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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-3011-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HECTOR S. ALVAREZ,

Defendant-Appellant.

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Submitted October 25, 2022 – Decided December 5, 2022

Before Judges Messano and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 07-12-2012.

Joseph E. Krakora, Public Defender, attorney for appellant (Mark Zavotsky, Designated Counsel, on the brief).

Mark Musella, Bergen County Prosecutor, attorney for respondent (William P. Miller, Assistant Prosecutor, of counsel; Catherine A. Foddai, Legal Assistant, on the brief).

PER CURIAM

A jury convicted defendant Hector S. Alvarez of second-degree conspiracy to commit robbery and fourth-degree attempted theft as a lesser-included offense of armed robbery. The charges arose from a conspiracy defendant had hatched with his fellow New York City police officer Miguel Castillo to rob an alleged drug dealer and money launderer in Rutherford. State v. Alvarez, Docket No. A-3332-10 (App. Div. Dec. 21, 2012) (slip op. at 2). Defendant admitted to the plan during an interrogation at Rutherford police headquarters, and Castillo testified for the State at trial. Id. at 7.

On August 6, 2010, the trial judge sentenced defendant to nine years' imprisonment subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, on the conspiracy conviction and a concurrent eighteen-month term on the attempted theft conviction.[1] We affirmed defendant's conviction and sentence on direct appeal, id. at 19, and the Court denied defendant's petition for certification. State v. Alvarez, 214 N.J. 118 (2013).[2]

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[1] The judge entered an amended judgment of conviction on September 30, 2010.

[2] Our opinion on direct appeal concluded the judge had erred in finding aggravating factor two – the age or vulnerability of the victim – see N.J.S.A. 2C:44-1(a)(2), applied under the facts of the case, but our judgment nevertheless affirmed defendant's sentence without any remand. Alvarez, slip op. at 19. For reasons unexplained by the record, the judge nonetheless entered a second amended judgment of conviction on January 15, 2013, removing aggravating factor two.

Defendant filed a pro se petition for post-conviction relief (PCR) on February 21, 2019, alleging trial counsel and his PBA attorney had provided ineffective assistance. With the help of appointed counsel, defendant filed a supplemental certification in support of the petition on December 11, 2019, again making ineffective assistance of counsel (IAC) claims against trial counsel and his PBA attorney, and now also asserting an IAC claim against appellate counsel.

In a separate certification filed three weeks later, defendant stated mistaken advice provided by appellate counsel excused his delay in filing the PCR petition. Specifically, defendant claimed that appellate counsel had told him the time limit in which he needed to file a PCR petition was tolled by the pendency of defendant's direct appeal and federal habeas corpus petition. According to defendant, he believed the "five-year period to file [his] PCR began" on February 7, 2017 – the day his habeas petition was denied.

The PCR judge, Keith A. Bachmann, who was not the trial judge, heard argument and initially reserved decision. Judge Bachmann subsequently issued a written decision denying defendant's petition.

The judge noted that both the trial judge and trial counsel had advised defendant that he had five years within which to file his PCR petition. Judge

Bachmann also observed that appellate counsel's May 17, 2012 letter advised defendant of his "right to file a PCR" and did "not contain a representation that the time within which to file . . . [wa]s tolled by an appeal and/or a [habeas corpus petition]."[3] Additionally, Judge Bachmann noted that in its February 7, 2017 decision denying defendant's habeas petition, the federal district court explicitly stated defendant was as of that date "time-barred from filing a PCR." However, defendant "could not explain why . . . he still waited another two years and eleven days before filing his self-filed PCR."

Judge Bachmann found defendant's assertion that his experienced appellate counsel had provided erroneous advice was "incredible." It was "not supported by [appellate counsel's] correspondence" with defendant and was contrary to information provided defendant by the trial judge and trial counsel. Lastly, the judge found defendant had offered "no reason to justify his" more than two-year delay after the federal court stated any PCR petition was already time-barred. Judge Bachmann nevertheless addressed the substantive points raised by defendant's petition and, finding none of them justified post-conviction relief, he entered the order dismissing defendant's PCR petition that we now review.

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[3] The letter is not in the appellate record.

Defendant raises the following points for our consideration:

> POINT I
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> DEFENDANT'S PETITION FOR POST[-] CONVICTION RELIEF SHOULD NOT BE TIME BARRED BECAUSE DEFENDANT'S DELAY IN FILING WAS DUE TO EXCUSABLE NEGLECT AND THE INTERESTS OF JUSTICE REQUIRE HIS CLAIMS BE HEARD.
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> POINT II
>
> DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE TO ADEQUATELY REPRESENT HIM AT HIS MIRANDA HEARING, AND FOR FAILURE TO OBJECT TO PREDUCIAL REMARKS BY THE PROSECUTOR AT CLOSING ARGUMENTS.[4]
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> POINT III
>
> APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT CHALLENGING DEFENDANT'S DENIAL OF HIS SUPRESSION MOTION AT TRIAL[.]
>
> POINT IV
>
> DEFENDANT IS ENTITLED TO A NEW TRIAL AND HIS CONVICTION MUST BE VACATED BASED ON A BRADY VIOLATION THROUGH WITHHOLDING OF INFORMATION WHICH HAD THE LIKELY POTENTIAL OF DEMONSTRATING HIS RIGHT AGAINST SELF-INCRIMINATION WAS VIOLATED[.] (Not Raised Below).

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[4] We have eliminated the sub-points contained in defendant's brief.

POINT V

DEFENDANT IS ENTITLED TO A NEW TRIAL AND HIS CONVICTIONS MUST BE VACATED BASED ON NEWLY DISCOVERED EVIDENCE WHICH WOULD HAVE THE LIKELY POTENTIAL OF DEMONSTRATING HIS RIGHT AGAINST SELF-INCRIMINATION WAS VIOLATED[.] (Not Raised Below).

In the absence of an evidentiary hearing, we review de novo both the factual inferences drawn from the record by the PCR judge and the judge's legal conclusions. State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016) (citing State v. Harris, 181 N.J. 391, 420–21 (2004)). With respect to first petitions for PCR relief, Rule 3:22-12(a)(1) provides that "no petition shall be filed . . . more than [five] years after the date of entry . . . of the judgment of conviction that is being challenged" except if the petition

> alleges facts showing that the delay beyond said time was due to defendant's excusable neglect and that there is a reasonable probability that if the defendant's factual assertions were found to be true[,] enforcement of the time bar would result in a fundamental injustice[.]
>
> [R. 3:22-12(a)(1)(A).]

The time bar is strictly applied given the "need for achieving finality of judgments and to allay the uncertainty associated with an unlimited possibility

of relitigation." State v. Brown, 455 N.J. Super. 460, 470 (App. Div. 2018) (quoting State v. McQuaid, 147 N.J. 464, 485 (1997)). Simply put, a "defendant is barred from seeking PCR" if the petition is filed more than five years after the judgment of conviction, and the defendant fails to demonstrate both excusable neglect and that a fundamental injustice would occur if the time bar were applied. Id. at 471 (first citing R. 3:21-5; and then citing R. 3:22-12(a)(1)(A)).

To establish "excusable neglect," a defendant must demonstrate "more than simply . . . a plausible explanation for a failure to file a timely PCR petition." State v. Norman, 405 N.J. Super. 149, 159 (App. Div. 2009). Our cases have uniformly held that appellate review does not toll the time bar, State v. Dillard, 208 N.J. Super. 722, 727 (App. Div. 1986) (citing R. 3:22-12), nor does the filing of a federal habeas corpus petition, State v. Milne, 178 N.J. 486, 494 (2004). We have also held that the five-year time bar is not extended even when pending appellate proceedings result in a remand. State v. Dugan, 289 N.J. Super. 15, 20–21 (App. Div. 1996).

In State v. Brewster, we concluded a "[d]efendant cannot assert excusable neglect simply because he received inaccurate . . . advice from his defense counsel." 429 N.J. Super. 387, 400 (App. Div. 2013) (citing State v. Goodwin, 173 N.J. 583, 595 (2002)). Moreover, as Judge Bachmann found, defendant

failed to produce any support for his bald assertion that contrary to the well-established law we have cited, appellate counsel affirmatively misadvised him that a direct appeal and habeas corpus petition tolled the five-year time bar. See State v. Porter, 216 N.J. 343, 355 (2013) (to establish a prima facie case for PCR relief, a "defendant must allege specific facts and evidence supporting his allegations"). "Defendant must demonstrate a prima facie case for relief before an evidentiary hearing is required, and the court is not obligated to conduct an evidentiary hearing to allow defendant to establish a prima facie case not contained within the allegations in his PCR petition." State v. Bringhurst, 401 N.J. Super. 421, 436–37 (App. Div. 2008). Because Rule 3:22-12(a)(1)(A) states that no time-barred petition "shall be filed" unless a petitioner establishes the exceptions contained in the Rule, we agree with Judge Bachmann that defendant's PCR petition was time-barred, and we affirm without addressing the other arguments defendant raises in Points II and III.

In Points IV and V, defendant asserts that newly-discovered evidence entitles him to a new trial. The issues were never raised before the PCR judge, and we decline to consider them for the first time on appeal. See, e.g., State v. Witt, 223 N.J. 409, 419 (2015) ("[W]ith few exceptions, 'our appellate courts will decline to consider questions or issues not properly presented to the trial

court when an opportunity for such a presentation is available.'" (quoting State v. Robinson, 200 N.J. 1, 20 (2009))). We note that pursuant to Rule 3:20-2, a motion for a new trial based on newly-discovered evidence "may be made at any time."

Affirmed.

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

CLERK OF THE APPELLATE DIVISION