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APPROVAL OF THE APPELLATE DIVISION**

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-2371-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WAYNE T. PARKER,

Defendant-Appellant.

Submitted April 7, 2022 – Decided May 2, 2022

Before Judges Haas and Alvarez.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 04-02-0178.

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

Jennifer Webb-McRae, Cumberland County Prosecutor, attorney for respondent (Kaila L. Diodati, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Wayne T. Parker appeals from the denial of his second post-conviction relief (PCR) petition. We affirm.

Defendant was convicted by a jury of the brutal September 8, 2003 home invasion burglary and the aggravated assaults upon two eighty-year-old victims. Details of the offenses are set forth in two earlier unpublished opinions regarding this matter, and need not be repeated here. The first opinion, rendered July 13, 2009, addressed defendant's direct appeal on the merits. State v. Parker, No. A-1593-05 (App. Div. July 13, 2009). In his counseled and uncounseled briefs, defendant raised fifteen points of error, including an attack on two aspects of the jury charges. The matter was remanded for resentencing in accord with the newly minted decision in State v. Pierce, 188 N.J. 155 (2006). The Supreme Court denied certification on defendant's appeal of our decision affirming the convictions. State v. Parker, 200 N.J. 547 (2009). On July 6, 2017, we affirmed the Law Division's January 19, 2015 denial of defendant's first PCR petition. State v. Parker, No. A-3990-14 (App. Div. July 6, 2017), certif. denied, 232 N.J. 48 (2018). Defendant had asserted ineffective assistance of counsel on multiple grounds before the Law Division judge. In his appeal of denial of his PCR petition, defendant raised the following points of error on appeal:

POINT I

[DEFENDANT] IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT HIS ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL.

POINT II

THIS MATTER MUST BE REMANDED BECAUSE THE PCR COURT DENIED RELIEF WITHOUT STATING FINDINGS OF FACT OR CONCLUSIONS OF LAW (NOT RAISED BELOW).

In the decision, we specifically discussed Rule 3:22-4, which bars claims that could have been raised on direct appeal from being litigated on PCR. We also discussed defendant's challenges to the jury instructions. The Supreme Court denied certification on January 9, 2018. Parker, 232 N.J. at 48.

Defendant filed this second PCR petition on December 14, 2018, and it was denied by the Law Division judge on July 24, 2020. Defendant now argues on appeal:

POINT I

THE DEFENDANT'S SECOND PCR PETITION SHOULD NOT HAVE BEEN TIME-BARRED.

POINT II

THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE THE DEFENDANT ESTABLISHED A PRIMA FACIE

CASE OF TRIAL, APPELLATE AND FIRST PCR
COUNSELS' INEFFECTIVENESS.

- A. Trial, Appellate and First PCR Counsel Failed to Pursue the Trial Court's Erroneous Omission in its Jury Charge That, in Order to Convict the Defendant of First-Degree Kidnapping, He "Knowingly" Failed to Release the Victims Unharmed and in a Safe Place Prior to Apprehension.
- B. Trial, Appellate and First PCR Counsel Failed to Pursue the Trial Court's Erroneous Inclusion of Invalid Types of Criminal Attempt in its Jury Charge.

Defendant's claims lack sufficient merit to warrant much discussion in a written opinion. See R. 2:11-3(e)(2).

Rule 3:22-12(a)(2)(C) explains a second or subsequent petition for PCR must be filed no more than one year after "the date of the denial of the first or subsequent application for [PCR] where ineffective assistance of counsel that represented the defendant on a first or subsequent application for [PCR] is being alleged." The rule may not be relaxed in the absence of the specific exceptions enumerated therein, none of which apply here.

Defendant's first PCR was denied January 19, 2015. A second petition was filed December 14, 2018, some three and a half years later. This application is time barred, and denial of relief is therefore affirmed for procedural reasons.

The decision in State v. Jackson, 454 N.J. Super. 284 (App. Div. 2018), informs the outcome. In that case, a second PCR petition was filed years after the first was denied. Id. at 289-90. The first alleged ineffective assistance of trial counsel, the second ineffective assistance of PCR counsel. Ibid. In fact, Jackson argued that the incompetence of first PCR counsel was so grave that he should not be considered to have filed a PCR petition in the first instance. Id. at 290-91. We discussed Rule 3:22-12(a)(2)(C), finding that since the "second petition was not filed within one year of the date of the denial of his first PCR . . . the PCR court properly dismissed his second PCR petition under R. 3:22-4(b)(1)" because the petition was untimely under Rule 3:22-1(a)(2)(C). Id. at 292. We explained that the Court prohibits expanding the time frame for filing subsequent PCR petitions. Id. at 292-93. This includes the excusable neglect and fundamental injustice exception. Id. at 293-94; see R. 3:22-12(a)(1).

Even ignoring the time bar, defendant does not demonstrate how the alleged errors of prior counsel would have altered the outcome. The State presented overwhelming proofs at the trial. The alleged errors in the jury instructions do not establish "legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the

error possessed a clear capacity to bring about an unjust result." State v. Montalvo, 229 N.J. 300, 321 (2017) (quoting State v. Chapland, 187 N.J. 275, 289 (2006)). Defendant therefore fails to meet the second prong of Strickland—that the alleged ineffective assistance of counsel prejudiced the outcome. See Strickland v. Washington, 466 U.S. 668, 687 (1984) (holding ineffective assistance of counsel claims require a defendant establish both that counsel performed deficiently and that the representation "prejudiced the defense[,] rendering the result unreliable). In other words, the claims defendant now wishes to raise regarding jury trial instructions did not have the potential to prejudice the outcome, which means no prima facie case of ineffective assistance has been established.

This application is time-barred. Even so, defendant did not make out a prima facie case of ineffective assistance of counsel.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION