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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2206-22**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HAKIM R. NELSON, a/k/a
DARNELL KNIGHT and
RAUSHAWN NELSON,

Defendant-Appellant.

Submitted May 6, 2024 – Decided June 4, 2024

Before Judges DeAlmeida and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law
Division, Middlesex County, Indictment No.
15-11-1363.

Jennifer Nicole Sellitti, Public Defender, attorney for
appellant (Steven M. Gilson, Designated Counsel, on
the brief).

Matthew J. Platkin, Attorney General, attorney for
respondent (Debra Grace Simms, Deputy Attorney
General, of counsel and on the brief).

PER CURIAM

Defendant, Hakim Nelson, appeals from a March 3, 2023, order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. Because we conclude defendant raises issues regarding ineffective assistance of counsel not raised before the PCR court, those issues are not properly before us, and we decline to consider them. We dismiss the appeal.

I.

The salient facts and procedural history were previously recounted in our decision addressing defendant's direct appeal, State v. Nelson, No. A-0684-18 (App. Div. July 23, 2020), certif. denied, 244 N.J. 350 (2020). We set forth only the facts material to our determination of defendant's PCR appeal. In 2014, defendant, an African American male, was accused of stealing the identities of Ahmad Musleh (Musleh) and Alberto Parache (Parache) to gain access to their bank accounts and steal approximately \$26,000 from the two victims. Id., slip op. at 3. By impersonating them on the phone with TD Bank, defendant gained information necessary to access their accounts.

On November 10, 2015, a grand jury indicted defendant on twelve counts, six for his criminal acts against Musleh and six for his alleged crimes against Parache. With respect to Musleh, defendant was charged with third-degree

impersonation/theft of identity, contrary to N.J.S.A. 2C:21-17(a) (count one); fourth-degree trafficking in personal identifying information, contrary to N.J.S.A. 2C:21-17.3(a) (count two); third-degree theft by deception, contrary to N.J.S.A. 2C:20-4 (counts three and four); and second and third-degree computer theft, contrary to N.J.S.A. 2C:20-25(c) (counts five and six).

With respect to Parache, defendant was charged with third-degree impersonation/theft of identity, contrary to N.J.S.A. 2C:21-17(a) (count seven); fourth-degree trafficking in personal identifying information, contrary to N.J.S.A. 2C:21-17.3(a) (count eight); third and fourth-degree theft by deception, contrary to N.J.S.A. 2C:20-4 (counts nine and ten); third-degree attempted theft by deception, contrary to N.J.S.A. 2C:5-1 and N.J.S.A. 2C:20-4 (count eleven); and second-degree computer theft, contrary to N.J.S.A. 2C:20-25(c) (count twelve).

After a five-day jury trial in June 2018, the jury convicted defendant on all counts. The court sentenced defendant, after merging counts three, four, nine, and eleven with other counts, to an aggregate term of eighteen years imprisonment with a nine-year period of parole ineligibility.

Defendant filed an appeal, contending the trial court improperly admitted impermissible lay opinion testimony, the state improperly introduced third-party

testimony that implied the existence of a non-testifying co-defendant in violation of the Confrontation Clause and the evidentiary bar against hearsay, the jury was erroneously charged, and his sentence was excessive. Nelson, slip op. at 8-16. We affirmed defendant's conviction. Id. at 16. Our Supreme Court denied certification. State v. Nelson, 244 N.J. 350 (2020). No issue was raised regarding jury selection or the composition of the jury on direct appeal.

On May 10, 2021, defendant filed a petition for post-conviction relief (PCR), and his counsel filed a supplemental brief. In his PCR petition, defendant alleged: (1) ineffective assistance of trial counsel by failing to move to bar the admission of a voice identification; (2) the trial court erred in denying his counsel's application to supplement voir dire by posing open-ended questions to the jury panel, and to ultimately strike the entire jury panel because jurors questioned later appeared to be "parroting" the responses of earlier panel members; (3) the trial court failed to rule on his counsel's application to refresh a sergeant's testimony; (4) certain jurors were asleep during portions of his trial; and (5) ulterior motive by investigators. Defendant did not raise any issue with respect to jury composition. The PCR court denied the petition without an evidentiary hearing in an order dated March 3, 2023. This appeal followed.

II.

On appeal, defendant raises the following issue for our consideration:

In support of his petition, defendant argues his trial and appellate counsel were ineffective for failing to object to the assistant prosecutor's use of preemptory challenges in contravention of the holdings in State v. Osario, 199 N.J. 486, 506 (1999), State v. Clark, 316 N.J. Super. 462 (App. Div. 1998), and Purkett v. Elem, 514 U.S. 765, 769 (1995).

Where a PCR judge does not hold an evidentiary hearing, this court's standard of review is de novo as to both the factual inferences drawn by the trial court from the record and the court's legal conclusions. State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016); see State v. Lawrence, 463 N.J. Super. 518, 522 (App. Div. 2020) (quoting State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014)). PCR is "a built-in 'safeguard that ensures a defendant was not unjustly convicted'" and is the New Jersey equivalent of a federal writ of habeas corpus. State v. Nash, 212 N.J. 518, 540 (2013) (quoting State v. McQuaid, 147 N.J. 464, 482 (1997)); State v. Pierre, 223 N.J. 560, 576 (2015) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)).

Defendant's only argument on appeal is that his trial counsel was ineffective for failing to raise the trial court's deficient analyses regarding defendant's claim that the prosecutor exercised unconstitutional preemptory

challenges to remove prospective jurors on the basis of race. Additionally, he contends his appellate counsel was ineffective for failing to raise this deficiency during defendant's direct appeal.

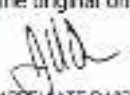
The State contends defendant's appellate claim is not properly before us because he had the opportunity to raise the issue in his PCR application and direct appeal but failed to do so. Defendant does not address this argument in his brief. We agree with the State that because defendant appeals from the trial court's order denying PCR, this appeal is limited to the issues raised before the PCR court. See State v. Benjamin, 442 N.J. Super. 258, 262 (App. Div. 2015); State v. Robinson, 200 N.J. 1, 19 (2009) ("[T]he points of divergence developed in proceedings before a trial court define the metes and bounds of appellate review.") The issues of preemptory challenges or juror composition are not properly before us. The issues were not raised to the PCR court in the instant petition for post-conviction relief. Consequently, defendant is barred from raising those issues in this appeal. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (declining to consider an appeal on "issues not properly presented to the trial court when an opportunity for such a presentation is available"); see also State v. Witt, 223 N.J. 409, 419 (2015) ("For sound jurisprudential reasons, with few exceptions, 'our appellate courts will decline

to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available.") (quoting State v. Robinson, 200 N.J. 1, 20 (2009)); R. 3:22-4.

Moreover, Rule 3:22-4 generally precludes review of claims raised for the first time in PCR petitions that could have been raised on direct appeal. McQuaid, 147 N.J. at 483; State v. Mitchell, 126 N.J. 565, 583–84 (1992). Defendant's arguments could have reasonably been raised in a prior proceeding. The alleged error occurred during voir dire of the jury, and there was nothing to prevent defendant from bringing this claim on direct appeal. Defendant failed to demonstrate that enforcement of the procedural bar would result in a fundamental injustice warranting relief within the understanding of Rule 3:22–4(a)(2) or how a denial of relief would be contrary to the State or Federal constitutions pursuant to Rule 3:22–4(3). Additionally, defendant does not contend he ever discussed this issue with appellate counsel who refused to include the issue in defendant's direct appeal.

Dismissed.

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



CLERK OF THE APPELLATE DIVISION