SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2254-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAVID BAKER,

Defendant-Appellant.

Submitted December 19, 2022 – Decided May 15, 2023

Before Judges Whipple, Smith, and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 13-02-0100.

Joseph E. Krakora, Public Defender, attorney for appellant (Amira R. Scurato, Designated Counsel, on the brief).

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Marc A. Festa, Chief Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant David Baker appeals from the November 16, 2020 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. Following our review of the record and applicable legal principles, we affirm.

I.

We glean the following facts from our prior opinion on defendant's direct appeal, State v. Baker, A-5307-15T3 (App. Div. Nov. 21, 2018) (slip op. 2-3), and from the record. At around 10:00 p.m. on August 25, 2012, two eyewitnesses observed a truck driven by defendant enter an intersection and strike a pedestrian. Police responded to the scene, identified defendant as the driver of the truck. An officer smelled alcohol on his breath and believed he was intoxicated. An open container of brandy was also seen in the center console of defendant's truck. Defendant failed the field sobriety tests and was transported to police headquarters where an Alcotest was administered, which revealed defendant had a .28 blood alcohol content (BAC).

The next day, defendant waived his Miranda[1] rights and acknowledged he had a few drinks at a park after work. Defendant stated he was driving home when he approached the intersection, turned left, and struck the victim after she

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

stepped in front of his vehicle.[2] The victim succumbed to her injuries and died two days later. Defendant was indicted for second-degree death by auto, N.J.S.A. 2C:11-5(b), and received summonses for driving while intoxicated, N.J.S.A. 39:4-50, and possessing an open container of alcohol in a motor vehicle, N.J.S.A. 39:4-51b(a).[3]

At a pre-trial hearing on September 29, 2015, defense counsel advised the court defendant was requesting a bench trial because he wanted to advance two legally inconsistent defenses. Defense counsel further indicated he advised defendant not to testify at trial. Specifically, in addressing these issues with the trial judge, counsel stated:

> [I]t's been our advice to [defendant] to proceed strictly on the . . . issue of recklessness and not on the issue of identification.
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> . . . .
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> [Defendant] . . . strongly feels that he wants the issue of identification, and he . . . strongly feels that he wants the opportunity to explain in testimony why it was not him that struck this woman.
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> . . . .

[2] Defendant would later recant his confession at trial.

[3] The open container charge was dismissed at sentencing.

> And he has the right to that, and even though it was not my advice to him to proceed in that manner, I am his attorney and so I will advocate zealously on his behalf regardless of whatever ultimate choice he makes. And that includes if he's going to take the witness stand. But either way, for him to . . . have that defense, which is . . . an identification defense, the only witness that we have is [defendant].[4]

A bench trial proceeded, and the judge heard testimony from the two eyewitnesses, the arresting officers, the medical examiner, and defendant. Defendant testified the victim was already lying on the ground when he arrived at the accident scene and he ran back to his vehicle to call 9-1-1.[5] Defendant testified he only admitted to hitting the pedestrian during his police interview to "go along with the lie until [he found] out what [their] aim [was,]" and because the police knew it was not him "but . . . were going to do so much with their

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[4] On October 1, 2015, in addressing defendant's request to waive a jury trial, the trial judge questioned defendant and found him to be "cogent, rational, unpressured, relaxed, knowing[,] and voluntary in his actions . . . ." Defendant stated he sought a bench trial because he thought a judge could understand and listen better and indicated he spoke to his counsel, signed the appropriate form, and acknowledged he understood the differences between a jury trial and bench trial.

[5] Defendant additionally testified he saw two cars already in the intersection when he arrived, which then drove off when defendant exited his vehicle and that a Jeep left the area before defendant even entered the intersection. He stated it looked like the same Jeep—carrying the two witnesses who testified against him—came back after he got out of his truck.

investigation to prove that it was [him]." Defendant stated he merely went along with the detective's questions because he felt the evidence would show he had nothing to do with it.

The trial judge determined defendant's testimony was not credible[6] and ultimately found him guilty of all charges. We affirmed the trial court's decision on defendant's direct appeal and declined to consider defendant's ineffective assistance claims because of the insufficient record.[7]

Defendant filed a verified PCR petition on November 13, 2019, and subsequently submitted a certification in support thereof. Defendant argued his

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[6] The trial judge noted:

> [Defendant's] initial formal statement is found to be credible for several reasons. It was given with minimal time available to contrive an elaborate defense of the kind [defendant] set forth years afterward with the benefit of discovery . . . . Also, as mentioned, [defendant's] initial recollection of the position of the body is exactly consistent with the reports of the eyewitnesses and is further corroborated by the blood evidence on scene (pooling at the point of impact) and injuries to the left side of [the victim's] head. . . . [Further,] defendant expresse[d] genuine remorse for his actions and [took] responsibility . . . .

[7] The Supreme Court denied defendant's petition for certification on June 3, 2019.

trial counsel rendered ineffective assistance based on his failure to prepare defendant for trial, share discovery with defendant, and retain a handwriting expert. He further asserted ineffective assistance of appellate counsel for failing to consult with defendant and not addressing the issues he wanted on direct appeal.

The PCR judge[8] issued a written opinion, discussed more fully below, denying defendant's application without an evidentiary hearing and finding defendant failed to establish "a prima facie reasonable probability that . . . there was a deficient performance of counsel, [or] that counsel did or failed to do that [which] would have changed the outcome of trial."

II.

Defendant raises the following points on appeal:

> POINT I
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> THE PCR COURT ERRED IN DENYING . . . DEFENDANT'S PETITION FOR [PCR] WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL AND APPELLATE COUNSEL.
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> A. Trial and Appellate Counsel Failed in Their Duty to Protect Defendant's Legal Interests.

[8] The same judge presided over the bench trial.

B. The PCR Judge Erred in Failing to Conduct an Evidentiary Hearing to Fully Explore Defendant's Claims and his Bias Requires a New Judge to Conduct the Hearing.

More particularly, defendant argues trial counsel was ineffective by failing to: apprise defendant of the status of the case by providing adequate consultations; share all discovery with defendant; prepare him to decide whether to testify and prepare him for his testimony; and retain a handwriting expert. Defendant claims appellate counsel was ineffective for failing to raise arguments urged by defendant and failing to maintain adequate contact with defendant. We are unpersuaded by defendant's contentions.

III.

We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). The de novo standard also applies to mixed questions of law and fact. Ibid. Where an evidentiary hearing has not been held, we "conduct a de novo review of both the factual findings and legal conclusions of the PCR court . . . ." Id. at 421.

To succeed on a claim of ineffective assistance of counsel, a defendant must establish both prongs of the test set forth in Strickland v. Washington, 466

U.S. 668, 687 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987), by a preponderance of the evidence. State v. Gaitan, 209 N.J. 339, 350 (2012). First, a defendant must show that "counsel's performance was deficient." Strickland, 466 U.S. at 687. This requires demonstrating that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Ibid. The Constitution requires "reasonably effective assistance," so an attorney's performance may not be attacked unless they did not act "within the range of competence demanded of attorneys in criminal cases" and instead "fell below an objective standard of reasonableness." Id. at 687-88.

When assessing the first Strickland prong, "[j]udicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight." Id. at 669. "Merely because a trial strategy fails does not mean that counsel was ineffective." State v. Bey, 161 N.J. 233, 251 (1999) (citing State v. Davis, 116 N.J. 341, 357 (1989)). Thus, a reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[,]" and "the defendant must overcome the presumption that, under the circumstances, the challenged action [by counsel] 'might be considered sound trial strategy.'"

Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). Further, the court must not focus on the defendant's dissatisfaction with counsel's "exercise of judgment during the trial, . . . while ignoring the totality of counsel's performance in the context of the State's evidence of [the] defendant's guilt." State v. Castagna, 187 N.J. 293, 314 (2006).

For the second prong of the Strickland test, the defendant must show "the deficient performance prejudiced the defense." 466 U.S. at 687. This means "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Ibid.

"[I]n order to establish a prima facie claim, 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 (1999). "[R]ather, the defendant 'must allege facts sufficient to demonstrate counsel's alleged substandard performance.'" State v. Jones, 219 N.J. 298, 312 (2014) (citations omitted) (quoting State v. Porter, 216 N.J. 343, 355 (2013)). Where a "court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to [PCR] . . . or that the defendant's allegations are too vague, conclusory, or speculative to warrant an evidentiary hearing . . . then an

evidentiary hearing need not be granted." State v. Marshall, 148 N.J. 89, 158 (1997) (citations omitted); see R. 3:22-10(e)(1)-(2).

Defendant is also entitled to the effective assistance of counsel on direct appeal. State v. O'Neil, 219 N.J. 598, 610 (2014). State v. Morrison extends the Strickland standard to the assessment of claims of ineffectiveness of appellate counsel. 215 N.J. Super. 540, 545-46 (App. Div. 1987). However, appellate counsel has no duty to raise every non-frivolous argument available to a defendant. Jones v. Barnes, 463 U.S. 745, 751 (1983). "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751-52.

Guided by these standards, we find the PCR court did not err in denying defendant's application. We initially observe there is a lack of specificity regarding several of defendant's contentions. We find defendant's argument that trial counsel failed to supply him with discovery and keep him apprised of the status of the case vague and conclusory. There is no indication of how trial counsel failed to keep defendant informed about the procedural posture of the case, and there is no discussion about what specific discovery counsel purportedly did not provide to defendant. Moreover, defendant failed to show

how these failures caused prejudice under the second prong of Strickland. Therefore, we reject these contentions, which amount to nothing more than bald assertions.

Defendant has failed to show what arguments he contends appellate counsel should have raised on direct appeal. Defendant makes bald allegations concerning his lack of contact with appellate counsel but does not identify the specific arguments he claims counsel failed to advance, let alone how those contentions would have altered the results on appeal. Given that appellate counsel has no duty to raise every non-frivolous argument available to a defendant, and because defendant has not articulated the specific arguments appellate counsel failed to assert, we conclude defendant has failed to establish appellate counsel's conduct was deficient. Jones, 463 U.S. at 751.

Defendant next asserts trial counsel failed to advise him regarding his decision to testify and to prepare him for his testimony. Again, defendant is not entirely clear as to how counsel was ineffective, and this allegation is belied by the record. In a pre-trial hearing on September 29, 2015, defense counsel advised defendant to seek a bench trial. Counsel's rationale for this advice was that defendant wanted to present a misidentification defense, and, alternatively, argue that he was not driving recklessly at the time of the fatal accident. Defense

counsel did not agree with this strategy and recommended defendant not testify. At the hearing addressing the waiver of a jury trial, defendant stated he sought a bench trial because he thought a judge could better understand his position. He also asserted he spoke to trial counsel, signed a waiver form, and understood the differences between a jury trial and bench trial.[9] Prior to testifying, defendant confirmed he discussed his decision to testify with his counsel and that he was not pressured into the decision. In short, the record reflects defense counsel consulted with defendant and discussed his possible defenses, whether or not he should testify, and the type of trial to choose if he was going to pursue inconsistent theories.[10]

We next address defendant's argument that trial counsel failed to retain a handwriting expert to challenge his signature on the Miranda waiver form. At trial, the judge stated, when discussing whether defendant signed the Alcotest consent form, "[t]here is no question but that [defendant] signed the Miranda

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[9] Defendant acknowledged he had enough time to discuss the issue with his attorney and when asked if he wanted any additional time he responded, "No. [I have] had [thirty-seven] months to do nothing but think, Judge."

[10] Additionally, defense counsel cited a law review article, case law, and the Rules of Professional Conduct in addressing the attorney-client strategy decision as it related to potential defenses and the decision to request a bench trial, demonstrating his preparedness for the trial and accommodating defendant's theories of defense.

[waiver form], and [I would] like to see that signature as compared with the [Alcotest signature]." Notably, during defendant's trial testimony he did not challenge his signature on the Miranda waiver form, but only the Alcotest signature. Moreover, the trial court noted defendant "can be seen signing [the Miranda form]" on video. Further, the PCR court noted:

> As the finder of fact, this court [was] uniquely suited to determine that even with the production of a handwriting expert or suppression of defendant's statement, this court would have reached the same conclusion as to guilt. Ultimately, there was no genuine question as to identity, operation[,] or level of intoxication/recklessness. In short, the proofs were overwhelming so as to not depend on the singular or collective establishment of the foregoing.

The PCR court noted a handwriting expert would not have altered the result of the trial given the overwhelming evidence. We find defendant failed to establish a prima facie case regarding this issue and discern no reason to disturb the PCR court's finding.

Lastly, defendant asserts the PCR court questioned defendant's credibility based on findings made at trial. The PCR court noted there would be difficulty in creating a record at an evidentiary hearing because defense counsel suffered a stroke and would be unavailable. Although the trial judge referenced defendant's credibility and should not have imported these findings from the

trial, we are satisfied these comments were not dispositive to the determination to deny the PCR petition.[11] The PCR court based its decision on factors independent of defendant's credibility. There was ample evidence in the record to support the PCR court's findings. An evidentiary hearing was not required where conclusory and vague assertions did not raise a factual dispute, and defendant failed to establish a prima facie case that his trial counsel or appellate counsel performed deficiently or that such performance prejudiced the outcome of his trial or appeal. Here, the PCR court did not err in denying a hearing as it would be futile where defendant cannot establish that any of his claims meet the Strickland standard.

To the extent that we have not addressed any of defendant's remaining arguments, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

[11] We further observe the PCR court noted, "this court is mindful that trial courts are obligated to consider all pro se and counseled bases for [PCR] . . . under State v. Taylor, 80 N.J. 353, 365 (1979), [and] are not to take a skeptical view towards claims of innocence or defense on such applications."