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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-2599-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HUMPHREY COHEN,

Defendant-Appellant.

Submitted February 12, 2018 – Decided March 9, 2018

Before Judges Whipple and Rose.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No.
83-03-1433.

Humphrey Cohen, appellant pro se.

Robert D. Laurino, Acting Essex County
Prosecutor, attorney for respondent (Tiffany
M. Russo, Special Deputy Attorney
General/Acting Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

Defendant Humphrey Cohen appeals from the denial of his eighth¹ petition for post-conviction relief ("PCR"). Defendant contended his plea counsel and appellate counsel were ineffective, and his sentence was illegal. Judge Siobhan A. Teare authored a comprehensive written decision dated January 12, 2017, denying defendant relief. Having considered defendant's arguments in light of the record and controlling law, we affirm.

We incorporate by reference the facts and procedural history set forth in our prior opinions. Briefly, following a jury trial, defendant was convicted of felony murder, N.J.S.A. 2C:11-3(a)(3), purposeful or knowing murder, N.J.S.A. 2C:11-3(a)(1) and (2), armed robbery, N.J.S.A. 2C:15-1, and unlawful possession of a handgun, N.J.S.A. 2C:39-5(b). On May 4, 1984, the sentencing judge merged the murder convictions and sentenced defendant to life imprisonment with a thirty-year period of parole ineligibility. The judge also merged the robbery and weapons offenses and sentenced defendant to a consecutive term of imprisonment of fifteen years with seven-and-a-half-years of

¹ The exact number of prior PCR petitions is unclear from the record. Defendant inaccurately references his prior petitions in his merits brief and appendix as, for example, his "second [third] petition." We count, in the record before us, seven prior PCR petitions and a prior motion to correct an illegal sentence pursuant to Rule 3:21-10(b). Therefore, we treat the present appeal as the denial of defendant's eighth PCR petition.

parole ineligibility. All of defendant's PCR petitions were denied; his motions for reconsideration of the denials were denied; his motion to correct an illegal sentence was denied; his direct appeal was denied; and one writ of habeas corpus filed in federal court was denied and another was withdrawn. See, e.g., State v. Cohen, No. A-5472-08 (App. Div. Aug. 24, 2010) (slip op. at 1-3), certif. denied, 207 N.J. 188 (2011), cert. denied, 565 U.S. 1238 (2012) (setting forth the factual and procedural history of defendant's appellate review).

Defendant filed the present petition for PCR on December 15, 2015.² The PCR judge denied the petition in a written opinion holding the claims were previously adjudicated. This appeal followed.

On appeal, defendant argues:

POINT I

BECAUSE [DEFENDANT] WOULD HAVE EITHER BEEN RELEASED FROM PRISON OR ELIGIBLE FOR PAROLE FORTHWITH IF ILLEGAL SENTENCE MOTION COUNSEL HAD APPLIED HER AMBIGUOUS STATUTE LEGAL KNOWLEDGE TO SHOW: (1) THE MURDER STATUTE N.J.S.A. 2C:11-3(a)(1), (2) IS AMBIGUOUS; AND (2) CONSEQUENTLY, [DEFENDANT] MUST BE RESENTENCED AS SOMEONE CONVICTED OF PURPOSELY

² As the State correctly notes, Judge Teare indicated defendant's present PCR petition was filed December 15, 2015, but defendant only appended an "amended letter memorandum," dated October 20, 2016, in support of his petition. In any event, in her opinion, the PCR judge cites to defendant's "amended petition."

OR KNOWINGLY CAUSING SERIOUS BODILY INJURY MURDER, FELONY MURDER, ROBBERY AND UNLAWFUL POSSESSION OF A WEAPON TO A MAXIMUM AGGREGATED THIRTY YEARS PAROLE INELIGIBILITY MEANS, THE PCR COURT COMMITTED ERROR BY RULING COUNSEL DID NOT RENDER [EFFICIENT] COUNSELING BECAUSE[] SHE WAS NOT OBLIGATED TO USE SAID LEGAL KNOWLEDGE.

POINT II

THE [PCR] COURT'S DECISION TO IGNORE[] [DEFENDANT'S CLAIM] THAT HE WAS CONVICTED OF [SERIOUS BODILY INJURY ("SBI")] UNINTENTIONAL MURDER AND INSTEAD TREAT [DEFENDANT] AS SOMEONE CONVICTED OF INTENTIONAL MURDER, RESULTED IN SAID COURT COMMITTING ERROR IN ITS RULING THAT APPELLATE COUNSEL . . . DID NOT RENDER[] INEFFECTIVE ASSISTANCE TO [DEFENDANT].

POINT III

BECAUSE COMPLEX MERGER OF THE OFFENSES ISSUES ARE NOT TO BE HEARD VIA THE EXCESSIVE SENTENCING ORAL ARGUMENT HEARING MEANS [DEFENDANT] RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL DUE TO SAID HEARING PREVENTING COUNSEL FROM ARGUING [DEFENDANT'S] NOVEL COMPLEX MERGER ISSUE WHICH REQUIRED REVIEW OF: (1) THE DEFINITION OF MURDER AND FELONY MURDER, (2) THE EVIDENCE, AND (3) THE MERGER LAWS TO DETERMINE WHETHER A CONVICTION FOR SBI MURDER AND FELONY MURDER REQUIRES EITHER THE SBI MURDER TO BE VACATED OR MERGED INTO FELONY MURDER. (Not raised below)

In a reply brief, defendant raises the following points:

POINT I

BECAUSE THERE EXISTS [MORE THAN] A REASONABLE PROBABILITY THAT [DEFENDANT'S] OVERALL [THIRTY-SEVEN-AND-A-HALF] YEARS [OF] PAROLE ELIGIBILITY WOULD HAVE BEEN [AND WOULD BE]

CORRECTED TO [THIRTY] YEARS IF [TRIAL] COUNSEL . . . HAD APPLIED HER AMBIGUOUS STATUTE KNOWLEDGE TO SHOW THE MURDER VERDICT MUST BE READ AS A VERDICT FOR SBI MURDER MEANS, [THE STATE] AND THE PCR COURT ARE IN ERROR THAT [TRIAL] COUNSEL . . . DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL WHEN SHE MADE THE DECISION TO NOT APPLY SAID KNOWLEDGE TO [DEFENDANT'S] ILLEGAL SENTENCE CLAIM.

POINT II

[THE STATE] WAIVED [ITS] ALLEGED PROCEDURAL BAR CLAIM BECAUSE [IT] FAILED TO PRESENT SAID CLAIM TO THE PCR COURT.

Our analysis of the issues raised on appeal is guided by a review of the two court rules that apply to a second or subsequent PCR. Rule 3:22-12(a)(2) states:

[N]o second or subsequent petition shall be filed more than one year after the latest of:

(A) the date on which the constitutional right asserted was initially recognized by the United States Supreme Court or the Supreme Court of New Jersey, if that right has been newly recognized by either of those Courts and made retroactive by either of those Courts to cases on collateral review; or

(B) the date on which the factual predicate for the relief sought was discovered, if that factual predicate could not have been discovered earlier through the exercise of reasonable diligence; or

(C) the date of the denial of the first or subsequent application for post-conviction relief where ineffective assistance of counsel that represented the defendant on the first

or subsequent application for post-conviction relief is being alleged.

Further, pursuant to Rule 3:22-4(b),

[a] second or subsequent petition for post-conviction relief shall be dismissed unless:

(1) it is timely under [Rule] 3:22-12(a)(2);
and

(2) it alleges on its face either:

(A) that the petition relies on a new rule of constitutional law, made retroactive to defendant's petition by the United States Supreme Court or the Supreme Court of New Jersey, that was unavailable during the pendency of any prior proceedings; or

(B) that the factual predicate for the relief sought could not have been discovered earlier through the exercise of reasonable diligence, and the facts underlying the ground for relief, if proven and viewed in light of the evidence as a whole, would raise a reasonable probability that the relief sought would be granted; or

(C) that the petition alleges a prima facie case of ineffective assistance of counsel that represented the defendant on the first or subsequent application for post-conviction relief.

Although the time limitations are not absolute and may be waived to prevent a fundamental injustice, the rules must be viewed

in light of their dual key purposes: to ensure the passage of time does not prejudice the State's retrial of a defendant and to respect the need for achieving finality. State v. DiFrisco, 187 N.J. 156, 166-67 (2006). Moreover, a PCR petition is not a substitute for an appeal of a conviction, Rule 3:22-3, and any available ground for relief not asserted in a prior proceeding is barred if it could have been raised earlier, Rule 3:22-4, or was asserted earlier, Rule 3:22-5.

We have carefully considered defendant's arguments in light of the applicable law, and conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We affirm substantially for the reasons stated by Judge Teare in her thorough written opinion of January 12, 2017. We add only the following brief comments.

We are satisfied defendant's eighth PCR petition, filed at least thirty-one years after the judgment of conviction without any showing of excusable neglect or manifest injustice, is clearly time-barred. R. 3:22-12(a). Defendant has articulated no basis to relax the clear restrictions concerning subsequent PCR petitions imposed by this rule. We agree with the PCR judge that trial counsel's letter brief in support of another client, purportedly discovered by defendant in February 2015, "discusses the ambiguity of the sentencing portion of the [murder] statute

which is wholly distinguishable from the argument [defendant] presents in this instant petition."

We also agree defendant's present claims are barred by Rule 3:22-4 and Rule 3:22-5 as they could have been raised, or were raised, either on direct appeal or in defendant's previous PCR petitions and appeals. As the PCR judge astutely observed, defendant's argument that appellate counsel was ineffective because she failed to argue merger of robbery with his felony murder conviction was considered and rejected by another trial judge pursuant to defendant's motion for an illegal sentence.

Moreover, in order to obtain relief on an ineffective assistance of counsel claim, a defendant must show both that his counsel's performance was deficient and that counsel's performance prejudiced his defense. State v. Fritz, 105 N.J. 42, 52 (1987) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). We are in accord with Judge Teare that defendant masks his previous illegal sentencing argument with his ineffective assistance of counsel claims against his trial and appellate counsel. Having been litigated previously, we agree with the PCR judge that these claims are barred. See R. 3:22-4 and R. 3:22-5.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION