

## RECORD IMPOUNDED

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This opinion shall not "constitute precedent or be binding upon any court." 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-0181-16T4

STATE OF NEW JERSEY  
IN THE INTEREST OF C.E.

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Submitted January 10, 2018 – Decided February 20, 2018

Before Judges Alvarez and Currier.

On appeal from Superior Court of New Jersey,  
Chancery Division, Essex County, Docket No.  
FJ-07-2803-02.

C.E., appellant pro se.

Robert D. Laurino, Acting Essex County  
Prosecutor, attorney for respondent State of  
New Jersey (Barbara A. Rosenkrans, Special  
Deputy Attorney General/Acting Assistant  
Prosecutor, on the brief).

PER CURIAM

Defendant C.E. appeals from the denial of his petition for post-conviction relief (PCR). We conclude that this is defendant's second PCR petition, and since it was not filed in a timely manner and defendant has not shown good cause for the delay, we affirm.

Defendant was convicted in 2006 of four counts of first-degree robbery, N.J.S.A. 2C:15-1, and one count of conspiracy to

commit robbery, N.J.S.A. 2C:5-2. In 2007, defendant was sentenced to an aggregate thirty-year term of incarceration, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2. We affirmed his convictions and sentence, State v. Evans, No. A-1530-08 (App. Div. June 24, 2011), and his petition for certification was subsequently denied. State v. Evans, 208 N.J. 601 (2011).

Defendant's first PCR petition was denied by the trial court on December 3, 2012. We affirmed, State v. Evans, No. A-3324-12 (App. Div. May 15, 2014), and a subsequent petition for certification was denied in October 2014. State v. Evans, 220 N.J. 43 (2014). Defendant also pursued federal remedies. His petition for a writ of habeas corpus and certificate of appealability was denied in June 2016. Evans v. D'Illio, No. 15-2132, 2016 U.S. Dist. LEXIS 73672 (D.N.J. June 6, 2016). The subsequent application to the Third Circuit was denied, Evans v. Adm'r N.J. State Prison, No. 16-3152, 2017 U.S. App. LEXIS 17919 (3d Cir. Jan. 18, 2017), and defendant's petition for a writ of certiorari was denied by the Supreme Court on October 10, 2017. Evans v. Johnson, \_\_\_ U.S. \_\_\_, 138 S. Ct. 319 (2017).

In 2016, defendant filed a PCR petition under a juvenile docket number, contending that he had learned that another person had used his name and birthdate as an alias, and that person had committed the juvenile offenses noted on defendant's criminal

record. Defendant asserted that due to these juvenile offenses in his criminal history, he was denied a mitigating factor and assessed an aggravating factor at his 2007 sentencing. He requested an evidentiary hearing and oral argument.

In denying defendant's petition, the PCR judge determined in a letter opinion issued on July 27, 2016, that (1) defendant's petition was his second PCR petition despite being filed under his juvenile offense docket numbers; (2) defendant was not entitled to the assignment of counsel because he did not show good cause; (3) due to the length of time that had passed since defendant's juvenile offenses, it was "impossible to determine the true perpetrator of the [juvenile] offenses" on his record because the Public Defender, Essex County Prosecutor, and the Essex County Youth Detention Center could not locate any records pertaining to the juvenile offenses; and (4) even if the juvenile offenses "were to be entirely wiped from [his] history, it would in no way impact his current status" because the offenses were not levied against him as an aggravating factor at sentencing.

We review the legal conclusions of a PCR judge de novo. State v. Harris, 181 N.J. 391, 421 (2004). The same scope of review applies to mixed questions of law and fact. Ibid.

On appeal, defendant contends that, because this petition addressed his alleged juvenile offenses, not his criminal

convictions, the judge wrongfully characterized his application as a second PCR petition. He therefore contends he was entitled to counsel, oral argument, and an evidentiary hearing. We disagree.

Although defendant asserts that the juvenile offenses and adjudications listed on his criminal record do not belong to him, the crux of his argument is the bearing those juvenile adjudications had at his sentencing on his adult convictions. His PCR petition challenges the sentence he is currently serving, the sentence previously affirmed by this court in both a direct and PCR appeal. Defendant only raises the error in his juvenile record for the effect he perceives it had on his sentence.

As we are satisfied that the judge correctly determined defendant's application to be a second PCR petition, it was not an abuse of discretion for the court to consider the application on the submitted briefs and not entertain oral argument.

Defendant is also not entitled to assigned counsel on a second PCR without a showing of good cause. R. 3:22-6(b). "[G]ood cause exists only when the court finds that a substantial issue of fact or law requires assignment of counsel and when a second or subsequent petition alleges on its face a basis to preclude dismissal under R. 3:22-4." R. 3-22(6)(b). Here, defendant has failed to show a substantial factual or legal issue to support the

assignment of counsel. Defendant's juvenile record was fourteen years old when he filed this PCR petition and, as the PCR judge explained, it was "impossible to determine the true perpetrator of the offenses at this point in time."

Further, defendant's juvenile record had no effect on the imposed sentence. At the sentencing hearing in 2007, the judge referenced the juvenile adjudication on defendant's record. Although the judge declined to accord defendant a mitigating factor for a lack of a prior record,<sup>1</sup> he also did not accept the State's request for an aggravating factor because he did not find it to be "a significant prior criminal history." The sentencing judge concluded that the aggravating factor of the death of a victim during the armed robbery "vastly outweigh[ed] any mitigating factor." Despite the discussion of defendant's juvenile record in 2007, he never raised the mistaken identity issue in any of the myriad of post-conviction proceedings. Defendant has not presented a substantial factual or legal issue warranting the assignment of counsel.

Although we have addressed the substance of defendant's arguments, it is of no consequence whether the application was a first or second PCR petition as it was untimely filed in either

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<sup>1</sup> Defendant also had several arrests as an adult listed in his criminal history.

instance. A first PCR petition must be filed within five years of the entry of the judgment of conviction. R. 3:22-12(a)(1). A defendant seeking relief from the time bar under the rule must show excusable neglect and that a fundamental injustice will result. R. 3:22-12(a)(1)(A). To relax the five-year time limitation for filing a PCR petition, the New Jersey Supreme Court has required a showing of "compelling, extenuating circumstances," State v. Milne, 178 N.J. 486, 492 (2004), or alternatively, "exceptional circumstances." State v. Goodwin, 173 N.J. 583, 594 (2002); see also State v. Murray, 162 N.J. 240, 246 (2000); State v. Mitchell, 126 N.J. 565, 580 (1992).

Defendant cannot demonstrate excusable neglect. The juvenile adjudication and offenses of which he complains in the current PCR petition were referenced by the prosecutor, defense counsel, and the judge at the time of sentencing in 2007. Defendant was aware he had juvenile offenses and an adjudication attributable to him at least nine years prior to the filing of this application.

The application is also time barred as a second PCR petition under Rule 3:22-4(b) for similar reasons. A second petition must be filed within one year of the discovery of new facts that could not have been discovered earlier. R. 3:22-12(a)(2)(B). The factual predicate asserted by defendant here is the discovery that the offenses listed on his juvenile criminal record were not

committed by him. However, as stated, he has been aware of this information since the sentencing hearing in 2007. We discern no reason to disturb the trial judge's 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