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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1806-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NICHOLAS H. NIGRO,

Defendant-Appellant.

Submitted May 17, 2022 – Decided June 10, 2022

Before Judges Fisher and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 09-12-2961.

Joseph E. Krakora, Public Defender, attorney for appellant (Craig S. Leeds, Designated Counsel, on the brief).

Cary S. Shill, Acting Atlantic County Prosecutor, attorney for respondent (John J. Santoliquido, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Nicholas H. Nigro appeals from the March 5, 2020 order of the Law Division denying his petition for post-conviction relief (PCR) without an evidentiary hearing, as well as the June 30, 2020 order denying his motion for reconsideration. We affirm.

I.

In April 2011, a jury convicted defendant of the first-degree murders of his fiancée and her mother, along with three related offenses. In May 2011, the trial court sentenced defendant to an aggregate 125-year prison term subject to the No Early Release Act, N.J.S.A. 2C:43-7.2.

On June 16, 2014, defendant, acting without counsel, filed a PCR petition alleging ineffective assistance of trial counsel. Because he had not yet exhausted his appeal rights, the Law Division dismissed the petition without prejudice.

On August 24, 2015, more than four years after entry of the judgment of conviction, defendant filed his direct appeal. We affirmed defendant's judgment of conviction in 2016. State v. Nigro, No. A-5246-10 (App. Div. Nov. 3, 2016). On October 10, 2017, the Supreme Court denied his petition for certification. State v. Nigro, 231 N.J. 221 (2017).

On March 6, 2018, defendant, acting without counsel, re-filed his PCR petition alleging ineffective assistance of trial counsel. An attorney

subsequently filed an amended petition on defendant's behalf. Defendant alleged his trial counsel was ineffective because he: (1) failed to file a motion in limine regarding the testimony of Brian Schultz and photographs of defendant's gun collection; (2) allowed the jury to have unsupervised access during deliberations to a video of his interrogation and confession; (3) did not properly investigate his case and review all of the discovery with defendant; (4) did not present an expert witness to offer an opinion on the phenomenon of false confessions; (5) did not highlight inconsistencies between defendant's confession and established facts relating to the murders; (6) failed to investigate alternative suspects; and (7) presented a flawed argument on appeal with respect to the suppression of defendant's confession.

Judge Jeffrey J. Waldman issued a detailed written opinion rejecting defendant's petition. The judge found that the petition was procedurally barred because it was not filed within five years of entry of the judgment of conviction, State v. Cummings, 321 N.J. Super. 154, 165 (App. Div. 1999), or ninety days of the conclusion of defendant's direct appeal. See R. 3:22-12(a)(3).

Judge Waldman also concluded that, even if the petition was not time barred, defendant had not made a prima facie showing of ineffective assistance of counsel. With respect to the failure to file a motion in limine, the court found

defendant's trial counsel was aware of potentially overly prejudicial remarks Schultz had made about defendant in the past. According to the judge, a review of the trial transcript revealed that defendant's counsel convinced the assistant prosecutor to instruct the witness not to repeat those remarks when testifying, negating the need for a motion in limine. In addition, the court concluded that Schultz's testimony was not overly prejudicial to defendant because it merely established that defendant owned and had experience with guns, which he admitted during his interrogation.

The court also found that trial counsel had successfully objected to the introduction of the photographs of defendant's gun collection after one such photograph was shown to the jury. Judge Waldman found that the jury's exposure to the photograph was not overly prejudicial, in light of the fact that defendant admitted to owning guns during his interrogation and Schultz testified that defendant owned several guns.

With respect to the jury's access to the recording of defendant's interrogation and confession, on defendant's direct appeal, we concluded it was error to allow the jury unfettered access to the recording. See State v. Burr, 195 N.J. 119 (2008). However, in light of the fact that defendant's counsel was aware of the holding in Burr and consented to submission of the recording to the jury,

we concluded the error was invited. We also found the error did not cause a fundamental miscarriage of justice that would warrant reversal of defendant's conviction despite the invited error doctrine.

Judge Waldman found trial counsel's decision to waive Burr and encourage submission of the recording to the jury was an informed, strategic decision. Counsel had argued defendant's confession, which had been shown during the trial, was factually incorrect in some respects, suggesting it was false, and that he was pressured into confessing by the officers who interrogated him. In addition, the judge found defendant had not established how submission of the recording to the jury resulted in a conviction that would not have been obtained had the jury been required to review the video in the courtroom.

The court also found defendant offered no details, examples, or evidence of his trial counsel's alleged failure to review discovery with him properly. As Judge Waldman noted, defendant's claim was based only on the bald assertion that he would have given more serious consideration to plea offers had he better understood the evidence on which the State intended to rely at trial. Similarly, the judge concluded that defendant offered no details with respect to his counsel's alleged failure properly to investigate the case. This included, the

judge found, an absence of evidence that an alternative suspect, worthy of investigation, was called to counsel's attention.

Judge Waldman also rejected defendant's argument with respect to his counsel's failure to call as a witness an expert in false confessions. First, the judge found that defendant's arguments were, in effect, addressed and rejected in his direct appeal, where he argued that his confession was psychologically compelled by the detectives who interrogated him. Thus, the judge concluded, defendant's claims on this point were barred by Rules 3:22-4 and -5. In addition, the judge concluded that expert testimony with respect to the credibility of a confession is inadmissible under N.J.R.E. 702, see State v. Free, 351 N.J. Super. 203 (App. Div. 2002).

Finally, Judge Waldman found the remaining claims in the PCR petition to be little more than unsupported expressions of defendant's dissatisfaction with the outcome of his trial. Each allegation with respect to counsel's failure to pursue a line of questioning or to object to particular evidence, the judge found, was not supported by the record. In addition, defendant's allegations with respect to counsel's failure to investigate alleged evidence were not supported by proof that any such evidence existed or, if it did exist, that it would have been admitted at trial or changed the verdict. The judge also concluded appellate

counsel's reliance on particular precedents was a strategic decision and did not affect the outcome of the appeal.

A March 5, 2020 order memorializes the trial court's dismissal of defendant's PCR petition.

Defendant subsequently moved for reconsideration of the March 5, 2020 order. He argued that Judge Waldman erred when he suggested in his opinion that defendant had not argued that excusable neglect caused the late filing of his petition. On that point, defendant had argued that the order dismissing his pre-appeal PCR petition did not contain language notifying him he must refile the petition in accordance with Rule 3:22-12(a)(3).

In a June 30, 2020 order, Judge John R. Rauh denied defendant's motion, finding that the portion of Judge Waldman's opinion appearing to state that defendant did not argue excusable neglect was incorrect, but alteration of the order dismissing the petition was not warranted.

This appeal follows. Defendant reiterates the arguments presented in the trial court and argues Judges Waldman and Rauh erred in their legal analysis.

II.

Rule 3:22-12 requires a PCR petition to be filed within five years of the judgment of conviction unless excusable neglect can be shown. "[T]he burden

to justify filing a petition after the five-year period will increase with the extent of the delay." State v. Afanador, 151 N.J. 41, 52 (1997). In addition, a PCR petition dismissed without prejudice because of a pending direct appeal

shall be treated as a first petition for purposes of these rules if refiled within 90 days of the date of the judgment on direct appeal, including consideration of a petition for certification, or within five years after the date of the entry pursuant to Rule 3:21-5 of the judgment of conviction that is being challenged.

[R. 3:22-12(a)(3).]

With respect to the substantive allegations, a defendant is entitled to PCR if there was a "[s]ubstantial 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" Rule 3:22-2(a). "A petitioner must establish the right to such relief by a preponderance of the credible evidence." State v. Preciose, 129 N.J. 451, 459 (1992). "To sustain that burden, specific facts" which "would provide the court with an adequate basis on which to rest its decision" must be articulated. State v. Mitchell, 126 N.J. 565, 579 (1992).

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee criminal defendants the right to the effective assistance of counsel. State v. O'Neil, 219 N.J. 598, 610 (2014) (citing Strickland v. Washington, 466 U.S. 668, 686 (1984); State v.

Fritz, 105 N.J. 42, 58 (1987)). To succeed on a claim of ineffective assistance of counsel, the defendant must meet the two-part test established by Strickland, and adopted by our Supreme Court in Fritz. 466 U.S. at 687; 105 N.J. at 58.

Under Strickland, a defendant first must show that his or her attorney made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687. Counsel's performance is deficient if it "[falls] below an objective standard of reasonableness." Id. at 688.

A defendant also must show that counsel's "deficient performance prejudiced the defense[,]" id. at 687, because "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. Ibid. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Id. at 697; State v. Marshall, 148 N.J. 89, 261 (1997). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Strickland, 466 U.S. at 697.

We review a judge's decision to deny a PCR petition without an evidentiary hearing for abuse of discretion. State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013) (citing Marshall, 148 N.J. at 157-58). A hearing is required only when: (1) a defendant establishes a prima facie case in support of PCR; (2) the court determines that there are disputed issues of material fact that cannot be resolved by review of the existing record; and (3) the court determines that an evidentiary hearing is required to resolve the claims asserted. State v. Porter, 216 N.J. 343, 354 (2013) (citing R. 3:22-10(b)). "A prima facie case is established when a defendant demonstrates '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.'" Id. at 355 (quoting R. 3:22-10(b)).

"[T]o establish a prima facie claim, a petitioner must do more than make bald assertions that he was denied effective assistance of counsel." Ibid. (quoting Cummings, 321 N.J. Super. at 170). A PCR petition must be "accompanied by an affidavit or certification by defendant, or by others, setting forth with particularity[,]" State v. Jones, 219 N.J. 298, 312 (2014), "facts sufficient to demonstrate counsel's alleged substandard performance[,]" Porter, 216 N.J. at 355 (quoting Cummings, 321 N.J. Super. at 170). See also R. 3:22-10(c).

Having carefully reviewed defendant's arguments in light of the record and applicable legal principles, we affirm the March 5, 2020 order substantially for the reasons set forth by Judge Waldman in his thorough and well-reasoned written decision. We agree that defendant's petition is time barred, having been filed after the period permitted by Rule 3:22-12(a)(3) without excusable neglect justifying the delay. We also agree that, even if we were to consider the petition to have been timely filed, defendant's substantive allegations are without merit and he did not make a sufficient showing to warrant an evidentiary hearing.

With respect to defendant's appeal of the June 30, 2020 order denying his motion for reconsideration, Rule 4:49-2 provides:

Except as otherwise provided by R. 1:13-1 (clerical errors) a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall . . . state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred, and shall have annexed thereto a copy of the judgment or order sought to be reconsidered and a copy of the court's corresponding written opinion, if any.

"A motion for reconsideration . . . is a matter left to the trial court's sound discretion." Lee v. Brown, 232 N.J. 114, 126 (2018) (quoting Guido v. Duane Morris, LLP, 202 N.J. 79, 87 (2010)); see also Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996). A party may move for reconsideration of a

court's decision pursuant to Rule 4:49-2, on the grounds that (1) the court based its decision on "a palpably incorrect or irrational basis," (2) the court either failed to consider or "appreciate the significance of probative, competent evidence," or (3) the moving party is presenting "new or additional information . . . which it could not have provided on the first application." Id. at 384 (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401-02 (Ch. Div. 1990)). The moving party must "initially demonstrate that the [c]ourt acted in an arbitrary, capricious, or unreasonable manner, before the [c]ourt should engage in the actual reconsideration process." D'Atria, 242 N.J. Super. at 401. A motion for reconsideration is not an opportunity to "expand the record and reargue a motion. [It] is designed to seek review of an order based on the evidence before the court on the initial motion, . . . not to serve as a vehicle to introduce new evidence in order to cure an inadequacy in the motion record." Cap. Fin. Co. of Del. Valley v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div. 2008).

Our review of the record uncovered no evidence of excusable neglect justifying the late filing of defendant's PCR petition. Thus, while Judge Waldman mistakenly suggested defendant did not argue that his petition should be considered timely because of excusable neglect, when the substantive basis

of Judge Waldman's decision was examined, Judge Rauh correctly concluded that no change to the order dismissing the petition was warranted.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION