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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0879-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LOUIS M. COSCIA,

Defendant-Appellant.

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Submitted January 11, 2023 – Decided February 14, 2023

Before Judges Accurso and Firko.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 14-07-1315.

Joseph E. Krakora, Public Defender, attorney for appellant (Anderson D. Harkov, Designated Counsel, on the brief).

Raymond S. Santiago, Acting Monmouth County Prosecutor, attorney for respondent (Alecia Woodard, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Luis M. Coscia appeals from the denial of his petition for post-conviction relief (PCR) without an evidentiary hearing. He claims the court erred because he established a prima facie case of counsel's ineffectiveness for failing to subpoena two witnesses to testify on his motion to suppress.[1] After hearing oral argument, Judge Michael A. Guadagno issued a written opinion finding defendant had not established a prima facie case of ineffective assistance warranting an evidentiary hearing. We affirm Judge Guadagno's order substantially for the reasons set forth in his thorough opinion.

On March 22, 2014, defendant threatened a taxicab driver with an imitation firearm by pushing it against the back of his neck and demanding money. Three days later, Jason McNabb, defendant's housemate, contacted the police after defendant told McNabb he'd robbed a cab driver and wanted to rob another. McNabb told the police defendant kept a handgun at 119 Bennett Avenue in Neptune City, where they lived. Kathleen Curto-Donnheimer owned the residence but did not live there. Her two stepsons, Charles and Joseph Curto, resided at the house.

[1] On appeal, defendant does not challenge the judge's ruling that rejected his claim counsel failed to advise him about the consequences of his plea agreement.

119 Bennett Avenue was known to police because of numerous borough ordinance violations and illegal drug activity taking place there prior to the robbery. In fact, defendant and McNabb had been arrested the month prior to the robbery for trespassing at 119 Bennett Avenue. Kathleen posted "no trespassing signs" at the residence because Charles and Joseph had been renting out rooms to several individuals in violation of a borough ordinance. At the police's insistence, Kathleen provided them with the names of five individuals who were allowed to live at 119 Bennett Avenue. Defendant's name was not on the list.

After learning defendant had an active warrant for a motor vehicle offense from another Township, the police went to 119 Bennett Avenue to arrest him. The police knocked on the door but got no response despite seeing silhouettes moving about upstairs. The police entered the open inner and outer front doors and arrested defendant who was on the second floor. Charles was present and was questioned by the police about the robbery investigation, including whether there was a gun on the premises. Charles told them defendant kept a gun "downstairs in the basement." After Charles gave the police written consent to search the premises, they found a metal imitation handgun in the basement.

Defendant was charged with first-degree robbery, N.J.S.A. 2C:15-1 (count one), and fourth-degree unlawful possession of an imitation firearm, N.J.S.A. 2C:39-4(e) (count two). Defendant was also charged with the disorderly person offense of trespass, N.J.S.A. 2C:18-3(b). He moved to bar the cab driver's identification of him pursuant to United States v. Wade, 388 U.S. 218 (1967), and to suppress the physical evidence seized by police during the search of 119 Bennett Avenue. Following an evidentiary hearing, which included Charles's testimony on behalf of the defense, the motion court denied both motions.

Subsequently, defendant entered into a plea agreement with the State. He pled guilty to first-degree armed robbery, and the State agreed to dismiss the other charges at sentencing. Defendant was sentenced in accordance with the plea agreement as a second-degree offender to seven years' imprisonment, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, to be served concurrently with a sentence he was already serving. We affirmed defendant's conviction and sentence on direct appeal. State v. Coscia, No. A-5192-16 (App. Div. Oct. 24, 2018). The Supreme Court dismissed defendant's certification pursuant to a stipulation submitted by counsel pursuant to Rule 2:8-2.

Defendant timely filed a petition for PCR, claiming his trial counsel was ineffective in failing to explain the consequences of his guilty plea and in failing

to call the owner of 119 Bennett Avenue and Leonard Varasano, an investigator with the Public Defender's office, as witnesses at the suppression hearing. Defendant asserted these two individuals would have confirmed he was on the premises lawfully at the time of his arrest and was not a trespasser.

Judge Guadagno rejected those claims following oral argument in a nine-page written opinion concluding defendant had failed to establish any deficiencies in the performance of his counsel and could not show he was prejudiced in any fashion by counsel's representation. The judge noted defendant "provided nothing to support his claim that calling [Kathleen] and Leonard Varasano would have bolstered the testimony of [Charles], leading to a different result on the motion to suppress physical evidence." In reviewing Varasano's investigative report, the judge highlighted that Kathleen advised the Neptune City police department that only "certain persons whose names were on the list created by her" were allowed on her premises and "defendant's name was not on the list."

The judge further emphasized Varasano's report stated unequivocally that Kathleen did not grant defendant permission to stay at the home. Therefore, the judge found counsel made a "sound" strategic decision not to call Kathleen and Varasano as witnesses, citing State v. Davis, 116 N.J. 341, 357 (1989),

superseded by constitutional amendment on other grounds, N.J. Const. art. 1 ¶12. The judge further underscored that defendant did not submit an affidavit or certification from either Kathleen or Varasano attesting defendant was legally on the premises to support his claim that his counsel was ineffective for failing to call them as witnesses, citing State v. Petrozelli, 351 N.J. Super. 14, 23 (App. Div. 2002). The judge concluded that "[m]erely bringing a petition for PCR does not necessitate an evidentiary hearing." See State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

Defendant appeals, reprising his arguments about the ineffectiveness of trial counsel in the following two points:

POINT ONE

THE PCR COURT ERRED WHEN IT FAILED TO GRANT DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING BECAUSE THE FAILURE OF MOTION COUNSEL TO SUBPOENA AS A DEFENSE WITNESS THE OWNER OF 119 BENNETT AVENUE, WHO WOULD HAVE ENHANCED THE TESTIMONY OF HER [STEP]SON, CHARLES CURTO, THAT DEFENDANT HAD PERMISSION TO STAY IN THE HOUSE AT THE TIME OF HIS ARREST AND SHE DID NOT CONSIDER DEFENDANT A TRESPASSER, CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

POINT TWO

THE FAILURE OF MOTION COUNSEL TO CALL THE OWNER OF 119 BENNETT AVENUE TO SUPPORT THE TESTIMONY AND CREDIBILITY OF HIS ONLY WITNESS DURING THE MOTION TO SUPPRESS HEARING, DEPRIVED DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Our review of the record convinces us Judge Guadagno conscientiously considered all of defendant's claims and appropriately denied him relief. We agree defendant failed to establish a prima facie case of counsel's ineffectiveness in not calling Kathleen or Varasano to testify at the suppression hearing. The investigator's two reports solidly backed the State's version of events, and there is nothing in the record to support defendant's claim that Kathleen's testimony could have assisted him by ostensibly corroborating Charles's testimony that defendant had permission to be on her premises. And, defendant did not proffer an affidavit or certification from Kathleen to substantiate his claim.

Defendant failed to establish that the performance of his counsel was substandard, or but for any of the alleged errors, the result would have been different. See Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984). We have nothing to add to the judge's thorough analysis. Accordingly, we affirm,

substantially for the reasons expressed in Judge Guadagno's opinion of October 15, 2021.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION