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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-3593-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHARLES NOBLE, a/k/a GERARD ALSTON,
a/k/a GERARD FURQUAN, a/k/a GERALD
ALSTON,

Defendant-Appellant.

Submitted May 23, 2017 – Decided July 18, 2017

Before Judges Leone and Vernoia.

On appeal from the Superior Court of New
Jersey, Law Division, Essex County, Indictment
No. 95-08-2645.

Joseph E. Krakora, Public Defender, attorney
for appellant (Anderson D. Harkov, Designated
Counsel, on the brief).

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

PER CURIAM

Defendant appeals an order denying his post-conviction relief (PCR) petition without an evidentiary hearing. We affirm.

Following a 1996 jury trial, defendant was convicted of third-degree theft of movable property, N.J.S.A. 2C:20-3(a).¹ At defendant's May 15, 1996 sentencing, the court considered a presentence report that had been used on January 16, 1996 in connection with defendant's sentencing on unrelated charges. The presentence report, however, also included a May 15, 1996 "UPDATE" addendum prepared by the probation department. It listed the offense for which defendant was being sentenced, the charges and sentence in the January 1996 matter, and a gap time credit calculation. Defendant's counsel advised the court he reviewed the presentence report and there were no amendments or changes required.

Defendant was sentenced on the third-degree theft conviction to a five-year custodial term with a two-and-a-half year period of parole ineligibility. The court ordered that the sentence run consecutively to the custodial sentence defendant received in

¹ On defendant's direct appeal we noted that his judgment of conviction erroneously stated he was convicted of first-degree carjacking, N.J.S.A. 2C:15-2, and directed that the judgment of conviction be corrected. State v. Alston, No. A-7653-95 (App. Div. June 18, 1998) (slip op. at 1, n. 1). The record on appeal does not include a corrected judgment of conviction.

January 1996. Defendant's conviction and sentence were affirmed on appeal. Alston, supra, slip op. at 4.

On December 19, 2014, defendant filed a pro se PCR petition alleging his trial counsel was ineffective because he allowed the court to sentence defendant based on the presentence report prepared for use in the January 1996 matter. Defendant further alleged his sentence was illegal because the court relied on the presentence report in the prior matter. Following the assignment of counsel, the court heard oral argument on the petition.

In a detailed written opinion the court found the petition was time barred under Rule 3:22-12(a)(1) because it was filed eighteen years after entry of defendant's judgment of conviction and defendant failed to demonstrate excusable neglect for the late filing. The judge also addressed the merits of defendant's petition, finding defendant did not demonstrate his attorney's performance was constitutionally deficient or that he suffered prejudice as a result of his counsel's alleged error. The court entered an order denying defendant's petition without an evidentiary hearing. This appeal followed.

On appeal, defendant makes the following arguments:

POINT ONE

THE TIME BAR OF R. 3:22-12 SHOULD NOT BE
APPLIED TO DEFENDANT'S PETITION FOR POST
CONVICTION RELIEF[.]

POINT TWO

THE PCR COURT ERRED WHEN IT FAILED TO GRANT DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING[.]

POINT THREE

THE FAILURE OF TRIAL COUNSEL TO OBJECT TO A SENTENCE PROCEEDING THAT WAS ILLEGAL BECAUSE IT VIOLATED R. 3:21-2 AND N.J.S.A. 2C:44-6, WHICH REQUIRE A SENTENCING COURT TO ORDER A PRESENTENCE REPORT, DEPRIVED DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL[.]

We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005). The de novo standard of review applies to mixed questions of fact and law. Id. at 420. Where an evidentiary hearing has not been held, it is within our authority "to conduct a de novo review of both the factual findings and legal conclusions of the PCR court." Id. at 421 (emphasis omitted). We apply those standards here.

We find no merit in defendant's argument that the court erred by finding his petition was time barred under Rule 3:22-12(a)(1). A PCR petition must be filed within five years of the entry of the judgment of conviction unless the defendant demonstrates "excusable neglect" for missing the deadline and that "there is a reasonable probability that if the defendant's factual assertions

were found to be true enforcement of the time bar would result in a fundamental injustice." R. 3:22-12(a)(1).

The PCR petition must allege facts sufficient to demonstrate excusable neglect and fundamental injustice under Rule 3:22-12(a)(1). See State v. Mitchell, 126 N.J. 565, 577 (1992) (finding that a PCR "petition itself must allege the facts relied on to support the claim"); State v. Cann, 342 N.J. Super. 93, 101-02 (App. Div.) ("A [PCR] petition is time-barred if it does not claim excusable neglect, or allege the facts relied on to support that claim."), certif. denied, 170 N.J. 208 (2001). "Absent compelling extenuating circumstances, the burden to justify filing a petition after the five-year period will increase with the extent of the delay." State v. Afandafor, 151 N.J. 41, 52 (1997); see also State v. Brewster, 429 N.J. Super. 387, 400 (App. Div. 2013) (finding a lapse of almost seven years following the five-year deadline "undercuts a finding of excusable neglect and fundamental injustice").

Here, defendant's petition was filed more than eighteen years following the entry of the judgment of conviction. His petition is devoid of any claim of excusable neglect justifying the late filing of his petition, or facts supporting a finding of excusable neglect. Moreover, as we will explain, defendant has failed to show a fundamental injustice. The court therefore correctly

determined defendant's petition was time barred under Rule 3:22-12(a)(1). Cann, supra, 342 N.J. Super. at 101-02.

Defendant argues he is not required to show excusable neglect because the court imposed an illegal sentence that may be challenged at any time under Rule 3:21-10(b)(5). He asserts imposition of the sentence resulted in a fundamental injustice. He asserts that his sentence is illegal because the court did not obtain a new presentence report for his May 1996 sentencing and instead relied on the report used at his January 1996 sentencing, as updated by the addendum. We disagree.

A court must order a presentence investigation of the defendant before imposing a sentence, and must accord it due consideration. N.J.S.A. 2C:44-6; R. 3:21-2(a); see also State v. Mance, 300 N.J. Super. 37, 65 (1997) (remanding for resentencing where the court relied on an outdated presentence report). Even assuming the use of the updated January 1996 presentence report violated these provisions, it did not affect the legality of defendant's sentence.

"[A] truly 'illegal' sentence can be corrected 'at any time.'" State v. Acevedo, 205 N.J. 40, 47 n.4 (2011) (quoting R. 3:21-10(b)(5); R. 3:22-12). "[A]n illegal sentence is one that 'exceeds the maximum penalty provided in the Code for a particular offense' or a sentence 'not imposed in accordance with law.'" Id.

at 45 (quoting State v. Murray, 162 N.J. 240, 247 (2000)). A sentence "not imposed in accordance with law" includes a "disposition [not] authorized by the Code." Murray, supra,, 162 N.J. at 247. However, "mere excessiveness of sentence otherwise within authorized limits, as distinct from illegality by reason of being beyond or not in accordance with legal authorization, is not an appropriate ground of post-conviction relief and can only be raised on direct appeal from the conviction." State v. Clark, 65 N.J. 426, 437 (1974).

In Acevedo, supra, the Court held that although the trial judge failed to state reasons for imposing consecutive sentences as required, the sentence was not illegal. 205 N.J. at 45-47. The Court explained the "defendant's contentions regarding consecutive sentences or the absence of reasons for imposition of the consecutive sentences [did] not relate to the issue of sentence 'legality,'" and thus, were not cognizable on PCR or under Rule 3:21-10(b)(5). Id. at 47.

The same is true here. Defendant's sentence was within the permissible sentencing range, and was authorized by the Code. Similar to the court's failure to state its reasons for imposing consecutive sentences in Acevedo, the court's reliance on an allegedly outdated presentence report did not affect the legality of defendant's sentence.

Defendant's reliance on Mance, supra, 300 N.J. Super. 37, is misplaced. Although in Mance we remanded for resentencing where the trial court relied on a presentence report that was over fifteen years old, the issue was raised on direct appeal. Id. at 44, 65. Here, because defendant's argument regarding the failure to obtain a new presentence report "[does] not relate to the issue of sentence 'legality,'" it is not cognizable in a PCR proceeding and does not provide grounds for relief under Rule 3:21-10(b)(5). Acevedo, supra, 205 N.J. at 47.

In any event, the presentence report here was not fifteen years out of date. The January 1996 presentence report was updated by the probation department with a May 15, 1996 addendum that was current on the date of sentencing. Defendant does not offer any information he contends would have been included in an entirely new presentence report that was not included in the updated presentence report relied upon by the court at defendant's sentencing.

Defendant's remaining arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We add only the following comments.

To sustain his burden of establishing an entitlement to PCR based on the alleged ineffectiveness of his trial counsel, plaintiff was required to show that his counsel's handling of

defendant's sentencing "fell below an objective standard of reasonableness," and that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068, 80 L. Ed. 2d 674, 693, 698 (1984); see also State v. Fritz, 105 N.J. 42, 58 (1987) (adopting Strickland standard for determination of PCR petitions alleging ineffective assistance of counsel claims under the New Jersey Constitution).

For the reasons stated by the PCR court, we are satisfied defendant failed to sustain his burden of demonstrating his trial counsel's performance was deficient and there was a reasonable probability he suffered prejudice as a result of his trial counsel's alleged error in permitting the sentencing court to rely on the updated presentence report. And because defendant failed to sustain his burden, the court did not err in denying defendant's request for an evidentiary hearing. See State v. Porter, 216 N.J. 343, 354 (2013); R. 3:22-10(b).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION