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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3159-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KENNETH R. BANKS,
a/k/a KEVIN BANKS,
RAQUAN BANKS, and
EDDIE JOHNSON,

Defendant-Appellant.

Submitted September 21, 2022 – Decided March 30, 2023

Before Judges DeAlmeida and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law
Division, Union County, Indictment No. 10-02-0206.

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

William A. Daniel, Union County Prosecutor, attorney
for respondent (Michele C. Buckley, Assistant
Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Kenneth Banks appeals from a September 14, 2020 order denying his second petition for post-conviction relief ("PCR") without an evidentiary hearing. We affirm, substantially for the reasons set forth in Judge Candido Rodriguez Jr.'s well-reasoned opinion.

We discern the following facts from the record. On October 17, 2009, a mother and her two young daughters were robbed at gunpoint while walking in Elizabeth. Based on the eldest daughter's (J.M.) description, officers apprehended defendant and co-defendant, Andrew Nance. Within two hours of the robbery, J.M. was presented with a photo array and made a positive identification of defendant as the man who robbed her at gunpoint. J.M. also positively identified the items recovered from defendant's vehicle following a warrantless search. Following defendant's arrest, he gave a videotaped statement at the precinct.

On February 25, 2010, a Union County grand jury returned Indictment No. 10-02-0206, charging defendant and co-defendant with first-degree robbery, contrary to N.J.S.A. 2C:15-1 (count one); and fourth-degree possession of an imitation firearm for an unlawful purpose, contrary to N.J.S.A. 2C:39-4(e)

(count two). The indictment also charged defendant, individually, with second-degree eluding, contrary to N.J.S.A. 2C:29-2(b) (count three).

On March 23, 2010, co-defendant hired investigator Autumn Gerena who interviewed J.M. Gerena's investigative report summarized J.M.'s account of the robbery, which was largely consistent with J.M.'s previous statements and indicated that J.M. was sure of her identification of defendant.

On May 13, 2010, defendant requested certain items of discovery from the State, including "all 9-1-1 calls, police transmissions, computer aided dispatch ("CAD") recordings, [] transcripts related to the pursuit, DVD statements made by victims and witnesses, [and] any supplemental police reports for the 10/16/09 robbery[.]" On August 5, 2010, the prosecutor provided defendant with a copy of the initial CAD report and indicated that the State would inquire into the existence of any recordings or additional reports.

On June 2, 2011, the pretrial judge denied defendant's motion to suppress evidence.¹ On May 1, 2012, the judge held a Wade hearing² and denied defendant's motion to suppress the photo array identifications, which were allegedly tainted by the officers' conduct. Though there were discrepancies in

¹ Co-defendant's suppression motion was also heard and denied.

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

some of the officers' statements, the judge "believe[d] all of the witnesses were trying to be credible...[and] [b]ased upon those credibility findings, [he was] satisfied that there was no intentional suggestibility." The judge further stated that "the out-of-court identifications will be permitted at trial because there's no suggestibility, there's no indication that the out-of-court identification is in any way so tainted that it would not be admissible."

On May 1, 2012, the matter proceeded to trial. On May 9, 2012, the prosecutor turned over a second, unique CAD report to the defense for the first time. The parties were adjourned to allow defendant to review the report overnight. On the morning of May 10, 2012, defense counsel stated that he did not have a "good faith foundation" for halting the trial and elected to "make every effort to deal with [the] issue" through the witnesses already available to defendant. On May 10, defendant was also made aware of the State's intention to use a transcript of defendant's video statement to the police on the date of arrest.³ Defendant's counsel objected to the late production of the transcript, asserting that the State had an obligation to provide a copy of the video transcript and that there was resulting prejudice towards defendant. The State responded,

³ The transcript was undisclosed because the State had no intention of introducing the statement prior to defendant's reference to matters in the statement and defendant's decision to testify.

noting that defendant had been in possession of the transcript's video for over two years and that it was defendant's decision to testify regarding the material on the video. Despite the recommendation of counsel, defendant elected to testify, which opened him up to questioning regarding the video transcript.⁴

On May 15, 2012, the jury returned a verdict of guilty on all counts of the indictment. On September 25, 2012, the trial judge denied defendant's motion for a new trial.

On October 5, 2012, defendant was sentenced on the robbery charge to a mandatory extended term of thirty years' imprisonment with an eighty-five percent period of parole ineligibility, pursuant to the No Early Release Act ("NERA"), N.J.S.A. 2C:43-7.2(a). Defendant was also sentenced to a consecutive discretionary extended term of twenty years' imprisonment with ten years of parole ineligibility on the eluding conviction. The weapons conviction merged with the robbery conviction. On December 28, 2013, defendant filed a notice of appeal, arguing that the items seized from his car should have been suppressed; prosecutorial misconduct; violations of the Confrontation Clause; and deprivations of defendant's due process and fair trial rights.

⁴ The judge addressed the defendant directly to reiterate that he would be cross-examined and would be obliged to answer all appropriate questions from the State.

On October 30, 2015, we affirmed defendant's conviction, disposing of each of his arguments; however, we remanded for resentencing, finding that defendant could not be sentenced to two extended terms in the same sentencing proceeding. State v. Banks, No. A-1896-12 (App. Div. Oct. 30, 2015) (slip op. at 30). On September 23, 2016, defendant was resentenced to twenty years' imprisonment, subject to NERA, on the robbery charge and ten years with a five-year period of parole ineligibility on the eluding charge.

On March 21, 2016, defendant filed his first petition for PCR, alleging—among other things—ineffective assistance of counsel for failing to object to an allegedly misleading jury instruction with respect to flight and for failing to request a mistrial when the State produced a second CAD report in the middle of trial. On June 23, 2017, the PCR judge denied defendant's petition without an evidentiary hearing.

On appeal, we affirmed the PCR judge's decision. State v. Banks, No. A-1551-17 (App. Div. May 29, 2019) (slip op. at 1). We reasoned that defendant was unable to establish that the alleged errors of trial and appellate counsel fulfilled the second prong of the test adopted in Strickland v. Washington, 466 U.S. 668 (1984). With respect to the late receipt of the CAD report specifically, we found that defendant was precluded from asserting this claim under Rule

3:22-5, as an essentially identical claim had already been raised and decided on direct appeal.

On July 1, 2019, defendant filed a second PCR petition, asserting that: (1) the court erred in denying his motion for a new trial based on erroneous admissions of hearsay statements, which violated defendant's right to confrontation; (2) prosecutorial misconduct in the form of untimely disclosure of a copy of defendant's videotaped statement; and (3) ineffective assistance of counsel by failing to call investigator Gerena as a trial witness, failing to request a mistrial when the State provided exculpatory evidence in the midst of trial, and failing to competently address alleged selective prosecution/racial profiling. Oral argument was heard on the matter on September 9, 2020.

On September 14, 2020, Judge Rodriguez issued a written decision, denying defendant's petition without an evidentiary hearing. In his decision, the judge went through each of defendant's claims and provided his reasoning for denying relief.

As for defendant's first claim, alleged violations of his Sixth Amendment right to confront witnesses, the judge found defendant was procedurally barred from raising the issue pursuant to Rule 3:22-5, as it "was specifically raised and addressed in the Appellate Division." Turning to the alleged prosecutorial

misconduct, the judge similarly found that this argument was procedurally barred under Rule 3:22-4. Defendant raised this claim in his motion for a new trial but neglected to raise it in his direct appeal, therefore, the court did not address the merits of defendant's argument as to this issue. In addressing defendant's claim that he was deprived a fair trial because the State did not timely provide a copy of the second CAD report, the judge found that this claim was also procedurally barred, as it had already been raised and addressed on defendant's direct appeal.

Turning to defendant's claims of ineffective assistance of counsel, the judge found that defendant failed to present a prima facie case and, therefore, denied relief without an evidentiary hearing. Specifically, Judge Rodriguez found that counsel's decision not to call investigator Gerena was "strategic," and defendant was unable to show that he was prejudiced by that decision.

With regard to counsel's alleged failure to request a mistrial when the State turned over exculpatory evidence in the middle of trial, the judge found that defendant was procedurally barred from raising this issue under Rule 3:22-4. In his reasoning, the judge stated that the "Appellate Division [already] heard the issue and determined that there was no error with regard to this issue and that defendant failed to show how he was prejudiced by this late discovery."

Similar to the prior claim, the judge found that defendant failed to establish that counsel was ineffective for not addressing the alleged selective prosecution/racial profiling of defendant. In so doing, the judge reasoned that defendant "fail[ed] to offer any specific evidence showing [that he] was unfairly treated by law enforcement." Therefore, defendant failed both prongs of the Strickland test.

Finally, the judge addressed defendant's claims that he was denied effective assistance of prior PCR counsel and appellate counsel. The judge disposed of these claims by finding that they "were raised in previous appeals and rejected by the appellate courts. Since the issues were previously raised, the argument that counsel was ineffective for failing to raise them fails." In addition, defendant failed to show direct evidence that any of the claims would have been successful and, therefore, could not establish that he suffered prejudice as a result of counsel's allegedly deficient performance.

This appeal followed. On appeal, defendant presents the following arguments for our consideration:

POINT I

AS DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, HE IS ENTITLED TO POST-CONVICTION RELIEF, OR, IN THE

ALTERN[A]TIVE, TO AN EVIDENTIARY HEARING.

A. The failure of the State to timely provide trial counsel with a copy of the transcript of the defendant's video statement until immediately before defendant was scheduled to testify deprived the defendant of a fair trial.

B. Trial counsel was ineffective when he failed to call Investigator Autumn Gerena as a rebuttal defense witness.

C. Trial counsel was ineffective by failing to request reconsideration of the trial court's order denying the suppression motion.

D. Appellate counsel was ineffective by failing to argue these and other points on direct appeal[].

E. The cumulative errors by trial, appellate, and first PCR counsel denied defendant effective legal representation.

POINT II

AS THERE ARE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE THE PCR COURT ERRED WHEN IT DENIED DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING.

We find that defendant's arguments lack sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(2). We write only to add the following brief comments.

When petitioning for PCR, the defendant must establish, by a preponderance of the credible evidence, that he is entitled to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013); State v. Preciose, 129 N.J. 451, 459 (1992). To sustain that burden, the defendant must allege and articulate specific facts that "provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing and the 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). Rather, trial courts should grant evidentiary hearings and make a determination on the merits only if the defendant has presented a prima facie claim of ineffective assistance, material issues of disputed facts lie outside the record, and resolution of the issues necessitates a hearing. R. 3:22-10(b); State v. Porter, 216 N.J. 343, 355 (2013). We review a judge's decision to deny a PCR petition without an evidentiary hearing for abuse of discretion. Preciose, 129 N.J. at 462.

To establish a prima facie claim of ineffective assistance of counsel, the defendant is obliged to show not only the particular manner in which counsel's performance was deficient, but also that the deficiency prejudiced his right to a fair trial. Strickland, 466 U.S. at 687; State v. Fritz, 105 N.J. 42, 58 (1987). There is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. Further, because prejudice is not presumed, Fritz, 105 N.J. at 52, the defendant must demonstrate "how specific errors of counsel undermined the reliability" of the proceeding. United States v. Cronin, 466 U.S. 648, 659 n.26 (1984).

In addition, procedural bars to PCR "exist 'in order to promote finality in judicial proceedings.'" State v. Goodwin, 173 N.J. 582, 593 (2002) (quoting State v. McQuaid, 147 N.J. 464, 483 (1997)). Under Rule 3:22-4, "[a]ny ground for relief not raised in the proceedings resulting in the conviction, . . . or in any appeal taken in any such proceedings is barred" from being heard on PCR unless the court finds:

- (1) that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; or

(2) that enforcement of the bar to preclude claims, including one for ineffective assistance of counsel, would result in fundamental injustice; or

(3) that denial of relief would be contrary to a new rule of constitutional law under either the Constitution of the United States or the State of New Jersey.

[R. 3:22-4(a).]

Moreover, a PCR petition is "neither a substitute for direct appeal . . . nor an opportunity to relitigate cases already decided on the merits." Preciose, 129 N.J. at 459 (citation omitted). Rule 3:22-5 provides that "[a] prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or . . . in any appeal taken from such proceedings." Specifically, this procedural bar applies "if the issue raised is identical or substantially equivalent to that adjudicated previously on direct appeal." State v. Marshall IV, 173 N.J. 343, 351 (2002) (quoting State v. Marshall III, 148 N.J. 89, 150 (1997)). Moreover, these limitations apply equally to claims of ineffective assistance of counsel where the issue was "raised on direct appeal and the record on appeal was adequate to permit adjudication of the issue." Pressler & Verniero, Current N.J. Court Rules, cmt. 4 on R. 3:22-4 (citing McQuaid, 147 N.J. at 484 and State v. Pagan, 378 N.J. Super. 549, 557 (App. Div. 2005)).

Guided by these well-established principles, we see no reason to disturb Judge Rodriguez's decision. Each of defendant's arguments raised under Point I are arguments attempting at relitigating an issue already reviewed and rejected by this court on appeal, arguments that should have been raised in an earlier proceeding, or arguments substantially equivalent to an argument previously adjudicated. We therefore decline to consider them.

As for defendant's arguments brought under Point II, we find that they lack merit and affirm the denial of defendant's petition substantially for the reasons detailed at length in Judge Rodriguez's opinion. We discern no abuse of discretion in the judge's consideration of the issues, or in his decision to deny the petition without an evidentiary hearing. We are satisfied that defense counsel's performance was not deficient, and defendant provides nothing more than bald assertions to the contrary.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION