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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0729-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PERFIS PENA-NUNEZ,

Defendant-Appellant.

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Submitted April 26, 2023 – Decided May 10, 2023

Before Judges Currier and Mayer.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 15-03-0246.

Bailey & Toraya, LLP, attorneys for appellant (Adam W. Toraya, on the brief).

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Timothy Kerrigan, Senior Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Perfis Pena-Nunez appeals from a September 16, 2021 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. Because defendant's PCR arguments regarding his sentence were raised and rejected in a prior appeal, we affirm.

We summarize the facts giving rise to defendant's PCR petition. Despite an active restraining order, defendant went to his girlfriend's home to visit their one-year-old child. After an argument, defendant took out a gun and shot the mother of his child twice in the head in front of the child. Defendant was charged with first-degree murder, N.J.S.A. 2C:11-3(a)(1), second-degree child endangerment, N.J.S.A. 2C:24-4(a), third-degree receiving stolen property, N.J.S.A. 2C:20-7, and various weapons charges. He pleaded guilty and was sentenced to an amended charge of first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1).

At the sentencing hearing, trial counsel argued for mitigating factors two (defendant did not contemplate his conduct would cause or threaten harm), seven (no prior criminal history), eight (defendant's conduct was unlikely to recur), nine (defendant was unlikely to commit another offense), eleven (excessive hardship), and twelve (cooperation with law enforcement). The State argued for aggravating factors one (nature and circumstances of the offense) and

nine (need to deter). The judge applied aggravating factors one, N.J.S.A. 2C:44-4(a)(1), and nine, N.J.S.A. 2C:11-4(a)(9), affording those factors substantial weight given that defendant's girlfriend had a restraining order against defendant, defendant brought an illegal weapon to his girlfriend's home, and defendant shot his girlfriend twice in the head in front of their young child. The judge also applied mitigating factors seven, N.J.S.A. 2C:44-1(b)(7), and twelve, N.J.S.A. 2C:44-1(b)(12), but afforded those factors minimal weight.

On May 13, 2016, the judge sentenced defendant to thirty years in prison subject to an eighty-five percent period of parole ineligibility. Additionally, the judge imposed a five-year period of parole supervision and ordered the payment of restitution and no contact with the victim's family.

Defendant appealed only from the sentence imposed. On our sentencing calendar, under Rule 2:9-11, defendant's appellate counsel raised the same arguments regarding sentencing as defendant's trial counsel. In an October 18, 2016 order, we upheld the sentence, finding the sentence was not manifestly excessive or unduly punitive and that it did not constitute an abuse of discretion. State v. Perfis Pena-Nunez, No. A-5249-15 (App. Div. Oct. 18, 2018).

On April 21, 2021, defendant filed a PCR petition. The PCR judge heard argument on September 15, 2021, and denied defendant's application without an

evidentiary hearing. The judge found "trial counsel was not deficient in the sentencing process." He noted that trial counsel provided letters from defendant's family and friends and two people appeared on defendant's behalf at the sentencing hearing. Based on a review of the sentencing transcript, the PCR judge concluded defendant's trial counsel made appropriate arguments in support of each argued mitigating factor. Thus, the judge found that defendant failed to demonstrate his trial attorney was ineffective. The judge further found defendant's PCR argument "that the imposed sentence would have been lower if trial counsel properly argued and addressed the mitigating and aggravating factors lack[ed] merit."

Based on a review of the sentencing appeal transcript and our order affirming defendant's sentence, the PCR judge rejected defendant's ineffective assistance claim against his appellate counsel, finding defendant "failed to demonstrate that his appellate counsel was ineffective." The judge stated, "[a]ppellate counsel at oral argument strongly disputed the [t]rial [c]ourt['s]" findings on the aggravating factors and articulated cogent arguments in support of the mitigating factors. Although we rejected appellate counsel's arguments, the judge concluded defendant's appellate counsel was not deficient.

In addition, the PCR judge found Rule 3:22-5 barred defendant's PCR petition because "[t]he issues of the application of mitigating and aggravating factors were presented to the Appellate Division on direct appeal and have been adjudicated."

On appeal, defendant raises the following arguments:

POINT ONE

THE POST-CONVICTION RELIEF COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL.

A. THE PREVAILING LEGAL PRINCIPLES REGARDING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, EVIDENTIARY HEARINGS, AND PETITIONS FOR POST-CONVICTION RELIEF.

B. DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN HIS ATTORNEY FAILED TO PROPERLY ARGUE AND ADDRESS THE COURT'S CONSIDERATION OF AGGRAVATING AND MITIGATING FACTORS.

C. DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN HIS ATTORNEY FAILED TO PROPERLY ARGUE AND ADDRESS THE COURT'S CONSIDERATION OF AGGRAVATING AND MITIGATING FACTORS ON APPEAL.

## POINT TWO

THE COURT MISAPPLIED ITS DISCRETION IN APPLYING R. 3:22-5 AS A PROCEDURAL BAR AGAINST THE DEFENDANT'S FILING FOR POST-CONVICTION RELIEF.

"We review a judge's decision to deny a PCR petition without an evidentiary hearing for abuse of discretion." State v. Peoples, 446 N.J. Super. 245, 255 (App. Div. 2016). A petition asserting a claim of ineffective assistance of counsel does not automatically entitle a defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). Rule 3:22-10(b), governing evidentiary hearings in PCR proceedings, provides:

A defendant shall be entitled to an evidentiary hearing only upon [1] the establishment of a prima facie case in support of post-conviction relief, [2] a determination by the court that there are material issues of disputed fact that cannot be resolved by reference to the existing record, and [3] a determination that an evidentiary hearing is necessary to resolve the claims for relief.

We agree with the PCR judge that defendant's ineffective assistance arguments are procedurally barred under Rule 3:22-5. The Rule provides:

[a] prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any post-conviction proceeding brought pursuant to this rule . . . or in any appeal taken from such proceedings.

[R. 3:22-5].

"It is . . . clear that an issue considered on direct appeal cannot thereafter be reconsidered by way of a post-conviction application." Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 3:22-3 (2023).

Here, we previously addressed and rejected defendant's PCR arguments on direct appeal. A PCR petition is not "an opportunity to relitigate cases already decided on the merits." State v. Preciose, 129 N.J. 451, 459 (App. Div. 1999).

Despite being procedurally barred, the PCR judge also addressed defendant's arguments on the merits. To establish a prima facie ineffective assistance of counsel claim, a defendant must demonstrate by a preponderance of the credible evidence that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 58 (1987). In reviewing ineffective assistance of counsel claims, "[j]udicial scrutiny of counsel's performance must be highly deferential," and courts "must indulge a strong presumption" that counsel's performance was reasonable. Strickland, 466 U.S. at 689.

We also reject defendant's PCR arguments on the merits. Having reviewed the record, both trial and appellate counsel strenuously argued for

application of mitigating factors two, seven, eight, nine, eleven, and twelve, and against aggravating factors one and nine. Despite trial counsel's arguments, the sentencing judge properly applied the aggravating and mitigating factors. Similarly, appellate counsel presented appropriate but unsuccessful arguments regarding application of the aggravating and mitigating factors.

Because defendant failed to establish a prima facie case in support of PCR, and there were no material issues of disputed fact outside the record, defendant was not entitled to an evidentiary hearing.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION