

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2453-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

G.S.,

Defendant-Appellant.

Submitted January 10, 2023 – Decided February 9, 2023

Before Judges Whipple, Smith, and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 14-02-0122.

Joseph E. Krakora, Public Defender, attorney for appellant (Mark Zavotsky, Designated Counsel, on the brief).

William A. Daniel, Union County Prosecutor, attorney for respondent (Milton S. Leibowitz, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant G.S.¹ appeals from a January 29, 2021 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. After careful review of the record and the governing legal principles, we affirm.

We recounted the facts underlying defendant's conviction for first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1); second-degree sexual assault, N.J.S.A. 2C:14-2(c)(1); second and fourth-degree criminal sexual contact, N.J.S.A. 2C:14-2(c) and N.J.S.A. 2C:14-2(b); and second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(1), in State v. G.S., No. A-2070-16 (App. Div. June 12, 2019) (slip op. at 2-4). Defendant was convicted of the above charges stemming from his sexual assault of his stepdaughter, Jane. Defendant was acquitted of similar charges arising from his alleged sexual assault of his daughter, Julia. Defendant was sentenced to twelve years imprisonment, subject to an eighty-five percent parole disqualifier pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. On the direct appeal, defendant argued, among other issues, the trial court failed to sever the charges for trial. We rejected this argument and affirmed defendant's conviction and

¹ We use initials and pseudonyms to protect the privacy of the victim and preserve the confidentiality of these proceedings. N.J.S.A. 2A:82-46(a); R. 1:38-3(c)(9).

sentence. Defendant's petition for certification was denied on November 12, 2019. State v. G.S., 240 N.J. 153 (2019).

In 2019, defendant filed a PCR petition, re-asserting the severance issue raised in the direct appeal. His petition also asserted trial counsel was ineffective for failing to object to certain remarks the prosecutor made during closing. Judge Regina Caulfield heard the PCR petition and issued a comprehensive written opinion. The court viewed the ineffective assistance of counsel claim concerning the failure to file a motion to sever the charges "intimately related" to the direct appeal issue. However, the court observed the claim was not barred by Rule 3:22-5.² Ultimately, the court held, given our decision on direct appeal that joinder of charges was appropriate, even if trial counsel had raised the issue before the trial court, it would have been denied.³

Judge Caulfield next addressed the argument trial counsel was ineffective for failing to object to the prosecutor's comments during closing argument that "a child understands . . . what it means to go to the doctor and the import of

² On direct appeal, defendant argued the trial court should have sua sponte severed the charges.

³ The court further noted defense counsel at trial "focused on the notion" that Julia mimicked Jane's allegations, and it would have been counterintuitive for trial counsel to sever the charges.

telling the doctor the absolute and complete honest truth." Initially, the court noted Rule 3:22-4(a)(2) procedurally barred defendant from raising this issue as he did not reference the prosecutor's comment on direct appeal. The judge further noted defendant did not demonstrate how he suffered a "fundamental injustice" as there is no indication this played a role in the determination of defendant's guilt since the jury acquitted defendant as to the charges involving Julia.

Nevertheless, Judge Caulfield addressed the issue on its merits. In closing argument, defense counsel argued Julia's statements to the doctor that her father touched her vagina with his penis was not credible, and the doctor's testimony was "worthless." Judge Caulfield determined the prosecutor's comment in the State's closing argument was in response to defense counsel's assertion. Defense counsel contended it was not believable Julia would disclose this to a doctor she had just met, as opposed to her mother or another family member. Judge Caulfield determined the State's argument was a fair comment in response to defendant's statements.

As to the prosecutor's comments concerning the victims' lack of motive to lie, Judge Caulfield noted Jane and Julia's credibility was the central focus of the trial as defense counsel suggested they were "coached." The judge also

documented various other attacks on the sisters' credibility. The court noted the prosecutor's comments were fair under the circumstances. Moreover, the prosecutor's reference to Jane having to "live with it" was an appropriate comment in view of her fear of being taken away from her mother if she reported the abuse. Finally, the prosecutor's reference to an "agenda" in discussing the testimony of defendant's brother and a character witness was justified in response to defense counsel's use of these witnesses to attack Jane and Julia's testimony.

Judge Caulfield concluded defendant was represented by a "very able attorney" who aggressively defended defendant throughout the trial, and defendant failed to establish a prima facie case for PCR, thereby denying a request for an evidentiary hearing. This appeal followed.

Defendant raises the following points on appeal:

POINT I

DEFENDANT RECEIVED INEFFECTIVE
ASSISTANCE OF TRIAL COUNSEL FOR
COUNSEL'S FAILURE TO FILE A MOTION TO
SEVER THE COUNTS BETWEEN INCIDENTS
LISTED IN THE INDICTMENT.

POINT II

DEFENDANT RECEIVED INEFFECTIVE
ASSISTANCE OF TRIAL COUNSEL FOR

COUNSEL'S FAILURE TO OBJECT TO REMARKS OF THE PROSECUTOR MADE AT CLOSING[,] DESIGNED TO PREJUDICE THE MINDS OF JURORS.

POINT III

APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT ARGUING THE OVERRULED OBJECTION OF TRIAL COUNSEL REGARDING THE PROSECUTOR'S COMMENTS[,] DESIGNED TO UNFAIRLY BOLSTER THE CREDIBILITY OF WITNESSES (Not Raised Below).

Where, as here, a PCR judge does not hold an evidentiary hearing, we "conduct a de novo review of both the factual findings and legal conclusions of the PCR court." State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016) (quoting State v. Harris, 181 N.J. 391, 421 (2004)). However, "we review under the abuse of discretion standard the PCR court's determination to proceed without an evidentiary hearing." State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013).

Ineffective assistance of counsel claims must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687-88 (1984), and adopted by the Supreme Court of New Jersey in State v. Fritz, 105 N.J. 42, 57-58 (1987). Under the first prong, a "defendant must show that counsel's performance was deficient" and counsel's errors were so egregious they were "not functioning as

the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. The second prong requires a defendant to demonstrate the alleged defects prejudiced his right to a fair trial to the extent "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694; Fritz, 105 N.J. at 60-61.

A petitioner for PCR is not automatically entitled to an evidentiary hearing. State v. Porter, 216 N.J. 343, 355 (2013); see also State v. L.G.-M., 462 N.J. Super. 357, 364 (App. Div. 2020) ("merely raising a claim for PCR does not entitle a defendant to an evidentiary hearing") (citing State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)). 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 [PCR]"). Allegations that are "too vague, conclusory, or speculative" do not merit an evidentiary hearing. State v. Marshall, 148 N.J. 89, 158 (1997).

A defendant seeking PCR must establish "by a preponderance of the credible evidence" they are entitled to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013) (quoting Preciose, 129 N.J. at 459). They must allege and articulate specific facts, which "provide the court with an adequate basis on which to rest its decision" State v. Pennington, 418 N.J. Super. 548, 553 (App. Div. 2011) (citing State v. Mitchell, 126 N.J. 565, 579 (1992)). A defendant "must do more than make bald assertions that he was denied the effective assistance of counsel." Cummings, 321 N.J. Super. at 170.

Guided by these legal principles, we affirm substantially for the reasons set forth in Judge Caulfield's opinion. We add the following comments. Defendant reprises his argument made on direct appeal regarding trial counsel's failure to file a motion to sever the charges. However, defendant fails to show why trial counsel's performance was deficient in not making a motion to sever the charges. We previously rejected this argument on direct appeal and determined joinder was appropriate. Counsel's performance is not deficient when they fail to file a meritless motion. State v. Goodwin, 173 N.J. 583, 600-02 (2002).

Judge Caulfield also properly determined the State's remarks during closing arguments were fair comment. "Prosecutors in criminal cases are

expected to make vigorous and forceful closing arguments to juries" and are afforded "considerable leeway in closing arguments so long as their comments are reasonably related to the scope of the evidence presented." State v. Timmendequas, 161 N.J. 515, 587 (1999) (citing State v. Harris, 141 N.J. 525, 559 (1995)). Consequently, prosecutors can "strike hard blows . . . [but not] foul ones." State v. Echols, 199 N.J. 344, 359 (2009) (alterations in original) (quoting State v. Wakefield, 190 N.J. 397, 436 (2007)). "In other words, as long as the prosecutor 'stays within the evidence and the legitimate inferences therefrom,' . . . '[t]here is no error[.]'" State v. McNeil-Thomas, 238 N.J. 256, 275 (2019) (first quoting State v. R.B., 183 N.J. 308, 330 (2005); then quoting State v. Carter, 91 N.J. 86, 125 (1982)). Here, Judge Caulfield carefully analyzed the evidence and arguments of defense counsel in finding the State's closing was fair comment, and we are unpersuaded by defendant's arguments.

Finally, defendant argues for the first time on appeal that appellate counsel was ineffective for not arguing on direct appeal the trial court erred in overruling defense counsel's objection regarding the prosecutor's comment that "a child understands . . . what it means to go to the doctor and the import of telling the doctor the absolute and complete truth." An appellate court need not consider questions not properly presented to a trial court unless the issue raised relates to

the trial court's jurisdiction or concerns a matter of great public interest. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973); see also State v. Witt, 223 N.J. 409, 418 (2015) (declining to consider a challenge to motor vehicle stop's validity not raised to trial court); State v. Arthur, 184 N.J. 307, 327 (2005) (applying Nieder to PCR appeal). Plaintiff's argument does not implicate the jurisdictional or public interest exceptions to the bar on raising arguments on appeal for the first time.

Pursuant to the Strickland standard, we find the PCR judge properly determined defendant failed to establish he received ineffective assistance of counsel or that he was entitled to an evidentiary hearing. 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.

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



CLERK OF THE APPELLATE DIVISION