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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-5420-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROBERT L. TERRY,

Defendant-Appellant.

Submitted April 23, 2018 – Decided May 15, 2018

Before Judges Accurso and O'Connor.

On appeal from Superior Court of New Jersey,
Law Division, Union County, Indictment Nos.
95-06-0574 and 95-06-0576.

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

Michael A. Monahan, Acting Union County
Prosecutor, attorney for respondent (Milton
S. Leibowitz, Special Deputy Attorney
General/Acting Assistant Prosecutor, on the
brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Robert L. Terry appeals from the denial of his fourth application for post-conviction relief (PCR), claiming the ineffective assistance of trial, appellate and PCR counsel. The trial court dismissed the claim as time-barred. We agree and affirm.

Defendant was tried for the 1994 murder of David Brown and aggravated assault of Diane Crews. The State claimed defendant, dressed in black, wearing a ski mask and armed with a gun, entered Crews' apartment in Elizabeth looking for Brown. As Brown tried to flee, the masked intruder chased him through the apartment, shooting him. Crews and another witness testified that when Brown fell, the intruder stood over him and shot him again at point blank range. Although neither saw the shooter's face, both identified him as defendant, a man they knew as "Justice," based on his voice. After shooting Brown, defendant pointed the gun at Crews' head and ordered her to open the door, which Brown's body was blocking. When the door was finally opened, defendant ran out of the apartment and down the stairs to the street.

When police arrived, Brown was bleeding badly. An officer told him he might not survive, and asked who shot him. Brown told him it was defendant Robert L. Terry. Brown died from his wounds a short time later.

A jury convicted defendant in 1996 of first degree murder, fourth degree aggravated assault, second degree possession of a weapon for an unlawful purpose, and third degree unlawful possession of a weapon. The same jury immediately thereafter convicted defendant of possession of a weapon by a convicted felon. The judge sentenced defendant to an extended term of life in prison plus fifteen and one-half years, with a forty-three year parole disqualifier.

We affirmed defendant's conviction but remanded for resentencing, as extended-term sentencing for murder was not available at the time the crime was committed, and the judge had failed to articulate his reasons for imposing consecutive sentences. State v. Terry, Nos. A-3371-96 and A-3382-96 (App. Div. July 1, 1998) (slip op. at 4, 23) (Terry I). The Supreme Court denied defendant's petition for certification. State v. Terry, 156 N.J. 426 (1998).

Defendant filed his first petition for PCR in 1998. State v. Terry, No. A-4207-99 (App. Div. Apr. 15, 2002) (slip op. at 5) (Terry II). The PCR judge denied relief, id. at 6, we affirmed, id. at 8, and the Supreme Court denied certification. State v. Terry, 174 N.J. 364 (2002). Defendant filed his second petition on March 19, 2003. State v. Terry, No. A-2334-03 (App. Div. Apr. 18, 2005) (slip op. at 3) (Terry III). The PCR judge

denied the petition as untimely and without merit, id. at 4, and we again affirmed, id. at 6-7.

Defendant thereafter filed a petition for a writ of habeas corpus under 28 U.S.C. § 2253(c)(2), which was dismissed as untimely by order and opinion of August 16, 2006. Terry v. Cathel, No. 05-4644(DRD) (D.N.J. Aug. 16, 2006) (slip op. at 1) (Terry IV). The U.S. Court of Appeals for the Third Circuit declined defendant's request for a certificate of appealability, Terry v. Cathel, No. 06-4212 (3d Cir. Apr. 16, 2007), and his sur-petition for rehearing en banc, Terry v. Cathel, No. 06-4212 (3d Cir. Jun. 6, 2007). The United States Supreme Court subsequently denied defendant's petition for writ of certiorari. Terry v. Ricci, 552 U.S. 1024 (2007). Defendant's subsequent application for leave to file a second or successive federal habeas corpus petition on grounds of actual innocence was denied because all claims had been raised in petitioner's previous federal habeas petition. In re Terry, No. 08-1795 (3d Cir. May 22, 2008) (Terry V).

Defendant thereafter returned to State court, filing his third PCR petition, nearly twelve years after his conviction. Defendant claimed he was actually innocent of the murder and if not for his trial counsel's ineffectiveness would have been acquitted, and thus the interests of justice required relaxation

of the procedural bar. The PCR judge denied relief and we affirmed, finding all of defendant's claims either a reiteration of ones made previously, and thus barred by R. 3:22-5, or ones that could have been made previously and thus barred by R. 3:22-4 and 3:22-12(a)(2). State v. Terry, No. A-4656-08 (App. Div. Aug. 2, 2010) (slip op. at 9) (Terry VI).

Thereafter, defendant filed another petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, claiming he was actually innocent of the crime of murder, that he received ineffective assistance of trial counsel and his sentence is illegal, which the court dismissed sua sponte without a certificate of appealability. Terry v. Bartkowski, No. 11-0733 (CCC) (D.N.J. Oct. 28, 2011) (slip op. at 4, 10) (Terry VII).

Defendant filed his fourth petition for PCR on April 7, 2015, claiming his trial counsel was ineffective by failing to advise him of a statement of a witness who saw him fleeing the crime scene, failing to reopen plea negotiations after the prosecution recovered an additional bullet that struck Brown and failing to properly advise him as to his sentencing exposure. Defendant also claimed his counsel on direct appeal and PCR counsel were ineffective for failing to raise those issues.

Specifically, defendant claimed that while studying his file in 2013, he learned an investigator had taken a statement

from a woman who claimed she saw defendant on the stairs leaving Crews' apartment immediately after the murder. The woman, who never testified at trial, told the investigator defendant was pulling off a ski mask and she had addressed him by name, but had not gone to the police with the information. Defendant remembered seeing the woman on the stairs, and claimed had he known she could identify him, he would have taken the plea offer.

As for the bullet, defendant claimed he turned down the plea because the State, although alleging defendant shot Brown while he was lying on the floor, had not recovered a bullet from beneath the body. Defendant claimed he believed the State would have difficulty proving he murdered Brown without that physical evidence. When the State reported recovering a bullet from the floor under Brown shortly before trial, defendant claimed he told counsel to reopen plea negotiations, but she refused, saying it was too late. Defendant claimed his counsel should have attempted to reopen plea negotiations based on a material change in circumstances.

The judge denied defendant's petition without an evidentiary hearing as obviously time-barred and found the facts defendant alleged, even if proven, did not "raise a reasonable probability that the relief sought would be granted." R. 3:22-

4(b)(2)(B). Considering the petition on its merits, the court noted defendant knew the witness had seen him on the stairs after the murder. Because defendant was aware of the witness, who never testified at trial in any event, the judge found defendant was not put to any disadvantage by his lack of knowledge of the interview. As to the bullet, the judge found the testimony of the eyewitnesses of defendant standing over Brown and shooting him at close range, coupled with the coroner's report and Brown's dying declaration, made the discovery of the bullet "not a material change in circumstances." The judge found defendant's remaining issues without merit.

Defendant appeals, raising the following issues:

POINT I

THE PCR PETITION WAS NOT TIME BARRED BECAUSE THE DEFENDANT'S FAILURE TO FILE HIS PETITION WITHIN FIVE YEARS OF HIS CONVICTION WAS DUE TO EXCUSABLE NEGLIGENCE AND THE INTERESTS OF JUSTICE WARRANT RELAXATION OF THE BAR.

POINT II

THE INTERESTS OF JUSTICE MANDATE A REMAND FOR A FULL EVIDENTIARY HEARING ON ALL ISSUES RAISED IN THE POST-CONVICTION RELIEF PETITION.

He adds the following points in a pro se brief:

POINT I

PETITIONER'S DEFENSE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FIVE TIMES DURING PRETRIAL PHASE BY FAILING TO PROPERLY ADVISE DEFENDANT CAUSING HIM TO REJECT A PLEA HE OTHERWISE WOULD HAVE ACCEPTED.

POINT II

THE ACCUMULATION OF ALL ERRORS COMMITTED BY COUNSEL DENIED DEFENDANT A FAIR CHANCE TO MAKE A REASONABLE DECISION WHETHER TO PLEAD GUILTY.

POINT III

AN EVIDENTIARY HEARING IS WARRANTED FOR REASONS OF INFORMATION EXISTING OUTSIDE OF ANY RECORDS AND DEFENSE COUNSEL'S REASONS FOR ACTION AND NONACTION NEEDS TO BE ON RECORD IN ORDER FOR APPELLATE COURT TO MAKE PROPER RULING.

We reject defendant's arguments as plainly without merit. See R. 2:11-3(e)(2).

Pursuant to Rule 3:22-12(a)(2), no second or subsequent petition for PCR, "[n]otwithstanding any other provision in [Rule 3:22-12], . . . shall be filed more than one year after the latest of" A) the United States Supreme Court's or the Supreme Court of New Jersey's recognition of a new constitutional right on which the defendant relies, which the Court has made retroactive to cases on collateral review; B) a newly discovered factual predicate, which could not have been earlier discovered through reasonable diligence; and C) "the

date of the denial of the first . . . application for post-conviction relief" where the defendant alleges ineffective assistance of counsel representing him on that petition.

R. 3:22-12(a)(2)(A)-(C). A 2009 amendment to the rule makes clear beyond question that the one-year limitation for second or subsequent petitions is non-relaxable. R. 3:22-12(b); see also State v. Jackson, ___ N.J. Super. ___, ___ (App. Div. 2018) (slip op. at 9-10). Rule 3:22-4(b) requires dismissal of a second petition if untimely under Rule 3:22-12(a)(2).

Application of those rules here makes plain the trial court was correct in dismissing defendant's fourth PCR petition as untimely. Defendant filed his fourth PCR petition on April 7, 2015, more than fifteen years after the denial of his first petition in 2000. Not only was the petition filed beyond the one-year, non-relaxable limitation of Rule 3:22-12(a)(2)(A)-(C), thus requiring its dismissal under Rule 3:22-4(b), but defendant has already raised, and we have already rejected, the claim that his counsel failed to advise him as to his sentence exposure and that he received ineffective assistance on his first PCR petition. Terry II, slip op. at 7-8. Dismissal of the petition was thus appropriate under Rule 3:22-5 as well.

Having reviewed the record, we are also satisfied defendant's fourth PCR petition is utterly without merit.


Defendant's new claims as to his counsel's effectiveness regarding the investigator's interview of a witness and the State's discovery of the bullet were both discoverable years ago and neither can be shown to establish deficient performance or prejudice to the defense. See Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984). Defendant's claims about his counsel's advice as to sentence have been already rejected twice. Terry VI, slip op. at 8-9. As for the failure of his appellate or PCR counsel to have raised those issues, defendant does not explain why such an appeal would have been successful, a prerequisite to obtaining relief in these circumstances. See State v. Echols, 199 N.J. 344, 361 (2009) (explaining that without a showing of reversible error, the failure of appellate counsel to have raised an issue "could not lead to the conclusion that there is a reasonable probability that, but for the errors of trial and appellate counsel, the outcome would have been different").

As we are confident that all of the facts underlying defendant's claims could "have been discovered earlier through the exercise of reasonable diligence," R. 3:22-4(a) and defendant has in no way been denied "fair proceedings leading to a just outcome," State v. Mitchell, 126 N.J. 565, 587 (1992), denial of defendant's fourth PCR petition resulted in no

injustice to him. See State v. Nash, 212 N.J. 518, 546-47
(2013).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION