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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-3201-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DANIEL LOCUS,  
a/k/a MICHAEL BAKER,  
a/k/a DANIEL LOCUS, JR.,

Defendant-Appellant.

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Submitted December 5, 2017- Decided January 2, 2018

Before Judges Yannotti and Mawla.

On appeal from Superior Court of New Jersey,  
Law Division, Camden County, Indictment No.  
09-02-0791.

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

Mary Eva Colalillo, Camden County Prosecutor,  
attorney for respondent (Linda A. Shashoua,  
Assistant Prosecutor, of counsel and on the  
brief).

PER CURIAM

Defendant Daniel Locus appeals from an order entered by the Law Division on July 31, 2015, which denied his petition for post-conviction relief (PCR). We affirm.

Defendant was found guilty of first-degree murder (N.J.S.A. 2C:11-3(a)(1)); second-degree possession of a weapon for an unlawful purpose (N.J.S.A. 2C:39-4(a)); second-degree unlawful possession of a weapon (N.J.S.A. 2C:39-5(b)); and third-degree endangering an injured victim (N.J.S.A. 2C:12-1.2). Defendant was sentenced to fifty-five years of incarceration, with an eighty-five percent period of parole ineligibility, pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2.

We affirmed defendant's convictions. State v. Locus, No. A-2847-10 (App. Div. Oct. 17, 2013). The Supreme Court denied certification. State v. Locus, 217 N.J. 588 (2014).

The underlying facts involved defendant's murder of Tony Ball for stealing defendant's drug cache that defendant stored near a building in Camden. Ball and an associate, Madonna Caraballo, planned to have Caraballo lure defendant away from the drugs with an offer of sex while Ball took the drugs. Defendant declined Caraballo's advances. He returned to discover Ball removing the drugs. Defendant shot Ball in the head and fled.

At trial, the State produced Caraballo who testified to the plan to steal the drugs. The State also produced Walter Boyd who

witnessed the shooting and named defendant as the shooter. The State called Patricia Myers who testified she overheard defendant say he was going to kill Ball and saw him shoot Ball. The State also called Angela Bumpers who testified she saw defendant immediately before the shooting, heard a gunshot, and saw Ball holding his head. She testified defendant was the only person standing near Ball, and that she saw defendant put away a silver object she believed to be a gun and run away.<sup>1</sup>

In his PCR petition, defendant claimed his trial attorney was ineffective because he failed to conduct an adequate investigation of the case, which would have resulted in the presentation of "beneficial" testimony from other witnesses who would have exonerated defendant. Those witnesses are Frank Alexander, Richard Burgos, Malukah Colvin, Michelle Howe, and Crystal Montgomery. In a comprehensive oral decision, Judge Kathleen M. Delaney addressed defendant's arguments and denied his petition finding he had not made a prima facie showing of ineffective assistance of counsel.

On appeal, defendant raises the following arguments:

POINT I THE TRIAL COURT ERRED IN DENYING THE  
DEFENDANT'S PETITION FOR POST CONVICTION

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<sup>1</sup> The State produced other witnesses and we recounted the full extent of the testimony adduced by the State in our prior opinion. We recite the testimony of the witnesses who are relevant to this appeal.

RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL.

A. FACTUAL BACKGROUND

B. SINCE THE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ARISING OUT OF COUNSEL'S FAILURE TO CALL POTENTIALLY EXCULPATORY AND BENEFICIAL WITNESSES AT TRIAL ARISING OUT OF AN INADEQUATE PRETRIAL INVESTIGATION, THE TRIAL COURT ERRED IN DENYING THIS CONTENTION WITHOUT AFFORDING THE DEFENDANT AN EVIDENTIARY HEARING.

POINT II THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A NEW TRIAL BASED UPON NEWLY DISCOVERED EVIDENCE ARISING OUT OF HIS PETITION FOR POST CONVICTION RELIEF.

I.

The PCR process affords an adjudged criminal defendant a "last chance to challenge the 'fairness and reliability of a criminal verdict. . . .'" State v. Nash, 212 N.J. 518, 540 (2013) (quoting State v. Feaster, 184 N.J. 235, 249 (2013)); see also R. 3:22-1. As to our standard of review, "where the [PCR] court does not hold an evidentiary hearing, we may exercise de novo review over the factual inferences the trial court has drawn from the documentary record." State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014) (citing State v. Harris, 181 N.J. 391, 420-21 (2004)).

"Post-conviction relief is neither a substitute for direct appeal, [Rule] 3:22-3, nor an opportunity to relitigate cases already decided on the merits, [Rule] 3:22-5." State v. Preciose, 129 N.J. 451, 459 (1992).

Consequently, petitioners may be procedurally barred from post-conviction relief under Rule 3:22-4 if they could have, but did not, raise the claim in a prior proceeding, unless they satisfy one of the following exceptions:

(a) that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; or (b) that enforcement of the bar would result in fundamental injustice; or (c) that denial of relief would be contrary to the Constitution of the United States or the State of New Jersey.

[Ibid.]

## II.

Defendant argues the PCR court should have granted him an evidentiary hearing to address his claim that his trial counsel was ineffective for failing to produce five witnesses to offer alibi testimony on his behalf. We disagree.

Rule 3:22-10(b) provides:

A defendant shall be entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of post-conviction relief, a determination by the court that there are material issues of disputed fact that cannot be resolved by reference to the existing record, and a

determination that an evidentiary hearing is necessary to resolve the claims for relief. To establish a prima facie case, defendant must demonstrate a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits.

Furthermore, Rule 3:22-10(e) provides the court shall not grant an evidentiary hearing if: (1) it "will not aid [in] the court's analysis of the defendant's entitlement to post-conviction relief;" (2) "the defendant's allegations are too vague, conclusory or speculative; or" (3) the defendant is attempting to use the hearing to explore or investigate other possible unsubstantiated PCR claims.

The decision of whether to hold an evidentiary hearing on a PCR petition is committed to the sound discretion of the PCR judge. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). The judge should grant an evidentiary hearing and make a determination on the merits of a defendant's claim only if the defendant has presented a prima facie claim of ineffective assistance. Preciose, 129 N.J. at 462.

In determining whether a prima facie claim has been established, the facts should be viewed "in the light most favorable to a defendant." Id. at 462-63. Additionally, "[a] petitioner must establish the right to such relief by a preponderance of the credible evidence." Id. at 459. "To sustain

that burden, specific facts must be alleged and articulated" to "provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

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 (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 (2005) (quoting Strickland, 466 U.S. at 689). "Mere dissatisfaction with a

'counsel's exercise of judgment' is insufficient to warrant overturning a conviction." Nash, 212 N.J. at 542 (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). Petitioner 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).]

Defendant submitted no objective evidence to support his argument that his trial counsel was ineffective for not having adduced the testimony of witnesses he claims would have provided exculpatory testimony. As Judge Delaney noted, the affidavits presented by defendant all predated the trial and defendant's counsel was aware of the affiants because he provided the same



affidavits in a letter to the prosecutor before trial. Judge Delaney reviewed each affidavit and explained with particularity why each did not justify an evidentiary hearing.

Defendant presented the pre-trial affidavits of Alexander, Burgos, and Colvin, which purported to establish an alibi defense. After reviewing the affidavits, Judge Delaney concluded placing those witnesses on the "stand would have provided minimal, if any, favorable testimony and posed great risk of damaging testimony on cross-examination." This was because Burgos' affidavit placed defendant at the scene of the murder at the same time it took place and Alexander's affidavit provided no credible alibi.<sup>2</sup>

Howe's pre-trial affidavit purportedly named another person as the shooter. However, Judge Delaney found calling Howe as a witness would have damaged her credibility because the affidavit contradicted her statement to the police.

Defendant's PCR counsel produced an investigator's report indicating Montgomery stated defendant was inside the residence from which he was dealing drugs during the shooting. However, as

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<sup>2</sup> Although Judge Delaney did not expressly utter Colvin's name when she stated "The remaining Affidavits were equally insufficient to establish a credible defense[,]" it is obvious from Colvin's pre-trial affidavit that she was "getting high," heard the gunshot and did not observe the shooter. Thus, her testimony would not establish a credible defense.

the State points out in its brief, no affidavit from Montgomery was provided and she later refused to sign one.

Also, as the State has argued, the record demonstrates defendant acknowledged the trial strategy not to call any of the witnesses he now asserts were crucial to his defense. Indeed, the trial judge took special care to address this issue during the trial.

COURT: [Y]ou heard the representations of your counsel with respect to, first of all, not calling witnesses except for Mr. Ellis bringing in some photographs. Do you understand that decision on his part?

DEFENDANT: Yes.

COURT: I can't ask you about the discussions that took place because it's subject to the attorney/client privilege, but I understand that you do know that it's [a] strategic decision?

DEFENDANT: Yes.

Therefore, Judge Delaney properly concluded

[d]efendant has submitted no [a]ffidavits or [c]ertifications supporting his alleged alibi defense and consequently cannot show that counsel was ineffective for failing to further investigate or call these witnesses at trial.

. . . .

This court is convinced . . . defendant knew that counsel was aware of the [a]ffidavits and discussed this trial strategy with counsel.

. . . .

Even if counsel presented these witnesses at trial there's no reasonable probability that the outcome would have been different. . . . In sum, . . . defendant has not demonstrated a prima facie claim that counsel was ineffective for failing to investigate and present witnesses who provided incredible pretrial [a]ffidavits.

Defendant's PCR petition failed to demonstrate actual ineffectiveness of counsel or a reasonable probability the outcome would have been different had trial counsel called these witnesses to testify. Judge Delaney correctly found defendant did not present a prima facie case of ineffective assistance of counsel and that an evidentiary hearing was not required.

### III.

Defendant argues the PCR court erred by denying his motion for a new trial based on the discovery of new evidence. Specifically, defendant asserts the investigative report obtained by his PCR counsel said Montgomery stated Myers had confided in her that Myers had committed perjury during the trial. Myers purportedly would not testify unless given immunity from punishment for perjury.

The Supreme Court has stated:

A jury verdict rendered after a fair trial should not be disturbed except for the clearest of reasons. Newly discovered evidence must be reviewed with a certain degree of circumspection to ensure that it is not the product of fabrication, and, if

credible and material, is of sufficient weight that it would probably alter the outcome of the verdict in a new trial.

[State v. Ways, 180 N.J. 171, 187-88 (2004)].

To meet the standard for a new trial based on newly discovered evidence, defendant must show that the evidence is 1) material, and not "merely" cumulative, impeaching, or contradictory; 2) that the evidence was discovered after completion of the trial and was "not discoverable by reasonable diligence beforehand"; and 3) that the evidence "would probably change the jury's verdict if a new trial were granted."

[Id. at 187].

Judge Delaney rejected defendant's argument that he met the standard under Ways to grant him a new trial. Specifically, she found:

[D]efendant has presented no credible evidence to support . . . Montgomery's claims other than her baseless assertions which amount to nothing more than hearsay. The defendant has not provided any [c]ertification or [a]ffidavit from . . . Myers demonstrating any truth to . . . Montgomery's claims.

. . . .

Furthermore, even if . . . Myers admitted to perjuring herself, the defendant cannot meet the standard for a new trial because the jury would not have changed its verdict absent . . . Myer's testimony.

Judge Delaney also recited the following from our prior decision where we addressed defendant's motion for a new trial on direct appeal. There, we stated:

Myers' post-trial statements were suspect because they were made after defendant's sister confronted and blamed her for defendant's conviction and asked her to recant. The [trial] judge noted that such circumstances were not conducive to producing credible statements. The [trial] judge found that Myers' post-trial statements were not material because they only addressed ancillary matters. Myers never denied that she knew defendant or recanted her statements as to what she had seen on the evening of [the murder].

Furthermore, the evidence probably would not have changed the jury's verdict. As the trial judge found, . . . defendant never established that there was a substantial likelihood that Myers had misidentified defendant. In addition, at trial, the State presented overwhelming evidence of defendant's guilt, wholly aside from Myers' testimony.

[State v. Locus, No. A-2847-10 (App. Div. Oct. 17, 2013) (slip op. at 17-18)].


Judge Delaney concluded, "[c]onsequently, since . . . defendant cannot show that the jury's verdict would change with a new trial, his motion for a new trial is denied." We agree.

The only evidence presented regarding Myers' alleged recantation was Montgomery's hearsay statement. Therefore, the uncertified hearsay lacked credibility and failed to meet the

sufficient weight standard under Ways. For these reasons,  
defendant was not entitled to a new trial.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION