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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-3098-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WALTER H. WEBB,

Defendant-Appellant.

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Submitted February 13, 2018 – Decided March 13, 2018

Before Judges Carroll and Mawla.

On appeal from Superior Court of New Jersey,  
Law Division, Hudson County, Indictment No.  
11-01-0210.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Mark Zavotsky, Designated  
Counsel, on the briefs).

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

PER CURIAM

Defendant Walter H. Webb appeals from a December 21, 2016  
order, which denied his petition for post-conviction relief (PCR)  
without an evidentiary hearing. We affirm.

The following facts are taken from the record. In October 2010, David Wilczek, an employee of an Outback Steakhouse (Outback) restaurant in Secaucus, was in the back of the restaurant waiting for a co-worker to open the door in order to begin his shift. Defendant approached Wilczek and offered twenty-three dollars in exchange for his car. Defendant then grabbed Wilczek's car keys and punched him in the face. A co-worker opened the door, observed the altercation, and then closed the door. Defendant tried to grab the door, but fell to the ground. Wilczek grabbed his keys, fled to the front of the restaurant, and called police.

When officers from the Secaucus Police Department arrived, Wilczek gave them a detailed description of defendant. Within ten minutes, police apprehended defendant nearby. Police drove defendant back to the scene, where Wilczek identified him as the assailant.

Defendant was tried and convicted by a jury of second-degree robbery, contrary to N.J.S.A. 2C:15-1. He was sentenced to a ten year prison term with an eighty-five percent period of parole ineligibility, pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. On appeal, we affirmed defendant's conviction and sentence. State v. Webb, No. A-0809-13 (App. Div. March 12, 2015).

Subsequently, defendant filed his PCR petition. Pertinent to this appeal, defendant argued his trial counsel was ineffective for failing to file a motion to compel discovery, namely, a surveillance video he claimed would have exonerated him. Defendant argued his counsel failed to file a motion to dismiss the indictment. He also argued his counsel was ineffective for failing to object to prejudicial remarks by the prosecutor during sentencing.

Judge Sheila A. Venable heard oral argument and issued a comprehensive written opinion denying the petition.<sup>1</sup> The judge determined trial counsel was not ineffective for failing to obtain a video that did not exist. The judge noted the prosecutor did not have the video, and the manager of the Outback searched for the recording four months after the incident, but learned it had been erased. The judge noted that Outback only retained videos for ten days.

Judge Venable determined counsel's decision not to file a motion to dismiss the indictment was a matter of trial strategy and would not have succeeded. Defendant had argued that no prima facie case for robbery had been demonstrated because Wilczek

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<sup>1</sup> Defendant asserted additional grounds for relief in his PCR petition, which the judge adjudicated. However, we address only those aspects of the PCR adjudication challenged by defendant in this appeal.

claimed a co-worker who opened the door saw the incident, yet "no effort was made to identify or produce [the co-worker] for corroboration." Defendant sought to challenge Wilczek's credibility as to whether a co-worker had actually witnessed the robbery.

Judge Venable rejected this argument and stated "trial counsel cannot be deemed to have been ineffective for failing to locate an unnamed employee who opened the door during the altercation, but was not alleged to have actually witnessed any of the incident." The judge found defendant's challenge to the indictment was "a difference of opinion with the result of the grand jury" rather than evidence of a defective indictment. The judge held: "There is no evidence in the record to indicate that the indictment was manifestly deficient or palpably defective, therefore trial counsel cannot be deemed to . . . have been ineffective . . . for choosing to not pursue a motion under the stringent motion to dismiss standard."

Judge Venable also rejected defendant's claim the sentencing judge was prejudiced as a result of comments made by the prosecutor during the sentencing hearing. Specifically, the prosecutor had argued defendant had violated a Tennessee order of protection, protecting his ex-wife and children, by shooting open the door to his ex-wife's home, shooting through the house, and killing the

family dog. Defendant argued his trial counsel was ineffective because he did not object to the prosecutor's presentation, which was factually misleading. Defendant claimed there was no order of protection, defendant thought there was no one home when he entered his ex-wife's residence, and he did not fire a weapon during the incident. Thus, defendant argued the factual inaccuracies led the trial judge to believe he had a propensity for violence in applying the aggravating factors for sentencing.

Judge Venable rejected defendant's argument that the failure to object to the prosecutor's comments was an ineffective assistance of counsel. The judge found the sentencing court did not rely on the prosecutor's remarks regarding the alleged violation of the order of protection as a part of the sentencing. Indeed, the judge stated:

There is no indication in the record that the [c]ourt relied on these statements by the prosecutor in determining the sentence. In sentencing [p]etitioner, the [c]ourt found aggravating factor nine, the need for deterring defendant and others from violating the law, and aggravating factor three, the risk of reoffending. The [c]ourt explained the finding of aggravating factor three based on [p]etitioner's prior arrests and the current sentence he was serving in Tennessee. The [c]ourt did not make any reference to an order of protection in its decision, therefore [p]etitioner has failed to establish that the fact that trial counsel did not object to the prosecutor's statement resulted in trial

counsel's representation falling below an objective standard of reasonableness.

This appeal followed. Defendant makes the following arguments:

POINT I – DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ENTITLING HIM TO POST CONVICTION RELIEF AND AN EVIDENTIARY HEARING.

(A) Counsel was ineffective for failing to compel/review discovery prior to trial.

(B) Counsel was ineffective for failing to move to dismiss the sole charge of robbery contained in the indictment.

(C) Counsel was ineffective for failing to move to object to prosecutor's misconduct during the sentencing proceedings which allowed for hearsay evidence to be considered in imposing a sentence.

We begin by reciting our standard of review. A PCR court need not grant an evidentiary hearing unless "a defendant has presented a prima facie [case] in support of post-conviction relief." State v. Marshall, 148 N.J. 89, 158 (1997) (alteration in original) (quoting State v. Preciose, 129 N.J. 451, 462 (1992)). "To establish such a prima facie case, the defendant must demonstrate a reasonable likelihood that his or her claim will ultimately succeed on the merits." Ibid. The court must view the facts "in the light most favorable to defendant." Ibid. (quoting Preciose, 129 N.J. at 462-63); accord R. 3:22-10(b). If the PCR

court has not held an evidentiary hearing, we "conduct a de novo review . . . ." State v. Harris, 181 N.J. 391, 421 (2004).

To establish ineffective assistance of counsel, defendant must satisfy a two-prong test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

[Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 52 (1987) (quoting Strickland, 466 U.S. at 687).]

Counsel's performance is evaluated with extreme deference, "requiring 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .'" Fritz, 105 N.J. at 52 (alteration in original) (quoting Strickland, 466 U.S. at 688-89). "To rebut that strong presumption, a [petitioner] must establish . . . trial counsel's actions did not equate to 'sound trial strategy.'" State v. Castagna, 187 N.J. 293, 314 (2006) (quoting Strickland, 466 U.S. at 689). "Mere dissatisfaction with a 'counsel's exercise of

judgment' is insufficient to warrant overturning a conviction." State v. Nash, 212 N.J. 518, 542 (2013) (quoting State v. Echols, 199 N.J. 344, 358 (2009)).

To demonstrate prejudice, "'actual ineffectiveness' . . . must [generally] be proved[.]" Fritz, 105 N.J. at 52 (quoting Strickland, 466 U.S. at 692-93). Defendant must show the existence of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Ibid. (quoting Strickland, 466 U.S. at 694). Indeed,

[i]t is not enough for [a] defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

[Strickland, 466 U.S. at 693 (citation omitted).]


We are satisfied from our review of the record that defendant failed to make a prima facie showing of ineffectiveness of counsel within the Strickland-Fritz test, substantially for the reasons stated by Judge Venable in her thoughtful written opinion. Accordingly, the judge correctly concluded that an evidentiary hearing was not warranted. See Preciose, 129 N.J. at 462-63. To



the extent we have not specifically addressed arguments raised by defendant, we find them without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION