

RECORD IMPOUNDED

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1805-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

T.R.G.,

Defendant-Appellant.

Submitted March 24, 2022 – Decided April 21, 2022

Before Judges Mawla and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 13-01-0003.

Joseph E. Krakora, Public Defender, attorney for appellant (Steven M. Gilson, Designated Counsel, on the brief).

Grace C. MacAulay, Camden County Prosecutor, attorney for respondent (Hannah M. Franke, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant T.G. appeals from a July 20, 2020 order denying his petition for post-conviction relief (PCR). After careful review of the record and the governing legal principles, we affirm.

In the underlying offense, defendant was charged with sexually assaulting his three step-granddaughters. After a trial, a jury convicted defendant of one count of aggravated assault, N.J.S.A. 2C:14-2(a)(1); two counts of sexual assault, N.J.S.A. 2C:14-2(b); and three counts of endangering the welfare of a child, N.J.S.A. 2C:24-4(a). The factual record is detailed in our opinion affirming defendant's conviction and sentence. See State v. T.R.G., No. A-5308-14 (App. Div. Nov. 17, 2017) (slip op. at 1-13).

On February 19, 2019, defendant filed this PCR petition based on alleged ineffective assistance of counsel. Defense counsel submitted a petition for PCR on or about January 31, 2020, in support of defendant's pro se petition. On July 20, 2020, the PCR judge issued an order and accompanying written opinion denying defendant's petition without a hearing.

On appeal, defendant raises the following points for our consideration:

POINT I

THE DEFENDANT'S CLAIMS OF TRIAL
COUNSEL'S INEFFECTIVENESS SHOULD NOT
HAVE BEEN PROCEDURALLY BARRED.

POINT II

THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE THE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF TRIAL COUNSEL'S INEFFECTIVENESS.

- A. Trial Counsel Failed To Object To The Prosecution's Vouching For And Bolstering The Alleged Victims' Credibility.
- B. Trial Counsel Failed To Inform The Defendant Of The Negative Impact Of Pleading The Fifth Amendment While Testifying.

"[W]e review under the abuse of discretion standard the PCR court's determination to proceed without an evidentiary hearing." State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013). "If the court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to post-conviction relief, . . . then an evidentiary hearing need not be granted." Ibid. (quoting State v. Marshall, 148 N.J. 89, 158 (1997)). We review the denial of a PCR petition with "deference to the trial court's factual findings . . . 'when supported by adequate, substantial and credible evidence.'" State v. Harris, 181 N.J. 391, 415 (2004) (quoting Toll Bros., Inc. v. Twp. of W. Windsor, 173 N.J. 502, 549 (2002)).

Where, as here, "no evidentiary hearing has been held, we 'may exercise de novo review over the factual inferences drawn from the documentary record

by the [PCR judge].'" State v. Reevey, 417 N.J. Super. 134, 146-47 (App. Div. 2010) (alteration in original) (quoting Harris, 181 N.J. at 421). We also review de novo the legal conclusions of the PCR judge. Harris, 181 N.J. at 415.

When an allegation underpinning an ineffective assistance of counsel claim has already been raised on direct appeal, "it may be procedurally barred on PCR by Rule 3:22-5." State v. McQuaid, 147 N.J. 464, 484 (1997). Rule 3:22-5 provides:

A prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any post-conviction proceeding brought pursuant to this rule or prior to the adoption thereof, or in any appeal taken from such proceedings.

"Preclusion of consideration of an argument presented in post-conviction relief proceedings should be effected only if the issue [raised] is identical or substantially equivalent' to that issue previously adjudicated on its merits." McQuaid, 147 N.J. at 484 (quoting State v. Bontempo, 170 N.J. Super. 220, 234 (Law Div. 1979)). The court will not accept a defendant's contention that he was unable to raise the issue of ineffective assistance of counsel in cases where the issue "could have been raised and would be procedurally barred but for the constitutional attiring of the petition in ineffective assistance of counsel clothing." State v. Moore, 273 N.J. Super. 118, 125 (App. Div. 1994).

As the PCR judge found, the substantive issue of the effect of defendant's unexpectedly pleading the Fifth Amendment in the midst of his testimony was fully addressed on direct appeal. On direct appeal, we found that any prejudice was as a result of defendant's own conduct and did not warrant reversal. T.R.G., slip op. at 23. Defendant cannot avoid the procedural bar by repackaging the claim as one for ineffective assistance of counsel. Moreover, as the PCR court also found, defendant's claim is a bald assertion unsupported by any competent evidence. See State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999) ("[I]n order to establish a prima facie claim, a petitioner must do more than make bald assertions that he was denied the effective assistance of counsel. He must allege facts sufficient to demonstrate counsel's alleged substandard performance.").

Further, Rule 3:22-4(a) provides:

(a) First Petition for Post-Conviction Relief. Any ground for relief not raised in the proceedings resulting in the conviction . . . or in any appeal taken in any such proceedings is barred from assertion in a proceeding under this rule 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.

We agree with the PCR judge's conclusion that defendant's claim that the prosecutor's comments improperly bolstered the victim's credibility is procedurally barred because the issue could have been raised on direct appeal. Specifically, the judge noted that, in accordance with Rule 3:22-4, there were "no factual predicates in this petition for post-conviction relief that could not have been discovered earlier through the exercise of reasonable diligence." The judge further determined that defendant had "failed to demonstrate that a fundamental injustice would occur if his present claim[s] were barred from consideration in a petition for post-conviction relief" and that he "failed to allege any new constitutional law that the bar on his claims would violate." Defendant chose not to raise the issue of the prosecutor's alleged bolstering of the victim's credibility on direct appeal. The judge's findings are supported by the record and his legal conclusions are sound. We discern no abuse of discretion warranting reversal.

To the extent we have not addressed defendant's arguments, we find they lack sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(2).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION