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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3973-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GREGORY GREENE,

Respondent-Appellant.

Submitted February 13, 2018 – Decided February 28, 2018

Before Judges Yannotti and Carroll.

On appeal from Superior Court of New Jersey,
Law Division, Union County, Indictment No. 09-
09-0799.

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

Ann M. Luvera, Acting Union County Prosecutor,
attorney for respondent (Meredith L. Balo,
Special Deputy Attorney General/Acting
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant Gregory Greene appeals from the denial of his petition for post-conviction relief (PCR) without an evidentiary hearing. For the reasons that follow, we affirm.

Defendant and others were charged with various offenses in connection with the November 3, 2007 robbery and homicide of Lazaro Tista. Specifically, the indictment charged defendant with purposeful or knowing murder, N.J.S.A. 2C:11-3(a)(1) or (2) (count one); unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (count two); possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count three); first-degree robbery, N.J.S.A. 2C:15-1 (count four); felony murder, N.J.S.A. 2C:11-3(a)(3) (count five); and bias intimidation, N.J.S.A. 2C:16-1(a)(3) (count six).

Following a lengthy jury trial, on count one, defendant was found not guilty of murder, but guilty of the lesser-included offense of aggravated manslaughter. Defendant was also found guilty on counts two through five, and not guilty on count six. At sentencing, following the appropriate merger of offenses, the trial judge sentenced defendant to an aggregate forty-year prison term, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2.

On direct appeal, among other points, defendant argued that the trial court erred by admitting testimony from a witness, M.B., that a co-defendant made statements to M.B. implicating defendant in Tista's robbery and homicide, and that he was prejudiced by the

trial court's failure to sever the bias intimidation charge. State v. Greene, No. A-3374-11 (App. Div. Oct. 30, 2014) (slip op. at 11-17). We rejected these arguments and affirmed defendant's convictions and the sentences imposed, but remanded for the entry of a corrected judgment of conviction. Id. at 22.¹ Defendant's petition for certification was thereafter denied by the Supreme Court. State v. Greene, 221 N.J. 285 (2015).

Defendant filed a petition for PCR and was assigned counsel to represent him. PCR counsel submitted a brief in which he argued trial counsel was ineffective for: (1) failing to file a motion to sever the bias intimidation charge; and (2) failing to object to M.B.'s hearsay testimony. Additionally, citing State v. Pomianek, 221 N.J. 66 (2015), PCR counsel argued the bias intimidation statute was unconstitutional.

The PCR court denied defendant's petition by order dated March 21, 2016. Judge Stuart Peim² issued a comprehensive twenty-two page written opinion that accompanied the order and set forth his reasons for denying relief. The judge addressed defendant's two main claims of ineffective assistance of trial counsel and,

¹ We need not recite the testimony from the trial, which is extensively detailed in our prior opinion.

² Judge Peim also presided over defendant's trial.

citing our earlier opinion, concluded they were procedurally barred under Rule 3:22-5³ because they were rooted in similar claims defendant raised, and we rejected, on direct appeal. In any event, on the merits, Judge Peim found defendant's claims failed to satisfy the two-prong test for ineffective assistance of counsel established 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). Finally, the judge found the argument regarding the unconstitutionality of the bias intimidation statute was of no moment because defendant was acquitted of that charge.

In his present appeal, defendant raises a single argument for our consideration:

SINCE THE DEFENDANT FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION FROM [PCR] COUNSEL, THE MATTER SHOULD BE REMANDED TO THE TRIAL COURT TO ASSIGN NEW [PCR] COUNSEL TO REPRESENT HIM, TO PERMIT THE FILING OF SUPPLEMENTAL SUBMISSIONS ON HIS BEHALF, AND TO CONDUCT A NEW HEARING RELATING THERETO. (Not Raised Below)

³ Rule 3:22-5 provides that "[a] prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any post-conviction proceeding" Rule 3:22-5 thus bars from further litigation through a PCR petition claims that were actually considered and decided in a prior proceeding. State v. Marshall, 173 N.J. 343, 350-53 (2002); State v. McQuaid, 147 N.J. 464, 484 (1997).

This appeal requires us to employ two standards: one governing claims of ineffective assistance of trial counsel, and another, somewhat different standard, governing claims against PCR counsel. We briefly set forth each standard.

The legal principles that govern our analysis of a defendant's claim that he was deprived of the effective assistance of trial counsel are well settled. When petitioning for PCR, the defendant must establish, by a preponderance of the credible evidence, that he or she is entitled to the requested relief. State v. Preciose, 129 N.J. 451, 459 (1992). To sustain that burden, the defendant must allege and articulate specific facts, which "provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). To establish a prima facie claim of ineffective assistance of counsel, the defendant must demonstrate a reasonable likelihood of success under the test set forth in Strickland. That is, the defendant must show: (1) the deficiency of his counsel's performance and (2) prejudice to his defense. Strickland, 466 U.S. at 687; see also Fritz, 105 N.J. at 58 (adopting the Strickland two-pronged analysis in New Jersey).

"[I]n order to establish a prima facie claim, [the defendant] must do more than make bald assertions that he was denied the effective assistance of counsel. He must allege facts sufficient to demonstrate counsel's alleged substandard performance." Cummings, 321 N.J. Super. at 170. Under the first prong, the defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Under the second prong, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Ibid. That is, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

Employing this standard, we are satisfied from our review of the record that defendant failed to make a prima facie showing of ineffectiveness of trial counsel within the Strickland-Fritz test, substantially for the reasons stated by Judge Peim in his thorough written decision. We further note that defendant's sole argument on appeal does not even implicate the performance of trial counsel.

We now turn our attention to defendant's argument that he was denied the effective assistance of PCR counsel. The performance of PCR counsel is examined under a different standard than the

standard applicable to trial counsel. Regarding a claim that PCR counsel was ineffective, the Supreme Court has stated:

PCR counsel must 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. If after investigation counsel can formulate no fair legal argument in support of a particular claim raised by defendant, no argument need be made on that point. Stated differently, the brief must advance the arguments that can be made in support of the petition and include defendant's remaining claims, either by listing them or incorporating them by reference so that the judge may consider them.

[State v. Webster, 187 N.J. 254, 257 (2006).]

"The remedy for counsel's failure to meet the[se] requirements . . . is a new PCR proceeding." State v. Hicks, 411 N.J. Super. 370, 376 (App. Div. 2010) (citing State v. Rue, 175 N.J. 1, 4 (2002)).

"This relief is not predicated upon a finding of ineffective assistance of counsel under the relevant constitutional standard. Rule 3:22-6(d) imposes an independent standard of professional conduct upon an attorney representing a defendant in a PCR proceeding." Hicks, 411 N.J. Super. at 376. We determined in Hicks the defendant had failed to receive the benefit of the attorney's expertise, because the attorney limited his performance

to re-presenting the arguments the defendant included in his own pro se petition; there was no evidence he conducted an independent evaluation of defendant's case to determine whether there were other grounds to attack defendant's conviction; and there were indications PCR counsel had not even reviewed the file, based on comments to the court in oral argument that betrayed ignorance of the essential facts of the underlying case. Id. at 374. We remanded for a new PCR proceeding. Ibid.

However, as we noted earlier, PCR counsel is not required to bolster claims raised by a defendant that are without foundation, but, rather, only those "the record will support." Webster, 187 N.J. at 257. With this standard in mind, we consider defendant's arguments as they pertain to his assigned PCR counsel.

Defendant faults PCR counsel for raising only "two substantive issues which had previously been raised and expressly rejected by the Appellate Division, and a third issue attacking the constitutionality of a charge for which the defendant had been acquitted." He asserts it "[i]s inconceivable that, in a trial spanning [sixteen] days and consuming approximately [2500] pages of transcripts, no bona fide issue could be raised on the defendant's behalf which was factually and legally supported by the record."

However, unlike in Hicks, where it was apparent that PCR counsel had failed to meet his obligations, we cannot conclude on the record before us that PCR counsel failed to discharge his proper responsibilities and that a remand for a new hearing is required. In his brief, defendant candidly concedes "[i]t is impossible to glean from the present circumstances whether the record did not support any other bona fide issues on the defendant's behalf." Accordingly, defendant does not allege with even the slightest degree of specificity what other meritorious issues PCR counsel could or should have raised.


We note further that in affirming defendant's conviction on direct appeal, we found "the evidence of [defendant's] guilt was overwhelming." Greene, No. A-3374-11 (slip op. at 15). Moreover, trial counsel was successful in securing defendant's acquittal on the more serious murder charge, and the bias intimidation charge. It thus cannot be said that the meritless issues raised by PCR counsel were the result of his failure to engage in a reasonable investigation and effort, or instead whether the record simply failed to support a valid claim of ineffective assistance of trial counsel.

Nor does defendant contend that PCR counsel failed to communicate with him or investigate any of his claims. Consequently, we discern no violation of the dictates of Rue, 175

N.J. at 4. We conclude that defendant has failed to assert a cognizable claim of inadequate performance by PCR counsel under the Hicks test. R. 3:22-4(b)(2)(C).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION