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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-2421-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BENJAMIN LEVINE,

Defendant-Appellant.

Argued October 26, 2017 – Decided November 15, 2017

Before Judges Simonelli and Haas.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Indictment No.
07-05-0864.

Benjamin Levine, appellant, argued the cause
pro se.

David M. Liston, Assistant Prosecutor, argued
the cause for respondent (Andrew C. Carey,
Middlesex County Prosecutor, attorney; Mr.
Liston, of counsel and on the brief).

PER CURIAM

Defendant appeals from an October 8, 2015 order denying his
petition for post-conviction relief (PCR) without an evidentiary
hearing. We affirm.

Following a trial, a jury convicted defendant of third-degree unlicensed practice of medicine, N.J.S.A. 2C:21-20 (count one); second-degree theft by deception, N.J.S.A. 2C:20-4 (count two); two counts of fourth-degree falsification of records, N.J.S.A. 2C:21-4(a) (counts six and eight), and third-degree insurance fraud, N.J.S.A. 2C:21-4.6 (count seven). After appropriate mergers, the judge sentenced defendant to an aggregate eight-year term and ordered him to pay restitution. On direct appeal, we affirmed defendant's conviction, but remanded to permit the entry of an amended judgment of conviction to correct the restitution amount. State v. Levine, No. A-4065-09 (App. Div. July 23, 2012) (slip op. at 2, 38), certif. denied, 213 N.J. 387 (2013).

Defendant thereafter filed a timely petition for PCR. For the most part, defendant attempted to relitigate the same issues he had unsuccessfully raised in his direct appeal. He also made other assertions that could have been raised on direct appeal. Finally, defendant asserted that his trial counsel had been ineffective because the attorney failed to argue that the criminal charges involved in this case should have been handled by the State Board of Medical Examiners rather than a court.

Following oral argument, the judge denied defendant's petition. In his oral decision, the judge found that the bulk of defendant's contentions were barred by either Rule 3:22-5 or Rule

3:22-4,¹ because defendant had either raised them on direct appeal or should have raised them in that proceeding. The judge also rejected defendant's claim that his attorney provided ineffective assistance because he did not assert that the State Board of Medical Examiners had jurisdiction over the criminal charges contained in the indictment.² The judge concluded that in the face of the overwhelming evidence of defendant's guilt presented at trial, "defendant received a more than adequate defense; he received a very good defense." This appeal followed.

On appeal, defendant raises the following contentions:

POINT I

INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE DEFENSE COUNSELORS IS OBJECTIVELY BASED ON A PRIMA FACIE CASE WHERE THE COUNSELORS DID NOT DO ANY INVESTIGATION TO DETERMINE THE STATUS OF DEFENDANT'S LICENSE AND FAILED TO INTERVIEW THE WITNESSES SO THAT ALL NOTES DOCUMENTS AND FILES WOULD BE BROUGHT TO COURT TO PROVIDE THE TRUE FACTS RELATED TO STATE MEDICAL BOARD LICENSING STATUTES IN RELATION TO THE CRIMINAL LAW. (Not Raised Below).

¹ Rule 3:22-5 provides that "[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 appeal taken from such proceedings." Rule 3:22-4 states that subject to exceptions not applicable here, "[a]ny ground for relief not raised . . . in any appeal taken [from a conviction] is barred from assertion in" a first petition for PCR.

² On direct appeal, we rejected defendant's assertion that the State Board of Medical Examiners had exclusive jurisdiction over the charges against him. Levine, supra, (slip op. at 2, 5, 16).

POINT II

THE LOWER PCR AND TRIAL COURTS MADE MULTIPLE ERRORS INCLUDING FAILURE TO ARRAIGN ON #07-05-00864 THAT MUST ALLOW AQUITTAL. (Not Raised Below).

POINT III

THE LOWER PCR COURT SHOULD HAVE KNOWN THAT GILLET DID NOT HAVE THE AUTHORITY OR THE JURISIDICION TO PROSECUTE THIS CASE, SO GILLET ENGAGED IN "BAD FAITH" AND LIES TO PREVENT THE JURY AND COURT FROM KNOWING. (Raised Below Point VIII, Reply Point V) (But Without New Case).

POINT IV

NO COURT OR PROSECUTOR CAN ADD VERBIAGE TO A CRIMINAL STATUTE TO CHANGE THE INTENT OF THE LEGISLATURE UNLESS THERE IS AMBIGUITY AND NO AMBIGUITY EXISTED IN THE STATUTE; BUT, JUDGE PULLEN CAUSED AMBIGUITY FOR THE JURY BY REFUSING TO DEFINE THE ELEMENT OF POSSESSION OF A LICENSE AND FAILING TO CHARGE THE JURY WITH THE ADMINISTRATIVE LICENSING STATUTES IN A PHYSICIAN LICENSING CASE, AS DEFENDANT POSSESSED A LICENSE. (Not Raised Below).

POINT V

THE TRIAL COURT VIOLATED ITS SCHEDULING DISCRETION BY DENYING REPRESENTATION OF DEFENDANT'S ATTORNEY. (Raised Below Point I).

When petitioning for PCR, the defendant must establish by a preponderance of the credible evidence that he or she is entitled to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013); State v. Preciose, 129 N.J. 451, 459 (1992). To sustain that burden, the defendant must allege and articulate specific facts

that "provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing, and the defendant "must do more than make bald assertions that he was denied the effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999). Rather, trial courts should grant evidentiary hearings and make a determination on the merits only if the defendant has presented a prima facie claim of ineffective assistance. Preciose, supra, 129 N.J. at 462.

To establish a prima facie claim of ineffective assistance of counsel, the defendant is obliged to show not only the particular manner in which counsel's performance was deficient, but also that the deficiency prejudiced his right to a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); State v. Fritz, 105 N.J. 42, 58 (1987). There is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, supra, 466 U.S. at 690, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695.

We have considered defendant's contentions in light of the record and applicable legal principles and conclude that they are

without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We add the following brief comments.

As defendant notes in the point headings to his brief, he did not raise Points I, II, or IV before the trial court. "We generally 'decline to consider questions or issues not properly raised to the trial court . . . unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" State v. Marrocellli, 448 N.J. Super. 349, 373 (App. Div. 2017) (quoting State v. Robinson, 200 N.J. 1, 20 (2009)). Neither of those exceptions applies to this case and, therefore, we will not consider defendant's newly-minted contentions here.


We also reject the arguments defendant raises in Points III and V because, as the trial judge found, they are barred by Rule 3:22-5. In Point III, defendant once again contends that this matter should have been referred to the State Board of Medical Examiners, which was the same argument he presented in Points I and VIII of the brief defendant's attorney submitted in defendant's direct appeal. Levine, supra, (slip op. at 2, 5). Similarly, defendant's assertion in Point V that the trial court did not permit an attorney defendant wanted to retain to represent him at trial mirrors the argument defendant unsuccessfully raised in Point I of the pro se supplemental brief he filed in his direct

appeal and in Point X of his supplemental reply brief in that matter. Id. at 4, 7.

As our Supreme Court made clear in Preciose, "[p]ost-conviction relief is neither a substitute for direct appeal, . . . nor an opportunity to relitigate cases already decided on the merits[.]" Preciose, supra, 129 N.J. at 459 (citations omitted). Because defendant unsuccessfully raised the exact same arguments on direct appeal that he attempted to present to the PCR court, the trial judge properly rejected these contentions under R. 3:22-5.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION