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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-3723-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JULIO GRACIANO, a/k/a JULIO
GRACEINO and COUNTY DJ,

Defendant-Appellant.

Submitted December 18, 2017 – Decided March 22, 2018

Before Judges Messano and O'Connor.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Indictment No.
08-01-0041.

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

Camelia M. Valdes, Passaic County Prosecutor,
attorney for respondent (Christopher W. Hsieh,
Chief Assistant Prosecutor, of counsel and on
the brief).

PER CURIAM

A jury convicted defendant Julio Graciano of murder and
related charges. The judge imposed an aggregate sentence of sixty-

five years' imprisonment with an eighty-five percent period of parole ineligibility pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2. State v. Graciano, No. A-6263-10 (App. Div. Aug. 14, 2013) (slip op. at 1-2). We affirmed defendant's conviction and sentence on direct appeal, id. at 3, and the Supreme Court denied his petition for certification. 217 N.J. 292 (2014).

Defendant filed a pro se petition for post-conviction relief (PCR). Appointed PCR counsel filed a brief asserting specific ineffective assistance of counsel (IAC) claims, including that trial counsel failed to properly investigate and call favorable witnesses, including an alibi witness, and trial counsel coerced defendant into not testifying on his own behalf.¹

The PCR judge, who was not the trial judge, granted defendant an evidentiary hearing, see Rule 3:22-10, at which defendant and trial counsel testified. Defendant said he was with a friend, Juan "Willie" Brito, at the time of the murder and into the early morning of the day after. Defendant told this to trial counsel prior to trial. Brito was present in the courtroom during most of the trial, but defendant believed his attorney never spoke to Brito.

¹ PCR counsel raised other specific alleged instances of trial counsel's and appellate counsel's ineffective assistance. However, we limit our discussion only to the specific claims renewed before us.

Defendant said his mother spoke to Brito, and Brito was willing to testify in support of defendant's alibi. According to defendant, his attorney told him Brito's testimony was unnecessary because "we had the trial beat." Defendant wanted to testify at trial, but his attorney told him not to and coached defendant on what to say when the judge questioned him about the decision.

After defendant's testimony, PCR counsel advised that his next witness, Brito, who he had subpoenaed, was not present. The prosecutor interjected:

Prosecutor: I'll be clear on the record what happened . . . Mr. Brito came to my office . . . after he received a copy of [PCR counsel's] subpoena. He spoke to . . . my trial chief because I was in court on other obligations.

And he basically explained . . . that what was in the affidavit supplied by [PCR counsel] was false. . . . [M]y chief had told Mr. Brito . . . come to [the judge's courtroom] as the subpoena directs, and then we'll . . . have everything cleaned up that day, just come in and tell the truth. We didn't say what happened. We just said come in today and tell the truth.

I know [PCR counsel] did serve him. I know he sent someone from his office, or defense investigator . . . to follow up with him.

PCR counsel: That's correct.

Prosecutor: But I expected Mr. Brito to be here. The State does not intend to call him.

. . . [A]t this point, Mr. Brito's not here, but the State did never subpoena him.

PCR counsel: I don't intend to call him

Trial counsel then testified. He met with defendant several times before trial and met Brito during trial. He recalled defendant was "adamant that perhaps Mr. Brito had some exculpatory evidence along the lines of an alibi." Counsel recalled a "note" or "letter" authored by Brito, but, as trial approached and counsel investigated further, Brito was "reluctant to testify and ultimately did not want to testify." Counsel's "professional opinion" was that to the extent the "letter was attempting to establish an alibi[,] . . . the overwhelming facts of the case . . . flew in . . . the face of that." See Graciano, slip op. at 4-5 (describing the "substantial" evidence of defendant's guilt, including the eyewitness testimony of several friends who were with him at the time of the shooting).

Counsel described his discussions with defendant regarding whether he should testify on his own behalf. He acknowledged advising defendant against testifying and explained his reasons.

On cross-examination, counsel stated that defendant never denied being at the scene of the shooting, but claimed he only fired a "warning" shot. Counsel said Brito ultimately chose not to testify "because he was going to perjure himself."

The PCR judge found trial counsel was credible and "did everything he could" with regard to Brito. The judge rejected defendant's claim that he was coerced into not testifying, noting the extended colloquy between defendant and the judge at trial. The judge found defendant made a "knowing and voluntary and conscious decision not to testify" at trial. He entered an order denying defendant's PCR petition.

Before us, defendant argues trial counsel rendered ineffective assistance by failing to call Brito as an alibi witness and by coercing defendant into not testifying. Additionally, defendant argues PCR counsel rendered ineffective assistance because he failed to call Brito as a witness at the evidentiary hearing. We find no merit to these arguments and affirm.

Our "standard of review is necessarily deferential to a PCR court's factual findings . . . [and] we will uphold the PCR court's findings that are supported by sufficient credible evidence in the record." State v. Nash, 212 N.J. 518, 540 (2013) (citing State v. Harris, 181 N.J. 391, 415 (2004)). However, we "need not defer to a PCR court's interpretation of the law; a legal conclusion is reviewed de novo." Id. at 540-41 (citing Harris, 181 N.J. at 415-16).

To establish an IAC claim, a defendant must satisfy the two-prong test formulated in Strickland v. Washington, 466 U.S. 668,

687 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). A defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Id. at 52 (quoting Strickland, 466 U.S. at 687). Second, a defendant must prove he suffered prejudice due to counsel's deficient performance. Strickland, 466 U.S. at 687. A defendant must show by a "reasonable probability" that the deficient performance affected the outcome. Fritz, 105 N.J. at 58. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Pierre, 223 N.J. 560, 583 (2015) (quoting Strickland, 466 U.S. at 694; Fritz, 105 N.J. at 52).

Here, the PCR judge specifically found trial counsel was a credible witness who had thoroughly investigated Brito as an alibi witness for trial. Although the judge did not explicitly find Brito refused to commit perjury, trial counsel clearly reached that conclusion. Indeed, trial counsel testified that defendant never denied being in the van from which the fatal shot was fired. We also agree with the PCR judge that both the trial record and the testimony at the PCR hearing fully support the conclusion that defendant voluntarily and knowingly chose not to testify at trial.

Lastly, defendant contends PCR counsel provided ineffective assistance because he failed to seek the court's assistance to


enforce the subpoena undisputedly served on Brito. Defendant urges us to remand for a hearing at which Brito is compelled to testify.

The State argues we should refuse to consider the argument because it was never raised before the PCR court. That position is untenable. How can a defendant at a PCR hearing argue the very attorney presenting his case at the hearing is rendering ineffective assistance?

However, we agree with the State that PCR counsel's duty is to "communicate with the client, investigate the claims urged by the client, and determine whether there are additional claims that should be brought forward. Thereafter, counsel should advance all of the legitimate arguments that the record will support." State v. Webster, 187 N.J. 254, 257 (2006). There simply is no credible evidence in the record to support the assertion that Brito, if forced to testify, would provide an alibi for defendant. It is reasonable to assume that PCR counsel's decision not to enforce the subpoena was for the very same reason that trial counsel decided not to call Brito as a witness, i.e., because Brito would not perjure himself by testifying in support of defendant's alleged alibi.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION