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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-3100-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CLIVE ROSE,

Defendant-Appellant.

Submitted January 30, 2018 – Decided February 7, 2018

Before Judges Hoffman and Gilson.

On appeal from Superior Court of New Jersey,
Law Division, Somerset County, Indictment No.
02-05-0301.

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

Michael H. Robertson, Somerset County
Prosecutor, attorney for respondent (Perry
Farhat, Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant Clive Rose appeals from a February 15, 2017 order
denying his petition for post-conviction relief (PCR) without an

evidentiary hearing. We affirm because defendant's petition was time-barred under Rule 3:22-12(a)(1).

I.

In May 2002, defendant was indicted for second-degree possession of cocaine with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(2), and third-degree possession of cocaine, N.J.S.A. 2C:35-10(a)(1). The charges against defendant arose out of a motor vehicle stop. Defendant was found to be driving while his license was suspended and he had an outstanding warrant for failure to appear at court. Accordingly, defendant was arrested on the warrant and an inventory search of defendant's jacket revealed over forty-three grams of cocaine.

Defendant moved to suppress the cocaine, but that motion was denied. In March 2003, defendant pled guilty to an amended charge of third-degree possession of cocaine with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(2), and third-degree possession of cocaine, N.J.S.A. 2C:35-10(a)(1).

On his plea form, "N/A" was circled in response to question seventeen, which asked if defendant understood that if he was not a United States citizen he could be deported by virtue of his guilty plea. During his plea, defendant testified that he had answered each of the questions on the plea form after discussing those questions with counsel. Defendant also affirmed that he

understood each of the questions, and that he had answered each of them truthfully. There was no specific discussion concerning defendant's citizenship status during the plea hearing.

With regard to his guilt, defendant testified that he was stopped by police while driving a car with a suspended license and that the police discovered cocaine in the pocket of his coat. Defendant then admitted that he knew the cocaine was there, he possessed the cocaine, and he had the intention to give some of the cocaine to friends and acquaintances.

On August 1, 2003, defendant was sentenced in accordance with the plea agreement to three years of probation, with 364 days in county jail, and fifty hours of community service. Defendant was also ordered to complete substance abuse evaluations and treatment and to pay applicable penalties and assessments.

Defendant filed a direct appeal contending that his motion to suppress the seizure of the cocaine should have been granted. We rejected defendant's arguments and affirmed his conviction and sentence. State v. Rose, No. A-6854-02 (App. Div. May 20, 2004).

On May 31, 2016, defendant filed a petition for PCR. Initially, defendant was self-represented, but after his petition was filed he was assigned counsel. Counsel then filed an amended verified petition and certification. In his amended petition, defendant stated that his "[t]rial counsel was ineffective for the

reasons set forth in Point II of the [b]rief." His brief then stated:

Defendant states that counsel fell well below the performance expected of counsel. In his pro se petition, he recites the specifics of how counsel ignored his request to review the discovery, explain his legal options or file pre-trial motions. Counsel did not even want to consider preparing his case for trial and coerced defendant into taking the plea.

. . . .

[Defendant] asserts that counsel misinformed him about the consequences of his plea regarding his immigration status. Counsel wrongfully advised him that he would not be placed in any jeopardy by pleading guilty to possession of [cocaine] with intent to distribute. Trial counsel assured [defendant] that he was getting his information from an experienced immigration attorney. [Defendant] contends that he never spoke to an immigration attorney prior to pleading guilty and was cajoled into pleading guilty.

The PCR court heard oral arguments on defendant's petition, and on February 15, 2017, the court denied the petition as time-barred by Rule 3:22-12(a)(1). The court explained the reasons for its ruling in a detailed thirteen-page written opinion. Of particular significance, the PCR court found that defendant's trial counsel had passed away in 2015. Thus, the court reasoned that the State would be prejudiced by defendant's unexcused delay in filing his PCR petition because the State could not call defendant's trial counsel to testify at a hearing.

II.

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

POINT ONE — MR. ROSE IS ENTITLED TO A REMAND OR AN EVIDENTIARY HEARING ON HIS CLAIM THAT HIS ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL.

POINT TWO — THE PCR COURT ERRONEOUSLY RULED THAT MR. ROSE'S PETITION WAS TIME BARRED BECAUSE ANY DELAY IN FILING THE PETITION WAS DUE TO EXCUSABLE NEGLIGENCE AND THERE IS A REASONABLE PROBABILITY THAT IF THE DEFENDANT'S FACTUAL ASSERTIONS WERE FOUND TO BE TRUE, ENFORCEMENT OF THE TIME BAR WOULD RESULT IN A FUNDAMENTAL INJUSTICE.

We reject defendant's arguments because his petition is time-barred. Defendant has made no showing of excusable neglect. Just as critically, defendant has made no showing that enforcement of the time bar would result in a fundamental injustice.

Rule 3:22-12(a)(1) precludes PCR petitions filed more than five years after entry of a judgment of conviction unless the delay was "due to defendant's excusable neglect and . . . there is reasonable probability that if the defendant's factual assertions were found to be true enforcement of the time bar would result in a fundamental injustice." Our Supreme Court has stated that "[t]he time bar should be relaxed only 'under exceptional circumstances' because '[as] time passes, justice becomes more elusive and the necessity for preserving finality and certainty

of judgments increases.'" State v. Goodwin, 173 N.J. 583, 594 (2002) (quoting State v. Afanador, 151 N.J. 41, 52 (1997)).

To establish "excusable neglect," a defendant must demonstrate "more than simply . . . a plausible explanation for a failure to file a timely PCR petition." State v. Norman, 405 N.J. Super. 149, 159 (App. Div. 2009). Factors to be considered include "the extent and cause of the delay, the prejudice to the State, and the importance of the [defendant's] claim in determining whether there has been an 'injustice' sufficient to relax the time limits." Afanador, 151 N.J. at 52.

Here, defendant was sentenced on August 1, 2003. His petition for PCR, however, was filed almost thirteen years later on May 31, 2016. Defendant argues that there was excusable neglect for the late filing because he did not learn of his counsel's alleged errors until he was detained by immigration authorities, apparently sometime in 2016. Defendant, however, has failed to offer a plausible explanation for his time delay. Significantly, at his plea hearing, defendant testified under oath that he reviewed each of the questions on his plea form and that he answered each of those questions. He also represented that he reviewed those questions with his counsel and understood the questions. Accordingly, the record reflects that defendant chose

to answer question seventeen concerning his immigration status by representing that it was not applicable; that is, he circled "N/A."

Moreover, defendant filed a direct appeal shortly after he was convicted and sentenced in 2003. Defendant was represented on that appeal by new counsel. Thus, defendant had an opportunity to discuss with appellate counsel his certified response to question seventeen on the plea form, and the alleged misinformation provided by his trial counsel.

Defendant also failed to give a detailed explanation of his contention that his trial counsel was ineffective. With regard to immigration advice, defendant references his brief, but the brief does not give a detailed explanation of the alleged misrepresentation. In contrast, the State would be prejudiced by allowing defendant's vague statements to proceed to a hearing because it could not call defendant's trial counsel since he has passed away.

Defendant has also failed to demonstrate a reasonable probability that enforcement of the time bar would result in a fundamental injustice. Nowhere in defendant's initial or amended certifications does he allege that he was innocent. Instead, the record establishes that defendant gave a knowing, voluntary, and intelligent guilty plea. In pleading guilty, defendant admitted that he possessed the cocaine with the intent to distribute it.

There was nothing vague or equivocal regarding defendant's guilty plea.

Finally, there was no showing that required an evidentiary hearing on defendant's PCR petition. A defendant is entitled to an evidentiary hearing on a PCR petition if he or she establishes a prima facie case in support of the petition. R. 3:22-10(b). To establish a claim of ineffective assistance of counsel, a defendant must satisfy a two-part test: (1) "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[,]" and (2) "the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 58-59 (1987).

Defendant has presented no evidence in support of his contention that his trial counsel ignored his request to review discovery, failed to explain his legal options, and failed to file pre-trial motions. Instead, defendant has simply presented bald assertions, without factual support. Such unsupported assertions do not establish a prima facie showing of ineffective assistance of counsel. See State v. Porter, 216 N.J. 343, 355 (2013) ("[A] defendant is not entitled to an evidentiary hearing if the 'allegations are too vague, conclusory, or speculative to warrant

an evidentiary hearing[.]'"') (quoting State v. Marshall, 148 N.J. 89, 158 (1997)).

Defendant also has not presented a prima facie showing of ineffective assistance of legal counsel concerning his immigration status. When defendant pled guilty in 2003, there was no requirement that defense counsel review a defendant's immigration status with the defendant. Instead, at that time, defense counsel was only ineffective if he provided inaccurate information concerning the immigration consequences of a plea. See Chaidez v. United States, 568 U.S. 342, 357-58 (2013); Padilla v. Kentucky, 559 U.S. 356, 386 (2010) (Alito, J., concurring); State v. Nunez-Valdez, 200 N.J. 129, 143 (2009). Here, defendant has failed to provide a detailed certification warranting a hearing on the alleged incorrect advice of trial counsel. See State v. Brewster, 429 N.J. Super. 387, 399-400 (App. Div. 2013) (holding that a PCR petition filed twelve years after defendant's conviction was time-barred even when defendant claimed that his trial counsel had given him incorrect advice concerning the immigration consequences of his guilty plea).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION