

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

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-0688-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KEITH M. KENION,

Defendant-Appellant.

Submitted March 24, 2022 – Decided May 26, 2022

Before Judges Mitterhoff and Alvarez.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 04-02-0178.

Robert Carter Pierce and Jeff Thakker, attorneys for appellant (Jeff Thakker, of counsel; Robert C. Pierce on the brief).

Jennifer Webb-McRae, Cumberland County Prosecutor, attorney for respondent (Kaila L. Diodati, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

In State v. Jackson, we considered Rule 3:22-12(a)(2)(C)'s prohibition against filing a petition for post-conviction relief (PCR) more than one year after "the date of the denial of the first or subsequent application for [PCR] where ineffective assistance of counsel that represented the defendant on the first or subsequent application for [PCR] is being alleged." 454 N.J. Super. 284, 291-97 (App. Div.), certif. denied, 236 N.J. 35 (2018). Applying the rule and the reasoning of the case to this appeal, we affirm a summary order that dismissed defendant's second PCR petition as untimely.

In State v. Kenion, No. A-1883-14 (App. Div. Nov. 27, 2017), we affirmed the September 22, 2014 denial of defendant's first PCR petition in which he alleged ineffective assistance of his trial and appellate counsel. On the appeal, he alleged ineffective assistance of PCR counsel.

On January 10, 2018, three years and four months after the decision, defendant filed a second petition—again alleging ineffective assistance—this time of PCR and appellate PCR counsel, whom he alleged ignored the grounds for relief he wanted argued. Unquestionably, Rule 3:22-6(d) requires assigned counsel to advance even arguments counsel deems to be lacking in merit by listing the claims in the PCR petition, or if a defendant filed the petition pro se,

by "incorporat[ing] them by reference." See State v. Rue, 175 N.J. 1 (2002). In State v. Webster, 187 N.J. 254 (2006), the Court only strengthened that mandate.

Defendant's second PCR petition, and this appeal, attempt to bypass the time bar found in Rule 3:22-12(a)(2)(C) by contending appellate PCR counsel was so ineffective that this should be considered a first PCR petition, not a second. But doing so would render the rule meaningless, and constructing a rule or statute so as to make it meaningless is contrary to settled law. See State v. Marolda, ___ N.J. Super. ___, ___ (App. Div. 2022) (slip op. at 19-20) (refusing to adopt construction that would render a Rule essentially superfluous); cf. MasTec Renewables Constr. Co. v. SunLight Gen. Mercer Solar, LLC, 462 N.J. Super. 297, 318 (App. Div. 2020) ("A court must make every effort to avoid rendering any part of a statute inoperative, superfluous or meaningless.").

Defendant clearly had ample opportunity to raise concerns about both PCR counsel and appellate PCR counsel in a more timely pro se filing of the second petition. Thus, we see no unfairness in the application of the time bar. See Jackson, 454 N.J. Super. at 291-97.

We do have a concern, however, with the manner in which the November 23, 2020 order entered in this case. The judge who decided it gave no reasons. The order merely states:

The petition for post[-]conviction relief is procedurally barred, the relief is out of time and does not present any claims that can be considered past the filing deadline for post-conviction relief. Therefore, for these reasons the motion is DENIED.^[1]

A self-represented litigant might unwittingly include claims of newly discovered evidence or an illegal sentence in a second PCR petition. Those claims are cognizable and unaffected by the Rule 3:22-12(a)(2)(C) time bar. See R. 3:22-4(b); R. 22-12(a)(2). Therefore, it is essential the judge review the petition, if only to ensure such grounds for relief are not included in the second PC petition, and place the reasons for denial or dismissal on the record. It would be unfair and a mistake of law to dismiss an untimely PCR petition out-of-hand where it included such claims, as they are always timely.

In addition, appellate review is meaningful only if the judge places his or her analysis on the record in open court and refers to it in the form of order denying or dismissing the PCR. See R. 1:7-4(a) ("The court shall, by an opinion or memorandum decision, either written or oral, state the facts and . . . its conclusions of law . . . on every motion decided by a written order that is appealable as of right.").

¹ The reason an earlier virtually identical order was filed on August 14, 2020 is unclear. It too denied the petition as out of time.

We cannot discern whether the Law Division judge reviewed this second PCR petition on the merits. We have chosen to affirm the decision without remanding for the judge to state findings of fact and conclusions of law because we were able to decide the appeal, and the effect of the time bar, based on review of the available information, including our own unpublished opinions and the transcripts provided by counsel of hearings that took place before this petition was filed. Nonetheless, the outcome of an untimely second PCR petition is not predetermined in every instance, and it would be an unwarranted risk—if not an unfair practice—to deny or dismiss every one without explanation.

Furthermore, unexplained decisions might necessitate the exercise of original jurisdiction² or remands on all appeals from denials or dismissals of untimely PCR petitions. Therefore, the better practice may be for the trial court to state findings of fact and conclusions of law when denying or dismissing a second or later PCR petition for untimeliness. A trial court's express review need not involve assignment of counsel and further proceedings where the outcome seems patently clear. Even abbreviated findings of fact and

² See R. 2:10-5 ("The appellate court may exercise such original jurisdiction as is necessary to the complete determination of any matter on review."); N.J. Election L. Enf't Comm'n v. DiVincenzo, 451 N.J. Super. 554, 570 (App. Div. 2017) (noting original jurisdiction appropriate when public interest favors expeditious dispute resolution).

conclusions of law can, however, ensure fairness and procedural due process to self-represented petitioners, and enable meaningful appellate review when applying a time bar.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION