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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-3201-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DERRICK ODOM, a/k/a BERNARD
ODOM,

Defendant-Appellant.

Submitted March 6, 2018 - Decided April 2, 2018

Before Judges Hoffman and Mayer.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Indictment No.
13-06-1234.

Joseph E. Krakora, Public Defender, attorney
for appellant (Robert Carter Pierce,
Designated Counsel, on the brief).

Esther Suarez, Hudson County Prosecutor,
attorney for respondent (Erin M. Campbell,
Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Derrick Odom appeals from a January 27, 2017 Law
Division order denying his petition for post-conviction relief

(PCR) without an evidentiary hearing. Following review of the record and applicable law, we reject defendant's arguments and affirm substantially for the reasons set forth in the PCR judge's January 27, 2017 written opinion.

I

We summarize the facts established at defendant's trial, which we set forth at length in our opinion on defendant's direct appeal. State v. Odom, No. A-3689-13 (App. Div. Oct. 29, 2015) (slip op. at 1-5), certif. denied, 224 N.J. 282 (2016). On the afternoon of March 15, 2013, in Jersey City, sixty-eight year old S.L. returned from the store when an unknown man entered her apartment complex behind her. The man demanded S.L. hand over her money. S.L. responded she did not have any money; at that point, the man "went with his hands towards S.L.'s jacket." Id. at 2. S.L. fought back and rammed her shopping cart into the man approximately six times. Shortly after the altercation began, another apartment resident entered the vestibule, and the assailant "nonchalantly" stopped what he was doing and left the building. Ibid. Thereafter, S.L. called the police.

Jersey City Police Department (JCPD) Officers James Frattini and Keith Jackson responded to the scene. S.L. described her assailant to the officers as a "five-eight, dark skinned black

male," who was wearing a "light gray hoodie, a black jacket and white sneakers." Ibid.

After taking S.L.'s statement, the officers began to search the area. After searching for approximately five minutes, the officers saw defendant sitting on a stoop near S.L.'s apartment building; they determined defendant was a possible suspect. S.L., however, was unable to identify defendant as her assailant, and the police did not arrest defendant on that day.

The JCPD continued to investigate the robbery, and later obtained a surveillance video from S.L.'s apartment complex. At trial, the sergeant who obtained the surveillance video testified it depicted "[a]n elderly woman pulling a shopping cart into the vestibule of [the apartment complex]. She remained in the vestibule for a few minutes and a male entered the vestibule and proceeded to attempt to take her pocketbook." Id. at 3. The sergeant described the man in the video as a black male wearing a gray sweatshirt.

On March 21, 2013, the JCPD searched¹ defendant's apartment and found a gray sweatshirt lying on his couch. The officers arrested defendant on an unrelated outstanding warrant, and

¹ Apparently, a woman who identified herself as defendant's girlfriend consented to the search. Id. at 4 n.2.

subsequently charged him with second-degree robbery in connection with the instant action.

Trial commenced in early January 2014, and on January 14, 2014 a jury found defendant guilty of second-degree robbery, N.J.S.A. 2C:15-1. The Law Division sentenced defendant to eight years in prison, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2. Defendant appealed, and this court affirmed defendant's conviction and sentence. Odom, slip op. at 31.

Subsequently, defendant filed a PCR petition, and PCR counsel filed an amended petition dated October 7, 2016. After hearing oral argument, the PCR judge denied defendant's petition without an evidentiary hearing. Defendant filed this appeal, raising the following arguments for our consideration:

POINT I

THE TRIAL COURT ERRED BY DENYING [DEFENDANT'S] PCR BECAUSE [DEFENDANT] ESTABLISHED HIS RIGHT TO POST-CONVICTION RELIEF IN THAT HIS COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL DURING [DEFENDANT'S] TRIAL.

- A. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A MOTION IN LIMINE, OR REQUEST A[N] [N.J.R.E.] 104 HEARING, TO DETERMINE THE ADMISSIBILITY OF THE GRAY SWEATSHIRT THAT WAS SEIZED FROM [DEFENDANT'S] RESIDENCE.
- B. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO OFFICER FRATTINI'S HEARSAY TESTIMONY THAT THE VICTIM REPORTED THAT THE PERPETRATOR WENT INTO HER JACKET

POCKETS, WHICH REQUIRED THE VICTIM TO PUSH THE PERPETRATOR AWAY.

C. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S IMPROPER REMARKS DURING SUMMATION.

POINT II

THE TRIAL COURT ERRED BY DENYING [DEFENDANT] AN EVIDENTIARY HEARING BECAUSE [DEFENDANT] ESTABLISHED A PRIMA FACIE CASE THAT DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL DURING [DEFENDANT'S] TRIAL.

POINT III

THE TRIAL COURT ERRED BY BARRING A PORTION OF [DEFENDANT'S] PETITION FOR POST-CONVICTION RELIEF UPON PROCEDURAL GROUNDS.

II

The PCR court did not hold an evidentiary hearing. Therefore, we "conduct a de novo review." State v. Harris, 181 N.J. 391, 421 (2004).

"Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." State v. Goodwin, 173 N.J. 583, 593 (2002) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). Pursuant to Rule 3:22-2(a), a criminal defendant is entitled to PCR if there was a "[s]ubstantial denial in the conviction proceedings to defendant's right under the" United States or New Jersey Constitutions. Preciose, 129 N.J. at 459. To sustain this burden, the petitioner must present specific facts that "provide

the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992). The trial court has discretion to dispense with an evidentiary hearing "[i]f the court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to [PCR] or that the defendant's allegations are too vague, conclusory, or speculative to warrant an evidentiary hearing." State v. Marshall, 148 N.J. 89, 158 (1997) (internal citations omitted); see also State v. Porter, 216 N.J. 343, 354 (2013).

Further, claims of constitutionally ineffective assistance of counsel are well-suited for post-conviction review. R. 3:22-4(a)(2); Preciose, 129 N.J. at 460. To establish a prima facie case of ineffective assistance of counsel, thus entitling him to an evidentiary hearing, defendant must show: (1) counsel's performance was objectively deficient; and (2) counsel's deficient performance prejudiced defendant to the extent that he was deprived of his right to a fair trial. State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the United States Supreme Court's two-prong test from Strickland v. Washington, 466 U.S. 668, 687 (1984)).

III

Defendant first argues his trial counsel was ineffective for failing to file a motion challenging the admissibility of the gray sweatshirt. Namely, he argues the probative value of the gray

sweatshirt was substantially outweighed by its prejudicial nature, thus necessitating trial counsel "to file a motion in limine or request a[n] [N.J.R.E.] 104 hearing."

The PCR judge found defendant's trial counsel clearly and unambiguously objected to the admission of the gray sweatshirt as evidence. Trial counsel's decision to informally challenge the gray sweatshirt's admissibility – rather than move for a Rule 104 hearing – was not improper. Moreover, on direct appeal, we affirmed the trial court's jury instruction as to the gray sweatshirt, advising the jury not to draw any prejudicial inferences. Odom, slip op. at 25. Accordingly, we agree with the trial judge's finding that "[c]ounsel's decision to raise the issue before trial began rather than through a formal motion . . . was a strategic decision rationally based on her professional judgement."

Defendant next argues the PCR judge erred in holding his counsel's failure to object to Officer Frattini's testimony was harmless error. Specifically, he asserts S.L. testified her attacker "never touched her, did not take anything from her, [and] she did not feel threatened and she was not injured."²

² At trial, S.L. testified defendant "started to go for me [h]e went with his hands toward[s] my jacket."

However, Officer Frattini testified that during the robbery, when S.L. told defendant she did not have any money, defendant "went into her pockets where she pushed him off" Defendant argues this testimony was both inaccurate as well as inadmissible hearsay; therefore, he argues, his counsel's failure to object "deprived [him] of his right to confront his accuser . . . and his right to a fair trial because counsel's errors allowed damaging hearsay testimony that [defendant] used force"

Defendant's argument lacks merit. On direct appeal we deemed Officer Frattini's testimony to be foundational for the events on the date of the incident, and S.L.'s testimony further supported that foundational recitation of events. Id. at 15-16. As the PCR judge noted, "[i]n light of S.L.'s testimony and [the sergeant's] testimony about the [surveillance] video, had [c]ounsel objected, the jury would still have been presented testimony of the facts [defendant] alleges should have been challenged by [c]ounsel." Accordingly, there was compelling evidence of defendant's guilt based on the surveillance video and other testimony, thereby eliminating defendant's ability to demonstrate counsel's allegedly deficient actions prejudiced him.

Finally, we reject defendant's contention that his trial counsel provided ineffective assistance when she failed to object to the prosecutor's closing remarks. Defendant's attempt to cast

his argument as one of ineffective assistance of counsel lacks persuasion, and we agree with the PCR judge's finding that Rule 3:22-4(a) bars defendant's claims.

Moreover, we reject defendant's argument that the prosecutor's summation was "inflammatory" because it implied defendant committed the crime due to financial insecurity. See, e.g., State v. Patterson, 435 N.J. Super. 498, 510 (App. Div. 2014) (holding prosecutors may not introduce evidence "for the sole purpose" of arguing the defendant committed the crime due to his or her lack of income). The prosecutor's suggestion that defendant's alleged employer did not pay him well did not amount to her arguing defendant committed the crime due to financial need. Rather, the prosecutor's remarks targeted the credibility of statements defendant made to police regarding his alleged employment at a store near S.L.'s apartment building.

Accordingly, defendant failed to make out a prima facie case for ineffective assistance of counsel.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION