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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1829-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN DEROSA, a/k/a
JOHNNIE B DEROSA,
JOHNNY DEROSA,
SELVIO URIBE,
JOHNNYBOY,
JOHNIE DEROSA,
NICHOLAS DEROSAJOHN,
JOHNNY BO DEROSA,

Defendant-Appellant.

Submitted June 7, 2023 – Decided July 11, 2023

Before Judges Mayer and Enright.

On appeal from the Superior Court of New Jersey, Law
Division, Hudson County, Indictment No. 10-06-1170.

Joseph E. Krakora, Public Defender, attorney for
appellant (Anthony J. Vecchio, Designated Counsel, on
the brief).

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Meagan E. Free, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant John DeRosa appeals from a December 16, 2021 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm, substantially for the reasons set forth in Judge Patrick J. Arre's thoughtful and comprehensive written opinion.

I.

The underlying facts of this matter are outlined in our unpublished opinion from defendant's direct appeal. See State v. DeRosa, No. A-3169-16 (App. Div. July 3, 2019) (slip op. at 1-26). Therefore, we need only summarize those facts to give context to our opinion.

On the morning of August 18, 2009, defendant and his two co-defendants, Edmir Sokoli and Elvis Feratovic, robbed a jewelry store in Kearny owned by a married couple. They waited until the husband stepped out of the store before entering and were surprised to find the wife was not alone, as her son also was present. Defendant warned the pair to stay put as Sokoli stuffed jewelry into a bag. When the son moved towards defendant, defendant fatally shot him four times, striking him in the head, torso, and leg.

Judge Arre presided over defendant's 2016 jury trial. Feratovic testified defendant planned the robbery and was armed. Sokoli testified he saw defendant shoot the owners' son. Additionally, a bystander testified they saw a man run out of the jewelry store at the time of the robbery who matched defendant's description.

The State's ballistics expert opined the "four discharged cartridge casings . . . recovered from [the crime] scene were, in fact, fired from one particular firearm." The expert also identified three of the four projectiles recovered from the scene as nine-millimeter projectiles, stating "they were all discharged from one particular nine-millimeter firearm." He identified the fourth projectile as a member of the "38 class" of projectiles, which includes nine-millimeter projectiles.

After a jury found defendant guilty of: first-degree murder, N.J.S.A. 2C:11-3(a)(1) (count one); first-degree felony murder, N.J.S.A. 2C:11-3(a)(3) (count two); first-degree robbery, N.J.S.A. 2C:15-1 (count three); second-degree possessing a handgun without a permit, N.J.S.A. 2C:58-4 (count four); and second-degree possessing a handgun with unlawful purpose, N.J.S.A. 2C:39-4

(count five),¹ Judge Arre sentenced him to a life term on the murder count and to concurrent terms of twenty years for armed robbery and ten years for unlawful possession of a weapon. Pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2(d)(1), defendant's parole ineligibility period was sixty-three years and nine months.

Defendant appealed from his conviction and sentence, arguing, in part, the trial court erred in "denying [his pretrial] application for a private investigator" because the staff investigator from the Office of the Public Defender (OPD) was unable to pursue essential avenues of investigation. DeRosa, slip op. at 24. We considered defendant's claim that he was denied investigatory resources "under the same standard governing claims of ineffective assistance of counsel." Id., slip op. at 24-25. Based on the two-pronged test under Strickland v. Washington, 466 U.S. 668, 687 (1984), we determined "[d]efendant . . . made only conclusory claims about the inadequacy of the OPD investigator, and . . . provided no detail as to the investigative steps a private investigator would have taken, let alone provided evidence that such an investigation would have produced evidence that could have affected the trial result." Id., slip op. at 25.

¹ The record reflects all other counts against defendant were dismissed prior to or during the trial.

In July 2020, defendant filed a PCR petition. One of the arguments he raised was that trial counsel was ineffective for failing to file an emergent interlocutory appeal after the trial court denied defendant's request for a private investigator. Defendant also argued trial counsel was ineffective because he failed "to retain a ballistics/firearm expert."

Judge Arre heard argument on defendant's petition in October 2021. On December 16, 2021, he issued an order, denying the petition without an evidentiary hearing.

In a written opinion accompanying the December 16 order, the judge found defendant did not demonstrate trial counsel "was deficient by failing to file an emergent application with the Appellate Division or that [he] deficiently performed investigative and expert services." Judge Arre also concluded defendant's "claim that counsel was ineffective for failing to file an emergent application with the Appellate Division" regarding the need for investigative services was "procedurally barred by R[ule] 3:22-5"² because there was "no significant distinction between the issues raised on [direct] appeal and the

² Rule 3:22-5 provides: "[a] prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any post-conviction proceeding brought pursuant to this rule or prior to the adoption thereof, or in any appeal taken from such proceedings."

issues" raised in his PCR petition. Nevertheless, the judge addressed the merits of this argument. Citing Strickland, the judge added that defendant "fail[ed] to present any new articulable facts or identifiable acts or omissions that would permit this [c]ourt to find that counsel . . . acted outside the wide range of professionally competent assistance." The judge concluded, "[defendant's] assertions about the OPD are conclusory and do not support a claim for ineffective assistance of counsel."

As to defendant's contention that trial counsel was ineffective for failing to "investigate and consult with a ballistics expert," Judge Arre found, even if defendant had shown trial counsel's representation was deficient, he still failed "to establish that the results of the proceeding would have been different." The judge further concluded defendant "fail[ed] to submit any facts that a ballistic investigation would have revealed" and did not "provide affidavits or certifications" to support his contention. Judge Arre added:

[Defendant did] not provide any proof that his requests for experts were denied, nor [did] he provide any proof that experts were not in fact retained. Specifically, [defendant] provides no proof that [the firearms expert trial counsel requested] was not retained by trial counsel and issue[d] an opinion in his case.

Most notably, [defendant] also fails to establish how additional expert testimony would have countered the State's expert or "call[ed] into question the

credibility of co-defendant Sokoli's testimony that only one gun was used and that it was shot by . . . [defendant]." [Defendant] inaccurately claims that [the State's ballistics expert] testified that the fourth projectile was a .380 caliber bullet. Rather, [the expert] testified that the fourth projectile was a member of the "38 class" of projectiles, which includes nine-millimeter projectiles.

. . . .

[Defendant] has failed to provide any reports, affidavits, or certifications from any of the cited experts that counter[] any of the State's evidence. Most importantly, without any evidence beyond bare allegations, or any proposed facts that an investigation may have revealed, [defendant] fail[ed] to establish the second prong of an ineffective assistance of counsel claim [under Strickland] because he has not demonstrated a reasonable probability that counsel's alleged deficient performance would have led to a different outcome. Therefore, [defendant] fails to show that trial counsel was ineffective in conducting expert services.

Finally, the judge found defendant

fail[ed] to show the existence of any credible evidence that lies outside the record that would support a prima facie claim for ineffective assistance of counsel. Because [defendant] fail[ed] to establish a prima facie case of ineffective assistance of counsel, there does not exist a "reasonable likelihood" of success under the Strickland test. Accordingly, [he] is not entitled to an evidentiary hearing.

II.

On appeal, defendant raises the following arguments:

POINT I

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE AN EMERGENT INTERLOCUTORY APPEAL CONCERNING ANCILLARY INVESTIGATIVE AND EXPERT SERVICES.

A. INVESTIGATIVE SERVICES.

B. EXPERT WITNESSES.

POINT II

THE PCR COURT ERRED IN NOT GRANTING DEFENDANT AN EVIDENTIARY HEARING.

We review the legal conclusions of a PCR court de novo, but generally defer to its factual findings when those findings are "supported by adequate, substantial and credible evidence." State v. Harris, 181 N.J. 391, 415 (2004) (citation omitted). When an evidentiary hearing has not been held, we may conduct a "de novo review of both the factual findings and legal conclusions of the PCR court." Id. at 421. Further, we review a trial court's decision to deny a PCR petition without an evidentiary hearing for an abuse of discretion. State v. Preciose, 129 N.J. 451, 462 (1992).

To succeed on an ineffective assistance of counsel claim, a defendant must satisfy the two-prong test enunciated in Strickland. 466 U.S. at 687. Under the

first Strickland prong, a defendant must show counsel's performance "fell below an objective standard of reasonableness" and "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687-88. "The quality of counsel's performance cannot be fairly assessed by focusing on a handful of issues while ignoring the totality of counsel's performance in the context of the State's evidence of defendant's guilt." State v. Castagna, 187 N.J. 293, 314 (2006) (citing State v. Marshall, 123 N.J. 1, 165 (1991)).

To satisfy the second Strickland prong, a defendant "must show that the deficient performance prejudiced the defense." 466 U.S. at 687. There must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

A defendant is entitled to an evidentiary hearing only after establishing a prima facie case supporting the PCR claims, meaning a "defendant must demonstrate a reasonable likelihood that [the PCR] claim will ultimately succeed on the merits." State v. Marshall, 148 N.J. 89, 158 (1997). Generally, courts only hold an evidentiary hearing if there are disputed issues as to material facts, but "if the court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to post-conviction

relief . . . then an evidentiary hearing need not be granted." Ibid. (citations omitted). See State v. Pyatt, 316 N.J. Super. 46, 51 (App. Div. 1998).

To be entitled to a hearing, a petitioner "must do more than make bald assertions that he was denied the effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). The mere raising of an ineffective assistance of counsel claim does not in itself entitle a petitioner to an evidentiary hearing. See Preciose, 129 N.J. at 462. See also State v. Porter, 216 N.J. 343, 355 (2013) (quoting Cummings, 321 N.J. Super. at 170) (stating that "when a petitioner claims his trial attorney inadequately investigated his case, he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification").

It also is well established that a PCR petition is not "an opportunity to relitigate cases already decided on the merits." Preciose, 129 N.J. at 459; see also R. 3:22-5.

Guided by these principles, we perceive no basis to disturb Judge Arre's finding that defendant's trial counsel was not ineffective for failing to file an emergent interlocutory appeal challenging the trial court's denial of his motion to compel the OPD to pay for a private investigator. Likewise, we concur with

Judge Arre's conclusion that defendant failed to satisfy either prong of the Strickland test. Accordingly, no evidentiary hearing was warranted. Preciose, 129 N.J. at 462.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION