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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-0521-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TULIO R. MENA,

Defendant-Appellant.

Submitted December 20, 2016 — Decided June 8, 2017

Before Judges Koblitz and Sumners.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Indictment No.
96-05-0724.

Joseph E. Krakora, Public Defender, attorney
for appellant (Karen A. Lodeserto, Designated
Counsel, on the brief).

Gurbir S. Grewal, Bergen County Prosecutor,
attorney for respondent (Annmarie Cozzi,
Senior Assistant Prosecutor, of counsel and
on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Tulio R. Mena appeals from a July 6, 2015 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. Defendant, through counsel, raises the following issue on appeal:

POINT I

DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING BECAUSE HIS TRIAL ATTORNEY WAS INEFFECTIVE IN ENGAGING IN UNETHICAL CONDUCT BEFORE THE JURY, CAUSING THE COURT TO ADMONISH HIM IN THEIR PRESENCE.

In his pro se supplemental brief, defendant raises the following issue:

POINT I

THIS MATTER SHOULD BE REMANDED TO ALLOW THE DEFENDANT TO HAVE HIS PRO-SE ISSUES RAISED CONCERNING THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL THAT DEFENDANT REQUESTED TO BE RAISED ON HIS BEHALF BY PCR COUNSEL.

For the reasons that follow, we affirm.

In May 1996, defendant was indicted on three counts of first-degree armed robbery, N.J.S.A. 2C:15-1, and three counts of fourth-degree possession of an imitation firearm weapon for an unlawful purpose, N.J.S.A. 2C:39-4(e), as a result of gas station robberies that occurred in 1995. However, he became a fugitive after failing to appear for his 1997 trial. Defendant was eventually arrested in 2008, and was later convicted by a jury in 2009 for two robberies while armed with an imitation handgun. After remand, he was

sentenced to an aggregate prison term of fifteen years with a parole disqualifier of seven and one-half years.

On direct appeal, we affirmed defendant's convictions, but reversed and remanded for resentencing. State v. Mena, No. A-6270-08 (App. Div. June 30, 2011) (slip op. at 5).¹ We detailed the facts underlying defendant's convictions in that opinion, and need not repeat them here. Id. at 2-3. Defendant argues, as he did on direct appeal, that he was prejudiced by the trial judge's critical remarks to defense counsel.

First, outside of the jury's presence, defense counsel requested a Spanish interpreter for defendant because he had always spoken to him in Spanish. In denying the request, the trial judge noted that all prior proceedings had been in English without an interpreter, and threatened to sanction counsel because he suspected the request was a "fraud upon the court." We did not consider this harmful because the exchange occurred outside the presence of the jury. State v. Mena, supra, slip op. at 9 n.2.

¹ Although citing an unpublished opinion is generally forbidden, we do so here to provide a full understanding of the issues presented and pursuant to the exception in Rule 1:36-3 that permits citation "to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law." Badiali v. N.J. Mfrs. Ins. Grp., 429 N.J. Super. 121, 126 n.4 (App. Div. 2012), aff'd, 220 N.J. 544 (2015).

Second, defense counsel stated in his opening remarks that defendant's purported statement to police was not defendant's statement. Id. at 5. The trial judge expressed dismay with the comment, asserting that it was improper for an opening statement, but refused to allow counsel to explain himself. Ibid. The judge further warned that he might sanction counsel if he had to instruct him again. Ibid. We determined that the judge's comments in the jury's presence were inappropriate. Id. at 8. We concluded, however, that the comments did not deprive defendant of a fair trial given the judge's final jury instructions commending defense counsel and the prosecutor for their professional manner and their courtesy to the court and jury, as well as advising that any rulings he made should not be viewed as favoring a particular side. Id. at 8-10.

Defendant filed a timely PCR petition, arguing that trial counsel's ineffectiveness deprived him of a fair trial when the judge criticized counsel for the unwarranted request for a Spanish interpreter and the opening remarks concerning defendant's purported statement. He also contended that appellate counsel was ineffective for not raising unspecified arguments on direct appeal.

Judge Edward A. Jerejian denied PCR relief. In his oral decision, the judge found that defendant failed to meet the

requirements of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), to establish a prima facie case of ineffective assistance of counsel. Judge Jerejian reasoned that on defendant's direct appeal, this court decided that the trial judge's response to counsel's request for an interpreter was outside the presence of the jury and therefore did not prejudice defendant. Likewise, he noted that the trial judge's threat to sanction trial counsel was considered harmless on appeal when we concluded that the comment did not deprive defendant of a fair trial. Furthermore, Judge Jerejian stated that defendant received a fair trial, and found that, even if trial counsel was incompetent, there was no prejudice to defendant because of the overwhelming evidence of his guilt.

In this appeal, defendant contends that he is entitled to an evidentiary hearing because he was denied a fair trial due to the trial judge's admonishment of trial counsel in the presence of the jury. Specifically, defendant argues that the judge's comments could have intimidated counsel and reduced counsel's ability to effectively represent him for fear that counsel may upset the judge and be sanctioned. Defendant further contends that the judge's threats may have turned the jury against him, causing his conviction. Defendant asserts that an evidentiary hearing is

necessary to have trial counsel testify regarding the effects the judge's comments had on counsel's representation of defendant.

Our examination of defendant's claims and review of the record convinces us that defendant was not denied effective assistance of counsel and there is no need for an evidentiary hearing. We affirm substantially for the reasons set forth in Judge Jerejian's well-reasoned bench decision. We add only the following brief comments.

"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 prior to the adoption thereof, or in any appeal taken from such proceedings." R. 3:22-5. Post-conviction relief proceedings are not an opportunity to re-litigate claims already decided on the merits in prior proceedings. State v. McQuaid, 147 N.J. 464, 483 (1997); R. 3:22-5. If an issue has been determined on the merits in a prior appeal, it cannot be re-litigated in a later appeal of the same case, even if the matter is of constitutional dimension. McQuaid, supra, 147 N.J. at 483-84; State v. White, 260 N.J. Super. 531, 538 (App. Div. 1992), certif. denied, 133 N.J. 436 (1993). Thus, we conclude that defendant's claims that he was prejudiced by the trial judge's comments to his

counsel are procedurally barred by Rule 3:22-5 as they were previously litigated.


Lastly, we address defendant's pro se arguments that PCR counsel was ineffective for failing to raise claims that he requested. Specifically, defendant claims that PCR counsel did not argue that trial counsel failed to: properly assist defendant during pre-trial plea negotiations, explain defendant's exposure to consecutive sentences, object to jury instructions that did not set forth the requisite elements for robbery using an imitation gun, and object to the judge's consideration of the use of an imitation gun as an aggravating factor at sentencing.

A defendant's constitutional right to effective assistance of counsel extends to a PCR petition when raising ineffective assistance of counsel claims for the first time. State v. Loftin, 191 N.J. 172, 198-99 (2007); State v. Quixal, 431 N.J. Super. 502, 513 (App. Div. 2013). Normally, we are inclined not to determine ineffective assistance of PCR counsel on an appeal from a denial of an initial PCR petition for the same reason as on direct appeal, because both circumstances involve "allegations and evidence that lie outside the trial record." State v. Preciose, 129 N.J. 451, 460 (1992)(citations omitted). We see no such obstacle in this case, given the lack of substance to defendant's claim.

In light of the record and applicable legal principles, we conclude that defendant's pro se arguments are without sufficient merit to warrant a discussion in a written opinion. R. 2:11-3(e)(2). Defendant's bald assertions did not establish a prima facie case of ineffective assistance of counsel, and did not warrant an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999). Additionally, as the PCR judge determined, there was ample evidence of defendant's guilt.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION