

RECORD IMPOUNDED

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0347-22**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

N.J.E.,¹

Defendant-Appellant.

Submitted June 5, 2024 – Decided June 26, 2024

Before Judges Currier and Vanek.

On appeal from the Superior Court of New Jersey,
Law Division, Atlantic County, Indictment No. 14-04-
0875.

Jennifer Nicole Sellitti, Public Defender, attorney for
appellant (Richard Sparaco, Designated Counsel, on
the brief).

¹ We identify defendant and other individuals by initials to protect the identity of the minor victim of sexual assault. R. 1:38-3(c)(12).

William E. Reynolds, Atlantic County Prosecutor,
attorney for respondent (John J. Santoliquido,
Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant N.J.E. appeals from a July 27, 2022 order denying his first petition for post-conviction relief (PCR) asserting ineffective assistance of his trial counsel. For the reasons that follow, we affirm for substantially the same reasons set forth by the PCR court.

I.

The salient facts were previously recounted in our unpublished decision affirming defendant's conviction and sentence on direct appeal. State v. N.J.E., No. A-1924-16 (App. Div. Oct. 3, 2018), certif. denied, 237 N.J. 326 (2019). We briefly set forth the facts material to our determination.

Defendant's conviction arose from the January 7, 2012 sexual assault of a fourteen-year-old male friend of defendant's daughter, B.E., which occurred while the two minors were spending the night at defendant's home. In March of 2012, a grand jury returned an indictment charging defendant with second-degree sexual assault, N.J.S.A. 2C:14-2(c). Defendant pleaded not guilty to the initial indictment as well as the intermediate and second superseding indictments, which cumulatively charged defendant with second-degree sexual

assault by force, N.J.S.A. 2C:14-2(c); second-degree sexual assault of a victim who was between thirteen and sixteen years old and the defendant was at least four years older than them, N.J.S.A. 2C:14-2(c)(4); and third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a).

After multiple delays in setting a trial date, on October 20, 2014, defendant was released from custody on his own recognizance. Trial proceeded on April 19, 20, and 21, 2016. Atlantic County Prosecutor's Office Detective George Rodriguez and the victim, V.R., were among the witnesses called by the State to testify at trial. Detective Rodriguez was unable to secure the presence of B.E., and defendant's ex-wife, J.F., to provide trial testimony as to their observations on the night of the incident, as the witnesses were unwilling to come to court. Defendant testified on his own behalf.

On April 21, 2016, after roughly forty-five minutes of deliberation, the jury returned a verdict, finding defendant guilty on all charges. On November 4, 2016, Judge Bernard E. DeLury imposed a sentence of ten years in prison, with eighty-five-percent parole ineligibility under the No Early Release Act

(NERA), N.J.S.A. 2C:43-7.2.² Defendant was awarded 1,256 days of jail credit, was ordered to pay various fines and was required to comply with Megan's Law, N.J.S.A. 2C:7-1 to -23, including parole supervision for life.

Defendant appealed. We affirmed the entirety of his conviction and sentence, N.J.E., slip op. at 1, and the Supreme Court denied certification, N.J.E., 237 N.J. at 326.

On May 29, 2019, defendant filed a pro se PCR petition arguing his trial counsel was ineffective for failing to: (1) properly cross-examine V.R.; (2) present character witnesses; (3) require B.E. and J.F. to testify at trial; (4) conduct a thorough pretrial investigation; and (5) properly consult with defendant and execute an effective trial strategy relating to defendant's testimony and obtaining expert witnesses. Defense counsel filed a brief further arguing defendant's trial counsel was ineffective for failing to introduce evidence of unfounded State of New Jersey, Division of Child Protection and Permanency (DCPP) complaints B.E. and J.F. made against defendant.

On July 27, 2022, the PCR court denied defendant's petition without an evidentiary hearing for the reasons set forth in a written decision. The PCR

² Judge DeLury merged the sentences for sexual assault of a victim between the ages of thirteen and fifteen and endangering the welfare of a child into the sentence for sexual assault by force.

court found defendant's "arguments [failed to] establish a prima facie showing of ineffective assistance of counsel" because, as a threshold matter, defendant did not supply a copy of any DCPD complaints to the court so it could analyze their potential usefulness and determine if the reports would have been admissible at trial.

As to defendant's argument regarding character witnesses, the PCR court found defendant did not proffer what character traits he would have expected the absent witnesses to testify to. The PCR court also concluded there are limited character traits relevant to the accusation of sexually assaulting a minor.

The PCR court found defendant's claims his trial counsel had not adequately conducted a pretrial investigation or prepared him for trial were "bald assertion[s]" not warranting relief under State v. Petrozelli, 351 N.J. Super. 14, 23 (App. Div. 2002). Therefore, the PCR court concluded defendant had not presented any material disputes of fact and denied defendant's PCR petition without an evidentiary hearing.

This appeal follows.

II.

Defendant raises the following points for our consideration:

POINT I

AS DEFENDANT HAD PRESENTED A PRIMA FACIE CASE THAT TRIAL COUNSEL WAS INEFFECTIVE AND THERE WAS A GENUINE ISSUE OF MATERIAL FACT IN DISPUTE, THE PCR COURT ERRED WHEN IT DENIED THE CLAIM WITHOUT FIRST HOLDING AN EVIDENTIARY HEARING.

SUBPOINT A

TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO INTRODUCE AT TRIAL EVIDENCE OF [DCPP] . . . RECORDS THAT WOULD HAVE IMPEACHED THE STATE'S WITNESS AND BOLSTERED . . . DEFENDANT'S ASSERTION THAT HE WAS BEING ACCUSED BECAUSE OF ULTERIOR MOTIVES OF [J.F.] AND [B.E.]

SUBPOINT B

TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO CALL A CHARACTER WITNESS TO BOLSTER DEFENDANT'S CREDIBILITY AT TRIAL.

SUBPOINT C

TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO EFFECTIVELY CROSS-EXAMINE [V.R.] WHO WAS THE SOLE EYEWITNESS AGAINST HIM.

PCR is New Jersey's response "to the federal writ of habeas corpus."

State v. Preciose, 129 N.J. 451, 459 (1992). To succeed in obtaining PCR, a

defendant must "establish, by a preponderance of the credible evidence, that he [or she] is entitled to the requested relief." State v. Mitchell, 126 N.J. 565, 579 (1992) (quoting State v. Marshall, 244 N.J. Super. 60, 69 (Law Div. 1990)).

"Ineffective-assistance-of-counsel claims are particularly suited for post-conviction review because they often cannot reasonably be raised in a prior proceeding." Preciose, 129 N.J. at 460 (citations omitted). Moreover, PCR "provide[s] a built-in 'safeguard that ensures that a defendant was not unjustly convicted.'" State v. Nash, 212 N.J. 518, 540 (2013) (quoting State v. McQuaid, 147 N.J. 464, 482 (1997)).

Because the PCR court did not hold an evidentiary hearing before denying defendant's petition for relief, we "conduct a de novo review of both the factual findings and legal conclusions of the PCR court." State v. Reevey, 417 N.J. Super. 134, 146-47 (App. Div. 2010) (quoting State v. Harris, 181 N.J. 391, 421 (2004)). However, "the PCR court's determination to proceed without an evidentiary hearing" is reviewed under the abuse of discretion standard. State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013). "Although [Rule] 3:22-1 does not require evidentiary hearings to be held on

[PCR] petitions, [Rule] 3:22-10 recognizes judicial discretion to conduct such hearings." State v. Russo, 333 N.J. Super. 119, 138 (App. Div. 2000).

Pursuant to Rule 3:22-10(b), it is proper for a PCR court to grant an evidentiary hearing when the defendant has presented a prima facie claim, material issues of disputed fact lie outside the record, and resolution of those issues necessitates a hearing. State v. Porter, 216 N.J. 343, 355 (2013). "A prima facie case is established when a defendant demonstrates 'a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits.'" Ibid. (quoting R. 3:22-10(b)).

Defendant argues on appeal that he received ineffective assistance from his trial counsel. Determining whether counsel's performance was ineffective for purposes of the Sixth Amendment to the United States Constitution requires analysis under the standards formulated in Strickland v. Washington, 466 U.S. 668, 687-88 (1984), and adopted by the Court in State v. Fritz, 105 N.J. 42, 58 (1987). To prevail on a claim of ineffective assistance of counsel, defendant must meet the two-prong test of establishing that: (1) counsel's performance was deficient and counsel made errors so egregious they were not functioning effectively as guaranteed by the Sixth Amendment; and (2) the

defect in performance prejudiced defendant's right to a fair trial such that there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 687, 694.

III.

We turn first to defendant's assertion that his trial counsel was ineffective for failing to introduce evidence of unfounded DCPD complaints made against him by B.E. and J.F. Defendant contends that if these records had been introduced, the jury could have concluded that he was being accused of sexually assaulting V.R. for "ulterior motives."

We discern no error in the PCR court's rejection of defendant's assertions. The PCR court succinctly addressed defendant's argument and determined it could not consider the contention since defendant had not provided the DCPD records to the court.

Defendant also does not proffer what information he believes are in the reports which would have assisted his defense at trial. Under Rule 3:22-10(c), "[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 and based upon personal knowledge of the declarant before the court may grant an evidentiary

hearing." Absent a factual basis set forth in a certification, "defendant's allegations are too vague, conclusory, or speculative to warrant an evidentiary hearing." State v. Marshall, 148 N.J. 89, 158 (1997). Defendant sets forth only uncertified assertions that DCPD intentionally included incorrect information in the reports regarding V.R.'s last name and argues the DCPD complaints "would have provided evidence that would have demonstrated [J.F.'s] and B.E.'s motives to fabricate the allegations made by them that precipitated his arrest."

Defendant posits that since he could have used the DCPD records to impeach V.R.'s testimony, he is prejudiced because the jury would have acquitted him if they had "the full background." Like the PCR court, without the records, we lack the ability to substantively review whether they would have been admissible as impeachment evidence under N.J.R.E. 607. See State v. Kelly, 201 N.J. 471, 492 (2010).

However, even considering the uncertified and unsupported allegations, defendant does not explain how these facts would have exculpated him. Prejudice resulting from trial counsel's performance is never to be presumed. Fritz, 105 N.J. at 52. Therefore, it is defendant's responsibility to demonstrate "how specific errors of counsel undermined the reliability of the finding of

guilt." United States v. Cronic, 466 U.S. 648, 659 n.26 (1984). In failing to provide the DCPD complaints defendant has not met this burden since we cannot ascertain whether their contents could have impacted the outcome of the trial.

Accordingly, we affirm the PCR court's determination that defendant did not establish his trial counsel was ineffective for failing to introduce DCPD records at trial nor is it likely the outcome of the trial would have been different if he had, thus failing to satisfy both prongs of the Strickland standard. 466 U.S. at 687-88.

IV.

Defendant argues his trial counsel should have called his former roommate of five years (the roommate) as a character witness to testify on his behalf. Specifically, defendant alleges the jury's determination hinged on comparing his credibility to V.R.'s. Therefore, defendant's trial counsel should have given the jury the opportunity to consider testimony from the roommate as to defendant's truthfulness.

Generally, a decision as to what evidence "to present [at trial] is clearly a matter of trial strategy which is entrusted to the sound discretion of competent trial counsel." State v. Coruzzi, 189 N.J. Super. 273, 321 (App.

Div. 1983). "[C]omplaints 'merely of matters of trial strategy' will not serve to ground a constitutional claim of inadequacy of representation of counsel." Fritz, 105 N.J. at 54 (quoting State v. Williams, 39 N.J. 471, 489 (1963), overruled on other grounds by State v. Czachor, 82 N.J. 392 (1980)).

A failure of competent counsel in a criminal case to present certain evidence or to advance certain contentions, whether such non-action represent an error of judgment or mere inadvertence, does not constitute denial of due process of law, even though such failure result in a conviction which perhaps might have been avoided. The constitutional requirement is satisfied when the defendant has had the benefit of the advice and guidance of a reputable and competent attorney.

[State v. Bentley, 46 N.J. Super. 193, 203 (App. Div. 1957).]

However, "[i]n addressing an ineffective assistance claim based on . . . counsel's failure to call an absent witness, a PCR court must unavoidably consider whether the absent witness's testimony would address a significant fact in the case, and assess the absent witness's credibility." State v. L.A., 433 N.J. Super. 1, 15 (App. Div. 2013).

Under N.J.R.E. 404(a), "[e]vidence of a pertinent trait of the defendant's character" may be "admissible to prove that on a particular occasion the person acted in conformity with the character or trait." In order to be pertinent under

the meaning of the Rule, the "reputation or opinion evidence of good character must relate" to an element of the charged offense. State v. Baluch, 341 N.J. Super. 141, 194 (App. Div. 2001).

We discern no error in the PCR court's conclusion that defendant has not explained what character traits the roommate would have testified to beyond a general reputation for truthfulness. Defendant does not elaborate on how a general propensity to be truthful directly relates to the accusations of sexual assault against a minor. "[P]ertinent evidence 'must relate to a character trait directly involved and apply to a relevant time and place in the defendant's life.'" State v. C.W.H., 465 N.J. Super. 574, 602 (App. Div. 2021) (quoting Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 3 on N.J.R.E. 404(a)(1) (2019) (citations omitted)).

It is inappropriate for us to speculate as to whether the roommate's testimony would have been credible and admissible under N.J.R.E. 404(a)(1) because there has been no proffer of what "significant fact in the case" he would have testified to related to defendant's character and the charges against him, as required under L.A., 433 N.J. Super. at 15.

For these reasons, we affirm the PCR court's determination that defendant did not establish his trial counsel was ineffective for failing to call

defendant's roommate to testify at trial under both prongs of the Strickland standard. 466 U.S. at 687-88.

V.

Finally, defendant contends his trial counsel was ineffective in not "aggressively cross-examin[ing] [V.R. and] question[ing] his character" because V.R. "was in a program for dropouts and troubled children." Defendant alleges his trial counsel's failure to do so constituted a breach of his right to confront his accuser. We are unconvinced.

It is defendant's burden to "affirmatively prove" he was prejudiced by his trial counsel's performance. State v. Gideon, 244 N.J. 538, 551 (2021) (quoting Strickland, 466 U.S. at 693). "The test is not whether defense counsel could have done better, but whether he met the constitutional threshold for effectiveness." Nash, 212 N.J. at 543.

"[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20 (1985). Further, defendants are not necessarily prejudiced when cross-examination does not yield a favorable result for their case because

"successful cross-examination is not the constitutional guarantee." United States v. Owens, 484 U.S. 554, 560 (1988).

Defendant has not met his burden of establishing his conviction would have been different if his trial counsel had more zealously cross-examined V.R. Strickland, 466 U.S. at 687-88. Mere dissatisfaction with "'counsel's exercise of judgment'" is insufficient to warrant overturning a conviction. State v. Echols, 199 N.J. 344, 358 (2009) (quoting State v. Castagna, 187 N.J. 293, 314 (2006)). Defendant has not specified "what questions counsel should have asked and how the answers would have affected the verdict." State v. Hightower, 120 N.J. 378, 408 (1990).

Defendant correctly posits that the court may not "preclude[] [him] from cross-examining a witness on possible bias and motive to lie." State v. Crudup, 176 N.J. Super. 215, 221 (App. Div. 1980). However, defendant was afforded that opportunity and his trial counsel questioned V.R. about myriad topics affecting his credibility, including any additional places B.E. and V.R. went on the night in question and whether defendant used force on V.R.


Accordingly, defendant has not "demonstrate[ed] a reasonable likelihood that his . . . claim will ultimately succeed on the merits." Marshall, 148 N.J. at

158. Therefore, the PCR court did not err in denying defendant's petition without an evidentiary hearing. R. 3:22-10(b).

Defendant's remaining arguments lack sufficient merit to warrant any further discussion in our 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