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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-1122-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GARFIELD SIMPSON,

Defendant-Appellant.

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Submitted October 5, 2016 – Decided February 14, 2017

Before Judges Reisner and Summers.

On appeal from Superior Court of New Jersey,  
Law Division, Passaic County, Indictment No.  
04-04-0377.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Alison Perrone, Designated  
Counsel, on the brief).

Camelia M. Valdes, Passaic County Prosecutor,  
attorney for respondent (Christopher W. Hsieh,  
Chief Assistant Prosecutor, of counsel and on  
the brief).

PER CURIAM

Following our remand, defendant Garfield Simpson appeals from  
the Law Division's order denying his petition for post-conviction

relief (PCR) without an evidentiary hearing. Before us, he presents the following arguments:

POINT I  
DEFENDANT'S PETITION FOR POST-CONVICTION  
RELIEF IS NOT PROCEDURALLY BARRED BY RULE  
3:22-5.

POINT II  
THIS MATTER MUST BE REMANDED FOR AN  
EVIDENTIARY HEARING BECAUSE A PRIMA FACIE CASE  
WAS ESTABLISHED AS TO INEFFECTIVENESS OF TRIAL  
COUNSEL.

For the reasons explained below, we affirm.

I.

The procedural history and trial evidence are detailed in our opinions affirming defendant's conviction on direct appeal, State v. Simpson, A-5670-05 (App. Div. June 5, 2008), certif. denied, 196 N.J. 464 (2008), and reversing denial of defendant's PCR and remanding for a new hearing, State v. Simpson, A-0204-10 (App. Div. March 1, 2013). A summary will suffice here.

On October 3, 2003, during the execution of a search warrant at defendant's apartment in Paterson, police seized about fifteen pounds of loose marijuana in fifteen zip lock bags, a stun gun, and a digital scale. During the raid, defendant and four women, Jamila Jendayi, Lashanna King, Dion Garvey and Takeeya Planno, were present in the residence. Defendant was the only one arrested

at that time, however Jendayi, was subsequently co-indicted with him for several controlled dangerous substance (CDS) offenses.

At trial,<sup>1</sup> defendant did not testify but he presented the testimony of Garvey, Planno, and Antoine Huffman, a member of his R&B and reggae band. His defense was that the marijuana was owned by his roommate, King, who through stipulated evidence, the jury was told had been charged with marijuana possession two weeks prior to the raid. The jury rejected that theory and found defendant guilty of fourth-degree possession of a CDS (marijuana), N.J.S.A. 2C:35-10(a)(3); second-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1), -5(b)(10)(b); third-degree possession of CDS with intent to distribute within 1000 feet of school property, N.J.S.A. 2C:35-7 and N.J.S.A. 2C:35-5(a); and fourth-degree possession of a prohibited weapon (stun gun), N.J.S.A. 2C:39-3(h). After merger, defendant was sentenced to an aggregate extended prison term of sixteen years with an eight-year period of parole ineligibility.

Following his unsuccessful direct appeal, defendant filed a PCR petition. In briefs by counsel and defendant, defendant raised numerous arguments of ineffective assistance of counsel, which were rejected by the court as procedurally barred or without merit.

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<sup>1</sup> Jendayi was not tried with defendant.

On appeal, we found error by the PCR court and remanded for a new hearing. We "conclude[ed] that the trial court abused its discretion in addressing the merits of points raised in a pro se supplemental brief despite PCR counsel's request for an adjournment[.]" State v. Simpson, supra, A-0204-10 (App. Div. March 1, 2013) (slip op. at 1). We further determined that "the trial court's decision does not include an adequate statement of findings and legal conclusion to permit appellate review." Id. at 2.

On remand, Judge Donna D. Gallucio, who did not hear the first PCR, conducted oral argument, and subsequently issued an order and written decision on June 13, 2014, denying PCR relief without an evidentiary hearing. The judge found that defendant did not establish counsel was ineffective for: (1) failing to object to co-defendant's representation by a former prosecutor because the trial court was aware of the representation and there was no proof that this prejudiced defendant; (2) failing to object to the State's summation argument that defendant was guilty of joint or constructive possession of CDS as being constructive amendment of the indictment because the argument was consistent with the model jury charge provided on possession; (3) failing to request or object to jury charges on unanimity, Rule 404(b) evidence, and joint possession, because the jury was properly

instructed; and (4) failing to argue N.J.S.A. 2A:152-3 was applicable because defendant did not prove the statute was applicable to this matter.

Further, Judge Gallucio found that Rule 3:22-5 procedurally barred the remaining ineffective assistance claims because they were identical or substantially similar to those argued on direct appeal. These claims alleged counsel did not: (1) file a motion contesting the arrest warrant, or the evidence seized in the search warrant, including but not limited to the assertion that pursuant to Franks v. Delaware, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 2676, 57 L. Ed. 2d 667, 672 (1978), the search warrant was obtained by faulty affidavits; (2) challenge the court's aggravating and mitigating findings at sentencing; and (3) seek the trial judge's recusal. This appeal followed.

## II.

On appeal, defendant contends that Judge Gallucio erred in finding that he did not establish a prima facie claim of ineffective assistance of counsel regarding: co-defendant's representation by a former prosecutor; the State's summation argument that defendant was guilty of joint or constructive possession of CDS; jury charges on unanimity, Rule 404(b) evidence, and joint possession; and the applicability of N.J.S.A. 2A:152-3. Defendant argues the judge should have granted his request for an

evidentiary hearing to enable him to perfect his claims through the testimony of trial counsel and other witnesses.

Defendant also asserts that his claims of ineffective assistance stemming from his sentencing and the recusal of the trial judge differ from the arguments made on direct appeal and should not be barred by Rule 3:22-5. He now argues that trial counsel's failure to contest the trial judge's factual findings at sentencing allowed the judge to make improper findings of aggravating factors and no mitigating factor. Regarding recusal, defendant maintains that on direct appeal he contended the trial judge should have recused himself upon learning through counsel that an unidentified woman alleged judicial misconduct.<sup>2</sup> However, he now argues that counsel's failure to seek recusal of the trial judge constitutes ineffective assistance of counsel. He also argues that the claim is not procedurally barred as this court declined to address the issue on direct appeal, leaving it for PCR. Moreover, defendant contends that the judge erred in not allowing an evidentiary hearing concerning these claims.

Our examination of defendant's claims and review of the record convinces us that defendant was not denied effective assistance

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<sup>2</sup> We determined there was no basis for recusal as the post-judgment record demonstrated the "bogus nature of the alleged misconduct." State v. Simpson, supra, A-5670-05 (App. Div. June 5, 2008), slip op. at 28.

of counsel and there is no need for an evidentiary hearing. We affirm substantially for the reasons set forth in Judge Gallucio's well-reasoned written decision. We add only the following brief comments.

A court reviewing a PCR petition based on claims of ineffective assistance has the discretion to grant an evidentiary hearing only if a defendant establishes a prima facie showing in support of the requested relief. State v. Preciose, 129 N.J. 451, 462 (1990). The mere raising of a claim for PCR does not entitle a defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999). When determining whether to grant an evidentiary hearing, the PCR court must consider the facts in the light most favorable to the defendant to determine if a defendant has established a prima facie claim. Preciose, supra, 129 N.J. at 462-63. A hearing should be conducted only if there are disputed issues as to material facts regarding entitlement to PCR that cannot be resolved based on the existing record. State v. Porter, 216 N.J. 343, 354 (2013).

"[I]n order to establish a prima facie claim, a petitioner must do more than make bald assertions that he was denied the effective assistance of counsel. He must allege facts sufficient to demonstrate counsel's alleged substandard performance."

Cummings, supra, 321 N.J. Super. at 170. When claiming defense counsel inadequately investigated, the defendant "must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." Ibid. (citing R. 1:6-6).

"A prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any post-conviction proceeding brought pursuant to this rule or prior to the adoption thereof, or in any appeal taken from such proceedings." R. 3:22-5. PCR proceedings are not an opportunity to re-litigate claims already decided on the merits in prior proceedings. State v. McQuaid, 147 N.J. 464, 483 (1997) (citing R. 3:22-5). If an issue has been determined on the merits in a prior appeal, it cannot be re-litigated in a later appeal of the same case, even if of constitutional dimension. Id. at 483-84; State v. White, 260 N.J. Super. 531, 538 (App. Div. 1992), certif. denied, 133 N.J. 436 (1993).

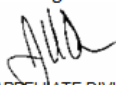
Here, defendant's bald assertions did not establish a prima facie case of ineffective assistance of counsel and did not warrant an evidentiary hearing. Likewise unpersuasive is defendant's attempt to re-fashion his direct appeal arguments on sentencing and recusal of the trial judge to overcome the procedural bar of



Rule 3:22-5. While in some circumstances, Rule 3:22-5 will not bar a claim that is related to a direct appeal issue, in this case, there is no material distinction between the arguments raised then and now on PCR appeal. Moreover, even if we consider defendant's sentencing and recusal arguments, they are without merit. 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