RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1710-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

A.A.,

Defendant-Appellant.

Submitted September 11, 2023 – Decided October 19, 2023

Before Judges Gilson and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 06-10-1238.

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

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Ali Y. Ozbek, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

In two separate trials, defendant A.A. was convicted of fourteen crimes related to multiple sexual assaults of two of his daughters.[1] He appeals from a March 18, 2020 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. Having considered his arguments in light of the law and record, we reject them and affirm.

I.

In October 2006, a grand jury indicted defendant for twenty-seven counts related to the sexual abuse of five of his daughters. The counts were severed as to each daughter and this appeal involves the trials related to two of his daughters.

The first trial, which was conducted in 2010, concerned the sexual abuse of O.A. The evidence at trial established that defendant began sexually abusing O.A. when she was approximately eight years old, and he began repeatedly raping her when she was approximately thirteen years old. At trial, DNA evidence established that defendant was the biological father of O.A.'s daughter, born in December 2001, when O.A. was fifteen years old. The jury convicted defendant of eight counts of crimes against O.A.: count seven, first-degree

[1] To protect the privacy interests of the victims, we use initials. See R. 1:38-3(c)(9).

aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1); count eight, second-degree sexual assault, N.J.S.A. 2C:14-2(b); count nine, fourth-degree lewdness, N.J.S.A. 2C:14-4(b)(1); count ten, second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a); count eleven, first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(2); count twelve, second-degree sexual assault, N.J.S.A. 2C:14-2(c)(4); count thirteen, third-degree aggravated criminal sexual contact, N.J.S.A. 2C:14-3(a); and count fourteen, fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b).

For the convictions related to O.A., defendant was sentenced to an aggregate term of forty years in prison with periods of parole ineligibility and parole supervision as prescribed by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Defendant filed a direct appeal, but we rejected his arguments and affirmed his convictions. State v. A.A., No. A-2499-11 (App. Div. Apr. 23, 2014). In issuing that ruling, we remanded with the direction that count eight be merged into count seven but the NERA component of this sentence on count eight still applied. The Supreme Court denied defendant's petition for certification. 220 N.J. 40 (2014).

On April 30, 2014, the sentencing court entered a change of judgment of conviction. Consistent with our directions, the court merged count eight into

count seven but continued the NERA portion of the sentence. The court also dismissed count nine based on the statute of limitations.

The second trial, which was conducted in 2013, concerned the sexual abuses of A.M. A.M. testified that defendant began sexually abusing her when she was eight years old. She explained that when she was approximately thirteen, defendant told her she was his sexual slave. She then described a long-running period of sexual abuse that included acts of oral, vaginal, and anal penetration. A.M. testified that defendant was the biological father of four of her children and defendant never offered any evidence to dispute her testimony.

The jury convicted defendant of six crimes related to A.M.: count fifteen, first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1); count sixteen, second-degree sexual assault, N.J.S.A. 2C:14-2(b); count seventeen, first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(2)(a); count eighteen, second-degree sexual assault, N.J.S.A. 2C:14-2(c)(4); count nineteen, second-degree sexual assault, N.J.S.A. 2C:14-2(c)(3)(a); and count twenty, second-degree sexual assault, N.J.S.A. 2C:14-2(c)(1). Defendant was sentenced to an aggregate prison term of fifty years with periods of parole ineligibility and supervision as prescribed by NERA. That sentence was run concurrent to the sentence from the first trial.

Defendant appealed his convictions and sentence from the second trial, but we rejected his arguments and affirmed. State v. A.A., No. A-3459-13 (App. Div. Apr. 20, 2017). The Supreme Court denied defendant's petition for certification. 231 N.J. 144 (2017).

In June 2018, defendant filed a PCR petition. He was assigned counsel and, with assistance of counsel, amended his petition. The PCR court heard oral argument on the petition on March 12, 2020. On March 18, 2020, the PCR court issued a written opinion and order denying the petition.

II.

On this appeal, defendant makes three arguments, which he articulates as follows:

> POINT I – THE PCR COURT ERRED WHEN IT FOUND DEFENDANT'S CONVICTIONS UNDER INDICTMENT NO. 06-10-1238-I WERE NOT BARRED BY THE STATUTE OF LIMITATIONS.
>
> POINT II – THE NERA PORTION OF THE SENTENCE IMPOSED ON COUNT EIGHT MUST BE VACATED AS IMPOSITION OF MINIMUM TERM VIOLATES THE EX POST FACTO CLAUSE OF THE U.S. CONSTITUTION.
>
> POINT III – AS DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, HE IS ENTITLED TO POST-CONVICTION RELIEF, OR, IN THE ALTERNATIVE, TO AN EVIDENTIARY HEARING.

Having considered each of these arguments, we determine that none of them have merit and affirm.

A. The Statute of Limitations.

Defendant contends that his convictions under counts seven through ten and fifteen through twenty were barred by the statute of limitations. In other words, defendant argues that four of his convictions related to O.A. and all six of his convictions related to A.M. were barred by the statute of limitations.

We begin our analysis with count nine, the fourth-degree lewdness conviction related to O.A. We agree that charge, which alleged conduct between January 1989 and January 1999, was time-barred. The applicable statute of limitations for lewdness required a charge to be brought within five years after the alleged lewdness was committed. See N.J.S.A. 2C:1-6(b)(1). Nevertheless, this issue is moot. On April 30, 2014, the judgment of conviction for the crimes related to O.A. was amended. Count nine was "dismissed by the court based on the statute of limitations."

The other convictions challenged by defendant involve sexual assaults and endangering the welfare of a child. Specifically, defendant challenges his convictions related to O.A. under counts seven, eight, and ten. In count seven, defendant was convicted of first-degree aggravated sexual assault of a child less

than thirteen years of age, between 1989 and January 25, 1999, in violation of N.J.S.A. 2C:14-2(a)(1). In count eight, defendant was convicted of second-degree sexual assault by committing acts of sexual contact on O.A., a child less than thirteen years of age, when defendant was at least four years older, between January 1989 and January 25, 1999, in violation of N.J.S.A. 2C:14-2(b). In count ten, defendant was convicted of second-degree endangering the welfare of O.A., a child under sixteen years of age, between 1989 and January 25, 2002, in violation of N.J.S.A. 2C:24-4(a).

Regarding the convictions related to A.M., defendant challenges all six of his convictions based on the statute of limitations. Those convictions were as follows:

Count fifteen: first-degree aggravated sexual assault when A.M. was under the age of thirteen, between 1982 and September 9, 1990, in violation of N.J.S.A. 2C:14-2(a)(1);

Count sixteen: second-degree sexual assault when A.M. was under the age of thirteen and defendant was at least four years older, between 1982 and September 9, 1990, in violation of N.J.S.A. 2C:14-2(b);

Count seventeen: first-degree aggravated sexual assault when A.M. was between thirteen and sixteen years old and related to defendant by blood,

between September 10, 1990 and September 9, 1993, in violation of N.J.S.A. 2C:14-2(a)(2)(a);

Count eighteen: second-degree sexual assault when A.M. was between thirteen and sixteen years old and defendant was at least four years older, between September 10, 1990 and September 9, 1993, in violation of N.J.S.A. 2C:14-2(c)(4);

Count nineteen: second-degree sexual assault when A.M. was between sixteen and eighteen years old and related to defendant by blood, between September 10, 1993 and September 9, 1995, in violation of N.J.S.A. 2C:14-2(c)(3)(a);

Count twenty: second-degree sexual assault through the use of physical force or coercion on A.M., between September 10, 1995 and 2002, in violation of N.J.S.A. 2C:14-2(c)(1).

The statutes of limitations for sexual assault, endangering the welfare of a child, and criminal sexual contact are all set forth in N.J.S.A. 2C:1-6. These statutes of limitations have been amended several times since 1980. In 1980, there was a five-year statute of limitations for sexual assaults, endangering the welfare of a child, and criminal sexual contact. See N.J.S.A. 2C:1-6(b)(1) (1980). The statute of limitations for sexual assault was amended four times

between 1986 and 1996. Effective December 3, 1986, prosecutions for sexual assault of any victim under the age of eighteen needed to be commenced within two years of the victim obtaining the age of eighteen or five years after the offense was committed, whichever was later. See L. 1986, c. 166, § 1. Effective December 29, 1989, prosecutions for sexual assault of any victim under the age of eighteen needed to be commenced within five years of the victim obtaining the age of eighteen. See L. 1989, c. 228, § 1. Effective June 24, 1994, prosecutions for sexual assault of any victim under the age of eighteen needed to be commenced within five years of the victim obtaining the age of eighteen or two years of discovery of the offense by the victim, whichever was later. See L. 1994, c. 53, § 1. Effective May 1, 1996, prosecutions for sexual assaults under N.J.S.A. 2C:14-2 can be commenced at any time. See N.J.S.A. 2C:1-6(a)(1); L. 1996, c. 22, § 1. In other words, in May 1996, the Legislature eliminated the statute of limitations for sexual assaults.

In 1986, the Legislature amended the statute of limitations so that prosecutions of sexual assaults of victims under eighteen could be brought within two years of the victim turning eighteen. We have held that extension applied to a sexual assault of a victim against whom the statute had not already run. State v. Nagle, 226 N.J. Super. 513, 517-18 (App. Div. 1988). In 1996,

when the Legislature eliminated the limitation period related to sexual assaults, it stated that the amendment applied to "all offenses not yet barred from prosecution under the statute of limitations as of the effective date." L. 1996, c. 22, § 2.

The sexual assault convictions related to O.A. took place between January 1989 and January 1999. O.A. was born in January 1986, and turned eighteen in January 2004. Accordingly, none of the statutes of limitations had run when the Legislature eliminated the limitation period for sexual assaults in 1996. Consequently, counts seven and eight are not barred by the statute of limitations.

Count ten, which charged defendant with endangering the welfare of O.A. between 1989 and 2002, is also not barred by the statute of limitations. Prior to December 29, 1989, a prosecution for endangering the welfare of a child had to be commenced within five years after the offense was committed. See N.J.S.A. 2C:1-6(b)(1) (1988). Effective December 29, 1989, prosecutions for endangering the welfare of a child under the age of eighteen had to be commenced within five years of the victim obtaining the age of eighteen. N.J.S.A. 2C:1-6(b)(4) (1989); L. 1989, c. 228, § 1. Effective June 1994, prosecutions for endangering the welfare of a child must be brought within five years of the victim obtaining the age of eighteen or within two years of the

discovery of the offense by the victim, whichever is later. N.J.S.A. 2C:1-6(b)(4); L. 1994, c. 53, § 1. Because O.A. turned eighteen in January 2004, and the charge against defendant was brought within five years of that time, the charge was timely and count ten is not barred by the statute of limitations.

The convictions related to A.M. concern conduct that took place between 1982 and 2002. A.M. was born in September 1977, and turned eighteen in September 1995. None of the statutes of limitations for the charges related to A.M. had run when the Legislature eliminated the limitation period for sexual assaults in 1996.

In summary, counts seven, eight, ten, and fifteen through twenty are not barred by the statute of limitations. The conviction for count nine (lewdness) has already been dismissed as barred by the statute of limitations.

B. The NERA Parole Disqualifier Imposed on Count Eight.

Defendant contends that the imposition of a minimum term of imprisonment under NERA for count eight violates the ex post facto clause of the United States Constitution. We reject this argument on procedural and substantive grounds.

In defendant's direct appeal of his convictions related to the charges concerning O.A., he argued that count eight should have merged into count

seven. In State v. A.A., No. A-2499-11, we agreed that count eight should have merged into count seven, but we also held the merger did not preclude the imposition of a parole disqualifier under NERA. Slip op. at 23. In 2014, the judgment of conviction was amended and count eight was merged into count seven, and the NERA parole disqualifier continued to apply. In other words, we have effectively considered this argument and rejected it. Accordingly, it is not open to rechallenge on this PCR petition. See State v. McQuaid, 147 N.J. 464, 483 (1997).

Nevertheless, even if we were to consider the merits of defendant's argument, the imposition of NERA does not violate the ex post facto clause. Counts seven and eight charged defendant with sexually assaulting O.A. between January 1989 and January 1999. NERA was originally enacted in 1997. N.J.S.A. 2C:43-7.2 (1997); L. 1997, c. 117, § 1. From 1997 to 2001, NERA required that defendants convicted of violent crimes be ineligible for parole until they had served eighty-five percent of the sentence imposed for the crime. N.J.S.A. 2C:43-7.2 (1997). "Violent crime" was defined by the Act to include "any aggravated sexual assault or sexual assault in which the actor uses, or threatens the immediate use of, physical force." N.J.S.A. 2C:43-7.2(d) (1997). In 2001, NERA was amended to set forth an enumerated list of first and second-

degree offenses to which it applies. N.J.S.A. 2C:43-7.2(d); L. 2001, c. 129, § 1. That amendment does not apply retroactively. State v. Parolin, 171 N.J. 223, 233 (2002). As we noted in our decision on the direct appeal, count eight "was subject to an eighty-five percent parole disqualifier pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, because the jury found that count eight was committed with physical force." A.A., slip op. at 22. Accordingly, the jury made the necessary finding for the imposition of a NERA parole disqualifier.

C. The Claims of Ineffective Assistance of Counsel.

Finally, defendant argues that he was denied effective assistance of counsel during both of his trials, and that he is entitled to PCR or, in the alternative, an evidentiary hearing. When no evidentiary hearing is conducted by the PCR court, appellate courts review the denial of a PCR petition de novo. State v. Harris, 181 N.J. 391, 420-21 (2004); State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014). A PCR court's decision to proceed without an evidentiary hearing is reviewed for an abuse of discretion. State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013).

To establish a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong Strickland test: (1) "counsel made errors so serious that

counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[,]" and (2) "the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984) (quoting U.S. Const. amend. VI); State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the Strickland two-prong test in New Jersey). In analyzing the first prong, "Strickland instructs reviewing courts to be 'highly deferential.'" Harris, 181 N.J. at 431 (quoting Strickland, 466 U.S. at 689). To establish prejudice under prong two, "a defendant 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 432 (quoting Strickland, 466 U.S. at 694).

A petitioner is not automatically entitled to an evidentiary hearing. State v. Porter, 216 N.J. 343, 355 (2013). Rule 3:22-10 provides that defendants are entitled to an evidentiary hearing on a PCR petition only if they establish a prima facie case in support of PCR, material issues of disputed facts cannot be resolved by reference to the existing record, and an evidentiary hearing is necessary to resolve the claims for relief. Porter, 216 N.J. at 354 (quoting R. 3:22-10(b)). If a "defendant's allegations are too vague, conclusory, or speculative to warrant an evidentiary hearing, then an evidentiary hearing need not be granted." State

v. Ball, 381 N.J. Super. 545, 558 (App. Div. 2005) (quoting State v. Marshall, 148 N.J. 89, 158 (1997)).

Defendant repeats the same arguments he made before the PCR court concerning why his counsel at his first and second trials were ineffective. The PCR judge, Judge Ronald B. Sokalski, analyzed and rejected each of those arguments. Having reviewed the record de novo, we affirm substantially for the reasons explained by Judge Sokalski in his thorough written opinion.

Affirmed.