

**NOT FOR PUBLICATION WITHOUT THE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-2737-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMES ROYAL,

Defendant-Appellant.

Submitted March 19, 2018 – Decided April 10, 2018

Before Judges Messano and Vernoia.

On appeal from Superior Court of New Jersey,
Law Division, Cumberland County, Indictment
No. 04-02-0180.

Joseph E. Krakora, Public Defender, attorney
for appellant (Steven M. Gilson, Designated
Counsel, of counsel and on the brief).

Jennifer Webb-McRae, Cumberland County
Prosecutor, attorney for respondent (Andre R.
Araujo, Assistant Prosecutor, of counsel and
on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant James Royal appeals from a October 5, 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.

The underlying facts in this case are set forth at length in our opinion on defendant's direct appeal, State v. James Royal, A-3432-09 (App. Div. July 7, 2014), certif. denied, 220 N.J. 208 (2015). We therefore limit our recitation to those facts relevant to defendant's PCR petition.

Following a jury trial, defendant was convicted of two counts of first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2), one count of second-degree burglary, N.J.S.A. 2C:18-2, and related weapons offenses arising from the January 17, 2003, shooting deaths of defendant's former girlfriend, Felicia Flores, and her sister, Natasha Ferrer.¹

The trial evidence showed that in the days preceding the murders of Flores and Ferrer, Flores informed defendant that she was no longer interested in a relationship with him. On January 17, 2003, defendant went into Flores's home armed with a handgun. Teondra Bowman, who was present, heard Ferrer tell Flores to inform

¹ Defendant was also convicted of other charges related to a January 16, 2003 incident involving Flores. Defendant's PCR petition is unrelated to his convictions on those charges.

defendant to leave the house or Ferrer would call the police. Ferrer told Bowman to take Ferrer's child out of the home. Bowman took the child, fled through a rear door, and heard two gunshots as she ran to her nearby house. She heard another gunshot as she arrived at her home, where she told her cousin Dave Smith that defendant was at Flores's house with a gun. Smith walked toward Flores's house and heard a gunshot.

After defendant's arrival at the home, Ferrer called 9-1-1. A State Police Sergeant was qualified as an expert in audio enhancement, and explained that he reduced the background noise on the recording of Ferrer's 9-1-1 call to allow the voices on the call to be heard more clearly. The enhanced recording of the 9-1-1 call, which was admitted in evidence, captured Ferrer's conversation with the 9-1-1 operator, some of defendant's statements while in the home, and the sounds of two gunshots.

The State presented evidence showing Flores was shot in the chest and above her pelvis. The medical examiner opined that based on the nature of the wounds, Flores was standing erect when she was shot in the pelvis, but was prone on the floor when she was shot in the chest. Flores died from the gunshot wounds.

Ferrer was found in the laundry room of the home. She sustained a single gunshot to the chest. The bullet caused damage to her heart, liver, stomach and spleen, resulting in her death.

The evidence also showed defendant sustained a bullet wound to his abdomen. The State presented a firearms expert who testified that all of the bullets and casings found at the scene were fired from the same gun, which was recovered in the kitchen where the police found Flores and defendant.

Defendant did not testify at trial. Through the testimony of defendant's expert psychologist, however, defendant contended he went to Flores's home with a plan to kill himself, and the gun accidentally fired when Flores attempted to grab the weapon.

Following our affirmance of defendant's conviction and sentence, and the Supreme Court's denial of his petition for certification, defendant filed a pro se PCR petition. He claimed there was newly discovered evidence that would have changed the outcome of trial, and the prosecutor suppressed evidence and used perjured testimony to obtain defendant's convictions. Before the PCR court, defendant's assigned counsel argued that trial counsel was ineffective by failing to obtain audio enhancement and ballistics experts to counter the State's experts at trial.

The court heard argument and denied the petition in a detailed written opinion. The court found defendant failed to sustain his burden of demonstrating an entitlement to either PCR or an evidentiary hearing. The court explained:

[I]n order to establish a prima facie case, a petitioner must do more than make bald assertions that he was denied the effective assistance of counsel. He must allege facts sufficient to demonstrate counsel's alleged substandard performance. Thus, when a petitioner claims his trial counsel inadequately investigated his case, he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or person making the certification. [] Petitioner has failed to provide any information, by way of certification, affidavit or report that would contradict the opinion of the State's expert[s]. . . . [A] party claiming ineffective assistance of counsel cannot baldly claim trial counsel was deficient for failing to produce evidence at trial without producing the very evidence he claims should have been presented. Petitioner has failed to provide this court with any evidence that this was not simply a trial strategy in which trial counsel was unable to find a qualified, credible expert in ballistics or audio that was able to reach an alternative opinion.

The court also found defendant was not entitled to an evidentiary hearing because he failed to establish a prima facie case of ineffective assistance of counsel. This appeal followed.

Defendant's counsel presents the following argument for our consideration:

THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF TRIAL COUNSEL'S INEFFECTIVENESS FOR FAILING TO INVESTIGATE/OBTAIN CRUCIAL EXPERT WITNESSES.

In his pro se brief, defendant presents the following arguments:

POINT I.

FAILING TO ADVANCE ALL LEGITIMATE ARGUMENTS THAT THE RECORD WILL SUPPORT INCORPORATING THEM IN WHICH WILL PRESERVE PETITIONER'S CONTENTIONS GOING FORWARD.

POINT II.

THE FAILURE TO INVESTIGATE AND RETAIN AN EXPERT.

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-pronged 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").

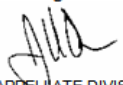
When a defendant asserts that his attorney failed to call exculpatory witnesses, "he must assert the facts that would have been revealed, 'supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making

the certification.'" State v. Petrozelli, 351 N.J. Super. 14, 23 (App. Div. 2002) (quoting Cummings, 321 N.J. Super. at 170). Counsel is not constitutionally ineffective by failing to call witnesses at a hearing whose testimony would not change the outcome. State v. Bey, 161 N.J. 233, 262 (1999).

We are satisfied the PCR court correctly applied these principles in denying defendant's PCR petition. Defendant presents nothing more than the bald assertion that his counsel should have presented audio enhancement and ballistics experts at trial. His petition is bereft of an affidavit or certification providing competent evidence supporting either prong of the Strickland standard. See Strickland, 466 U.S. at 687 (holding a petitioner must establish both prongs of the standard to obtain reversal of a conviction based on a claim of ineffective assistance of counsel).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION