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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3097-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOEL CINTRON,

Defendant-Appellant.

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Submitted March 19, 2018 - Decided May 17, 2018

Before Judges Messano and Accurso.

On appeal from Superior Court of New Jersey,  
Law Division, Burlington County, Indictment  
No. 08-08-0895.

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

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

PER CURIAM

Defendant Joel Cintron appeals from the denial of his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

Defendant was convicted by a jury of second-degree aggravated assault and two counts of assault by auto while intoxicated following a high-speed crash on Route 73 in Palmyra. State v. Cintron, A-1342-11 (App. Div. Sept. 23, 2013) (slip op. at 1-3). The accident happened about one o'clock in the morning on a summer night in 2007. Id. at 3. Defendant was in a blue Honda Civic with his girlfriend that police had clocked going 100 mph in a 45 mph zone just minutes before the accident. Id. at 3-4. Defendant's car collided with a pickup truck, causing it to overturn and trapping the driver. Id. at 5. The front-end of the Civic was heavily damaged, especially on the passenger side. Id. at 4. Defendant emerged without a scratch, but his girlfriend suffered a broken ankle. Ibid.

The first officer to arrive on the scene saw defendant seated behind the wheel and a woman in the front passenger seat. Ibid. Defendant, however, testified he was not driving. Id. at 8. The jury did not believe him. Based on the evidence adduced at trial, including statements defendant made to the officers at the scene and later at the police station, which the court admitted following a N.J.R.E. 104 hearing, the results of field

sobriety tests, and the testimony of the State's forensic toxicologist, who testified defendant's urine tested positive for "toxicologically significant concentrations" of 374 ng/ml<sup>1</sup> of PCP and 107 ng/ml of marijuana, representing "recent intentional intake of those substances," the jury convicted defendant on all counts. Id. at 7-8.

The judge merged defendant's convictions for sentencing purposes and imposed a ten-year term of imprisonment on the second-degree aggravated assault, subject to the periods of parole ineligibility and supervision required by the No Early Release Act, N.J.S.A. 2C:43-7.2, and a concurrent eighteen-month term on the remaining assault by auto while intoxicated. Cintron, slip op. at 1-2. We affirmed defendant's conviction and sentence for aggravated assault but reversed and remanded the convictions for assault by auto based on errors in the jury charge. Id. at 3, 13-14. The State dismissed those charges on remand. Defendant's petition for certification was denied. State v. Cintron, 217 N.J. 304 (2014).

Defendant filed a timely petition for PCR claiming his trial counsel was ineffective for having failed to retain the services of an expert witness and argue mitigating factors at

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<sup>1</sup> Nanograms per milliliter.

sentencing. Defendant claimed he is innocent of the charges, that he did not use either PCP or marijuana in the days leading up to the accident and was not the driver. Defendant also claimed his counsel did not advise him he could address the court at sentencing. He claimed counsel did not advise the judge of his willingness to pay restitution, the hardship his incarceration would work on his family or explain that his prior record did not involve violence or injury to others.

PCR counsel retained a psychiatrist, who opined, among other things, that following the accident, defendant "was in an impaired mental state that was not caused by alcohol [defendant's urinalysis was negative for alcohol] and could have been caused by brain concussion, drug effects, sleep deprivation, or any combination thereof" which "is not a matter that can be settled by a toxicologist"; that "[g]iven the degree of impairment documented, it remains ambiguous whether [defendant] was the driver"; that the testimony of the State's expert at the N.J.R.E. 104 hearing "went beyond that of a toxicologist, into the domain of forensic psychiatry" and that defendant's "mental impairment following the accident was such that he was unable to appreciate the consequences of refusing the Alcotest and that he lacked the capacity to waive his

Miranda rights knowingly and intelligently, leading to an involuntary statement."

The State secured the certification of defendant's trial counsel, who explained that because defendant insisted he was not the driver, the case was defended on that basis. After reviewing the State's expert report, counsel explained he elected not to retain his own expert because he "thought it would draw too much of the jury's attention to [defendant's] alleged level of intoxication," which the police reports also evidenced. Instead, counsel "emphasized that based on [defendant's] alleged level of toxicity and alleged rate of speed, it was nearly impossible for him to drive the distance from Philadelphia to the location of impact." Counsel also argued that defendant's girlfriend's injuries "were consistent with her being the driver."

After reviewing the trial record, defendant's expert report and the certification of trial counsel and hearing oral argument, Judge Haines determined an evidentiary hearing was not necessary as defendant had not established a prima facie case of ineffective assistance. See State v. Preciose, 129 N.J. 451, 462-64 (1992). Choosing to "work backwards" by first addressing

the prejudice prong of the Strickland<sup>2</sup> test, the judge found having a defense expert testify at the N.J.R.E. 104 hearing would not have resulted in the exclusion of defendant's statements.

Judge Haines noted the trial judge's decision rested almost exclusively on the observations of the police officer who arrested defendant, not on the scientific testimony of the State's expert. Indeed, he noted the only reference to the expert's testimony in the trial judge's decision was the expert's statement that the level of PCP in defendant's urine "was not at the level where the PCP would 'generally anesthetize' a person." The remainder of the decision relied on the patrolman's testimony as to defendant's "ability to follow instructions, to inform police that his girlfriend was injured, and to tell his girlfriend not to talk to [the] police," including the advice she tell them someone else was driving. Judge Haines concluded "[a] defense expert would not have been able to counteract the testimony of [the officer] who provided all of the factual testimony about [d]efendant's behavior."

The judge further reasoned that even assuming the defense could have called an expert who could have overcome the

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<sup>2</sup> Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984).

testimony of both the State's expert and the officer, the only result would have been to exclude defendant's statements at trial. The judge acknowledged that certain of defendant's initial responses to the officer's questions could be judged incriminating. When the officer asked his name and if he was the driver, defendant responded, "[y]eah[,] me and my girl were in it, my name is Joel Cintron." The officer also testified defendant explained what happened by telling the officer, "they were driving down the road, he didn't see the other car, he hit it, he don't know where it came from, you know, he just didn't see the other car." The PCR judge noted, however, that defendant's statements were not the only evidence supporting his conviction. The judge explained:

Without these statements, there was still testimony that would have – at a minimum – identified him as the driver of the vehicle, identified his vehicle as traveling at approximately one hundred miles per hour, described his general impairment shortly after the crash and subsequently at the Pennsauken Police Department, and revealed that he was under the influence of PCP at the time of the accident. Simply put, there was overwhelming evidence that [d]efendant was driving recklessly and under the influence, and that his actions caused serious bodily injury. For all these reasons, [d]efendant cannot show that he was prejudiced by trial counsel's decision not to employ a defense expert at the N.J.R.E. 104(c) hearing.

[Internal citations to the record omitted.]

The judge dismissed defendant's expert's speculation that defendant may have suffered a head injury in the accident, causing the impairment observed by the arresting officer, as "just that – speculation." He noted defendant testified he suffered no injury in the accident, and that there was no certification from defendant attesting to injuries or any "symptoms that occurred after the accident, or even if any of these things were true, that he communicated them to [trial counsel]."

In addition to finding defendant was not prejudiced by the lack of expert testimony at the N.J.R.E. 104 hearing, Judge Haines found the defense expert's "assessment of [the State's toxicologist's] trial testimony does not provide any evidence that a defense expert at trial would have led to any different outcome" other than a critique of the State's expert before the jury. He noted that defendant's expert does not "reconcile" defendant's testimony that he was not the driver, as the expert opined that fact "remains ambiguous." The judge found "[i]f anything, an opinion like this would have likely been confusing to the jury."

Moreover, the judge found the expert's critique missed the larger point. "In the State of New Jersey, the presence of PCP



in the system of a motorist (regardless of quantity) and evidence of impairment," both of which defendant's expert necessarily concedes, "would be sufficient for a motor vehicle conviction under N.J.S.A. 39:4-50(a)(1)(ii)." Accordingly, he concluded "[a] defense expert who would have quibbled over the quantity of PCP in [d]efendant's system would not have made a difference in the outcome of the trial." The judge thus concluded defendant could not demonstrate any prejudice from his counsel's failure to call an expert at trial.

Although that finding was sufficient to reject defendant's petition on the point, the judge also considered whether trial counsel was deficient by not hiring an expert. He found this was "not a case where counsel did not have enough facts available to make a strategic decision about whether or not to retain an expert witness." To the contrary, the judge found counsel's certification established that "[a]fter reviewing the information in the file and the State's expert report, counsel decided that an expert witness would not be an effective trial strategy." Accordingly, Judge Haines found defendant could not show the decision fell outside "the wide range of reasonable professional assistance." See Strickland, 466 U.S. at 689.

As to counsel's failure to argue mitigating factors at sentencing, Judge Haines found nothing to suggest the sentencing

judge would have found any of the factors urged, especially as the judge addressed defendant's intoxication, and ability to pay restitution as well as his prior criminal record, or that any would have made a difference in defendant's sentence.

Accordingly, he found defendant could not prove his counsel was in any way deficient with regard to sentencing or that his performance prejudiced defendant.

Defendant appeals, reprising the arguments he made to the trial court and claiming the trial court erred in denying relief without an evidentiary hearing. We disagree.

To succeed on a claim of ineffective assistance, defendant must establish, first, that "counsel's representation fell below an objective standard of reasonableness" and, second, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 687-88, 694. A defendant must do more than demonstrate that an alleged error might have "had some conceivable effect on the outcome of the trial," State v. Sheika, 337 N.J. Super. 228, 242 (App. Div. 2001), instead, he must prove the error is so serious as to undermine the court's confidence that the "defendant's trial was fair, and that the jury properly convicted him." State v. Pierre, 223 N.J. 560, 583, 588 (2015).

Measured by that standard, we agree with Judge Haines that defendant has not established he received ineffective assistance from his trial counsel. As the judge explained, because defendant could not dispute either the PCP and marijuana in his system at the time of the accident or his obvious impairment immediately thereafter, a defense expert at trial would not have made any difference in the outcome. Defendant's argument regarding his counsel's performance at sentencing is plainly without merit and requires no discussion here. See R. 2:11-3(e)(2).

The only real issue is whether a defense expert could have succeeded in convincing the trial judge to exclude defendant's statements at the N.J.R.E. 104 hearing. Having reviewed the transcript of the hearing, we agree with Judge Haines that the absence of his own expert did not prejudice defendant.

Importantly, the record makes clear the trial judge understood the point defendant's expert on PCR thought most significant: the presence of PCP and marijuana in a person's urine cannot be correlated to levels of the drugs in that person's brain, and thus the drugs' effect on behavior cannot be inferred from a urine specimen. The only opinion the State's toxicologist could offer was that the levels of PCP and marijuana in defendant's urine were over the cutoffs federal

regulations establish for safety sensitive positions and were not so significant as to anesthetize him (the expert explained that PCP is an approved animal tranquilizer). The expert made clear to the court he could not offer an opinion as to whether any particular cognitive function would be impaired from analyzing a urine specimen.

Accordingly, the trial judge based his opinion as to defendant's ability to voluntarily and competently make the statements he did, not on the levels of PCP and marijuana in his urine, but on his ability to recall events and follow instructions. The judge found defendant, while impaired, was obviously not anesthetized. He noted "defendant knew to tell his girlfriend not to talk to the police. . . . [,] knew that his girlfriend was injured[,], and he knew not to take the Alcotest," explaining it would show he was drunk.

The judge found:

The defendant's statements demonstrate his cognition[,], and the court is impressed with the defendant's ability to follow instructions[,], even if poorly. [W]hen asked to touch his finger to his nose and touching it instead to his temple, [it] doesn't mean that he didn't understand the instruction, it just means that his motor skills were impaired.

The judge pronounced himself satisfied, "[u]nder all of the circumstances," that the State "established beyond a reasonable

doubt that the defendant[, ] while under the influence . . . of PCP and/or marijuana, nonetheless retained more than sufficient cognition to know what he was talking about and that his statements were voluntarily made." The judge concluded his ruling by observing:

Whether he would have made [the statements] had he been totally sober, none of us know but here the court is satisfied there's nothing involuntary about the statements made and there's nothing to show that they weren't competently made. Finally, the court notes that that the defendant was given his Miranda rights when he was arrested by the police and again at the police station. That's the court's ruling.

Because, as defendant's expert points out, there is no correlation between the level of PCP or marijuana in a person's urine and observed impairment, a defense expert at the N.J.R.E. 104 hearing would not have been able to argue the level of drugs in defendant's system made his statements to the police not voluntary. Further, as Judge Haines noted, there is no evidence in the record to suggest the possible brain injury defendant's retained expert now posits might have accounted for his behavior, which could render his statements inadmissible.

The expert opined that had defendant been driving "and was rational during this sequence, he would have submitted to the Alcotest, which likely would have averted further testing," and

not insisted on giving a urine specimen, thus providing police with evidence of his recent drug use. But it is just as likely for that decision to have been a product of unfamiliarity with the different tests as of defendant's impaired cognitive functioning. In sum, we agree with Judge Haines that defendant's expert offered nothing to counter the detailed testimony the officer provided that defendant, while undoubtedly impaired, could provide answers to the officer's questions and follow his instructions. Because that testimony formed the basis of the trial judge's refusal to exclude defendant's statements at trial, we agree defendant failed to show he was prejudiced by the absence of his own expert.

We further agree with the PCR judge that even if defendant's efforts to exclude his statements to the police had been successful, the outcome of the trial would not have been different. As we noted on defendant's direct appeal, notwithstanding that the jury was required to consider the credibility of defendant's incriminating statements in deciding whether he was the driver as he testified, the judge failed to

provide the jury with Hampton<sup>3</sup> and Kociolek<sup>4</sup> charges. Cintron, slip op. at 13. We agreed with defendant that was plain error. We did not, however, reverse his conviction on that basis because the extent of the other evidence in the record that defendant was driving at the time of the accident convinced us the omission was harmless. See State v. Harris, 156 N.J. 122, 183 (1998) (holding the omission of Kociolek and Hampton charges warrants reversal only when the omission is clearly capable of producing an unjust result, considered in the context of the entire case). As we previously found that defendant's statements were not critical to the State's case, see State v. Jordan, 147 N.J. 409, 42-26 (1997), we likewise agree with Judge Haines that their admission, even if error, which we do not acknowledge, does not undermine our confidence in the outcome. See Pierre, 223 N.J. at 583.

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<sup>3</sup> State v. Hampton, 61 N.J. 250, 272 (1972) (holding where the State introduces defendant's confession, jurors must be instructed they should decide under all the circumstances whether the confession is true and if they find it not true, then they must treat it as inadmissible and disregard it in determining the ultimate issue of guilt or innocence).

<sup>4</sup> State v. Kociolek, 23 N.J. 400, 421-22 (1957) (holding error in refusing request to charge that jury should receive, weigh and consider with caution alleged oral admissions by defendant).

Accordingly, we affirm the denial of defendant's petition substantially for the reasons set forth in Judge Haines's February 14, 2017 written opinion.

Affirmed.

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



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