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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-0027-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MONIQUE KENDALL a/k/a
MONIQUE KENDAL,

Defendant-Appellant.

Submitted November 2, 2016 – Decided April 6, 2017

Before Judges Alvarez and Manahan.

On appeal from the Superior Court of New
Jersey, Law Division, Hudson County,
Indictment No. 03-01-0036.

Joseph E. Krakora, Public Defender, attorney
for appellant (Alan I. Smith, Designated
Counsel, on the brief).

Esther Suarez, Hudson County Prosecutor,
attorney for respondent (Erin M. Campbell,
Assistant Prosecutor, on the brief).

PER CURIAM

On April 30, 2004, defendant Monique Kendall entered a guilty plea to an amended charge of aggravated manslaughter, N.J.S.A. 2C:11-4. She entered the plea after the jury informed the court

that it was deadlocked after two days of deliberations. Despite being directed not to do so, the panel advised that ten members voted for a verdict of murder, N.J.S.A. 2C:11-3(a)(1) and (2), and two for aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1). The jury found defendant guilty of unlawful possession of a weapon, N.J.S.A. 2C:39-5(b), and possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a). Pursuant to the plea agreement, she was sentenced to twenty-five years, subject to the No Early Release Act's (NERA), N.J.S.A. 2C:43-7.2, eighty-five percent parole ineligibility.

Defendant now appeals Judge John A. Young's February 4, 2014 written decision denying her post-conviction relief (PCR) petition. We affirm, essentially for the reasons stated in his thorough and thoughtful decision, which denied the application on both procedural grounds, as the petition was filed beyond the five-year time limitation, Rule 3:22-12(a), and on substantive grounds. We add the following by way of brief comment.

Defendant has actively pursued appeals of her sentence and the denial of her petition to withdraw her guilty plea since 2004. She was eventually denied certification to the Supreme Court on her appeal of her sentence. State v. Kendall, 210 N.J. 109 (2012). We begin our discussion with defendant's April 30, 2004 colloquy with the trial judge.

Once the jury informed the court of the deadlock between murder and aggravated manslaughter, and their vote on the weapons offenses, Judge Kevin G. Callahan told defendant, outside the jury's presence, that he was going to direct the panel to resume their deliberations and that the trial would continue. He asked her to confirm that she was rejecting the State's plea offer, a twenty-five-year sentence recommendation in exchange for a guilty plea to aggravated manslaughter. The judge told her the presumptive term was twenty years on aggravated manslaughter, and the maximum was thirty.

After the trial judge's explanation, defendant's attorney confirmed that he too had thoroughly discussed the matter with his client, and that defendant "indicated" that she wished to proceed with the trial. The judge then asked defendant to stand and again explained the circumstances, including the fact the jury had convicted her of the weapons offenses.

During this colloquy, which spanned nine pages of transcript, defendant's attorney said very little. He confirmed that he had discussed the status of the proceeding with his client, and that he "felt in all probability there could be a conviction, and she still chooses to proceed with the trial" The judge said he was ensuring, for the sake of the record, that "if there is a conviction here, that [defendant] cannot then say that you didn't

talk to her about it." The judge confirmed that defendant understood that even if the jury was unable to reach a verdict on the charge of murder, the case would be retried. When the court asked defendant to confirm she wanted to go forward, defendant's attorney said: "Judge, she indicated now she's willing to take the plea"

The judge also told defendant that "although you always have the right to appeal, in appealing a plea, it is far more difficult in overturning than appealing a conviction by a jury" A recess was taken, during which the jury was given their lunch break, so that the plea form could be completed.

Once the plea paperwork was signed, Judge Callahan comprehensively questioned defendant regarding the knowing, intelligent, and voluntary nature of her guilty plea and the factual basis. The transcript of that colloquy, which included the judge directly asking defendant to state the facts that made her guilty of aggravated manslaughter, is some twenty-eight pages in length. In establishing a factual basis, defendant acknowledged that she fired an automatic handgun three times into a crowd, resulting in the victim's death.

Defendant initially appealed her sentence to the excessive sentence oral argument (ESOA) panel, Rule 2:9-11, which remanded the case pursuant to State v. Natale, 184 N.J. 458 (2005). After

that remand, the same sentence was imposed. The matter was again appealed to the ESOA calendar. Once the panel learned that she wished to renew her motion to withdraw her guilty plea, the matter was remanded to the trial court.

On July 2, 2008, Judge Callahan denied defendant's motion. He noted that the disclosure of the jury's votes at trial occurred even though he had instructed the jury not to reveal them. He also noted that the net effect of that improvident disclosure was to give defendant more information helpful to her decision about entering a guilty plea. The judge did not credit her argument that the information had a coercive effect.

Defendant also claimed her attorney had assured her that she would receive leniency from the judge for sentencing purposes. Her attorney submitted a certification denying that he had made any such statements.

The judge found defendant's statement that she merely acted in self-defense by "shooting at a wall," using a gun that "fell into her lap" was not credible. Defendant had testified to that effect at trial. She had described the shooting incident in those terms during her presentence interview, and at sentencing. The judge observed, "the jury by virtue of its questions more than likely found [d]efendant's version of the incident not credible." Even if true, he did not consider that version of the event to

have any "bearing on determining whether a motion to withdraw a guilty plea should be granted."

Having failed to convince Judge Callahan that she was coerced into accepting a guilty plea, or improperly influenced by her defense attorney, or not guilty of aggravated manslaughter, defendant appealed, claiming ineffective assistance of trial counsel and her first appellate attorney. She alleged that the second time she appealed the matter to the ESOA panel, the petition upon which the Supreme Court denied certification, the appellate attorney erred in failing to raise the issue of the withdrawal of the guilty plea.

Judge Young said, however, that although the ESOA order denying defendant relief by way of sentence reduction did not mention the issue, that a member of the ESOA panel asked appellate counsel if there was anything that he wished to bring to the court's attention regarding the application to withdraw the guilty plea.¹ Despite the absence of any mention of the issue in the order, it was raised.

Defendant did not file her petition for post-conviction relief until May 1, 2012. She attributed her delay to difficulty in locating missing transcripts.

¹ We do not have a copy of that transcript, although it appears Judge Young did.

Now on appeal, defendant raises the following points:

POINT I

THE ORDER DENYING POST-CONVICTION RELIEF SHOULD BE REVERSED AND THE MATTER REMANDED FOR AN EVIDENTIARY HEARING BECAUSE THE ISSUES RAISED IN DEFENDANT'S PETITION PRESENTED THE COURT WITH PRIMA FACIE PROOF OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AND APPELLATE COUNSEL BY A PREPONDERANCE OF THE EVIDENCE.

POINT II

THE ORDER DENYING POST-CONVICTION RELIEF SHOULD BE REVERSED BECAUSE IT VIOLATED DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

POINT III

THE ORDER DENYING POST-CONVICTION RELIEF SHOULD BE REVERSED BECAUSE, REGARDLESS OF WHETHER APPELLATE COUNSEL WAS INEFFECTIVE UNDER THE STRICKLAND TEST, APPELLATE COUNSEL'S FAILURE TO RAISE THE DENIAL OF DEFENDANT'S MOTION TO WITHDRAW HER GUILTY PLEA AS AN ISSUE ON DIRECT APPEAL VIOLATED HER FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO APPELLATE REVIEW.

POINT IV

THE ORDER DENYING POST-CONVICTION RELIEF SHOULD BE REVERSED BECAUSE THE PCR COURT MISAPPLIED THE PROCEDURAL BAR OF RULE 3:22-12.

As we have said, all defendant's assertions are comprehensively addressed by Judge Young's opinion. We reiterate only his point that the five-year time bar applies to this case. Defendant's ongoing appeals of her sentence and efforts at withdrawing her guilty plea do not toll the time bar. See State

v. Dillard, 208 N.J. Super. 722, 727 (App. Div.), certif. denied, 105 N.J. 527 (1986). The petition was filed seven years after defendant's second sentencing on November 10, 2005. Defendant obviously had the option of filing her petition and preserving her claim at any point during the intervening years, even if consideration was delayed because transcripts could not be located. The exceptional circumstances which warrant relaxation of the time bar are simply not present here.

Furthermore, there is no "reasonable probability that if the defendant's factual assertions were found to be true enforcement of the time bar would result in a fundamental injustice." R. 3:22-12(a)(1). Her claim that her trial attorney assured her the judge would impose less than twenty-five years is contradicted by his certification. Her claim that the second ESOA panel failed to address her petition to withdraw her guilty plea is not correct. Given Judge Callahan's thorough explanation of the voluntary, intelligent, and knowing nature of defendant's guilty plea and questioning regarding her factual basis, defendant has no basis for withdrawal. Thus, no fundamental injustice would result from allowing application of the rule. R. 3:22-12(a)(1).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION