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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0237-23

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ESTERLIN MELENDEZ,

Defendant-Appellant.

Submitted May 28, 2024 – Decided June 13, 2024

Before Judges Paganelli and Whipple.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 96-03-0881.

Hegge and Confusione, LLC, attorneys for appellant (Michael James Confusione, of counsel and on the brief).

Theodore N. Stephens, II, Essex County Prosecutor, attorney for respondent (Braden Bendon Couch, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Esterlin Melendez appeals from an August 20, 2023 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

We incorporate herein the facts set forth in our decision affirming defendant's convictions in State v. Melendez, No. A-1385-96 (App. Div. Apr. 30, 1998). The parties are fully familiar with the facts and, therefore, we will not reiterate them here.

Procedurally, defendant was found guilty following a jury trial in July 1996. In September 1996, he was sentenced to a term of life imprisonment with thirty years of parole ineligibility for the primary crime of murder. In November 1996, defendant filed a direct appeal, we affirmed the conviction but remanded for re-sentencing. Id. at 12. Defendant was re-sentenced in October 2000.

In his direct appeal, defendant argued as relevant here: (I) "the guilty verdict for murder was tainted by two events: the failure of the judge to respond to a jury question regarding the difference between murder and aggravated manslaughter and premature jury deliberation on that same issue"; (II) "the jury instructions on passion/provocation manslaughter (1) had the clear capacity to confuse the jury on the assignment of the burden of proof, and (2) unjustly reduced the chances of a verdict for that crime, thereby improperly increasing

the chances of a guilty verdict for murder"; and (III) "the victim's statement, 'It's not the first time he ha[d] hit me,' was pure hearsay, inadmissible via any hearsay exception; alternatively a limiting instruction should have been given." Id. at 6-7. "After review of the record, the applicable law, and the briefs filed, we conclude[d] the contentions . . . [we]re without merit." Id. at 7.

As to defendant's argument concerning the jury instruction, we concluded "the failure to advise the jury that it may find defendant guilty of passion/provocation manslaughter, rather than it must find defendant guilty of passion/provocation manslaughter when the State had not disproven at least one of the four factors beyond a reasonable doubt was error." Id. at 8.¹

We noted "[n]o objection was raised at trial," and we were, therefore, required to "decide whether the alleged error in the use of the word 'may' [wa]s clearly capable of producing an unjust result." Ibid. (citing R. 2:10-2). We concluded the "error was harmless because, notwithstanding the fact that the State consented to the charge being given at trial, the evidence did not support a charge on passion/provocation manslaughter." Id. at 9. "Accordingly, the

¹ We cited State v. Mauricio, 117 N.J. 402, 411 (1990) regarding the "four elements of passion/provocation manslaughter."

instruction, although erroneous, was harmless." Ibid. (citing State v. McClain, 248 N.J. Super. 409, 416 (App. Div. 1991)).

"We recognize[d] that the record [was to] be viewed in the light most favorable to defendant" but, nonetheless, concluded the evidence was insufficient to support the charge. Defendant was not "entitle[d] . . . to a passion/provocation manslaughter charge" by his justifications: (1) "[d]efendant's belief that the victim may have had an affair because she had obtained a telephone credit card without telling him"; (2) the victim's statement "that she would see defendant in court"; and (3) "defendant's self-serving contention that the victim pushed him and grabbed a knife and attempted to cut him" twelve days earlier.² Id. at 9-10.

In October 2021, defendant filed a petition for PCR on the grounds of ineffective assistance of trial counsel. He contended, despite the bars imposed under Rule 3:22-4(a) and Rule 3:22-5, PCR review was necessary to avoid "a fundamental injustice." He argued trial counsel was ineffective by failing to: (1) "ensure that . . . the trial court provided the jury with the correct instructions on evaluating whether defendant was guilty of murder . . . or only of

² After we affirmed defendant's convictions, he filed a petition for certification which the New Jersey Supreme Court denied. State v. Melendez, 156 N.J. 407 (1998).

passion[/]provocation manslaughter"; (2) "sufficiently investigate the witnesses [of a prior incident between defendant and the victim] in the case"; and (3) "sufficiently object to damaging hearsay evidence admitted against defendant at trial."

The PCR judge denied relief. She determined an evidentiary hearing was unnecessary because defendant's PCR application did not establish a prima facie case of ineffective assistance of trial counsel and the "facts . . . ha[d] been established on the record."

In addition, the judge determined that under Rule 3:22-12, defendant's petition was filed "more than [twenty-one] years after [defendant] was re[-]sentenced." Therefore, it "was not timely and [wa]s procedurally barred." Moreover, she found there was no exception to the time bar imposed by Rule 3:22-12 because "defendant ha[d] not put forth any facts that support[ed] the contention that there [wa]s excusable neglect that would [have] warrant[ed] relaxing the time limits to file a PCR. Nor did defendant show [PCR wa]s warranted in order to 'correct a fundamental injustice.'"

Despite finding the PCR petition was procedurally barred, the judge considered the merits of defendant's arguments. As to the jury instruction, the judge noted our opinion on defendant's direct appeal "that the record did not

support defendant's entitlement to a charge of passion/provocation manslaughter" and the "claimed error in th[e] charge was harmless in that it was not clearly capable of producing an unjust result."

In addition, the judge found "[a]t multiple times during trial, trial counsel reiterated . . . that [it wa]s a case of passion/provocation manslaughter" and argued for the passion/provocation charge. Indeed, the judge found the jury instruction was given at the request of trial counsel. Under these circumstances, the judge concluded "defendant failed to establish that counsel's performance with respect to the jury instruction for passion[/]provocation was deficient."

The judge considered defendant's argument that trial counsel failed to properly investigate witnesses of a prior incident between defendant and the victim. The judge noted defendant was required to "assert the facts an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the person making the certification."³ The judge stated she could "only address what ha[d] been provided to" her and "[n]othing in defendant's moving papers support[ed] the contention that trial counsel erred while investigating the witnesses in th[e] case." In addition, the judge reviewed trial counsel's cross-examination of the witnesses and found trial

³ Citing State v. Cummings, 321 N.J. Super. 154, 159 (App. Div. 1999).

counsel "elicit[ed] testimony that could [have] be[en] seen as beneficial for defendant" and "used facts and evidence in a manner that show[ed] he properly investigated each witness that testified." The judge found "trial counsel adequately investigated the witnesses in th[e] case and his actions were well within the purview of an objective standard of reasonableness."

The judge also considered defendant's argument that "trial counsel failed to object to the damaging hearsay testimony admitted against him at trial." The judge cited our opinion on defendant's direct appeal, noting we "held that the argument was without merit and did not comment any further." Nonetheless, the judge concluded the testimony would have been admissible pursuant to a hearsay exception. Thus, the judge determined "whether trial counsel objected to the testimony . . . or not, the testimony would have been permissible under the rules of evidence." Therefore, trial counsel's "[f]ailure to object d[id] not change the outcome of the trial, nor did it [a]ffect defendant's subsequent testimony."

The judge concluded that since "defendant's claims of ineffective assistance of counsel [we]re cursory and lack[ed] merit," she need "not address the second prong of Strickland, as defendant ha[d] not met the first prong."⁴

⁴ Strickland v. Washington, 466 U.S. 668 (1994).

On appeal, defendant contends:

THE TRIAL COURT ERRED IN DENYING
DEFENDANT'S PETITION FOR [PCR] WITHOUT
AN EVIDENTIARY HEARING.

More specifically, defendant argues: (1) his "ineffective assistance of counsel claims raised on PCR . . . ha[d] never been determined on their merits . . . at any point in the[] criminal proceedings against him," and "fundamental injustice concerns . . . warranted [a] merits review"; (2) an evidentiary hearing was required so "counsel c[ould] explain the reasons for his conduct and inaction"; and (3) counsel's representation was deficient because he failed to: (i) "ensure that correct instructions [for the passion/provocation charge] were provided to the jury"; (ii) "sufficiently investigate the witnesses involved in the critical incident that - the State claimed - occurred . . . two weeks before the shooting"; and (iii) object to the testimony regarding decedent's statements made following a prior incident.

We begin our discussion with a review of the principles governing our analysis. "[PCR] is New Jersey's analogue to the federal writ of habeas corpus." State v. Pierre, 223 N.J. 560, 576 (2015) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). "[PCR] provide[s] a built-in 'safeguard that ensures that a defendant [is] not unjustly convicted.'" State v. Nash, 212 N.J. 518, 540 (2013) (quoting State v. McQuaid, 147 N.J. 464, 482 (1997)).

Under Rule 3:22-12(a)(1)(A), a first petition for PCR must be filed no

more than [five] years after the date of entry pursuant to Rule 3:21-5 of the judgment of conviction that is being challenged unless:

(A) 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.[.]

[(Emphasis added).]

To establish excusable neglect, a defendant must demonstrate "more than simply providing a plausible explanation for a failure to file a timely PCR petition." State v. Norman, 405 N.J. Super. 149, 159 (App. Div. 2009). In assessing whether a defendant has demonstrated excusable neglect, a court must weigh "the extent of the delay"; "the purposes advanced by the five-year rule"; "the nature of defendant's claim[;] and the potential harm . . . realized" by defendant. State v. Murray, 162 N.J. 240, 251 (2000) (citing State v. Mitchell, 126 N.J. 565, 580 (1992)). Additionally, the court must weigh the "cause of the delay, the prejudice to the State, and the importance of the [defendant's] claim in determining whether there has been an 'injustice' sufficient to relax the time limits." Norman, 405 N.J. Super. at 159 (quoting State v. Afanador, 151 N.J. 41, 52 (1997)). "[A] misunderstanding of the

meaning of [Rule 3:22-12] would not constitute 'excusable neglect'" State v. Dugan, 289 N.J. Super. 15, 22 (App. Div. 1996).

"A fundamental injustice occurs 'when the judicial system has denied a defendant with fair proceedings leading to a just outcome or when inadvertent errors mistakenly impacted a determination of guilt or otherwise wrought a miscarriage of justice.'" State v. Hannah, 248 N.J. 148, 179 (2021) (internal quotation marks omitted) (quoting Nash, 212 N.J. at 546). "To demonstrate a fundamental injustice, a defendant must show 'that an error or violation played a role in the determination of guilt.'" Ibid. (internal quotation marks omitted) (quoting Nash, 212 N.J. at 547).

In addition, Rule 3:22-4(a)(2) states:

(a) First Petition for [PCR]. Any ground for relief not raised in the proceedings resulting in conviction, . . . or in any appeal taken in any such proceedings is barred from assertion in a proceeding under this rule unless the court on motion or at the hearing finds:

. . . .

(2) that enforcement of the bar to preclude claims, including one for ineffective assistance of counsel, would result in fundamental injustice[.] . . .

[(Emphasis added).]

Further, a defendant is not entitled to PCR relief where there was

[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 prior to the adoption thereof, or in any appeal taken from such proceedings.

[R. 3:22-5.]

However, our Supreme Court has "held that 'Rule 3:22-5's bar to review of a prior claim litigated on the merits is not an inflexible command' and must yield to a fundamental injustice." Hannah, 248 N.J. at 178-79 (internal quotation marks omitted) (quoting Nash, 212 N.J. at 547).

"A petitioner must establish the right to [PCR] by a preponderance of the credible evidence." Preciose, 129 N.J. at 459 (citing Mitchell, 126 N.J. at 579). "[T]rial courts ordinarily should grant evidentiary hearings to resolve ineffective-assistance-of-counsel claims if a defendant has presented a prima facie claim in support of [PCR]." Id. at 462. "[C]ourts should view the facts in the light most favorable to a defendant to determine whether a defendant has established a prima facie claim." Id. 462-63.

"Our standard of review is necessarily deferential to a PCR court's factual findings" Nash, 212 N.J. at 540. However, in the absence of an evidentiary hearing we "may exercise de novo review over the factual inferences drawn from the documentary record." State v. Harris, 181 N.J. 391, 419 (2004) (citing

Zettlemyer v. Fulcomer, 923 F.2d 284, 291 n.5 (3d Cir. 1991)). Moreover, "we need not defer to a PCR court's interpretation of the law; a legal conclusion is reviewed de novo." Nash, 212 N.J. at 540-41.

"A petition for [PCR] is cognizable if based upon . . . [a s]ubstantial denial in the conviction proceedings of [a] defendant's rights under the Constitution of the United States or the Constitution or laws of the State of New Jersey." R. 3:22-2(a).

"Those accused in criminal proceedings are guaranteed the right to counsel to assist in their defense." State v. Gideon, 244 N.J. 538, 549 (2021) (citing U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10). "It is not enough '[t]hat a person who happens to be a lawyer is present at trial alongside the accused,' rather, the right to counsel has been interpreted by the United States Supreme Court and [the New Jersey Supreme] Court as 'the right to the effective assistance of counsel.'" Id. at 550 (second alteration in original) (quoting Strickland, 466 U.S. at 685-86).

To establish a prima facie claim for ineffective assistance of counsel, a defendant must satisfy the two-prong test established in Strickland:⁵

First, the defendant must show that counsel's performance was deficient. This requires showing that

⁵ The New Jersey Supreme Court adopted the Strickland standard in State v. Fritz, 105 N.J. 42, 58 (1987).

counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

[Strickland, 466 U.S. at 687.]

"[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" Id. at 689.

Applying the applicable legal standards and having reviewed the record on appeal, we are convinced defendant failed to establish a prima facie right to an evidentiary hearing or PCR.

We conclude defendant's petition for PCR was untimely under Rule 3:22-12(a)(1). Further, defendant failed to establish "excusable neglect" for his substantially late filing, or that "fundamental injustice" would occur if the PCR claim was barred. R. 3:22-12(a)(1)(A).

Moreover, we conclude defendant's arguments regarding: (1) the jury instruction and (2) the hearsay testimony were considered by us in his direct appeal and, therefore, are barred under Rule 3:22-4 and Rule 3:22-5. We find no "fundamental injustice" in barring PCR under these rules. Nonetheless, we add that

our prior opinion concluded these arguments were "without merit." In other words, there was no error. In terms of our PCR analysis, therefore, we are satisfied trial counsel's representation was not deficient under the first prong of Strickland. With respect to the jury instruction, while we concluded it was erroneously worded, we stated "the evidence did not support a charge on passion/provocation manslaughter." Melendez, slip op. at 9. "Accordingly, the instruction, although erroneous, was harmless." Ibid. Therefore, there was no prejudice to defendant under the second prong of Strickland.

Lastly, despite the petition for PCR being barred under our court rules, we are satisfied defendant's argument that trial counsel failed to "sufficiently investigate the witnesses [of a prior incident between defendant and the victim] in the case" is without merit. The PCR judge detailed counsel's cross-examination of the witnesses and stated trial counsel "used facts and evidence in a manner that show[ed] he properly investigated each witness that testified." The judge found "trial counsel adequately investigated the witnesses in this case and his actions were well within the purview of an objective standard of reasonableness." Moreover, the judge stated defendant failed to support his argument with affidavits or certifications. "[W]hen a petitioner claims his trial attorney inadequately investigated his case, he must assert the facts that an investigation would have revealed, supported by affidavits or

certifications based upon the personal knowledge of the affiant or the person making the certification." Cummings, 321 N.J. Super. at 170 (citing R. 1:6-6).

To the extent we have not addressed any of defendant's remaining arguments, we conclude they lack 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