

# RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2806-22

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ABDUL M. STANBACK, a/k/a  
ABDUL M. STANABACH,  
ABDUL STANBACK, ABDUL  
STANBAK, and DUL,

Defendant-Appellant.

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Submitted May 29, 2024 – Decided June 5, 2024

Before Judges Gooden Brown and Natali.

On appeal from the Superior Court of New Jersey, Law  
Division, Gloucester County, Indictment No. 16-08-  
0633.

Jennifer Nicole Sellitti, Public Defender, attorney for  
appellant (Andrew Robert Burroughs, Designated  
Counsel, on the brief).

Christine A. Hoffman, Acting Gloucester County  
Prosecutor, attorney for respondent (Michael C.

Mellon, Special Deputy Attorney General/Acting  
Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Abdul M. Stanback appeals from a September 8, 2022 Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

I.

Following a jury trial, defendant Abdul Stanback was convicted of aggravated sexual assault in the course of a burglary and third-degree burglary, and sentenced to a forty-five-year extended prison term with an eighty-five percent period of parole ineligibility pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2. We affirmed defendant's conviction and sentence, see State v. Stanback, No. A-2871-18 (App. Div. Feb. 9, 2021), and the Supreme Court denied certification. 247 N.J. 146 (2021).

As discussed in our unpublished opinion, the facts of the sexual assault are particularly graphic and the evidence supporting defendant's guilt overwhelming. We refer the reader to that opinion and the facts contained

therein and detail only those portions of the trial and PCR record necessary to address defendant's Strickland<sup>1</sup>-based arguments.

On December 11, 2015, P.S.<sup>2</sup> woke up at approximately 5:00 a.m., when defendant, who had entered her apartment, began to violently assault her. In fear for her life, P.S. grabbed a handful of hair from his beard because she "wanted to get DNA under [her] fingernails." Defendant then ordered P.S. to "get on [her] hands and knees" and raped her.

P.S. noted that although "[t]he rape itself was not long," the entire assault lasted over two hours. After defendant stopped, he told P.S. that he "wanted [her] to take a shower." P.S. refused because she thought defendant would "start up again and [she] was going to be dead."

Defendant wiped off his penis with a towel, laid back on her bed, and asked, "I'm sorry for raping you and . . . if I promise to never . . . come back

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<sup>1</sup> To establish ineffective assistance of counsel, a convicted defendant must satisfy the two-part test enunciated in Strickland v. Washington, 466 U.S. 668, 687 (1984), by demonstrating that: (1) counsel's performance was deficient, and (2) the deficient performance actually prejudiced the accused's defense. The Strickland test has been adopted for application under our State constitution in New Jersey. State v. Fritz, 105 N.J. 42, 58 (1987).

<sup>2</sup> We use the victim's initials to protect her privacy.

again would [she] not call the police[?]" Defendant then left P.S.'s apartment after she explained to him that she was not a "cop caller."

P.S. thereafter called her friend to tell him what happened because defendant's sexual assault "really messed [her] up and [her] face was all beat up . . . ." P.S. called the police and when they arrived, P.S. provided the officers with the hairs she pulled from defendant's beard, which she had wrapped in a folded paper towel. P.S. was then transported in an ambulance to Underwood Hospital.

At the hospital, P.S. was examined by a sexual assault nurse examiner. The nurse testified that P.S. had "numerous areas of tenderness or pain along with injur[ies]" which included facial "[r]edness, swelling, tenderness, [and] an abrasion to her lip . . . ." She further noted that P.S. had an "abrasion to her right wrist, bruising and tenderness to her left rib area[,] and a bite mark on the left index finger.

The nurse also took buccal, vaginal, cervical, anal, and rectal swabs of P.S., and collected her underwear. She also took swabs of P.S.'s external injuries, including the bite mark on her left index finger. These items were then placed into an evidence kit, and subsequently sent to the New Jersey State Police (NJSP) Laboratory for DNA testing along with the defendant's beard hair.

At trial, Dolores Coniglio-Rivera, a forensic scientist with the NJSP, testified regarding the recovered DNA evidence. She stated that she performed short tandem repeat (STR) tests on the provided samples, which she explained was "a short piece of DNA that gets repeated a certain number of times and different people have different numbers of repeats."

Coniglio-Rivera also explained the meaning of the terms source, match, and exclusion. She noted that if a "statistic is [one] in at least [seven] trillion for [African-American, Caucasian, and Hispanic] populations . . . then . . . [the] individual is identified as the [']source['] of the profile." She further stated that "[i]f the statistic does not meet that threshold of [one] in at least [seven] trillion, then . . . the profiles [']match['] each other." Finally, she stated that "[i]f it was not a match and not source identity, then it would be an [']exclusion['] . . . ."

Coniglio-Rivera identified defendant as the source of the beard hairs, which statistically calculated to one in 7.82 sextillion individuals among African-Americans, one in 571 sextillion among Caucasians, and one in 160 sextillion among Hispanics. Also, as to the STR epithelial (skin) fraction from one of the underwear samples, she noted that defendant "matched the minor profile" which statistically occurred in one of twenty-two African-Americans. On cross-examination, Coniglio-Rivera also explained additional Y-STR testing

that she performed, which was identical to the original STR tests with "the only exception being that instead of looking at a bunch of different chromosomes from all across the genome, now it's looking strictly at the Y chromosome[,] so only male DNA."

As to the vaginal sample, she confirmed that the Y-STR profile obtained "matched the profile from [defendant]" but acknowledged that statistically every African-American male would be a match. Regarding the Y-STR epithelial fraction anal sample, Coniglio-Rivera stated defendant "matches the major profile" which was "expected to occur no more frequently than [one] in 413 . . . of the African-American population."

With respect to the Y-STR sperm fraction external genital sample, she noted that "matched the Y-STR profile from [defendant]" which occurred in approximately one in six African-American males. Further, with respect to the Y-STR testing of P.S.'s index finger, Coniglio-Rivera indicated that the specimen "matched the Y-STR profile of [defendant]" which was statistically found in fifty percent of African-American males. In addition, the Y-STR testing excluded defendant as source from the underwear sample and the cervical swab.

Defendant appealed his conviction and sentence arguing the court's "incomplete and confusing jury instructions deprived [him] of his rights to due process and a fair trial and require reversal of his convictions." He contended the court's "instruction on aggravated sexual assault failed to adequately explain that force or coercion was an additional element for aggravated sexual assault" and further failed "to explain that this element of intending to engage in sexual assault by using force or coercion also applied to the burglary charge." We disagreed and concluded the court "clearly and sufficiently charged the jury on burglary, aggravated sexual assault, and sexual assault."

Defendant also argued his convictions should be reversed because the admission of Y-STR DNA evidence and Coniglio-Rivera's testimony that defendant "matched" the Y-STR profile was confusing, irrelevant, and unfairly prejudicial. We rejected defendant's argument and found "although the Y-STR results did not prove that defendant was a source, they did establish that defendant could not be excluded from the class of individuals who could have sexually assaulted P.S." For example, Coniglio-Rivera testified that defendant could not be excluded based on the results of the Y-STR testing on the sperm fraction from the vaginal swabs. Moreover, as noted, Coniglio-Rivera testified

that the Y-STR results actually excluded defendant as a source from P.S.'s underwear sample and the cervical swab.

We also rejected defendant's argument Coniglio-Rivera should not have been permitted to testify defendant "matched" the DNA found on the victim because Coniglio-Rivera used this term to explain her detailed statistical findings regarding the DNA evidence and to illustrate the differences between a source, match, and exclusion as those terms are understood in the scientific community. We stated, "on this record, there is no discernible reason why the jury would be confused or misled by the repeated use of the word 'match' when such terms were thoroughly explained by the expert."

Additionally, we noted, Coniglio-Rivera's testimony, even if erroneous, was not capable of producing an unjust result "in light of the overwhelming evidence of defendant's guilt, including P.S.'s identification of defendant and detailed description of the assault, the nurse's testimony regarding her injuries, and the STR DNA evidence identifying defendant as the source of the beard hairs."

After the Supreme Court denied certification, defendant filed a timely counseled PCR petition. As relevant to the issues before us, defendant based his Strickland claim on his trial counsel's failure to retain a DNA expert who



could have assisted the defense by providing testimony and better preparing trial counsel.<sup>3</sup> Neither defendant nor counsel filed an accompanying certification, and the petition did not include a certification or affidavit from a DNA expert.

After considering the parties' written submissions and oral arguments, the PCR court denied defendant's petition without an evidentiary hearing in a September 8, 2022 order and explained the bases for its decision in a written opinion issued the same day. The PCR court concluded defendant failed to establish his trial counsel's performance was ineffective under the first prong of Strickland, noting the decision to retain an expert is strategic as "calling an expert whose ultimate opinion on cross-examination may have been supportive of the State's expert's position [and] would have reduced [d]efendant's possible chances severely."

In addition, the PCR court concluded defendant failed to establish he was prejudiced by counsel's actions for failing to retain a DNA expert. On this

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<sup>3</sup> Before the PCR court, defendant also contended his counsel was constitutionally ineffective under Strickland when he failed to object to the court's jury instructions with respect to the burglary and aggravated sexual assault charges, causing the instructions to be reviewed for plain error. The court rejected that argument and defendant has not reprised it before us. We accordingly do not address the court's reasoning and deem defendant's contention on this point waived. In re Gloria T. Mann Revocable Tr., 468 N.J. Super. 160, 180 (App. Div. 2021); Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2024).

point, the court expressly found "[t]here is little to no evidence that suggests the results of the proceeding would have been different but for trial counsel retaining a DNA expert." The PCR court further noted defendant failed to show how an expert would have helped him, and stated it would "not speculate that opting not to retain one was error or below the standard of effective assistance of counsel."

This appeal followed in which defendant raises the following two points:

**POINT I**

**AS DEFENDANT HAS MET HIS BURDEN TO SHOW A PRIMA FACIE CASE OF INEFFECTIVE ASSISTANCE OF COUNSEL AND THERE WERE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE, THE PCR COURT ERRED WHEN IT DENIED HIS PCR PETITION WITHOUT AN EVIDENTIARY HEARING.**

**POINT II**

**THIS MATTER SHOULD BE REMANDED TO ALLOW ASSIGNMENT OF COMPETENT PCR COUNSEL SO THAT DEFENDANT'S PCR CLAIMS CAN BE PROPERLY IDENTIFIED AND INVESTIGATED.**

**II.**

In his first point, defendant reprises his argument before the PCR court that his trial counsel was ineffective for failing to "retain the services of a DNA

expert" as such an expert could have assisted the defense "by providing testimony explaining the statistical significance of [defendant's] being excluded as a contributor to certain DNA mixtures collected from the victim." Defendant maintains such an expert could have also prepared his trial counsel to "address the State's expert's claim that collected Y-STR profiles 'match' [him]," and explained the "limited value" of such to the jury. Defendant contends because DNA was critical to the State's case, his counsel should have consulted with, and possibly presented, a DNA expert.

Defendant also asserts "DNA was a major issue of dispute by the defense," but "trial counsel failed to object to the inconsistent and rather confusing" DNA testimony. Defendant notes as his PCR counsel stated at oral argument, "[n]obody involved in the case from the defense side . . . had any unique knowledge as to the DNA profile and how the exclusion of [defendant's] DNA from certain mixtures would have [] impacted the case."

Defendant further maintains an evidentiary hearing is required "to question the prior counsel . . . with regard to why he didn't do certain things that he should have done." He further argues there is a genuine issue of material fact as to whether he received effective representation and a complete defense, warranting an evidentiary hearing.

"[W]e 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). "If the court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to post-conviction relief, . . . then an evidentiary hearing need not be granted." Ibid. (alteration in original) (quoting State v. Marshall, 148 N.J. 89, 158 (1997)). We review the denial of a PCR petition with "deference to the trial court's factual findings . . . 'when supported by adequate, substantial and credible evidence.'" State v. Harris, 181 N.J. 391, 415 (2004) (alteration in original) (internal citation omitted).

Where, as here, "no evidentiary hearing has been held, we 'may exercise de novo review over the factual inferences drawn from the documentary record by the [PCR judge].'" State v. Reevey, 417 N.J. Super. 134, 146-47 (App. Div. 2010) (alteration in original) (quoting Harris, 181 N.J. at 421). We also review de novo the legal conclusions of the PCR judge. Harris, 181 N.J. at 415-16.

Simply raising a PCR claim does not entitle a defendant to an evidentiary hearing as a 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 decide 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).

When petitioning for PCR, the defendant must establish, by a preponderance of the credible evidence, that they are entitled to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013); State v. Preciose, 129 N.J. 451, 459 (1992). As noted, 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 their right to a fair trial. Strickland, 466 U.S. at 687; Fritz, 105 N.J. at 58.

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. 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. As such, "[j]udicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be

made to eliminate the distorting effects of hindsight." Id. at 689. Where a defendant's ineffective assistance of counsel claim is based on a failure to call a witness, the defendant "must assert the facts that would have been revealed, 'supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification.'" State v. Petrozelli, 351 N.J. Super. 14, 23 (App. Div. 2002) (quoting Cummings, 321 N.J. Super. at 170).

Under the "second, and far more difficult prong," of the Strickland test, State v. Gideon, 244 N.J. 538, 550 (2021) (quoting Preciose, 129 N.J. at 463), a defendant "must show that the deficient performance prejudiced the defense[,]" State v. O'Neil, 219 N.J. 598, 611 (2014) (quoting Strickland, 466 U.S. at 687). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Gideon, 244 N.J. at 550-51 (alteration in original) (quoting Strickland, 466 U.S. at 694).

Here, we are convinced the court correctly denied defendant's petition without an evidentiary hearing because he failed to establish either the performance or prejudice prong of the Strickland test. Neither before the PCR court nor us has defendant identified any DNA expert that would have assisted

in his defense or explain the substantive testimony to which the expert would have testified. Without such proofs, defendant's claims that counsel's performance was ineffective for failing to retain a DNA expert to assist at trial or offer substantive testimony amount to nothing more than bald, unsupported allegations insufficient to warrant relief under Strickland.

Further, defendant also failed to establish a prima facie claim he was prejudiced by counsel's purported deficiencies. As the PCR court correctly found "[t]here is little to no evidence that the results of the proceeding would have been different but for trial counsel retaining a DNA expert." Indeed, although defendant asserts a DNA expert could have explained to the jury the limited value of his Y-STR profile "match," and his being excluded from other samples, defendant's counsel elicited such testimony from Coniglio-Rivera on cross-examination, which we discussed in our opinion on defendant's direct appeal. As we explained:

As to the vaginal sample, she confirmed that the Y-STR profile obtained "matched the profile from [defendant]" but acknowledged that statistically every African-American male would be a match. Regarding the Y-STR epithelial fraction anal sample, Coniglio-Rivera stated defendant "matches the major profile" which was "expected to occur no more frequently than [one] in 413 . . . of the African-American population."

As to the Y-STR sperm fraction external genital sample, she noted that "matched the Y-STR profile from [defendant]" which occurred in approximately one in six African-American males. Further, with respect to the Y-STR testing of P.S.'s index finger, Coniglio-Rivera indicated that the specimen "matched the Y-STR profile of [defendant]" which was statistically found in fifty percent of African-American males. In addition, the Y-STR testing excluded defendant as source from the underwear sample and the cervical swab.

[Stanback, slip op. at 6-7.]

In reviewing the admissibility of the DNA evidence for plain error, we concluded such evidence was properly admitted and found no reason why the jury would have been confused or misled. Stanback, slip op. at 18-19. In addition, as we noted, the record contains "overwhelming evidence of defendant's guilt, including P.S.'s identification of defendant and detailed description of the assault, the nurse's testimony regarding her injuries, and the STR DNA evidence identifying defendant as the source of the beard hairs." Stanback, slip op. at 21.

In light of Coniglio-Rivera's testimony on cross-examination, the other evidence overwhelmingly supporting defendant's guilt, including the other DNA evidence, the victim's testimony, and in the absence of any specific facts or opinions a DNA expert for defendant would assert or how such an expert would



have assisted defendant's trial counsel, we are not persuaded the court erred in concluding defendant failed to establish he was prejudiced by his trial counsel not retaining such an expert. In light of these factual and legal conclusions, the court also correctly denied defendant's request for an evidentiary hearing. See Preciose, 129 N.J. at 462 ("[T]rial courts ordinarily should grant evidentiary hearings to resolve ineffective assistance of counsel claims if a defendant has presented a prima facie claim in support of [PCR].").

### III.

In his second point, defendant argues his PCR counsel was ineffective contending he failed to: (1) conduct any "independent investigation . . . to identify [his] ineffective assistance of counsel claims"; (2) consult a DNA expert; (3) file a certification on behalf of defendant; (4) submit a "proper brief in support" of defendant's petition; or (5) "cite to a single case or court rule" at oral argument or in defendant's PCR petition. In sum, defendant asserts his PCR counsel's representation was "perfunctory" and "did not meet even the rudimentary standards required of effective legal PCR representation."

With respect to a claim PCR counsel was ineffective, the Supreme Court has stated:

PCR counsel must communicate with the client, investigate the claims urged by the client, and

determine whether there are additional claims that should be brought forward. Thereafter, counsel should advance all of the legitimate arguments that the record will support. If after investigation counsel can formulate no fair legal argument in support of a particular claim raised by defendant, no argument need be made on that point. Stated differently, the brief must advance the arguments that can be made in support of the petition and include defendant's remaining claims, either by listing them or incorporating them by reference so that the judge may consider them.

[State v. Webster, 187 N.J. 254, 257 (2006).]

"The remedy for counsel's failure to meet the[se] requirements . . . is a new PCR proceeding." State v. Hicks, 411 N.J. Super. 370, 376 (App. Div. 2010) (citing State v. Rue, 175 N.J. 1, 4 (2002)). Such relief "is not predicated upon a finding of ineffective assistance of counsel under the relevant constitutional standard. Rule 3:22-6(d) imposes an independent standard of professional conduct upon an attorney representing a defendant in a PCR proceeding." Ibid. (citations omitted).

In Hicks, we remanded for a new PCR hearing as we determined PCR counsel was ineffective. Id. at 375. Specifically, we determined defendant failed to receive the benefit of the PCR counsel's experience because the attorney limited his performance to re-presenting the arguments defendant asserted in his pro se petition and noted there was no evidence PCR counsel

"conducted an independent evaluation of defendant's case to determine whether there were other grounds to attack defendant's conviction." Id. at 374. We also found he made comments at oral argument revealing his ignorance of the essential facts of the case. Ibid.

PCR counsel, however, is not required to bolster claims raised by a defendant that are without foundation, but rather, only those "the record will support." Webster, 187 N.J. at 257. With this standard in mind, we consider defendant's arguments as they pertain to his assigned PCR counsel.

Unlike in Hicks, where it was apparent PCR counsel had failed to meet his obligations, we cannot conclude on the record before us that PCR counsel failed to discharge his responsibilities properly and that a remand for a new hearing is required. For example, defendant has not demonstrated that he presented any claims to PCR counsel that were not argued that would have changed the outcome of the court's decision. See Webster, 187 N.J. at 257.

With respect to counsel's failure to submit a certification detailing all of defendant's arguments, based on the record before us, defendant's counseled PCR petition contains all of defendant's claims. See ibid. Further, there is no indication PCR counsel was fundamentally ignorant with respect to the facts of the case as the counsel was in Hicks. Indeed, both in defendant's written petition

and at oral argument, PCR counsel engaged with the court with respect to defendant's arguments and the facts of the case.

We are also not persuaded by defendant's contention PCR counsel failed to review the trial record and transcripts simply because the submissions to the PCR court do not contain record or legal citations. As noted, although brief, the petition does include the procedural history and the facts upon which relief was sought. Those facts include trial counsel's failure to object to the court's jury instructions and failure to retain a DNA expert who could have "explain[ed] the statistical significance" of the DNA evidence. On this record, we discern no violation of the dictates of Rue, 175 N.J. at 4.

Although we do not find a remand for a new hearing is necessary on the current record with respect to defendant's claim his PCR counsel was ineffective for failing to consult a DNA expert, failing to file a certification detailing defendant's arguments, or failing to properly brief and argue defendant's contentions, defendant also argues his PCR counsel failed to conduct an "independent investigation" to determine other potential errors committed by his trial counsel during his representation of defendant. As to this remaining argument, defendant may raise this contention in a properly supported second PCR petition, see State v. Armour, 446 N.J. Super. 295, 317 (App. Div. 2016);

see also R. 3:22-12(a)(2)(C), as it involves matters outside the record better suited for a subsequent petition. See Armour, 446 N.J. Super. at 317.

To the extent we have not specifically addressed any of defendant's legal arguments it is because we have concluded they are of insufficient 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