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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3126-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSEPH MAGGIO,

Defendant-Appellant.

Submitted June 1, 2017 — Decided November 28, 2017

Before Judges Fuentes and Gooden Brown.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Indictment No.
83-03-0450.

Joseph E. Krakora, Public Defender, attorney
for appellant (Steven M. Gilson, Designated
Counsel, on the brief).

Andrew C. Carey, Middlesex County Prosecutor,
attorney for respondent (Joie Piderit,
Assistant Prosecutor, of counsel and on the
brief).

The opinion of the court was delivered by

FUENTES, P.J.A.D.

Defendant Joseph Maggio appeals from the order of the Criminal Part denying his post-conviction relief (PCR) petition. We affirm.

On March 16, 1983, a Middlesex County Grand Jury returned Indictment No. 83-03-0450, charging defendant with first degree armed robbery, N.J.S.A. 2C:15-1, second degree burglary, N.J.S.A. 2C:18-2, third degree theft, N.J.S.A. 2C:20-3a, second degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4a, third degree unlawful possession of a handgun, N.J.S.A. 2C:39-5b,¹ and third degree terroristic threats, N.J.S.A. 2C:12-3b.

Defendant was arrested in 1983 in the State of New York on unrelated charges of first and second degree attempted murder. Defendant was tried and convicted of first and second degree attempted murder in New York and was sentenced to consecutive terms on these charges of twenty-five years to life and twelve-and-one-half years to twenty-five years. In November 1983, defendant signed a consent agreement pursuant to the Interstate Agreement on Detainers (IAD), N.J.S.A. 2A:159A-1 to -15, to allow his transportation from New York to New Jersey to stand trial in this State on the charges under Indictment No. 83-03-0450. See State v. Pero, 370 N.J. Super. 203, 206 (App. Div. 2004).

¹ Effective August 8, 2013, the Legislature amended N.J.S.A. 2C:39-5b to elevate the crime of unlawful possession of a handgun to a second degree offense.

Defendant was arraigned before the Criminal Part on the charges reflected in Indictment No. 83-03-0450 on February 2, 1984. During the arraignment, the State served defendant with Indictment No. 83-01-0088, reflecting charges unrelated to this case. On May 15, 1984, the Criminal Part denied defendant's motion to dismiss Indictment No. 83-01-0088 under Article III of the IAD, N.J.S.A. 2A:159A-3, and granted the State's motion for a 180-day extension. Defendant filed a PCR petition challenging the court's ruling concerning the IAD. The Criminal Part denied defendant's petition on April 1, 1984.

On June 20, 1984, defendant was tried before a jury on the charges reflected in Indictment No. 83-03-0450. The jury returned a verdict finding defendant guilty of first degree armed robbery, second degree burglary, third degree theft, and third degree terroristic threats. The jury acquitted defendant of second degree possession of a handgun for an unlawful purpose and third degree unlawful possession of a handgun. On August 10, 1984, the court sentenced defendant on his conviction of first degree robbery as a persistent offender under N.J.S.A. 2C:44-3, and imposed an extended term of life imprisonment with a twenty-five-year period of parole ineligibility. The court also ordered that this sentence run consecutive to the sentence defendant was serving for the crimes committed in New York State. Finally, the court sentenced

defendant to a term of ten years, with a five-year period of parole ineligibility on the second degree burglary conviction, and five years for the third degree theft conviction, with a thirty-month period of parole ineligibility. However, these three sentences were to run concurrently with the extended term sentence imposed for the first degree armed robbery.

Defendant thereafter filed a direct appeal to this court challenging his conviction and sentence. This court affirmed defendant's conviction in an unpublished, Per Curiam opinion. State v. Joseph Maggio, Docket No. A-0375-84 (App. Div. April 20, 1987). With respect to the sentence, we directed the trial court to merge the third degree theft conviction with the first degree armed robbery conviction and amend the Judgment of Conviction accordingly. Id. at 10. The Supreme Court denied defendant's petition for certification. State v. Maggio, 109 N.J. 54 (1987).

On May 17, 1988, Judge Harold A. Ackerman, U.S.D.J., denied defendant's pro se petition seeking habeas corpus relief under 28 U.S.C.A. §2254. Joseph Maggio v. Robert J. Henderson, et al., No. 87-5113 (D.N.J. May 17, 1988). The United States Third Circuit Court of Appeals thereafter denied defendant's request for a certificate of probable cause pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure. See Joseph Maggio v. Robert J. Henderson, et al., No. 88-5447 (3d Cir. Sept. 14, 1988).

On June 26, 1992, defendant, represented by counsel, filed a PCR petition claiming ineffective assistance of trial counsel based on trial counsel's alleged failure to find and present an alibi witness. Defendant's counsel in this appeal wrote in the brief before us that: "No definitive records exist as to the second petition's disposition, but courtroom records suggest that the court dismissed this petition or that the court ordered a withdrawal of the petition." In support of this supposition, appellate counsel cites to the following statement in the Memorandum of Opinion written by Judge Diane Pincus in support of her February 26, 2016 order denying defendant's PCR petition: "Evidence suggests that [d]efendant filed a second PCR petition in 1995 ("1995 PCR"). However, neither party has produced orders demonstrating the result of this 1995 PCR or the reasons behind its disposition." (Emphasis added.)

On December 17, 2013, defendant filed what he characterizes as his "third PCR petition," claiming ineffective assistance of counsel based on counsel's failure to investigate and call to the stand the alleged alibi witness. The only support defendant presented for the existence of this alleged alibi witness and for defense counsel's failure to interview him is his bold assertion, unsupported by any court records and uncorroborated by any person with relevant, competent knowledge of the events.

In her Memorandum of Opinion, Judge Pincus retraced defendant's procedural history and summarized the evidence presented by the State at trial that led the jury to find him guilty, beyond a reasonable doubt, of the charges for which he was sentenced. We will not restate these facts here. Instead, we incorporate by reference Judge Pincus's factual recitation as reflected in her Memorandum of Opinion. In her legal analysis, Judge Pincus concluded defendant was procedurally barred from bringing this latest PCR petition pursuant to Rule 3:22-4(a), which precludes a defendant from raising "[a]ny ground for relief not raised in the proceedings resulting in the conviction, or in a post-conviction proceeding brought and decided prior to the adoption of this rule, or in any appeal taken in any such proceedings[.]" Rule 3:22-4(a) also delineates exceptions to this procedural bar. Judge Pincus carefully reviewed these exceptions and found no legal or factual basis to apply any of them here. Judge Pincus also concluded defendant was not entitled to any relief available under Rule 3:22-4(b).

Despite these procedural impediments, Judge Pincus reviewed defendant's claims on their merits, and found no factual or legal grounds to conclude defendant had established a prima facie case of ineffective assistance of counsel under the standards adopted by the United States Supreme Court in Strickland v. Washington,

466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and subsequently adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). Defendant now appeals raising the following arguments.

POINT I

DEFENDANT'S PCR PETITION SHOULD NOT HAVE BEEN
PROCEDURALLY BARRED.

POINT II

THIS MATTER MUST BE REMANDED FOR AN
EVIDENTIARY HEARING BECAUSE DEFENDANT
ESTABLISHED A PRIMA FACIE CLAIM OF TRIAL
COUNSEL'S INEFFECTIVENESS FOR FAILING TO
ADEQUATELY INVESTIGATE THIS CASE REGARDING AN
ALIBI WITNESS AND FOR FAILING TO HAVE THAT
WITNESS TESTIFY.

We reject these arguments and affirm substantially for the reasons expressed by Judge Pincus in her Memorandum of Opinion. Based on the evidence presented before the PCR court, defendant has not established a prima facie case of ineffective assistance of counsel. He was therefore not entitled to an evidentiary hearing pursuant to Rule 3:22-10(b). State v. Preciose, 129 N.J. 451, 462-63 (1992).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION