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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2430-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KEVIN D. ROBERTS, a/k/a
TAMIR HAWKINS, KEVIN
DWAYNE ROBERTS,
KEVIN JOHNSON,
KEVIN ROBERTS, and
CYPRESS MOUNDO,

Defendant-Appellant.

Submitted March 29, 2023 – Decided July 13, 2023

Before Judges Vernoia and Firko.

On appeal from the Superior Court of New Jersey, Law
Division, Essex County, Indictment No. 14-09-2285.

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

Theodore N. Stephens, II, Acting Essex County
Prosecutor, attorney for respondent (Emily M. M. Pirro,

Special Deputy Attorney General/Acting Assistant
Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Kevin Roberts appeals from the January 13, 2022 order denying his post-conviction relief (PCR) petition without an evidentiary hearing. Having considered the record and the parties' arguments, we are convinced Judge Michael Ravin¹ correctly determined defendant failed to sustain his burden of establishing any prima facie claims of ineffective assistance of counsel and therefore properly denied the petition without an evidentiary hearing. Accordingly, we affirm.

I.

On July 24, 2017, defendant pled guilty to first-degree carjacking during which the driver of a Range Rover was shot and killed at the Mall at Short Hills (the mall). On January 18, 2018, the court sentenced defendant to twenty years' imprisonment, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, and dismissed other charges. The details underlying the conviction are set forth in our prior opinion and need not be repeated at length here. See State v. Roberts, No. A-3811-17 (App. Div. Apr. 21, 2020). On September 25, 2020,

¹ Judge Ravin handled all of the matters referenced in this opinion.

the Supreme Court denied defendant's petition for certification. State v. Roberts, 244 N.J. 238 (2020). We recount the pertinent facts here.

A grand jury charged defendant in an indictment with second-degree conspiracy to commit a carjacking, N.J.S.A. 2C:5-2 and 2C:15-2(a); first-degree carjacking, N.J.S.A. 2C:15-2(a)(2); first-degree felony murder, N.J.S.A. 2C:11-3(a)(3); first-degree murder, N.J.S.A. 2C:11-3(a)(3); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a). The grand jury also charged defendant's three co-defendants, Basim Henry, Karif Ford, and Hanif Thompson, on all counts. The same day, a grand jury also charged defendant in a separate indictment with second-degree certain persons not to possess weapons, N.J.S.A. 2C:39-7(b).

On December 15, 2013, Jamie and Dustin Friedland² drove their 2012 silver Range Rover to the mall in Millburn and parked on the third-floor parking deck. Henry drove Thompson, Ford, and defendant in a 1996 green and beige two-tone GMC Suburban to the same parking deck looking to steal a Range Rover. Thompson and defendant approached Dustin, a struggle ensued, and

² For clarity and intending no disrespect, we refer to Jamie and Dustin Friedland by their first names. "Jamie" is sometimes referred to as "Jaime" in the record.

Thompson fatally shot Dustin in the head. Thompson and defendant pointed a gun at Jamie's head, ordered her out of the vehicle, and drove away in the Range Rover, following Henry and Ford in the Suburban.

Investigators recovered a recording from mall surveillance footage, which captured the parking lot and the two vehicles. The Range Rover was recovered the following morning in Newark. Investigators also obtained mall surveillance from three days before the shooting incident, which revealed the Suburban following a 2013 white Range Rover out of the parking lot.

At 11:25 p.m. the night of the shooting, Detectives Luigi Corino and Carlos Olmo of the Essex County Prosecutor's Office (ECPO) interviewed mall employee Liza Carpini. She left the mall sometime after 9:00 p.m. that evening and passed two unfamiliar "black men", one pulling up a "grey hoodie," with a white "pattern" on it, coming from the direction near the California Pizza kitchen stairwell. Carpini described the man wearing the hoodie as being approximately five feet, eight inches tall; "skinny," around 160 pounds; having short hair; a medium dark complexion; wearing jeans; and in his twenties. The other male was taller and dressed in all black. A few seconds later as Carpini approached her car, she heard "three or four" gun shots and the sound of a vehicle "fleeing the area." Carpini was able to describe the man in the grey hoodie but not the

second man because she did not see him well enough. She never saw the two men in the mall before. Carpini explained she "was alone" and had a "well-lit" unobstructed view of the two men. According to Carpini, no one else she spoke to saw the assailants before she spoke to the police. The ECPO issued a "be on the lookout" alert for the victims' Range Rover and the Suburban.

Further investigation revealed defendant and co-defendants were looking to obtain high end vehicles to sell to their customers. On December 17, 2013, the court granted the State's application to install and monitor a mobile tracking device on the Suburban, which turned out to be registered to Henry's mother's significant other, and was located in South Orange. Cellular phone records showed defendants were together before the shooting and carjacking because their cellular phones pinged off the cellular tower that serviced the mall just before the murder and all four defendants returned to the Newark area afterwards.

On December 19, 2013, Ford met with ECPO detectives, waived his Miranda³ rights, and submitted to a recorded interview. Ford provided a detailed account of the carjacking and admitted his involvement. Ford voluntarily turned

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

his cellular phone over to the detectives. A search of Ford's phone revealed text messages from Thompson's phone advising Ford not to give out his phone number and to stop "running his mouth." The next day, arrest warrants were obtained for all four defendants.

On December 20, 2013, Carpini was asked to go to the ECPO to review a photo display to see if she could identify the man in the grey hoodie. Detective Oriolo⁴ read Carpini detailed instructions about the photo array procedure. Oriolo, who was not involved in the investigation, showed her six photos, numbered one through six. When Carpini was shown photo number four, she asked it to be put aside. When shown photo number six, Carpini asked if she could "look at two" photographs together. But Oriolo told Carpini she could only look at one photo at a time.

Oriolo showed Carpini all of the photos a second time in order. After reviewing photo number four again, she stated "maybe." Oriolo told her that she could take a closer look at photo number six, and the video of the procedure shows that she did. Carpini asked to see photo number four for a third time and said, "Uh-huh, [n]umber [four]." She added, "I think it's number [four]." When

⁴ Detective Oriolo's first name is not contained in the record.

Oriolo asked if she was sure, Carpini responded "yes" and signed the back of photo number four.

After completing the photograph identification form, Carpini verified that the photo she identified was that of the man pulling up his grey hoodie as he was walking near the crime scene. Lieutenant Thomas Kelly came into the room and confirmed with Carpini that she completed the form and verified her signature. Kelly stated that photo number four was defendant, and he identified him out loud in Carpini's presence by his name, an alias, his SBI#, and his date of birth. After Lieutenant Kelly revealed defendant's name, the lieutenant asked Carpini if she had "any doubt in her mind" that the individual she selected was the suspect. Carpini replied there was "no doubt" in her mind as to her identification of defendant and no one suggested to her which photo to select.

In his petition, defendant contends on December 20, 2013, several police officers entered the driveway of his residence and informed him that he was being detained for child support warrants. Although defendant advised the officers no such warrants were outstanding, and no proof of these warrants were provided by the officers as he requested, the officers transported him to the police station and placed him in a jail cell.

Defendant alleges two officers then brought him from the jail cell to an interrogation room, told him about the carjacking incident at the mall, and started questioning him about it. According to defendant, he invoked his right to be represented by counsel twice, but the officers disregarded his requests and continued to question him, intimating that asking for a lawyer meant he "had something to hide." Defendant asked for a lawyer for a third time. The officers left the room and said they were going to get his lawyer.

In his petition, defendant states an imposter, ostensibly a police officer, "entered the room and identified himself as [defendant's] lawyer." The imposter purportedly told defendant that he was being held for "carjacking, robbery and murder," and suggested defendant "admit his involvement in the incident." Defendant denied committing a robbery but agreed to admit he participated in a robbery "if it would help him," but he would not confess to a murder. According to defendant, the imposter "smiled, stood up[,] and left the room." The officers "reentered the room" and told defendant "they had him on tape admitting to the robbery."

Defendant asserts he was escorted to an upstairs interrogation room, where officers instructed him that if he "repeat[ed] what the detectives told him when they were downstairs," then they would "help him get through it." Without

being advised of his Miranda rights, defendant gave a recorded statement to the officers.

On December 21, 2013, Henry was arrested in Pennsylvania. After waiving his Miranda rights, Henry gave a statement explaining the events leading up to the murder, the murder itself, and his attempts to evade detection. Henry confirmed that several days prior to the murder, he and Thompson drove to the mall in the Suburban looking to steal a Jeep Cherokee. On the night of the murder, Henry stated he picked up Thompson, Ford, and defendant in the Suburban and went to the mall to steal a Range Rover. Henry observed a gun in Thompson's coat before defendants went to the mall.

On August 13, 2015, defendant moved for a Wade⁵ hearing to determine the admissibility of Carpini's out-of-court identification. On October 9, 2015, the judge issued a comprehensive, twenty-two-page written decision and order denying defendant's motion for a Wade hearing to suppress the identification. The judge concluded that Detective Oriolo instructed Carpini prior to and during

⁵ United States v. Wade, 388 U.S. 218 (1967).

the identification procedure in accordance with Henderson⁶ and the Attorney General Guidelines.⁷

Between July 2015 and March 2017, Judge Ravin denied defendant's and co-defendants' motions to recuse himself; suppress evidence, including the cellular phone records of all four defendants obtained with communication data warrants; conduct oral argument on the motion to suppress; obtain a bill of particulars; and compel discovery.

In March 2017, a jury convicted Henry of all counts charged in the indictment following a trial. On June 26, 2017, Henry was sentenced to life imprisonment subject to NERA. Less than one month later, on July 24, 2017, defendant pled guilty to first-degree carjacking. At his plea allocution, defendant testified that on December 15, 2013, he and co-defendants went to the mall because "they needed to get a car for . . . Thompson's client." Defendant admitted the four men understood they were going "to be involved in [a] carjacking."

⁶ State v. Henderson, 208 N.J. 208, 251 (2011).

⁷ Attorney General Guidelines for Preparing and Conducting Out-of-Court Eyewitness Identifications (Oct. 1, 2012).

According to defendant, Ford told him and the two other co-defendants that he no longer wished to participate in the carjacking. In response, defendant "got out of the car and assisted . . . Thompson in the actual [car]jacking." Defendant testified he approached the victim's vehicle, struggled with him to obtain the car keys, and during the struggle, heard two gunshots. Upon hearing the gunshots, defendant and Thompson "jumped in the . . . Range Rover" and drove away. Henry and Ford drove away in the Suburban.

Pursuant to the plea agreement, defendant agreed to testify against co-defendants, if necessary. Judge Ravin confirmed defendant understood the consequences of the plea and voluntarily entered the guilty plea. Pertinent to the issues on appeal, defendant testified he reviewed all the discovery in the case with his trial counsel; counsel answered all his questions; and he was "absolutely satisfied" with counsel's services. Defendant acknowledged he understood "it would be very difficult to take this guilty plea back after [the court] accept[s] it," and even more difficult to do so after he was sentenced.

On defendant's direct appeal, he argued two points: (1) the judge erred in not conducting oral argument on the motions to suppress evidence despite being requested by defendant; and (2) the judge inappropriately interpreted and considered mitigating factor twelve, "the willingness of . . . defendant to

cooperate with law enforcement authorities," N.J.S.A. 2C:44-1(b)(12), at sentencing. See Roberts, slip op. at 4. We concluded the judge did not abuse his discretion in denying oral argument because the "issues were not complex" and the briefs were "succinct and precise." Id. at 11. We also rejected defendant's argument that the judge failed to afford appropriate weight to mitigating factor twelve at the time of sentencing because the judge considered defendant's agreement to testify against co-defendants as part of the plea negotiations.

On October 29, 2020, defendant filed a timely pro se PCR petition claiming his plea, trial, and appellate counsel were ineffective. The petition was amended by defendant's PCR counsel, who alleged defendant's plea counsel was ineffective by failing to move for suppression of evidence resulting from defendant's alleged illegal detention based on false representations he had pending child support bench warrants; failing to file a Miranda motion challenging his statement to the police; failing to investigate an alibi defense; failing to raise arguments during the Wade hearing concerning the different physical characteristics depicted in the photos shown to Carpini; failing to conduct an adequate investigation or "meet with him sufficiently;" and failing to adequately review and explain the plea offer and plea agreement with him,

thereby coercing him into pleading guilty. The amended "verified" petition for PCR is not signed by defendant or his PCR counsel.

On December 10, 2021, the judge heard argument on the amended petition and reserved decision. On January 13, 2022, the judge issued a comprehensive twenty-three-page written decision denying PCR without an evidentiary hearing. The judge provided the standard for analyzing a claim of ineffective assistance of counsel established in Strickland v. Washington, 466 U.S. 668 (1984), as adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987), and explained the merits of any putative motion for suppression under the standard adopted in Miranda and State v. Fisher, 156 N.J. 494, 501 (1998). The judge rejected defendant's claim that trial counsel was ineffective for failing to file a motion to suppress statements emanating from his initial detention or his recorded statement.

In his decision, the judge determined a motion to suppress would not have been "meritorious" because defendant did not assert that during his detention, "he made any statement[]" or "any evidence was seized from him." Therefore, there was nothing to suppress. Regarding defendant's recorded statement, however, the judge found a motion to suppress "would have been meritorious." Defendant invoked his right to counsel, but the officers ignored his request, "and

detectives continued to question him for approximately thirty minutes after his request."

The judge noted the detectives did not read defendant his Miranda rights until after he confessed to the carjacking. However, the judge found no prejudice resulted from counsel's error because the "mound of other evidence against" defendant and Henry's imposition of a life sentence "after going to trial," made it unlikely defendant "still would have insisted on going to trial rather than taking a plea, even if trial counsel had successfully suppressed [defendant's] recorded confession."

The judge then addressed counsel's duty to make a reasonable investigation or decision regarding defendant's alleged alibi defense under State v. Chew, 179 N.J. 186, 217 (2004). The judge rejected defendant's claim that trial counsel was ineffective for failing to conduct an adequate investigation as to the alleged alibi because defendant did not assert there were any alibi witnesses; his claim that he was selling drugs while knowingly in the view of video cameras is "highly suspect;" defendant did not allege what a video camera recording might show or if one even exists; the statements of two co-defendants, an eyewitness (Carpini), and cellular phone records place him at the scene of the crimes; the cellular phone records confirmed all four defendants were together

before the murder; their cellular phones were not in use at the time of the murder; the four defendants were in contact with one another after the murder; all four defendants returned to Newark after the murder; and defendant "himself confessed."

In addition, the judge found defendant was not credible because he stated "that during his interrogation, he told the [imposter] lawyer that he . . . would admit he participated in a robbery if it would help him, even though he did not commit the robbery." The judge also considered defendant's claim his trial counsel was ineffective by failing to seek discovery on whether defendant had outstanding child support warrants prior to his entering a guilty plea. The judge determined this claim was "meritless" because Ford "had already given a statement to police . . . implicating defendant" when the police arrested him. Thus, the court found the officers had a valid basis to arrest defendant and therefore any failure to investigate child support warrants was "inconsequential."

The judge concluded defendant's claim that trial counsel failed to adequately review and explain the plea offer was "belied" by the record and contradicted by defendant's statement at his plea allocution that counsel reviewed all the discovery with him and answered all his questions. In addition,

the judge analyzed counsel's performance in the preparation and submission of the Wade motion to suppress defendant's identification, which was filed prior to his plea. The judge noted defendant's counsel also joined in co-defendants' motions to suppress.

The judge highlighted that he "properly and thoroughly analyzed the issue of whether the photo lineup was impermissibly suggestive and flawed" in his written Wade decision and found defendant did not establish an "improper lineup construction." In his decision, the judge found defendant's eye position in the photo of defendant used in the identification procedure "does not amount to suggestiveness," and the judge determined a Wade hearing was not required because there was no improper lineup construction. The judge found defendant failed to establish a prima face ineffective assistance of counsel claim or that counsel was not diligent and did not zealously represent defendant. A memorializing order was entered. This appeal followed.

Defendant presents the following Point with subparts for our consideration:

POINT I

DEFENDANT PRESENTED A PRIMA FACIE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL. DEFENDANT'S CLAIM IS SUPPORTED BY MATERIAL ISSUES OF

DISPUTED FACTS LYING OUTSIDE THE RECORD. THE RESOLUTION OF THE DISPUTED FACTS NECESSITATED AN EVIDENTIARY HEARING. THE PCR COURT ERRED IN FAILING TO CONDUCT SUCH A HEARING. (Raised Below.)

A. Defense Counsel's Failure To File A Motion To Suppress Based Upon The Illegal Seizure Of Defendant By Police Constitutes Ineffective Assistance Of Counsel.

B. Defense Counsel's Failure To File A Motion To Suppress Based Upon Illegal Police Tactics, Including The Technique Of Question First Mirandize Second And Impersonating Legal Counsel, Constitutes Ineffective Assistance Of Counsel.

C. Defense Counsel's Failure To Investigate Defendant's Alibi Defense And Counsel's Failure To Investigate The Alleged Child Support Warrants Constitutes Ineffective Assistance Of Counsel.

D. Defense Counsel's Lack Of Diligence And Failure To Zealously Represent Defendant Constitutes Ineffective Assistance Of Counsel.

E. Defense Counsel Was Ineffective In The Preparation And Submission Of The Motion To Suppress The Identification Of Defendant.

F. Defendant Was Entitled To [PCR] Or At The Very Least An Evidentiary Hearing On The Issues Raised.

II.

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 Twp. of Manalapan, 140 N.J. 366, 378 (1995)). The de novo standard of review also applies to mixed questions of fact and law. Id. at 420. Where, as here, an evidentiary hearing has not been held, 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.

We consider defendant's ineffective assistance of counsel claims under the two-part standard established by the United States Supreme Court in Strickland, 466 U.S. at 687, and later adopted by our Supreme Court in Fritz, 105 N.J. at 58, as applicable under the New Jersey Constitution. Under the first prong of the Strickland standard, a petitioner must show counsel's performance was deficient. 466 U.S. at 687. A petitioner must demonstrate counsel's handling of the matter "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.

Under Strickland's second prong, a defendant must "affirmatively prove" "a reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different." State v. Gideon, 244 N.J. 538, 551 (2021) (quoting Strickland, 466 U.S. at 693-94).

Where, as here, a defendant seeks PCR from a conviction resulting from a plea, the second prong of the Strickland standard is established when the defendant demonstrates a "reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial," State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009) (alteration in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)); see also State v. Gaitan, 209 N.J. 339, 350 (2012), and that "a decision to reject the plea bargain would have been rational under the circumstances," Padilla v. Kentucky, 559 U.S. 356, 372 (2010).

To sustain the burden imposed under the Strickland standard, a defendant "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). "[A] defendant must allege specific facts and evidence supporting [their] allegations." State v. Porter, 216 N.J. 343, 355 (2013). The facts upon which a PCR claim is based must be "supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." Cummings, 321 N.J. Super. at 170.

Our Supreme Court has explained that "[a]lthough a demonstration of prejudice constitutes the second part of the Strickland analysis, courts are permitted leeway to choose to examine first whether a defendant has been prejudiced, and if not, to dismiss the claim without determining whether counsel's performance was constitutionally deficient." Gaitan, 209 N.J. at 350 (internal citation omitted).

A.

We first address the fact that defendant's amended verified petition is not signed or dated by him or his PCR counsel in violation of the court rules. A petition for PCR "shall be verified by defendant," Rule 3:22-8, and "[a]ny factual assertion that provides the predicate for a claim of relief must be made by an affidavit or certification pursuant to Rule 1:4-4 . . . before the court may grant an evidentiary hearing," Rule 3:22-10(c). Rule 1:4-4(c) provides "[e]very affidavit or certification shall be filed with an original signature." Accordingly, an unsigned, undated petition "does not comply with the requirements of Rules 3:22-8 and 3:22-10(c) applicable to a PCR petition." State v. Brewster, 429 N.J. Super. 387, 395-96 (App. Div. 2013); see also Porter, 216 N.J. at 355 (emphasizing facts asserted in support of a petition for PCR "must be made by an affidavit or certification pursuant to Rule 1:4-4").

The State argues defendant's petition is not competent evidence because it "does not comply with the requirements of Rules 3:22-8 and 3:22-10(c)," Brewster, 429 N.J. Super. at 395-96. We note the State's procedural argument is correct and, on this basis alone, we affirm the judge's order denying PCR. However, the judge considered the facts in defendant's petition as if they had been duly verified, as do we for the purpose of addressing the merits of defendant's claim. Therefore, viewing the facts in a light most favorable to defendant, see State v. Preciose, 129 N.J. 451, 467-63 (1992), and thus assuming his statements are true, we are convinced the factual allegations asserted are insufficient to establish a prima facie case of ineffective assistance of counsel.

B.

Defendant first argues his trial counsel was ineffective by failing to move for suppression of evidence resulting from his alleged improper initial detention by law enforcement based on what he claims were misrepresentations he had pending child support bench warrants. According to defendant, he asked the officers to provide proof of these warrants when they came to his home, but they failed to do so. Defendant asserts his initial detention was improper with "no reasonable and articulable suspicions."

Defendant argues the judge erred by finding trial counsel made a reasonable strategic decision not to move to suppress evidence on that basis because had trial counsel litigated the issue and the judge concluded the basis of defendant's arrest was premised upon a lie, then all of the evidence marshalled against him would have been suppressed as "fruit of the poisonous tree." In defendant's view, trial counsel's failure to investigate whether there were any child support warrants implies a lack of diligence because the record contains no "specific timeline concerning defendant's arrest and co-defendant[] [Ford's] statement."

The State counters that the police had more than sufficient probable cause to detain defendant on the carjacking and homicide charges, and at the start of his statement, detectives told defendant they were investigating a homicide. The State contends Ford had confessed and stated defendant participated in the carjacking two days prior to defendant's interrogation. The State also avers defendant later confessed to the "actual crime at hand," which had nothing to do with child support warrants, and therefore, there are no grounds supporting a motion to suppress evidence.

Where a defendant claims trial counsel's performance was deficient by failing to move to suppress evidence, he or she must demonstrate there is a

reasonable probability the motion is meritorious. Kimmelman v. Morrison, 477 U.S. 365, 375 (1986); Fisher, 156 N.J. at 501. A defendant must allege specific facts sufficient to support a prima facie claim trial counsel's performance was deficient with "affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." Cummings, 321 N.J. Super. at 170. "It is not ineffective assistance of counsel for defense counsel not to file a meritless motion." State v. O'Neal, 190 N.J. 601, 619 (2007).

Defendant made, and makes, no showing supported by competent evidence that the motion to suppress he argues his counsel should have filed would have been meritorious. Even if defendant properly presented an affidavit asserting the police falsely represented there were pending child support bench warrants against him, defendant would not have met his burden under Strickland.

As a result of Ford's confession implicating defendant on December 19, 2013, we found—on defendant's direct appeal—that the police obtained an arrest warrant for defendant on December 20, 2013. See Roberts, slip op. at 7. In his petition, defendant contends he was arrested on December 20, 2013. While it is unclear from the record the exact times when the police obtained the arrest warrant and arrested defendant on same day, the police's purported reference to non-existing child custody warrants is irrelevant as they already had probable

cause to arrest defendant due to Ford's confession the day before. State v. Jones, 143 N.J. 4, 17 (1995) ("As long as the officers acted reasonably in executing the warrant, . . . then the arrest . . . should be admitted.").

Alternatively, defendant argues if his arrest preceded Ford's confession and was based on non-existent child support warrants, the police would have lacked probable cause to arrest him, rendering his arrest illegal. Defendant's argument fails, however, because as previously noted, we found he was arrested the day after Ford confessed. See Roberts, slip op. at 7. Based on Ford's confession implicating defendant, defendant was properly questioned by the police under State v. Barry, 86 N.J. 80 (1981).

In Barry, the defendant and three co-conspirators, including the defendant's brother, robbed a bank. Id. at 83-84. The defendant drove the getaway car to and from the bank. Id. at 84. The two conspirators later confessed and implicated the defendant's brother in the crime, but not the defendant. Ibid. When the brother was arrested, a detective also arrested the defendant because he "recognized him from a prior investigation." Ibid. While the police held the defendant, a co-conspirator confessed and implicated the defendant. Id. at 85. After being given Miranda warnings, the defendant signed a waiver form and confessed. Id. at 85-86. A jury convicted him. Id. at 85.

We reversed the conviction, concluding the defendant's confession should have been excluded as "fruit of an illegal arrest." Id. at 86-87. Our Supreme Court, however, reversed and reinstated the conviction, finding the defendant's confession was admissible because the co-conspirator's statement gave "the police . . . probable cause to [hold the] defendant" and "effectively purged the taint of his illegal arrest." Id. at 89. Defendant's argument is undermined by the Court's holding in Barry. And here, law enforcement already had probable cause to arrest defendant, notwithstanding the non-existent child support warrants, since Ford had previously implicated him in the carjacking and homicide. Moreover, defendant has not presented any competent evidence that he was arrested on December 20 before police obtained an arrest warrant and arrested him on December 21.

Here, defendant's failure to demonstrate the putative suppression motion would have been meritorious required the denial of his PCR petition. See Kimmelman, 477 U.S. at 375; Fisher, 156 N.J. at 501. Absent such a showing, defendant did not sustain his burden of establishing either that his trial counsel's performance was deficient or that there is a reasonable probability, but for his counsel's alleged error in failing to make the motion, the outcome of his case would have been different. Strickland, 466 U.S. at 700.

C.

Next, defendant contends he "immediately invoked his right to counsel" when his interrogation commenced. Defendant claims the officers violated his right against self-incrimination by continuing to question him for "approximately thirty minutes;" discouraging him from seeking a lawyer; and then sending an "imposter" lawyer to solicit his confession to robbery, carjacking, and murder. Defendant argues his trial counsel was ineffective by failing to file a motion to suppress his statement based on these police tactics, which he alleges are illegal.

As stated, defendant alleges he told the imposter he would confess to robbery. Officers informed defendant his admission had been recorded, read him his Miranda warnings, and "suggested . . . [he] 'make a formal statement.'" Defendant then confessed to the carjacking and murder. By ignoring defendant's repeated invocations of his right to counsel throughout the interrogation and deceiving him about the "imposter" lawyer, defendant asserts he was prevented from waiving his rights knowingly and voluntarily. The State counters that the record does not support defendant's argument and given the weight of the evidence against him, no prejudice is shown.

The judge first found there was "a reasonable probability" that defendant's post-Miranda recorded statement would have been inadmissible. Viewing the evidence in light most favorable to defendant, the judge appeared to determine that defendant met his burden under Strickland's first prong by finding his motion to suppress "would have been meritorious." However, regarding the second prong of Strickland, the judge found "there was no reasonable likelihood . . . defendant would have given up an extremely favorable plea offer to instead take his chances at trial."

"When Miranda warnings are given after a custodial interrogation has already produced incriminating statements, the admissibility of post-warning statements will turn on whether the warnings functioned effectively in providing the defendant the ability to exercise his state law privilege against self-incrimination." State v. O'Neill, 193 N.J. 148, 180-81 (2007). Although we agree that based on defendant's representations in his supporting certification a Miranda motion should have been filed and may have been meritorious, and thereby established a prima showing of deficient performance under Strickland's first prong, we concur with the judge that defendant did not satisfy Strickland's second prong, which required him to show it would have been rational to forego the plea offer and proceed to trial. Nunez-Valdéz, 200 N.J. at 139.

In considering Strickland's prejudice-prong, we must "fairly assess defendant's trial counsel's decisions in the context of the State's case against defendant and the strengths and weaknesses of the evidence available to the defense." State v. Pierre, 223 N.J. 560, 579 (2015); see also Gideon, 244 N.J. at 556 (stating "the overall strength of the evidence before the factfinder is important in analyzing the second prong of Strickland"). Here, the State's case was exceedingly strong. The evidence against defendant included Ford's confession implicating defendant and Carpini's identification. Also, cellular phone records from a cellular tower near the mall showed that all four defendants were together near the mall just before the murder, they did not use their phones during the murder, they contacted each other shortly after the murder, and all four defendants later returned to Newark after the murder. Judge Ravin also found that even without defendant's recorded statement, the overwhelming evidence against defendant does not support a reasoned conclusion there was a reasonable probability he would not have pled guilty had a motion to suppress been filed or that it would have been rational for defendant to reject the plea offer and proceed to trial if his statement had been suppressed as the result of the filing of a suppression motion. State v. DiFrisco, 137 N.J. 434, 457 (1994). Moreover, defendant's plea to first-degree carjacking resulted in a twenty-year

prison sentence, whereas co-defendant Henry was previously tried and found guilty on all counts and sentenced to life imprisonment.

Defendant argues that an evidentiary hearing was required to determine whether a motion to suppress would have been successful. We are convinced Judge Ravin correctly found defendant failed to sustain his burden of establishing a prima facie claim of ineffective assistance of counsel under the second Strickland prong. See Strickland, 466 U.S. at 699; State v. Nash, 212 N.J. 518, 542 (2013). Thus, defendant's failure to establish Strickland's second prong rendered an evidentiary hearing unnecessary. See Porter, 216 N.J. at 355; R. 3:22-10(b) (entitlement to an evidentiary hearing requires that the defendant establish a prima facie case of ineffective assistance of counsel in support of PCR).

D.

Next, defendant argues the judge erred in finding he did not establish he received ineffective assistance of counsel based on counsel's failure to develop an alibi defense. Defendant asserts he could not have committed the charged crimes because at the time, "he was selling illicit drugs . . . in Newark," at 457-470 Hawthorne Avenue. Defendant alleges he provided the judge with "an affidavit" from a property owner, Avraham I. Abramov, stating "video cameras

. . . record[] activity directly in front of the property," however, "video footage from" the date of the charged crimes "no longer exists," as the cameras periodically delete footage.⁸ According to defendant, he "timely" requested that trial counsel investigate and obtain the video footage, but counsel made "no attempt" to do so. Defendant also argues his alibi is plausible because he has been arrested twenty-four times on drug related charges, showing his "tendency to be careless when engaged in drug trafficking."

The judge rejected defendant's proffered alibi claim because he was persuaded by the "mountain of evidence" placing defendant at the crime scene—including the cellular phone records and testimony from two co-defendants and Carpini. The judge also considered defendant's statements placing him at the scene. Moreover, the judge emphasized defendant's "assertion that he was selling drugs while knowingly in the view of video cameras is highly suspect."

Our Supreme Court has recognized that an attorney's failure to investigate an alibi defense can be "a serious deficiency that can result in the reversal of a conviction." Porter, 216 N.J. at 353; see also State v. Ways, 180 N.J. 171, 188 (2004) (noting that "evidence that supports a defense, such as alibi, third-party guilt, or a general denial of guilt would be material").

⁸ The property owner's affidavit is not included in defendant's appendix.

However, when a petitioner alleges counsel rendered ineffective assistance by inadequately investigating the case, then the petitioner "must assert the facts that an investigation would have revealed, supported by affidavits or certifications upon the personal knowledge of the affiant or the person making the certification." Porter, 216 N.J. at 354 (quoting Cummings, 321 N.J. Super. at 170).

Defendant has failed to show that the affidavit of the property owner is sufficient to establish a prima facie basis of an alibi to warrant an evidentiary hearing. Apart from cameras being at the property owner's location at the time of the charged crimes, there is no competent evidence the putative recordings, which are unavailable, show defendant dealing drugs on the street at the time of the carjacking and murder at the mall.

We agree with the judge that defendant "does not assert there are alibi witnesses that he can rely on," and even if counsel investigated the alibi, the camera footage "might have been gone" or would have been "unclear." The judge correctly found defendant did not present competent evidence that an investigation by counsel of the purported alibi would have produced evidence that "could have placed [defendant] where he said he was." Having failed to present competent evidence that his counsel's performance was deficient by

allegedly failing to investigate the putative alibi, and because defendant did not present any evidence establishing a reasonable probability that an investigation of the claimed alibi would have changed the outcome of the proceedings, the judge correctly denied the ineffective assistance of counsel claim without an evidentiary hearing. See Padilla, 559 U.S. at 372; Preciose, 129 N.J. at 462-63; Cummings, 321 N.J. Super. at 170;.

E.

Next, defendant argues his trial counsel was ineffective in the preparation and submission of the Wade motion to suppress the identification of defendant by Carpini. Defendant contends trial counsel failed to focus the Wade motion on system variables and the suggestiveness of the photo array presented to Carpini due to his haircut being different in the photo used by the officers compared to the time of the murder; defendant looking toward the floor in the photo; and having a different complexion than the other individuals in the photo array. Defendant maintains counsel's ineffectiveness caused the judge to deny a Wade hearing and deprive defendant of his rights under Henderson. See Henderson, 208 N.J. at 219-220.

A trial court may hold a Wade hearing pursuant to N.J.R.E. 104(a) to determine whether a pretrial identification of a criminal defendant was properly

conducted and therefore admissible under N.J.R.E. 803(a)(3). However, the right to a Wade hearing is not absolute and a hearing is not required in every case involving an out-of-court identification. State v. Ruffin, 371 N.J. Super. 371, 391 (App. Div. 2004); superseded on other grounds by State v. Green, 239 N.J. 88 (2019). "A threshold showing of some evidence of impermissible suggestiveness is required." Ibid. (citing State v. Ortiz, 203 N.J. Super. 518, 522 (App. Div. 1985)). Impermissible suggestibility is described as follows:

[T]he determination [of impermissible suggestibility] can only be reached so as to require the exclusion of the evidence where all of the circumstances lead forcefully to the conclusion that the identification was not actually that of the eyewitness, but was imposed upon him so that a substantial likelihood of irreparable misidentification can be said to exist.

[State v. Madison, 109 N.J. 233, 234 (1988).]

If the court finds the identification procedure was impermissibly suggestive, it must then determine whether the procedure was nevertheless reliable. Id. at 232-33. "The totality of the circumstances must be considered in weighing the suggestive nature of the identification against the reliability of the identification." State v. Herrera, 187 N.J. 493, 504 (2006).

In Manson v. Brathwaite, the United States Supreme Court identified five reliability factors to be considered by the trial court: (1) whether the witness had

the opportunity to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the witness's level of certainty at the time of the identification confrontation; and (5) the amount of time between the crime and the confrontation. 432 U.S. 98, 114 (1977).

If, after evaluating those factors the court is convinced that, notwithstanding the suggestive nature of the procedure, the witness's identification is reliable, then the identification may be admitted into evidence. Ibid. Thus, to obtain a Wade hearing, defendant here was required to show Carpini's identification was tainted by impermissibly suggestive procedures, and that the identification was not reliable and should be suppressed. Madison, 109 N.J. at 232.

In Henderson, the Court adopted a framework to assess whether a process used by the police to obtain eyewitness identification of a perpetrator was reliable or improperly suggestive, thereby requiring a hearing to determine the identification's admissibility. 208 N.J. at 292-93. As we have noted, the Henderson Court held that in assessing the identification procedure, trial courts should consider factors in two categories: system and estimator variables. Id. at 303.

When a defendant seeks to exclude an out-of-court identification, he or she must show "some evidence of suggestiveness tied to a system variable which could [have led] to a mistaken identification." State v. Anthony, 237 N.J. 213, 233 (2019) (citing Henderson, 208 N.J. at 288-89). If a defendant presents evidence of suggestiveness, the burden shifts to the State to "offer proof to show that the proffered eyewitness identification is reliable." Henderson, 208 N.J. at 289. But the "ultimate burden remains on the defendant to prove a very substantial likelihood of irreparable misidentification." Ibid. (citations omitted). In that regard, the "threshold for suppression" is high and in most cases the issue of identification is "likely to be presented to the jury." Id. at 303.

In his PCR decision, Judge Ravin emphasized that he "properly and thoroughly" explored the propriety of the identification and whether the photo lineup was impermissibly suggestive and flawed. The judge referenced his written decision denying the Wade motion in his PCR decision. The judge found defendant was "not the only person in the photo array who is not looking directly at the camera." Additionally, the judge noted Carpini "unhesitatingly said 'no'" in response to being shown photo number one, where the person is not looking at the camera, suggesting "the position of the person's eyes in the photo[] did not influence [her]."

The judge noted Carpini "hesitated" when she reviewed photo number six, depicting the individual "looking straight into the camera." Thus, the judge aptly concluded that "eye position did not influence . . . Carpini's identification." Further, the judge concluded "there is nothing [d]efendant alleges that makes [his] photo suggestively stand out from the other photos." Noting defendant's eye position in his photo identification procedure did "not amount to evidence of suggestiveness," the judge denied a Wade hearing on the alleged basis of "improper lineup construction." Thus, in denying PCR, the judge concluded trial counsel was not ineffective in the preparation and submission of the Wade motion to suppress defendant's identification. We agree.

In support of the Wade motion, counsel essentially argued five points: (1) estimator variables and the totality of the circumstances demonstrated the out-of-court identification was unreliable; (2) the identification procedure was improper because the detective showed Carpini the photo array "out of sequence" by beginning her second review of the photo array before she could answer "no" to photo number six and by allowing her to look at photo number four after finishing her second review; (3) the photo array was flawed because defendant is "looking down and away" in his photo, sending a negative impression of "avoidance, shame, or guilt;" (4) the officers inappropriately

provided Carpini with recording confidence and feedback by reciting defendant's name, alias, and SBI number after she selected photo number four; and (5) the identification was invalid because the police did not question Carpini about any conversations she had with other mall employees or friends about the incident.

Judge Ravin rejected all of these arguments for the reasons stated above. The judge emphasized under Henderson, "a Wade hearing is warranted only if there is some evidence of suggestiveness related to a system variable, not an estimator variable."⁹ The judge also found the officer's identification of

⁹ In Henderson, the Court identified eight "system variables," defined as characteristics of the identification procedure over which law enforcement has control. 208 N.J. at 248-61. These variables are: (1) whether a "blind" or "double-blind" administrator is used; (2) whether pre-identification instructions are given; (3) whether the lineup is constructed of a sufficient number of fillers that look like the suspect; (4) whether the witness is given feedback during or after the procedure; (5) whether the witness is exposed to multiple viewings of the suspect; (6) whether the lineup is presented sequentially versus simultaneously; (7) whether a composite is used; and (8) whether the procedure is a "showup." Ibid.

The Court also identified ten "estimator variables," defined as factors beyond the control of law enforcement which relate to the incident, the witness, or the perpetrator. Id. at 261. These variables are: (1) the stress level of the witness when making the identification; (2) whether a visible weapon was used during the crime; (3) the amount of time the witness viewed the suspect; (4) the lighting and the witness's distance from the perpetrator; (5) the witness's age; (6) whether the perpetrator wore a hat or disguise; (7) the amount of time that passed

defendant after Carpini stated she was "sure" about her selection does not evidence suggestiveness or confirmatory feedback. And, the judge found defendant did not indicate any person or specific "media attention" that "may have possibly influenced" the identification.

As the judge determined, trial counsel was not ineffective by failing to focus the Wade motion on the suggestiveness of the photo array because, as the judge correctly found, the photo array did not include any indicia of impermissible suggestiveness. Based upon our de novo review, we similarly conclude that defendant failed to establish a prima facie showing of ineffective assistance of counsel on the Wade issue, and an evidentiary hearing was not warranted.

F.

We also reject defendant's argument the judge should have held an evidentiary hearing on the petition. A judge's decision as to whether to hold an evidentiary hearing on a PCR petition alleging ineffective assistance of counsel is discretionary. Preciose, 129 N.J. at 451; R. 3:22-10(b). No hearing is required

between the event and the identification; (8) whether the witness and perpetrator were different races; (9) whether the witness was exposed to co-witness feedback; and (10) the speed with which the witness makes the identification. Id. at 261-72.

unless defendant has established a prima facie case, that is, a reasonable likelihood of success under Strickland. Preciose, 129 N.J. at 462-63. As defendant did not establish a prima facie case for relief on any of his claims, no evidentiary hearing was required.

To the extent we have not addressed any of defendant's arguments, it is because we conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION