

RECORD IMPOUNDED

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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1498-22

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

D.M,¹

Defendant-Appellant.

Argued May 14, 2024 – Decided May 22, 2024

Before Judges Puglisi and Haas.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 11-02-0197.

Alan L. Zegas argued the cause for appellant (Law Offices of Alan L. Zegas, attorney; Alan L. Zegas and Joshua M. Nahum, on the brief).

William P. Miller, Assistant Prosecutor, argued the cause for respondent (Mark Musella, Bergen County Prosecutor, attorney; William P. Miller, of counsel and

¹ In order to protect the privacy of the child victims, we use initials to identify defendant pursuant to Rule 1:38-3(c)(9).

on the brief; Catherine A. Foddai, Legal Assistant, on the brief).

PER CURIAM

Defendant D.M. appeals from the Law Division's December 9, 2022 order denying his petition for post-conviction relief (PCR) following a two-day evidentiary hearing. We affirm.

The underlying facts concerning the offenses involved in this matter are set forth in our prior opinion on defendant's direct appeal from his convictions for multiple acts of sexual assault and other charges in State v. D.M., No. A-1606-12 (App. Div. Apr. 7, 2015). Therefore, those facts will not be repeated here. In that decision, we affirmed defendant's convictions. (slip op. at 4).²

Defendant thereafter filed an untimely petition for PCR.³ Among other things, defendant asserted that his trial attorney provided him with ineffective assistance because he: (1) failed to investigate certain legal and factual

² The trial court sentenced defendant to an aggregate term of thirty years with twenty-five years and eight months of parole ineligibility. Ibid. Defendant did not challenge his sentence on direct appeal. Ibid.

³ In its December 9, 2022 decision, the trial court found that defendant's petition was barred by the five-year filing deadline set forth in Rule 3:22-12(a)(1). Nevertheless, the court still painstakingly reviewed all of the contentions defendant raised in his petition.

arguments; (2) improperly shifted the burden of proof to defendant in his opening statement to the jury; and (3) failed to properly prepare defendant and other witnesses for testifying at trial. The trial court conducted a hearing to consider defendant's claims. Defendant testified on his own behalf, and he also presented testimony from his brother-in-law, his brother, his sister's partner, and a Pennsylvania detective. The State relied upon the testimony of defendant's trial attorney.

At the conclusion of the hearing, the trial court found that defendant did not satisfy the two-prong test of Strickland v. Washington, 466 U.S. 668, 687 (1984), which requires a showing that trial counsel's performance was deficient and that, but for the deficient performance, the result would have been different. The court fully explained the basis for its rulings in a comprehensive forty-two page written opinion which detailed its findings of fact and conclusions of law. Significantly, the court made detailed credibility findings supporting its determination that the testimony of defendant and his family members, where relevant to the issues raised in this appeal, was not credible or persuasive. On the other hand, the court found that defendant's trial counsel's testimony was credible.

On appeal, defendant raises the same arguments he unsuccessfully raised to the Law Division. Defendant asserts:

Point I

The Trial Court Erred by Failing to Grant [Defendant's] Petition With Respect to Trial Counsel's Failure to Investigate Legal and Factual Arguments.

Point II

The Court Erred In Denying [Defendant's] PCR Petition When Trial Counsel's Opening Statement Was Deficient and Prejudiced Defendant Because It Improperly Shifted the Burden of Proof to Defendant.

Point III

The PCR Court Erred By Denying [Defendant's] Petition Based Upon Trial Counsel's Failure to Properly Prepare [Defendant] for Testifying.

Point IV

The PCR Court Erred By Failing to Grant [Defendant's] Petition Based Upon Trial Counsel's Failure to Prepare Other Witnesses.

Point V

The PCR Court Erred by Failing To Grant [Defendant's] Petition Because Counsel's Cumulative Deficiencies Prejudiced Defendant and Denied Him His Rights to the Effective Assistance of Counsel.

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).

To establish a prima facie claim of ineffective assistance of counsel, the defendant is obligated 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). Under the first prong of this test, the defendant must demonstrate that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Under the second prong, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Ibid. That is, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

There is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. Moreover, the acts or omissions of counsel of which a defendant complains must amount to more than mere tactical strategy. Id. at 689. As the Supreme Court observed in Strickland,

[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

[Ibid. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).]


Where, as here, the trial court conducts an evidentiary hearing, we must uphold the court's factual findings, "so long as those findings are supported by sufficient credible evidence in the record." State v. Rockford, 213 N.J. 424, 440 (2013) (quoting State v. Robinson, 200 N.J. 1, 15 (2009)). Additionally, we defer to a trial court's findings that are "substantially influenced by [its]

opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Ibid. (quoting Robinson, 200 N.J. at 15).

Having considered defendant's present contentions in light of the record and these well-established principles, we discern no basis for disturbing the trial court's well-reasoned determination that defendant failed to satisfy the Strickland test with regard to any of his contentions. Accordingly, we affirm the court's denial of defendant's PCR petition substantially for the reasons detailed at length in its comprehensive written opinion.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION