

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

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-1060-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PETER PAPASAVVAS,

Defendant-Appellant.

Submitted April 26, 2023 – Decided July 31, 2023

Before Judges Haas and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 96-06-0823.

Joseph E. Krakora, Public Defender, attorney for appellant (Andrew R. Burroughs, Designated Counsel, on the briefs).

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (David M. Liston, Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Peter Papasavvas appeals from the August 23, 2021 order of the Law Division denying his third petition for post-conviction relief (PCR) without an evidentiary hearing and his motion for appointment of PCR counsel. We affirm.

I.

At about 10:00 p.m. on April 25, 1996, a sixty-four-year-old woman returned home to find defendant, clad only in a pair of boxer shorts, hiding in her basement. Defendant entered her home while it was unoccupied in an attempt to escape apprehension by police officers investigating an unrelated matter. The State alleged that defendant tied a knotted belt or ligature around the woman's face and neck, distorting her mouth and interfering with her breathing. After a struggle, defendant threw the woman down the basement stairs, breaking her neck. Defendant admitted he put his hands around the victim's neck and claimed he intended only to render her unconscious with a "sleeper hold" and she accidentally fell down the stairs after losing consciousness. Defendant anally raped the victim while she was motionless on the basement floor, purportedly to determine if she was feigning

unconsciousness. Before doing so, he used a pair of scissors to cut the victim's clothing in very straight lines to expose her private parts.

After killing the victim, defendant left a trail of incriminating evidence. He called his home from the victim's telephone. The call was recorded on her telephone bill. Defendant also stole the victim's car and went to New York City, where he used her credit cards to entertain a girlfriend.

At trial, defendant's counsel did not deny defendant caused the victim's death, but sought to prove he lacked the mental state required to commit murder. Defendant presented an expert who opined that because of a brain injury suffered in a motorcycle accident, defendant did not act in a purposeful and knowing manner when causing the victim's death. His counsel told the jury during his opening that defendant placed the belt around the victim's mouth to silence her, not to kill her, and the fall down the basement stairs was accidental. The medical examiner testified the cause of death was assault "compounded by strangulation both manual and ligature."

A jury convicted defendant of first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2); first-degree felony murder, N.J.S.A. 2C:11-3(a)(3); second-degree burglary, N.J.S.A. 2C:18-2; second-degree robbery, N.J.S.A. 2C:15-1, third-degree aggravated criminal sexual contact, N.J.S.A. 2C:14-3, third-degree theft,

N.J.S.A. 2C:20-3, and fourth-degree unlawful theft or receipt of a credit card, N.J.S.A. 2C:21-6(c). Defendant was sentenced to death on the murder conviction and received a term of incarceration on the noncapital counts.

In 2000, the Supreme Court affirmed defendant's conviction and death sentence. State v. Papasavvas, 163 N.J. 565 (2000). The Court, however, remanded for resentencing on the noncapital counts. Defendant was resentenced on the noncapital counts and, following a second appeal, was resentenced on those counts a second time. At the second resentencing, the court: (1) merged the felony murder conviction into the murder conviction; (2) imposed an extended twenty-year sentence with a ten-year period of parole ineligibility on the burglary conviction to run consecutive to the sentence on the murder conviction; (3) merged the theft and credit card convictions into the robbery conviction, on which the court imposed a concurrent ten-year sentence with a five-year period of parole ineligibility; and (4) imposed a concurrent five-year sentence with a two-and-a-half-year period of parole ineligibility on the criminal sexual contact conviction.

In 2002, the Supreme Court vacated defendant's death sentence on proportionality review. State v. Papasavvas, 170 N.J. 462, 495-96 (2002). On April 15, 2002, defendant was resentenced to life imprisonment with a thirty-

year period of parole ineligibility on the murder conviction to run consecutively with the extended twenty-year sentence with a ten-year period of parole ineligibility on the burglary conviction. The concurrent sentences for robbery and criminal sexual contact were unchanged.

In 2004, defendant's first PCR petition was denied without an evidentiary hearing. We affirmed. State v. Papasavvas, No. A-6302-03 (App. Div. Mar. 21, 2006). The Supreme Court denied defendant's petition for certification. State v. Papasavvas, 186 N.J. 608 (2006).

In 2013, defendant filed another PCR petition. He withdrew the petition in 2014 and filed a motion for post-conviction DNA testing pursuant to N.J.S.A. 2A:84A-32a. He sought to test the belt placed around the victim's mouth and neck, which he denied having placed there. He argued the DNA test would prove the ligature was put on the victim either by police to make the murder scene more gruesome or by a perpetrator who killed the victim after defendant left her house. The motion was denied. We affirmed. State v. Papasavvas, No. A-5146-13 (App. Div. Oct. 27, 2016). The Supreme Court denied defendant's petition for certification. State v. Papasavvas, 230 N.J. 408 (2017).

In 2017, defendant filed a second PCR petition.¹ He argued he was denied effective assistance of trial, appellate, and PCR counsel when each failed to acquire the victim's death certificate, which he argues creates reasonable doubt about his responsibility for the murder. On May 4, 2018, the trial court denied defendant's second petition. We affirmed. State v. Papasavvas, No. A-4460-17 (App. Div. Oct. 16, 2019). The Supreme Court denied defendant's petition for certification. State v. Papasavvas, 241 N.J. 19 (2020).

Shortly after the trial court issued its decision denying defendant's second PCR petition, the United States Supreme Court issued its opinion in McCoy v. Louisiana, 584 U.S. ____, 138 S. Ct. 1500 (2018). In that case, the Court held that it was a violation of the Sixth Amendment for counsel at the guilt phase of a death penalty trial to, over "the defendant's intransigent and unambiguous objection," id. at 1507, concede guilt as a strategy to avoid a death sentence in the penalty phase of the trial. The Court held "that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." Id. at 1505.

¹ The parties agreed the petition should be considered defendant's second PCR petition because he withdrew his 2013 petition.

On February 14, 2021, defendant filed a third PCR petition. He argued that McCoy created a newly recognized constitutional right which applies retroactively to his murder conviction and affords him relief. He argued that he informed his trial counsel that he denied tying the belt around the victim. He alleged that he instructed his attorney: "don't tell them I did that or they will kill me." According to defendant, notwithstanding his clear instruction, trial counsel told the jury in opening remarks that defendant tied the belt around the victim. He argued that counsel's comment, combined with the medical examiner's opinion of the victim's cause of death, ensured his conviction of murder and violated the Sixth Amendment.

The trial court denied the petition without holding an evidentiary hearing. The court concluded that defendant's reliance on McCoy was misplaced because the facts of his case do not fall under McCoy. The court noted that in McCoy the defendant adamantly denied involvement in the murder, while defendant admitting to putting his hands around the neck of the victim to put her in a "sleeper hold" to keep her quiet. Thus, the trial court concluded, defendant had only insisted on his attorney not admitting "one particular fact: that defendant tied a belt or ligature around the victim's face and neck." The trial court also concluded that "there is no case law which supports a finding that the McCoy

holding was to be applied retroactively so as to serve as a basis for the relief" defendant seeks.

This appeal followed. Defendant makes the following arguments.

POINT I

THE INTEREST OF JUSTICE AND FAIR PLAY REQUIRE THAT THE PROCEDURAL BAR BE RELAXED AND THAT THIS MATTER BE REMANDED SO THAT DEFENDANT BE ASSIGNED COMPETENT COUNSEL TO COMPLETE A THOROUGH REVIEW OF THE FILE AND PRESENT COMPETENT ARGUMENTS.

POINT II

THE PCR COURT ERRED WHEN IT DENIED DEFENDANT'S REQUEST FOR ASSISTANCE OF PCR COUNSEL.

POINT III

DEFENDANT WAS DENIED EFFECTIVE LEGAL ASSISTANCE WHEN HIS ATTORNEY CONCEDED A MATERIAL ELEMENT OF GUILT AGAINST HIS CLIENT'S WISHES.

II.

We begin with the trial court's legal conclusion, which we review de novo, State v. Harris, 181 N.J. 391, 419 (2004), that defendant's third PCR petition was untimely filed. Rule 3:22-4(b) provides, in relevant part:

A second or subsequent petition for post-conviction relief shall be dismissed unless:

(1) it is timely under R. 3:22-12(a)(2); and

(2) it alleges on its face . . .

(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

Rule 3:22-12(a)(2) provides, in relevant part, that "no second or subsequent petition shall be filed more than one year after the latest of" the following:

(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

"These time limitations shall not be relaxed, except as provided herein." R. 3:22-12(b).

Defendant argues that his third petition was timely filed under subsection (A) based on a newly recognized constitutional right as announced in McCoy, which applies retroactively to convictions on collateral review. We agree with defendant that McCoy announced a newly recognized constitutional right.

Given that defendant's conviction and sentence became final, at the latest, in April 2002 when he was resentenced on his murder conviction, the new rule in McCoy was announced after "all avenues of direct appeal ha[d] been exhausted" for defendant. See State v. J.A., 398 N.J. Super. 511, 514 (App. Div. 2008). Thus, defendant would be entitled to relief under McCoy only if that decision was given complete retroactive effect, rendering it applicable to cases on collateral review. See Teague v. Lane, 489 U.S. 288, 301 (1989); State v. Covil, 240 N.J. 448, 468 (2020).

The decision in McCoy is silent with respect to whether it is to be applied retroactively to cases on collateral review. Courts, however, have declined to apply McCoy retroactively to collateral challenges. See Smith v. Stein, 982 F.3d 229 (4th Cir. 2020); Christian v. Thomas, 982 F.3d 1215 (9th Cir. 2020). Those courts reasoned that the Supreme Court has held that new rules of constitutional law, such as the one announced in McCoy, are "generally applicable only to cases that are still on direct review." Smith, 982 F.3d at 233 (quoting Whorton v. Bockting, 549 U.S. 406, 416 (2007)). The only exception for procedural rules such as this one has been if the rule is truly a "'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." Whorton, 549 U.S. at 416 (alteration in original). The Fourth

Circuit, however, noted that "the Supreme Court has never found a new procedural rule to be 'watershed' even though it has considered the question more than a dozen times." Smith, 982 F.3d at 235 (citing Whorton, 549 U.S. at 418 (collecting cases)).

More recently, the Supreme Court noted that in the thirty-two years since it announced the exception for watershed rules of criminal procedure in Teague, "the Court has never found that any new procedural rule actually satisfie[d] the purported exception." Edwards v. Vannoy, 538 U.S. ____, 141 S. Ct. 1547, 1555 (2021). The Edwards Court declared that "[c]ontinuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts." Id. at 1560. It accordingly announced "[t]he watershed exception is moribund," and abandoned it. Ibid. The law is now that "new procedural rules apply to cases pending in trial court and on direct review . . . [b]ut . . . do not apply retroactively on federal collateral review." Id. at 1562.

Given the Court's announcement in Edwards that no new procedural rule will apply retroactively in federal habeas proceedings, we are confident the new rule announced in McCoy does not apply here as a matter of federal law, and thus, that defendant's third PCR petition is barred by Rule 3:22-12(a)(2)(A).

Although our Supreme Court could determine to apply the rule in McCoy retroactively as a matter of state law in New Jersey PCR proceedings, see Danforth v. Minnesota, 552 U.S. 264, 282 (2008), until it does, we are bound by the strictures of Rule 3:22-12(a)(2)(A). We note, as well, that defendant's third petition was filed more than a year after the opinion in McCoy was issued.

Defendant argues that consideration of his time-barred petition was appropriate because basic fair play and fundamental fairness requires judicial intervention, given his claim of innocence. We disagree. Defendant's third petition raises no compelling constitutional claim of widespread application that would warrant departure from the time limits established in Rules 3:22-4 and 3:22-12.

Our disposition makes it unnecessary to determine whether the trial court correctly found that even if McCoy applied retroactively to defendant's third PCR petition, he would not be entitled to relief under the new procedural rule announced in that opinion, given his admission to having manually choked the victim.

In addition, in light of these holdings, we see no basis on which to disturb the trial court's conclusion that defendant did not demonstrate "good cause" for the appointment of PCR counsel. See R. 3:22-6(b) (allowing for the

appointment of counsel "when the court finds that a substantial issue of fact or law requires assignment of counsel and when a second or subsequent petition alleges on its face a basis to preclude dismissal under R. 3:22-4.").

We have carefully considered defendant's remaining arguments, including those raised in his pro se supplemental brief, and conclude they are without sufficient merit to warrant discussion in a written opinion. 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