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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3491-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KEMAL ALBUT, a/k/a
KEMEL ALBUT, and
KEMAL ALBERT,

Defendant-Appellant.

Submitted February 12, 2024 – Decided June 20, 2024

Before Judges Berdote Byrne and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law
Division, Passaic County, Indictment No. 09-04-0422.

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

Camelia M. Valdes, Passaic County Prosecutor,
attorney for respondent (Timothy P. Kerrigan, Jr., Chief
Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant, Kemal Albut, appeals from a June 29, 2017 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. Because defendant failed to establish a prima facie showing of ineffective assistance of counsel, we affirm.

I.

The salient facts and procedural history were previously recounted in our decisions on defendant's direct appeal, State v. Albut (Albut I), No. A-3389-11 (App. Div. Apr. 15, 2015), and first PCR appeal, State v. Albut (Albut II), No. A-0028-11 (App. Div. Jan. 14, 2020). We set forth only the facts material to our determination of defendant's second PCR appeal.

Defendant was charged with fatally shooting Jaime Bermudez and wounding Jaime's brother, Brian Bermudez, in Paterson in November 2008, before fleeing to Connecticut, where he was arrested in his girlfriend Brendaliz Mojica's motel room. Mojica allowed officers in the room, where they arrested defendant and recovered his weapon. After his arrest, defendant gave an unrecorded, inculpatory statement to police while still in Connecticut.

A Passaic County Grand Jury subsequently returned an indictment charging defendant with: first-degree murder, N.J.S.A. 2C:11-3(a)(1) or (2) (count one); second-degree possession of a nine-millimeter handgun for an

unlawful purpose against Jaime and/or Brian Bermudez, N.J.S.A. 2C:39-4(a) (count two); second-degree unlawful possession of a nine-millimeter handgun without a permit, N.J.S.A. 2C:39-5(b) (count three); first-degree attempted murder of Brian Bermudez, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3(a)(1) (count four); and second-degree unlawful possession by certain persons not authorized to have a handgun, N.J.S.A. 2C:39-7(b) (count five).

Prior to trial, the trial court conducted a pretrial Sands/Brunson hearing¹ because the State moved to admit evidence regarding defendant's four prior convictions for robbery, weapons, and drug-related offenses. Defendant's trial counsel argued the convictions should be excluded due to remoteness and their prejudicial effect. The trial court found the convictions were not remote, the State could refer to the prior convictions if defendant testified because they were admissible, and the State would have to sanitize the prior convictions if it chose to use them.

¹ State v. Sands, 76 N.J. 127, 147 (1978) (trial courts have the discretion to exclude certain prior-conviction evidence when necessary to protect a defendant from undue prejudice); State v. Brunson, 132 N.J. 377, 394 (1993) (prior-conviction evidence for the purpose of impeaching the credibility of a testifying defendant should be limited to "the number, degree, and date of the defendant's prior similar convictions.").

Defendant was tried before a jury over the course of two months with one disruption. During direct examination of John Umstead, the State's identification witness, a news photographer walked into the courtroom and began taking photographs. Before Umstead identified defendant as the shooter, defendant's trial counsel requested a sidebar, which was conducted in chambers. The trial court learned a media representative had been given authorization from the Assignment Judge to be present during defendant's trial. The parties explained to the court the photographer's conduct, by "burst[ing]"² into the courtroom and using a camera that made noise, was obtrusive and distracting. Defense counsel argued the photographer's actions distracted some of the jury "during the last couple sentences of [Umstead's] testimony."

Defense counsel requested the court instruct the jury regarding media presence in the courtroom. Counsel stated she did not have an objection to media presence but wanted the jury instructed. Following the court's instructions to the jury, the State resumed its direct examination of Umstead.

The jury convicted defendant of all charged crimes except first-degree murder (count one) and attempted murder (count four), where the jury instead

² Counsel's use of the term "burst[ing]" is disputed. It is clear the trial judge did not notice the "distraction" as she was focused on the witness' testimony.

convicted defendant of the lesser-included offenses of aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1), and aggravated assault by attempting to or causing bodily injury with a deadly weapon, N.J.S.A. 2C:12-1(b)(2). The trial court sentenced defendant for an extended term pursuant to N.J.S.A. 2C:44-3(a) to an aggregate sentence of life in prison, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2.

We affirmed the convictions and sentence. Defendant's first PCR petition, filed in 2015, raised seven claims. On June 29, 2017, the PCR court denied six of the claims. It conducted an evidentiary hearing on the remaining claim and, on January 2, 2019, the PCR court partially granted PCR, ordering defendant be resentenced to an ordinary term of imprisonment. See Albut II, slip op. at 3-4, 6.³ The six claims rejected by the PCR court were not appealed. The State appealed the order partially granting PCR. The six claims rejected by the PCR court were not appealed. We reversed the grant of PCR. Albut II (slip op. at 9, 14-15). The Supreme Court denied defendant's petition for certification. State v. Albut, 241 N.J. 518 (2020).

³ Our decision refers to eight arguments. Albut II, slip op. at 3. Defendant's first "argument," however, was merely a recitation of black letter law as to his right to effective assistance of counsel and the standard for PCR.

A second PCR petition in 2020 alleged defendant's counsel was ineffective for failing to appeal the six issues rejected by the first PCR court. In 2021, the second PCR petition was granted, allowing defendant to appeal the six claims denied in his first PCR petition. This appeal followed.

II.

On appeal, defendant makes two arguments, which he articulates as follows:

POINT I

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ADEQUATELY OBJECT TO UNDULY INTRUSIVE MEDIA COVERAGE WHICH DISRUPTED THE TRIAL AND DISTRACTED THE JURY

POINT II

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF THE TRIAL COURT'S DECISION THAT REMOTE PRIOR CONVICTIONS WOULD BE ADMISSIBLE TO IMPEACH DEFENDANT SHOULD HE TESTIFY.

Initially, we note, in defendant's first petition for PCR filed in October 2015, defendant argued seven reasons why he received ineffective assistance of counsel from both his trial and appellate attorneys: (1) appellate counsel failed to challenge the prosecutor's failure to provide discovery, specifically the

criminal history of witness Umstead; (2) trial counsel failed to argue self-defense or defense of others; (3) trial counsel failed to object to the warrantless hotel room search which led to the discovery of the gun; (4) trial counsel failed to object to courtroom media coverage which distracted the jury; (5) appellate counsel failed to raise the issue of the admission of defendant's prior convictions for purposes of impeachment; (6) trial counsel failed to adequately advise defendant as to the potential for an extended term life sentence; and (7) cumulative error.

However, despite being given the opportunity to raise six of the seven issues in this appeal, defendant claims only that he has demonstrated prima facie claims of ineffective assistance of counsel for failing to adequately object to intrusive media coverage which disrupted the trial, and ineffective assistance of appellate counsel for failing to challenge the result of the Sands/Brunson motion, which ruled defendant's prior convictions admissible for purposes of impeaching his credibility. Therefore, we deem all the remaining issues, originally raised in his first PCR, waived. Green Knight Cap., LLC v. Calderon, 469 N.J. Super. 390, 396 (App. Div. 2021) (quoting Woodlands Cmty. Ass'n v. Mitchell, 450 N.J. Super. 310, 319 (App. Div. 2017)).

III.

"Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." State v. Pierre, 223 N.J. 560, 576 (2015) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). Although our "review is necessarily deferential to a PCR court's factual findings based on its review of live witness testimony," State v. Nash, 212 N.J. 518, 540 (2013), where, as here, a PCR court does not conduct an evidentiary hearing, we review the PCR court's decision to deny the PCR petition de novo. See State v. Harris, 181 N.J. 391, 420-21 (2004). A PCR court's interpretation of the law is also reviewed de novo. Nash, 212 N.J. at 540-41.

Both the Sixth Amendment of the United States Constitution and Article I, Paragraph 10 of our State Constitution guarantee the right to effective assistance of counsel at all stages of criminal proceedings. Strickland v. Washington, 466 U.S. 668, 686 (1984); State v. Fritz, 105 N.J. 42, 58 (1987). Our Supreme Court has adopted the two-part test articulated in Strickland to determine whether a defendant has received ineffective assistance of counsel. Fritz, 105 N.J. at 58. A defendant may seek PCR if the defendant shows (1) "[defendant's] counsel's performance was deficient" and (2) this "deficient

performance prejudiced the defense." Id. at 52 (quoting Strickland, 466 U.S. at 687).

A defendant must demonstrate "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. We employ a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" Id. at 689; State v. Hess, 207 N.J. 123, 147 (2011).

Secondly, the defendant must demonstrate "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. This second prong is particularly demanding and requires "[t]he error committed . . . be so serious as to undermine the court's confidence in the jury's verdict or the result reached." State v. Allegro, 193 N.J. 352, 367 (2008) (brackets in original) (quoting State v. Castagna, 187 N.J. 293, 315 (2006)). This "is an exacting standard." State v. Gideon, 244 N.J. 538, 551 (2021) (quoting Allegro, 193 N.J. at 367). "Prejudice is not to be presumed," but must be affirmatively proven by the defendant. Ibid.

Media Coverage

Defendant argues his trial counsel was ineffective in failing to "adequately" object or move for a mistrial following what he argues was a

violation of Canon 3A (9) of the New Jersey Code of Judicial Conduct pertaining to the prohibition against taking photographs of proceedings without consent from both parties by a news photographer.

Defendant's main contention is that the interruption occurred during the State's direct examination of a critical witness, Umstead, and the photographer's presence was unauthorized, which his counsel "had a duty to correct" to "protect [his] interests." Defendant does not articulate how the presence of media or the alleged disruption affected the outcome of his trial.

First, defendant fails to demonstrate that a motion for a mistrial would have been successful. State v. O'Neal, 190 N.J. 601, 619 (2007) ("It is not ineffective assistance of counsel for defense counsel not to file a meritless motion."). Second, trial counsel's decision to not move for a mistrial was a matter of sound trial strategy, and the absence of the motion does not convince us it deprived defendant of a fair trial. After the photographer interrupted the proceedings, trial counsel acted promptly and requested a sidebar to confer with the court. Counsel requested an adjournment to consider consenting to the media's presence. The court conducted a hearing where trial counsel requested a jury instruction and a court instruction to the photographer to be unobtrusive as trial proceeded. The court notified the jury of the media presence, assured

them the media was prohibited from taking their photographs, and instructed them that they were prohibited from reading any media accounts. Defense counsel took steps to ensure trial would proceed without distraction and made the necessary requests to ensure the jury was instructed appropriately.

It is well-settled that a defense attorney's trial strategy is generally not second-guessed in a PCR proceeding. State v. Gary, 229 N.J. Super. 102, 116, (App. Div. 1988). To the contrary, trial counsel's informed strategic decisions demand our heightened deference, and "are virtually unchallengeable" Strickland, 466 U.S. at 690-91. "[C]omplaints 'merely of matters of trial strategy' will not serve to ground a constitutional claim of inadequacy," Fritz, 105 N.J. at 54 (quoting State v. Williams, 39 N.J. 471, 489 (1963)), and defendant does not articulate how his trial counsel's decision was not sound or reasonable. See State v. Coruzzi, 189 N.J. Super. 273, 321 (App. Div. 1983) (observing trial strategy is clearly within the discretion of competent trial counsel); see also State v. Echols, 199 N.J. 344, 358 (2009) (holding presumption that counsel provided effective reasonable legal assistance "may be rebutted if defendant demonstrates that counsel's actions did not equate to 'sound trial strategy.'"). We discern no reason to disturb the trial court's ruling.

Evidence of Prior Convictions

Defendant also contends his appellate counsel was ineffective for failing to raise issue with the trial court's Sands/Brunson decisions in his direct appeal. He argues two of his prior convictions were too remote to be admissible and "[t]he trial court's decision may have affected [his] decision as to whether to testify in his own behalf." We are unpersuaded.

At the time of trial on October 18, 2011, defendant had four (4) prior convictions: (1) eluding and unlawful taking of a means of conveyance, convicted on January 23, 2001; (2) unlawful possession of a handgun, convicted on October 1, 2001; (3) distribution or possession with intent to distribute a controlled dangerous substance within 1,000 feet of school property, convicted on November 21, 2002; and (4) robbery, convicted on February 24, 2004.

Pursuant to N.J.R.E. 609, evidence of a witness's prior conviction of a crime is presumptively admissible to affect credibility unless the adverse party can demonstrate the conviction is too remote or otherwise irrelevant. "Ordinarily evidence of prior convictions should be admitted and the burden of proof to justify exclusion rests on [the party seeking exclusion]." Sands, 76 N.J. at 144. Within these parameters, the discretion to admit or exclude a conviction is left to the trial judge whose determination cannot be reversed absent an abuse

of discretion. State v. Hutson, 211 N.J. Super. 49, 53 (App. Div. 1986); see Sands, 76 N.J. at 144.

Defendant's trial counsel argued the 2001 convictions should be excluded due to remoteness. The trial court acknowledged those convictions were "just around that ten-year mark," but found they were admissible as a result of the existence of the more recent convictions.

As to the 2002 conviction for drug distribution, defendant's trial counsel argued that conviction should be sanitized because the present case involved allegations of drug dealing not involving defendant. Specifically, defendant's trial counsel argued admission of the nature of the 2002 conviction would prejudice defendant because the evidence presented regarding drug distribution "might lead to the jury concluding that [defendant] took certain actions because he was involved with drug dealing." The State argued it planned to "avoid having witnesses through their testimony link this defendant personally to the distribution of drugs." The trial court indicated it would not require sanitization of the drug distribution charge.

Defendant's trial counsel also argued his conviction for unlawful possession of a handgun should be sanitized. The trial court ruled that conviction would have to be sanitized because defendant was charged with the

same crime in this case. The State conceded that sanitizing the unlawful possession of handgun charge would require it to sanitize defendant's other convictions, and its inclination, if defendant testified, would be to choose to omit any reference to the handgun charge entirely. The trial court agreed.

In order to prevail on his claim that appellate counsel was ineffective, defendant was required to demonstrate his argument, that the trial court erred in finding the two older convictions were admissible, would have been successful on his direct appeal. See O'Neal, 190 N.J. at 619 (an attorney is not ineffective by failing to make an argument that lacks merit or would be unsuccessful); State v. Worlock, 117 N.J. 596, 625 (1990). Based on our review of the record, we are convinced defendant failed to demonstrate a prima facie case that his claim would have been successful on direct appeal.


Right to an Evidentiary Hearing

A defendant is not automatically entitled to an evidentiary hearing. State v. Porter, 216 N.J. 343, 355 (2013). Rule 3:22-10(b) provides that a defendant is entitled to an evidentiary hearing only if he or she establishes a prima facie case in support of PCR, "material issues of disputed fact cannot be resolved by reference to the existing record," and "an evidentiary hearing is necessary to resolve the claims for relief." Porter, 216 N.J. at 354 (quoting R. 3:22-10(b)).

We review the trial court's failure to hold an evidentiary hearing for abuse of discretion. State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013). Applying these principles to the matter before us, we conclude an evidentiary hearing was not warranted on any of defendant's claims.

To the extent we have not addressed any remaining contentions, they lack sufficient 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