

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0639-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GARY S. HARRIS,

Defendant-Appellant.

Submitted December 19, 2017 — Decided January 16, 2018

Before Judges Hoffman and Mayer.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Indictment No.
94-04-0546.

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

Andrew C. Carey, Middlesex County Prosecutor,
attorney for respondent (Brian D. Gillet,
Deputy First Assistant Prosecutor, of counsel
and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Gary S. Harris appeals from an August 24, 2015 order of the Law Division denying his petition for post-conviction relief (PCR) couched as a "motion for a new trial."¹ Defendant argues he was deprived of a fair trial based upon ineffective assistance of counsel and other constitutional violations. Defendant also contends that the motion judge erred by deciding his motion without oral argument. We disagree and affirm.

The facts resulting in defendant's conviction and sentence are set forth in our opinion in State v. Harris, No. A-7683-95 (App. Div. Jan. 5, 1998), certif. denied, 156 N.J. 386 (1998). In his direct appeal, defendant raised eight arguments. We rejected defendant's arguments on appeal and affirmed his conviction. Defendant's petition for certification was denied on June 30, 1998.

We need not repeat the facts leading to defendant's conviction. However, we detail defendant's judicial filings since his conviction as those filings are pertinent to this appeal.

In or around May 2000, defendant filed his first PCR petition, arguing that his trial and appellate counsel were ineffective and that his trial counsel had a conflict of interest. An evidentiary

¹ This is defendant's seventh attempt to overturn his conviction/sentence. His arguments in this appeal are duplicative of claims previously raised and adjudicated before other courts.

hearing was conducted. On June 6, 2000, the judge denied PCR relief.

Defendant appealed the denial of his first PCR petition. On appeal, defendant argued his trial counsel had an alleged conflict of interest and failed to move for dismissal of the indictment. We affirmed the denial of defendant's first PCR petition on October 29, 2002. Defendant's petition for certification was denied. See State v. Harris, No. A-6184-99 (App. Div. Oct. 29, 2002), certif. denied, 176 N.J. 279 (2003).

On May 5, 2004, defendant filed a petition for a writ of habeas corpus in the United States District Court for the District of New Jersey. Before the federal court, defendant argued that his trial counsel had a conflict of interest, his appellate counsel was ineffective in failing to raise the conflict issue, and the trial was tainted by prosecutorial misconduct. On November 29, 2005, the federal court dismissed the petition, with prejudice, as untimely. Harris v. Hendricks, No. 04-2125, 2005 U.S. Dist. LEXIS 30201 (D.N.J. Nov. 29, 2005).

In or around February 2007, defendant filed a motion to correct an illegal sentence, realleging ineffective assistance of trial counsel. The motion judge treated defendant's motion as a second PCR application and denied the petition as substantively

and procedurally deficient. Defendant's request for reconsideration was denied.

Defendant appealed the denial of his 2007 motion to correct an illegal sentence, arguing he was deprived of a fair trial and his state and federal constitutional rights were violated. On June 11, 2008, we found defendant's appeal of his 2007 motion was "absolutely without merit," and the Court denied certification. State v. Harris, No. A-5022-06 (App. Div. June 11, 2008) (slip op. at 3), certif. denied, 196 N.J. 596 (2008).

In or around March 2009, defendant filed a second motion to correct/vacate an illegal sentence. That motion was denied on March 13, 2009, and defendant appealed. In his appeal, defendant alleged violation of his constitutional rights, ineffective assistance of trial counsel, and "all points raised by defendant in any and all prior submissions to the court." In denying defendant's appeal, we found that defendant's "arguments have been addressed and rejected on several occasions." State v. Harris, No. A-3781-08 (App. Div. Apr. 27, 2010) (slip op. at 3), certif. denied, 203 N.J. 607 (2010).

On September 10, 2010, defendant moved for a new trial based on newly discovered evidence. Defendant again claimed ineffective assistance of trial counsel, albeit on a different basis, by alleging his trial counsel should have challenged his arrest

warrant because the warrant was based upon false statements and lacked probable cause. On August 18, 2011, the judge denied the motion, finding that defendant's ineffective assistance claim was procedurally barred and that his motion for a new trial failed to satisfy any of the elements warranting a new trial.

On March 1, 2012, defendant filed another PCR petition. By order dated September 27, 2012, the judge denied defendant's third PCR application as untimely.

On February 22, 2015, defendant again moved for a new trial based on newly discovered evidence. The "new evidence" was defendant's repeated claim that his arrest warrant was based on false information. The "new evidence" also included defendant's discovery that his trial counsel was also the New Brunswick Planning Board attorney, which defendant alleged created a conflict of interest. On August 24, 2015, the judge denied defendant's motion without oral argument. The judge expressly found that defendant's claims had either been raised and adjudicated in defendant's prior motions and/or were procedurally barred.

On appeal, defendant, through his assigned counsel and in his pro se brief, raises the following arguments:

POINT I

THIS MATTER MUST BE REMANDED FOR ORAL ARGUMENT.

POINT II

MR. HARRIS IS ENTITLED TO A REMAND ON HIS MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE.

POINT III

PROSECUTORIAL MISCONDUCT THROUGHOUT THE PROCEEDINGS DEPRIVED DEFENDANT OF HIS RIGHTS TO DUE PROCESS OF LAW, TRIAL BY JURY AND RIGHT TO A FAIR TRIAL AGAINST ALL POLICY, LAW, AND JUSTICE AND IN VIOLATION OF U.S. CONST. AMENDS. V, VI, AND XIV AND N.J. CONST. (1947) ART. 1, PARAS. 1, 9, AND 10.

POINT IV

THE DEFENDANT'S RIGHT TO BE FREE FROM ILLEGAL SEARCH AND SEIZURE UNDER U.S. CONST. AMEND. IV WAS VIOLATED DUE TO THE FALSE STATEMENTS WITHIN THE AFFIDAVITS BY THE ALLEGED VICTIM, WHICH MISLED THE MUNICIPAL JUDGE'S DETERMINATION OF "PROBABLE CAUSE."

POINT V

IT IS A VIOLATION OF U.S. CONST. AMEND IV TO KNOWINGLY AND INTENTIONALLY, OR WITH RECKLESS DISREGARD FOR THE TRUTH, INCLUDE FALSE STATEMENTS IN AN AFFIDAVIT FILED IN SUPPORT OF A WARRANT.

POINT VI

THE TRIAL COURT ERRED IN THE PROCEEDING BY VIOLATING THE DEFENDANT'S SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS, IN VIOLATION OF THE LAW, CORRECT PROCEDURES, AND THE FUNDAMENTAL RIGHTS OF THE DEFENDANT. THIS CAUSED PROCEDURAL AND JURISDICTIONAL DEFECTS

WITHIN THE TRIAL MECHANISM, RENDERING IT
INVALID.

POINT VII

THE TRIAL COURT'S IMPROPER DECISION AND ABUSE
OF DISCRETION CONSTITUTED ERROR, BAD FAITH,
PREJUDICE, AND BIAS, WHICH CAUSED PROCEDURAL
AND JURISDICTIONAL DEFECTS WITHIN THE TRIAL
MECHANISM AND CLEARLY DENIED THE DEFENDANT HIS
RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW,
IN VIOLATION OF U.S. CONST. AMENDS. VI AND XIV
AND N.J. CONST. (1947) ART. 1, PARAS. 1, 9,
AND 10.

POINT VIII

THE TRIAL COURT AND THE STATE LOST ALL SUBJECT
MATTER JURISDICTION OVER PETITIONER'S TRIAL
PROCEEDINGS ON FEBRUARY 22, 1996 DUE TO
UNCONSTITUTIONAL MANIPULATION OF THE
INDICTMENT PRIOR TO OPENING STATEMENTS OVER
THE OBJECTION OF PETITIONER WHE[N] THEY
OMITTED A MATERIAL ELEMENT OF THE OFFENSE THE
GRAND JURY HAD CHARGED WITHIN THE INDICTMENT
THAT WOULD'VE EXONERATED AND PROVED
PETITIONER'S ACTUAL INNOCENCE AT TRIAL. DUE
TO THIS UNLAWFUL ACTION THE JURISDICTION WAS
LOST TO CONTINUE TO "TRY" OR SENTENCE
PETITIONER, CAUSING HIM TO BE ILLEGALLY AND
UNLAWFULLY CONFINED IN VIOLATION OF HIS RIGHTS
UNDER U.S. CONST. AMEND[S]. IV, VI, AND XIV
AND N.J. CONST. (1947) ART. 1 PARAS. 1, 9, AND
10.

Our review of defendant's appeal requires the application of
several standards, including the criteria governing PCR
applications, new trial motions, and oral argument of PCR
applications.

Rule 3:22-4(b) places strict limitations on second and subsequent petitions for post-conviction relief. The Rule compels dismissal of a subsequent petition for PCR unless a defendant can satisfy the time requirement within which to seek such relief and the substantive grounds for such relief.

Rule 3:22-12(a)(2) imposes a time limitation for subsequent PCR petitions. In this case, defendant's application is a subsequent petition and therefore must be filed within one year after "the date on which the factual predicate for the relief sought was discovered, if that factual predicate could not have been discovered earlier through the exercise of reasonable diligence." R. 3:22-12(a)(2)(B).

"[A] motion for a new trial is addressed to the sound discretion of the trial judge, and the exercise of that discretion will not be interfered with on appeal unless a clear abuse has been shown." State v. Armour, 446 N.J. Super. 295, 306 (App. Div.) (alteration in original) (quoting State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000)), certif. denied, 228 N.J. 239 (2016).

"The question of whether oral argument is granted on a petition for post-conviction relief remains within the sound discretion of the [PCR] court." State v. Mayron, 344 N.J. Super. 382, 387 (App. Div. 2001). We review such decisions under an

abuse of discretion standard. See State v. Parker, 212 N.J. 269, 283 (2012).

Having reviewed the record, we concur with the judge that defendant's claims are procedurally barred by the New Jersey Court Rules. We also agree with the judge that defendant's claims are based on unfounded assertions and could have been discovered sooner through the exercise of reasonable diligence. We likewise find, as did the judge, that oral argument was not required to decide defendant's seventh application challenging his judgment of conviction.

Rule 3:22-4(b) mandates dismissal of a second or subsequent PCR petition unless it meets the requirements of the rule as to timing and substance. The instant petition represents defendant's third PCR application, subjecting him to the strict requirements of Rule 3:22-4(b).

Defendant contends that his third PCR petition is timely as "the factual predicate for the relief sought could not have been discovered earlier through the exercise of reasonable diligence, and the facts underlying the ground for relief, if proven and viewed in light of the evidence as a whole, would raise a reasonable probability" that relief would be granted. Rule 3:22-4(b)(2)(B). In support of his most recent PCR petition, defendant asserts two factual predicates not discoverable earlier:

(1) that his arrest warrant was based on fabricated information; and (2) that his trial counsel was also the attorney for the New Brunswick Planning Board.

Defendant's challenge to the arrest warrant was previously raised and adjudicated by another panel of this court and, therefore, is barred by Rule 3:22-5. Further, defendant's claim that his arrest warrant was based on false statements is unsupported by any evidence in the record and defendant failed to proffer any evidentiary basis for this claim. Defendant's bare allegations with respect to the arrest warrant do not constitute evidence that would raise a reasonable probability that relief would be granted. See R. 3:22-4(b)(2)(B).

Similarly, defendant's claim that his trial counsel was also the New Brunswick Planning Board attorney, thus presenting a conflict of interest, is not information that could not have been discovered earlier through the exercise of reasonable diligence. This information could have been revealed by a simple inquiry. Furthermore, this information does not raise a reasonable probability that relief would be granted.

We concur with the judge that the arrest warrant allegation is not new and that both allegations were discoverable earlier through the exercise of reasonable diligence. Thus, defendant's

third PCR petition fails to satisfy the substantive requirements of Rule 3:22-4(b) and is untimely pursuant to Rule 3:22-12(a)(2).

Relying on the same arguments, defendant contends that he is entitled to a new trial. Rule 3:20-1 provides that a defendant may be entitled to a new trial "if required in the interests of justice." Rule 3:20-2 specifies that a motion for new trial based on newly discovered evidence may be filed "at any time." In seeking a new trial, a defendant must proffer evidence that is "(1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the trial and not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury's verdict if a new trial were granted." State v. Carter, 85 N.J. 300, 314 (1981).

Defendant's claim that his arrest warrant was based on false statements has no evidentiary basis and has been litigated previously. As such, defendant's newly discovered evidence claim on this ground is not "of the sort that would probably change the jury's verdict." Ibid.

Nor is defendant's discovery that his trial counsel was also the attorney for the New Brunswick Planning Board information that was not discoverable beforehand to warrant a new trial. There is also no basis in the record to support a claim that counsel's representation of the New Brunswick Planning Board created any

conflict that would have changed the jury's verdict. Defendant does not explain how his trial counsel's representation of the Planning Board was prejudicial to his case. Based on our review of the record, trial counsel moved for disclosure of certain evidence by the State, moved to suppress defendant's statements to the police, moved to admit certain evidence against the State's witness and to suppress certain evidence by the State, diligently cross-examined the State's witnesses at trial, and moved for a mistrial after closing. Defendant's representation by an attorney who also was the municipal Planning Board attorney is neither new evidence not available at the time of trial, nor evidence that would tend to lead to a different result.

Defendant argues the motion judge erred by denying his motion without oral argument. Defendant contends that the "barebones statement" in his motion brief regarding his ineffective assistance claim requires the court to conduct oral argument so that he can "fully and meaningfully set forth his claim." Defendant further argues that the motion judge misunderstood the basis of his ineffective assistance claim and that oral argument would have clarified the arguments. Defendant also asserts the judge failed to provide a statement of reasons for denying oral argument.

We find that the judge's decision to deny the motion without oral argument was not an abuse of discretion. A judge's decision to grant oral argument on a PCR petition depends on "the apparent merits and complexity of the issues raised, whether the petition is an initial application, whether argument of counsel will add to the written positions that have been submitted, and in general, whether the goals and purposes of the post-conviction procedure are furthered by oral argument." Mayron, 344 N.J. Super. at 387. While "there is a strong presumption in favor of oral argument in connection with an initial petition for post-conviction relief," Parker, 212 N.J. at 283, this is defendant's third PCR, and defendant had the benefit of oral argument in prior applications.

In his pro se brief, defendant raises additional arguments including: defendant's arrest warrant for violation of a restraining order was invalid as there was no restraining order; defendant was deprived of the ability to present exculpatory evidence at trial; the entire trial was tainted by prosecutorial misconduct related to the restraining order; false statements used to procure the warrant for violation of the restraining order constitute "new evidence" in support of a new trial; defendant's arrest was unconstitutional and, therefore, all information supporting the arrest warrant for violation of the restraining order should have been suppressed as fruit of the poisonous tree;

trial counsel was ineffective for failing to challenge the arrest/warrant; and the trial court impermissibly altered the indictment before trial, stripping the court of jurisdiction. These contentions were raised and adjudicated in prior applications. See State v. Harris, No. A-7683-95 (App. Div. January 5, 1998), certif. denied, 156 N.J. 386 (1998); State v. Harris, No. A-6184-99 (App. Div. June 6, 2000), certif. denied, 176 N.J. 279 (2003); State v. Harris, No. A-5022-06 (App. Div. 2008); certif. denied, 196 N.J. 596 (2008); and State v. Harris, No. A-3781-08 (App. Div. Apr. 27, 2010), certif. denied, 203 N.J. 607.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION