

RECORD IMPOUNDED

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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-3636-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JEROME PEED, a/k/a JERRY PEED,

Defendant-Appellant.

Submitted October 31, 2017 – Decided January 26, 2018

Before Judges Sumners and Moynihan.

On appeal from Superior Court of New Jersey,
Law Division, Cumberland County, Indictment
No. 02-07-0613 and 13-07-0581.

Joseph E. Krakora, Public Defender, attorney
for appellant (Brian D. Driscoll, Designated
Counsel, on the brief).

Jennifer Webb-McRae, Cumberland County
Prosecutor, attorney for respondent (Danielle
R. Pennino, Assistant Prosecutor, of counsel
and on the brief).

PER CURIAM

Defendant Jerome Peed appeals from an order denying his
petition for post-conviction relief (PCR) without an evidentiary

hearing. We affirm because defendant's petition was untimely filed.

Defendant's petition arises from his April 15, 2004 conviction by a jury for second-degree endangering the welfare of a child. The jury found him not guilty of five sexual assault charges. We detailed the facts underlying the conviction when we denied his direct appeal, and need not repeat them here. State v. J.P., No. A-6211-03, (App. Div. June 20, 2006).

After serving his five-year prison sentence without parole eligibility, defendant ran afoul of the law again in July 2013, when he was indicted on four counts of fourth-degree violation of the conditions of community supervision for life. About six months later, in accord with his plea agreement, defendant pled guilty to two of the counts, with the other two counts being dismissed, and he was sentenced to a concurrent prison term of 270 days.

Seeking to terminate his community supervision for life, defendant filed a pro se PCR petition on April 24, 2014. The petition alleged the endangering conviction was the result of prosecutorial misconduct in tampering with the jury during deliberations. After defendant was assigned PCR counsel, the petition was supplemented to allege a claim of ineffective assistance of counsel. Pertinent to the issues raised before us, defendant contended neither trial counsel nor appellate counsel

challenged the trial court's failure to instruct the jury that defendant could only be convicted of endangering if it found him guilty of one of the five sexual assault charges and if it found that he had assumed the responsibility to care for the minor victim. Since the jury found him not guilty of those sexual assault charges, defendant maintains his conviction should be reversed and a judgment of acquittal should be entered because there was no factual or legal basis to support the guilty verdict for endangering.

Defendant subsequently filed a motion to compel interrogation of the jury to substantiate his prosecutorial misconduct claim. The motion was supported by a certification from defendant's brother, Vincent, stating that while he was on a bus, a woman mistook him for defendant and told him she was a member of the jury that found him guilty. She added that the jury had planned to find him innocent until the prosecutor came into the jury room during deliberations and told the jury that it had to find defendant guilty of some offense. Vincent further claimed:

At first[,] I didn't believe that she was actually a member of the jury; however several years later[,] [the woman] and I became co-workers. My brother saw a picture of [the woman] and instantly recognized her as a member of the jury that convicted him.

The certification did not provide the dates Vincent had the conversations with the alleged juror and his brother. The State opposed, submitting the trial prosecutor's certification that he has "never spoken with any jurors before, during, or after any trials," and "never entered [into] a jury deliberation room to inform jurors that they must find [an] individual guilty."

The PCR court denied the motion, stating in an oral decision that there was "no credible evidence to support that allegation, that would cause the [c]ourt to do the extraordinary of bringing a jury back [twelve] years later, interrogating them about conduct that is specifically denied by the [prosecutor] accused of doing it, by [certification] subjecting that [prosecutor] to [p]erjury." The court also found it remarkable that no juror brought the alleged incident to the trial judge's attention as required by the jury instructions.

Five months later, following argument, the court entered an order denying PCR without an evidentiary hearing. In its oral opinion, the court determined the petition was procedurally barred as untimely because it was filed ten years¹ after defendant's endangering conviction, which is well beyond the five-year time limit for filing a PCR petition. The court further found there

¹ The court misspoke by stating eleven or twelve years.

was no manifest injustice to relax the rule's time limitations as defendant's allegation of prosecutorial misconduct was "shocking" and lacked any credibility to change the result of defendant's conviction. Reiterating the credibility assessment it made in denying defendant's motion to compel the interrogation of the jury, the court explained: the juror confronted a man she thought she voted to convict of a sex crime, the juror later worked with defendant's brother, the trial court's procedure of sequestering the jury during its deliberations did not prevent the prosecutor's access to the jury, and the failure of any other juror to complain about the prosecutor's behavior.

The court likewise rejected defendant's claim of ineffective assistance of trial counsel and appellate counsel regarding the jury instruction on endangering because it was untimely raised ten years after his conviction. The court found there was no proof of manifest injustice to allow an extension of the time to make the claim because looking at the instructions as a whole they were not faulty, and any changes as defendant contends would not have altered the outcome. Even assuming the jury instruction was faulty, the court determined it would not have affected the outcome of the trial. The court added that "some" of the jury instruction issues were rejected on direct appeal, and therefore, it could not review them in a PCR petition.

Defendant presents the following arguments for our consideration:

POINT I

THE COURT ERRED IN FINDING THE PETITION FOR POST[-]CONVICTION RELIEF BARRED BY THE TIME LIMITS OF [Rule 3:22-12(a)].

POINT II

THE COURT ERRED IN FINDING THAT THE CLAIM OF IMPROPER JURY INSTRUCTION ON COUNT SEVEN HAD PREVIOUSLY BEEN RAISED ON APPEAL.

POINT III

THE COURT ERRED IN DENYING AN EVIDENCE HEARING AND IN DENYING THE PETITION FOR POST[-] CONVICTION RELIEF.

Having reviewed the record on appeal, we agree with the argument in Point II that the jury instruction contention was not raised on direct appeal and thus should not have been rejected by the court. Nonetheless, we agree substantially for the reasons expressed in the court's oral decision that defendant's petition should be dismissed without an evidentiary hearing because it was untimely filed. We add the following comments.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-part Strickland test by demonstrating that "counsel's performance was deficient," that is, "counsel made errors so serious that counsel was not functioning as the 'counsel'

guaranteed [to] the defendant by the Sixth Amendment," and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 687, 694 (1984); accord State v. Fritz, 105 N.J. 42, 58 (1987).

The mere raising of a claim for PCR does not entitle a defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (1999). A court reviewing a PCR petition based on claims of ineffective assistance has the discretion to grant an evidentiary hearing only if a defendant establishes a prima facie showing in support of the requested relief. State v. Preciose, 129 N.J. 451, 462 (1992). The court should only conduct a hearing if there are disputed issues as to material facts regarding entitlement to PCR that cannot be resolved based on the existing record supported by "specific facts and evidence supporting his allegations." State v. Porter, 216 N.J. 343, 354-55 (2013).

In order to establish a prima facie claim, a defendant's petition must satisfy the time limits for filing a claim. See State v. Echols, 199 N.J. 344, 357 (2009). Rule 3:22-12(a)(1) provides that a defendant's first petition for PCR shall be filed no more than five years after the entry of the judgment of conviction. However, Rule 3:22-12(a)(1)(A) allows a court to

relax the five-year time bar if the petition alleges facts showing the filing was untimely due to defendant's excusable neglect and there is a reasonable probability that, if defendant's factual assertions were found to be true, enforcement of the time bar would result in a fundamental injustice.

"The concept of excusable neglect encompasses more than simply providing a plausible explanation for a failure to file a timely PCR petition." State v. Norman, 405 N.J. Super. 149, 159 (App. Div. 2009). A defendant's lack of sophistication in the law does not relax the time-bar. State v. Murray, 162 N.J. 240, 246 (2000). If the petitioner fails to allege sufficient facts, this rule bars the claim. State v. Mitchell, 126 N.J. 565, 576 (1992).


Here, the judgment of conviction was entered on April 15, 2004, and defendant's first and only PCR was filed ten years later on April 24, 2014. Defendant asserts he established excusable neglect through Vincent's certification, which the PCR court did not address. We disagree. The certification sets forth no dates or time frame when the juror told Vincent, or when Vincent told defendant, about the prosecutor's alleged misconduct. Thus, defendant fails to substantiate when he should have filed his PCR claim of prosecutorial misconduct, which is necessary to establish it was timely filed. As for the ineffective assistance claim related to the jury instructions, it arose during the trial and

the time for filing tolled upon defendant's conviction. And defendant offers no excusable neglect for not raising the claim within five years of his conviction.

Since defendant has not established excusable neglect for filing an untimely PCR petition, we need not address the merits of his claims to determine whether enforcement of the time bar would result in a fundamental injustice. See R. 3:22-12(a)(1)(A). Accordingly, the petition is procedurally barred as untimely.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION