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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-2885-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LUCIOUS THOMAS, a/k/a POODA
LUCIOUS THOMAS, LUCIAS THOMAS
and LUCUS THOMAS,

Defendant-Appellant.

Submitted February 15, 2018 – Decided March 1, 2018

Before Judges Haas and Gooden Brown.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Indictment No.
12-09-1630.

Joseph E. Krakora, Public Defender, attorney
for appellant (Kisha M. Hebbon, Designated
Counsel, on the brief).

Esther Suarez, Hudson County Prosecutor,
attorney for respondent (Svjetlana Tesic,
Assistant Prosecutor, on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Lucious Thomas appeals from the February 1, 2017 Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

Following a trial at which defendant represented himself, a jury convicted him of all the counts contained in an eight-count indictment. We incorporate herein the procedural history and facts set forth in our prior opinion on defendant's direct appeal in which we affirmed his conviction and sentence on the underlying offenses. State v. Thomas, No. A-3960-13 (App. Div. Aug. 24, 2015) (slip op. at 1-6).

Defendant filed a timely petition for PCR. He argued that his standby counsel was ineffective because he failed to review discovery with him prior to the trial. Defendant also alleged that his appellate attorney was ineffective because she did not argue on appeal that the trial judge incorrectly denied defendant's motion to reveal the identity of a confidential informant.

In a thorough written opinion, Judge Patrick J. Arre considered each of these contentions and denied defendant's petition. The judge concluded that defendant failed to satisfy the two-prong test of Strickland v. Washington, 466 U.S. 668, 687, (1984), which requires a showing that counsel's performance was deficient and that, but for the deficient performance, the result would have been different.

Taking defendant's contentions in turn, Judge Arre first found that although defendant argued that his "trial counsel was ineffective in failing to advise him of discovery materials, [he] has failed to allege what would have potentially been revealed from such material, which defenses could have been raised on his behalf, and how this would have altered the outcome of his trial." Therefore, the judge concluded that defendant did not establish either prong of the Strickland test.

Judge Arre also rejected defendant's assertion that his appellate attorney was ineffective because she did not challenge the trial judge's denial of his pre-trial motion to disclose the identity of a confidential informant. Judge Arre found that defendant did not demonstrate that this argument, if raised, would have been successful.

As the judge noted, N.J.R.E. 516 provides that an informant's identity should be protected unless that information "has already been otherwise disclosed or [] disclosure of his [or her] identity is essential to assure a fair determination of the issues." Because defendant did not establish that either of these conditions were met, Judge Arre concluded that defendant's appellate attorney properly declined to assert this issue on appeal. This appeal followed.

On appeal, defendant raises the same contentions that he unsuccessfully presented to the trial court. He asserts:

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S PETITION FOR [PCR] WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO DETERMINE THE MERITS OF HIS CONTENTION THAT HE WAS DENIED THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

- A. The Prevailing Legal Principles Regarding Claims Of Ineffective Assistance Of Counsel, Evidentiary Hearings And Petitions For [PCR].
- B. Trial Counsel Rendered Ineffective Legal Representation By Virtue Of His Failure To Review Discovery With Defendant.
- C. Appellate Counsel Rendered Ineffective Legal Representation By Virtue Of Her Failure To Raise The Issue That The Trial Court Erroneously Denied Defendant's Motion To Reveal The Identity Of The Confidential Informant.
- D. Defendant Is Entitled To A Remand To The Trial Court To Afford Him An Evidentiary Hearing To Determine The Merits Of His Contention That He Was Denied The Effective Assistance Of Trial And Appellate Counsel.

In addition, defendant raises the following issues in his pro se supplemental brief:

POINT I

[DEFENDANT] HAS ESTABLISHED A PRIMA FACIE SHOWING OF INEFFECTIVE ASSISTANCE OF COUNSEL.

POINT [II]

THE DEFENDANT WAS DEPRIVED [SIC] HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

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).

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.

[State v. O'Neil, 219 N.J. 598, 611 (2014) (quoting Strickland, 466 U.S. at 687-88, 694).]

"[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).

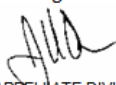
In addition, an appellate attorney is not ineffective for failing to raise every issue imaginable. State v. Gaither, 396 N.J. Super. 508, 515 (App. Div. 2007). Instead, appellate counsel is afforded the discretion to construct and present what he or she deems are the most effective arguments in support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

We have considered defendant's contentions in light of the record and applicable legal principles and conclude they are without sufficient merit to warrant discussion in a written

opinion. R. 2:11-3(e)(2). We affirm substantially for the reasons Judge Arre expressed in his thoughtful written opinion. 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.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION