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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-5431-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DARWIN G. GODOY,

Defendant-Appellant.

Submitted September 12, 2017 – Decided September 27, 2017

Before Judges Sumners and Moynihan.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Indictment No.
98-04-0624.

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

Gurbir S. Grewal, Bergen County Prosecutor,
attorney for respondent (Catherine A. Foddai,
Senior Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant appeals the denial of his application for post-conviction relief (PCR) without an evidentiary hearing, and raises the following arguments in his brief:

POINT I

DEFENDANT WAS ENTITLED TO AN EVIDENTIARY HEARING BECAUSE HE PRESENTED A PRIMA FACIE CASE OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AND THE EVIDENCE LAID OUTSIDE THE RECORD.

POINT II

DEFENDANT WAS ENTITLED TO AN EVIDENTIARY HEARING BECAUSE HE PRESENTED A PRIMA FACIE CASE OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

We affirm the denial of defendant's petition substantially for the reasons set forth in Judge James J. Guida's oral opinion on May 18, 2015.

We previously considered defendant's PCR in July 2011 and rejected his arguments that: his statement to the police should not have been introduced into evidence against him at trial; his request for an adjournment of the trial should not have been denied; the trial court erred in charging the jury on accomplice liability; he should have faced only one – not three – murder charges; his rights under the Vienna Convention on Consular Relations were violated; and his sentence was illegal. State v. Godoy, No. A-2439-09 (App. Div. July 22, 2011) (slip op. at 7-10).

Defendant also argued that a portion of the admissions he made during the entry of his vacated plea was impermissibly introduced into evidence at his trial. Id. at 8-9. We remanded the matter to the PCR court because we were not able to determine from the record whether the trial court admitted defendant's plea testimony or his testimony from the trial of his accomplices; we were concerned that defendant's admissions of guilt during the plea colloquy were admitted into evidence in contravention of New Jersey Rule of Evidence 401. Godoy, supra, slip op. at 11-12.

After reviewing the record of defendant's testimony Judge Guida determined, and defendant's PCR counsel agreed, it was "crystal clear that what was played was not the plea colloquy, but the testimony . . . during the trial proceedings." His finding obviated the concern that prompted our remand.

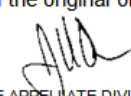
Defendant now argues, without citing to any authority, that his prior trial testimony was also inadmissible at his trial. He also contends his trial counsel was ineffective because he failed to tell defendant that his testimony at his accomplice's trial could be used against him at his own trial. Defendant did not raise these issues prior to the remand. We agree with Judge Guida that these contentions are time-barred because they were raised well after the five-year time limit set forth in Rule 3:22-12(a), and defendant has failed to show excusable neglect. State v.

Cann, 342 N.J. Super. 93, 101-02 (App. Div.), certif. denied, 170 N.J. 208 (2001) (citation omitted).

We also agree with Judge Guida that defendant is not entitled to an evidentiary hearing regarding his claim of ineffective assistance of trial counsel, having failed to present a viable prima facie case that would warrant one. State v. Preciose, 129 N.J. 451, 462-63 (1992). Defendant further avers that he was entitled to an evidentiary hearing because he presented a prima facie case of ineffective assistance of appellate counsel. We find insufficient merit in that argument to warrant discussion in a written opinion. 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