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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2150-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EDWIN JIMENEZ, a/k/a
EDWIN ANTONIO JIMENEZ,
and SURIEL ADAN
CUBENO-JIMENEZ,

Defendant-Appellant.

Submitted November 9, 2022 – Decided March 8, 2023

Before Judges Messano and Gummer.

On appeal from the Superior Court of New Jersey, Law
Division, Passaic County, Indictment No. 12-08-0637.

Adam W. Toraya, attorney for appellant.

Camelia M. Valdes, Passaic County Prosecutor,
attorney for respondent (Ali Y. Ozbek, Assistant
Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Edwin Jimenez appeals from an order denying his post-conviction relief (PCR) petition after oral argument but without an evidentiary hearing. Because defendant failed to establish a prima facie showing of ineffective assistance of counsel, we affirm.

In 2012, defendant in a recorded statement confessed to shooting three people, two of whom died as a result. In 2015, a jury convicted defendant of two counts of passion/provocation manslaughter, N.J.S.A. 2C:11-4(b)(2), as a lesser included offense of murder, N.J.S.A. 2C:11-3(a); second-degree aggravated assault, N.J.S.A. 2C:12-1(b), as a lesser-included offense of attempted murder, N.J.S.A. 2C:5-1 and 2C:11-3(a); three counts of second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1); second-degree illegal possession of a handgun, N.J.S.A. 2C:39-5(b)(1); and second degree possession of a firearm by certain persons prohibited from having such weapons, N.J.S.A. 2C:39-7(b). The judge imposed three consecutive nine-year terms of imprisonment on the manslaughter and aggravated assault convictions, each subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, and a consecutive eight-year term of imprisonment, with a five-year period of parole ineligibility, on the certain-persons conviction.

In his direct appeal, defendant argued, among other things, that the trial court had erred in not suppressing a confession he had made to police, the prosecutor had engaged in multiple acts of misconduct, his sentence was excessive, the trial court erred in its jury instruction on aggravated assault (serious bodily injury), and the judgment of conviction contained an error. We affirmed defendant's convictions and sentence and remanded only for a correction of the judgment of conviction. State v. Jimenez, No. A-0117-15 (App. Div. June 18, 2018). The Supreme Court denied defendant's petition for certification. 236 N.J. 377 (2019).

Defendant, representing himself, submitted a petition seeking PCR. Defendant was assigned PCR counsel, who submitted an amended PCR petition and several supporting briefs. In a decision placed on the record after hearing oral argument, the PCR court found defendant had failed to establish either of the two required prongs of Strickland v. Washington, 466 U.S. 668, 687 (1984). Because defendant had failed to establish a prima facie case of ineffective assistance of counsel, the court held he was not entitled to an evidentiary hearing on his petition. Finding defendant had had effective assistance of counsel and that the evidence against him was "overwhelming," the court denied his petition and issued an order memorializing that decision.

In appealing the denial of his PCR petition, defendant argues:

THE POST-CONVICTION RELIEF COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL.

Defendant expressly contends he was entitled to an evidentiary hearing because he had established a prima facie case that trial counsel was ineffective in failing to (1) "present evidence that defendant was substantially shorter than the suspect identified by the witnesses at the scene"; (2) "to cross-examine [witness A.M.]¹ on his criminal background"; (3) "to request a postponement after it was discovered that the State was providing favors in return for his testimony at trial"; (4) "to object to the State's failure to advise him of the favors they were providing [A.M.] for his testimony"; (5) "to object to the jury hearing the defendant's recorded statement where his immigration status as not being a United States citizen was revealed"; (6) "to object to the jury hearing the defendant's recorded statement where he is threatened with deportation"; (7) "to object to the portion of the defendant's statement where the interrogator opines

¹ We use initials consistent with our opinion on defendant's direct appeal.

that defendant is lying"; (8) "to seek a Wade hearing after [A.M.] was shown only one photograph of defendant in order to make his identification"²; (9) "to object to the testimony of [the witness] where he stated he did not sign the photograph of defendant because he was afraid"; (10) "to explain to defendant[] he had a right to testify at his Miranda hearing"³; and (11) "to file a motion to suppress evidence obtained after an illegal stop of the vehicle when defendant was arrested."

We review the PCR court's legal and factual determinations de novo because it rendered its decision without an evidentiary hearing. State v. Aburoumi, 464 N.J. Super. 326, 338-39 (App. Div. 2020). We review under an abuse-of-discretion standard the PCR court's decision to proceed without an evidentiary hearing. State v. L.G.-M., 462 N.J. Super. 357, 365 (App. Div. 2020). A court views "the facts in the light most favorable to the defendant" when "determining the propriety of conducting an evidentiary hearing" on a PCR petition. State v. Jones, 219 N.J. 298, 311 (2014).

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate: (1) "counsel made errors so serious that counsel was not

² United States v. Wade, 388 U.S. 218 (1967).

³ Miranda v. Arizona, 384 U.S. 436 (1966).

functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and (2) "the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687 (quoting U.S. Const. amend. VI); State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the Strickland two-prong test in New Jersey); see also State v. Gideon, 244 N.J. 538, 550-51 (2021) (describing the two required prongs under Strickland). "Prejudice is not to be presumed The defendant must 'affirmatively prove prejudice.'" Gideon, 244 N.J. at 551 (quoting Strickland, 466 U.S. at 693). A failure to make an unsuccessful argument does not constitute ineffective assistance of counsel. State v. Echols, 199 N.J. 344, 365 (2009). Bare assertions are "insufficient to support a prima facie case of ineffectiveness." State v. Blake, 444 N.J. Super. 285, 299 (App. Div. 2016) (quoting State v. Cummings, 321 N.J. Super. 154, 171 (App. Div. 1999)).

A petitioner for PCR is not automatically entitled to an evidentiary hearing. State v. Porter, 216 N.J. 343, 355 (2013); see also L.G.-M., 462 N.J. Super. at 364 ("[M]erely raising a claim for PCR does not entitle a defendant to an evidentiary hearing."). A court should conduct an evidentiary hearing on a PCR petition only if the petitioner establishes a prima facie case in support of PCR, material issues of disputed fact cannot be resolved by reference to the

existing record, and an evidentiary hearing is necessary to resolve the claims for relief. Porter, 216 N.J. at 354 (citing R. 3:22-10(b)); see also State v. Preciose, 129 N.J. 451, 462 (1992) (PCR court should grant an evidentiary hearing "if a defendant has presented a prima facie claim in support of post-conviction relief"). Allegations that are "too vague, conclusory, or speculative" do not merit an evidentiary hearing. State v. Marshall, 148 N.J. 89, 158 (1997). Defendant did not meet that standard.

In faulting trial counsel for failing to present evidence of defendant's height to refute the testimony of a witness who had compared his own height to the height of the shooter he had observed, defendant fails to explain how that evidence would have altered the result of the trial. As the PCR court found, the description by that witness "would not have been . . . significant" given that "[i]dentification was not an issue" because defendant had confessed to the shootings and another witness had identified him as the shooter. Moreover, trial counsel in summation argued about the height discrepancy to the jury, who had the opportunity to observe defendant and the witness.

With regard to A.M., defendant faults trial counsel for not cross-examining A.M. regarding his criminal background, specifically a pending charge regarding possession of marijuana; not requesting a postponement when

it was disclosed the State was considering providing "favours" to A.M.; and not objecting to the State's failure to advise him of the "favours" it was providing to A.M. Those arguments are based on pure conjecture about why A.M. decided to be a cooperating witness for the State and are not supported by the record. The assistant prosecutor disclosed on the record at trial that over the lunch break A.M. had asked what might "be done to help protect him and his family" and that "the powers that be are working on things while we're up in court." The "things" specifically referenced by the assistant prosecutor were a "hotel stay and State intervention on relocation." As the trial court found, "we don't have anything else formulated . . . he hasn't been given anything yet, because they don't even know what they can give him, if anything." The trial court permitted cross-examination on what A.M.'s expectations were, whether he was looking for something from the State, and what he wanted in exchange for his testimony but recognized strategically defendant may not want to engage in that line of questioning: "On one hand you can make the argument that this guy is testifying favorably because he's looking for something. But at the same time it's only going to emphasize the fact that he is frightened and what he's looking for is some kind of an assurance of protection."

Nothing in the record indicates the State suppressed any evidence. The assistant prosecutor could not disclose a deal that didn't exist or an offer that hadn't been made. Nothing indicates the trial court would have granted an adjournment request or that an adjournment would have had any impact on the outcome of the trial. And nothing indicates trial counsel's decision not to question A.M. regarding his pending charges or whether he sought something in exchange for his testimony was anything more than a reasonable strategic decision by counsel. State v. Pierre, 223 N.J. 560, 578-79 (2015) (finding "[a]n attorney is entitled to a 'strong presumption' that he or she provided reasonably effective assistance, and a 'defendant must overcome the presumption that' the attorney's decisions followed a sound strategic approach to the case." (quoting Strickland, 466 U.S. at 689)).

In his argument regarding references in his recorded statement to his immigration status and a threat of deportation, defendant mischaracterizes what was said. Defendant was not threatened with deportation but was told he would not be deported. Moreover, defendant does not address how these references impacted the outcome of the trial, other than assuming they had "the capability of appealing to the passions and pre-conceived beliefs in the minds of the jurors." Even though defendant had confessed to being the shooter, the jury did

not convict him of murder or attempted murder but of the lesser-included offenses of manslaughter and aggravated assault. With that verdict and given the totality of the evidence demonstrating defendant's guilt, we find no merit to the argument the jury was somehow inflamed by that deportation reference or that the reference impacted the ultimate outcome of the trial.

Defendant's argument regarding trial counsel's failure to object to the inclusion of the detective's comment about defendant lying during his recorded statement is also without merit. The PCR court appropriately distinguished this case from State v. Tung, 460 N.J. Super. 75 (2019), and recognized that the trial court's rulings made clear the detective could not speculate as to what was in defendant's mind. Defendant does not address how the detective's comments could have prejudiced his case given that defendant confessed to being the shooter thirty-two minutes into his interrogation.

Defendant faults trial counsel for not seeking a Wade hearing challenging the admissibility of A.M.'s identification of defendant when he was shown a single photograph and for not objecting to A.M.'s testimony that he had not signed the photograph because he "fear[ed] for [his] life." The PCR court correctly held that showing A.M. defendant's photograph was "confirmatory." See State v. Pressley, 232 N.J. 587, 592-93 (2018) (finding "[a] confirmatory

identification occurs when a witness identifies someone he or she knows from before but cannot identify by name" and "is not considered suggestive"). A.M.'s testimony makes clear he did not identify defendant as the shooter by recognizing him in the photograph a detective had shown him; he identified him as the shooter because he had known defendant since high school. Ignoring that clear testimony, defendant fails to demonstrate a motion for a Wade hearing had a likelihood for success or how, even if successful, it would have mattered given defendant's confession. See Echols, 199 N.J. at 365.

Defendant contends trial counsel should have objected to A.M.'s statement about fearing for his life because it "implied there was other information, not presented to the jury, that [d]efendant was someone to be feared" and had the "ability to cause the jury to speculate as to the reason why [A.M.] was afraid of [d]efendant." The jury heard A.M.'s testimony identifying defendant as the person who had shot three people, killing two of them. A.M.'s reason for fearing for his life was obvious, and his statement did not imply the existence of other undisclosed information about defendant.

As the PCR court recognized, defendant's bald assertion that trial counsel failed to explain he had a right to testify at the Miranda hearing is belied by the record. In defendant's presence on the record, trial counsel stated he had had a

conversation with defendant and "[w]e're aware of the fact that [defendant] could take the stand . . . for the limited purpose of the Miranda [hearing]." He represented to the court defendant had "elected to exercise his right to remain silent" With the assistance of a translator, the trial court asked defendant a series of questions to ensure he had been advised of and understood his right to testify at the hearing.

THE COURT: Okay. Let me just ask Mr. Jimenez questions. Mr. Jimenez, did you understand what your attorney just said, sir?

DEFENDANT: Yes.

THE COURT: And do you understand that right now we are conducting this hearing so that I can determine whether or not the statement that you allegedly gave to the police is going to [be] admissible in the trial, do you understand that?

DEFENDANT: Yes, I understand.

THE COURT: And for the purposes of this hearing, if you wish to testify and provide additional information to the court, you would certainly have that right, do you understand that?

DEFENDANT: Yes, I understand.

THE COURT: And it's my understanding that after you have consulted with your attorney, a decision has been made for you not to testify at this hearing; is that correct, Sir?

DEFENDANT: Yes.

THE COURT: And this was a decision that you have voluntarily made, and knowingly made after you have consulted with your attorney, is that correct?

DEFENDANT: Yes.


Defendant's responses to the trial court were clear and direct and do not support his contention he is entitled to an evidentiary hearing on this issue.

Asserting a handgun recovered during a motor-vehicle stop was not in plain view, defendant faults trial counsel for not moving to suppress the evidence obtained from the motor-vehicle stop. The PCR court held "[a]ny motion to suppress the evidence because of an unlawful stop would not have been . . . successful" and "[d]efense counsel was not ineffective for not filing a motion which would not have been successful." We discern no basis to disturb those findings.

A PCR petition that is based on speculation, bald assertions, and arguments that are unsupported or contradicted by the record and that fails to address how the alleged deficiencies of trial counsel prejudiced defendant's case does not merit an evidentiary hearing. That is what we have here. Accordingly, we affirm the PCR court's denial of defendant's petition.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION