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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0178-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HERIC N. MALAVE, a/k/a
NELSON HERIC MALAVE,
CARLOS FIELDS, and
ERIC MALAVE,

Defendant-Appellant.

Submitted September 13, 2023 – Decided October 2, 2023

Before Judges Gooden Brown and Natali.

On appeal from the Superior Court of New Jersey, Law
Division, Bergen County, Indictment No. 15-10-1390.

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

Mark Musella, Bergen County Prosecutor, attorney for
respondent (Jaimee M. Chasmer, Assistant Prosecutor,
of counsel and on the brief).

PER CURIAM

Defendant appeals from the July 26, 2021 Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

Following a 2017 bifurcated jury trial, defendant was convicted of second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(1) (count one); fourth-degree resisting arrest by flight, N.J.S.A. 2C:29-2(a)(2) (count three); third-degree resisting arrest by force, N.J.S.A. 2C:29-2(a)(3)(a) (count four); third-degree aggravated assault on a police officer, N.J.S.A. 2C:12-1(b)(5)(a) (count five); third-degree possession of ethylone,¹ a controlled dangerous substance, N.J.S.A. 2C:35-10(a)(1) (count seven); first-degree unlawful possession of a weapon by a person with a prior robbery conviction, N.J.S.A. 2C:39-5(b) and 2C:39-5(j) (count eight); and second-degree certain persons not to possess weapons, N.J.S.A. 2C:39-7(b) (count nine). Defendant was acquitted of second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count two); and third-degree aggravated assault by pointing a firearm at a police officer, N.J.S.A. 2C:12-1(b)(9) (count six).

¹ Ethylone is commonly known as "Molly." State v. Desir, 461 N.J. Super. 185, 187 n.1 (App. Div. 2019).

Defendant was sentenced in 2018 to an aggregate nineteen-year term of imprisonment, with an eight-year period of parole ineligibility. In an unpublished opinion, we affirmed the convictions and sentence, and the Supreme Court denied certification. State v. Malave, No. A-5800-17 (App. Div. Apr. 27, 2020), certif. denied, 244 N.J. 159 (2020).

We incorporate by reference the detailed recitation of the facts contained in our unpublished opinion. To summarize,

The convictions stemmed from a police encounter during which defendant fled from police on foot twice, and wrestled with police after they tried to arrest him for driving while intoxicated (DWI). Although the arresting officer testified defendant pointed a handgun at him during the struggle, defendant denied possessing a gun or assaulting the officer, claiming the police used excessive force in effectuating the arrest.

[Id., slip op. at 2.]

After defendant was ultimately subdued, a semi-automatic handgun containing three .25 caliber bullets was recovered from the wooded area where the chase had occurred, and a small plastic bag containing a white powder, later identified as Ethylone, was found on defendant's person.

In addition to the law enforcement witnesses, defendant testified at the first trial on counts one through seven after the trial judge advised defendant of

his constitutional right to remain silent and conducted a Sands/Brunson² hearing to determine the admissibility of defendant's prior conviction for impeachment purposes in the event he waived his right to remain silent and testified. The judge ruled that the State could only refer to the fact that defendant had a prior conviction for a second-degree offense and served a four-year prison sentence, without specifying that the prior offense was a robbery charge.

Notwithstanding the judge's ruling, during direct examination, trial counsel asked defendant if he had been convicted or pled guilty to second-degree robbery in 2009. Defendant responded in the affirmative and added that he had been sentenced to four years' imprisonment. At the conclusion of his testimony, defendant signed a form acknowledging that he had knowingly and voluntarily waived his right and elected to testify on his own behalf, and the judge gave the jury an appropriate limiting instruction to restrict the use of the prior-conviction evidence to assessing defendant's credibility. At the second trial on counts eight

² State v. Sands, 76 N.J. 127, 147 (1978) (recognizing that trial courts have the discretion to exclude certain prior-conviction evidence when necessary to protect a defendant from undue prejudice); State v. Brunson, 132 N.J. 377, 394 (1993) (holding that prior-conviction evidence for the purpose of "impeach[ing] the credibility of a testifying defendant" should be limited to "the number, degree, and date of the defendant's prior similar convictions.").

and nine, trial counsel did not provide an opening or closing statement and defendant did not testify.

Prior to sentencing, defendant moved for a new trial, arguing that he felt compelled to testify after trial counsel commented in his opening statement that defendant was going to testify. In support, defendant submitted a 2018 certification in which he averred that he did not intend to testify because of his prior conviction but "felt that [he] had no choice but to testify" after trial counsel's opening. Defendant asserted counsel never discussed with him his "right to testify or not testify" or the contents of counsel's opening statement beforehand. Defendant also argued that he was entitled to a new trial on counts eight and nine because he "was never advised of his right to testify" during the second trial and trial counsel produced no evidence in his defense.

On July 11, 2018, the trial judge denied defendant's motion, reasoning that defendant was advised of his rights on the record by the court and signed a "voluntary waiver" acknowledging his election to waive his right to remain silent. The judge also determined that it was "trial strategy" for defense counsel to not "present any additional evidence" because "[a]ll the evidence considered" during the second trial "was the exact same evidence from the first trial." The judge sentenced defendant the following day.

Defendant filed a timely PCR petition, which was supplemented by PCR counsel. In his petition, defendant asserted, among other things, that he was deprived of the effective assistance of counsel because trial counsel: (1) "improperly committed [defendant] to testifying" during opening statements; (2) "informed the jury that [defendant] had a prior conviction" and "inexplicably reveal[ed] the nature of that prior conviction despite the trial court's [sanitization] ruling"; and (3) failed to "represent[]" defendant "during the second trial."³

Following oral argument, on July 26, 2021, the PCR judge issued an order and accompanying written opinion denying defendant's petition. In his opinion, the judge reviewed the factual background and procedural history of the case, applied the governing legal principles, and concluded defendant "failed to establish a prima facie claim of [IAC]." Specifically, the judge determined defendant failed to show that either his attorney's performance fell below the objective standard of reasonableness set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984), and adopted by our Supreme Court in State v. Fritz, 105

³ In his direct appeal, defendant raised ineffective assistance of counsel (IAC) claims, which we "decline[d] to reach . . . without the benefit of a fulsome record developed in a [PCR] proceeding in which trial counsel may explain the reasons for their actions." Malave, slip op. at 9.

N.J. 42, 49-58 (1987), or that the outcome would have been different without the purported deficient performance as required under the second prong of the Strickland/Fritz test. The judge also concluded that defendant was not entitled to an evidentiary hearing.

First, the judge determined that "[t]rial counsel's decision to inform the jury that [defendant] would testify in his own defense was simply trial strategy" that defendant "agreed to." The judge reasoned:

During opening statements trial counsel stated, "the fact is you should anticipate hearing from [defendant]. [He] is going to tell his story[.]" Further, the record demonstrates [defendant's] willingness to testify. The record contains numerous references to [defendant's] decision to testify in his own defense. Even the trial court mentioned it two times prior to the State resting. During closing arguments, trial counsel continued with this strategic decision by urging the jurors to consider [defendant's] testimony.

[Defendant's] assertion that trial counsel's statement to the jury eradicated his decision to testify is nothing but a bald assertion devoid of any support from the record. The record is clear that [defendant] knowingly and voluntarily decided to testify in his own defense. Prior to testifying [defendant] was reminded of his right to remain silent and explicitly waived that right. Additionally, when it came time for [defendant] to testify, he clearly stated, "I'm going to testify." [Defendant] then proceeded to explain to the jurors that he ran from the troopers because [he] possessed drugs and was afraid to be arrested again.

Simply because trial counsel's strategy was unsuccessful, does not mean that . . . defendant was prejudiced.

[(Citations omitted).]

Next, the judge determined that "trial counsel's decision to introduce [defendant's] prior robbery conviction was a strategic decision," stating:

While [defendant] was on the stand[,] trial counsel asked, "were you in 2009 convicted or plead guilty to a robbery, second degree?" [Defendant] responded, "Yes." Trial counsel's decision to question [defendant] was an attempt to bolster his credibility. [Defendant] willingly testified that he pleaded guilty because he was in fact guilty. [Defendant] then stated that he was challenging the possession and assault charges at hand because he was innocent. Trial counsel's questions were intended to show that [defendant] was willing to take responsibility for his previous wrongful actions but was innocent of the charges at hand.

[(Citations omitted).]

The judge also concluded defendant failed to establish that he was "prejudiced by trial counsel's actions." The judge reasoned that the trial judge "instructed the jury more than once[] that [defendant's] convictions could only be considered in the determination of [defendant's] credibility or believability of his testimony." The judge pointed out that the "limiting instruction was effective" because the jury "acquitt[ed defendant] of two counts of the indictment."

Finally, the judge rejected defendant's claim that because "he received no assistance of counsel at the second . . . trial," "prejudice should be presumed," explaining that "[defendant] failed to meet the standard set forth in [United States v. Cronin, 466 U.S. 648 (1984)]." The judge expounded:

Trial counsel made a strategic decision to not make any opening or closing arguments during the second trial. Trial counsel zealously advocated for [defendant] and contested the State's case during the first trial, confronting and aggressively cross-examining each of the State's witnesses. The only additional evidence presented in the second trial was evidence of [defendant's] criminal record. At the second trial, the trial court instructed the jury to consider the evidence on possession anew[] and make an independent determination as to whether the State proved the element beyond a reasonable doubt[,] and the jury ultimately found that [defendant] was a certain person, with a prior robbery conviction, in possession of a handgun.

In this ensuing appeal, defendant raises the following points for our consideration:

POINT ONE

[DEFENDANT] IS ENTITLED TO RELIEF ON HIS CLAIMS THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY DEPRIVING HIM OF HIS RIGHT TO REMAIN SILENT, INFORMING THE JURY OF HIS PRIOR ROBBERY CONVICTION, AND UNDERMINING HIS DEFENSE AT HIS SECOND TRIAL.

POINT TWO

IN THE ALTERNATIVE, [DEFENDANT] IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIMS THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE.

"[W]e review under the abuse of discretion standard the PCR court's determination to proceed without an evidentiary hearing." State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013). "If the court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to [PCR], . . . then an evidentiary hearing need not be granted." State v. Marshall, 148 N.J. 89, 158 (1997) (citations omitted).

An evidentiary hearing is only required when a defendant establishes "'a prima facie case in support of [PCR]," the court determines that there are "'material issues of disputed fact that cannot be resolved by reference to the existing record,'" and the court determines that "'an evidentiary hearing is necessary to resolve the claims'" asserted. State v. Porter, 216 N.J. 343, 354 (2013) (alteration in original) (quoting R. 3:22-10(b)). "[W]here . . . no evidentiary hearing was conducted," as here, "we may review the factual inferences the [trial] court has drawn from the documentary record de novo," and "[w]e also review de novo the court's conclusions of law." State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016).

"To establish a prima facie case, defendant must demonstrate 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." R. 3:22-10(b). To establish a prima facie IAC claim, a defendant must demonstrate "by a preponderance of the credible evidence," State v. Echols, 199 N.J. 344, 357 (2009), that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense, Strickland, 466 U.S. at 687; Fritz, 105 N.J. at 58.

Failure to meet either prong of the Strickland/Fritz test results in the denial of a petition for PCR. State v. Parker, 212 N.J. 269, 280 (2012) (citing Echols, 199 N.J. at 358). That said, "courts are permitted leeway to choose to examine first whether a defendant has been prejudiced, and if not, to dismiss the claim without determining whether counsel's performance was constitutionally deficient." State v. Gaitan, 209 N.J. 339, 350 (2012) (citation omitted) (citing Strickland, 466 U.S. at 697).

Strickland's first prong requires a defendant to "show[] that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and "that counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 687-88.

In making that determination, "[j]udicial scrutiny of counsel's performance must be highly deferential," and courts "must indulge a strong presumption" that counsel's performance was reasonable. Id. at 689. To that end, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Ibid. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). "[C]omplaints 'merely of matters of trial strategy' will not serve to ground a constitutional claim of inadequacy of representation by counsel." Fritz, 105 N.J. at 54 (quoting State v. Williams, 39 N.J. 471, 489 (1963)).

To satisfy the prejudice prong, "[t]he error committed must be so serious as to undermine the court's confidence in the jury's verdict or result reached." State v. Chew, 179 N.J. 186, 204 (2004) (citing Strickland, 466 U.S. at 694). As such, a defendant must establish 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. Ultimately, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id. at 691. "Important to the prejudice analysis is the strength of the evidence that was before the fact-finder at trial." State v. Pierre, 223 N.J. 560, 583 (2015). To

that end, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Strickland, 466 U.S. at 696.

Applying these principles, we discern no abuse of discretion in the judge's denial of defendant's PCR petition without an evidentiary hearing, and we reject defendant's contentions that he was entitled to PCR.

To support his position that trial counsel compelled him to testify by telling the jury during his opening statement that defendant would testify, defendant refers to the 2018 certification he submitted with his motion for a new trial. However, defendant's certification that he was forced to testify due to trial counsel's opening statement is contradicted by the record which shows that defendant was informed by the trial judge of his constitutional right to remain silent and executed a waiver form, acknowledging that he understood his right to remain silent and have the jury instructed accordingly and "knowingly and voluntarily elected to waive these rights." See State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999) ("[I]n order to establish a prima facie claim, a petitioner must do more than make bald assertions that he was denied the effective assistance of counsel.").

We also agree with the judge that having defendant testify constituted a strategic tactic to counter the State's proofs. Defendant's testimony was necessary to explain why he fled from the officers and to dispute the State's account that he was in possession of a gun. Without defendant's testimony, the State's proofs that defendant possessed and pointed a gun at the officer during the struggle would have been uncontested. The jury's verdict acquitting defendant on counts two and six showed the effectiveness of the strategy and the absence of any prejudice to defendant. "The quality of counsel's performance cannot be fairly assessed by focusing on a handful of issues while ignoring the totality of counsel's performance in the context of the State's evidence of defendant's guilt." State v. Castagna, 187 N.J. 293, 314 (2006).

We also reject defendant's contention that eliciting testimony of defendant's prior robbery conviction during his direct examination, contrary to the trial judge's sanitization ruling, established a prima facie claim of IAC. In Castagna, our Supreme Court addressed whether a defendant "indicted for murder" and "aggravated manslaughter" was "deprived of effective assistance of counsel" after the defendant's counsel conceded to the jury during opening statements that the defendant "assaulted the victim," thereby "establish[ing] an

element of the offense of aggravated manslaughter." Id. at 315-16. Although the Court determined that the defendant's IAC claims "must await a post-conviction relief petition," the Court declined to find the defendant demonstrated a "prima facie" showing of IAC where his trial counsel engaged in the "high-risk strategy of admitting [the defendant]'s guilt to lesser-included offenses in the hope that it would enhance [the defendant's] credibility, eventually leading to a not guilty verdict of the most serious offense." Id. at 316. The Court noted that "[i]f [the defendant] had agreed in advance with defense counsel's trial strategy, then defense counsel's conduct was not plainly ineffective." Ibid.

Here, the judge determined that trial counsel's decision to elicit the prior robbery conviction evidence from defendant was a deliberate trial strategy intended to bolster, rather than undermine, defendant's credibility. Even if counsel's performance in that regard was deficient, defendant nevertheless failed to show prejudice. As the PCR judge pointed out, the trial judge instructed the jury twice that defendant's prior robbery conviction was only relevant in assessing defendant's credibility and the jury's verdict demonstrated that the limiting instruction was effective. Indeed, most of the charges for which defendant was convicted correlated with defendant's admissions during his trial

testimony. Generally, "strategic miscalculations or trial mistakes are insufficient to warrant reversal 'except in those rare instances where they are of such magnitude as to thwart the fundamental guarantee of [a] fair trial.'" Castagna, 187 N.J. at 314-15 (alteration in original) (quoting State v. Buonadonna, 122 N.J. 22, 42 (1991)). Such circumstances are not present here.

Defendant further argues that prejudice should be presumed under Cronic because "counsel's deficiency" in eliciting the prior-conviction evidence and compelling defendant to testify was "sufficiently egregious." In Cronic, the United States Supreme Court identified three rare instances in which counsel's performance is so deficient that prejudice is presumed. 466 U.S. at 659-62. The first and "[m]ost obvious . . . is the complete denial of counsel" during "a critical stage of . . . trial." Id. at 659. The second occurs when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." Ibid. The third occurs "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not," such as a conflict-of-interest situation. Bell v. Cone, 535 U.S. 685, 696 (2002) (citing Cronic, 466 U.S. at 659-62). In State v. Miller, our Supreme Court determined there was "no authority in this Court for the expansion of the presumption of prejudice beyond the narrow parameters set in Cronic." 216 N.J. 40, 61-62

(2013). Contrary to defendant's assertion, none of the rare circumstances delineated in Cronic are present here.

Likewise, we reject defendant's claim that "by presenting no defense" in the second trial, defense counsel's performance "was per se ineffective under Cronic." In the second phase of a bifurcated trial, the jury is "able to consider . . . any evidence that is relevant to the remaining charge then being tried even though it was introduced in the earlier phase of the trial." State v. Ragland, 105 N.J. 189, 216 (1986) (Handler, J., concurring in part and dissenting in part). See State v. Lopez, 417 N.J. Super. 34, 40 (App. Div. 2010) (outlining procedures for bifurcated trials when the defendant is charged with unlawful possession of a weapon and possession of a weapon by a convicted felon).

During the first trial, defense counsel had vigorously contested the State's proofs. Focusing on whether defendant possessed the handgun, the possession of which was an essential element of the unlawful possession of a weapon and certain persons charges tried in the second trial, defense counsel emphasized critical omissions in the troopers' reports and elicited from defendant that he had never possessed, handled, or touched a gun. Moreover, during closing arguments at the end of the first trial, trial counsel stressed that the State had not

introduced independent evidence that defendant possessed the gun, such as "fingerprints," "DNA," "pictures," or "video."

Because the jury was able to consider all the evidence introduced in the first trial during the second trial, we are satisfied that Cronic is inapplicable. Thus, defendant is not relieved of the obligation to establish prejudice, which he has failed to do. In defendant's direct appeal, we addressed defendant's claim of error by the trial judge in failing to ensure defendant was aware of his right to testify at the second trial. Malave, slip op. at 11. We noted that "because defendant's defense to the charges was squarely presented to the jury" during the first trial, any error "was harmless beyond a reasonable doubt." Ibid. By the same token, defendant suffered no prejudice from trial counsel's failure to present a defense at the second trial "because defendant's defense to the charges was squarely presented to the jury" during the first trial. Ibid.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION