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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-2440-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JASON S. KOKINDA,

Defendant-Appellant.

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Submitted January 30, 2018 – Decided February 13, 2018

Before Judges Leone and Mawla.

On appeal from Superior Court of New Jersey,  
Law Division, Bergen County, Indictment No.  
08-09-1432.

Jason S. Kokinda, appellant pro se.

Dennis Calo, Acting Bergen County Prosecutor,  
attorney for respondent (Annmarie Cozzi,  
Special Deputy Attorney General/Acting Senior  
Assistant Prosecutor, of counsel and on the  
Letter Brief).

PER CURIAM

Defendant Jason Kokinda was indicted on second-degree  
endangering the welfare of a child by transmitting a picture  
depicting child exploitation or abuse, contrary to N.J.S.A. 2C:24-

4(b)(5)(A). He subsequently pled guilty, and pursuant to his plea agreement, was sentenced to three years in prison and required to comply with Megan's law. Defendant filed no direct appeal, but filed a petition for post-conviction relief (PCR), which the court dismissed without prejudice because defendant was incarcerated in Pennsylvania on related charges. Once defendant was released in 2016, he re-filed his PCR petition, which was denied on August 10, 2016. Defendant appeals from this order.

The underlying facts are as follows. In 2007, members of the Bergen County Prosecutor's Office and the Computer Crimes Task Force (CCTF) were conducting undercover investigations of sexual predators in internet chat rooms. On January 27, 2007, a member of the CCTF entered a chat room posing as a mother of two young children. A user, subsequently determined to be defendant, began a sexually explicit conversation with the CCTF investigator regarding sexual relations with children ages fifteen and nine.

The same day, and pursuant to the earlier online chat, defendant emailed the investigator stating "here's some pics." The email contained two photographs. The first photograph depicted a naked prepubescent girl posing for the camera. The second photograph depicted a child less than six years old laying on her back and exposing her vagina to the photographer. As a result, defendant was arrested and charged with endangering the welfare

of a child by transmitting child pornography via the internet. Defendant's plea and sentencing followed.

In his PCR petition, defendant argued he was engaged in role play and should not have been prosecuted for his chat communications. However, the PCR judge correctly pointed out defendant was charged with transmitting two images of child exploitation to the investigator, which met the elements of N.J.S.A. 2C:24-4(b)(5)(a), namely, "[a] person commits a crime of the second degree if, by any means, including but not limited to the Internet, he: (i) knowingly distributes an item depicting the sexual exploitation or abuse of a child[.]"

The PCR judge stated

[defendant] was not charged for his chat communications. However, when viewing the totality of the circumstances including the chat room that petitioner was in, communications sent from petitioner to [the investigator] in that chat room, and the context and nature of the pictures themselves it is apparent that the images depict children under the age of [sixteen], and both images depicted the sexual exploitation or abuse of a child. Further, as petitioner knowingly possessed and distributed these images, the elements of [N.J.S.A. 2C:24-4(b)(5)(a)] are clearly satisfied.

On appeal, defendant argues he was a victim of a conspiracy in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), N.J.S.A. 2C:41-1 to -6.2, which renders his plea

invalid. Defendant re-asserts the claim that he was merely engaged in fantasy role play and should not have been prosecuted for the statements he made to the investigator.

The PCR process affords an adjudged criminal defendant a "last chance to challenge the 'fairness and reliability of a criminal verdict . . . .'" State v. Nash, 212 N.J. 518, 540 (2013) (quoting State v. Feaster, 184 N.J. 235, 249 (2005)); see also Rule 3:22-1. As to our standard of review, "where the [PCR] court does not hold an evidentiary hearing, we may exercise de novo review over the factual inferences the trial court has drawn from the documentary record." State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014).

A petition for PCR may be granted upon the following grounds:

- (a) Substantial denial in the conviction proceedings of defendant's rights under the Constitution of the United States or the Constitution or laws of the State of New Jersey;
- (b) Lack of jurisdiction of the court to impose the judgment rendered upon defendant's conviction;
- (c) Imposition of sentence in excess of or otherwise not in accordance with the sentence authorized by law if raised together with other grounds cognizable under paragraph (a), (b), or (d) of this rule. Otherwise a claim alleging the imposition of sentence in excess of or otherwise not in accordance with the sentence authorized by law shall be filed pursuant to R[ule] 3:21-10(b)(5).

(d) Any ground heretofore available as a basis for collateral attack upon a conviction by habeas corpus or any other common-law or statutory remedy.

[R. 3:22-2.]

"Post-conviction relief is neither a substitute for direct appeal, R[ule] 3:22-3, nor an opportunity to relitigate cases already decided on the merits, R[ule] 3:22-5." State v. Preciose, 129 N.J. 451, 459 (1992). Rule 3:22-10(b) states a defendant is only entitled to an evidentiary hearing where the defendant demonstrates a prima facie case in support of post-conviction relief by showing "a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits."

At the outset, we note defendant did not raise his RICO claims before the PCR court, and has not explained why he did not do so. Defendant also has not offered an explanation as to how barring him from doing so would result in a fundamental injustice, or a constitutional violation. "[A]ppellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (quoting

Reynolds Offset Co., Inc. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959)). For these reasons, we do not consider defendant's RICO claim.

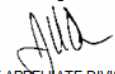
Lastly, defendant cannot obtain relief by contending he was engaged in "fantasy age-oriented role-playing" when he was communicating with the investigator as a grounds for PCR relief. Defendant misapprehends the charges against him. As the PCR judge noted, defendant

was not charged, nor did [defendant] plead guilty to being in a chat room or [for] any of his communications with the undercover officer [who] was pretending to be a mother to a young child. Rather, [defendant] was prosecuted because he transmitted two images of child exploitation to the undercover officer in an email message on January 27, 2007.

Defendant's transmission of two photographs to the investigator clearly established the elements of N.J.S.A. 2C:24-4(b)(5)(a). There is no dispute the photographs depicted sexually explicit images of underage children. Likewise, no credible argument can refute that the act of transmitting the photos met the mens rea requirement of the statute. For these reasons, viewing the facts in a light most favorable to defendant, he failed to demonstrate a prima facie showing of success on the merits of his PCR petition.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION