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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-2738-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANDREW DENNIS,

Defendant-Appellant.

Submitted April 10, 2018 – Decided May 11, 2018

Before Judges Reisner and Gilson.

On appeal from Superior Court of New Jersey,
Law Division, Atlantic County, Indictment No.
00-10-2041.

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

Damon G. Tyner, Atlantic County Prosecutor,
attorney for respondent (Nicole L. Campellone,
Assistant Prosecutor, of counsel and on the
brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Andrew Dennis appeals from a January 19, 2017 order denying his second petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm because the second petition was barred by Rule 3:22-4 and otherwise lacked merit.

In 2001, a jury convicted defendant and two co-defendants of multiple counts of first-degree robbery, N.J.S.A. 2C:15-1; second-, third-, and fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) to (4); second-degree burglary, N.J.S.A. 2C:18-2; third-degree criminal restraint, N.J.S.A. 2C:13-2; conspiracy, N.J.S.A. 2C:5-2; and various weapons offenses. Those convictions arose out of an armed robbery where the victim, after being robbed, was shot in each of his knees.

In sentencing defendant, the court granted the State's motion for a discretionary extended term because defendant was a persistent offender, N.J.S.A. 2C:44-3(a), and sentenced him to an aggregate of sixty years in prison, with fifty-one years of parole ineligibility.

We affirmed defendant's convictions and sentence on direct appeal. State v. Dennis, No. A-0422-01 (App. Div. June 29, 2004). The Supreme Court accepted certification, limited to the issue of whether defendant's Sixth Amendment right to counsel was violated when he was not represented at a probable cause hearing. State v. Dennis, 182 N.J. 428 (2005). The Court held that defendant had

a right to counsel at the probable cause hearing, but that the violation of the right was harmless error. Accordingly, the Supreme Court affirmed defendant's conviction. State v. Dennis, 185 N.J. 300 (2005).

In May 2006, defendant filed his first petition for PCR. He argued that his trial counsel had been ineffective in misadvising him concerning his sentencing exposure, and that had he been properly advised he would have accepted the State's plea offer. The trial court denied that petition, but ruled that defendant had been illegally sentenced and resentenced defendant.

In 2009, we remanded the matter to permit defendant to order the transcripts to be submitted in support of his PCR application. State v. Dennis, No. A-3934-07 (App. Div. Mar. 9, 2009). After those transcripts were submitted, the trial court denied defendant's petition without an evidentiary hearing. We reversed and remanded for an evidentiary hearing. State v. Dennis, No. A-3934-07 (App. Div. Jan. 6, 2011).

In 2011, the trial court conducted an evidentiary hearing. On January 6, 2012, the court denied defendant's first petition for PCR. The court, however, vacated defendant's sentence and resentenced him on April 12, 2012. At his resentencing, defendant was sentenced to an aggregate term of thirty years in prison, with eighty-five percent of that time ineligible for parole as

prescribed by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. In February 2014, we affirmed the trial court's denial of defendant's first petition for PCR. State v. Dennis, No. A-0148-12 (App. Div. Feb. 7, 2014), certif. denied, 219 N.J. 630 (2014).

In October 2014, defendant filed his second petition for PCR. Defendant alleged that his first PCR trial and appellate counsel were ineffective in failing to raise the issue of his right to represent himself. He also alleged that his PCR appellate counsel was ineffective in failing to raise the issue that defendant was resentenced without reviewing the updated presentence report with his counsel.

Defendant was assigned new PCR counsel and the trial court heard oral arguments. On January 19, 2017, the trial court denied defendant's second petition without an evidentiary hearing. The court explained the reasons for that denial on the record, finding that defendant's second petition was time-barred and without merit.

On this appeal, defendant contends that his second petition was timely and that he should have been given an evidentiary hearing. Specifically, defendant asserts:

POINT I – THE PCR COURT ERRED IN DENYING THE INSTANT PETITION AS UNTIMELY AND IN DENYING DENNIS' REQUEST FOR AN EVIDENTIARY HEARING

- A. The PCR Court Erred In Deeming The Instant Petition Untimely
- B. The PCR Court Erred In Denying Petitioner's Request For An Evidentiary Hearing

In a supplemental brief, which defendant filed himself, he also argues:

POINT I — THE DEFENDANT CONTENDS THAT HIS SECOND PCR PETITION SHOULD HAVE BEEN GRANTED BECAUSE AT ORAL ARGUMENT HE PROVED THAT THE FACTUAL PREDICATE FOR THE RELIEF SOUGHT COULD NOT HAVE BEEN DISCOVERED EARLIER THROUGH THE EXERCISE OF REASONABLE DILIGENCE, AND THE FACTS TO THE FARETTA ISSUE THAT WAS RAISED IN THE PCR COURT IF ADDRESSED DEFENDANT WOULD PREVAIL ON THE MERITS.

POINT II — DEFENDANT DEMONSTRATED IN THE PCR COURT THAT HIS FARETTA ISSUE WAS NOT PROCEDURALLY BARRED UNDER R. 3:22-4(a)(2) DEFENDANT SUBMITS THAT IF THE PCR COURT WOULD HAVE ADDRESSED THE MERITS OF HIS FARETTA ISSUE HE WOULD HAVE WON ON THE MERITS. THE JUDICIAL SYSTEM DENIED DEFENDANT WITH A FAIR PROCEEDING LEADING TO A JUST OUTCOME.

We affirm the denial of defendant's second PCR petition because the petition was barred by Rule 3:22-4 and otherwise lacked merit. Defendant claims that both his first PCR trial counsel and appellate counsel were ineffective in failing to raise and argue that defendant was denied the right to represent himself. That argument could have and should have been raised on his first PCR petition. Rule 3:22-4 precludes post-conviction relief on grounds that could have been raised in prior proceedings. There are three

narrow exceptions to that rule, but none of them applies here. R. 3:22-4(a); see also State v. Reevey, 417 N.J. Super. 134, 148 (App. Div. 2010), certif. denied, 206 N.J. 64 (2011).

Here, defendant claims that on February 7, 2001, his original trial counsel raised the subject of defendant representing himself. Defendant now wants to contend that his first PCR trial and appellate counsel were ineffective in failing to raise that issue. Defendant obviously was aware of that issue since February 2001, and he cannot now claim that he could not have previously raised the issue.

Defendant also has failed to establish that enforcement of the procedural bar would result in a fundamental injustice. Defendant has not alleged, and the record does not support, an argument that his failure to represent himself played a role in the determination of his guilt. State v. Martini, 187 N.J. 469, 481-82 (2006). Finally, defendant's claim for relief does not rely on a new constitutional rule of law. R. 3:22-4(a)(3). Accordingly, since defendant's latest claims do not fall within one of the exceptions, they are procedurally-barred.

Defendant's claim that his first PCR appellate counsel was ineffective also lacks substantive merit. Defendant asserts that his first PCR appellate counsel should have raised the issue that he was not given the opportunity to review his updated presentence

report before he was resentenced on April 12, 2012. To establish a prima facie case of ineffective assistance of counsel, defendant must show that there was a deficient performance by counsel and prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 58 (1987).

Here, defendant has failed to make any showing of prejudice. Defendant has not contended that there was anything in his updated presentencing report that was inaccurate. Thus, defendant cannot show that he was prejudiced by his counsel's failure to review that report with him.¹

Affirmed.

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



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¹ On appeal, defendant also argues that he was entitled to a new presentence report before he was resentenced in 2012. That issue was not raised before the trial court on defendant's second petition for PCR and, accordingly, we decline to consider it. See State v. Stein, 225 N.J. 582, 599 (2016).