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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-1913-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

AGUSTIN GARCIA,

Defendant-Appellant.

Argued May 13, 2024 – Decided May 23, 2024

Before Judges Gilson and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 00-06-1368.

Agustin Garcia, appellant, argued the cause pro se.

William P. Miller, Assistant Prosecutor, argued the cause for respondent (Mark Musella, Bergen County Prosecutor, attorney; William P. Miller, of counsel and on the brief).

PER CURIAM

Defendant Agustin Garcia appeals from the December 21, 2021 order of the Law Division denying his fifth petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

I.

In 1999, defendant murdered his former girlfriend on the day she was to marry another man. Defendant shot her at close range in her home just before the wedding ceremony. The shooting was witnessed by several guests and family members and recorded by a videographer who was filming the events of the day.

In 2001, a jury convicted defendant of first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2); second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a); third-degree possession of a handgun without a permit, N.J.S.A. 2C:39-5(b); and four counts of third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a). Following the merger of certain convictions, the trial court sentenced defendant to an aggregate term of life in prison with a thirty-year period of parole ineligibility.

On direct appeal, defendant challenged, among other things, the admission of the video recording of the murder into evidence at trial. In Point I of his self-represented brief, defendant argued:

THE COURT IMPROPERLY ADMITTED THE WEDDING VIDEOTAPE THAT DID NOT ESTABLISH DEFENDANT'S GUILT IN ANY WAY AND WAS CLEARLY PREJUDICIAL AND INFLAMMATORY.

In support of this point, defendant advanced two arguments. First, he argued that the trial court erred when it admitted the video because it was unduly prejudicial, given the dramatic nature of the recording, that defendant's identity as the shooter was not contested, and there was sufficient eyewitness testimony regarding the shooting available to the State. Second, defendant argued that the jury was not properly advised that certain parts of the video had no sound and that the video had been modified from its original form.

We affirmed defendant's convictions of murder and the weapons offenses, but reversed his endangering convictions. State v. Garcia, No. A-3939-01 (App. Div. May 11, 2004). With respect to defendant's first argument, we affirmed the trial court's admission of the video recording based on its determination that "the tape was admissible because it was relevant on the issue of who caused the victim's death and to show the facts and circumstances immediately prior to the shooting." Id. (slip op. at 26). We noted that the State had "carefully redacted to limit, wherever possible, [the recording's] inevitable dramatic effect." Id. (slip op. at 30). We also rejected defendant's second argument as factually

inaccurate because "the trial judge apprised the jury of the limited audio" and the testifying officer had informed the jury that "he had edited the tape as per the court's direction and had also reproduced certain sections in slow motion and as still frames." Id. (slip op. at 26). The Supreme Court denied defendant's petition for certification. State v. Garcia, 181 N.J. 545 (2004).

In 2007, defendant filed his first PCR petition. In his self-represented submissions, defendant again challenged the admission of the video recording as evidence at trial. He argued that his trial counsel was ineffective for failing to "file a motion to suppress the wedding tape on tampering" State v. Garcia, No. A-5437-06 (App. Div. Nov. 6, 2009) (slip op. at 3). The trial court denied the first petition, holding that "there was no indication the video had been tampered with and no evidence at all the video had been manipulated in any way other than the way it was done in open court with defendant and his three attorneys present, which included freezing frames and excluding the portions that did not pertain to the shooting." Id. (slip op. at 4).

On appeal from the denial of his first petition, defendant, in a self-represented submission raised the following argument:

TRIAL COUNSELS WERE INEFFECTIVE FOR NOT
CONSULTING OR HIRING AN EXPERT TO
EXAMINE THE WEDDING VIDEOTAPE FOR
EVIDENCE OF AN ALTERCATION CAPTURED

ON THE AUDIO OF THE VIDEOTAPE AND FOR
FAILING TO HAVE AN EXPERT TESTIFY AT
TRIAL.

We affirmed denial of the first petition, holding that defendant's arguments that his trial counsel was ineffective with respect to the video recording were "completely without merit." Id. (slip op. at 12). The Supreme Court denied defendant's petition for certification. State v. Garcia, 202 N.J. 348 (2010).

In 2008, defendant filed a second PCR petition. He again argued that his trial counsel was ineffective for not consulting or hiring an expert to examine the video recording. The trial court dismissed the second petition, concluding that it was "little more than a resubmission of his prior petition." State v. Garcia, A-3198-09 (App. Div. Aug. 12, 2011) (slip op. at 3). We affirmed, concluding defendant's claims were time barred under Rule 3:22-12(a) and the ineffective assistance claims were substantively barred under Rule 3:22-5 because they had already been raised by defendant and rejected by the court. Id. (slip op. at 5-6). Despite the bars, we addressed defendant's claims and concluded that "[t]he broad proposition offered that counsel failed to hire experts to review, and presumably challenge as authentic, videotapes and audiotapes introduced at trial by the State, or otherwise present defense witnesses, lacks merit." Id. at (slip

op. at 7). The Supreme Court denied defendant's petition for certification. State v. Garcia, 209 N.J. 596 (2012).

Defendant filed his third PCR petition while the appeal from the dismissal of his second petition was pending. He alleged, among other things, ineffective assistance of PRC counsel with respect to his argument concerning admission of the video recording of the murder. The trial court denied the petition.

On appeal, defendant argued

POST-CONVICTION COUNSEL . . . FAILED TO INVESTIGATE AND PROPERLY PUT FORTH APPELLANT'S CLAIMS OF PROSECUTORIAL MISCONDUCT AND PRIOR COUNSELS' INEFFECTIVE ASSISTANCE DUE TO A FRAUDULENTLY ALTER[ED] WEDDING VIDEOTAPE

TRIAL COUNSEL[] W[AS] INEFFECTIVE FOR NOT CONSULTING OR HIRING AN EXPERT TO EXAMINE THE WEDDING VIDEOTAPE FOR EVIDENCE OF AN ALTERCATION CAPTURED ON THE AUDIO OF THE VIDEOTAPE.

We affirmed, concluding that "[t]he third petition does not raise any of the issues allowed by Rule 3:22-4(b)(2)(A)-(C)." State v. Garcia, No. A-2764-10 (App. Div. May 16, 2013) (slip op. at 7). The Supreme Court denied defendant's petition for certification. State v. Garcia, 217 N.J. 284 (2014).

Defendant thereafter filed his fourth PCR petition, requesting a new trial based on what he alleged to be newly discovered evidence concerning the video recording. In 2016, the trial court denied the fourth petition concluding that defendant's claim was meritless because the allegedly newly discovered evidence had been produced during discovery prior to his trial. In addition, the trial court found that defendant's other claims had been previously adjudicated in his prior PCR petitions.

Defendant subsequently filed a motion to compel production of the entire video recording and the portion admitted as evidence at trial. The trial court denied defendant's application, concluding that "all arguments about the video . . . had been addressed and resolved in [defendant's] prior direct appeal and orders and appeals concerning his PCR petitions." State v. Garcia, A-3575-18 (App. Div. Oct. 13, 2021) (slip op. at 2). We affirmed, concluding that production of the video recording could not support any new argument that would not be procedurally barred because it was available to defendant and his counsel before the trial and during his direct appeal and all of defendant's arguments concerning the video recording had been raised and adjudicated in his direct appeal and PCR petitions. Id. (slip op. at 5-6). The Supreme Court

denied defendant's petition for certification. State v. Garcia, 250 N.J. 352 (2022).¹

On November 9, 2021, defendant filed his fifth PCR petition, which is the subject of this appeal. In his fifth petition, defendant alleged he was entitled to a new trial because the video recording was fraudulently altered.

On December 21, 2021, the trial court issued an order denying the fifth petition because defendant raised "no cognizable basis to grant relief." In an accompanying statement of reasons, the trial court concluded that defendant's claims were barred by Rule 3:22-5 because they had been adjudicated in defendant's direct appeal or in his prior PCR petitions.

This appeal follows. Defendant raises the following arguments.

POINT I

[THE] JUDGE['S] DEC. 21, 2021 "NO
COGNIZABLE" DENIAL RELYING SOLELY ON
[ANOTHER] JUDGE['S] MARCH 28, 2017 RULING
(Da: 1033-1-36), ARBITRARILY ENTERED

¹ Separately, defendant filed requests under the Open Public Records Act, N.J.S.A. 47:1A-1 to -13, and the common law with the Bergen County Prosecutor's Office (BCPO) seeking to compel production of the unedited, original version of the video recording. The BCPO denied his requests. The Assignment Judge affirmed the denial, concluding that defendant had been in possession of the video recording for sixteen years. We affirmed. Garcia v. Bergen Cnty. Prosecutor's Off., A-3085-16, A-4501-16 (App. Div. May 17, 2019). The Supreme Court denied defendant's petition for certification. Garcia v. Bergen Cnty. Prosecutor's Off., 241 N.J. 154 (2020).

WITHOUT ANY PARTICIPATION BY ALREADY ASSIGNED COUNSEL (Jan. 25, 2019 Trans. 62:3-19; Da:257-259), I.E., FAILING TO RULE ON MERIT OF APPELLANT'S JULY 25, 2019, LAST AMENDED ON 11-05-21 PROPERTY AND TIMELY FILED INSTANT SUBSEQUENT PCR PETITION (Da: 400-401; 488-491; 594-635; 1033-1036), RAISING INEFFECTIVE ASSISTANCE BY ASSIGNED COUNSELS . . . ON MATTER LITIGATED BY NEW JERSEY PUBLIC DEFENDER UNTIL RECENT SUPREME COURT OF NEW JERSEY'S APRIL 5, 2022 DENIAL OF DOCKET NO. 086339 (Da: 1093-1096), "'IS WHOLLY UNSUPPORTED BY THE EVIDENCE.' UNITED STATES V. HOFFECKER, 530 F.3d 137, 183 (3d Cir. 2008)", DEPRIVING APPELLANT OF HIS CONSTITUTIONALLY PROTECTED RIGHT TO THE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW, GUARANTEED BY THE 6TH AND 14TH AMEND U.S. CONST. AND ART. I, PAR. 1 OF N.J. CONST, WARRANTING REVERSAL AND REMAND FOR FURTHER PROCEEDINGS TO CORRECT RESULTING FUNDAMENTAL UNFAIRNESS AND/OR MISCARRIAGE OF JUSTICE.

A. ASSIGNED COUNSEL, ASSISTANT DEPUTY PUBLIC DEFENDER['S] EGREGIOUSLY INEFFECTIVE ASSISTANCE OF COUNSEL, I.E., FAILING TO EVEN ENTER APPEARANCE ADHERING TO N.J.C.R. 3:8-3, 3:22-6A, ABANDONED APPELLANT, ALLOWING [THE] JUDGE . . . TO ENTER ORDERS DATED AUGUST 25, 2016, MARCH 3, 2017 AND MARCH 28, 2017 (DA:361-364; 388; 550-552), AND APPELLATE DIVISION'S AUG. 31, 2007, JAN. 26, 2018, APR. 6, 2018, DEC. 7, 2018 (DA:420; 459; 476; 478); AND SUPREME COURT'S JAN. 23, 2018 (DA:458) ORDERS WITHOUT ANY PARTICIPATION OF

ALREADY ASSIGNED COUNSEL (JAN. 25, 2019 TRANS. 62:3-19; DA;257). THEREBY DEPRIVING APPELLANT OF RIGHT TO COUNSEL AND DUE PROCESS OF LAW, GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENT OF U.S. CONSTITUTION.

B. ASSIGNED COUNSEL, ASSISTANT DEPUTY PUBLIC DEFENDER . . . RENDERED INEFFECTIVE ASSISTANCE TO PETITIONER, I.E., FAILING TO PERFORM REQUIRED INVESTIGATION TO ACQUIRING (SIC) THE MOST BASIC UNDERSTANDING OF THE CASE, AND FAILING TO AMEND NOTICE OF APPEAL, ERRONEOUSLY FILE[D] BY HER AS FROM FINAL ORDER, INSTEAD AS INTERLOCUTORY....

POINT II

IN THE ALTERNATIVE, BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE, THE PCR COURT ERRED IN DENYING AN EVIDENTIARY HEARING.

In his reply brief, defendant raised the following argument

CONTRARY TO RESPONDENT'S ALLEGATION (RESP.'S BR. 10-11 (NOV. 9, 2023)), INSTANT MATTER IS NOT PROCEDURALLY BARRED UNDER N.J.C.R. 3:22-5, DUE TO COURTS' FAILURE TO ASSESS "WITHIN THE CONTEXT OF EVIDENTIARY HEARING [2013 N.J. LEXIS 79 (JAN. 22, 2013)]" THE VIDEOTAPE FORENSIC EVIDENCE (APLT.'S DA: 1-16 (MAY 26, 2022)), FILED IN SUPPORT OF APPELLANT'S MAY 8, 2007 MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE,

"SUPPLEMENTING THE FIRST PCR RECORD["
PURSUANT TO N.J.C.R. 1:7-4(b). (MAY 4, 2207
(SIC) TRANS. 43:18-21; APLT.'S DA: 249-256; 799-
1032 (MAY 26, 2022)).

II.

Petitions for PCR are not vehicles to repeatedly raise claims that have previously been adjudicated. Rule 3:22-5 provides:

[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 in any appeal taken from such proceedings.

As the Supreme Court explained,

[p]reclusion of consideration of an argument presented in post-conviction relief proceedings should be effected only if the issue raised is identical or substantially equivalent to that adjudicated previously on direct appeal.


[State v. Marshall, 148 N.J. 89, 150 (1997) (quoting State v. Bontempo, 170 N.J. Super. 220, 234 (Law Div. 1979)).]

Having reviewed defendant's arguments in light of the record and applicable legal principles, we affirm the December 21, 2021 order of the trial court. Defendant's fifth PCR petition alleges the same claims regarding the video recording of the murder that he raised in his direct appeal and in his first four PCR petitions. Those claims were repeatedly determined to be meritless.

We see no legal basis which would permit defendant to raise these previously rejected claims in a fifth PCR petition.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION