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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-4697-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HUGH JOSEPHS, JR.,

Defendant-Appellant.

Submitted March 8, 2017 – Decided March 23, 2017

Before Judges Simonelli and Gooden Brown.

On appeal from the Superior Court of New
Jersey, Law Division, Camden County,
Indictment No. 01-12-3706.

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

Mary Eva Colalillo, Camden County Prosecutor,
attorney for respondent (Nancy P. Scharff,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant Hugh Josephs, Jr. appeals from the February 18,
2015 Law Division order, which denied his petition for post-
conviction relief (PCR) without an evidentiary hearing. We affirm.

Following a jury trial, defendant was convicted on three counts of first degree murder, N.J.S.A. 2C:11-3(a)(1)-(2) (counts one, two, and three); second-degree aggravated assault, N.J.S.A. 2:12-1(b)(1) (count five); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count ten); and third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (count eleven). The jury found defendant not guilty of first-degree attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:5-11(3)(a) (count four); and four counts of first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2 (counts six, seven, eight, and nine).

On January 30, 2004, the trial court sentenced defendant to three consecutive fifty-year terms of imprisonment with thirty-year periods of parole ineligibility on counts one, two, and three; a consecutive ten-year term of imprisonment with a five-year period of parole ineligibility on count five; and a concurrent five-year term of imprisonment on count eleven. Defendant's aggregate sentence was 160 years with 95 years of parole ineligibility. The court entered a judgment of conviction (JOC) on February 3, 2004.

Defendant appealed his conviction and sentence. We affirmed, but remanded for resentencing on the aggravated assault conviction. State v. Josephs, No. A-1053-04 (App. Div. June 26, 2006). Our Supreme Court denied certification. State v. Josephs,

188 N.J. 579 (2006). On August 22, 2008, the court entered an amended JOC, resentencing defendant to a five-year term of imprisonment with a two-and-one-half-year period of parole ineligibility to be served consecutively with the murder sentences.

On January 28, 2014, defendant filed a PCR petition, arguing, in pertinent part, that trial counsel rendered ineffective assistance by failing to investigate and pursue an alibi defense. Defendant claimed that he had provided counsel with a written statement that outlined his whereabouts and the persons with him on the day of the shooting, but counsel conducted no investigation and failed to present his alibi defense to the court. Defendant also argued there was excusable neglect for the untimely filing because he was not aware or advised of the five-year period to file the petition.

In a February 18, 2015 oral opinion, the PCR judge denied the petition without an evidentiary hearing, holding that the petition was procedurally barred by Rule 3:22-12(a)(1). The judge found that defendant's reason for the untimely filing did not constitute excusable neglect, and there was no injustice warranting relaxation of the five-year time bar.

Addressing the merits, the judge found no support for defendant's claim of ineffective assistance of counsel. The judge

first found that defendant failed to provide a copy of the written statement he allegedly gave to trial counsel, and failed to provide "even the barest information" supporting his alibi defense, including his whereabouts at the time of the shooting, the names of any witnesses, or any sworn statements or affidavits supporting his alibi.

The judge also found that counsel's failure to investigate the alleged alibi did not prejudice defendant in light of the overwhelming evidence of defendant's guilt. This evidence included defendant's confession to the police wherein he admitted he was present at the crime scene and shot one of the victims; the testimony of the surviving victim that defendant shot at him with a .9-millimeter handgun; and forensic and ballistic evidence found at the crime scene, which confirmed that all three murder victims suffered gunshot wounds from a .9-millimeter handgun. This appeal followed.

On appeal, defendant raises the following contentions:

POINT I: THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR [PCR], IN PART, ON PROCEDURAL GROUNDS PURSUANT TO RULE 3:22-12(a).

POINT II: THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR [PCR] WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE

FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL AS A RESULT OF COUNSEL'S FAILURE TO PURSUE A POTENTIAL ALIBI DEFENSE.

Rule 3:22-12(a)(1) provides that no first PCR petition shall be filed "more than 5 years after the date of entry pursuant to Rule 3:21-5 of the judgment of conviction that is being challenged unless it alleges facts showing that the delay beyond said time was due to defendant's excusable neglect." "[A] court may relax the time bar if the defendant alleges facts demonstrating that the delay was due to the defendant's excusable neglect or if the 'interests of justice' demand it." State v. Goodwin, 173 N.J. 583, 594 (2002) (quoting State v. Mitchell, 126 N.J. 565, 576 (1992)). Notably, the five-year limitation period commences upon the actual entry of the judgment of conviction and is not stayed nor tolled by other review proceedings. The entry date of the initial judgment of conviction controls even where subsequent sentencing proceedings occur. State v. Dugan, 289 N.J. Super. 15, 19 (App. Div.), certif. denied, 145 N.J. 373 (1996).

Here, defendant filed his PCR petition beyond five years of entry of the February 3, 2004 JOC. Even if the date of entry of the amended JOC, August 22, 2008, was the starting date, defendant's petition was untimely filed. Defendant failed to show excusable neglect to warrant relaxation of the time bar.

"Ignorance of the law and rules of court does not qualify as excusable neglect." State v. Merola, 365 N.J. Super. 203, 218 (Law Div. 2002), aff'd o.b., 365 N.J. Super. 82 (App. Div. 2003), certif. denied, 179 N.J. 312 (2004). Similarly, a defendant's "lack[ing] sophistication in the law" is not excusable neglect. Ibid. (quoting State v. Murray, 162 N.J. 240, 246 (2000)). In any event, even if defendant's petition was not procedurally barred, it failed on the merits.

The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999). Rather, trial courts should grant evidentiary hearings and make a determination on the merits only if the defendant has presented a prima facie claim of ineffective assistance, material issues of disputed fact lie outside the record, and resolution of the issues necessitates a hearing. R. 3:22-10(b); State v. Porter, 216 N.J. 343, 355 (2013). To establish a prima facie claim of ineffective assistance of counsel, the defendant

must satisfy two prongs. First, he must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. An attorney's representation is deficient when it [falls] below an objective standard of reasonableness.

Second, a defendant must show that the deficient performance prejudiced the defense. A defendant will be prejudiced when counsel's errors are sufficiently serious to deny him a fair trial. The prejudice standard is met if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability simply means a probability sufficient to undermine confidence in the outcome of the proceeding.

[State v. O'Neil, 219 N.J. 598, 611 (2014) (citations omitted).]

"An ineffective assistance of counsel claim may occur when counsel fails to conduct an adequate pre-trial investigation." State v. Porter, 216 N.J. 343, 352 (2013) (citations omitted). Counsel has a duty "to conduct a prompt investigation of the circumstances of the case" relevant to the defendant's "guilt and degree of guilt or penalty." Id. at 353 (citations omitted). Accordingly, "[f]ailure to investigate an alibi defense is a serious deficiency that can result in the reversal of a conviction" because of the great potential for creating reasonable doubt as to a defendant's guilt in the minds of the jury. Ibid. (quoting State v. Mitchell, 149 N.J. Super. 259, 262 (App. Div. 1977)).

If a defendant claims his counsel inadequately investigated an alibi, he or she must assert facts that an investigation would have revealed, supported by affidavits or certifications based on the personal knowledge of the affiant. Ibid. (quoting Cummings,

supra, 321 N.J. Super. at 170). We must consider a defendant's contentions indulgently, by viewing the asserted facts in a light most favorable to the defendant. Ibid.

We have considered defendant's ineffective assistance of counsel contention in light of the record and applicable legal principles and conclude it is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We affirm substantially for the reasons expressed by the PCR judge in his well-reasoned oral opinion. There was no support whatsoever for defendant's claim of ineffective assistance of counsel.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION