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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-4717-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ISRAEL A. SEPULVEDA, a/k/a
JESSE MENESES, and ALEX SEPULVEDA,

Defendant-Appellant.

Submitted May 24, 2018 – Decided May 31, 2018

Before Judges Haas and Rothstadt.

On appeal from Superior Court of New Jersey,
Law Division, Morris County, Accusation No.
15-12-1116.

Joseph E. Krakora, Public Defender, attorney
for appellant (Abby P. Schwartz, Designated
Counsel, on the brief).

Fredric M. Knapp, Morris County Prosecutor,
attorney for respondent (Paula Jordao,
Assistant Prosecutor, on the brief).

PER CURIAM

Defendant appeals from the January 31, 2017 Law Division order denying his petition for post-conviction relief (PCR). We affirm.

After being charged with a number of offenses in a multi-count indictment, defendant pled guilty to second-degree distribution of a controlled dangerous substance; third-degree receiving stolen property; and fourth-degree shoplifting. On December 12, 2014, defendant was sentenced to Drug Court Special Probation on these charges.

While serving that sentence, defendant was arrested for, and later charged in a four-count Accusation with, third-degree possession of heroin (count one); third-degree possession of heroin with intent to distribute (count two); third-degree conspiracy to distribute heroin (count three); and fourth-degree hindering apprehension (count four). Defendant was also charged with a violation of probation (VOP) in connection with his Drug Court sentence.

On December 16, 2015, defendant pled guilty to count two of the Accusation. In return for his guilty plea, the State agreed to recommend to the trial judge that defendant be sentenced to a three-year term, and that this sentence be concurrent to the

sentence defendant would receive from the Drug Court judge¹ on the VOP if that judge were to terminate defendant from Drug Court and re-sentence him on the three charges that had originally formed the basis for that sentence. The State also agreed to recommend the imposition of a three-year term on the VOP, and to dismiss the three remaining charges in the Accusation.

Defendant was scheduled to be sentenced separately on the same day for both matters. Before beginning his sentencing proceeding on the heroin distribution charge, the trial judge advised defendant and his attorney² that he had spoken to the Drug Court judge, who stated he would likely reject the plea agreement and sentence defendant to a consecutive sentence for the VOP. In light of this, the trial judge advised defendant that he could withdraw his guilty plea. However, defendant decided to proceed, and the trial judge sentenced him to a three-year term on the distribution charge.

Later that day, defendant appeared before the Drug Court judge on the VOP. At that proceeding, defendant pled guilty to

¹ Three different judges were involved in the proceedings leading to this appeal. The first judge presided at the plea proceeding. The second judge (trial judge) sentenced defendant on the heroin distribution charge, and the third judge (Drug Court judge) sentenced defendant on the VOP.

² One attorney represented defendant before the trial judge, and a different attorney represented defendant in the Drug Court.

the VOP after the Drug Court judge conducted a thorough colloquy with defendant. The judge advised defendant that he did not have to plead guilty to the VOP and could take back his guilty plea on the heroin distribution charge in view of the judge's statement that he was not inclined to sentence defendant to a concurrent sentence. Defendant agreed to proceed with the sentencing.

At oral argument, defendant's attorney strenuously argued that the Drug Court judge should impose a three-year concurrent term on the VOP. However, for the reasons expressed in detail in the judge's oral opinion, he sentenced defendant to a consecutive three-year term on the second-degree drug distribution charge, a concurrent three-year term on the third-degree receiving stolen property charge, and a concurrent one-year term on the fourth-degree shoplifting charge.

Defendant did not file a direct appeal challenging the Drug Court judge's sentence. Instead, defendant filed a PCR petition, alleging that he received ineffective assistance from his attorneys because they failed to argue for a concurrent sentence on the VOP.

The Drug Court judge presided at oral argument on the petition³ and, following oral argument, rendered a thorough written opinion denying it. The judge found "[d]efendant's claims of ineffective assistance of counsel to be completely meritless" because his attorneys argued vigorously on his behalf for concurrent sentences, and ensured that defendant was fully aware that he had the right to withdraw his plea to the heroin distribution charge and the right to have a hearing on the VOP charge rather than entering a guilty plea. Thus, the judge concluded that defendant failed to satisfy the two-prong test of Strickland v. Washington, 466 U.S. 668, 687 (1984), which requires a showing that trial counsel's performance was deficient and that, but for the deficient performance, the result would have been different.

The judge also determined that defendant's challenge to the terms of his sentence was barred because it was based solely on

³ In his petition, defendant stated that he did not wish to withdraw his guilty pleas to any of the charges; he just wanted the sentences to be concurrent. At oral argument, however, defendant's attorney stated that defendant was "willing to withdraw his plea and go to trial if necessary." In spite of this statement, defendant made no formal motion to withdraw either of his pleas and, in his appellate brief, now states that he "has made it clear throughout that he does not want his pleas of guilty withdrawn"

the trial record and could have been raised on direct appeal. R. 3:22-4(a). This appeal followed.

On appeal, defendant no longer contends that his trial attorneys provided ineffective assistance to him in connection with his sentences. Instead, he attempts to directly challenge his sentences because they were not concurrent. Specifically, defendant argues that he "was denied due process and a fair trial when one judge overstepped his allowable judicial role and left both the State and the defense with no options to enforce the plea bargain, as a result of which the PCR court erred in denying the defendant's petition for [PCR]." We disagree.

It is well established that a PCR petition "is not . . . a substitute for appeal" R. 3:22-3; see, e.g., State v. Hess, 207 N.J. 123, 145 (2011). Therefore, a defendant "is generally barred from presenting a claim on PCR that could have been raised at trial or on direct appeal, R. 3:22-4(a)[.]" State v. Nash, 212 N.J. 518, 546 (2013). Under Rule 3:22-4(a),

[a]ny ground for relief not raised in the proceedings resulting in the conviction, or in a [PCR] proceeding brought and decided prior to the adoption of this rule, or in any appeal taken in any such proceedings is barred from assertion in a [PCR] proceeding . . . unless the court on motion or at the hearing finds:

(1) that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; or

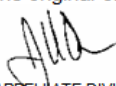
(2) that enforcement of the bar to preclude claims, including one for ineffective assistance of counsel, would result in fundamental injustice; or

(3) that denial of relief would be contrary to a new rule of constitutional law under either the Constitution of the United States or the State of New Jersey.

Here, defendant did not file a direct appeal challenging his sentences or the proceedings the judges followed in determining them. Defendant does not assert that any of the three exceptions to the Rule 3:22-4(a) bar apply in this case. Therefore, the trial court properly denied defendant's 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