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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-4674-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EARL T. MOORE, a/k/a "B,"
TREMAINE T. MUHAMMAD, TREMAYNE
TAYLOR, TREMAYNE E. MOORE,
STACEY MOORE, TREMAYNE COX,
MOORE COX and SUBOR HARRIS,

Defendant-Appellant.

Submitted November 9, 2017 – Decided January 25, 2018

Before Judges Alvarez and Currier.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Indictment No.
09-04-1407.

Joseph E. Krakora, Public Defender, attorney
for appellant (David A. Gies, Designated
Counsel, on the briefs).

Mary Eva Colalillo, Camden County Prosecutor,
attorney for respondent (Kevin J. Hein,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant Earl T. Moore appeals the May 28, 2015 denial of his petition for post-conviction relief (PCR). After a review of the arguments in light of the record and applicable principles of law, we affirm.

I.

The facts relating to the charges and trial are derived from our opinion in State v. Moore, No. A-3298-10 (App. Div. Jan. 23) (slip op. at 3-5), certif. denied, 214 N.J. 235 (2013).

On the night of August 29, 2005, defendant, Lawrence Willis and Corey Manderville, were driving around together when they decided to rob Dewey Marshall, who Willis knew to be a drug dealer. Defendant and Willis were both armed.

Because Marshall knew both Willis and Manderville, defendant called Michael Coombs to assist in the robbery. Defendant and Coombs were members of the same faction of the Bloods street gang. Defendant held a higher rank within the gang than Coombs did and, therefore, Coombs was required to follow any and all of defendant's orders.

All four of the men went to Marshall's apartment. Marshall answered the door and, upon seeing defendant with a gun in his hand, he attempted to flee. Defendant shot and killed Marshall.

Several witnesses identified the individuals, and an apartment complex surveillance camera captured the events that occurred outside of the apartment. The bullets retrieved from the scene and Marshall's head were found to be discharged from the same firearm, and were from the same type of handgun used by defendant.

Indictment Number 09-04-1407 charged defendant with one count of first-degree murder, N.J.S.A. 2C:11-3(a)(1) (count one); one count of first-degree felony murder, N.J.S.A. 2C:11-3(a)(3) (count two); one count of first-degree armed robbery, N.J.S.A. 2C:15-1 (count three); one count of second-degree burglary, N.J.S.A. 2C:18-2(b)(1) or (count four); one count of second-degree conspiracy to commit armed burglary and/or armed robbery, N.J.S.A. 2C:5-2, 2C:15-1, and/or 2C:18-2(b)(1) or (count five); one count of second-degree possession of a weapon, N.J.S.A. 2C:39-4(a) (count six); one count of third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (count seven); one count of third-degree endangering an injured victim, N.J.S.A. 2C:12-1.2 (count eight);¹ and one count of second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b) (count nine).

¹ This count was dismissed prior to trial.

Prior to the commencement of trial, the State moved to admit evidence of defendant's history of gang involvement under N.J.R.E. 404(b). The motion was granted.

Defendant was convicted on the eight remaining counts of the indictment. At sentencing, the court merged counts one, three, and six with count two. As to count two, the judge sentenced defendant to life imprisonment, to include the requisite eighty-five percent period of parole ineligibility pursuant to N.J.S.A. 2C:43-7. As to count five, the judge sentenced defendant to a custodial term of ten years, with a five year period of parole ineligibility. As to count seven, the judge sentenced defendant to a custodial term of five years, with a two-and-one-half year period of parole ineligibility. As to count nine, the judge sentenced defendant to a custodial term of ten years, with a five year period of parole ineligibility. Defendant's sentences on counts five, seven, and nine were to run concurrent with defendant's sentence on count two.

On direct appeal, we affirmed the convictions and sentences. Moore, slip op. at 28. Defendant thereafter filed a PCR petition. After hearing oral argument, the PCR court denied the petition without an evidentiary hearing.

Defendant appeals, arguing:

POINT ONE: PREJUDICE IS PRESUMED WHERE THE INTEGRITY OF THE ADVERSARIAL PROCESS IS AT STAKE AS IN THE TRIAL ATTORNEY'S FAILURE TO MINIMIZE THE PREJUDICIAL EFFECT UPON THE JURY OF TESTIMONY REGARDING THE DEFENDANT'S GANG AFFILIATION.

POINT TWO: PCR COUNSEL'S FAILURE TO FASHION AN INEFFECTIVENESS CLAIM UNDER CRONIC DID NOT MEET THE PROFESSIONAL STANDARD UNDER RULE 3:22-6(d). (NOT RAISED BELOW)

POINT THREE: THE DEFENDANT'S TRIAL ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE, AMONG OTHER THINGS, HE DID NOT INTERVIEW A CREDIBLE ALIBI WITNESS ALTHOUGH THE WITNESS'S VITAL INFORMATION WAS SET FORTH IN THE DISCOVERABLE MATERIAL.

POINT FOUR: IN SUMMARY FASHION, THE DEFENDANT INCORPORATES THE REST OF HIS ARGUMENTS MADE TO THE PCR COURT.

II.

Where the PCR court has not held an evidentiary hearing, a de novo review is appropriate. State v. Harris, 181 N.J. 391, 420-21 (2004).

All of defendant's claims allege the ineffective assistance of counsel. To show ineffective assistance of counsel, a defendant must satisfy the two-pronged test of Strickland v. Washington, 466 U.S. 668 (1984), which our Supreme Court adopted in State v. Fritz, 105 N.J. 42 (1987). "The defendant must demonstrate first that counsel's performance was deficient, i.e., that 'counsel made errors so serious that counsel was not functioning as the "counsel"

guaranteed the defendant by the Sixth Amendment.'" State v. Parker, 212 N.J. 269, 279 (2012) (quoting Strickland, 466 U.S. at 687). In doing so, the "defendant must overcome a strong presumption that counsel rendered reasonable professional assistance." Ibid. (citing Strickland, 466 U.S. at 689). Second, "a defendant must also establish that the ineffectiveness of his attorney prejudiced his defense. 'The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 279-80 (quoting Strickland, 466 U.S. at 694).

"A defendant shall be entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of post-conviction relief. . . . To establish a prima facie case, defendant must demonstrate a reasonable likelihood that his or her claim . . . will ultimately succeed on the merits." R. 3:22-10(b). However, merely raising a claim for PCR does not entitle defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

Where "defendant's allegations are too vague, conclusory or speculative[,] " the court shall not grant an evidentiary hearing. R. 3:22-10(e)(2); see also Cummings, 321 N.J. Super. at 170 (reasoning that "bald assertions" of ineffective assistance are

insufficient to sustain a claim for PCR or warrant an evidentiary hearing). Rather, for the court to grant an evidentiary hearing, defendant "must allege specific facts and evidence supporting his allegations." State v. Porter, 216 N.J. 343, 355 (2013).

III.

Prior to trial, the trial judge granted the State's motion to admit the evidence of defendant's gang affiliation as motive to commit the crime pursuant to N.J.R.E. 404(b). At trial, counsel did not further object to the introduction of this evidence. Following the close of testimony, the trial judge instructed the jury as to the limited use of the character evidence to prevent a biased verdict.

Defendant now argues that trial counsel's failure to minimize the prejudicial effect of defendant's gang affiliation amounted to ineffective assistance of counsel and he urges the court to find the presumption of prejudice discussed in United States v. Cronin, 466 U.S. 648 (1984). In Cronin, the Supreme Court held that when counsel's errors are of such a magnitude that "no amount of showing of want of prejudice would cure it[,]" it is unnecessary for a defendant to demonstrate prejudice. 466 U.S. at 659 (quoting Davis v. Alaska, 415 U.S. 308, 318 (1974)). Cronin has only applied in the most extreme of cases, such as where trial counsel was completely absent during jury deliberations and the return of

the verdict, and where the trial court openly questioned trial counsel's competence and provoked trial counsel into acts inconsistent with his duty of client loyalty. See Fritz, 105 N.J. at 62-63; see also Siverson v. O'Leary, 764 F.2d 1208 (7th Cir. 1985); Wilson v. Mintzes, 761 F.2d 275 (6th Cir. 1985).

The alleged deficiencies with regard to the admission of defendant's gang affiliation fall far short of those described in Cronic and its progeny. In defendant's direct appeal, we affirmed the trial judge's decision to admit the character evidence and found that the trial court provided the required limiting instructions to the jury. See Moore, slip op. at 15-16. Therefore, no prejudice can be presumed from trial counsel's decision to not challenge the character evidence and subsequent limiting instruction. The PCR judge correctly found that defendant was not entitled to post-conviction relief on this basis.

IV.

Defendant also argues that PCR counsel was ineffective for not seeking review of defendant's claims under the Cronic standard. For the reasons discussed above, this claim lacks sufficient merit to warrant discussion, R. 2:11-3(e)(2), and we add only the following comments. Cronic sets a high threshold for a presumption of prejudice and the presumption of prejudice will only be found in very limited circumstances. See Fritz, 105 N.J. at 62. Even

if PCR counsel had sought the application of Cronic, the argument would have been futile.

V.

Defendant asserts multiple additional arguments as to why trial counsel was ineffective, including not calling an alleged alibi witness, introducing a prosecution witness as a defense witness, not engaging in plea negotiations, failing to voir dire the ballistics expert, not discussing a witness statement with defendant, and failing to know the outcome of a singular bail motion. We are not persuaded by these arguments.

The record demonstrates that trial counsel investigated the presence of the alibi witness - defendant's girlfriend. Trial counsel stated on the record during a hearing that he had been "looking into investigation with respect to an alibi [and] . . . [a]s soon as it was made mention by [defendant] to [him], [he] utilized the services of the Public Defender's Office in an attempt to get some more information about that." The decision not to call the witness was strategic and was likely done because her testimony would not have been helpful. See Fritz, 105 N.J. at 54 ("complaints 'merely of matters of trial strategy' will not serve to ground a constitutional claim of inadequacy of representation by counsel.") (quoting State v. Williams, 39 N.J. 471, 489 (1963)).

The PCR judge noted in his written decision: "[w]here a defendant's ineffective assistance of counsel claim is based on a failure to investigate, the defendant 'must assert the facts that would have been revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification.'" (quoting State v. Petrozelli, 351 N.J. Super. 14, 23 (App. Div. 2002)). Defendant did not present any such affidavits or certifications to support his argument. Without any such supporting facts, defendant failed to establish a prima facie case of ineffective assistance of counsel in this regard.

Defendant asserts that trial counsel's decision to recall a prosecution witness as a defense witness was in error. Again, that decision was a strategic decision within trial counsel's purview. By questioning this witness through direct examination rather than cross-examination, trial counsel could utilize a wider scope of inquiry regarding the witness's investigation into the murder. Trial counsel was able to elicit testimony regarding previous interviews with a witness that could not have been inquired into on cross-examination. Trial counsel was, therefore, not ineffective in this regard.

Defendant also argues that trial counsel failed to engage in meaningful plea negotiations. However, during the May 24, 2010

hearing, when asked about attempts to resolve the charges prior to trial, defendant stated: "[w]e talked about it [and] . . . [t]hey ain't trying to wheel and deal, so we're going all the way." As the PCR judge stated, because defendant decided to "go[] all the way" to trial, counsel was not ineffective. There is no evidence presented by defendant in the record that he would have pled guilty to any charge and, as such, defendant failed to establish that counsel was ineffective with regard to plea negotiations.

Defendant's next argument, that trial counsel should have challenged the credentials of the State's ballistics expert, is also without merit. Trial counsel, faced with a qualified expert,² made the strategic decision to not challenge the expert's credentials because doing so may have amplified his qualifications and bolstered his credibility with the jury. This strategic decision was not ineffective assistance of counsel.

Finally, defendant argues that trial counsel failed to properly communicate with him with regard to a witness statement and the outcome of a singular bail motion. Defendant's arguments with regard to these issues were unsupported by any evidence in the record. We are satisfied that the PCR judge correctly found

² There was no claim in this case that the trial court erroneously permitted the witness to testify as an expert.


that defendant failed to establish a prima facie case of ineffective assistance of counsel and was, therefore, not entitled to an evidentiary hearing.

VI.

In asserting his final argument on appeal, defendant simply incorporates "the remainder of his arguments made to the PCR court." These remaining claims lack sufficient merit to warrant discussion, R. 2:11-3(e)(2), and we add only the following comments. Defendant has failed to present evidence sufficient to establish a prima facie case of ineffective assistance of trial and PCR counsel under Strickland-Fritz.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION