SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1546-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROLAND E. AMOS,

Defendant-Appellant.

Submitted September 18, 2023 – Decided October 25, 2023

Before Judges Gooden Brown and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment Nos. 15-01-0110 and 15-01-0115.

Joseph E. Krakora, Public Defender, attorney for appellant (Steven M. Gilson, Designated Counsel, on the brief.)

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (David M. Liston, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Roland E. Amos appeals from an October 21, 2021 Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing and his motion to compel DNA testing. We affirm.

I.

We first briefly summarize the relevant facts which are provided in greater detail in our unpublished opinion affirming defendant's conviction and sentence. See State v. Amos, No. A-4777-16T1 (App. Div. May 13, 2019), certif. denied 240 N.J. 77 (2019). We then address the procedural history related to defendant's PCR petition and motion and the additional factual background related to those applications.

Defendant was charged in two indictments with multiple, serious offenses. In the first, he was charged with first-degree murder of Brian Hoey, N.J.S.A. 2C:11-3(a)(1) or (2), with the aggravating factor of committing murder to escape detection, contrary to N.J.S.A. 2C:11- 3(b)(4)(f); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); two counts of third-degree witness tampering, N.J.S.A. 2C:28- 5(a)(1) and (a)(2); two counts of third-degree hindering apprehension or prosecution, N.J.S.A. 2C:29-3(b)(1) and (b)(4); and

second-degree hindering apprehension or prosecution, N.J.S.A. 2C:29-3(b)(3). In the second indictment, defendant was charged with second-degree certain persons not to possess weapons, contrary to N.J.S.A. 2C:39-7(b).

Following two jury trials, defendant was found guilty of first-degree murder, but not guilty of the aggravating factor. Defendant was also found guilty of possession of a weapon, possession of a weapon for an unlawful purpose, witness tampering, hindering his own apprehension or prosecution, and the certain persons offense.

The charges relate to an incident that occurred in the early morning hours of September 1, 2014, when Hoey was shot multiple times while standing outside his townhouse in North Brunswick smoking a cigarette. At 1:26 a.m., P.P.,[1] called 9-1-1, and an officer from the North Brunswick Police Department (NBPD) responded to the scene. Efforts to save Hoey's life were unsuccessful, and he died at 1:54 a.m. at the hospital.

Detective Bree Curran of the Middlesex County Prosecutor's Office (MCPO) arrived at Hoey's townhouse and, when canvassing the scene, discovered seven .45 caliber shell casings and six .45 caliber projectiles or

[1] Consistent with our previous opinion, we use initials to identify certain individuals to protect their privacy.

projectile fragments, later determined to have all been fired from the same gun. Detective Curran also photographed and collected three cigarette butts, one of which was the brand Hoey smoked, and which was still burning on the sidewalk when police arrived. All three cigarettes were sent for DNA testing, but the results did not match Hoey or defendant, nor did they match any individual in the Combined DNA Index System (CODIS).

Around 3:50 a.m., when defendant, who was known as "Universal," attempted to enter his townhouse located next door to Hoey's, Detective Robert Powell of the NBPD and Detective Gregory Morris of the MCPO asked him from where he was coming. Defendant said he had been with S.S., and later at a barbecue in Newark.

Defendant was in possession of two cell phones and, when requested, voluntarily provided police with the phones and associated numbers. Police later obtained cell phone records for one of the phones, and at trial the State called an expert who confirmed the accuracy of defendant's cell phone records. The expert also stated defendant's cell phone records revealed one of defendant's phones was in the area of Hoey's residence at 12:42 a.m. and 3:42 a.m., and in Clark, New Jersey, at 1:53 a.m.

On September 4, 2014, Powell interviewed S.S., who initially provided an alibi for defendant. Specifically, S.S. said she and defendant had gone to dinner the night before Hoey was murdered, and thereafter, went shopping for a car. Afterwards, she stated she and defendant stopped at a liquor store and at approximately 8:30 p.m., he left to go to a barbecue. At 10:50 p.m. S.S. told the police defendant called her and said he needed a ride home from Newark.

S.S. also stated she drove to Newark and picked up defendant and they went to her apartment in Rahway, arriving there shortly after midnight. S.S. informed the police between 12:30 a.m. and 1:00 a.m., defendant walked to a donut shop to get a coffee and called S.S. on his way to see if she wanted anything. S.S. stated at 3:15 a.m., she drove defendant to his townhouse in North Brunswick, which took twenty-five to thirty minutes.

On October 2, 2014, the police confronted S.S. with information they had obtained from defendant's cell phone records, and which contradicted S.S.'s version of events. Despite telling S.S. they did not believe she was telling the truth, S.S. initially repeated substantially the same story. Shortly thereafter, however, S.S. admitted her initial statement was false.

In her recanted statement, S.S. told detectives after she went to dinner with defendant, he left around 8:00 p.m. to go to the barbecue, and she did not

see him again until approximately 1:53 a.m., when he called and said, "open the door, I'm coming." S.S. testified defendant arrived at her apartment two or three minutes after he called her.

According to S.S., defendant entered her apartment and removed his shirt and placed it in a plastic bag. At his request, S.S. also retrieved a shoebox. S.S. also agreed to drive to his mother's house in Newark, where they drove in separate cars.

As they were driving through Irvington, defendant signaled for S.S. to pull over by flashing his high beams. They stopped behind a strip mall, and although S.S. did not see what defendant did when he got out of his car, she believed he threw the garbage bag and shoebox into a dumpster. They proceeded to Newark, where defendant parked his car at his mother's house and S.S. then drove defendant to his townhouse in North Brunswick. S.S. told the police she never saw a gun.

S.S. also informed the detectives she was aware defendant had a "run in" with Hoey, his neighbor, and as a result, the police came to defendant's home. Defendant told S.S. the incident had been "bothering him," but he had "taken care of" the problem. In addition, defendant told S.S. the police "ha[d] nothing on [him]" and "[t]hey're not going to find the gun." He urged her "to be strong"

and "go with the story." S.S. told the police she initially lied to them because she was scared of defendant who threatened her when he stated, "if I felt like you were telling on me or doing anything to get me jammed up, I would have [] killed you."

The State called S.S. as a witness at trial. She initially testified she did not recall providing a statement to the detectives, and later stated she could not remember previously what she told them. After conducting a Gross[2] hearing, the court permitted the State to introduce S.S.'s prior statement at trial.

P.P. testified regarding defendant's prior run in with Hoey. She stated approximately eleven months before Hoey was killed, defendant gave Hoey money and asked him to purchase money orders.

Officer James Karas of the NBPD provided further testimony regarding the counterfeit allegation. He stated on October 3, 2013, he arrested Hoey at a Walmart store and charged him with attempting to use ten counterfeit one-hundred-dollar bills to buy money orders. Hoey told Karas that "Universal" gave him the money and asked him to buy the money orders as a favor.

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[2] State v. Gross, 121 N.J. 1, 7-9 (1990).

Detective Michael Braun of the NBPD interviewed Hoey after Karas arrested him. Braun similarly testified that Hoey identified defendant as the person who gave him the counterfeit money and he showed Braun a text message in which defendant had asked him to purchase two $500 money orders at Walmart in exchange for "a gift."

Braun also testified that in October 2013, defendant's roommate consented to a search of the residence, but that the police did not locate any counterfeit money. When the roommate told defendant about the search, "[h]e wasn't happy," but she stated she never saw defendant with a gun or with counterfeit money and never observed any animosity between defendant and Hoey.

The State also called Dr. Alex Zhang, the Middlesex County assistant medical examiner, who performed Hoey's autopsy. It was Dr. Zhang's opinion Hoey was shot from a distance of more than three feet because there was no gunpowder stippling, soot, or muzzle imprints on Hoey's body. As such, Dr. Zhang explained the evidence did not indicate a "close range" or "intermediate range" shooting. On cross-examination, Dr. Zhang maintained none of the bullets that hit Hoey were fired from "within three feet," as "there was no evidence to indicate any shot . . . show[ed] [a] close range [shooting]," but

conceded he could not "definitely" say the bullets were fired from beyond three feet.

Dr. Zhang also stated Hoey had "small scratch injuries on [his] extremities," but there was "no way" for him to determine, one way or the other, if those injuries were defensive wounds. Finally, Dr. Zhang stated he discovered a hair on Hoey's hand which he submitted to investigating officers but was unsure it was tested for DNA.

Detective Curran also testified on behalf of the State. She was present at Hoey's autopsy and confirmed there was a hair found on Hoey's hand, but it was never tested, nor was there a request made to have the hair tested. Detective Powell stated based on the medical examiner's report, there was no evidence of a struggle between Hoey and the murderer.

Both parties' summations referenced the hair found on Hoey. Defendant's counsel highlighted its importance and argued the State's failure to test the hair for DNA demonstrated its "lack of investigation," as the possible defensive wounds on Hoey and the hair found in his hand indicated a struggle with a third-

party.[3] Defendant's counsel further argued the State could have tested the hair for DNA and compared it to the DNA from the cigarette but failed to do so.

The State responded by stressing there was "absolutely no evidence of a struggle" between Hoey and his murderer. The State further hypothesized either P.P. or Hoey's daughter could have "left a hair" on Hoey's hand, because they were "the two people who were touching him right after he was shot."

In February 2020, defendant filed a timely pro se PCR petition in which he argued his counsel was constitutionally ineffective under the well-recognized standard detailed in Strickland v. Washington, 466 U.S. 668, 687 (1984).[4] Defendant based his Strickland claim on trial counsel's failure to (1) perform an adequate pre-trial investigation of M.T., an alibi witness; (2) ascertain the credibility and mental state of witnesses; (3) object to prejudicial evidence; (4)

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[3] Defendant maintained at trial a third-party killed Hoey. For example, during summation, defendant's counsel referenced a man Hoey purchased drugs from, another individual who had come to Hoey's house thirteen days prior to the murder and yelled obscenities, including, "I'm going to kill you," and other individuals that visited Hoey's residence late at night as the possible perpetrators.

[4] To establish ineffective assistance of counsel, a convicted defendant must satisfy the two-part test enunciated in Strickland, 466 U.S. at 687, by demonstrating that: (1) counsel's performance was deficient, and (2) the deficient performance actually prejudiced the accused's defense. The Strickland test has been adopted for application under our State constitution in New Jersey. See State v. Fritz, 105 N.J. 42, 58 (1987).

challenge the admissibility of witness statements, evidence, or prior convictions; and (5) obtain forensic cell phone evidence.[5]

Defendant's PCR counsel filed a supplemental petition, arguing defendant's conviction "resulted from a substantial denial" of defendant's constitutional rights and should therefore be set aside, or, in the alternative, defendant should be granted an evidentiary hearing. Additionally, in June 2021, defendant filed a motion to compel DNA testing of the hair found on Hoey.

Defendant attached his own certifications to his supplemental petition, as well as certifications from his then-PCR counsel, and M.T. Both PCR counsel's and M.T.'s certifications included attached reports by investigators from the Office of the Public Defender (OPD) from July 30, 2015, and September 20, 2020, respectively.

Defendant's certifications stated, among other things, that prior to his first trial he informed his attorney he was with M.T. at the time of the murder and his

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[5] Before us, defendant limits his arguments to claims: 1) his trial counsel was ineffective in failing to investigate M.T., and 2) the PCR court improperly denied his motion to compel DNA testing. As he has failed to reprise the remaining ineffective assistance of counsel claims presented to the PCR court, we accordingly deem those unbriefed arguments waived. See Telebright Corp. v. Dir., N.J. Div. of Taxation, 424 N.J. Super. 384, 393 (App. Div. 2012) (deeming a contention waived when the party failed to include any arguments supporting the contention in its brief); Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2023) ("[A]n issue not briefed is deemed waived.").

attorney "told [him] since [he] didn't tell the police that in the beginning, the State wasn't going to believe [him] now." Defendant further certified his attorney in the second trial informed defendant "she wasn't going to call [M.T.] . . . as [his] alibi witness" after speaking with his first trial counsel.

Defendant's PCR counsel attested while in the process of reviewing defendant's file, she discovered the July 2015 OPD investigator's interview report which counsel attached to her certification. The 2015 report stated that on July 30, 2015, M.T. came to OPD for an interview because defendant identified her as an alibi witness. The report detailed that on the night of the murder, M.T. stated she met with defendant at a park at approximately 12:15 a.m. and they were in defendant's car from 12:15 a.m. until 12:45 a.m., during which their encounter "turned a bit romantic with touching and kissing."

M.T. stated defendant received a call on one of his two phones, and after answering the call, said, "[o]h shit, I have to go." M.T. described the call as urgent and unusual but she was unaware of who called defendant. The report stated M.T. "checked the time" when defendant left her, and she observed it was 12:45 a.m.

Defendant also submitted a certification from M.T., dated November 28, 2020. M.T.'s certification included an attached investigative report from

November 20, 2020, detailing a new interview between a different OPD investigator and M.T. from September 2020. The 2020 report explained in the most recent interview with M.T., she stated she was with defendant on September 1, 2014, in North Brunswick at a "dog park" from 1:15 a.m. until defendant left at 1:45 a.m., an hour later than the timeline in the statement memorialized by the first OPD investigator. M.T. explained she looked at the dashboard clock of the vehicle she was in when defendant arrived, and looked again when she got back into the vehicle to leave.

She also acknowledged she previously spoke with an OPD investigator in July 2015, but the "time frame indicated in [that] report . . . was wrong." M.T. hypothesized the investigator must have "misunderstood what she said or made a mistake and got the time frame wrong." M.T. stated she was not contacted for a follow-up interview or to review her report to "clarify any mistakes." M.T. also attested defendant's trial counsel failed to request she testify but would have if asked.

M.T. identified no other errors in the July 2015 OPD investigative report, other than the incorrect times she was purportedly with defendant. Additionally, as characterized by the PCR court, M.T. wrote a May 4, 2017 letter to the court

prior to sentencing in which she "admitted to having sat through the [defendant's] first trial."

With respect to defendant's motion to compel DNA testing of the hair found on Hoey's hand, defendant argued law enforcement ignored "important forensic evidence," and DNA testing should be ordered as defendant satisfied the requirements set forth in N.J.S.A. 2A: 84A-32a.[6] The State opposed both motions.

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[6] The statute permits "'any person who was convicted of a crime and is currently serving a term of imprisonment' to make a motion for DNA testing." State v. Hogue, 175 N.J. 578, 585 (2003) (alteration in original) (quoting N.J.S.A. 2A:84A-32a). A court "shall not grant the motion . . . unless" defendant satisfies the eight-prong test detailed in N.J.S.A. 2A:84A-32a(d):

> (1) the evidence to be tested is available and in a condition that would permit the DNA testing that is requested in the motion;
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> (2) the evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect;
>
> (3) the identity of the defendant was a significant issue in the case;
>
> (4) the eligible person has made a prima facie showing that the evidence sought to be tested is material to the issue of the eligible person's identity as the offender;

After considering the parties' written submissions and oral arguments, the PCR court denied defendant's PCR petition without an evidentiary hearing. The court also denied defendant's motion to compel DNA, concluding he failed to

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> (5) the requested DNA testing result would raise a reasonable probability that if the results were favorable to the defendant, a motion for a new trial based upon newly discovered evidence would be granted. The court in its discretion may consider any evidence whether or not it was introduced at trial;
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> (6) the evidence sought to be tested meets either of the following conditions:
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> (a) it was not tested previously;
>
> (b) it was tested previously, but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the offender or have a reasonable probability of contradicting prior test results;
>
> (7) the testing requested employs a method generally accepted within the relevant scientific community; and
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> (8) the motion is not made solely for the purpose of delay.
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> [N.J.S.A. 2A:84A-32a(d).]

meet all the statutory requirements of N.J.S.A. 2A:84A-32a, and explained its decision, as noted, in a written decision.

Regarding defendant's ineffective assistance of counsel claim, the PCR court concluded he failed to satisfy either the performance or prejudice prong of Strickland. As to the performance prong, the PCR court found, defendant's counsel investigated M.T. as an alibi witness, as evidenced by the existence of the July 30, 2015 OPD investigative report. It further reasoned counsel's decision not to call M.T. as a witness was a "reasonably strategic trial decision" as the 12:15 to 12:45 a.m. timeframe memorialized in the report did not establish an alibi because defendant would have had sufficient time to travel to Hoey's townhouse in North Brunswick, where he was shot around 1:26 a.m. Additionally, the PCR court reasoned trial counsel could have refrained from calling M.T. because her credibility would have been questioned based on her then-romantic relationship with defendant.

The PCR court also determined defendant failed to establish he was prejudiced by any error of his trial counsel, as M.T.'s statement she was with defendant from 1:15 to 1:45 a.m. at a North Brunswick park was contradicted by defendant's cell phone records, which placed him in Clark at 1:53 a.m., and

S.S.'s testimony which placed him at her apartment in Rahway two or three minutes later.

In denying defendant's motion to compel DNA testing, the PCR court limited its substantive analysis to prongs four and five of N.J.S.A. 2A:84A-32a(d) as the State conceded defendant satisfied the remaining criteria. It determined defendant failed to satisfy prong four because the DNA testing of the hair found on the victim would not exculpate him. As the PCR court explained, "the identity of the source of [the] hair [was] irrelevant," because there was no evidence that the shooting was at close range or there was a physical struggle.

The PCR court similarly found defendant failed to satisfy prong five of 2A:84A-32a(d). It determined, under the circumstances, DNA from the hair was not the type of evidence that would "tend[] to change the jury's verdict if a new trial is granted" and noted the jury was presented with similar DNA evidence, i.e., the cigarette butts, suggestive of third-party guilt, but nonetheless found defendant guilty. This appeal followed.

Before us, defendant argues:

> I. THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE THE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF TRIAL COUNSEL'S INEFFECTIVENESS

FOR FAILING TO ADEQUATELY INVESTIGATE AN ALIBI DEFENSE.

II. DEFENDANT'S MOTION TO COMPEL DNA TESTING OF THE HAIR FOUND IN THE VICTIM'S HAND SHOULD HAVE BEEN GRANTED.

In his first point, defendant contends the PCR court erred in denying his petition without an evidentiary hearing because his counsel was constitutionally deficient in failing to conduct an adequate investigation into M.T. as an alibi witness and maintains the PCR court improperly considered M.T.'s credibility. He also takes issue with the PCR court's challenge to M.T.'s alibi stressing his possible presence in Clark at 1:53 a.m. and in Rahway two or three minutes later does "not necessarily preclude his being with [M.T.] in North Brunswick from 1:15 to 1:45 a.m.," as it was possible to travel from North Brunswick to Clark in eight minutes. Defendant also claims his trial counsel's failure to obtain a signed certification from M.T. following her 2015 interview with OPD, review the report with M.T., or verify the truthfulness and accuracy of the report was "no less than an egregious omission." We disagree with all of these arguments.

II.

We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004). The de novo standard of review also applies to mixed questions of fact and law. Id. at 420. Where, as here, a PCR court fails to

conduct an evidentiary hearing, 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 421.

"With respect to both prongs of the Strickland test, a defendant asserting ineffective assistance of counsel on PCR bears the burden of proving [their] right to relief by a preponderance of the evidence." State v. Gaitan, 209 N.J. 339, 350 (2012); see also State v. Goodwin, 173 N.J. 583, 593 (2002). A failure to satisfy either prong of the Strickland standard requires the denial of a PCR petition. State v. Nash, 212 N.J. 518, 542 (2013); Fritz, 105 N.J. at 52.

"An ineffective assistance of counsel claim may occur when counsel fails to conduct an adequate pretrial investigation." State v. Porter, 216 N.J. 343, 352 (2013). This is because "counsel has a duty to make 'reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" State v. Chew, 179 N.J. 186, 217 (2004) (quoting State v. Savage, 120 N.J. 594, 618 (1990)).

If trial counsel "thoroughly investigate[d] law and facts, considering all possible options, his or her trial strategy is 'virtually unchallengeable.'" Savage, 120 N.J. at 617 (quoting Strickland, 466 U.S. at 690-91). "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety

of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Strickland, 466 U.S. at 688-89.

Further, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. "In evaluating a defendant's claim, the court 'must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.'" State v. Castagna, 187 N.J. 293, 314 (2006) (quoting Strickland, 466 U.S. at 690).

Regarding counsel's decision whether to call a trial witness, our Supreme Court has explained, "[d]etermining which witnesses to call to the stand is one of the most difficult strategic decisions any trial attorney must confront." State v. Arthur, 184 N.J. 307, 320 (2005). Indeed, determining which witnesses to call is an "art" and a court's review of that decision should be "highly deferential." Id. at 321 (quoting Strickland, 466 U.S. at 693). This deference extends to decisions about whether to present an alibi defense. State v. Drisco, 355 N.J. Super. 283, 291 (App. Div. 2002) ("Counsel's fear that a weak alibi could cause more harm than good is the type of strategic decision that should not be second guessed on appeal.").

Finally, an evidentiary hearing is not automatic. See State v. Preciose, 129 N.J. 451, 462 (1992). PCR courts should, however, grant an evidentiary hearing "to resolve ineffective assistance of counsel claims if a defendant has presented a prima facie claim in support of PCR and the facts supporting the claim are outside the trial record." State v. Cummings, 321 N.J. Super. 154, 170 (1999).

Against these legal principles and applying a de novo standard of review, we agree with the PCR court that defendant failed to establish either the performance or prejudice prongs of the Strickland test. It is undisputed after defendant informed his prior counsel that M.T. may be an alibi witness, he commissioned an investigator from the OPD to interview her. Based on the detailed multi-page report of that interview, it is clear from the record counsel reasonably determined M.T. could not serve an alibi witness as the report stated she was with defendant from 12:15 to 12:45 a.m. at a North Brunswick park, which would not exculpate defendant because he would have had sufficient time to travel to Hoey's residence in North Brunswick from the park before the murder occurred around 1:26 a.m.

Based on the record, we also reject defendant's argument his trial counsel was ineffective in not reviewing or confirming the investigative report with M.T.

Simply put, nothing in the July 2015 OPD report suggested the investigator erroneously recorded M.T.'s information nor do the PCR submissions support the proposition counsel was made aware, or reasonably should have been aware, any information in the July 2015 report was inaccurate, or that the reporting investigator was unreliable.

We note defendant cited no case, and our research similarly did not uncover any persuasive authority, in which counsel's failure to confirm an otherwise accurate investigative report with a witness, absent a reasonable basis to conclude information contained in the report was incorrect, or the reporting investigator unreliable, constituted ineffective assistance of counsel under Strickland. We also observe according to M.T.'s May 4, 2017 letter to the trial court, she was present in court during defendant's trial when the State established Hoey was shot around 1:26 a.m. Nothing in the PCR record suggests M.T. informed defendant's counsel of her revised timeline during trial.

Finally, we note, as did the PCR court, M.T.'s revised timeline does not address, let alone explain, the State's cell phone evidence, which placed defendant in Clark at 1:53, and S.S.'s testimony placing him at her Rahway apartment two or three minutes later. Defendant's claim S.S.'s testimony and his cell phone records "did not necessarily preclude his being with [M.T.] in North

Brunswick from 1:15 to 1:45 a.m., thereby leaving the alibi defense intact," is unsupported as there is nothing in the record to explain how defendant could have traveled from North Brunswick to Clark, a distance of approximately eighteen miles,[7] in eight minutes.

More precisely, defendant does not point to any evidence, either before us or in his PCR certifications, that would explain how he could have been in a North Brunswick park at 1:45 a.m. and in Clark at 1:53 a.m., and therefore we reject defendant's contentions on this point as nothing more than a bald assertion. See Nextel of N.Y., Inc. v. Bd. of Adjustment, 361 N.J. Super. 22, 45 (App. Div. 2003) (declining to consider plaintiff's conclusory claim as it was "not supported by any factual truth, much less substantial credible evidence in the record"). As defendant failed to establish a prima facie ineffective assistance of counsel claim under Strickland, the court was not required to conduct an evidentiary hearing. See Preciose, 129 N.J. at 462 ("[T]rial courts ordinarily should grant evidentiary hearings to resolve ineffective assistance of counsel claims if a defendant has presented a prima facie claim in support of [PCR].")

[7] See Google Maps, North Brunswick Township, NJ to Clark, NJ (last visited October 12, 2023).

III.

In defendant's second point, he argues the court's denial of his motion to compel DNA testing of the hair found on Hoey constituted an abuse of discretion as he satisfied all eight prongs of N.J.S.A. 2A:84A-32a(d). Defendant claims the hair was "momentous" to his defense because the "small injuries" found on the victim's body could not definitively be ruled out as defensive wounds, and the PCR court incorrectly concluded the State established there was no evidence of a physical struggle. Defendant also contends Dr. Zhang did not preclude the possibility of a close-range shooting.

Defendant further argues the DNA from the cigarette butt and the hair are distinguishable because the hair was found on Hoey, while the cigarette butt was found on the ground and could easily be characterized as "innocuous" as it was not located on Hoey's person and "yielded no relevant DNA results." Defendant also contends if the DNA testing of the hair failed to implicate defendant, it would in turn "exculpate defendant" by "raising a reasonable doubt" of third-party involvement as there was evidence presented to the jury of "unsavory characters" who possessed anger towards Hoey, as well as a motivation to harm him.

Relying on State v. Ways, 180 N.J. 171 (2004) and State v. Peterson, 364 N.J. Super. 387 (App. Div. 2003), defendant similarly argues he satisfied prong five, as the possible DNA from the hair sufficiently establishes defendant would be entitled to a new trial based on newly discovered evidence, as the results would satisfy the necessary requirements under State v. Carter, 85 N.J. 300, 314 (1981). Specifically, defendant argues this evidence would be material to the identity of Hoey's murderer, it was not previously discoverable based on his trial counsel's ineffectiveness by failing to request DNA testing, and the DNA results would likely change the jury's verdict. Again, we disagree.

A "trial court's decision regarding N.J.S.A. 2A:84A-32a is premised upon the court's judgment and discretion." State v. Armour, 446 N.J. Super. 295, at 306 n.4 (2016). The court's ruling is accordingly reviewed for an "abuse of discretion." Ibid. However, "our review of a trial court's legal determinations . . . is de novo." Ibid.

"It is defendant's burden to establish that all of the elements necessary for DNA testing have been fulfilled." Armour, 446 N.J. Super. at 311 (citing State v. Peterson, 364 N.J. Super. 387, 392-93 (App. Div. 2003)). A defendant may satisfy prong four when the forensic evidence in question was used in identifying defendant as the offender. See Peterson, 364 N.J. Super. at 392-394. Relevant

to prong five, "[t]o be entitled to a new trial based on newly discovered evidence, a defendant must demonstrate that the new evidence is: '(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.'" DeMarco, 387 N.J. Super. 596, 516 (2006) (quoting Carter, 85 N.J. at 314). "[T]he test to be satisfied under a newly discovered evidence approach is . . . stringent." Carter, 85 N.J. at 314. "[A]ll three prongs of that test must be satisfied before a defendant will gain the relief of a new trial." State v. Ways, 180 N.J. 171, 187 (2004).

"[E]vidence that supports a defense, such as alibi, third-party guilt, or a general denial of guilt would be material" under the first prong of the Carter test, where the focal issue at trial is the identity of the perpetrator. Ways, 180 N.J. at 188. In particular, DNA testing showing that another person was the source of the crime scene evidence attributed to defendant would be "material to the issue [of the perpetrator's identity] and not merely cumulative or impeaching or contradictory." Peterson, 364 N.J. Super. at 398 (brackets in original) (citations omitted). DNA test results that "not only tend[] to exculpate defendant but to implicate someone else" would qualify as proof of the type "that would probably

change the jury's verdict if a new trial were granted." Id. at 398-99 (citations omitted); see also DeMarco, 387 N.J. Super. at 517.

Having carefully reviewed the arguments in light of the record and applicable legal principles, we disagree with defendant's contention the PCR court abused its discretion in denying his application for DNA testing of the hair. The evidence in this case did not suggest Hoey was shot at close range or struggled with his killer, and there was nothing in the record to suggest the hair found on Hoey's hand was attributable to the shooter. Unlike in Peterson, where the DNA to be tested was "one of the primary components of the State's overwhelming evidence," the State in this case did not present the hair as evidence of defendant's guilt. 364 N.J. Super. at 387. We also note, other physical evidence from the scene, namely three cigarette butts, were tested for DNA, and returned no matches for defendant or any other individual in the CODIS system. The State's identification of defendant as the shooter was based on evidence of his conduct prior to and following the shooting, and not on physical evidence recovered from the scene.

Additionally, we disagree the PCR court abused its discretion in finding defendant failed to satisfy prong five of the statute as defendant failed to satisfy the Carter test, and thus failed to establish a reasonable probability a new trial

would be granted even if the hair yielded favorable DNA results. Unlike in Ways, where the Supreme Court held newly discovered evidence implicating an identified third-party was sufficient to create reasonable doubt with respect to an essential aspect of the State's case such that a new trial was ordered, no such evidence or reasonable doubt exists here. In Ways, the evidence the court found engendered reasonable doubt included the identified third-party's attempt to dispose of a murder weapon, evidence linking the third-party to the murder weapon, and a third-party's confession to the murder. 180 N.J at 197.

As noted, we are satisfied on the current record defendant did not establish the hair as material to the identity of Hoey's killer, as the evidence presented at trial did not suggest Hoey was shot within three feet or engaged in a struggle. Even if material, defendant also failed to establish, as required by Carter, the evidence was not discoverable by reasonable diligence prior to trial. 85 N.J. at 314. Indeed, it is clear from the record defendant and counsel were aware of the hair and the State's failure to submit it for DNA testing, as defense counsel referenced it in her summation. Finally, even if we were to indulge defendant's contention he satisfied prongs one and two of the Carter test, we are convinced defendant failed to establish the evidence was "of the sort that would probably change the jury's verdict if a new trial was granted," as the jury was aware of

the untested hair, the cigarette butts originating from someone other than Hoey or defendant, and defendant's third-party guilt theme, and nonetheless found him guilty. Ibid.

Affirmed.