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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-5594-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMES L. WALDREN, a/k/a JAMES
JOHNSON and JAMES L. PARKER,

Defendant-Appellant.

Submitted February 2, 2017 – Decided April 5, 2017

Before Judges Lihotz and Hoffman.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No. 09-
12-3254.

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

Carolyn A. Murray, Acting Essex County
Prosecutor, attorney for respondent (Barbara
A. Rosenkrans, Special Deputy Attorney
General/Acting Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

Defendant James L. Waldren appeals from a June 26, 2015 Law Division order denying his petition for post-conviction relief (PCR). On appeal, defendant argues:

POINT I.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL.

POINT II.

THE DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF WAS NOT PROCEDURALLY BARRED BY EITHER RULE 3:22-4 OR RULE 3:22-5.

We have considered these arguments in light of the record and applicable law. We affirm.

Tried by a jury, defendant was convicted of second-degree conspiracy to commit robbery (count one) and fourth-degree resisting arrest (count thirty-six). The jury was hung on first-degree robbery (count two), and acquitted defendant of the remaining thirty-four counts in an multi-defendant indictment arising from the robbery of a pharmacy on July 22, 2009. Rejecting defendant's opposition, the judge concluded defendant qualified as a persistent offender and sentenced him to a fifteen-year term of imprisonment, subject to the an 85% period of parole ineligibility, as set forth in the No Early Release Act, N.J.S.A.

2C:43-7.2. On direct appeal, this court affirmed defendant's conviction and sentence in an unpublished opinion, and the Supreme Court denied certification. State v. Waldren, No. A-5225-11 (App. Div. May 21, 2014), certif. denied, 220 N.J. 98 (2014).

Defendant filed this petition for PCR. Following oral argument, the judge denied relief for reasons stated in an oral opinion. We granted defendant's request to allow his appeal from the June 26, 2015 order denying PCR to be filed as within time.

Arguing trial counsel provided ineffective assistance during sentencing, defendant urges we reverse the denial of his request for PCR. More specifically, defendant maintains the trial judge erred in concluding he qualified as a persistent offender and believes an evidentiary hearing was necessary to show counsel failed to present evidential support for applicable mitigating factors and to adequately refute applied aggravating factors.¹

¹ Defendant's challenge to the imposed extended term centers on whether defendant was convicted of two qualifying crimes, which occurred "within 10 years of the date of the crime for which the defendant is being sentenced." N.J.S.A. 2C:44-3(a). Defendant maintained the court should overlook a period of custody in 2003, insisting it resulted from an alleged error. Also, he argued his release from custody on March 26, 2001, was beyond a ten-year period from the February 12, 2012 sentencing date. The trial judge rejected defendant's claim of administrative error and his interpretation of the statute, noting the crime for which defendant faced sentence occurred in 2009, which was within ten years of his release in either 2003 or 2001.

"Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." State v. Goodwin, 173 N.J. 583, 593 (2002) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). The process affords an adjudged criminal defendant a "last chance to challenge the 'fairness and reliability of verdict.'" State v. Nash, 212 N.J. 518, 540 (2013) (citing State v. Feaster, 184 N.J. 1, 18 (2002)); see also R. 3:22-1. "Post-conviction relief is neither a substitute for direct appeal, R. 3:22-3, nor an opportunity to relitigate cases already decided on the merits, R. 3:22-5." Preciose, supra, 129 N.J. at 459; see also State v. Echols, 199 N.J. 344 (2009).

It is well-settled that to set aside a conviction based upon a claim of ineffective assistance of counsel, a petitioner must prove, by a preponderance of the evidence, that (1) counsel performed deficiently, and made errors so serious that he or she was not functioning as counsel guaranteed by the Sixth Amendment; and (2) defendant suffered prejudice as a result. Strickland v. Washington, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 2064, 2068, 80 L. Ed. 2d 674, 693, 698 (1984); [] Preciose, [supra,] 129 N.J. [at] 459 (reciting preponderance of the evidence standard of proof)

[State v. L.A., 433 N.J. Super. 1, 13 (App. Div. 2013).]

Strickland's two-prong test was adopted by New Jersey in State v. Fritz, 105 N.J. 42, 58 (1987).

In our review of an order denying a PCR petition, we afford deference to a PCR judge's factual findings, as long as they are "supported by sufficient credible evidence in the record." Nash, supra, 212 N.J. at 540; see State v. Elders, 192 N.J. 224, 244 (2007) ("A trial court's findings should be disturbed only if they are so clearly mistaken that the interest of justice demand intervention and correction." (citation omitted)). However, we do not defer to legal conclusions, which we review de novo. Nash, supra, 212 N.J. at 540-41; see also State v. Gregory, 220 N.J. 413, 419-20 (2015).

A petition for post-conviction relief attacking an imposed sentence is cognizable if it seeks to correct a sentence not authorized by law. See R. 3:21-10(b)(5); R. 3:22-2(c). In State v. Murray, 162 N.J. 240 (2000), the Court addressed the meaning of the term "illegal sentence." In order to render a sentence "illegal," the sentence must either exceed the statutory maximum for the offense, or be otherwise "imposed not in accordance with the law." Id. at 246-47. The latter category includes dispositions not authorized by the Code of Criminal Justice or a failure of the sentence "to satisfy required presentencing conditions." Ibid.

Here, defendant maintains he was wrongly sentenced to an extended term as a persistent offender. On this issue, we, like

the PCR judge, refer to the discussion by this court affirming defendant's sentence on direct appeal. Defendant argued:

THE DISCRETIONARY EXTENDED TERM SENTENCE
IMPOSED UPON THE DEFENDANT OF FIFTEEN (15)
YEARS WITH 85% PAROLE INELIGIBILITY WAS
EXCESSIVE AND SHOULD BE MODIFIED AND REDUCED.

Following review, we rejected this argument stating: "There were sufficient grounds under N.J.S.A. 2C:44-3(a) to impose an excessive sentence. [Th]is argument is without sufficient merit to warrant further consideration." Waldren, supra, slip op. at 25-26 (citing R. 2:11-3(e)(2)).

We reject defendant's suggestion his PCR claim raises a distinct issue from that presented and reviewed on direct appeal. On appeal, defendant challenged the applicability of the discretionary term and the length of his sentence. Thus, we conclude the current claims raise the same issues, which have been adjudicated, may not again be raised in a petition for PCR. See R. 3:22-5 ("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 appeal taken from such proceedings."); see also Preciose, supra, 129 N.J. at 476.

Defendant's second claim asserts counsel was ineffective in arguing for application of mitigating and in opposing application

of aggravating factors. This issue strikes to the length of the sentence, not its legality.

"[G]enerally an alleged excessive sentence – that is, a sentence within the range permitted by a verdict or a plea – is not cognizable on PCR" State v. Hess, 207 N.J. 123, 145 (2011).


The rule is . . . fairly established that mere excessiveness of sentence otherwise within authorized limits, as distinct from illegality by reason of being beyond or not in accordance with legal authorization, is not an appropriate ground of post-conviction relief and can only be raised on direct appeal from the conviction.

[State v. Acevedo, 205 N.J. 40, 45-46 (2011) (quoting State v. Clark, 65 N.J. 426, 436-37 (1974)).]

Therefore, "allegations of improper consideration of aggravating and mitigating factors . . . were not cognizable claims on post-conviction relief." Acevedo, supra, 205 N.J. at 47 (citing State v. Flores, 228 N.J. Super. 586, 596-97 (App. Div. 1988), certif. denied, 115 N.J. 78 (1989)). PCR was properly denied.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION