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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-3593-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CARNELL DAVIS,

Defendant-Appellant.

Submitted November 17, 2016 — Decided March 22, 2017

Before Judges Lihotz and O'Connor.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment Nos.
06-07-2304 and 06-07-2305.

Joseph E. Krakora, Public Defender, attorney
for appellant (William Welaj, Designated
Counsel, on the brief).

Carolyn A. Murray, Acting Essex County
Prosecutor, attorney for respondent (Barbara
A. Rosenkrans, Special Deputy Attorney
General/Acting Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

Defendant Carnell Davis appeals from a December 23, 2014 Law Division order denying his petition for post-conviction relief (PCR) alleging ineffectiveness of counsel. We affirm.

On May 24, 2007, a jury convicted defendant of two counts of first-degree armed robbery, N.J.S.A. 2C:15-1; second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1); and third-degree possession of a handgun without a permit, N.J.S.A. 2C:39-5(b). On September 18, 2007, defendant was sentenced to concurrent mandatory extended terms of fifty years imprisonment, subject to an eighty-five percent period of parole ineligibility mandated by the No Early Release Act, N.J.S.A. 2C:43-7.2. The judgment of conviction was filed the same day.

Defendant filed a direct appeal, challenging both his convictions and sentence. On May 18, 2012, we reversed one of the convictions for armed robbery and remanded this charge for a retrial. The remaining three convictions were affirmed, but defendant's sentences on these convictions were vacated for resentencing after the trial on the reversed charge. State v. Davis, No. A-1051-09 (App. Div. May 18, 2012) (slip op. at 16). The Supreme Court denied defendant's petition for certification. State v. Davis, 213 N.J. 396 (2013).

The State ultimately dismissed the robbery charge remanded for retrial and, on August 3, 2013, defendant was resentenced on the three remaining counts to, in the aggregate, an extended twenty-five year term, with an eighty-five percent period of parole ineligibility. The facts underlying defendant's convictions are set forth in our opinion, but to provide perspective, we briefly recount the salient trial evidence.

Defendant's convictions arise out of an armed robbery committed in Newark during the evening of September 15-16, 2005. The two victims, J.S. (John) and L.S. (Leonard),¹ were walking from a bar toward Leonard's car when they noticed a man, later identified as defendant, sitting on the hood of Leonard's car. As Leonard unlocked and entered his car, defendant lifted his shirt, revealing a .38 caliber silver revolver tucked into his waistband. Defendant instructed Leonard to not move or start the car, but Leonard locked himself in his car and drove off.

Leonard testified defendant pointed the gun in his direction and twice pulled the trigger, but the gun did not fire. After he got away, Leonard called the police and then

¹ We employ the use of initials, as well as fictitious names, in order to protect the victims' privacy.

returned to the scene, where he witnessed defendant pointing a gun at and removing items from John's pockets.

John testified that, when Leonard escaped, defendant approached him, pressed the gun against his stomach, and demanded John turn over his money. Defendant also reached around and retrieved John's wallet from his back pocket. The wallet contained between \$100 and \$120. Defendant then tried to remove John's wristwatch but was thwarted by the lock on the wristband.

While focused on the watch, defendant dropped the cash he had removed from John's wallet. Defendant then pulled the trigger of his gun two times, but it failed to fire. As defendant stooped to retrieve the money he had dropped on the ground, John ran and, seeing Leonard's vehicle, jumped into his car. As John fled, defendant tried to shoot Leonard but was again unsuccessful.

After the robbery, both victims gave a description of defendant to the police. Both victims also identified defendant from a photo array presented to them early in the morning of September 16, 2005. Defendant was arrested three days later. Defendant neither testified nor called any witnesses.

Among other things, on direct appeal defendant argued he was denied a fair trial because a detective testified the

victims identified him from a photo array. Defendant claimed the fact defendant's photo was in the array suggested he had a criminal history. In addition, defendant argued trial counsel was ineffective because, during his summation, counsel told the jury the picture of defendant in the photo array was an "arrest photo," suggesting defendant had been previously arrested. We considered both arguments and found no reversible error.

On September 19, 2013, defendant filed his petition for PCR, and his attorney subsequently filed a brief on defendant's behalf. As he had on his direct appeal, defendant again contended, albeit in a different form, the detective's testimony the victims had identified defendant in the photo array was prejudicial. However, defendant re-cast this claim by alleging trial counsel had been ineffective for failing to object to the detective's testimony. In addition, defendant again asserted trial counsel was ineffective for characterizing defendant's picture in the array as an arrest photo.

After hearing oral argument, Judge Martin Cronin issued a written opinion dated December 23, 2014, in which he analyzed and rejected defendant's arguments. The judge found defendant's petition time barred, as it was filed six years after the judgment of conviction had been entered without any showing the delay was due to excusable neglect. See R. 3:22-12(a)(1). He

also concluded the two subject contentions were precluded from additional review because they had been previously adjudicated on direct appeal. See R. 3:22-5. Finally, the judge determined trial counsel's alleged deficiencies failed to meet the two-prong test formulated in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987).²

On appeal, defendant argues:

POINT I — THE [PCR] COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF, IN PART, ON PROCEDURAL GROUNDS PURSUANT TO RULE 3:22-12(a).

POINT II — THE [PCR] COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE DID NOT RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL AS A RESULT OF COUNSEL'S COMMENTS SUGGESTING TO THE JURY THE DEFENDANT HAD BEEN INVOLVED IN PRIOR CRIMINAL ACTIVITY.


² In this two-part test, a defendant must first show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Fritz, supra, 105 N.J. at 52 (quoting Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693). Second, a defendant must prove he suffered prejudice due to counsel's deficient performance. Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. A defendant must show by a "reasonable probability" the deficient performance affected the outcome. Fritz, supra, 105 N.J. at 58.

POINT III — THE [PCR] COURT ERRED IN DENYING
THE DEFENDANT'S PETITION FOR POST CONVICTION
RELIEF, IN PART, UPON PROCEDURAL GROUNDS
PURSUANT TO RULE 3:22-5.

Having reviewed the record, we conclude defendant's arguments are without sufficient merit to warrant discussion in another written opinion. R. 2:11-3(e)(2). We affirm the denial of defendant's PCR petition for substantially the reasons provided in Judge Cronin's comprehensive written decision.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION