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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2049-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CRISTIAN VASILE,

Defendant-Appellant.

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Submitted December 6, 2022 – Decided December 14, 2022

Before Judges Geiger and Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 15-03-0499.

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

Theodore N. Stephens II, Acting Essex County Prosecutor, attorney for respondent (Matthew E. Hanley, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Cristian Vasile appeals from a Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

An indictment charged defendant with third-degree burglary, N.J.S.A. 2C:18-2, and third-degree theft by unlawful taking, 2C:20-3(a). The theft count was subsequently amended to a disorderly persons offense.

Tried by a jury, defendant was convicted of the burglary. The remaining charge was dismissed. The court granted the State's motion to sentence defendant as a persistent offender pursuant to N.J.S.A. 2C:44-3(a) and sentenced defendant to an extended nine-year term, subject to a fifty-four-month period of parole ineligibility. We affirmed the conviction and sentence on direct appeal, State v. Vasile, No. A-4676-15 (App. Div. May 18, 2018), and the Supreme Court denied certification, State v. Vasile, 236 N.J. 234 (2018).

In our opinion on direct appeal, we recounted the following facts established by the trial record:

On December 3, 2014, the occupant of the third floor apartment at 91 Warwick Street saw a stranger standing in front of 82 Warwick Street. The man appeared to be either ringing the doorbell or talking on his cell phone. The man opened a window next to the door and went inside. The neighbor immediately called police. During the 911 call, the neighbor said he did not know the number of the house the man entered, but guessed

it must be "80 something." He later added "[86] or something like that," and described the man as white, wearing a black jacket and carrying a dark backpack.

Shortly after the man entered 82 Warwick [Street], police arrived and were directed to the apartment by the neighbor. Newark Police Officer Carlos Gonzalez and his partner, Officer Joseph Cueto, gained entry through the unlocked back door. Once inside, they went into the ransacked master bedroom and encountered the owner's grandson, who came out of his nearby bedroom. He did not match the description of the intruder. The officers found no one else on the first floor, but saw an interior staircase to the left of the back door.

When the officers went upstairs, a man who appeared to be disoriented, later identified as defendant, began to go down the stairs as police were going up. Cueto noticed defendant put down a blue bag. He was detained and patted down for weapons; a pry bar was discovered in his back pocket. The officers handcuffed defendant, searched the backpack, and found additional pry bars on his person.

Inside the blue bag, Cueto found a white box containing Vera Wang perfume and a larger white rectangular box containing a gold necklace. The contents of the bag were photographed, and defendant was driven to the station.

The owner of 82 Warwick Street testified that at approximately 2:30 that afternoon, she was crocheting in her basement when she heard noises. When the police walked her through the first floor, she saw that everything was "a mess" in her bedroom. She was missing a closed white box of perfume and a white box containing a gold necklace located in a nightstand in

her bedroom, the items police recovered from the blue bag. The owner did not know defendant and was unable to identify him at trial.

[Vasile, slip op. at 1-2.]

We also recounted the procedural history following the jury's verdict.

Thereafter, defendant moved pro se for a new trial on the basis that: (1) the verdict sheet from the jury was not secured; (2) an inconsistency existed between the State's Grand Jury witness, the indictment, and a 911 call as to the house number on Warwick Street where defendant was arrested; and (3) the State did not use a witness to identify defendant. Defendant made these arguments himself at some length on the record, and thanked the court for "letting me represent myself."

The court did "not find sufficient merit in any of the defendant's arguments for a new trial." As to the issue with the verdict sheet, the court explained:

I spoke to my court clerk. Apparently, I'm not sure what happened with the verdict sheet that the jury foreperson had. They may have taken that with them. But we don't have it in the court file. When the file was sent down to . . . the Probation Department for the pre-sentence interview[,] my clerk, inadvertently . . . checked off not guilty.

. . . .

But that was not the . . . jury's copy. Apparently, for whatever reason, we did not secure the verdict sheet.

The court also noted defendant had not established "the State knowingly used false or perjured testimony that was material to the conviction." Nor did defendant present any new, material evidence not discoverable prior to trial that could have affected the jury's verdict. Accordingly, the court denied defendant's motion.

[Id. at 7-8.]

Thereafter, defendant filed a timely pro se PCR petition and brief that contended trial counsel was ineffective for failing to demonstrate alleged inaccuracies about the police version of the events. Attached as exhibits to the brief were an event chronology and radio call log. Counsel was appointed to represent defendant. Counsel filed an amended petition, supplemental certification, and supplemental brief. Defendant claimed trial counsel was ineffective by: (1) failing to cross-examine the police officers regarding the 911 call log to show the timeline contradicted their version of events; and (2) failing to move for a new trial based upon a verdict sheet that stated defendant was not guilty of burglary. Defendant contended he established a prima facie case sufficient to require an evidentiary hearing.

Defendant asserted that the 911 call log contradicted the officer's version of events, because the events described by the officer could not have happened in the four-minute timeframe that the 911 transcript and call log established. He

claims competent counsel would have highlighted this discrepancy during cross-examination. He acknowledged the foreman said "guilty" when asked on the record about that charge, but claims the foreman could have misinterpreted the question to mean whether defendant was guilty of the lesser-included offense of criminal trespass. Defendant further asserted trial counsel was ineffective for failure to move for a new trial based upon the jury foreman's verdict sheet that indicated defendant was not guilty of burglary.

The State noted that trial counsel used the event chronology during cross-examination. The State contended the event timeline established by the 911 transcript and call log did not contradict the officer's testimony. It noted there a few minutes elapsed between the officer's arrival on scene and defendant's arrest. The State further contended that trial counsel's decision to use the call log and transcript somewhat sparingly was part of trial counsel's trial strategy.

Regarding the verdict sheet, the State emphasized that the verdict was announced by the foreman in open court and recorded on CourtSmart. When the court polled the jury, the jurors unanimously agreed with the verdict that defendant was guilty of burglary. The State asserted the verdict sheet is a mere exhibit used to assist the jury during deliberations and the loss of the foreman's verdict sheet does not require reversal of the conviction.

Judge John Zunic, who also presided over the trial, heard oral and issued an order and written decision denying the petition without an evidentiary hearing. The judge found defendant failed to make a prima facie case of ineffective assistance of counsel on either claim under the Strickland/Fritz<sup>1</sup> test.

As to the timeline issue, the judge noted "[t]rial [c]ounsel did, in fact, refer to and offer to use the event chronology regarding the call logs during her cross-examination of Officer Gonzalez regarding this issue." The judge noted "the officer's version of events may have been consistent with the event chronology. Officer Gonzales stated that he arrived on scene 'around 2:30' and completed the arrest 'maybe several minutes later.'" The judge found the events described by the officer "could fit into this timeframe." The judge found the non-use of the event chronology following the cited testimony "was a tactical decision made by [t]rial [c]ounsel, as further testimony by the officer regarding the event chronology may have strengthened the State's case against [d]efendant."

The judge further found defendant did not satisfy the second prong of the Strickland/Fritz test regarding use of the call logs:

Defendant has not established that the outcome would have been different had [t]rial [c]ounsel used the call logs in a different manner during the officer's

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<sup>1</sup> Strickland v. Washington, 466 U.S. 668 (1984); State v. Fritz, 105 N.J. 42 (1987).

testimony. The event chronology does little to negate the overwhelming evidence against [d]efendant, especially that [d]efendant was located by office\’s on the victim’s property while in possession of the victim’s possessions. The timeline that Officer Gonzales testified to was a somewhat minor aspect of his critical testimony regarding the events leading to [d]efendant’s arrest. Consequently, [d]efendant cannot establish prejudice . . . .

The judge also found defendant failed to make a prima facie case regarding the verdict sheet issue. The judge explained:

Defendant asserts that the alleged verdict sheet used by the jury foreman during the verdict shows that the jury may have been confused or mistaken in their verdict. However, there is overwhelming evidence to the contrary. Defendant’s allegations are reliant on a comment in the Pre-Sentence Report indicating that the verdict sheet they received from the court clerk marked [d]efendant as "not guilty" of [b]urglary. The verdict sheet used by the jury foreman has not been recovered, and thus its contents remain unknown. Still, the verdict was announced by the jury foreman and recorded on CourtSmart audio, finding [d]efendant guilty of [b]urglary. Each juror was then polled to ensure that the jury unanimously found [d]efendant guilty of [b]urglary. Trial [c]ounsel could not have made a meritorious motion after such a colloquy, as the record was abundantly clear that [d]efendant was found guilty of [b]urglary, not any lesser included offense. Additionally, during the sentencing hearing, the [c]ourt addressed the verdict sheet mentioned in the Pre-Sentence Report, as well as the verdict sheet used by the jury foreperson[.]

. . . .



During that hearing, the [c]ourt also noted that the jury never reached a decision on the lesser included offense of [c]riminal [t]respass, as they had found [d]efendant guilty of [b]urglary beforehand.

[(footnotes omitted).]

Considering these facts, the judge found "[t]rial [c]ounsel's representation did not fall outside of the wide range of professionally competent assistance, and thus, [d]efendant has not satisfied the first prong of the Strickland-Fritz test." The judge also found that defendant did not satisfy the second prong of the Strickland-Fritz test, noting defendant did not provide any statutes or case law that supported a motion for a new trial.

Finally, the judge found the claims raised by defendant in his pro se brief either lacked merit or were procedurally barred because they were addressed and rejected on direct appeal.

This appeal followed. Defendant raises a single point:

[DEFENDANT] IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT HIS ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO PRESENT A COMPLETE DEFENSE AND FAILING TO MOVE TO CLARIFY ADEQUATELY THE VERDICT SHEET DISCREPANCY IN ORDER TO UPHOLD HER CLIENT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL.

We are guided by the following principles. "Where, as here, the PCR court has not conducted an evidentiary hearing, we review its legal and factual determinations de novo." State v. Aburoumi, 464 N.J. Super. 326, 338-39 (App. Div. 2020) (citing State v. Jackson, 454 N.J. Super. 284, 291 (App. Div. 2018)). To establish an ineffective assistance of counsel claim, "a defendant must demonstrate: (1) counsel's performance was deficient; and (2) the deficient performance actually prejudiced the petitioner's defense." Id. at 339 (citing Strickland, 466 U.S. at 687; Fritz, 105 N.J. at 58). "That is, the defendant must establish, first, that 'counsel's representation fell below an objective standard of reasonableness' and, second, that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" State v. Alvarez, 473 N.J. Super. 448, 455 (App. Div. 2022) (quoting Strickland, 466 U.S. at 688, 694). "We review a judge's decision to deny a PCR petition without an evidentiary hearing for abuse of discretion." State v. Peoples, 446 N.J. Super. 245, 255 (App. Div. 2016) (citing State v. Preciose, 129 N.J. 451, 462 (1992)).

A petition asserting a claim of ineffective assistance of counsel does not automatically entitle a defendant to an evidentiary hearing. State v. Cummings,

321 N.J. Super. 154, 170 (App. Div. 1999). Rule 3:22-10(b) governs evidentiary hearings in PCR proceedings. It provides:

A defendant shall be entitled to an evidentiary hearing only upon [1] the establishment of a prima facie case in support of post-conviction relief, [2] a determination by the court that there are material issues of disputed fact that cannot be resolved by reference to the existing record, and [3] a determination that an evidentiary hearing is necessary to resolve the claims for relief.

[R. 3:22-10(b); accord State v. Porter, 216 N.J. 343, 354 (2013); Preciose, 129 N.J. at 462.]

"A prima facie case is established when a defendant demonstrates 'a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits.'" Porter, 216 N.J. at 355 (quoting R. 3:22-10(b)). A defendant "must do more than make bald assertions that he was denied the effective assistance of counsel." Ibid. (quoting Cummings, 321 N.J. Super. at 170). Rather, a defendant's claim must be supported by "specific facts and evidence." Ibid. "[A] defendant is not entitled to an evidentiary hearing if the 'allegations are too vague, conclusory, or speculative.'" Ibid. (quoting State v. Marshall, 148 N.J. 89, 158 (1997)).

Applying these principles, we find no merit in defendant's argument and affirm substantially for the reasons expressed by Judge Zunic in his

comprehensive and cogent written decision. We add the following brief comments.

In evaluating whether a defendant has satisfied the second prong of the Strickland-Fritz test, a court "must consider the quantum and quality of [the] evidence." Marshall, 148 N.J. at 157. Here, the evidence against defendant was overwhelming. He was caught on the second floor of the burglarized building with pry bars in his pocket and backpack, and had stolen items in a blue bag he was carrying when intercepted by police as he descended the stairs. The owner did not know defendant.

Regarding the verdict sheet, the foreman's announcement on the record of the jury's verdict of guilty is controlling. When polled, each juror confirmed the guilty verdict on the burglary count. Moreover, the verdict sheet mentioned in the presentence report contained a clerical error. As we noted in our opinion on direct appeal, in his decision denying defendant's motion for a new trial, the judge explained that his court clerk "inadvertently . . . checked off not guilty" on a copy of the verdict sheet "[w]hen the file was sent down to . . . the Probation Department for the pre-sentence interview[.]" Vasile, slip op. at 7-8.


An additional motion for a new trial would not have been successful. The failure to file a meritless motion is not ineffective assistance of counsel. See

State v. O'Neal, 190 N.J. 601, 619 (2007) (holding that failure to file a meritless motion is not ineffective assistance of counsel); State v. Roper, 378 N.J. Super. 236, 237 (App. Div. 2005) (observing that if a legal argument "had no merit, then defendant would be unable to establish the 'prejudice prong' of the ineffective assistance of counsel standard established by Strickland"). More generally, trial counsel's performance is not deficient by failing to make a meritless argument. See State v. Worlock, 117 N.J. 596, 625 (1990) ("The failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel.").

The record amply supports the judge's findings and reasoning. Defendant's arguments lacked merit or were procedurally barred by Rule 3:22-5.<sup>2</sup> He did not satisfy the first or second prongs of the Strickland-Fritz test as to any issue he raised. Accordingly, defendant did not establish a prima facie case and was not entitled to an evidentiary hearing. PCR was properly denied.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION

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<sup>2</sup> Under Rule 3:22-5, "[a] prior adjudication upon the merits of any ground for relief is conclusive whether made" during the trial, in any post-conviction proceedings, "or in any appeal taken from such proceedings."