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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1830-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DEMARCUS DREW, a/k/a
DEMARCUS A. DREW,

Defendant-Appellant.

Submitted January 22, 2024 – Decided June 19, 2024

Before Judges Berdote Byrne and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law
Division, Camden County, Indictment No. 12-09-2526.

Joseph E. Krakora, Public Defender, attorney for
appellant (Monique Moyse, Designated Counsel, on the
brief).

Matthew J. Platkin, Attorney General, attorney for
respondent (Kaili E. Matthews, Deputy Attorney
General, of counsel and on the brief).

PER CURIAM

Defendant Demarcus Drew appeals from the December 1, 2019 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

We incorporate the facts from our opinion in State v. Drew, No. A-5494-14 (App. Div. Aug. 8, 2018). Defendant appealed his convictions and sentence for second-degree passion-provocation manslaughter and weapons related offenses. In his direct appeal, defendant raised perceived jury instruction errors for the first time on appeal, asserting the trial court erred in not sua sponte delivering two instructions from the final jury charge concerning statements made by defendant to Benjamin Alford, his prison cellmate: (1) the Hampton/Kociolek¹ instructions; and (2) the provision of the testimony of a cooperating witness charge that states such testimony should be given "careful scrutiny," and the jury must consider whether the witness has a "special interest in the outcome," and whether the testimony was "influenced by the hope or expectation of any favorable treatment or reward," or "by any feelings of revenge or reprisal." Defendant also challenged his sentence; namely, the

¹ State v. Hampton, 61 N.J. 250 (1972); State v. Kociolek, 23 N.J. 400 (1957).

extended sentence and the consecutive sentence. On direct appeal, we affirmed defendant's conviction and sentence.

We concluded no plain error resulted from the omission of the two instructions. We held that there was no prejudice to defendant regarding the omission of the cooperating witness charge because the jury received the credibility of witnesses' instruction, defense counsel thoroughly cross-examined Alford, and there was other eyewitness testimony regarding the shooting. Drew, slip op. at 29-30.

We similarly concluded no plain error occurred in omitting the Hampton/Kociolek charges because "'the jury was made well aware of the questions surrounding the reliability of defendant's alleged statements to' Alford by defense counsel's cross-examination and closing argument." Ibid. (quoting State v. Feaster, 156 N.J. 1, 72-73 (1998)). We further concluded that the trial court's "'detailed credibility instruction that sufficiently guided the jury in assessing [Alford's] testimony'" and that "a Hampton instruction . . . 'is not required when a defendant has allegedly made a voluntary inculpatory statement to a non-police witness without being subjected to any form of physical or psychological pressure.'" Ibid. (first quoting Feaster, 156 N.J. at 72-73; then

quoting State v. Baldwin, 296 N.J. Super. 391, 398 (App. Div. 1997)) (alteration in original).

With regard to defendant's challenge to his sentence, we determined the trial court "was guided by the factors in [Yarbough]²" in finding defendant's sentences should be served consecutively. Id. at 34. In affirming defendant's sentence, we concluded "[t]he trial court's findings were supported by the evidence," and therefore, "the [trial] court did not violate 'the criteria for imposing consecutive sentences enunciated in [Yarbough]' in imposing a consecutive sentence for unlawful possession of a handgun without a permit." Ibid. (quoting State v. Lane, 279 N.J. Super. 209, 222 (App. Div. 1995)). Defendant's petition for certification was denied. State v. Drew, 236 N.J. 621 (2019).

On July 2019, defendant filed a self-represented PCR petition. In November 2019, appointed counsel filed a supplemental supporting brief. Both briefs raised ineffective assistance of counsel claims, arguing trial counsel failed to request the testimony of cooperating witness and the Hampton/Kociolek instructions and failed to argue the Yarbough factors at sentencing. Defendant

² State v. Yarbough, 100 N.J. 627 (1985).

also argued the trial court illegally imposed an extended term sentence; the State's use of Alford's testimony was "illegal," and Harris made inconsistent statements.

The PCR court heard oral argument on December 1, 2019. Following oral argument, the court rendered an oral opinion, denying defendant's petition. The PCR court summarized the facts from the trial record and considered the applicable legal principles. The court noted that defendant's sentencing and jury instruction arguments were adjudicated on the merits in his direct appeal, and concluded defendant's arguments were procedurally barred under Rule 3:22-5.

On appeal, defendant renews only those claims that the PCR court determined were procedurally barred.

POINT I

[DEFENDANT] IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO ADVOCATE FOR A JURY CHARGE ON THE PROPER ASSESSMENT OF HIS ALLEGED STATEMENTS AND FAILING TO ADVOCATE ADEQUATELY AT SENTENCING FOR CONCURRENT SENTENCES.

Defendant renews the same arguments presented on direct appeal. He

further argues that the resolution of his claims was dependent on evidence outside of the trial record and warranted an evidentiary hearing. We reject defendant's argument.

"Post-conviction relief 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)). Post-conviction relief provides "a built-in 'safeguard that ensures that a defendant was not unjustly convicted.'" State v. Nash, 212 N.J. 518, 540 (2013) (quoting State v. McQuaid, 147 N.J. 464, 482, (1997)). A petition for post-conviction relief is not a substitute for a direct appeal. State v. Mitchell, 126 N.J. 565, 583 (1992).

We apply a de novo standard of review when a PCR court does not conduct an evidentiary hearing. State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016) (citing State v. Harris, 181 N.J. 391, 420-21 (2004)). When petitioning for PCR, a defendant must establish entitlement to "PCR by a preponderance of the evidence." State v. O'Donnell, 435 N.J. Super. 351, 370 (App. Div. 2014) (citing Preciose, 129 N.J. at 459).

Under Rule 3:22-5, where an issue has previously been raised and decided, the "prior adjudication upon the merits . . . is conclusive whether made in the proceedings resulting in the conviction . . . or in any appeal taken from such

proceedings." A PCR proceeding is not "an opportunity to re-litigate claims already decided on the merits." McQuaid, 147 at 483. Therefore, prior adjudication on the merits "ordinarily constitutes a procedural bar to the reassertion of the same ground as a basis for post-conviction review." Preciose, 129 N.J. at 476.

Nonetheless, the PCR court addressed defendant's ineffective assistance of counsel claim, finding that defendant failed to demonstrate a prima facie case of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 687 (1984) and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 52 (1987).

Based on the record, we are satisfied that the PCR court properly determined that defendant's arguments were procedurally barred. Defendant reprises the same arguments presented to us on direct appeal. We also add that even if defendant's arguments were not procedurally barred, we agree with the PCR court that he failed to satisfy the two-prong test articulated in Strickland. Thus, we discern no abuse of discretion by the PCR court in denying defendant's petition without an evidentiary hearing.

To the extent not addressed, defendant's remaining contentions lack sufficient merit to warrant further 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.


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