

**NOT FOR PUBLICATION WITHOUT THE  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-2861-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LAWRENCE MOODY,

Defendant-Appellant.

---

Submitted April 18, 2018 – Decided May 31, 2018

Before Judges Nugent and Currier.

On appeal from Superior Court of New Jersey,  
Law Division, Passaic County, Indictment No.  
10-05-0495.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Monique Moyse, Designated  
Counsel, on the brief).

Camelia M. Valdes, Passaic County Prosecutor,  
attorney for respondent (Christopher W. Hsieh,  
Chief Assistant Prosecutor, of counsel and on  
the brief).

PER CURIAM

Defendant Lawrence Moody appeals from the denial of his petition for post-conviction relief (PCR), contending that trial counsel was ineffective on several grounds and the PCR court

improperly denied his petition without an evidentiary hearing. Because we conclude an evidentiary hearing is appropriate on the sole issue of whether trial counsel was ineffective in failing to file a motion to suppress certain physical evidence, we reverse.

The following is the trial evidence as set forth in our opinion in the direct appeal, State v. Moody, No. A-5908-12 (App. Div. Feb. 17, 2016) (slip op. at 2-3), certif. denied, 225 N.J. 340 (2016).

Paterson Police Detective Brandon Stapleton and Officer James Miyasato, while in plain clothes and separate unmarked vehicles, set up surveillance in front of an apartment building located approximately one block away from a public school. Stapleton observed defendant sitting in a vehicle, and then subsequently leave his car when a man approached the entrance of the apartment building. The two men had a brief conversation, and the man handed defendant what appeared to be "green paper money." Defendant then entered the apartment building, returned approximately one minute later, and handed the man an object which Stapleton suspected to contain narcotics. Defendant returned to his parked car. Although Stapleton instructed Miyasato to detain the suspected customer, the officer was unable to locate the man.

Shortly thereafter, defendant emerged from his vehicle and walked towards a woman who approached the building entrance. They

exchanged a few words and the woman gave defendant "what appeared to be green paper currency." When defendant entered the building, Stapleton told Miyasato that he "observed what [he] believed to be the beginning of a narcotics transaction," and directed Miyasato to follow defendant.

When Miyasato entered the building, he found defendant in the process of closing a mailbox with a key. Miyasato was able to see numerous bundles of glassine envelopes in the open mailbox, and he arrested defendant. Subsequent testing revealed the contents of the envelopes to be heroin.

Although both Miyasato and Stapleton testified consistently to the circumstances surrounding the investigation and defendant's arrest, two defense witnesses testified that defendant was not inside the apartment building when arrested, but rather was sitting in his vehicle when the officers removed and arrested him. Defense witnesses Kim and Terrance Randall testified that they arrived at the apartment building to drop off some items for their daughter. After parking their car, they observed two plain-clothes officers approach defendant's vehicle. The defense witnesses believed that the officers "must have known somebody was in the car . . . [because one officer] grabbed the door handle very aggressively." The defense witnesses both testified that after the officers opened

the vehicle door, defendant got out of the vehicle, and the officers arrested him.

Defendant was later charged in a three count indictment with third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1) (count one); third-degree possession of a CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3) (count two); and third-degree possession of a CDS with intent to distribute within 1000 feet of school property, N.J.S.A. 2C:35-7 and N.J.S.A. 2C:35-5(a) (count three).

Defense counsel did not file a motion to suppress the physical evidence seized following defendant's arrest. A jury found defendant guilty on all three counts, and he was sentenced as a second-time drug distributor, N.J.S.A. 2C:43-6(f), to a mandatory extended term of ten years with a five-year period of parole ineligibility. Defendant appealed both his convictions and sentence, which we affirmed. Moody, slip op. at 13.

Defendant filed a pro se petition for PCR and supporting certification. In his certification, defendant claimed trial counsel was ineffective for failing to file a suppression motion, failing to call an additional witness, and failing to make objections during trial. He did not identify any factual support in the record or provide any additional certifications, statements, or evidence to support his claims. Defendant was

provided with PCR counsel who filed a supporting brief. Defendant also filed an amended PCR petition.

On February 8, 2017, the PCR court denied defendant's petition for PCR without an evidentiary hearing. In his decision, the PCR judge noted, although he found the defense witnesses credible, their testimony "contradicted the testimony of the police officers." The PCR judge concluded that defendant failed to "establish[] a prima facie case entitling him to an evidentiary hearing . . . [because] [h]e has not shown that his counsel acted outside the range of professional competence."

Defendant appeals, arguing:

POINT I: MR. MOODY IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT HIS ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL.

Where the PCR court has not held an evidentiary hearing, a de novo review is appropriate. State v. Harris, 181 N.J. 391, 420-21 (2004).

All of defendant's claims allege the ineffective assistance of counsel. The standard for determining whether counsel's performance was ineffective for purposes of the Sixth Amendment was formulated in Strickland v. Washington, 466 U.S. 668 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42 (1987). In order to prevail on a claim of ineffective assistance

of counsel, defendant must meet the two-prong test establishing both that: (1) counsel's performance was deficient and he or she made errors that were so egregious that counsel was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution; and (2) the defect in performance prejudiced defendant's rights to a fair trial such that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 687, 694.

"A defendant shall be entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of post-conviction relief. . . . To establish a prima facie case, defendant must demonstrate a reasonable likelihood that his or her claim . . . will ultimately succeed on the merits." R. 3:22-10(b). However, merely raising a claim for PCR does not entitle defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

Where "defendant's allegations are too vague, conclusory or speculative[,] " the court shall not grant an evidentiary hearing. R. 3:22-10(e)(2); see also Cummings, 321 N.J. Super. at 170 (reasoning that "bald assertions" of ineffective assistance are insufficient to sustain a claim for PCR or warrant an evidentiary hearing). Rather, for the court to grant an evidentiary hearing,

"defendant must allege specific facts and evidence supporting his allegations." State v. Porter, 216 N.J. 343, 355 (2013).

Defendant argues that trial counsel was ineffective on several grounds, including failing to call an additional witness, failing to object during trial, and failing to file a motion to suppress the physical evidence seized following his arrest.

We are satisfied defendant failed to establish a prima facie case of ineffective assistance of counsel regarding his contentions that counsel failed to call an additional witness and posit objections at trial. The decision to not call a witness is a strategic one within the discretion of trial counsel. See Fritz, 105 N.J. at 54 ("complaints 'merely of matters of trial strategy' will not serve to ground a constitutional claim of inadequacy of representation by counsel") (quoting State v. Williams, 39 N.J. 471, 489 (1963)).

Where a defendant's ineffective assistance of counsel claim is based on a failure to investigate or call a witness, the defendant "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). Here, defendant did not present any affidavits or certifications in his PCR petition

or on appeal to support his argument that trial counsel was ineffective for failing to call an additional witness.

The decision to not object to certain testimony or other evidence presented by the State at trial is also a strategic decision within trial counsel's purview. See Fritz, 105 N.J. at 54. In both his PCR petition and on appeal, defendant failed to identify any specific objections that trial counsel should have made or whether those objections would have been successful. We are, therefore, satisfied from our review of the record that defendant failed to demonstrate the ineffectiveness of trial counsel under the Strickland-Fritz test with regard to the alleged failure to investigate and call a witness as well as the alleged failure to object at trial.

However, with regard to defendant's argument that trial counsel was ineffective for failing to file a motion to suppress the physical evidence seized following his arrest, we conclude that the PCR judge erred in denying defendant's PCR petition without an evidentiary hearing.

At trial, Miyasato and Stapleton testified for the State while Kim and Terrance Randall testified for defendant. Miyasato testified that when he followed defendant into the lobby of the apartment building he saw, in plain view, the small bags of heroin defendant was removing from the partially opened mailbox. However,



the defense witnesses testified that the officers never entered the apartment building, but rather arrested defendant while he was sitting in his parked car.

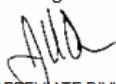
In denying defendant's PCR petition, the PCR judge noted the testimony of the defense witnesses "contradicted the testimony of the police officers." He then stated he found all four witnesses to be credible. This is not a finding that can be made by the court solely on a review of the trial transcripts. With all four witnesses appearing credible to the PCR judge, he could not resolve the two completely different factual scenarios surrounding defendant's arrest without a hearing.

Defendant's trial counsel should have been aware, through his investigation and preparation of the defense witnesses, that the witnesses would testify that defendant was not in the lobby of the apartment complex when he was arrested, but was sitting in his vehicle. This may have provided a legitimate basis to file a motion to suppress the seized physical evidence. Due to the contradictory testimony regarding the circumstances surrounding defendant's arrest, an evidentiary hearing is required to determine whether trial counsel's failure to file a suppression motion was a strategic decision within trial counsel's discretion or amounted to ineffective assistance of trial counsel.

Accordingly, we reverse and remand for the PCR court to hold an evidentiary hearing solely to determine whether trial counsel was ineffective in failing to file a motion to suppress the physical evidence seized during defendant's arrest.

Reversed and remanded for an evidentiary hearing. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION