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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-1409-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSEPH JOHNSON,

Defendant-Appellant.

Submitted February 15, 2018 – Decided March 22, 2018

Before Judges Haas and Gooden Brown.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Indictment No.
08-08-1461.

Joseph Johnson, appellant pro se.

Esther Suarez, Hudson County Prosecutor,
attorney for respondent (Stephanie Davis
Elson, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant appeals from a January 27, 2016 Law Division order,
denying his motion for a new trial based on newly discovered
evidence. We affirm.

Following a jury trial, defendant was convicted of second-degree robbery, N.J.S.A. 2C:15-1, and first-degree carjacking, N.J.S.A. 2C:15-2, and sentenced to an aggregate term of forty years, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. The convictions stemmed from defendant assaulting two employees and a customer in the course of committing a robbery at a delicatessen, and assaulting a driver in the course of carjacking a vehicle to facilitate his subsequent escape. Defendant was ultimately apprehended by police at the scene, and all four victims identified defendant as the assailant.

Defendant's convictions and sentence were affirmed in an unpublished opinion, and his petition for certification was denied. State v. Johnson, No. A-1131-09 (App. Div. Mar. 12, 2012), certif. denied, 213 N.J. 397 (2013). Defendant filed two petitions for post-conviction relief (PCR), both of which were denied by the trial court without an evidentiary hearing. Those decisions were affirmed in a consolidated unpublished opinion, and his petition for certification was denied. State v. Johnson, No. A-4711-13 and A-2754-14 (App. Div. July 21, 2016), certif. denied, 230 N.J. 476 (2017).

While his PCR appeal was pending, defendant filed a pro se motion for a new trial pursuant to Rule 3:20-2, essentially arguing the State failed to provide in discovery all the video surveillance

tapes from the delicatessen that were in their possession in violation of Brady v. Maryland, 373 U.S. 83, 87 (1963). According to defendant, the State provided one tape in discovery, which he described as depicting grainy surveillance footage of the robbery. However, references to "surveillance tapes" and "a new tape" in written communications from his PCR counsel dated August 23 and November 2, 2013, respectively, led defendant to believe that there were additional exculpatory tapes in the State's possession depicting a clearer image of the robber that were never turned over in discovery.

In a January 27, 2016 order, the court denied defendant's motion. Citing State v. Carter, 85 N.J. 300, 314 (1981), the court found that "[t]his evidence is not newly discovered, clearly exculpatory, or of the sort that would probably change the jury's verdict if a new trial were granted." This appeal followed.

On appeal, defendant argues:

POINT I¹

THE TRIAL COURT ERRED IN NOT FINDING A BRADY VIOLATION, WHEN IT BECAME CLEAR THAT THE STATE VIOLATED BRADY AND R. 3:13-3(B)(1) BY WITHHOLDING PIECES OF EXCULPATORY AND IMPEACHMENT EVIDENCE, THE EVIDENCE WAS UNQUESTIONABLY MATERIAL.

¹ We condensed Point I for clarity.

POINT II

IF THE STATE DID PROVIDE THE VIDEO SURVEILLANCE TAPE TO THE DEFENSE, THEN DEFENSE COUNSEL WAS CLEARLY INEFFECTIVE IN FAILING TO UTILIZE IT AS EVIDENCE TO EXCULPATE DEFENDANT FROM THE CRIME AS THIRD PARTY EVIDENCE.

As to Point I, we find insufficient merit in this argument to warrant discussion in a written opinion, R. 2:11-3(e)(2), and add only the following brief comments. It is clear from the record that defendant misconstrued the import of PCR counsel's references to a video surveillance tape in correspondence with defendant. There was only one surveillance tape capturing the robbery, which was turned over by the State in discovery.

Previously, the PCR judge who viewed the surveillance tape rejected defendant's assertion that it was clearly exculpatory "because it [did] not show that it was someone other than [defendant] who committed the offense." According to the PCR judge, "[t]he face of the perpetrator [was] not clear and [d]efendant was wearing the same clothing as depicted in the video at the time of his arrest moments after the offense."

In Carter, the Court set forth the elements that a defendant must meet in order to prevail on a new trial motion. The newly discovered evidence must be (1) material, meaning not merely cumulative, impeaching, or contradictory; (2) the evidence must have been discovered after the trial and not discoverable by

reasonable diligence beforehand; and (3) the evidence must be of the type that would probably change the jury's verdict at a new trial. Id. at 314. Here, defendant failed to meet the Carter standard. As such, defendant's motion for a new trial was properly denied.

In his second point, defendant argues for the first time on appeal that if the State did provide the tape, then his attorney was ineffective for failing to use it at trial. However, "[i]ssues not raised below, even constitutional issues, will ordinarily not be considered on appeal unless they are jurisdictional in nature or substantially implicate public interest." Pressler & Verniero, Current N.J. Court Rules, cmt. 3 on R. 2:6-2 (2018) (citing State v. Robinson, 200 N.J. 1, 20-22 (2009)). Here, neither concern is implicated.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION