SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0887-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAIME CENTENO,

Defendant-Appellant.

Submitted March 6, 2023 – Decided April 14, 2023

Before Judges Gooden Brown and Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 09-06-2092.

Jaime Centeno, appellant pro se.

Grace C. MacAulay, Camden County Prosecutor, attorney for plaintiff (Jason Magid, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from the August 24, 2020 Law Division order denying his motion for a new trial based on newly discovered evidence. We affirm.

Following a 2010 trial, a jury convicted defendant of murder and related offenses charged in a 2009 indictment. The convictions stemmed from defendant fatally shooting Jose Sosa in a Camden bar around midnight on December 13, 2008. Defendant was sentenced to an aggregate term of life imprisonment, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, with additional consecutive and concurrent terms. We affirmed his convictions and sentence in an unpublished opinion, State v. Centeno (Centeno I), No. A-1523-10 (App. Div. May 2, 2012) (slip op. at 2), and the Supreme Court denied certification, State v. Centeno, 212 N.J. 456 (2012).

We incorporate by reference our detailed recitation of the facts contained in Centeno I. For purposes of this appeal, we briefly recount the following evidence supporting defendant's convictions. The bartender that evening testified that prior to the shooting, she had assisted defendant by finding a place in the bar where he could charge his phone. Centeno I, slip op. at 2. Approximately twenty-five minutes later, she observed defendant walk towards Sosa, with whom he "didn't get along," and shoot Sosa in the chest with "a small gun." Id. at 3. Although "defendant's hood was pulled over his head," the bartender "had a frontal view of him" and "could even see the scar on the left side of his face." Ibid. She gave a statement to responding officers that night,

and subsequently reported "discovering defendant's cell phone where he had left it, still plugged into the wall near the pool table in the bar." Id. at 3-4.

Two patrons at the bar that night also placed defendant at the scene of the shooting. One patron, "an acquaintance" of defendant, testified that prior to the shooting, "[d]efendant [had] complimented [her] on her appearance, and with his cell phone photographed the two of them standing together." Id. at 3. The jury was shown the photograph. The other patron, who "had known [defendant] for three or four years," testified that she had observed defendant and Sosa make "eye contact," "felt sudden tension in the air," and "a short while" later, heard "the sound of a gunshot, and people running." Id. at 4-5.

The State corroborated the witnesses' accounts of an antagonistic relationship between defendant and Sosa by presenting evidence that the Camden County Prosecutor's Office "had investigated Sosa's involvement in the assault of Edwin Centeno, defendant's brother." Id. at 5-6. Ultimately, "the indictment" charging Sosa in connection with the assault "was dismissed in January 2007" after Edwin Centeno died "in a car accident." Id. at 6.

In February 2013, defendant filed his first petition for post-conviction relief (PCR), asserting that he was denied effective assistance of trial and appellate counsel because, among other things, trial counsel failed to investigate

alibi witnesses. The trial court denied the petition without an evidentiary hearing and we affirmed the denial in an unpublished opinion. State v. Centeno (Centeno II), No. A-1989-13 (App. Div. Oct. 1, 2015). The Supreme Court subsequently denied certification. State v. Centeno, 224 N.J. 527 (2016).

In August 2016, defendant filed his second PCR petition. The PCR court denied the petition without an evidentiary hearing, and we affirmed in an unpublished opinion. State v. Centeno (Centeno III), A-4631-16 (App. Div. Sep. 13, 2018) (slip op. at 2). We noted the trial court appropriately denied the petition "not only because of [its] untimeliness . . . but its lack of substantive merit." Id. at 6. Pertinent to this appeal, we explained that defendant's "claim of error" regarding the trial court's "failure to sua sponte instruct the jury as to passion/provocation" would "undercut[] any credibility on the part of a purported alibi witness" as the requested jury instruction "would logically be premised on defendant's presence at the scene." Id. at 5. Thereafter, the Supreme Court denied certification. State v. Centeno, 237 N.J. 416 (2019).

Having exhausted his PCR claims in state court, on April 30, 2019, defendant submitted an amended petition for habeas relief in the federal district court. See Centeno v. Davis, Civ. Action No. 16-2779, U.S. Dist. 2022 LEXIS 51975, at *4 (D.N.J. Mar. 23, 2022). Defendant had previously filed a petition

for a writ of habeas corpus, but had obtained a stay and abeyance pending resolution of all state claims. Id. at *3. The federal district court ultimately denied defendant's petition on the merits on March 23, 2022. Id. at *73.

While his habeas petition was pending, defendant filed a pro se motion for a new trial pursuant to Rule 3:20-1 based on alleged newly discovered evidence that established an alibi defense for Sosa's murder. In support of his motion, defendant submitted a July 10, 2019 affidavit authored by defendant's friend and purported alibi witness, Anthony Fontanez. In the affidavit, Fontanez averred that on the evening of December 13, 2008, defendant "showed up to [his] house [in Camden] at around 11:45 [p.m.]" and was "playing video games [with Fontanez] when the victim got shot." Fontanez added that after speaking with defendant's brother, Francisco Centeno, he had "left a message" to vouch for defendant's alibi defense at defendant's attorney's office, but no one contacted him and he (Fontanez) "ended up incarcerated . . . on February 1, 2009."

In his motion, defendant claimed Fontanez's affidavit could not have been discovered before trial because his trial attorney was ineffective for "neglecting to conduct an adequate investigation of [defendant's] alibi defense" and for failing to "serve subpoenas" and "call . . . witnesses to vouch for his alibi." To further support his motion, defendant submitted additional affidavits he and his

brother, Francisco, had prepared as well as a certification authored by Rafael Medina.[1] Defendant also named Steven Cuto and his mother, Aleyda Flores, as two additional alibi witnesses who would attest that defendant was with Fontanez and not at the bar when the shooting occurred.

On August 24, 2020, the motion judge entered an order denying defendant's motion for a new trial without conducting an evidentiary hearing. In an accompanying written decision, the judge applied the governing legal principles and concluded that the alleged newly discovered evidence failed to meet the three-pronged test for granting a new trial enunciated in State v. Ways, 180 N.J. 171, 187 (2004). The judge determined that the purported alibi testimony was not "newly discovered evidence" because it "ha[d] been available to [defendant] since trial." The judge noted that defendant's claim that the evidence would have been discovered but for trial counsel's "failure to investigate" was "already addressed by various courts" and his application was "nothing more than an attempt to relitigate an ineffective assistance of counsel claim disguised as a motion for a new trial."

The judge also determined that the purported alibi testimony "would [not] have likely changed the jury's verdict if a new trial were granted" because the

[1] The additional affidavits and certification were not provided in the record.

State produced "overwhelming evidence of [defendant's] guilt . . . at trial." Moreover, the judge found that the alibi claim was not "credible" because defendant "placed [himself] at the scene of the crime at the time the crime was committed by arguing [on direct appeal] that the jury should have been instructed as to passion/provocation." Defendant's subsequent motion for reconsideration was denied, and this appeal followed.

On appeal, defendant raises the following single point:

> THE . . . JUDGE HAS ERRED BY FAILING TO GRANT [DEFENDANT] A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE OF ACTUAL INNOCENCE, THEREFORE IN VIOLATION OF [DEFENDANT'S] RIGHTS OF ACTUAL INNOCENCE CLAIM.

In evaluating defendant's argument, we apply well-established legal principles. Under our rules, "[a] motion for a new trial based on the ground of newly-discovered evidence may be made at any time." R. 3:20-2. In State v. Carter, 85 N.J. 300, 314 (1981), our Supreme Court set forth the applicable three-pronged test. Under Carter,

> to qualify as newly discovered evidence entitling a party to a new trial, the new evidence must be (1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the trial and not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury's verdict if a new trial were granted.

[Ibid. (citing State v. Artis, 36 N.J. 538, 541 (1962)).]

The first and third prongs of the Carter test "are inextricably intertwined." State v. Nash, 212 N.J. 518, 549 (2013); see also State v. Behn, 375 N.J. Super. 409, 432 (App. Div. 2005) (recognizing the "analysis of newly discovered evidence essentially merges the first and third prongs of the Carter test"). Under the first prong, "[m]aterial evidence is any evidence that would have some bearing on the claims being advanced." Nash, 212 N.J. at 549 (alteration in original) (quoting Ways, 180 N.J. at 188). As such, "evidence that supports a defense, such as [an] alibi, . . . would be material." Ways, 180 N.J. at 188. However, "'[d]etermining whether evidence is "merely cumulative, or impeaching, or contradictory,"' necessarily implicates prong three, 'whether the evidence is "of the sort that would probably change the jury's verdict if a new trial were granted."'" Nash, 212 N.J. at 549 (alteration in original) (quoting Ways, 180 N.J. at 188-89).

Under that rubric, "evidence that would have the probable effect of raising a reasonable doubt as to the defendant's guilt would not be considered merely cumulative, impeaching, or contradictory." Ibid. (quoting Ways, 180 N.J. at 189). On the other hand, "[t]he characterization of evidence as 'merely cumulative, or impeaching, or contradictory' is a judgment that such evidence is

not of great significance and would probably not alter the outcome of a verdict." Ways, 180 N.J. at 189. In short, "[t]he power of the newly discovered evidence to alter the verdict is the central issue, not the label to be placed on that evidence." Id. at 191-92. This requires assessing such evidence in the context of the "'corroborative proofs' in th[e] record." State v. Szemple, 247 N.J. 82, 110 (2021) (quoting State v. Herrerra, 211 N.J. 308, 343 (2012)).

Carter's second prong "recognizes that judgments must be accorded a degree of finality and, therefore, requires that the new evidence must have been discovered after completion of trial and must not have been discoverable earlier through the exercise of reasonable diligence." Ways, 180 N.J. at 192 (citing Carter, 85 N.J. at 314). Under this prong, "[t]he defense must 'act with reasonable dispatch in searching for evidence before the start of the trial.'" Nash, 212 N.J. at 550 (quoting Ways, 180 N.J. at 192). Indeed, "the belated introduction of evidence may be relevant to the . . . court's evaluation of the evidence's credibility." Ways, 180 N.J. at 192.

"We review a motion for a new trial decision for an abuse of discretion," State v. Fortin, 464 N.J. Super. 193, 216 (App. Div. 2020) (citing State v. Armour, 446 N.J. Super. 295, 306 (App. Div. 2016)), and will not interfere with the decision "unless a clear abuse has been shown," State v. Russo, 333 N.J.

Super. 119, 137 (App. Div. 2000) (citing Artis, 36 N.J. at 541). "We must keep in mind that the purpose of post-conviction review in light of newly discovered evidence is to provide a safeguard in the system for those who are unjustly convicted of a crime." Ways, 180 N.J. at 188. That being said, "[n]ewly discovered evidence must be reviewed with a certain degree of circumspection to ensure that it is not the product of fabrication, and, if credible and material, is of sufficient weight that it would probably alter the outcome of the verdict in a new trial." Id. at 187-88.

Still, a "reviewing court must engage in a thorough, fact-sensitive analysis to determine whether the newly discovered evidence would probably make a difference to the jury." Id. at 191. "[A]ll three prongs of th[e] test must be satisfied before a defendant will gain the relief of a new trial," id. at 187, and the defendant bears "'the burden to establish each prong is met.'" Fortin, 464 N.J. Super. at 216 (quoting State v. Smith, 29 N.J. 561, 573 (1959)); see also State v. Allen, 398 N.J. Super. 247, 258 (App. Div. 2008) ("The absence of any one of these elements warrants denial of the motion.").

Like PCR petitions, the mere raising of a claim of newly discovered evidence does not entitle the defendant to an evidentiary hearing. Cf. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999) ("Although R[ule] 3:22-

1 does not require evidentiary hearings to be held on [PCR] petitions, R[ule] 3:22-10 recognizes judicial discretion to conduct such hearings."); State v. Porter, 216 N.J. 343, 354 (2013) ("[O]nce a defendant presents a prima facie claim, an evidentiary hearing should ordinarily be granted to resolve any ineffective assistance of counsel claims." (citation omitted) (first citing R. 3:22-10(b); and then citing State v. Preciose, 129 N.J. 451, 462-63 (1992))). The same standard applies to a motion for a new trial based on newly discovered evidence—that is, the trial court should grant an evidentiary hearing only if the defendant has presented a prima facie case of newly discovered evidence warranting a new trial under the Carter test. See Carter, 85 N.J. at 314; R. 3:22-10(b).

On appeal, defendant asserts he is entitled to a new trial because Fontanez's proposed testimony: (1) is material evidence that "support[s] an alibi defense"; (2) was "discovered . . . after the completion of his trial" due to his trial attorney's failure to investigate with "reasonable diligence"; and (3) "would have had a probability of changing the verdict" if presented at trial. In the

alternative, defendant argues the judge erred in making "credibility findings without hearing Fontanez testify" at an evidentiary hearing.[2]

Considering defendant's contentions in light of the record and applicable principles, we discern no abuse of discretion or legal error in the judge's decision to deny the motion without conducting an evidentiary hearing. Like the judge, we conclude defendant failed to establish all three prongs of the Carter test. Critically, defendant failed to demonstrate that the jury would have reached a different result if a new trial were granted. In that regard, the impact of newly discovered evidence must be "placed in context with the trial evidence" and considered in relation to the State's proofs at trial. Ways, 180 N.J. at 195. Here, the jury was presented with testimony from multiple witnesses, who placed defendant in the bar at the time of the shooting and corroborated the State's theory that defendant had motive to kill Sosa.

Most damning was the bartender's eyewitness account of the shooting. The bartender had known defendant for "ten years or more" and identified

[2] On appeal, defendant only presses his claim pertaining to Fontanez. We therefore deem his claims pertaining to the other purported alibi witnesses as waived. See State v. Shangzhen Huang, 461 N.J. Super. 119, 125 (App. Div. 2018) (finding a defendant abandoned an issue that was not argued in his merits brief); see also Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2023) ("It is, of course, clear that an issue not briefed is deemed waived.").

defendant at trial as the triggerman. She also recovered defendant's cell phone the following day where he had left it charging in the bar. Based on the overwhelming trial evidence placing defendant at the scene of the shooting, Fontanez's proposed alibi testimony is "'merely' . . . contradictory." Id. at 187 (quoting Carter, 85 N.J. at 314).

Accordingly, we are satisfied that Fontanez's proposed alibi testimony would neither "'shake the very foundation of the State's case'" nor "'alter the earlier jury verdict.'" Nash, 212 N.J. at 549 (quoting Ways, 180 N.J. at 189). "[T]he test is whether the evidence if introduced is such as ought to have led the jury to a different conclusion—one of probability and not mere possibility." State v. Haines, 20 N.J. 438, 445 (1956). Fontanez's testimony does not satisfy that test.

Affirmed.