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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2877-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANTHONY DUDLEY,

Defendant-Appellant.

Submitted May 6, 2024 – Decided June 10, 2024

Before Judges DeAlmeida and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 00-04-0650.

Jennifer Nicole Sellitti, Public Defender, attorney for appellant (Adam W. Toraya, Designated Counsel, on the brief).

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Colleen Kristan Signorelli, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Anthony Dudley appeals from the September 28, 2021 order of the Law Division dismissing his second petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

I.

On September 6, 1999, defendant participated in an armed robbery of a church bingo hall by threatening to kill an elderly man. A little more than a month later, on October 9, 1999, defendant committed an armed robbery of a restaurant by putting a loaded automatic weapon to the store manager's head and fleeing with approximately \$2,000.

On April 6, 2000, a grand jury returned two indictments against defendant. The first related to the bingo hall armed robbery and the second to the restaurant armed robbery.

The bingo hall armed robbery charges were tried first. A jury convicted defendant of first-degree armed robbery, N.J.S.A. 2C:15-1; second-degree conspiracy to commit armed robbery, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:15-1; second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); and third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b).

On January 4, 2002, the trial court sentenced defendant for the bingo hall armed robbery convictions. Upon the State's application, the court imposed a

discretionary extended term based on defendant's status as a persistent offender pursuant to N.J.S.A. 2C:44-3(a). For first-degree armed robbery, the court sentenced defendant to a discretionary extended term of fifty years of imprisonment. Pursuant to the Graves Act, N.J.S.A. 2C:43-6, the court imposed a twenty-two-year period of parole ineligibility. After sentencing on the other counts, the term of imprisonment on the armed robbery conviction became the controlling term.

The charges arising from the restaurant armed robbery were tried in 2003. A jury convicted defendant on all counts: first-degree armed robbery, N.J.S.A. 2C:15-1; second-degree armed burglary, N.J.S.A. 2C:18-2; second-degree conspiracy to commit armed robbery, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:15-1; second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); and third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b).

The State applied for a mandatory extended term under N.J.S.A. 2C:44-3(d), a provision of the Graves Act, and a discretionary term as a persistent offender under N.J.S.A. 2C:44-3(a). The court determined defendant was subject to both a mandatory extended term under the Graves Act and a discretionary extended term as a persistent offender.

Under N.J.S.A. 2C:44-3(d), the court imposed a mandatory extended term of fifty years of imprisonment, with a parole ineligibility period of twenty-three years, on the armed robbery conviction. After sentencing on the other counts, the term of imprisonment on the armed robbery conviction became the controlling term. The court ordered the sentences on the restaurant armed robbery convictions to run consecutively to the sentences on the bingo hall armed robbery convictions, resulting in an aggregate sentence of 100 years with a forty-five-year period of parole ineligibility. An August 6, 2003 judgment of conviction memorializes defendant's convictions and sentence.

We affirmed defendant's convictions and sentence for the restaurant armed robbery. State v. Dudley, No. A-1020-03 (App. Div. Feb. 5, 2007). The Supreme Court denied certification. State v. Dudley, 196 N.J. 598 (2008).

On January 9, 2009, defendant filed his first PCR petition with respect to the restaurant armed robbery convictions. Among the claims defendant alleged was that his trial counsel was ineffective. The trial court denied defendant's first petition on June 30, 2010. We affirmed. State v. Dudley, No. A-2415-10 (App. Div. Apr. 23, 2012). The Supreme Court denied certification. State v. Dudley, 212 N.J. 431 (2012).

On October 27, 2017, defendant moved in the Law Division pursuant to Rule 3:21-10(b)(5) to correct an illegal sentence with respect to the restaurant armed robbery. We affirmed the trial court's denial of the motion. State v. Dudley, No. A-5991-17 (App. Div. July 7, 2020). The Supreme Court denied certification. State v. Dudley, 244 N.J. 282 (2020).

On September 23, 2021, defendant filed his second PCR petition. He alleged: (1) his trial counsel provided ineffective assistance at sentencing by not zealously challenging the excessiveness of his aggregate 100-year sentence; and (2) he is entitled to resentencing pursuant to the holding in State v. Torres, 246 N.J. 246, 273 (2021). Defendant argued that his petition was not untimely because it was filed within one year of the issuance of the opinion in Torres. He requested appointment of counsel.

On September 28, 2021, the trial court entered an order denying appointment of counsel and dismissing the petition because the claims alleged are procedurally barred. The order was not accompanied by a written or oral statement of reasons and conclusions of law.

This appeal followed. Defendant raises the following arguments.

POINT ONE

THE POST-CONVICTION RELIEF COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR

POST-CONVICTION RELIEF WITHOUT PROVIDING ANY LEGAL OR FACTUAL ANALYSIS OF ANY OF THE ISSUES HE RAISED.

A. THE PREVAILING LEGAL PRINCIPLES REGARDING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, EVIDENTIARY HEARINGS, AND PETITIONS FOR POST-CONVICTION RELIEF.

B. DEFENDANT MADE A SHOWING OF GOOD CAUSE, PURSUANT TO R. 3:22-6(b) THAT HIS 100 YEAR SENTENCE VIOLATES THE PROVISIONS IN STATE V. TORRES, 246 N.J. 246 (2021).

POINT TWO

THE COURT MISAPPLIED ITS DISCRETION IN APPLYING R. 3:22-4, R. 3:22-5 AND R. 3:22-12, AS A PROCEDURAL BAR AGAINST THE DEFENDANT'S FILING FOR POST-CONVICTION RELIEF.

II.

We review de novo the trial court's legal conclusion that defendant's second PCR petition is barred by R. 3:22-4 and R. 3:22-12(a)(2). State v. Harris, 181 N.J. 391, 419 (2004). While we agree that the trial court failed to provide meaningful findings of fact and conclusions of law, R. 1:7-4(a), our review of the record readily reveals that defendant's second petition is procedurally barred.

Rule 3:22-4(b) provides, in relevant part:

A second or subsequent petition for post-conviction relief shall be dismissed unless:

(1) it is timely under R. 3:22-12(a)(2); and

(2) it alleges on its face either:

(A) that the petition relies on a new rule of constitutional law, made retroactive to defendant's petition by the United States Supreme Court or the Supreme Court of New Jersey, that was unavailable during the pendency of any prior proceedings; or

(B) that the factual predicate for the relief sought could not have been discovered earlier through the exercise of reasonable diligence, and the facts underlying the ground for relief, if proven and viewed in light of the evidence as a whole, would raise a reasonable probability that the relief sought would be granted; or

(C) that the petition alleges a prima facie case of ineffective assistance of counsel that represented the defendant on the first or subsequent application for post-conviction relief.

Rule 3:22-12(a)(2) provides that "no second or subsequent petition shall be filed more than one year after the latest of" the following:

(A) the date on which the constitutional right asserted was initially recognized by the United States Supreme Court or the Supreme Court of New Jersey, if that right has been newly recognized by either of those Courts and made retroactive by either of those Courts to cases on collateral review; or

(B) the date on which the factual predicate for the relief sought was discovered, if that factual predicate could not have been discovered earlier through the exercise of reasonable diligence; or

(C) the date of the denial of the first or subsequent application for post-conviction relief where ineffective assistance of counsel that represented the defendant on the first or subsequent application for post-conviction relief is being alleged.

"These time limitations shall not be relaxed, except as provided herein." R.
3:22-12(b).

Defendant does not allege he is entitled to relief based on a newly discovered factual predicate. Thus, subsection (B) of the rule does not apply. Nor does defendant allege ineffective assistance of counsel with respect to his first petition. Subsection (C) of the rule, therefore, also does not apply.

Instead, defendant argues he is entitled to relief based on a newly recognized constitutional right established in Torres and made retroactive to him. He argues his second petition was timely under subsection (A) of the rule because it was filed within a year of the day on which Torres was issued. A close examination of the holding in Torres, however, reveals defendant's second petition is procedurally barred.

In Torres, issued almost twenty years after defendant was sentenced for his restaurant armed robbery convictions, the Court did not announce a new rule.

It instead renewed and reemphasized the long-established requirement that a sentencing court provide "an explanation of the overall fairness of [a] consecutive sentence" 246 N.J. at 270. The Court explained its intention "to underscore" and "promote" the "concepts of uniformity, predictability, and proportionality" that underlie the sentencing factors it set forth in State v. Yarbough, 100 N.J. 627, 630 (1985). Id. at 252-53. As the Court stated,

[w]e reiterate the repeated instruction that a sentencing court's decision whether to impose consecutive sentences should retain focus on "the fairness of the overall sentence." [State v. Miller, 108 N.J. [112,] 122 [(1987)]; see also State v. Abdullah, 184 N.J. 497, 515 (2005). Toward that end, the sentencing court's explanation of its evaluation of the fairness of the overall sentence is "a necessary feature in any Yarbough analysis." [State v. Cuff, 239 N.J. [321,] 352 [(2019)].

[Id. at 270.]

Because the Court did not create a new rule of law, retroactivity is not applicable. State v. Feal, 194 N.J. 293, 307 (2008); State v. Burstein, 85 N.J. 394, 403 (1981) (stating "retroactivity can arise only where there has been a departure from existing law."). Thus, defendant's second petition, to the extent that it relies on the holding in Torres, does not fall under Subsection (A) of the rule. It is, as the trial court concluded, procedurally barred.

Defendant's claim that his trial counsel was ineffective at sentencing is also procedurally barred. That claim is tethered to the holding in Torres, which, he argues, revealed that his attorney should have argued more vigorously against his aggregate sentence. Yet, as explained above, Torres does not create a new rule. If defendant believed his trial counsel was ineffective at sentencing, he had the opportunity to raise that claim in his first petition.

As a general rule, the court may not relax the time limit for filing a second PCR petition. State v. Jackson, 454 N.J. Super. 284, 292-94 (App. Div. 2018). Defendant's claim of fundamental injustice, therefore, does not provide refuge from the denial of his second petition. Unlike Rule 3:22-12(a)(1)(A), which applies to the filing deadline for a first PCR petition, Rule 3:22-12(a)(2) does not allow relief from a mandatory time bar based on fundamental injustice. See Id. at 293-94.

Finally, because defendant's second petition does not raise "a substantial issue of fact or law[.]" R. 3:22-6(b), the trial court properly denied his application for appointment of counsel.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION