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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-1057-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RAMON RODRIGUEZ, a/k/a
RAMON ANTONIO RODRIGUEZ,

Defendant-Appellant.

Submitted February 28, 2018 – Decided April 23, 2018

Before Judges Currier and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Indictment No.
85-06-0918.

Joseph E. Krakora, Public Defender, attorney
for appellant (Thomas G. Hand, Designated
Counsel, on the brief).

Andrew C. Carey, Middlesex County Prosecutor,
attorney for respondent (Joie Piderit,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant Ramon Rodriguez appeals from the October 31, 2016
denial of his second petition for post-conviction relief (PCR).

After a review of the arguments in light of the record and applicable principles of law, we affirm.

The facts relating to the charges, trial, and post-conviction proceedings are derived from our opinions in State v. Rodriguez (Rodriguez I), No. A-4572-86 (App. Div. July 17, 1989) and State v. Rodriguez (Rodriguez II), No. A-0674-92 (App. Div. May 24, 1994).

In 1985, defendant was charged with fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (count one); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count two); and first-degree murder, N.J.S.A. 2C:11-3 (count three). On January 14, 1987, a jury found him guilty of all three counts.

Defendant was sentenced on the murder conviction to a custodial term of life with thirty years of parole ineligibility. After merging the two possessory convictions, the judge sentenced defendant to a consecutive custodial term of five years with two and one-half years of parole ineligibility.

Defendant subsequently appealed, and we affirmed both defendant's convictions and sentence in Rodriguez I, slip op. at 9. Defendant's subsequent petition for certification was denied by the Supreme Court in 1989. State v. Rodrigues, 118 N.J. 234 (1989). On August 6, 1992, the trial court merged the possession

of the gun for an unlawful purpose conviction with the murder conviction pursuant to State v. Williams, 213 N.J. Super. 30 (App. Div. 1986).

In 1990, defendant filed a petition for PCR, and a hearing was conducted over two days. In addition to other issues, defendant argued that his sentence was illegal. The PCR judge found that the sentence was not illegal, and as there were no specific assertions concerning the ineffective assistance of counsel, the petition was denied in June 1992. We affirmed. Rodriguez II, slip op. at 4. Although we found that the issues raised in the PCR petition and appeal should have been presented in the direct appeal, we nevertheless considered the merits of each issue, including the claims of an illegal sentence and ineffective assistance of counsel. Id. at 3-4. The petition for certification was denied. State v. Rodriguez, 138 N.J. 265 (1994).¹

¹ Defendant's petition for a writ of habeas corpus was denied in Rodriguez v. Morton, No. 95-5116 (D.N.J. Oct. 5, 1995). A subsequent certification of probable cause in the Third Circuit was remanded for a probable cause determination by the District Court. Rodriguez v. Morton, No. 95-5116 (3rd May 28, 1997) (slip op. at 1-2). After finding no probable cause for the appeal, the District Court denied defendant's petition for habeas corpus. Id. at 7-14.

In 2013, defendant filed a motion to correct an illegal sentence, contending that his sentence should be amended to thirty years with parole eligibility after thirty years because the sentencing judge had referred to a 1983 psychological report prepared for an incident that preceded his 1985 charges. The court denied defendant's motion because he had not provided the pre-sentence report, sentencing transcript, and the subject psychological report. Without these documents, the judge stated that he could not properly adjudicate defendant's motion.

On January 7, 2015, defendant filed a second PCR petition and was assigned counsel. The State provided the psychological reports referenced in the 1987 pre-sentence report and referred to by defendant in the earlier motion. Following oral argument, Judge Michael A. Toto issued an oral decision denying the PCR petition. He noted that at the time of sentencing, defendant and his counsel confirmed that they had reviewed the pre-sentence report and the psychological reports. The prosecutor referred to the psychological evaluation in his comments at sentencing. The Judgment of Conviction (JOC) referenced the evaluation. There was no objection to the report either at sentencing or to its reference in the JOC.

An October 31, 2016 order and written decision followed. Judge Toto determined:

[the] sentence was [not] excessive. [Defendant] was sentenced to life with 30 years parole disqualifier. [Defendant's] sentence was the subject of appellate review and the sentence was affirmed. There were no objections raised at sentencing regarding the use of the prior medical records and reports. [Defendant] has not proven that either the sentence was illegal or excessive, or that prior counsel was ineffective.

The court also held that defendant's PCR petition was procedurally barred by Rules 3:22-12, 3:22-5, and 3:22-4. Judge Toto noted that defendant heard the sentencing judge's comments at the time of his sentencing and did not question the use of the report. No objection to the report was raised in any subsequent proceeding, including the direct appeal, the first PCR petition, or the habeas corpus applications.

On appeal, defendant presents the following issues:

POINT I: THE TRIAL COURT ERRED IN DENYING DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF IN LIGHT OF THE SENTENCING COURT'S ERRONEOUS USE OF PREVIOUS PSYCHOLOGICAL EXAMINATIONS IN IMPOSING RODRIGUEZ'S SENTENCE.

POINT II: THE TRIAL COURT ERRED IN DENYING RODRIGUEZ'S PETITION BECAUSE RODRIGUEZ'S TRIAL COUNSEL WAS INEFFECTIVE (Not Raised Below).

POINT III: RODRIGUEZ'S APPLICATION FOR POST-CONVICTION RELIEF WAS NOT PROCEDURALLY BARRED.

We review the legal conclusions of a PCR judge de novo. State v. Harris, 181 N.J. 391, 420-21 (2004). The same scope of review applies to mixed questions of law and fact. Ibid.

Defendant contends that the trial court erred in finding that his PCR petition was time-barred. He further contends that the sentencing court erred in considering old psychological examination reports when imposing his sentence and that his counsel was ineffective for failing to object to the use of the reports.

Under Rule 3:22-12(a)(2), a second or subsequent PCR petition must be filed within one year of the date on which a new constitutional right is recognized by the courts, "the date on which the factual predicate for the relief sought was discovered," or "the date of the denial of the first or subsequent application for [PCR] where ineffective assistance of counsel that represented the defendant on the first or subsequent application for [PCR] is being alleged." A subsequent PCR petition must be dismissed unless it complies with Rule 3:22-12(a)(2), and pleads, on its face, one of the three criteria under Rule 3:22-12(a)(2). R. 3:22-4(b). Further, under Rule 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 post-conviction proceeding . . . or in any appeal taken from such proceedings."

However, a procedural rule otherwise barring post-conviction relief may be overlooked to avoid a fundamental injustice where the deficient representation of counsel affected "a determination of guilt or otherwise wrought a miscarriage of justice." State v. Nash, 212 N.J. 518, 546 (2013) (quoting State v. Mitchell, 126 N.J. 565, 587 (1992)).

Defendant's PCR petition was untimely pursuant to Rules 3:22-12(a)(2) and 3:22-4(b). The first PCR petition was denied in 1992. Defendant now argues that a psychological report from 1983 was improperly used at sentencing in 1987 and that his PCR counsel from 1992 was ineffective. We discern no merit in this argument. As the trial court noted, both defendant and his counsel were aware of the report's use at the sentencing in 1987 as it was read aloud during the proceeding. Defendant and counsel were also aware of the report as argued in the first PCR petition in 1992. Defendant failed to show a fundamental injustice.

Under Rule 3:22-12(a)(2)(B) -(C), defendant was required to file a subsequent PCR petition within one year of the denial of his 1992 PCR petition because he was aware of the factual predicate, the psychological report, at the time of his first petition and the alleged ineffective representation in 1992. However, defendant did not file the instant PCR petition until February 2015, twenty-three years later. We are satisfied that

defendant's claim as to the psychological report and trial counsel's failure to object to it were properly barred as untimely. Furthermore, the claim could have been raised in prior proceedings. See R. 3:22-4(a).

We decline to address defendant's argument that his sentence was illegal as it was previously challenged and determined in the direct appeal. The claim is, therefore, procedurally barred. See R. 3:22-5.

We conclude that the remainder of defendant's arguments lack sufficient merit to warrant discussion in a written opinion, Rule 2:11-3(e)(2), and affirm substantially for the cogent reasons expressed by Judge Toto.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION