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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-1639-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EDELBARTO PADILLA,
a/k/a LEO DEL MONTE, LEO
DELMONTE, ERIC CORTEZ,
RAUL HERNANDEZ, HERBERTO
PADILLA, MICHAEL LANDON,
ERICKSON PAZ, ERICSON
PAZ, ERICSON PAZARIELO,
ERICSON PZARIELO,
MICHAEL L. PAZARIELO,
ERIC SANTANA, ERIK SANTANA
MICHAEL LAURARA,
LEO DELEON, and LEO DEMICH,

Defendant-Appellant.

Submitted April 4, 2022 – Decided May 9, 2022

Before Judges Messano and Enright.

On appeal from the Superior Court of New Jersey, Law
Division, Essex County, Indictment No. 08-01-0114.

Robert C. Pierce, attorney for appellant (Jeff Thakker, of counsel; Robert C. Pierce, on the brief).

Theodore N. Stephens II, Acting Essex County Prosecutor, attorney for respondent (Matthew E. Hanley, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

A jury convicted defendant Edelbarto Padilla of first-degree murder and related charges in the 2002 shooting death of Carlos Freitas in an after-hours bar in Newark. State v. Padilla, No. A-2446-13 (App. Div. Apr. 7, 2016) (slip op. at 2). Defendant fled the scene and was not apprehended until 2010 when he was arrested in New Brunswick on unrelated charges. Ibid. At trial, the State produced three eyewitnesses that identified defendant as the shooter. One of them was defendant's friend, a taxicab driver who was in the bar with him and drove defendant from the shooting scene. Id. at 16–17. We rejected defendant's arguments on appeal and affirmed his conviction and sentence. Id. at 29. The Court denied defendant's petition for certification. 227 N.J. 133 (2016).

Defendant filed a timely petition for post-conviction relief (PCR) alleging the ineffective assistance of trial and appellate counsel (IAC). State v. Padilla, No. A-4601-16 (App. Div. Sept. 26, 2018) (slip op. at 3). The PCR judge denied the petition on May 4, 2017, and defendant appealed, claiming trial counsel was

ineffective for not allowing defendant to testify at trial and for failing to adequately cross-examine the State's witnesses. Id. at 3–4. We affirmed the denial of PCR, id. at 9, and the Court again denied defendant's petition for certification. 237 N.J. 411 (2019).

More than two years after the denial of his first petition, defendant filed a pro se second PCR petition on June 24, 2019, alleging PCR counsel was ineffective. It included a voluminous appendix of correspondence between defendant and PCR counsel suggesting additional investigation trial counsel should have performed and additional questions he should have asked of witnesses; in a pro se brief, only a portion of which is supplied in this record, defendant alleged PCR counsel never asserted more than one dozen alleged shortcomings in trial counsel's performance.

Second PCR counsel was appointed to represent defendant and furnished a supplemental certification from defendant and a supplemental brief. Defendant's supplemental certification asserted his innocence and again reiterated his desire to have testified at trial, which he claimed trial counsel discouraged him from doing. The small portion of the supplemental brief supplied in this record only reiterates the IAC claims defendant made in his pro se submission regarding trial counsel.

Argument on the second PCR petition was heard by the same judge who denied defendant's first petition. PCR counsel's brief argument incorporated defendant's pro se arguments, but completely misstated the procedural history of the case in framing additional arguments. PCR counsel claimed that trial counsel's discouragement of defendant testifying led to his guilty plea, despite an available defense and defendant's claims of innocence.

The second PCR judge denied the petition. In a written opinion, she found the petition was time-barred under Rule 3:22-12(a)(2), because it was not filed within one year of the denial of defendant's first PCR petition. The judge also noted that "Rule 3:22-12(b)(1) mandates dismissal of a second petition unless timely filed," and, citing our decision in State v. Jackson, 454 N.J. Super. 284, 293 (App. Div. 2018), the judge concluded the one-year limitation was "non-relaxable." "For the sake of completeness," the judge addressed the merits of defendant's arguments and rejected them.

Before us, defendant contends first PCR counsel was ineffective, because defendant's voluminous pro se submissions demonstrated counsel failed to advance the arguments defendant asserted in his correspondence with her, advancing instead only arguments that were clearly insufficient to obtain PCR relief. Defendant also contends second PCR counsel provided ineffective

assistance, as evidenced by his confusion over the procedural history of the case and his mere parroting of defendant's pro se submissions. Finally, defendant contends the second PCR petition was not time-barred because defendant's medical condition during the year after denial of the first petition made it difficult for him to meet the deadline. In this regard, we granted defendant's motion to supplement the record with additional medical records while he was in custody. Having considered these arguments in light of the record and applicable legal standards, we affirm.

Rule 3:22-12(a)(2)(C) provides that

[n]otwithstanding any other provision in this rule, no second . . . petition shall be filed more than one year after . . . the date of the denial of the first . . . application for post-conviction relief where ineffective assistance of counsel that represented the defendant on the first . . . application for post-conviction relief is being alleged.

The time limit "shall not be relaxed," except as otherwise provided within the Rule. R. 3:22-12(b). In turn, Rule 3:22-4(b)(1) states: "A second or subsequent petition for post-conviction relief shall be dismissed unless . . . it is timely under Rule 3:22-12(a)(2)." (emphasis added).

In Jackson, we detailed the historical progression leading to the Court's adoption of the current Rules. 454 N.J. Super. at 292–94. We concluded that

under the current iteration of these Rules, a defendant could not successfully urge relaxation of these time frames, as he could under Rule 3:22-12(a)(1) governing first PCR petitions, with claims of excusable neglect and a resulting fundamental injustice if the petition were time-barred. Id. at 293–94. We never reached the merits of the defendant's PCR petition because it was untimely and subject to mandatory dismissal. Id. at 297; see also State v. Brown, 455 N.J. Super. 460, 470 (App. Div. 2018) (holding that absent competent evidence establishing the defendant's entitlement to relaxation of Rule 3:22-12(a)(1)'s five-year time limit for first PCR petitions, "the court does not have the authority to review the merits of the claim").


Defendant does not dispute his failure to comply with the one-year time limit for second PCR petitions, but rather offers essentially two excuses. First, relying on the voluminous medical records now part of the appellate record, defendant claims he was physically unable to file a petition during the year following denial of his first PCR petition. This variation on a theme of excusable neglect is not cognizable under the current Rule. Jackson, 454 N.J. Super. at 293–94. Moreover, our review of the medical records fails to reveal any compelling reason for extending the time limit.

Second, defendant takes issue with the alleged unfairness of the procedural bar. He notes that his direct appeal of the denial of his first PCR petition was pending during the year after the May 4, 2017. Defendant asserts that pursuant to Rule 3:22-6A(2), had he filed a second PCR petition while that appeal was pending, it would have been dismissed without prejudice. That is undoubtedly true.

However, pursuant to Rule 3:22-12(a)(3), had defendant filed a second PCR petition while the appeal from the denial of his first was pending, and had the second PCR petition been dismissed without prejudice, defendant would have had an additional ninety days from "the date of the judgment on direct appeal, including consideration of a petition for certification," to re-file a second PCR petition. We issued our judgment on September 26, 2018; defendant would have had to re-file his second PCR petition by December 26, 2018. He did not file the second petition until six months later, on June 24, 2019.

Having carefully reviewed the record and the voluminous material defendant furnished his first PCR counsel, we see no reason to remand the matter for another hearing on defendant's second PCR petition, given that it is both procedurally deficient and substantively without merit. R. 2:11-3(e)(2).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION