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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0602-22**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DYRELLE VENABLE,

Defendant-Appellant.

Submitted February 5, 2024 – Decided June 4, 2024

Before Judges Gilson and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 16-07-0973.

Jennifer Nicole Sellitti, Public Defender, attorney for appellant (Steven M. Gilson, Designated Counsel, on the brief).

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Stephanie Davis Elson, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Dyrelle Venable appeals from the September 1, 2022 order of the Law Division denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We vacate the order and remand for an evidentiary hearing.

I.

In 2017, a jury convicted defendant of first-degree robbery, N.J.S.A. 2C:15-1; first-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:15-1; and second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b). For first-degree robbery, the court sentenced defendant to a twelve-year term of incarceration with an eighty-five-percent period of parole ineligibility pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2. The court also sentenced defendant to concurrent terms of five years' imprisonment, with an eighty-five-percent period of parole ineligibility for first-degree conspiracy to commit robbery, and five years' imprisonment with a forty-two-month period of parole ineligibility for second-degree unlawful possession of a weapon.

The convictions arose from the sidewalk robbery and physical assault of a man by a group of assailants, some of whom were armed with handguns. Defendant denied involvement in the robbery. The victim's identification of

defendant was a principal issue at trial. Defendant's trial counsel called no witnesses.

We affirmed defendant's convictions and sentence. State v. Venable, A-3718-17 (App. Div. Oct. 6, 2020). The Supreme Court denied defendant's petition for certification. State v. Venable, 245 N.J. 60 (2021).

Defendant subsequently filed a petition for PCR. He alleged ineffective assistance of trial counsel for not calling a witness on defendant's behalf. In support of his petition, defendant submitted an affidavit from K.P., who was charged as a juvenile for the robbery. At the time of defendant's trial, K.P. also had open adult charges from a separate robbery that took place after K.P. turned eighteen.

In the affidavit, K.P. stated that he alone was responsible for the robbery. According to K.P., defendant did not participate in the robbery and was not aware that K.P. intended to commit the robbery. K.P. stated that during an interview with the Hudson County Prosecutor's Office prior to trial, he reported that he was responsible for the robbery and that defendant had no involvement in the crime. In addition, K.P. stated that he signed multiple affidavits attesting to defendant's innocence, one of which was attached to the petition, and was

available to testify at defendant's trial, but was not called as a witness. Arguably, there are inconsistencies in K.P.'s written statements.

Defendant also included with the petition a report by a private investigator, dated June 1, 2017, and created at the request of defendant's trial counsel. The report states that the investigator interviewed K.P. at the Hudson County Correctional Facility prior to defendant's trial. K.P. told the investigator that defendant was not involved in the robbery and that K.P. was not sure where defendant was when the robbery took place. Finally, defendant submitted an affidavit in which he stated that his trial counsel was aware that K.P. had taken sole responsibility for the robbery but refused to call him as a witness at trial.

The State opposed defendant's petition. It argued that because K.P. had open robbery charges at the time of defendant's trial, it is unlikely that defendant's trial counsel or K.P.'s counsel would have allowed him to testify and be subject to cross-examination about his involvement in the robbery for which he faced charges. In addition, the State argued the written statements by K.P. attached to the petition are inconsistent and contradicted by a surveillance video recording that shows K.P. and defendant in close proximity to the victim shortly before the robbery.

On September 1, 2022, the PCR court issued an oral opinion denying defendant's petition without an evidentiary hearing. The court found that defendant had not established a prima facie claim of ineffective assistance of counsel warranting an evidentiary hearing. Relying on a description of the surveillance video recording written by the trial judge, the PCR court concluded that the footage showed defendant near the victim, first watching him, then following him in concert with a codefendant. It appears from the record that the PCR court did not view the recording. The PCR court found that "[t]he credibility of [K.P.'s] certification is significantly reduced, given the video evidence and the victim's account which directly refutes his claim." The court concluded, "[c]ounsel cannot be said to have been ineffective in any measure for failing to call a witness whose claims are not in any way credible."

The court considered both prongs of the Strickland/Fritz standard applicable to ineffective assistance of counsel claims.¹ The court concluded that "[c]ounsel's failure to call [K.P.] who had an open criminal matter at the time of the trial and subject him to extensive cross-examination by the State, is not equivalent to ineffective assistance but instead, a very likely strategic decision."

¹ Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 58 (1987).

The court continued, "I do not find [t]rial [c]ounsel's failure to call [K.P.] ineffective, in fact, I find it was a strategic decision by [c]ounsel not to call [K.P.] because his testimony would have contradicted quite evident surveillance footage."

Having concluded that defendant failed to establish that his trial counsel was ineffective, the PCR court entered a September 1, 2022 order dismissing defendant's petition.

This appeal followed. Defendant makes the following argument.

THIS MATTER MUST BE REMANDED FOR AN
EVIDENTIARY HEARING BECAUSE THE
DEFENDANT ESTABLISHED A PRIMA FACIE
CASE OF INEFFECTIVENESS BY NOT HAVING
AN EXCULPATORY WITNESS TESTIFY.

II.

Our rules anticipate the need to hold an evidentiary hearing on a PCR petition, "only upon the establishment of a prima facie case in support of post-conviction relief." R. 3:22-10(b). "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.'" State v. Porter, 216 N.J. 343, 355 (2013) (quoting R. 3:22-10(b)).

To succeed on a claim of ineffective assistance of counsel, the defendant must meet the two-part test established by Strickland, and adopted by our Supreme Court in Fritz. 466 U.S. at 687; 105 N.J. at 58. Under Strickland, a defendant first must show that his or her attorney made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687. Counsel's performance is deficient if it "[falls] below an objective standard of reasonableness." Id. at 688. "To satisfy prong one, [defendant] had to 'overcome a "strong presumption" that counsel exercised "reasonable professional judgment" and "sound trial strategy" in fulfilling his responsibilities.'" State v. Nash, 212 N.J. 518, 542 (2013) (quoting State v. Hess, 207 N.J. 123, 147 (2011)). "[I]f counsel makes a thorough investigation of the law and facts and considers all likely options, counsel's trial strategy is 'virtually unchallengeable.'" Ibid. (alteration in original) (quoting State v. Chew, 179 N.J. 186, 217 (2004)).

When the court conducts an evidentiary hearing, "[o]ur standard of review is necessarily deferential to a PCR court's factual findings . . . that are supported by sufficient credible evidence in the record." Id. at 540. However, here the PCR court did not conduct a hearing. The court instead made factual determinations and credibility assessments based only on the affidavits,

certification and investigation report submitted by defendant and the written opinion of the trial judge regarding what is depicted in a surveillance video recording. Based only on these documents, the court found that K.P.'s statements exonerating defendant were "not in any way credible." More importantly, the PCR court found that defendant's trial counsel made the strategic decision not to call K.P. as a witness without any evidence from trial counsel that such a decision was, in fact, made and explaining the reasons why K.P. was not called as a witness.

It was error for the PCR court to make credibility determinations regarding K.P.'s statements based only on the above-referenced documents. See Porter, 216 N.J. at 356 (noting it was "abundantly clear that an evidentiary hearing was warranted" when the judge made credibility determinations based only on certifications). In addition, it was error for the court to find that defendant's trial counsel made a strategic decision not to call K.P. as a witness in the absence of any evidence from counsel that he made such a decision and explaining its basis.

Defendant's allegations, when viewed in the light most favorable to him, demonstrate a reasonable likelihood that his trial attorney was ineffective when he failed to call a witness who was willing to provide testimony exonerating

defendant that could have resulted in defendant's acquittal. Of course, defendant's allegations alone are insufficient to warrant PCR and an evidentiary hearing may result in the court finding that defendant's counsel was, in fact, not ineffective because the decision not to call K.P. as a witness was a well-founded trial strategy.

Having concluded that defendant presented a prima facie case for PCR warranting an evidentiary hearing, we remand for such a hearing. We offer no opinion with respect to the outcome of the hearing. Nor do we offer an opinion with respect to whether, if defendant proves that his counsel's performance was deficient for not calling K.P. as a witness, he will also establish the second prong of the Strickland/Fritz test: that trial counsel's "deficient performance prejudiced the defense." Strickland, 466 U.S. at 687. A defendant must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. Ibid. We leave that determination to the PCR court in the first instance.

The September 1, 2022 order is vacated and the matter is remanded for an evidentiary hearing. We do not retain jurisdiction.

This document is a true and correct copy of the original as filed with the court.
JUL 11 2024
CLERK OF THE DISTRICT COURT