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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-1874-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FRANCISCO G. RAWLINS, a/k/a
FRANCISCO G. RAWLINGS and
ZION'ELIYAH YAH'TORAH,

Defendant-Appellant.

Submitted February 28, 2023 – Decided April 11, 2023

Before Judges Geiger and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 98-07-0965.

Joseph E. Krakora, Public Defender, attorney for appellant (Karen A. Lodeserto, Designated Counsel, on the brief).

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (Patrick F. Galdieri, II, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from an order denying him post-conviction relief (PCR) for ineffective assistance of counsel. Defendant argues his counsel at sentencing was ineffective for failing to oppose the trial court's imposition of his sentence for burglary consecutive to sentences he was serving for prior carjacking and robbery offenses. Because defendant failed to raise a cognizable claim for PCR, and his petition is time-barred pursuant to Rule 3:22-12, we affirm.

On May 29, 1998, as part of an undercover operation regarding thefts, a police officer parked a United Parcel Service truck in Perth Amboy. The officer opened the rear of the truck and removed a package before leaving the area to make a delivery. Defendant then walked up to the rear of the truck, surveyed the area, removed several boxes, and walked away from the truck. Police arrested him.

A grand jury indicted defendant, charging him with one count of third-degree burglary, contrary to N.J.S.A. 2C:18-2. Defendant was found guilty following a bench trial. The sentencing judge granted the State's motion for imposition of a discretionary extended term of imprisonment and sentenced defendant to a seven-year term with a three-year parole ineligibility period

pursuant to the persistent offender statute, N.J.S.A. 2C:44-3(a). The sentencing judge ordered the seven-year sentence to run consecutive to prior imprisonment terms defendant was already serving for carjacking and robbery convictions, stemming from separate incidents that occurred in April 1999. Defendant's sentencing counsel did not make any argument opposing the imposition of the imprisonment terms consecutively.

Defendant did not appeal his conviction or sentence but filed a motion seeking reconsideration of his sentence in November 2011. On January 4, 2012, that motion was denied, and defendant appealed that order, but later withdrew the appeal.

On January 19, 2021, pursuant to Rule 3:21-10(b)(5), defendant filed a pro se motion to correct his sentence. The PCR court designated the motion as a petition for PCR and assigned counsel. Defendant argued sentencing counsel was ineffective, pursuant to Strickland v. Washington, 466 U.S. 668 (1984), because counsel failed to argue the sentence should be served concurrent with, rather than consecutive to, his prior offenses. The PCR court denied defendant's application, reasoning defendant's sentence did not exceed the penalties authorized for third-degree burglary, nor was it illegal or not authorized by law. Citing State v. Acevedo, 205 N.J. 40, 47 (2011), the PCR court stated

"[a]lthough the sentencing [j]udge should have provided a [Yarbough] analysis, the absence[] of one does not make [defendant]'s sentence illegal." Defendant filed this appeal, arguing the PCR court erred in not holding an evidentiary hearing to hear testimony from sentencing counsel regarding his failure to argue against imposition of consecutive sentences.

We afford deference to the PCR court's factual findings, but our interpretation of the law is de novo. State v. Nash, 212 N.J. 518, 540-41 (2013). "Ineffective-assistance-of-counsel claims are particularly suited for post-conviction review because they often cannot reasonably be raised in a prior proceeding." State v. Hess, 207 N.J. 123, 145 (2011) (quoting State v. Preciose, 129 N.J. 451, 460 (1992)). Because defendant was convicted following a bench trial, he may prevail on an ineffective assistance claim, pursuant to Strickland, if he proves (1) "trial counsel's performance was deficient[,] and (2) this "deficient performance prejudiced the defense." State v. Fritz, 105 N.J. 42, 52 (1987) (quoting Strickland, 466 U.S. at 687).

First, defendant's claim of ineffective assistance of counsel for failure to argue against the imposition of consecutive sentences is not a cognizable claim for PCR and is, therefore, not properly before us. Under the guise of an ineffective assistance of counsel label, defendant challenges the imposition of

the consecutive imprisonment terms as excessive, which has expressly been held not cognizable for PCR review. See Acevedo, 205 N.J. at 45; Pressler & Verniero, Current N.J. Court Rules, cmt. 3 on R. 3:22-2 (2023) ("Because PCR addresses only illegal sentences, PCR also is not available to remedy a judge's failure to state reasons for consecutive sentences or to consider the required factors." (citing Acevedo, 205 N.J. at 45-47)).

In Acevedo, the defendant pled guilty to aggravated manslaughter and burglary and received consecutive sentences totaling forty years. 205 N.J. at 42. The Supreme Court, in reinstating the consecutive sentences, reasoned "an illegal sentence is one that 'exceeds the maximum penalty provided in the Code for a particular offense' or a sentence 'not imposed in accordance with law.'" Id. at 45 (quoting State v. Murray, 162 N.J. 240, 247 (2000)). While the sentencing court must explain the reasons for imposing consecutive sentences, the commission of such an error is not a cognizable ground for PCR or a modification of a sentence pursuant Rule 3:21-10(b)(5). Id. at 45, 47. Moreover, "mere excessiveness of a sentence otherwise within authorized limits" can only be raised on direct appeal. Id. at 45-46 (quoting State v. Clark, 65 N.J. 426, 437 (1974)). The Court concluded excessiveness of a sentence does

not pertain to sentence "legality" and is "not cognizable on PCR, or under . . . Rule 3:21-10(b)(5)." Id. at 47.

Defendant's claim is not cognizable on PCR because it pertains to the sentencing court's failure to explain its reasoning in imposing consecutive sentences or analyzing Yarbough factors. See State v. Yarbough, 100 N.J. 627, 643-44 (1985); State v. Torres, 246 N.J. 246, 266 (2021); N.J.S.A. 2C:44-5(a). Regardless of the sentencing court's failure to provide reasoning for imposing consecutive sentences, such error pertains only to the excessiveness of defendant's sentence, not its legality, and Acevedo forecloses defendant's ability to bring this argument as a claim for PCR.

Further, the proper vehicle for challenging an excessive sentence is via direct appeal, not PCR. Hess, 207 N.J. at 145; State v. Tormasi, 466 N.J. Super. 51, 67 (App. Div. 2021). Defendant did not appeal his conviction or sentence, filed a motion for reconsideration of his sentence in November 2011, appealed the denial of that motion, but later withdrew it. No further action was taken since that time until the present application for PCR. A decade has passed since the entry of the order denying reconsideration, and defendant's attempt to recharacterize appeal of his sentence as a PCR claim does not withstand scrutiny.

To the extent defendant could bring his ineffective assistance claim for sentencing counsel's failure to argue against the imposition of consecutive sentences, those claims are also not properly before us because they are time-barred. "Because [PCR] is not a substitute for direct appeal and because of the public policy to promote finality in judicial proceedings, our rules provide various procedural bars." State v. Peoples, 446 N.J. Super. 245, 254 (App. Div. 2016) (internal quotations omitted) (quoting State v. Echols, 199 N.J. 344, 357 (2009)). Pursuant to Rule 3:22-12(a)(1)(A) any claim for PCR must be brought within five years of the date in which the judgment of conviction is entered unless "it alleges facts showing that the delay beyond said time was due to defendant's excusable neglect and that there is a reasonable probability that if the defendant's factual assertions were found to be true enforcement of the time bar would result in a fundamental injustice."

Here, the judgment of conviction was entered on November 8, 2002. Thus, defendant's ineffective assistance of counsel claim needed to be brought by November 8, 2007. Defendant did not bring this motion to correct his sentence, which he recharacterized as a PCR petition, until January 19, 2021, more than thirteen years past the limitations period. Defendant has not demonstrated, nor is there support in the record, that his failure to timely file his

PCR petition was due to excusable neglect or fundamental injustice would result if we applied the five-year bar.

Defendant's PCR petition is also time-barred because defendant is not challenging the legality of his sentence. Pursuant to Rule 3:21-10(b)(5), a motion to correct an illegal sentence may be filed at any time. However, defendant's challenge relates only to the sentence's excessiveness and "is not illegal if the sentencing [court] fails to state the reasons for imposition of a sentence on the record as is required by case law." State v. Hyland, 238 N.J. 135, 145-46 (2019); see also Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R. 3:21-10 (2023) ("Note also that [R. 3:21-10](b)(5) does not apply to claims arising from the imposition of consecutive sentences without a statement of reasons."). Therefore, defendant's claim is not cognizable under Rule 3:21-10(b)(5), relaxation of the time-bar does not apply, and defendant's petition for PCR is not properly before us.

Because defendant challenges the sentencing court's failure to provide reasons for imposing his seven-year sentence for third-degree burglary consecutive to imprisonment terms he was serving for prior carjacking and robbery convictions, his claims are not cognizable for PCR or pursuant to Rule 3:21-10(b)(5). Further, defendant cannot now, more than eight years past the

statutory deadline of Rule 3:22-12(a)(1)(A), bring a claim for ineffective assistance of counsel. We affirm the PCR court's denial of relief and its decision to not hold 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