him in the head with the bottle and defendant stabbed Davis a second time. Defendant testified he backed away, but Davis again hit him in the head with the bottle. Defendant then explained Davis "hunched over" him and defendant stabbed Davis two more times. Thereafter, Davis collapsed. Defendant testified that after an unsuccessful attempt to rouse Davis, he fled the scene and disposed of the knife.

Douglas testified that defendant and Davis started arguing and he told them to stop. He claimed Davis lowered the bottle to his side and looked at Douglas. According to Douglas, while Davis was looking at him, defendant stabbed Davis five times. Contrary to defendant's testimony, Douglas stated Davis did not fight back after the first stab, yet defendant continued his attack on Davis. Douglas explained that he drove off after the stabbing, but came back and told someone to call an ambulance.

Douglas's trial testimony differed from his second statement to the police. However, Douglas's statement to the police was consistent with defendant's trial testimony insofar as defendant

and Davis fought, and Davis threatened defendant first. Defense counsel cross-examined Douglas at length about the discrepancies between his trial testimony and his statement to the police.

Between the time Douglas gave his statement to the police and the trial, Douglas was charged with distributing a controlled substance in a school zone. Those charges were pending when Douglas testified in this matter. During cross-examination, Douglas admitted he sought leniency in his drug case by testifying for the State in this case.

During the trial, the State advised defense counsel and the trial judge that it intended to introduce as evidence a knife found in defendant's car. Defense counsel challenged the admissibility of the knife and told the judge, "we might want to have at least some kind of a hearing on that." The judge responded that he did not believe a hearing was required "as opposed to just having an argument as to what we should do." Defense counsel agreed to legal argument to resolve this evidentiary issue.

Outside the presence of the jury, the judge heard legal argument regarding admissibility of the knife found in defendant's car. Defense counsel argued there was no DNA evidence on the knife and no testimony from the medical examiner opining the knife could have been the murder weapon. Without such evidence, defense counsel maintained there was no basis to admit the knife. The

State responded that the knife found in defendant's car matched Douglas's description of the murder weapon and counsel's arguments went to the weight of the evidence rather than to its admissibility. The judge ruled the knife would be admitted into evidence.

At the conclusion of the trial, the jury found defendant guilty of first-degree murder, and the judge sentenced him to thirty years in prison.

After direct appeals from his conviction were exhausted, defendant filed his PCR petition. The PCR judge held oral argument on defendant's petition, and denied the application without an evidentiary hearing.

The PCR judge rejected defendant's contention that his trial counsel was ineffective because counsel failed to request a Rule 104 hearing regarding the admissibility of the knife found in defendant's car. To the contrary, the PCR judge noted that defense counsel requested a hearing, but agreed with the trial judge's suggestion to conduct argument on the matter outside the presence of the jury. The PCR judge also found defendant failed to demonstrate any prejudice because his attorney made strong arguments against admission of the knife, which the trial judge ultimately rejected.

On defendant's claim that his trial counsel was ineffective because he failed to interview relevant witnesses, the PCR judge deemed the argument unavailing. Regarding the failure to interview Douglas prior to trial, the PCR judge noted defendant's trial counsel extensively cross-examined Douglas on the inconsistencies between his trial testimony and his statement to the police. Additionally, the PCR judge found that had a pretrial interview of Douglas been conducted by defendant's attorney, it was unlikely that Douglas "would have been more forthcoming" with details concerning the incident than he was during his interview with the assistant prosecutor.

Similarly, on defendant's claim that his trial attorney failed to interview his mother, the PCR judge found defendant never told the police he was on the phone with his mother during or after the stabbing. In addition, the PCR judge remarked defendant failed to present a certification or affidavit from his mother stating the exonerating information she would have provided.

On the failure of defendant's trial counsel to request a cooperating witness charge, the PCR judge ruled that the jury was instructed multiple times to question Douglas's credibility based on his inconsistent statements, his criminal record, and his pending drug charges. As a whole, the PCR judge determined the

jury instructions regarding the jury's evaluation of Douglas's testimony were proper.

On appeal, defendant argues:

POINT I

THE COURT ERRED IN DENYING DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE EFFECTIVE LEGAL REPRESENTATION.

POINT II

TRIAL COUNSEL'S FAILURE TO REQUEST A HEARING PURSUANT TO N.J.R.E. 104 REGARDING THE ADMISSIBILITY OF THE KNIFE RECOVERED FROM MR. SCOTT'S VEHICLE CONSTITUTED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

POINT III

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INTERVIEW RELEVANT WITNESSES PRIOR TO TRIAL.

POINT IV

MR. SCOTT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DUE TO DEFENSE COUNSEL'S FAILURE TO REQUEST A COOPERATING WITNESS CHARGE REGARDING MR. DOUGLAS'S TESTIMONY.

We "will uphold [a] PCR court's findings that are supported by sufficient credible evidence in the record." State v. Nash, 212 N.J. 518, 540 (2013). "[W]e review under the abuse of discretion standard [a] PCR court's determination to proceed without an evidentiary hearing." State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013). When a defendant challenges a

PCR judge's denial of a petition without an evidentiary hearing, "the question before [the] [c]ourt is whether defendant has alleged any facts that, when viewed in the light most favorable to him, are sufficient to demonstrate a reasonable likelihood of success on his PCR claim." State v. Jones, 219 N.J. 298, 311 (2014).

To establish a prima facie claim of ineffective assistance of counsel, a convicted defendant must satisfy the two-part test enunciated in Strickland by demonstrating that: (1) counsel's performance was deficient, and (2) the deficient performance actually prejudiced the accused's defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). See also State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the Strickland test in New Jersey).

In reviewing ineffective assistance claims, courts apply a strong presumption that a defendant's trial counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. "[C]omplaints 'merely of matters of trial strategy' will not serve to ground a constitutional claim of inadequacy[.]" Fritz, 105 N.J. at 54 (quoting State v. Williams, 39 N.J. 471, 489 (1963), overruled on other grounds by State v. Czachor, 82 N.J. 392 (1980)). To establish a prima facie claim of ineffective assistance of counsel, a defendant must demonstrate a reasonable

likelihood of succeeding under the Strickland/Fritz test. See State v. Preciose, 129 N.J. 451, 463 (1992). To demonstrate the likelihood of succeeding under the Strickland/Fritz test, a defendant "must do more than make bald assertions[,] . . . [and] must allege facts sufficient to demonstrate counsel's alleged substandard performance." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

We reject defendant's arguments on appeal asserting his trial counsel was ineffective.

First, contrary to defendant's argument, his trial counsel requested a Rule 104 hearing on the admissibility of the knife. Instead of a hearing, the trial judge allowed counsel to present legal arguments addressing the issue. The knife was admitted into evidence over defense counsel's objection. Defendant's attorney then aggressively cross-examined the State's witness as to the lack of DNA and fingerprint evidence connecting the knife to the stabbing. Having reviewed the record, we find that defense counsel's actions did not fall below the requisite standard to satisfy the Strickland/Fritz test.

Nor do we find that defendant made the requisite showing to prevail on his ineffective assistance claim based on his trial attorney's failure to interview Douglas and defendant's mother. "[C]ounsel has a duty to make reasonable investigations or to make

a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691. "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." Strickland, 466 U.S. at 691.

In light of the record, we agree with the PCR judge that it was not unreasonable for defense counsel to decline to interview Douglas. Douglas's second statement to the police was favorable to defendant and, thus, we cannot presume that trial counsel should have conducted a pretrial interview to discredit Douglas. See Strickland, 466 U.S. at 694. Additionally, defense counsel had the benefit of an overnight recess to prepare for his cross-examination of Douglas and explore the inconsistencies between Douglas's statement to the police and his trial testimony. Having reviewed defense counsel's cross-examination of Douglas, we agree with the PCR judge that defense counsel diligently questioned Douglas on the inconsistencies, and his failure to conduct a pretrial interview of Douglas did not constitute ineffective assistance.

We also reject defendant's ineffective assistance claim based upon his counsel's failure to interview defendant's mother. The PCR judge correctly noted that defendant did not provide an affidavit or other evidence as to the scope of her testimony. Moreover, defendant does not allege that he was elsewhere at the time of the stabbing, or that his mother would have provided testimony contradicting Douglas's version of events.

Nor do we find the failure of defendant's trial attorney to request a cooperating witness charge constituted ineffective assistance of counsel. "Appropriate and proper charges to a jury are essential for a fair trial." State v. Green, 86 N.J. 281, 287 (1981). "In determining the propriety of a jury charge, we will examine the charge as a whole" State v. Martini, 187 N.J. 469, 477 (2006) (citation omitted). "Reversible error will not be found where the [jury] charge, considered as a whole, adequately conveys the law and would not confuse or mislead the jury, even though part, standing alone, might be incorrect." Latta v. Caulfield, 79 N.J. 128, 135 (1979).

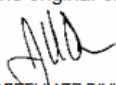
In this case, the jury was told to consider the credibility of the witnesses, to assess their reasons, if any, for testifying, to weigh any prior inconsistent statements as part of that assessment, and, specifically, to consider any previous criminal convictions. We find the jury was instructed to scrutinize

Douglas's testimony such that defense counsel was not ineffective in failing to request the cooperating witness charge. See State v. Harris, 156 N.J. 122, 180–82 (1998). Through defense counsel's cross-examination, the jury learned that Douglas had prior convictions, served time in prison, provided inconsistent statements regarding the incident, and had a pending criminal charge. The judge explained that the jury should consider those factors in evaluating Douglas's testimony. Based upon defense counsel zealous cross-examination of Douglas, and counsel's repeated emphasis during closing argument that Douglas was not credible and was influenced by his pending charges, coupled with the general instructions to the jury on evaluating credibility of witnesses, we conclude there was no prejudice to defendant as a result of defense counsel's failure to request the cooperating witness charge.

Because defendant failed to make a prima facie showing of ineffective assistance of counsel, no evidentiary hearing was required. Preciose, 129 N.J. at 462–63. Thus, the PCR judge's decision to deny defendant's PCR motion without oral argument was not an abuse of discretion.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION