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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-4405-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EDWIN SANTIAGO,

Defendant-Appellant.

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Submitted February 14, 2017 - Decided March 17, 2017

Before Judges Fasciale and Gilson.

On appeal from Superior Court of New Jersey,  
Law Division, Hudson County, Indictment No.  
05-06-0822.

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

Esther Suarez, Hudson County Prosecutor,  
attorney for respondent (Kerry J. Salkin,  
Assistant Prosecutor, of counsel and on the  
brief).

PER CURIAM

Defendant Edwin Santiago appeals from an April 30, 2015  
order denying his petition for post-conviction relief (PCR)  
without an evidentiary hearing. The record establishes that

defendant directed his trial counsel to file a direct appeal, but no appeal was filed. Thus, there is a presumption that defendant was prejudiced by his counsel's failure to file a direct appeal. See Roe v. Flores-Ortega, 528 U.S. 470, 483, 120 S. Ct. 1029, 1038, 145 L. Ed. 2d 985, 999 (2000); State v. Carson, \_\_\_ N.J. \_\_\_ (2016); State v. Jones, 446 N.J. Super. 28 (App. Div.), certif. denied, \_\_\_ N.J. \_\_\_ (2016). Here, however, defendant filed his PCR petition beyond the five years afforded under Rule 3:22-12(a)(1). Thus, we reverse and remand for an evidentiary hearing to determine if defendant can show excusable neglect for filing his PCR petition late.

I.

In 2006, a jury convicted defendant of first-degree robbery, N.J.S.A. 2C:15-1; third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4; fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d); and third-degree resisting arrest, N.J.S.A. 2C:29-2(a).

Defendant was sentenced on August 3, 2006. On the robbery conviction, he was sentenced to seventeen years in prison, with a period of parole ineligibility as prescribed by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, and five years of parole supervision following his release. The weapons convictions were merged into the robbery conviction. On the conviction for

resisting arrest, defendant was sentenced to a concurrent term of four years in prison with two years of parole ineligibility.

At his sentencing, defendant was advised that he had forty-five days to file a direct appeal. Defendant then signed a form stating that he wanted to appeal his convictions and sentence. His trial counsel also signed that form and trial counsel informed the sentencing judge and defendant that the appeal "has already [been] put [in] process." At trial and at his sentencing, defendant was represented by a public defender. Defendant was also informed that he could be represented by the Public Defender's Office on his appeal. Despite the representation by trial counsel, no direct appeal was ever filed.

On September 26, 2014, defendant filed a petition for PCR claiming, among other things, that his trial counsel had represented that he would file a direct appeal, but never did. Defendant was, thereafter, assigned PCR counsel. With the assistance of PCR counsel, defendant filed a supplemental certification stating that his trial counsel was ineffective for failing to initiate a direct appeal on defendant's behalf. Specifically, defendant certified:

I told my lawyer that I wanted to appeal my conviction at trial and he said he would. He had me sign a form that he said that the

[p]ublic [d]efender used to start an appeal but he never turned it in and no appeal was filed. My current attorney provided me with a copy of this form so I know that [my trial counsel] had it and did nothing with it.

Defendant also alleged that trial counsel had been ineffective in failing to (1) investigate his case; (2) provide him with a copy of the State's discovery; (3) permit him to participate in jury selection; (4) prevent the admission of the victim's identification of defendant; and (5) request an adjournment of the trial because the State had produced the weapon (a rock) just before trial.

Defendant certified that his delay in filing his PCR petition was excusable because he was waiting for his trial counsel to notify him about the appeal. He also certified that "I do not speak English and I was never advised by anyone of [PCR] or that I could file a petition or that there was a [five] year time limit to do so. I learned much later."

On April 30, 2015, defendant and PCR counsel appeared for oral argument on the petition. The same judge who presided over defendant's trial heard the argument on the PCR petition. The PCR judge denied the petition finding that it was time-barred because it was filed eight years after defendant's conviction. In support of that ruling, the judge found that defendant showed no excusable neglect for filing the petition late and there was

no reasonable probability that enforcement of the time bar would result in a fundamental injustice.

The PCR court also went on to review the substance of defendant's alleged claim of ineffective assistance of trial counsel. The court found that defendant failed to establish a prima facie case of ineffective assistance of trial counsel. In evaluating the prima facie showing concerning trial counsel's failure to file a direct appeal, the PCR judge reasoned that defendant took no action to pursue the appeal beyond signing a form stating that he wished the appeal to be pursued. The PCR judge also reasoned that defendant "offers no grounds for appeal which have any merit."

On this appeal, defendant makes three arguments:

- I. THE TRIAL COURT MISAPPLIED THE LAW IN DENYING THE DEFENDANT'S PETITION FOR [PCR], IN PART, ON PROCEDURAL GROUNDS, PURSUANT TO RULE 3:22-12
- II. THE TRIAL COURT MISAPPLIED THE LAW IN DENYING THE DEFENDANT'S PETITION FOR [PCR] WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE WAS PROVIDED WITH INADEQUATE ASSISTANCE FROM TRIAL COUNSEL WHEN HE FAILED TO ALLOW DEFENDANT TO PARTICIPATE IN JURY SELECTION AND WHEN HE FAILED TO PROVIDE NOTICE TO THE PUBLIC DEFENDER'S OFFICE THAT HE WISHED TO APPEAL HIS CONVICTION
- III. THE TRIAL COURT MISAPPLIED THE LAW IN DENYING THE DEFENDANT'S PETITION FOR

[PCR] WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE WAS GIVEN INCORRECT ADVICE ABOUT THE SHOW-UP IDENTIFICATION, ESPECIALLY IN LIGHT OF VIABLE DEFENSE MOTIONS IN THE CASE TO SUPPRESS THE SHOW-UP IDENTIFICATION IN VIOLATION OF U.S. V. WADE<sup>1</sup> AND TO SUPPRESS EVIDENCE THAT SHOULD HAVE BEEN PROVIDED IN DISCOVERY

We first address defendant's argument that his trial counsel was ineffective in failing to file a direct appeal. The United States Supreme Court has held that when counsel's deficient performance "led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself[,] . . . [the] denial of the entire judicial proceeding . . . demands a presumption of prejudice." Roe v. Flores-Ortega, supra, 528 U.S. at 483, 120 S. Ct. at 1038, 145 L. Ed. 2d at 999. As a result, "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." Id. at 484, 120 S. Ct. at 1039, 145 L. Ed. 2d at 1000.

Our Supreme Court has held that Flores-Ortega is "controlling case law," and has reversed the denial of a PCR

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<sup>1</sup> United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

petition where defense counsel's deficient performance deprived defendant of his right to appeal. Carson, supra, slip op. at 2-3. In Carson, defendant pled guilty to first-degree robbery and aggravated manslaughter in October 2005. Id. at 1. Defendant was then sentenced on January 11, 2008. Ibid. At sentencing, defendant was notified of his right to appeal, but no appeal was filed. Ibid. Five years later, on January 14, 2013, defendant filed a pro se petition for PCR. Ibid. Defendant certified that he asked his counsel to file an appeal, but his counsel did not do so. Ibid. Defense counsel also certified that defendant did ask him to file an appeal and he failed to do so. Ibid. The State agreed that defendant had been deprived of his right to appeal his sentence and requested the Court to summarily remand the matter. Id. at 2. In light of Flores-Ortega, our Supreme Court then remanded the matter directing that defendant had forty-five days to file an appeal of his conviction and sentence. Id. at 2-3.

Relying on Flores-Ortega, we have also reversed the denial of a petition for PCR when it was undisputed that defendant directed his trial counsel to file an appeal, but no direct appeal was filed. Jones, supra, 446 N.J. Super. at 36-37. In Jones, defendant pled guilty to first-degree armed-robbery and second-degree unlawful possession of a weapon in March 2013.

Two months later, on May 10, 2013, defendant was sentenced to fifteen years in prison subject to NERA. No direct appeal was filed.

On March 7, 2014, the defendant in Jones filed a pro se PCR petition alleging that he was deprived of effective assistance of counsel on a number of grounds, including that his trial counsel failed to appeal the judgment of conviction. Id. at 31. In support of that contention, defendant filed a certification asserting that he "told [his] attorney [he] wanted to file an appeal but he never filed it." Ibid. (alterations in original). Applying the holding in Flores-Ortega, we reversed and remanded with direction that defendant be accorded forty-five days to file a direct appeal. Id. at 37-38.

We also clarified that the presumption of prejudice ends the inquiry and that a defendant was not required to demonstrate "nonfrivolous grounds for appeal" to succeed on an ineffectiveness claim when it is undisputed that defendant requested an appeal be filed, but no appeal was filed. Id. at 36-37. Thus, in Jones we went on to explain that we understood the Supreme Court's discussion in Flores-Ortega of "non-frivolous grounds for appeal" to be limited to cases "where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken[.]" Id. at 35 (quoting Flores-



Ortega, supra, 528 U.S. at 478, 120 S. Ct. at 1035, 145 L. Ed. 2d at 995).

Applying the holdings in Flores-Ortega, Carson, and Jones, to the facts in this case, establishes that defendant has made a prima facie showing of ineffective assistance of counsel as it relates to the failure to file a direct appeal. Here, however, unlike in Carson and Jones, defendant did not file his PCR petition within the five-year period prescribed by Rule 3:22-12(a)(1). That rule provides that a first petition for PCR must be filed no more than five years after conviction unless a defendant can demonstrate excusable neglect and that there is a reasonable probability that enforcement of the time bar would result in a fundamental injustice.

In this case, defendant has established that there is a reasonable probability that enforcement of the time bar would result in a fundamental injustice. It is indisputable that defendant requested his trial counsel to file an appeal, but trial counsel failed to file the appeal. As a consequence, defendant has been deprived of his direct appeal.

What is not developed in the current record is whether defendant can show excusable neglect for waiting eight years before filing his first PCR petition. That issue cannot be decided on the current record. The PCR judge gave two reasons

for why defendant could not show excusable neglect. First, he asserted, without an evidentiary hearing, that defendant took no action after he directed counsel to file the appeal. Second, he concluded that defendant "offer[ed] no grounds for appeal which have any merit." The first part of that reasoning -- that defendant took no action -- incorrectly assumes that a defendant who has directed counsel to file an appeal has an obligation to monitor counsel. We reject such reasoning. Instead, defendant has established a prima facie case of ineffective assistance of counsel as it relates to the failure to file the direct appeal. The question that needs to be explored at an evidentiary hearing is when defendant knew that the appeal had not been filed and whether he thereafter acted in a timely manner in filing his petition for PCR.

The second ground relied upon by the PCR judge -- that defendant offered no meritorious grounds for an appeal -- is reasoning that we rejected in Jones. In that regard, we explained:

[T]he [Supreme] Court in Flores-Ortega, supra, 528 U.S. at 486, 120 S. Ct. at 1039-40, 145 L. Ed. 2d at 1001, emphasized its earlier holding in Rodriguez v. United States, 395 U.S. 327, 330, 89 S. Ct. 1715, 1717, 23 L. Ed. 2d 340, 344 (1969), which recognized that defendants whose attorneys have frustrated the right to appeal "should be treated exactly like any other

appellants" and "not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings."


[Jones, supra, 446 N.J. Super. at 34.]

In other words, given that defendant never had the chance to file an appeal, he does not have to demonstrate that the appeal is meritorious. Instead, if he can show excusable neglect, he will have the right to file a direct appeal and he should be given forty-five days to do so. The merits of that appeal will be evaluated when the appeal is fully briefed.

In making this last point, we emphasize that we are making no determination concerning the merits of any potential appeal. Furthermore, because we are reversing and remanding this matter for an evidentiary hearing to determine if defendant can show excusable neglect to be permitted to file a direct appeal, we do not reach any of the additional grounds for alleged ineffective assistance of counsel.

Reversed and remanded for an evidentiary hearing consistent with this opinion. We do not retain jurisdiction.

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

  
CLERK OF THE APPELLATE DIVISION