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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-3082-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARTY ALSTON,

Defendant-Appellant.

Submitted November 9, 2016 – Decided March 10, 2017

Before Judges Messano and Guadagno.

On appeal from the Superior Court of New
Jersey, Law Division, Mercer County,
Indictment No. 06-02-0263.

Joseph E. Krakora, Public Defender, attorney
for appellant (Janet A. Allegro, Designated
Counsel, on the briefs).

Angelo J. Onofri, Acting Mercer County
Prosecutor, attorney for respondent (Laura
Sunyak, Special Deputy Attorney
General/Acting Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

Defendant Marty Alston appeals from a Law Division order
denying his petition for post-conviction relief (PCR) without an

evidentiary hearing. Defendant claims his trial and appellate counsel were ineffective.

Tried to a jury, defendant was convicted of first-degree robbery, N.J.S.A. 2C:15-1; third-degree theft, N.J.S.A. 2C:20-3(a); first-degree kidnapping, N.J.S.A. 2C:13-1(b); third-degree criminal restraint, N.J.S.A. 2C:13-2(a); 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 February 1, 2008, defendant received an aggregate seventeen-year sentence, subject to the provisions of the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

Defendant appealed and challenged the admission of 911 emergency calls; the trial court's failure to remove a juror during trial; the prosecutor's comments during cross-examination and summation; the trial court's denial of defendant's motion to suppress; and defendant's sentence. We affirmed, State v. Alston, No. A-4671-07 (App. Div. July 21, 2010), and the Supreme Court denied defendant's petition for certification, 205 N.J. 77 (2011).

In April 2012, defendant filed a pro se PCR petition. After counsel was assigned, a brief was filed in support of the petition. Defendant filed a pro se supplemental letter brief in May 2013. After defendant's assigned counsel was relieved due

to a conflict of interest, substitute PCR counsel submitted a letter brief.

On September 19, 2014, Judge Pedro J. Jimenez, Jr., heard oral argument. On September 25, 2014, Judge Jimenez entered an order denying the petition accompanied by a written decision.

On appeal, defendant raises the following points:

POINT I

THE COURT ERRED IN DENYING DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE EFFECTIVE LEGAL REPRESENTATION.

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

POINT II

DEFENDANT'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS AND A FAIR TRIAL WAS DENIED WHEN THE COURT CONDUCTED AN IN CAMERA PROCEEDING TO ADDRESS POSSIBLE JUROR BIAS INITIATED BY A NOTE FROM A JUROR.

A. THE TRIAL COURT DENIED DEFENDANT A FAIR TRIAL BY FAILING TO PRESERVE JUROR ONE'S NOTE AND INVOLVE DEFENDANT IN THE IN CAMERA PROCEEDING.

B. TRIAL COUNSEL'S FAILURE TO INFORM DEFENDANT OF JUROR ONE'S NOTE, THE IN CAMERA PROCEEDING AND TO OBJECT TO THE PRESENCE OF SUCH A CLEARLY

BIASED JUROR RESULTED IN
INEFFECTIVE ASSISTANCE OF COUNSEL.

C. INEFFECTIVE ASSISTANCE OF
APPELLATE COUNSEL.

POINT III

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO
PERFORM NECESSARY LEGAL STEPS BOTH BEFORE AND
DURING THE TRIAL, AND THEREFORE, DENIED
DEFENDANT OF HIS RIGHT TO A FAIR TRIAL.

A. TRIAL COUNSEL WAS INEFFECTIVE FOR
FAILING TO MOVE TO PRESERVE THE
AUDIOTAPES OF THE 911 CALLS AND TO
INVESTIGATE THE CALLERS.

B. TRIAL COUNSEL WAS INEFFECTIVE FOR
FAILING TO PROPERLY ADDRESS THE LOSS
OF CERTAIN STATE EVIDENCE.

C. TRIAL COUNSEL FAILED TO PROPERLY
ADDRESS INNOCUOUS ITEMS FOUND IN THE
VAN THAT WERE PORTRAYED AS WEAPONS
BY THE STATE.

D. TRIAL COUNSEL FAILED TO
INVESTIGATE AND CALL RELEVANT
WITNESSES TO SUPPORT THE DEFENSE
RESULTING IN INEFFECTIVE ASSISTANCE
OF COUNSEL.

E. TRIAL COUNSEL WAS INEFFECTIVE FOR
FAILING TO MOVE FOR SEVERANCE.

F. TRIAL COUNSEL FAILED TO PROVIDE
DISCOVERY TO DEFENDANT.

We find no merit to these arguments and affirm on the basis
of Judge Jimenez's thorough and thoughtful decision. We add
only the following brief comments.

We agree with Judge Jimenez that defendant challenged the admission of computer-aided dispatch summaries of the 911 calls on his direct appeal and is now barred from attempting to relitigate that issue by Rule 3:22-5, which states:

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.

Similarly, the issues surrounding jurors number one, two, and twelve were thoroughly reviewed and we concluded the incidents involving the three jurors, "either singly or in combination, provide no basis to reverse defendant's convictions." State v. Alston, supra, slip op. at 21.

We are satisfied that Judge Jimenez correctly determined that defendant failed to present a prima facie claim of ineffective assistance and was not entitled to an evidentiary hearing.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION