

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

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-1835-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DWAYNE E. STEWART,

Defendant-Appellant.

Submitted February 6, 2018 – Decided March 8, 2018

Before Judges Hoffman and Gilson.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Accusation No.
97-02-0550.

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

Mary Eva Colalillo, Camden County Prosecutor,
attorney for respondent (Maura Murphy
Sullivan, Assistant Prosecutor, and Linda A.
Shashoua, Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant Dwayne E. Stewart appeals from a September 23, 2016
order denying his petition for post-conviction relief (PCR) and

his application to withdraw his guilty plea. We affirm because defendant's petition was time-barred, and he failed to show any of the factors warranting the withdrawal of his guilty plea.

I.

In 1997, defendant was arrested and charged with second-degree endangering the welfare of two children based on allegations of improper sexual contact. The victims were identified by their initials, A.L. and S.L. Approximately one month after those charges were filed, defendant, represented by counsel, negotiated a plea agreement under which he pled guilty to two counts of fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b). In exchange, the State agreed to recommend that defendant be sentenced to five years of probation conditioned on him spending 364 days in the county jail and being subject to Megan's Law registration and reporting, N.J.S.A. 2C:7-1 to -11.

In pleading guilty, defendant reviewed and signed plea forms, including a supplemental form that explained that he would be required to register as a sex offender as proscribed by Megan's Law. During his plea, defendant acknowledged that he reviewed the plea forms with his attorney and he understood the forms. Defendant then pled guilty, testifying that he touched both sixteen-year-old victims in their groin area to gratify himself.

The sentencing did not take place until 1999. In the meantime, the State discovered information that one of the victims, A.L., may have fabricated the claim against defendant. Accordingly, defendant filed an application to withdraw his guilty plea. With the assistance of counsel, defendant then negotiated a new plea agreement. Under that revised plea agreement, defendant was allowed to withdraw his original plea of guilty to the count involving A.L. Defendant continued to acknowledge his guilt with regard to the count involving S.L. In exchange, the State agreed to recommend a three-year term of probation with no additional jail time. Defendant confirmed on the record that his previously entered guilty plea to the count involving S.L. was truthful. Defendant was sentenced in accordance with the revised plea agreement.

On March 30, 2015, defendant, who was self-represented, filed a petition for PCR. He was assigned counsel, and counsel filed an amended verified petition, asserting that defendant should be allowed to withdraw his guilty plea. Thereafter, the court heard oral argument on the petition. On September 23, 2016, the PCR judge, Judge Edward J. McBride, entered an order denying the petition and filed a thirteen-page written opinion supporting that decision.

Defendant claimed his plea counsel was ineffective by incorrectly telling him that he would be subject to Megan's Law reporting for ten years. Defendant went on to argue that he relied on that incorrect information in deciding to plead guilty and, therefore, he should be allowed to withdraw his guilty plea. Judge McBride analyzed those claims under the well-established law governing PCR petitions and the right to withdraw a guilty plea.

With regard to the PCR petition, Judge McBride found that the petition was untimely under Rule 3:22-12(a)(1). The judge noted that defendant was sentenced in 1999, but filed his petition over sixteen years later in March 2015. Judge McBride found that defendant had not shown excusable neglect. In that regard, he noted that defendant's arguments concerning ineffective assistance of counsel related to the contention that he was advised that he would be subject to Megan's Law only for ten years. Judge McBride pointed out that defendant waited six years beyond the ten year period before making this argument.

Judge McBride also analyzed defendant's arguments on the merits. In that regard, Judge McBride found that defendant had not established a prima facie showing of either prong of the Strickland test governing claims of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687 (1984); see also State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the two-part

Strickland test). The judge correctly noted that defendant "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010). Judge McBride then found that defendant's claim that he would have rejected the plea to a fourth-degree crime and risk a conviction on the second-degree crime lacked any credible support in the record.

Turning to the application to withdraw the guilty plea, Judge McBride analyzed the claims under the four factors set forth in State v. Slater, 198 N.J. 145, 157-58 (2009). The judge found that defendant had not established any of those factors and, thus, defendant had not established a basis to withdraw his guilty plea.

II.

On appeal, defendant makes three arguments, which he articulates as follows:

POINT I — DEFENDANT'S PETITION FOR POST CONVICTION RELIEF SHOULD NOT BE TIME BARRED BECAUSE DEFENDANT'S DELAY IN FILING WAS DUE TO EXCUSABLE NEGLIGENCE AND THE INTERESTS OF JUSTICE REQUIRE HIS CLAIMS BE HEARD

POINT II — DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL FOR HAVING BEEN AFFIRMATIVELY MISINFORMED ON THE PENAL CONSEQUENCES OF MEGAN'S LAW REGISTRATION THEREBY ENTITLING HIM TO POST CONVICTION RELIEF AND AN EVIDENTIARY HEARING


POINT III — DEFENDANT IS ENTITLED TO WITHDRAW HIS PLEA BECAUSE THE NATURE AND STRENGTH OF

HIS CLAIM OUTWEIGH THE STATE'S INTEREST IN
PRESERVING THE PLEA

Having reviewed the record in light of defendant's arguments and the law, we conclude that defendant's arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We affirm substantially for the reasons explained by Judge McBride in his comprehensive and well-reasoned opinion.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION