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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-5138-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ERIC D. BIRTHWRIGHT,  
a/k/a KEYSHAWN WILLIAMS,

Defendant-Appellant.

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Submitted December 20, 2017 – Decided January 16, 2018

Before Judges Fuentes and Manahan.

On appeal from Superior Court of New Jersey,  
Law Division, Union County, Indictment No.  
07-08-0681.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Steven M. Gilson, Designated  
Counsel, of counsel and on the brief).

Thomas K. Isenhour, Acting Union County  
Prosecutor, attorney for respondent (Cynthia  
L. Ritter, Special Deputy Attorney General/  
Acting Assistant Prosecutor, of counsel and  
on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Eric D. Birthwright appeals from an order denying his petition for post-conviction relief (PCR) after oral argument without an evidentiary hearing. We affirm.

In 2010, defendant was tried and convicted of first-degree murder, N.J.S.A. 2C:11-3(a)(1), (2) (count one); third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (count two); and second-degree possession of a firearm for unlawful purpose, N.J.S.A. 2C:39-5(a) (count three). As to count one, defendant was sentenced by Judge Stuart Peim to an aggregate fifty-year prison term with an eight-five percent parole disqualifier. Concurrent terms of four years on the remaining charges were imposed.

Defendant appealed. In June 2014, aside from merging the charges and for an accounting of jail credits, we affirmed the convictions and sentence. The matter was remanded for clarification of jail credits. In February 2015, the Supreme Court denied defendant's petition for certification. State v. Birthwright, No. A-0582-11 (App. Div. June 16, 2014), certif. denied, 220 N.J. 575 (2014).

The following month, defendant filed a pro se petition for PCR. In April 2016, following argument, Judge Peim filed a comprehensive written opinion denying defendant PCR relief. This appeal follows.

Defendant raises the following point on appeal:

POINT I

DEFENDANT'S CONVICTIONS MUST BE REVERSED DUE TO TRIAL COUNSEL'S INEFFECTIVENESS, OR IN THE ALTERNATIVE, THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF TRIAL COUNSEL'S INEFFECTIVENESS.

A. TRIAL COUNSEL FELL ASLEEP DURING THE TRIAL.

B. TRIAL COUNSEL FAILED TO INVESTIGATE WITNESSES AND OTHER DEFENSES.

Additionally, defendant raises the following points in his pro se brief:

POINT I

THE PCR COURT RELIED ON AN INCORRECT LEGAL STANDARD IN DENYING DEFENDANT'S CLAIM THAT THIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN TRIAL COUNSEL SLEPT THROUGH VARIOUS CRITICAL STAGES OF THE TRIAL REQUIRING PREJUDICE TO BE PRESUMED.

POINT II

ALTHOUGH THE RECORD CLEARLY INDICATES DEFENSE COUNSEL SLEPT ON MORE THAN ONE OCCASION, A REMAND IS REQUIRED TO DETERMINE HOW MANY TIMES COUNSEL WAS SLEEPING.

The test for ineffective assistance of counsel was formulated in Strickland v. Washington, 466 U.S. 668 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42 (1987). To establish a deprivation of the Sixth Amendment right to the

effective assistance of counsel, a defendant must satisfy the following two-pronged Strickland/Fritz test: (1) that counsel's performance was deficient and he or she made errors that were so serious that counsel was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution; and (2) that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "[A] defendant must overcome a strong presumption that counsel rendered reasonable professional assistance." State v. Parker, 212 N.J. 269, 279 (2012). If a defendant establishes one prong of this test, but not the other, the petition for PCR must fail. Id. at 280. Thus, both prongs of the Strickland/Fritz test must be satisfied before post-conviction relief may be granted. Strickland, 466 U.S. at 687.

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).

We apply the Strickland standard and review the reasonableness of counsel's assistance with "a heavy measure of deference to counsel's judgments." State v. Martini, 160 N.J. 248, 266 (1999) (quoting Strickland, 466 U.S. at 691). Judge Peim applied this standard and concluded that the defendant's arguments did not support a finding of ineffective assistance of counsel.

Concerning the judge's determination to dispense with an evidentiary hearing, the court has discretion to make this decision, "[i]f the court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to post-conviction relief, . . . 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 (1992) (citations omitted). From our review of the record, and extending to defendant all favorable inferences, the judge's decision to forego an evidentiary hearing was not mistaken.

After close examination of the record in light of the contentions posed in this appeal, including the considerable amount of evidence unrelated to the grounds upon which the PCR petition was based that supported defendant's conviction, we affirm substantially for the reasons set forth by Judge Peim in his thorough written decision.

Affirmed.

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

