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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-4513-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAVID A. FIGUEROA,

Defendant-Appellant.

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Submitted December 11, 2017 – Decided March 15, 2018

Before Judges Messano and Accurso.

On appeal from Superior Court of New Jersey,  
Law Division, Bergen County, Indictment No.  
12-05-0705.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Lee March Grayson, Designated  
Counsel, on the brief).

Gurbir S. Grewal, Bergen County Prosecutor,  
attorney for respondent (William P. Miller,  
Assistant Prosecutor, of counsel and on the  
brief).

PER CURIAM

A jury convicted defendant David A. Figueroa of aggravated  
assault and weapons offenses, and the judge sentenced him to an

aggregate six-year term of imprisonment with an 85% period of parole ineligibility pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2. We affirmed defendant's conviction on direct appeal and remanded for resentencing. State v. Figueroa, No. A-4610-12 (App. Div. Oct. 21, 2014) (slip op. at 4). We specifically preserved for post-conviction relief (PCR) defendant's assertion that trial counsel rendered ineffective assistance (IAC). Id. at 9 n.3.

Defendant filed a timely PCR petition asserting IAC. Specifically, the petition focused on trial counsel's substitution into the case. As the transcript bears out, counsel appeared before the trial judge one day before the scheduled trial date and requested an adjournment, telling the judge he had "not seen any discovery yet." Counsel also stated that defendant had unsuccessfully tried to contact his prior attorney to review the discovery, a claim which predecessor counsel, who was present, denied.

The judge, however, noted the trial date was set three months earlier and refused to permit the substitution unless counsel agreed to start the trial the next day. When the judge asked counsel if he would be ready, he responded: "We don't seem to have much of a choice [y]our [h]onor and so therefore, yes." When

again pressed by the judge, counsel responded, "We do have a choice and we are going forward."

PCR counsel argued trial counsel's lack of familiarity with the evidence resulted in trial errors that prejudiced defendant. He cited counsel's inappropriate direct examination of defendant, which resulted in the jury hearing the specifics of defendant's prior criminal convictions even though the judge had ordered sanitization, and failure to object to the prosecutor's cross-examination, which, PCR counsel argued, resulted in the jury receiving a flight charge. Id. at 7-11.

PCR counsel argued trial counsel failed to contest the nature of the victim's injuries, essentially conceding the victim suffered "serious bodily injury," see N.J.S.A. 2C:12-1(b)(1) (causing or attempting to cause serious bodily injury is a second-degree crime), failed to adequately cross-examine the victim about his prior criminal history, and failed to call witnesses who may have supported defendant's claim of self-defense. PCR counsel argued that trial counsel simply should not have agreed to represent defendant after the judge denied his adjournment request.

Following oral argument, the PCR judge, who was not the trial judge, denied defendant's petition, explaining her reasons in a written opinion. She concluded the trial judge's denial of an

adjournment was not a mistaken exercise of discretion, and, based upon a review of the trial transcripts, trial counsel had received the very limited discovery in the case, was fully familiar with the facts and was adequately prepared for trial.

The judge found that trial counsel strategically elicited the specifics of defendant's prior criminal convictions in "an effort to 'soften the blow' rather than have the . . . [p]rosecutor bring that information to the jury." The judge rejected defendant's other claims about trial counsel's performance. Lastly, the judge concluded that denying defendant the right to private counsel of his choice would likely have been reversible error. See State v. Kates, 216 N.J. 393, 395-96 (2014). The judge denied the petition without an evidentiary hearing.

Before us, defendant argues that trial counsel provided ineffective assistance because he agreed to represent defendant, despite being unfamiliar with the facts of the case, without having reviewed discovery and without conducting any investigation. Additionally, for the first time on appeal, defendant contends appellate counsel provided ineffective assistance by failing to raise an argument that the denial of a reasonable adjournment request compelled reversal. On this point, defendant urges us to remand for an evidentiary hearing on appellate counsel's performance.

We have considered these arguments in light of the record and applicable legal standards. We affirm.

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).

In State v. Miller, 216 N.J. 40, 59 (2013), the Court reiterated that for purposes of PCR review, the presumed prejudice standard of United States v. Cronin, 466 U.S. 648, 661-62 (1984), does not apply to a petitioner's allegation of inadequate attorney preparation time because the court denied an adjournment request.

[T]he obstacles facing defendant's attorney in terms of inability to prepare are insufficient to warrant a presumption of prejudice and to

excuse the need for an inquiry into the actual conduct of the trial. Indeed, no federal court has reversed a criminal conviction, pursuant to Cronic, based solely on the ground of inadequate attorney preparation, whether attributable to the trial court's refusal of a continuance or not.

[Miller, 216 N.J. at 59 (quoting Fritz, 105 N.J. at 61-62).]

In short, a defendant must still establish both prongs of the Strickland/Fritz test. Id. at 62.

In particular, defendant cites two specific examples where trial counsel's inadequate preparation resulted in prejudice. Other general allegations regarding counsel's lack of investigation or preparation are unsupported by specifics. See State v. Porter, 216 N.J. 343, 355 (2013) (holding the petition must be supported by "specific facts and evidence supporting [defendant's] allegations").

Defendant argues counsel improperly questioned defendant about his prior convictions and failed to cross-examine the victim about his prior convictions. These two examples of deficient performance, he contends, were prejudicial.

We reject the claim as to the cross-examination of the victim. The trial court ruled the victim's prior convictions would be admissible for impeachment purposes, N.J.R.E. 609, and the prosecutor elicited information about them on direct examination.

Counsel's decision not to ask about them again during cross-examination, and perhaps emphasize their importance, was understandable, since defendant, who had his own convictions, intended to testify and did.

We do not necessarily agree with the PCR judge that counsel's questioning of defendant about his prior criminal record, see Figueroa, slip op. at 7-8, was a strategic effort to "'soften the blow'" in anticipation of the prosecutor's cross-examination. The judge had already ruled that the details of defendant's prior convictions would be sanitized, so the particular offenses for which defendant was convicted would, but for counsel's open-ended questioning, never have been revealed to the jury.

However, we already noted that the questioning may have been designed to eliminate jury speculation about the exact nature of the crimes. Id. at 10. More importantly, contrary to defendant's assertion, the direct and cross-examination of defendant had little to do with the judge's proper decision to instruct the jury on flight. The evidence that defendant immediately fled the bar in haste after cutting the victim's face was undisputed. In short, in light of the overwhelming evidence of defendant's guilt, id. at 4-7, counsel's direct examination of defendant, and his failure to object to the prosecutor's gratuitous and improper comment during cross-examination, id. 10-12, does not "undermine [our]

confidence in the outcome" reached by the jury. Pierre, 223 N.J. at 583.

Lastly, defendant for the first time argues appellate counsel provided ineffective assistance by failing to argue on direct appeal that the trial judge's denial of an adjournment was reversible error. We generally refuse to consider issues not presented to the trial court, State v. Witt, 223 N.J. 409, 419 (2015), but we address defendant's claim here for purposes of complete review.

We apply the Strickland/Fritz standard to a defendant's IAC claims regarding appellate counsel. State v. Gaither, 396 N.J. Super. 508, 513 (App. Div. 2007) (citing State v. Morrison, 215 N.J. Super. 540, 546 (App. Div. 1987)). Most importantly, appellate counsel has no obligation to raise issues on direct appeal that would not succeed. See State v. Echols, 199 N.J. 344, 361 (2009).


"A motion for an adjournment implicates a trial court's authority to control its own calendar and is reviewed under a deferential standard." Miller, 216 N.J. at 65. Although the trial judge did not engage in a searching review of the factors identified in Miller as guideposts for the exercise of the court's discretionary authority, see id. at 67, we are convinced from our



review of the record that the judge's decision to deny an adjournment was not a mistaken exercise of discretion.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION