SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1641-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RASHAWN CARTER,
a/k/a CURTIS WALKER,

Defendant-Appellant.

Submitted March 9, 2022 – Decided June 14, 2022

Before Judges Whipple, Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 11-12-2963.

Joseph E. Krakora, Public Defender, attorney for appellant (Steven M. Gilson, Designated Counsel, on the brief).

Grace C. MacAulay, Camden County Prosecutor, attorney for respondent (Natalie A. Schmid Drummond, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from an October 23, 2020 Law Division order issued by Judge Edward McBride denying defendant's petition for post-conviction relief (PCR) without a hearing. Defendant was convicted by a jury of felony murder and multiple robberies and was sentenced to an aggregate term of 107 years subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. He contends his trial counsel rendered ineffective assistance by (1) failing to procure funding from the Office of the Public Defender (OPD) for an expert to counter the State's historical cell site analysis expert, and (2) failing to interview two individuals before trial. After carefully reviewing the record in view of the governing principles of law, we reject defendant's contentions and affirm the denial of PCR without a hearing substantially for the reasons expressed by Judge McBride in his written opinion.

I.

On December 21, 2011, a grand jury charged defendant, codefendant William Cooper, and codefendant Maurice Carter with: (1) knowing and purposeful murder, N.J.S.A. 2C:11-3(a)(1)–(2) (Count One); (2) felony murder, N.J.S.A. 2C:11-3(a)(3) (Count Two); (3) six counts of first-degree armed robbery, N.J.S.A. 2C:15-1 (Counts Three, Four, Five, Six, Seven, and Eight); (4) six counts of first-degree kidnapping, N.J.S.A. 2C:13-1(b)(1) (Counts Nine,

Ten, Eleven, Twelve, Thirteen, and Fourteen); (5) six counts of third-degree criminal restraint, N.J.S.A. 2C:13-2(a) (Counts Fifteen, Sixteen, Seventeen, Eighteen, Nineteen, and Twenty); (6) second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (Count Twenty-One); (7) second-degree unlawful possession of a firearm, N.J.S.A. 2C:39-5(b) (Count Twenty-Two); and (8) first-degree conspiracy, N.J.S.A. 2C:5-2/2C:11-3(a)(1) (Count Twenty-Three).

Defendant and Cooper were tried together before a jury. To provide context for defendant's PCR claims, we summarize the facts elicited at trial.

On October 14, 2009, at approximately 8:40 p.m., defendant, William Cooper, and Maurice Carter entered Alex's Bakery in Woodlynne, New Jersey. Defendant was wearing a red "Ed Hardy" jacket "with no mask or gloves." Upon entering the bakery, Cooper proceeded to the register and pointed a gun at the two owners, Oscar Hernandez and Silvia Ramos Morales.

Hernandez ran towards the kitchen and attempted to close the door. Cooper followed and pushed the door open. After opening the door and an ensuing struggle between the two men, Cooper fatally shot Hernandez.

During the struggle between Cooper and Hernandez, defendant "ordered the three bakery patrons in the store to get on the ground" while Maurice Carter

stood guard at the front door. Ramos Morales was watching the struggle from her hiding spot under the computer area of the bakery. She pressed a silent alarm twenty-four times. She continued to watch Cooper closely and remained undetected for a period of time.

Cooper stepped over Hernandez's body and moved towards Ramos Morales. Cooper attempted and failed to open the cash register. Defendant and Maurice Carter were also unsuccessful in opening the register.

At some point during the armed robbery, two individuals attempted to enter the bakery, but defendant held the door closed and told them that the store was closed. Around this time, Cooper noticed Ramos Morales and motioned at her with his gun to go into the kitchen. Shortly after, someone called out that the police "were on their way" and the three men fled.

On the same night as the robbery, police interviewed Latasha Baker—defendant's sister—as a witness and victim of the robbery. Baker had entered the bakery with her one-year-old son, looking to purchase a slice of cake. Hernandez notified Baker that the cake was only sold whole and not in slices. After walking around the store, Baker left. However, she later returned, this time with her son, and repeated her request for a slice of cake. She was in the bakery when the three men robbed the store. After the robbery, she alleged that

her cell phone had been taken during the robbery. She provided to police the phone number associated with the "stolen" phone.

Following the robbery, police obtained a Communications Data Warrant to track Baker's allegedly stolen cell phone and were able to trace the cell phone to Baker's house, which was located less than a block from the bakery. Police went to Baker's home. She allowed them to enter her home. A "hand-held signal monitoring device" located Baker's cell phone underneath her couch. Police then interviewed her a second time. When police questioned "how the allegedly stolen cell phone was in her house, she gave three different, increasingly implausible reasons."

Because of Baker's statements, police reviewed her cell phone records. The records revealed that between 8 and 9 p.m. on the date of the robbery, there were approximately thirteen calls between Baker's cell phone and a phone number Baker identified as defendant's number. After obtaining this information, police reviewed security footage from the night of the incident. The surveillance showed Baker leaving the bakery the first time, then walking toward a back alley. That was the same alley the three men had used to approach and then leave the bakery.

As part of their investigation, police eventually reached out to Eddie Bell, who was the father of Baker's child. Police provided Bell with a picture of the robbery suspects, and he recognized the "Ed Hardy" jacket. Bell told police that the jacket belonged to him and that he had left the jacket at Baker's house. After reviewing surveillance footage from the night of the incident, Bell was able to identify defendant. Bell told police that he had known defendant for approximately six years.

Following Bell's identification of defendant, police reached out to Vernon Carter, defendant's brother. Unbeknownst to Carter, police secretly recorded the conversation. Vernon Carter explained that his brother told him about a robbery and that the robbery "went bad."

The conversation with Vernon Carter led police to defendant's sister's house. On October 28, 2009, police went to the sister's residence in search of defendant. Police found defendant and Cooper hiding behind a small pantry door. Police placed both men under arrest.

In January 2010, Michael Streater contacted police with information regarding the robbery. At the time he contacted police, Streater was out on bail. Streater had previously shared a jail cell with Cooper in 2009. Streater told police that Cooper admitted to robbing the bakery and shooting Hernandez.

The State at trial introduced expert testimony from an FBI agent concerning historical cell-site analysis. The expert opined that defendant's cell phone was in close proximity both to Baker's phone and the bakery shortly before the robbery occurred.

Based on the foregoing evidence, the jury found defendant guilty of felony murder, N.J.S.A. 2C:11-3(a)(3), five counts of first-degree armed robbery, N.J.S.A. 2C:15-1, five counts of criminal restraint, N.J.S.A. 2C:13-2(a), and conspiracy to commit armed robbery and criminal restraint. The jury found defendant not guilty of knowing/purposeful murder[1] and weapons offenses.

Defendant was sentenced to an aggregate term of 107 years, with approximately eighty-seven years to be served before becoming eligible for parole, pursuant to NERA. We affirmed the convictions and sentence on direct appeal. State v. Carter, No. A-1132-15 (App. Div. July 17, 2018) (slip op. at 45), certif. denied, 236 N.J. 597 (2019).

Defendant thereafter timely filed a timely petition for PCR. On October 23, 2020, the trial court denied defendant's PCR petition without an evidentiary hearing. This appeal follows.

[1] The State's proof established that codefendant Cooper fired the shot that killed one of the robbery victims, Oscar Hernandez.

Defendant raises the following issues for our consideration:

> POINT I
>
> THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF COUNSELS' INEFFECTIVENESS.
>
> A. COUNSEL FAILED TO PURSUE PUBLIC DEFENDER FUNDING FOR AN EXPERT TO COUNTER THE STATE'S EXPERT.
>
> B. TRIAL COUNSEL FAILED TO INTERVIEW EDDIE BELL AND TANEKIA CARTER.

II.

We begin our analysis by acknowledging the legal principles governing this appeal. Both the Sixth Amendment of the United States Constitution and Article 1, paragraph 10 of the 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) (citing McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). In order to demonstrate ineffectiveness of counsel, "[f]irst, the defendant must show that counsel's performance was deficient . . . . Second, the defendant must show that the deficient performance prejudiced the defense." Id. at 687. In State v. Fritz, our Supreme Court adopted the two-part test articulated in Strickland. 105 N.J. 42, 58 (1987).

To meet the first prong of the Strickland test, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Strickland, 466 U.S. at 687. Reviewing courts indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. The fact that a trial strategy fails to obtain the optimal outcome for a defendant is insufficient to show that counsel was ineffective. State v. DiFrisco, 174 N.J. 195, 220 (2002) (citing State v. Bey, 161 N.J. 233, 251 (1999)).

The second prong of the Strickland test requires the defendant to show "that 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. Put differently, counsel's errors must create a "reasonable probability" that the outcome of the proceedings would have been different if counsel had not made the errors. Id. at 694. The second Strickland prong is particularly demanding: "the error committed must 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) (quoting State v. Castagna, 187 N.J. 293, 315 (2006)). Furthermore, to set aside a guilty plea based on ineffective assistance of counsel, a defendant must show "there is a reasonable probability that, but for counsel's errors, [the defendant]

would not have pled guilty and would have insisted on going to trial." State v. DiFrisco, 137 N.J. 434, 457 (1994) (alteration in original). 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. (citing Fritz, 105 N.J. at 52; Strickland, 466 U.S. at 693).

Short of obtaining immediate relief, a defendant may prove that an evidentiary hearing is warranted to develop the factual record in connection with an ineffective assistance claim. State v. Preciose, 129 N.J. 451, 463 (1992). A defendant is entitled to an evidentiary hearing only when (1) he or she is able to prove a prima facie case of ineffective assistance of counsel, (2) there are material issues of disputed fact that must be resolved with evidence outside of the record, and (3) the hearing is necessary to resolve the claims for relief. R. 3:22-10(b). A defendant must "do more than make bald assertions that he was denied the effective assistance of counsel" to establish a prima facie case entitling him to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999); see also State v. Porter, 216 N.J. 343, 355 (2013) (quoting State v. Marshall, 148 N.J. 89, 158 (1997)) ("[A] defendant is not entitled to an evidentiary hearing if the 'allegations are too vague, conclusory, or speculative to warrant an evidentiary hearing[.]'").

When a PCR judge does not hold an evidentiary hearing, our standard of review is de novo as to both the factual inferences drawn by the PCR judge from the record and the judge's legal conclusions. State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016). We "view the facts in the light most favorable to a defendant to determine whether a defendant has established a prima facie claim." Preciose, 129 N.J. at 463.

III.

We first address defendant's contention that his original counsel rendered constitutionally ineffective assistance in his efforts to apply for funding from OPD to pay for a historical cell site expert, and that his pool counsel thereafter rendered ineffective assistance by failing to reapply for funding from OPD.

An indigent defendant is entitled to counsel, as well as other ancillary services, as may be necessary to prepare an adequate defense. See State v. DiFrisco, 174 N.J. at 243–44. That includes the right to the assistance of expert witnesses. Id. at 244. Funding for experts is provided pursuant to the State Constitution and the Public Defender Act, N.J.S.A. 2A:158A-1 to -26. Ibid.; see also Matter of Cannady, 126 N.J. 486, 492 (1991). OPD has discretionary authority to determine what services and facilities will be provided to an indigent defendant. In making that determination, OPD must "weigh the factors

of need and real value to the defense against the financial constraints inherent in the OPD's budget." Cannady, 126 N.J. at 493 (citing N.J.S.A. 2A:158A-5). The Court in Cannady recognized that OPD must be afforded discretion in deciding whether to provide ancillary services because, "in the real world of public funding of state agencies, . . . resources are not unlimited but rather are subject to budgetary limitations." Ibid. (citing State v. Cantalupo, 187 N.J. Super. 113, 121 (App. Div. 1982)).

We briefly summarize the pertinent facts as are set forth in Judge McBride's comprehensive opinion. Defendant originally retained private counsel. After defendant notified original counsel that he could not afford the cost to retain an expert, original counsel filed an application with OPD for ancillary services funding to cover the cost of a defense expert. OPD denied that application. Original counsel then sought an order to compel OPD to provide such funding. That application was heard and denied by Judge Irvin J. Snyder.

In denying defendant's motion to compel OPD for ancillary services expert funding, the Judge Snyder reasoned that a "defendant must first establish

indigency" pursuant to N.J.S.A. 2A:158A-14.[2] The judge added, "[o]nce the defendant sufficiently documents the indigency application, . . . OPD can then determine whether the facts of the case warrant the need for ancillary services." In making a decision on funding for ancillary services, Judge Snyder recognized that OPD must consider four questions:

> 1. Is the service requested reasonably related to the issue in contention?
>
> 2. Is the service requested reasonably related to the applicant's method of refuting the State's proofs?
>
> 3. Is the service requested needed and of real value to the defense when weighed against the financial constraints of the OPD?
>
> 4. Is the requested service one that is generally available to defendants represented by the OPD?
>
> [Cannady, 126 N.J. at 495.]

After reviewing the record and the briefs submitted, Judge Snyder determined that

> OPD does not claim that the expert selected by the defendant is unqualified to perform the requested service or that his fee of $200.00 per hour is unreasonable. However, when the OPD requested the defendant to show how the expert will refute the State's

[2] We note the trial court cited to N.J.S.A. 2A:158A-15, which has been repealed. N.J.S.A. 2A:158A-14 appears to be the correct provision for determining indigency. The definition of indigency can be found in N.J.S.A. 2A:158A-2.

> proofs and what the real value of the expert's services will be to the defense's case, the defense failed to provide an answer to either of those questions. The defendant does not clearly explain how his expert will result [sic] the finding of the [FBI expert's] report. Moreover, the OPD has also shown that this kind of expert service is not generally available to defendants represented by the OPD and hence would be a special provision for this defendant. In light of these unanswered questions raised by the OPD, the defendant has failed to make a showing that the expense is necessary.

We agree with the Judge McBride that on this record, defendant has failed to establish either prong of the Strickland test with respect to the services rendered by his original counsel. As to the first prong, we believe that defendant's original counsel should have provided to OPD an explanation as to how the defense expert would refute the State's proofs and what real value the expert's services would contribute to the defense case. However, the failure to provide those answers to OPD does not change the fact that OPD's decision to deny funding was based in part on the fact that funding for an expert in cell site analysis is not typically available.

We stress, moreover, that counsel filed a motion with the trial court seeking an order to compel OPD to provide funding. We thus conclude that defendant's original counsel took appropriate, indeed assertive steps to obtain funding, belying the notion that his efforts fell below the standard established

under the first prong in Strickland. See Strickland, 466 U.S. at 689 (noting that reviewing courts indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance").

Even were we to assume for the purposes of argument that defendant had satisfied the first prong, we agree with Judge McBride that defendant has also failed to meet the requirements under the second prong of the Strickland test, as he has not established that there is a reasonable probability that the outcome of the proceedings would have been different. Id. at 694. Defendant argues that the proffered expert testimony would have highlighted flaws in the State's expert report. In addressing this argument, Judge McBride carefully considered United States v. Jones, 918 F. Supp. 2d 1 (D.D.C. 2013), which defendant's expert referred to.[3] Judge McBride reasoned,

> In Jones, the defense challenged the government's expert's use of the depiction of a wedge-shaped form to show the coverage area of a particular antenna on a cell site. The cell site contained three antennas, with each one designed to provide coverage for one third (or 120°) of the circular distribution of the signals from the site. The court rejected the defense challenge to the government's expert's graphic depiction of the direction

[3] We note that in State v. Burney, we recently held that the State could present expert testimony on historical cell site data analysis to give a general approximation of the defendant's location at the time of the robbery that was committed in that case. __ N.J. Super. __, __ App. Div. 2022) (slip op. at 26–31).

> of the signals from a specific antenna. However, relying on Rule 403 [of] the Federal Rules of Evidence, the court ruled the use of an arc to connect the two vector lines depicting the direction of the signals to create a wedge and thereby convey the impression of an end point or end-range for the promulgation of the signals was unduly prejudicial.
>
> In this case, while the state's expert presented a graphic representation of the coverage areas of two cell site antennas in the form of a wedge, two of the other cell sites at issue (both of which were used by defendant's phone) were smaller, omni-directional sites that were located only blocks from the location of the robbery and Baker's home. Thus, defendant's proffered expert testimony would not have effectively contradicted the testimony of the state's expert regarding the two omni-directional cell site antennas
>
> Moreover, even if the depiction used by the state's expert for the coverage area of the other two antennas had been altered to remove the arc connecting the two vector lines, as was done in Jones, the overlap between the coverage area of those two antennas (one of which was used for signals from defendant's phone and the other for signals from Baker's phone) still would have been evident in the graphical illustrations used by the state's expert to explain his testimony.

We agree with Judge McBride's thoughtful analysis, which is based on his close familiarity with the trial proofs. We thus conclude it is unlikely, much less probable, that the defenses expert's testimony would have changed the outcome of the trial. See Strickland, 466 U.S. at 693 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome

of the proceeding. Virtually every act or omission of counsel would meet that test, . . . and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding."). Accordingly, defendant has failed to establish that he is entitled to relief based on his original counsel's failure to obtain funding from OPD.

We reach the same conclusion with respect to the performance of defendant's pool counsel, who served as trial counsel. Defendant contends that pool counsel rendered ineffective assistance by failing to reapply for OPD funding. Defendant has presented no evidence to suggest that OPD would have changed its decision had there been a renewed application. Indeed, that seems especially unlikely in view of OPD's efforts to oppose defendant's motion to compel funding. See State v. O'Neil, 190 N.J. 601, 619 (2007) ("It is not ineffective assistance of counsel for defense counsel not to file a meritless motion . . . .").

We add that pool counsel at trial amply demonstrated his effectiveness on the issue of the historical cell cite evidence. As Judge McBride noted in his opinion:

> [T]rial counsel conducted extensive cross examination of the state's expert. Among the admissions trial counsel elicited from the state's expert was that the figures depicted on the graphic presentations were

> "essentially estimations" of what the expert believed those figures represented.

See Harrington v. Richter, 562 U.S. 86, 107 (2011) (noting that "[c]ounsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies").

IV.

We turn next to defendant's contention that his original and replacement pool counsel were "per se ineffective" under State v. Davis, 116 N.J. 341 (1989), superseded on other grounds, State v. Cruz, 163 N.J. 403, 411 (2000). That argument lacks sufficient merit to warrant extensive discussion. R. 2:11-3(e)(2). The Court in Davis explained:

> [W]hen the level of counsel's participation makes the idea of a fair trial a nullity, no prejudice need be shown. It is presumed . . . . To establish this category of ineffective assistance, defendant is not required to show prejudice. That degree of deficient performance is tantamount to a "complete denial of counsel."
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> [Id. at 352.]

The rule in Davis does not apply in this case. Even were we to assume for the sake of argument that the performance of either counsel with respect to OPD funding was objectively ineffective, such performance would by no means rise to the level of per se ineffectiveness. As we have noted, original counsel

applied for funding with the OPD and even sought intervention from a Law Division judge when the funding request was denied. This is not a situation where counsel completely failed to seek funding. Pool counsel, meanwhile, recognized that OPD previously denied the funding and affirmatively opposed defendant's motion to compel it to provide funding. As we have noted, pool counsel was under no obligation to file a second application that would have likely been rejected.

V.

We next address whether defendant's trial counsel rendered ineffective assistance by failing to interview Eddie Bell and Tanekia Carter. We address each witness in turn.

Eddie Bell

Defendant contends that by failing to interview Bell before trial, his trial counsel did not have sufficient information upon which to effectively cross-examine Bell. At trial, Bell identified defendant as the individual wearing the red jacket in the surveillance video recording of the robbery. Defendant argues that had pool counsel interviewed Bell, he could have elicited that Bell felt intimated during his encounters with police shortly after the robbery. In support

of that PCR contention, defendant submitted an affidavit from Bell that reads in pertinent part:

> 2. Three detectives came to my place of employment to ask me questions about the robbery of Alex's Bakery. The detectives requested that I accompany them to their station for the interrogation. I was placed in the back of a police cruiser and driven to their station.
>
> 3. I felt intimidated by the police when they chose to approach me in this manner. Although I did not want to talk to them, I did not feel like I was able to say no to them.
>
> . . . .
>
> 5. There was a pre-interview (which was not recorded) and then the detectives conducted the interview (which was recorded).
>
> 6. I continued to feel intimidation from the detectives during the entire time I was at the station. I felt a lot of pressure to tell the detectives what I though[t] they wanted to hear—namely incriminating statement about Rashawn Carter.
>
> 7. After the interview through the time I was called as a witness at trial I definitely felt continuing intimidation and pressure from law enforcement officials to cooperate with them as a witness against Rashawn Carter.

It bears emphasis that Bell's affidavit does not aver that he had misidentified defendant or the jacket. Rather, the gravamen of the affidavit is that he was intimidated by police and felt pressure to identify defendant.

Our Supreme Court has recognized that "[c]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." State v. Martini, 160 N.J. 248, 266 (1999) (quoting Strickland, 466 U.S. at 691). Importantly, "[w]hether this duty has been satisfied is measured by 'reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.'" Ibid. In other words, "when counsel's decision to limit an investigation is supported by 'reasonable professional judgments,' we will not find deficient performance." Ibid. (quoting Burger v. Kemp, 483 U.S. 776, 794 (1987)). "That is, if counsel makes a thorough investigation of the law and facts and considers all likely options, counsel's trial strategy is 'virtually unchallengeable.'" State v. Chew, 179 N.J. 186, 217 (2004) (quoting Strickland, 466 U.S. at 690–91).

It is undisputed that in this instance, pool counsel failed to interview Bell prior to the trial. Had he done so, counsel would have been able to elicit at trial that Bell was pressured by police and then argue that such intimidation effected the reliability of Bell's identification of defendant and the jacket.

However, counsel was still able to effectively cross-examine Bell. For example, counsel on cross-examination confirmed that Bell did not recognize photos of defendant that police had shown to him when they were investigating the robbery. Pool counsel was also able to get Bell to acknowledge that he was unsure whether he actually left his Ed Hardy jacket at Baker's house.

But even accepting that pool counsel's failure to interview Bell satisfies the first prong of the Strickland test, we agree with the PCR court that defendant has not established the second prong. We do not find it probable that cross-examination revealing defendant felt pressured by police would have changed the result of the trial.

Tanekia Carter

Defendant also argues that pool counsel was ineffective for failing to interview Tanekia Carter, defendant's sister. Defendant argues that had pool counsel interviewed Tanekia Carter, she could have been called as a witness to contradict Vernon Carter's, (defendant's brother) statement to police that defendant had admitted to Vernon that he was part of a robbery that "went bad."

Tanekia Carter's affidavit submitted in support of the PCR petition states in relevant part:

> 3. Vernon and Rashawn had a good relationship at one time, but by 2009 their relationship had become very bad. I believe that Vernon was jealous of the success that Rashawn was experiencing in life.
>
> 4. I am aware that Vernon made a statement to the police in which Vernon claimed that Rashawn admitted to being involved in the robbery of bakery in October 2009.
>
> 5. I do not believe that Rashawn ever made any such admission to Vernon.
>
> 6. I believe that Vernon's jealousy of Rashawn was part of the reason Vernon said what he did to the police. I also believed that Vernon was trying to get the reward money that was being offered to anyone who provided information leading to the arrest of the people who robbed the bakery. Furthermore, I believe that Vernon was looking for some sort of help from the police for an open drug case he had pending at the time in Cumberland County.
>
> 7. I have heard that as a result of the cooperation that Vernon provided to the police that his drug charges were reduced in Cumberland County.
>
> 8. I was never contacted by anyone representing Rashawn either before, or during, Rashawn's trial.

It is doubtful that Tanekia's opinion that Vernon Carter's statement to police was untruthful would be admissible. But in any event, Vernon Carter recanted his statement to police during his trial testimony. The relevant colloquy between the prosecutor and Vernon Carter is as follows:

> Q: Mr. Carter, before we took our break, before you were off the stand, you said you remembered something about the marshals in 2009?
>
> A: Sort of.
>
> Q: Sort of, okay. Didn't you, in fact, give a statement to Sergeant Saunders saying your brother, Rashawn Carter, told you in October of 2009 that he was involved in a robbery gone bad?
>
> A: He never told me anything. I made that up.

Accordingly, Tanekia Carter's testimony, claiming that Vernon had lied to the police, would not have provided information that was not already presented to the jury. In these circumstances, even assuming for purposes of argument that pool counsel was ineffective by not interviewing Tanekia, any such interview and resultant testimony would not meet the second prong of the Strickland test.

For the foregoing reasons, we agree with Judge McBride that defendant has failed to establish a prima facie case entitling him to an evidentiary hearing much less a new trial. Any such hearing would not have produced additional relevant evidence that was not already in the record for the PCR court to consider in deciding defendant's petition.

To the extent we have not addressed them, any remaining arguments raised by defendant lack sufficient merit to warrant consideration. 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