SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2765-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ERIC HINES, a/k/a GREGORY MAYS, TOM JONES, THOMAS JONES, TERRANCE KENNEDY, TERRANCE KERNEY and TERRANCE KERNNEY,

Defendant-Appellant.

Submitted September 14, 2017 – Decided March 5, 2018

Before Judges Rothstadt and Gooden Brown.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Indictment No. 09-10-3535.

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

Mary Eva Colalillo, Camden County Prosecutor, attorney for respondent (Kevin J. Hein, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from the October 30, 2015 Law Division order denying his petition for post-conviction relief (PCR) without granting an evidentiary hearing. We affirm.

Following a jury trial, on July 1, 2010, defendant was convicted of second-degree robbery, N.J.S.A. 2C:15-1 (count one); second-degree burglary, N.J.S.A. 2C:18-2(a) (count two); third-degree theft, N.J.S.A. 2C:20-3 (count three); fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a)(2) (count four); and third-degree burglary, N.J.S.A. 2C:18-2(a) (count five). On August 6, 2010, after appropriate mergers, defendant was sentenced as a persistent offender, N.J.S.A. 2C:44-3(a), to twenty years' imprisonment subject to the provisions of the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, on count one, a consecutive eighteen-month term with a nine-month parole disqualifier on count four, and a concurrent five-year term with a two-and-one-half year parole disqualifier on count five.

Briefly, the facts underlying the convictions stemmed from defendant burglarizing the victim's home in the middle of the night, awakening her from a sound sleep, and assaulting her while she tried to call 911. Although defendant successfully evaded apprehension at the scene, a Combined DNA Index System (CODIS) hit from a knit hat worn by the fleeing suspect, found outside in the bushes in proximity to items stolen from the victim's home, matched

defendant's DNA. The CODIS hit was confirmed by buccal swabs taken from defendant without a warrant while he was in custody on unrelated charges. DNA from a beer can found inside the victim's ransacked home also matched defendant's DNA, notwithstanding the fact that the victim never identified defendant as her assailant and her initial description of her intruder did not match defendant.

We affirmed defendant's convictions and sentence on direct appeal, and his petition for certification was denied by the Supreme Court. State v. Hines, No. A-2944-10 (App. Div. Sep. 5, 2013), certif. denied, 217 N.J. 294 (2014). Thereafter, defendant filed a timely pro se petition for PCR in which he alleged ineffective assistance of counsel. Defendant claimed that trial counsel was ineffective primarily for failing to challenge the admissibility of the DNA evidence and for withdrawing a motion to suppress the DNA evidence over his objection. Defendant also claimed that appellate counsel was ineffective primarily for failing to raise the withdrawal of the suppression motion in his direct appeal and for "refus[ing] to order pre-trial transcripts" to facilitate a complete appellate review of the issues. PCR counsel was appointed and submitted supporting briefs and documentary exhibits challenging the DNA evidence, including the abandoned suppression motion and the chain of custody proofs.

After oral argument, in a thorough oral decision, Judge Edward J. McBride, Jr., considered each contention and denied defendant's petition.[1] The judge concluded that defendant failed to establish a prima facie case to satisfy the two-prong test of Strickland v. Washington, 466 U.S. 668, 687 (1984). First, Judge McBride recounted the pertinent facts. He noted that after police responded to a 9-1-1 call of a robbery in progress and the victim reported that the intruder fled the area,

> [t]he police encountered a male on a bicycle carrying a bag a short while later. The male ignored orders from the police to stop and instead fled, ultimately escaping. A search of the area revealed a bag containing items from the victim's home, including her purse. Police . . . recovered a knit hat and a tube sock.
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> Police conducted further investigation at the victim's home. A search yielded open bottles and cans of alcohol. Those were seized by the police as evidence. Those items along with the hat and the tube [sock] were submitted for DNA testing. Test results using the CODIS system revealed that the DNA matched the defendant whose DNA had been on file stemming from a prior arrest. Defendant, who was incarcerated in the [c]ounty jail at the time, was charged with the crimes that ultimately led to the indictment.

[1] The judge also rejected defendant's additional arguments that appellate counsel was ineffective for failing to pursue alleged violations under Brady v. Maryland, 373 U.S. 83 (1963) and United States v. Wade, 388 U.S. 218 (1967), and for putting a statement in the appellate brief that had been ruled inadmissible at trial.

Next, Judge McBride considered defendant's contention that any evidence generated from the CODIS hit was the fruit of the poisonous tree and should have been suppressed because the DNA "exemplar was withdrawn against his will and more importantly was not conducted pursuant to a [c]ourt order . . . ." Relying on State v. Johnson, 365 N.J. Super. 27, 35 (App. Div. 2003), the judge concluded that while "trial counsel did not file a motion ultimately to suppress the DNA evidence[,] the defense cannot establish that such a motion would have been meritorious" in order to prevail on an ineffective assistance of counsel (IAC) claim. He explained:

> Generally a warrant is needed to take a buccal swab unless there's an exception to the warrant requirement. However, the inevitable discovery doctrine can . . . permit the admissibility of evidence that would otherwise be the product of an illegality when the evidence in question would inevitably have been discovered without reference to the police error or misconduct.
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> As the trial judge made clear on a couple of occasions[,] had the State been required to obtain a new buccal swab that request would have been granted because probable cause to issue an order compelling the taking of the . . . swab still would have existed in the form of the CODIS hit, whether that hit came from a beer can or it came from something else.
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> The CODIS hit . . . itself was not the product of the taking of the exemplar from the . . . defendant without a [c]ourt [o]rder

> . . . . [T]he taking of that exemplar resulted from the CODIS hit.

The judge carefully reviewed the pre-trial transcripts identified by defendant to support his claim that trial counsel was ineffective for withdrawing his suppression motion against his will. Judge McBride noted that in those transcripts, the trial judge repeatedly informed defendant and trial counsel that a suppression motion would be "fruitless" because, ultimately, his DNA "would have been compelled" by court order even if the first buccal swab was suppressed. After reviewing the case law, trial counsel later conceded "that the acquiring of a second DNA swab or buccal swab would be inevitable discovery." Judge McBride concluded:

> So, the supplemental transcripts submitted to this [c]ourt do not further advance the defendant's argument about ineffective assistance of counsel on the failure to pursue a [m]otion to [s]uppress the DNA evidence that resulted from the buccal swab that was taken without a [c]ourt [o]rder because there would have been a subsequent [c]ourt [o]rder entered had it been applied for.

Turning to defendant's contention regarding trial counsel's ineffectiveness in failing to adequately challenge "the chain of custody on the DNA[,]" Judge McBride painstakingly reviewed numerous exhibits submitted by defendant to support his claim. In rejecting defendant's claim, the judge explained:

> First, defense counsel did not stipulate to the chain of custody. She cross-examined every witness and there were multiple witnesses presented . . . by the State. . . . All of them were extensively cross-examined about chain of custody issues.
>
> And . . . this alleged discrepancy from the documents that I just reviewed[,] . . . those discrepancies are explainable. They do not demonstrate opportunities for defense counsel to have undermined the State's evidence on chain of custody because they were consistent with the testimony in the trial.

Likewise, the judge rejected defendant's assertion that trial counsel failed to challenge documents pertaining to "the movement of evidence" following its "initial retrieval" and "leading up to the trial" that were allegedly inconsistent, altered, fabricated or inappropriately redacted. The judge noted that to conclude that the State fabricated and manufactured evidence against him,

> would require a conclusion that about a half a dozen people who testified in this case about chain of custody and about the conduct of the DNA extraction and DNA testing testified falsely. And even if it is, in fact, a discrepancy in [these] document[s,] there's no basis to make that kind of a conclusion at all.

In specifically addressing defendant's claim that his trial attorney was ineffective for failing to "consult[] with an expert to either assist in the cross-examination of the [State's] expert[s] or to present a contrary analysis[,]" Judge McBride explained

> When there's a claim on a PCR petition such as this, that claim, in order to generate the right to an [e]videntiary [h]earing, would need to be supported by an affidavit from an expert who reviewed the documents and said, yes, there does appear to be discrepancies here that affected the integrity or accuracy of the extraction or the testing. We do not have that here.
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> We have counsel making a best effort to advance arguments on behalf of his client about different issues that may exist or may not exist in these documents. But none of us in this room have the expertise to be able to draw any conclusions from these . . . documents.
>
> . . . .
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> That . . . would require submission of an affidavit from an expert not to prove that the State's evidence was tainted but to at least raise a[n] issue that required exploration of an [e]videntiary [h]earing.

In rejecting defendant's challenge to the effectiveness of his appellate attorney, the judge noted

> Appellate counsel is not obligated to pursue every argument advanced by an appellant. Counsel is only required to present arguments that are reasoned and reasonable. . . . [I]n the Appellate Division's practice here in this State[,] defendants are permitted to submit their own briefs in the Appellate Division. So, that further . . . supplements the notion that the [a]ppellate counsel is not there to simply parrot every argument that the client wishes to be made.
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> The standard to review a claim of ineffective assistance of . . . [a]ppellate

> [c]ounsel is the same as the [Strickland] standard for trial counsel . . . . The defendant has not established that the arguments that . . . he says should have been made had any merit.
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> . . . .
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> So, since there has not been a demonstration that defense counsel was ineffective in failing to advance arguments that . . . did not have any merit then that claim of ineffective [a]ppellate [c]ounsel fails and no evidentiary hearing is required on that fact.

On appeal, defendant raises the same contentions that he unsuccessfully presented to Judge McBride as well as an argument pertaining to PCR counsel raised for the first time on appeal. He asserts:

> POINT I
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> THE PCR COURT'S DECISION SHOULD BE REVERSED AS DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 10, PARAGRAPH 11 OF THE NEW JERSEY CONSTITUTION.
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> a. Defense Counsel Failed To Retain An Expert Or Consultant Knowledgeable in DNA Testing, Allowing the State to Present Uncontested, Unexamined DNA Evidence in a Case Where No Other Evidence Linked Defendant to the Crime Scene.
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> b. Defense Counsel Failed to Demonstrate at Trial That the State's Chain of Custody Evidence Was Deficient.

(1) The State's Chain of Custody Documentation Showed Clear Evidence of Falsified Signatures.

(2) The State's Chain of Custody Documentation Showed Clear Evidence of Subsequent Alterations.

c. Defense Counsel Withdrew A Meritorious Motion to Suppress DNA Evidence Taken From Defendant Without a Warrant in Violation of His Fourth Amendment Rights.

POINT II

THE PCR COURT ERRED IN DENYING DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING.

POINT III

THE PCR COURT'S DECISION SHOULD BE REVERSED AND THIS MATTER REMANDED TO THE LAW DIVISION AS PCR COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY REPEATING TRIAL COUNSEL'S ERROR AND FAILING TO RETAIN A DNA EXPERT TO REVIEW THE STATE'S EVIDENCE. (NOT RAISED BELOW).

The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). Rather, 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, material issues of disputed facts lie outside the record, and resolution of the issues necessitates a hearing. R. 3:22-10(b); State v. Porter, 216 N.J. 343, 355 (2013).

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). Where, as in this case, "no evidentiary hearing has been held, we 'may exercise [de novo] review over the factual inferences drawn from the documentary record by the [PCR judge].'" State v. Reevey, 417 N.J. Super. 134, 146-47 (App. Div. 2010) (second alteration in original) (quoting State v. Harris, 181 N.J. 391, 421 (2004)).

To establish a prima facie claim of ineffective assistance of counsel, the defendant

> must satisfy two prongs. First, he must demonstrate that counsel made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." An attorney's representation is deficient when it "[falls] below an objective standard of reasonableness."
>
> Second, a defendant "must show that the deficient performance prejudiced the defense." A defendant will be prejudiced when counsel's errors are sufficiently serious to deny him a "fair trial." The prejudice standard is met if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A "reasonable probability" simply means a "probability sufficient to undermine confidence in the outcome" of the proceeding.
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> [State v. O'Neil, 219 N.J. 598, 611 (2014) (citations omitted) (quoting Strickland, 466 U.S. at 687-88, 694).]

Furthermore,

> Where, as here, defense counsel's failure to litigate a Fourth Amendment claim is the principal allegation of ineffectiveness, "the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice."
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> [Johnson, 365 N.J. Super. at 35 (quoting Kimmelman v. Morrison, 477 U.S. 365, 375 (1986)).]

In addition, an appellate attorney is not ineffective for failing to raise every issue imaginable. State v. Gaither, 396 N.J. Super. 508, 515 (App. Div. 2007). Instead, appellate counsel is afforded the discretion to construct and present what he or she deems are the most effective arguments in support of their client's position. Id. at 516.

"[I]n order to establish a [prima facie] claim, [the defendant] 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." Cummings, 321 N.J. Super. at 170. The defendant must establish, by a preponderance of the credible evidence, that he is entitled to the required relief. State v. Nash, 212 N.J. 518, 541 (2013).

"[A]n otherwise valid conviction will not be upset because of ordinary dissatisfaction with counsel's exercise of judgment in his conduct of the trial. To warrant reversal, counsel must have been so inadequate as to render the trial a farce or mockery of justice." State v. Coruzzi, 189 N.J. Super. 273, 320 (App. Div. 1993) (citation omitted). Simple mistakes, bad strategy, or bad tactics "do not amount to ineffective assistance of counsel unless, taken as a whole, the trial was a mockery of justice." State v. Bonet, 132 N.J. Super. 186, 191 (App. Div. 1975). "Merely because a trial strategy fails does not mean that counsel was ineffective." State v. Bey, 161 N.J. 233, 251 (1999). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" State v. Sheika, 337 N.J. Super. 228, 241 (App. Div. 2001) (quoting Strickland, 466 U.S. at 689).

Here, defendant renews his arguments that his trial counsel's failure "to seek the assistance of a DNA expert," combined with counsel's abandonment of "a viable motion to suppress against her client's wishes," as well as her failure "to challenge clear deficiencies in the State's chain of custody proofs" violated defendant's right to effective assistance of counsel. We disagree

and are in accord with Judge McBride's reasoning in rejecting defendant's arguments. Defendant's challenge to the DNA evidence was unsupported by any report, affidavit or certification from a DNA expert. Defendant's challenge to the chain of custody proofs is unavailing because the witnesses were subjected to extensive cross-examination. The inevitable discovery doctrine would have compelled defendant's buccal swab despite any police illegality in obtaining the initial exemplar. See State v. Sugar, 108 N.J. 151, 158-59 (1987).

Moreover, even assuming counsels' performance could in some way be characterized as deficient, which we do not find, defendant has failed to meet the heavy burden of proof that but for counsels' performance, the result would have been any different given the damning evidence of his guilt. Accordingly, we discern no abuse of discretion in the denial of defendant's PCR petition without an evidentiary hearing, as defendant failed to present a prima facie claim of ineffective assistance of counsel warranting an evidentiary hearing.

Defendant also raises for the first time on appeal that PCR counsel was ineffective in failing to obtain the assistance of a DNA expert to support his petition. However, "issues not raised below, even constitutional issues, will not ordinarily be considered on appeal unless they are jurisdictional in nature or

substantially implicate public interest." State v. Walker, 385 N.J. Super. 388, 410 (App. Div. 2006). Here, because neither interest is implicated and the record is insufficient to permit the adjudication of this belated challenge, we decline to consider this argument.[2] See also State v. Robinson, 200 N.J. 1, 21 (2009)

Affirmed.

[2] We note that inasmuch as PCR counsel is being accused of ineffectiveness by virtue of the very same omission he found objectionable by trial counsel, it lends support to the State's contention that expert evidence to counter the States DNA evidence was unobtainable.