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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-5674-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL DERRY,

Defendant-Appellant.

Submitted December 14, 2016 – Decided April 19, 2017

Before Judges Accurso and Manahan.

On appeal from Superior Court of New Jersey,
Law Division, Atlantic County, Indictment
No. 03-07-1275.

Michael Derry, appellant pro se.

Diane Ruberton, Acting Atlantic County
Prosecutor, attorney for respondent
(Courtney M. Cittadini, Special Deputy
Attorney General/Acting Assistant
Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Michael Derry appeals from the July 28, 2015
order denying reconsideration of the dismissal of his second
petition for post-conviction relief (PCR) claiming the attorneys

who represented him on direct appeal and on his first PCR application rendered ineffective assistance. The trial court dismissed the claim as time-barred. We agree and affirm.

Following a shooting in the course of a robbery which left the victim paralyzed, defendant was convicted by a jury in 2007 of conspiracy, robbery, aggravated assault and weapons charges and sentenced to an aggregate term of twenty-seven years in State prison subject to the periods of parole ineligibility and supervision required by the No Early Release Act, N.J.S.A. 2C:43-7.2. Defendant was also convicted of a certain persons offense for which he received a consecutive nine-year term with a mandatory five-year period of parole ineligibility pursuant to N.J.S.A. 2C:39-7b.

We affirmed defendant's convictions and aggregate sentence, subject to a limited remand to correct the judgment of conviction and for a hearing on defendant's claim that a juror was asleep at trial for fifteen to twenty minutes. State v. Derry, No. A-2229-07 (App. Div. Sept. 3, 2009) (slip op. at 14-16). We emphasized that we were not reversing defendant's convictions and that a new trial was not warranted "unless the remand proceedings result in a determination by the trial judge that the 'sleeping juror' was unable 'to render a fair decision.'" Id. at 15 (quoting State v. Reevey, 159 N.J. Super.

130, 134 (App. Div.), certif. denied, 79 N.J. 471 (1978)). The Supreme Court granted defendant's petition for certification limited to four issues, including "whether a juror sleeping for some part of the trial denied defendant of a fair trial," and whether the sentence was excessive. State v. Derry, 201 N.J. 155 (2010).

On March 2, 2010, the Court granted the State's motion for a limited remand to conduct the hearing we ordered regarding the sleeping juror. State v. Derry, No. A-6282-11 (App. Div. Jan. 7, 2014) (slip op. at 5). The Court directed the Law Division to file its findings and conclusions with the Court within sixty days, making clear it was retaining jurisdiction. Following the remand hearing, the trial judge concluded the juror had not been sleeping. Ibid. The Court thereafter determined certification had been improvidently granted and dismissed the appeal. State v. Derry, 204 N.J. 33 (2010).

Defendant did not attempt to take an appeal from the remand. Instead, he filed a timely first petition for PCR on August 4, 2011 arguing, among other things, that he received ineffective assistance of trial and appellate counsel, his sentence was excessive and his jail credits should be recalculated. Derry, supra, No. A-6282-11, slip op. at 5-7. The trial judge denied the petition on April 18, 2012, which we

affirmed. Id. at 8-9, 11. In our opinion, we also addressed, and rejected, defendant's claim that he "was subjected to the constructive denial of PCR counsel." Id. at 10, 14-16. The Supreme Court denied defendant's petition for certification. State v. Derry, 218 N.J. 276 (2014).

Defendant filed his second petition for PCR on May 11, 2015, claiming the consecutive nine-year term on the certain persons offense should have been run concurrent and thus his sentence was illegal, he received ineffective assistance of appellate and PCR counsel for their failure to appeal from the trial court's findings on remand, trial counsel was ineffective for failing to advise defendant of his exposure to a consecutive sentence with a parole ineligibility term on the certain persons offense, and that he was entitled to additional jail credits.

The judge denied the petition on the papers as obviously time-barred. Defendant's motion for reconsideration was likewise denied.¹ Defendant appeals, raising the following issues.

¹ Defendant has failed to provide us a copy of the judge's letter memorandum, pursuant to Rule 2:6-1(a)(1)(D), in which the judge discussed his reasons for denying the motion for reconsideration, making review of that order impossible. See Cipala v. Lincoln Tech. Inst., 179 N.J. 45, 55 (2004) (affirming this court's refusal to address an issue based on appellant's failure to include documents necessary for its review in the appendix).

THE COURT ERRED IN DETERMINING THAT APPELLANT'S SECOND P.C.R. PETITION IS UNTIMELY.

A. The P.C.R. Court erred in denying Appellant's Second Petition for Post-Conviction Relief as the plain language of R. 3:22-4 gave rise for Appellant to submit said petition.

B. The P.C.R. court erred in summarily dismissing Appellant's Second Petition for Post-Conviction Relief as untimely; because the New Jersey Supreme Court still retained jurisdiction. Had the Appellant filed his second petition within a year of the denial of his first petition, as the P.C.R. court suggested, that court would not have had the jurisdiction to entertain said second petition.

We reject defendant's arguments as plainly without merit. See R. 2:11-3(e)(2).

Pursuant to Rule 3:22-12(a)(2), no second or subsequent petition for PCR, "[n]otwithstanding any other provision in [Rule 3:22-12], . . . shall be filed more than one year after the latest of" A) the United States Supreme Court's or the Supreme Court of New Jersey's recognition of a new constitutional right on which the defendant relies, which the Court has made retroactive to cases on collateral review; B) a newly discovered factual predicate, which could not have been earlier discovered through reasonable diligence; and C) "the date of the denial of the first . . . application for post-

conviction relief" where the defendant alleges ineffective assistance of counsel representing him on that petition.

R. 3:22-12(a)(2)(A)-(C). A 2009 amendment to the rule makes clear beyond question that the one-year limitation for second or subsequent petitions is non-relaxable. R. 3:22-12(c). Rule 3:22-4(b) requires dismissal of a second petition if untimely under Rule 3:22-12(a)(2).

Application of those rules here makes plain the trial court was correct in dismissing defendant's second PCR petition as untimely. Defendant filed his second PCR petition on May 11, 2015, more than one year beyond the denial of his first petition on April 18, 2012. Not only was the petition filed beyond the one-year non-relaxable limitation of Rule 3:22-12(a)(2)(A)-(C), thus requiring its dismissal under Rule 3:22-4(b), but defendant raised, and we rejected, the claim that he received ineffective assistance on his first PCR petition in his appeal from the denial of that petition. Derry, supra, No. A-6282-11, slip op. at 9-10, 16. Dismissal of the petition was thus appropriate under Rule 3:22-5 as well.

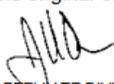
Having reviewed the record, we are also satisfied defendant's second PCR petition is utterly without merit. Defendant's claims as to his sentence and his counsel's effectiveness in that regard have been conclusively rejected on

their merits. As for the failure of his appellate or PCR counsel to have appealed from the remand, defendant nowhere claims he directed his counsel to file an appeal on his behalf, or upon realizing no appeal was filed sought relief from this court nunc pro tunc.

Moreover, defendant does not explain why such an appeal would have been successful, a prerequisite to obtaining relief in these circumstances. See State v. Echols, 199 N.J. 344, 361 (2009) (explaining that without a showing of reversible error, the failure of appellate counsel to have raised an issue "could not lead to the conclusion that there is a reasonable probability that, but for the errors of trial and appellate counsel, the outcome would have been different"). As we are confident defendant could not show reversible error from the judge's factual findings on the remand, see State v. Locurto, 157 N.J. 463, 474-75 (1999), denial of defendant's second PCR petition resulted in no injustice to him. See State v. Nash, 212 N.J. 518, 546-47 (2013).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION