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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0393-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DARNELL WILSON,

Defendant-Appellant.

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Submitted February 1, 2023 – Decided May 17, 2023

Before Judges Gooden Brown and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 13-01-0081.

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

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Colleen Kristan Signorelli, Assistant Prosecutor, on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant appeals from the June 7, 2021 Law Division order denying his petition for post-conviction relief (PCR) after an evidentiary hearing. We affirm.

## I.

Following a 2014 joint jury trial with codefendant Tiwan Flagler, defendant was convicted of armed robbery, conspiracy, and related weapons offenses committed in 2012. In 2015, he was sentenced to an aggregate eighteen-year prison term, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2. We affirmed his convictions and sentence in a consolidated unpublished opinion, State v. Flagler, No. A-3357-14 (App. Div. May 11, 2018) (slip op. at 5), and the Supreme Court subsequently denied certification, State v. Flagler, 236 N.J. 46 (2018).

The facts and procedural history of the case are detailed in our unpublished opinion and need not be repeated here. To summarize,

[t]he convictions stemmed from defendants robbing a traveling salesman at gunpoint after luring him to a secluded location. The victim promptly reported the robbery to the police and provided a description of his assailants, who had been regular customers, as well as a description of the vehicle they were driving. A few days later, police conducted a motor vehicle stop of the suspect vehicle and apprehended the two occupants, who matched the victim's descriptions and were later identified as

defendants. A handgun matching the victim's description was found on Flagler's person during the ensuing pat down.

[Flagler, slip op. at 3.]

In 2019, defendant filed a timely pro se PCR petition, which was supplemented after the assignment of counsel. In general, the petition alleged that defendant received ineffective assistance of counsel (IAC) from both trial and appellate counsel. As to trial counsel, defendant asserted counsel failed to: (1) file a Wade/Henderson<sup>1</sup> motion to suppress the victim's out-of-court identification of defendant; (2) request a jury instruction on cross-racial identification; (3) object to the prosecutor's reference to a non-testifying witness's inadmissible hearsay statement during openings; (4) request that the trial court voir dire the remaining jurors to assess taint after a juror was excused for reading a newspaper article about the case; (5) ask the trial court at sentencing to consider youth as a non-statutory mitigating factor because defendant was twenty-three years old when he committed the crimes; (6) file a motion to dismiss the indictment based on the prosecutor's failure to provide exculpatory evidence of third-party guilt to the grand jury; and (7) request an

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<sup>1</sup> United States v. Wade, 388 U.S. 218 (1967); State v. Henderson, 208 N.J. 208 (2011).

adverse inference charge based on an officer's failure to preserve photos of the suspect vehicle taken during a motor vehicle stop five days before defendant was apprehended in the same vehicle. On the latter point, among other things, defendant claimed appellate counsel failed to argue on appeal that defendant was entitled to a spoliation charge.

On February 19, 2021, the PCR judge issued a written opinion and accompanying order determining that an evidentiary hearing was warranted to address defendant's claims regarding counsel's failure to file a Wade/Henderson motion and request a cautionary jury instruction on cross-racial identification in accordance with State v. Cromedy, 158 N.J. 112 (1999), as well as an adverse inference charge pursuant to State v. W.B., 205 N.J. 588 (2011), in connection with the officer's failure to preserve the photos of the suspect vehicle. As to defendant's remaining claims, the PCR judge determined an evidentiary hearing was not needed.

During the evidentiary hearing conducted on April 19, 2021, defendant and his attorney testified. Following the hearing, the PCR judge entered an order on June 7, 2021, denying defendant's petition. In a supporting oral decision placed on the record on the same date, the PCR judge reviewed the factual background and procedural history of the case, and made factual findings based

on the testimony elicited at the evidentiary hearing. After applying the governing legal principles, the judge concluded defendant failed to show that either counsel'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 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.

First, the judge recounted the testimony of trial counsel, who had been practicing for approximately seven years at the time of defendant's trial and whose practice "primar[ily] focus[ed] on criminal defense." The judge found trial counsel "to be a very credible witness" and noted that he "did not avoid questions," and "admitted what he did . . . and . . . did[ not] know." The judge was also "impressed by the fact that [trial counsel] . . . remembered conversations with [defendant], specifically with regard to [defendant's] familiarity with . . . the alleged victim." In that regard, during his testimony, defendant denied telling trial counsel he knew the victim. Thus, by accepting trial counsel's testimony, the judge implicitly discredited defendant's testimony.

Despite defendant's denial, trial counsel confirmed defendant had told him that he and the victim "were not strangers to one another." As such, trial counsel

believed a Wade/Henderson motion was not "viable" notwithstanding the fact that the identification procedure "was[ not] recorded." Instead, trial counsel's strategy was to attack the victim's credibility based on various "inconsistencies that were attributed to the victim," including the fact that the victim initially named a different individual as involved in the robbery and gave "two or three different locations" for the robbery. In addition, according to trial counsel, the victim's "phone could[ not] have been stolen" as he had claimed "because [the victim] was making phone calls" after the robbery. Trial counsel also planned to attack what he described as "really poor" police work in the case. Trial counsel discussed the strategy with defendant as well as defendant's prior attorney, but made decisions based on his own "in[-]depth" research and assessment of the case. The judge acknowledged that trial counsel "candidly admitted that there were some things that he could have done differently, such as requesting certain jury instructions." Nonetheless, trial counsel "reaffirmed his actions" based on his review of "the discovery" at the time.

Turning to the merits, the judge first addressed defendant's argument that "trial counsel [was] ineffective by failing to file a Wade[/]Henderson motion" because the failure to "electronically record[]" the identification procedure

meant "there was no way to confirm that the identification process was completely uninfluenced by the presenting officer." The judge recounted that

a photo array was put together with [defendant's] photo included with similarly featured individuals. [The presenting officer] was a blind administrator meaning that he would not be able to identify defendant in the array himself. [The] photo instructions were filled out by [the victim] following the photo array. . . .

. . . .

. . . [A]lthough there was no recording of the identification procedure there was a . . . summary [of] the identification procedure and full statement of the victim . . . .

After reciting the applicable case law, the judge concluded that the "failure . . . to record the identification process" was "a violation of Henderson, Anthony,<sup>[2]</sup> and Rule 3:11."<sup>3</sup> Nonetheless, the judge found defendant could not establish prejudice because of the State's compelling proofs confirming the reliability of the victim's identification of both defendants. In that regard, the judge pointed to the victim's trial testimony that he "knew [defendants] for a[] while," that he had "do[ne] business with" both defendants "almost" on a

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<sup>2</sup> State v. Anthony, 237 N.J. 213 (2019).

<sup>3</sup> When trial counsel contemplated filing a Wade/Henderson motion, Henderson was the governing law and required defendants to make a threshold showing of "actual evidence of suggestiveness" to obtain a hearing. 208 N.J. at 288.

"weekly" basis, that he had "met them more than five" but "less than ten" times, and that he "trusted [defendants] and . . . had [his] guard down."

The judge further explained that

as testified by [trial counsel] at the evidentiary hearing[, defendant] himself told trial counsel that he knew the victim and that [he] had done business with him on numerous occasions. [The v]ictim testified that he had met . . . [defendant] in person between five and ten times . . . .

So . . . the victim's testimony and statements corroborate what [trial counsel] relays was told to him by . . . defendant. They knew each other. Identification was not an issue. [Trial counsel] said there was no point in highlighting this area. In his professional judgment it did not make sense to highlight this at all. . . . [I] find[], therefore, that [defendant] has not [met] the requirements for ineffective assistance of counsel . . . .

Next, the judge addressed "whether trial counsel [was] ineffective by failing to request the jury charge on cross[-]racial identification." In rejecting the claim, the judge pointed out that the cross-racial identification charge was not "automatically" warranted under the case law merely because there was a "white victim" and "a black assailant" as in this case. "Instead[, the] charge[ was] reserved for situations where identification [was] a credible issue in the case . . . ." The judge found that given the fact the "victim and [defendant]



knew each other" and "had several business dealings" before the robbery took place, "the Cromedy charge was not required" under the circumstances.<sup>4</sup>

Next, the judge addressed whether trial counsel was deficient for failing to request an "adverse jury instruction" regarding the "unavailability of photos" of the suspect vehicle taken during a traffic stop of defendant's girlfriend. The judge recounted that "[t]he officer took the[] photos in question five days before [defendant] was arrested," when defendant's girlfriend, who was "not connected to th[e] case[,] was found . . . driving the vehicle" matching the description that had been given by the victim. Based on information obtained during the stop, defendant was identified as a suspect and apprehended in the same vehicle five days later.

According to the judge, although the officer testified that he had "emailed [the photos] to himself to put in his report," by the time of trial, the photos were lost. In rejecting defendant's claim, the judge determined defendant failed to show "how the failure to request an adverse charge was objectively unreasonable" or "that he was prejudiced" by the absence of the charge. Furthermore, the judge found defendant's reliance on W.B. unavailing because

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<sup>4</sup> Despite trial counsel's failure to request a cross-racial identification charge, the record reveals that the trial judge gave the charge sua sponte.

in that case, the Court specifically noted that the charge was not warranted every time notes were lost or destroyed. See W.B., 205 N.J. at 608 (holding that "if notes of a law enforcement officer are lost or destroyed before trial, a defendant, upon request, may be entitled to an adverse inference charge").<sup>5</sup>

Turning to defendant's PCR claims that were decided without an evidentiary hearing, the judge first considered whether trial counsel was deficient for failing to request "voir dire of the entire jury after a single juror was excused." Recounting the pertinent facts, the judge stated:

Here[,] it was determined that one newspaper article had been published reg[ar]ding the [case] and one juror admitted she had read the article. The juror stated she had not discussed the article with anyone. As mandated by the case law[,] the trial [c]ourt questioned [the juror] in the presence of counsel to determine if there was any taint by the juror. The juror was ultimately excused.

The other jurors at the time of the initial questioning had not indicated they had seen any newspaper article and as a result the trial [c]ourt reminded the jurors of their responsibility to [observe] no media and outside information sources. No . . . other jurors were questioned.

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<sup>5</sup> The record reveals that trial counsel did, in fact, request an adverse inference charge, but the request was denied by the trial judge.

Under the circumstances, the judge determined that defendant failed to show "that defense counsel's failure was objectively unreasonable and that he ha[d] been . . . prejudice[d]." In support, the judge explained that defendant "was unable to demonstrate that any of the remaining jurors saw[] . . . [a] newspaper . . . article or communicated with the excused juror about the[ article]."

Next, the judge addressed defendant's claim "[t]hat trial counsel was ineffective by failing to present [defendant's] age as a non[-]statut[ory] mitigating factor" during sentencing. The judge rejected defendant's reliance on State v. Zuber, 227 N.J. 422 (2017), finding our Supreme Court's holding in that case "did not demand that [trial counsel] ask that age be considered." Moreover, the judge noted that whereas the defendants in Zuber were juveniles when they committed the crimes, defendant in this case was twenty-three years old. As a result, the judge concluded that "trial counsel was not ineffective in failing to present [defendant's] age as a non[-]statutory mitigating factor."<sup>6</sup>

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<sup>6</sup> On October 19, 2020, the Legislature amended N.J.S.A. 2C:44-1 to add mitigating factor fourteen, N.J.S.A. 2C:44-1(b)(14), which permits consideration of the defendant's age as a mitigating factor when "[t]he defendant was under [twenty-six] years of age at the time of the commission of the offense." L. 2020, c. 110, § 1. In State v. Lane, 251 N.J. 84, 87 (2022), our Supreme Court held that mitigating factor fourteen does not apply retroactively.

Next, the judge addressed defendant's claim that trial counsel "was ineffective by failing to file a motion to dismiss the indictment" based on the victim's reported initial account that a different individual was involved in the robbery. In rejecting defendant's claim, the judge explained that under State v. Hogan, 144 N.J. 216, 226 (1996), "[p]rosecutors are obligated to inform a grand jury of any evidence [that is] clearly exculpatory [and] that directly negates guilt." However, the judge determined that a motion to dismiss the indictment would have been denied here because the victim's reported conflicting account of the robber did not qualify as clearly exculpatory evidence under Hogan.

The judge also noted that the evidence against defendant was "overwhelming" based upon the victim's "out[-]of[-]court identification" and in-court identification of defendant as well as "the fact that the victim knew [defendant] and had done business with him on multiple occasions." Indeed, as we stated in our unpublished consolidated opinion, "[t]he victim knew and identified both defendants from their prior encounters and a loaded handgun matching the victim's description was recovered from Flagler in a vehicle also matching the victim's description." Flagler, slip op. at 26.

Next, the judge considered whether trial counsel was deficient for failing to object during opening statements when the prosecutor stated that, "based upon

a traffic stop" of the suspect vehicle while it was being driven by a non-testifying witness who turned out to be defendant's girlfriend, detectives determined that defendant "was the only other driver of the vehicle." Although the judge found "an objection arguably could have been raised," the judge concluded that trial counsel's alleged failure was not "fatal."<sup>7</sup>

Finally, the judge addressed defendant's claim that "[a]ppellate counsel was ineffective" by failing to advance any of the arguments raised in his petition "on direct appeal." In rejecting defendant's claim, the judge found defendant failed to "demonstrate how [a]ppellate counsel acted unreasonably in only bringing certain issues" and "how the alleged failure to advance all issues caused him any prejudice." This appeal followed.

On appeal, in his counseled brief, defendant raises the following points for our consideration:

**POINT ONE**

**[DEFENDANT] IS ENTITLED TO RELIEF ON HIS CLAIMS THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE.**

- A. Trial Counsel Failed to File a Motion to Suppress Identification.**

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<sup>7</sup> The record reveals that trial counsel did, in fact, object to the prosecutor's comment.

- B. Trial Counsel Failed to Request a Charge on Cross-[R]acial Identification.

POINT TWO

[DEFENDANT] IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS REMAINING CLAIMS THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE.

- A. Trial Counsel Failed to Object to the Prosecutor's Improper Comment During His Opening Statement.
- B. Appellate Counsel Failed to Raise [T]hat the Trial Court Erred in Refusing an Adverse Inference Charge Based on an Officer's Failure to Preserve Photographs.
- C. Trial Counsel Failed to Request [T]hat the Court Conduct a Voir Dire of the Jury After a Juror [W]as Excused for Reading a Newspaper Article About the Case.
- D. Trial Counsel Failed to Present [Defendant's] Age as a Non-Statutory Mitigating Factor.
- E. Trial Counsel Failed to File a Motion to Dismiss the Indictment Based on the State's Failure to Provide Exculpatory Evidence During the Grand Jury Proceedings.

In his pro se supplemental brief, defendant makes the following arguments:

## POINT I

THE INADEQUATE REPRESENTATION THAT DEFENDANT RECEIVED AT THE TRIAL LEVEL FELL BELOW AN OBJECTIVE REASONABLE STANDARD, THUS VIOLATING HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE UNITED STATES AND NEW JERSEY CONSTITUTIONS.

- A. The PCR Court [E]rred in [F]ailing to [F]ind [T]hat Defendant [W]as [D]enied the Effective Assistance of Counsel [B]ecause Defense Counsel, [P]rior to [T]rial [F]ailed to [F]ile a Motion for a Wade/Henderson [H]earing [W]here [The Victim's] [I]dentification of . . . Defendant [W]as [N]ot [R]ecorded.
- B. The PCR Court [E]rred in [F]ailing to [F]ind [T]hat [T]rial [C]ounsel's [F]ailure to [R]equest a [D]etailed and [F]ocused [I]dentification [I]nstruction [D]enied Defendant a [F]air [T]rial and of [E]ffective [A]ssistance of [C]ounsel.
- C. The PCR Court [E]rred in [F]ailing to [F]ind [T]hat [T]rial [C]ounsel [W]as [I]neffective for [F]ailing to [R]equest a [J]ury [I]nstruction on the [P]olice[s] [F]ailure to [P]reserve [P]hotographs of the [D]efendant's [V]ehicle.

## POINT II

THE TRIAL WAS SO INFECTED WITH ERROR THAT EVEN IF EACH INDIVIDUAL ERROR DOES NOT REQUIRE REVERSAL, THE AGGREGATE OF

THE ERRORS COMMITTED BY TRIAL COUNSEL  
DENIED DEFENDANT A FAIR TRIAL.

II.

We begin by setting out some guideposts that inform our review. "We review the legal conclusions of a PCR judge de novo." State v. Reevey, 417 N.J. Super. 134, 146 (App. Div. 2010). Where no evidentiary hearing is conducted, "it is within our authority 'to conduct a de novo review of both the factual findings and legal conclusions of the PCR court.'" Id. at 147 (quoting State v. Harris, 181 N.J. 391, 421 (2004)). However, where an evidentiary hearing is held, we "defer to the PCR court's factual findings, given its opportunity to hear live witness testimony." State v. Gideon, 244 N.J. 538, 551 (2021). "In such circumstances we will uphold the PCR court's findings that are supported by sufficient credible evidence in the record." State v. Nash, 212 N.J. 518, 540 (2013).

"[W]e review under the abuse of discretion standard the PCR court's determination to proceed [with or] without an evidentiary hearing." State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013). Under our court rules, a defendant is entitled to an evidentiary hearing only if: (1) the defendant establishes a prima facie PCR claim; (2) "there are material issues of disputed fact that cannot be resolved by reference to the existing record"; and (3) "an



evidentiary hearing is necessary to resolve the claims for relief." R. 3:22-10(b). "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." Ibid.

As to trial counsel, 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.

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. "[I]n making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." Id. at 689. As such, a 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)).

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). This prong generally requires that a defendant 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.

The same Strickland/Fritz standard applies to claims of ineffective assistance of appellate counsel. State v. Gaither, 396 N.J. Super. 508, 513 (App. Div. 2007). However, "a defendant does not have a constitutional right to have appellate counsel raise every non-frivolous issue that defendant requests on appeal." Id. at 515 (citing Jones v. Barnes, 463 U.S. 745, 753-54 (1983)). Instead, counsel may "winnow[] out weaker arguments on appeal and focus[] on one central issue if possible, or at most on a few key issues." Jones, 463 U.S. at 751-52. Furthermore, appellate counsel must "examine the record with a view to selecting the most promising issues for review." Id. at 752. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Smith v. Robbins, 528 U.S. 259, 288 (2000) (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

A defendant must establish both prongs of the Strickland/Fritz test to obtain a reversal of the challenged conviction. Strickland, 466 U.S. at 697; Fritz, 105 N.J. at 58. Therefore, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which . . . will often be so, that course should be followed." Strickland, 466 U.S. at 697. Thus, "[a]lthough a demonstration of prejudice constitutes the second part of the Strickland analysis, 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).

On appeal, in his counseled brief, defendant renews the same challenges rejected by the PCR judge, adding that he was entitled to an evidentiary hearing on all the claims. In his pro se brief, defendant essentially expounds on the same issues, adding a cumulative error argument. Examining first whether defendant has been prejudiced, we reject defendant's contentions, affirm substantially for the reasons expressed by the PCR judge, and dismiss the claims without determining whether counsel's performance was constitutionally deficient. Ibid.

We add the following comments. Regarding the Wade/Henderson motion, given the familiarity between defendant and the victim, such a motion would not

have been meritorious. Likewise, a motion to dismiss the indictment would have been unsuccessful. Although the detective reported that the victim initially identified an individual named "Big Nate" as involved in the robbery, at trial, the victim clarified that it was a "[m]isunderstanding." The victim explained that he "could have mentioned [Big Nate's] name" but "did[ not] say he had anything to do with it." Instead, the victim said "[he] tried to tell [the detective] that [he] kn[ew] the[ robbers] from [Big Nate]." As such, the reported mistaken identification did not meet the standard of "clearly exculpatory" evidence requiring disclosure by the prosecutor under Hogan, 144 N.J. at 237 (requiring prosecutors to disclose evidence to the grand jury only when the evidence "both directly negates the guilt of the accused and is clearly exculpatory").

As a result, defendant cannot establish the prejudice prong under Strickland because either motion would not have been meritorious. See State v. Roper, 378 N.J. Super. 236, 237 (App. Div. 2005) (explaining "[i]f [a motion] had no merit, then [a] defendant would be unable to establish the 'prejudice prong' of the [IAC] standard established by Strickland"); see also State v. Fisher, 156 N.J. 494, 501 (1998) (explaining that when the IAC claim is based on counsel's failure to file a motion, "the defendant not only must satisfy both parts of the Strickland test but also must prove that [the motion was] meritorious").

Regarding the cross-racial identification charge, defendant cannot show prejudice because the judge sua sponte read the model charge to the jury verbatim. See Model Jury Charge (Criminal), "Identification: In-Court and Out-of-Court Identifications" (rev. May 18, 2020); see also State v. Ramirez, 246 N.J. 61, 70 (2021) (finding no plain error where "[t]he judge read the model charge verbatim"). As to defendant's argument regarding the failure to conduct a voir dire of the jury after a juror was excused for reading a newspaper article about the case, defendant cannot show the requisite prejudice where we found "no error, much less plain error," in rejecting essentially the same argument raised by Flagler in his direct appeal. Flagler, slip op. at 40-41.

Regarding defendant's sentencing argument, the trial court was fully aware of defendant's age when it found aggravating factor three, N.J.S.A. 2C:44-1(a)(3), based on defendant's prior juvenile and adult criminal history, aggravating factor nine, N.J.S.A. 2C:44-1(a)(9), based on the need for deterrence, and no mitigating factors. Even if the court had applied defendant's youth as a non-statutory mitigating factor, the two "weighty" aggravating factors would still preponderate, resulting in a sentence towards the higher end of the sentencing range as defendant received here. See State v. Natale, 184 N.J. 458,

488 (2005) ("[W]hen the aggravating factors preponderate, sentences will tend toward the higher end of the range.").

Finally, regarding defendant's contention that he was prejudiced by appellate counsel's failure to argue on direct appeal that an adverse inference charge was warranted due to the officer's failure to preserve the photos of the suspect vehicle, an appellate court would have found either that no error had occurred or that it was harmless. As the PCR judge noted, it is unclear how the loss of the photographs of the suspect vehicle, taken "five days before [defendant] was arrested" during a traffic stop of a "person not connected to th[e] case," could prejudice defendant. Moreover, although the photographs could not be located, the officer documented and included in his report the make, model, year, and registration number of the vehicle, which is essentially equivalent to the information the photographs would have revealed.

To the extent we have not addressed a particular argument, it is because either our disposition makes it unnecessary or the argument was without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).<sup>8</sup>

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<sup>8</sup> We reject as belied by the record defendant's contention that his attorney was ineffective by failing to object to the prosecutor's reference to a non-testifying witness's inadmissible hearsay statement during his opening statement. As to defendant's argument that his attorney was ineffective by failing to object to two

Affirmed.

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



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officers testifying about the same statement, defendant is barred from raising this issue in his PCR petition because defendant unsuccessfully raised a substantially equivalent issue in his direct appeal. See R. 3:22-5; see also State v. Preciose, 129 N.J. 451, 476 (1992) ("[A] prior adjudication on the merits ordinarily constitutes a procedural bar to the reassertion of the same ground as a basis for post-conviction review."); State v. McQuaid, 147 N.J. 464, 484 (1997) ("If the same claim is adjudicated on the merits on direct appeal a court should deny PCR on that issue, thereby encouraging petitioners to raise all meritorious issues on direct appeal.").