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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3842-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

T.L.[1],

Defendant-Appellant.

Submitted February 28, 2022 – Decided April 14, 2022

Before Judges Sabatino and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Sussex County, Indictment No. 07-08-0372.

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

Francis A. Koch, Sussex County Prosecutor, attorney for respondent (Shaina Brenner, Assistant Prosecutor, of counsel and on the brief).

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[1] We use defendant's initials and pseudonyms for the victims, identified herein as Alicia and Betty, to protect their identities and confidentiality. R. 1:38-3(c)(12).

PER CURIAM

Defendant appeals from a February 7, 2020 Law Division order that dismissed with prejudice his motion for an independent psychiatric evaluation. We affirm.

I.

To provide background for our opinion, we briefly detail the facts underlying defendant's convictions, sentence, unsuccessful appeal, and post-conviction relief (PCR) application.

After the Vernon Township police received reports of criminal sexual contact between defendant and his daughters, Alicia and Betty, he was arrested and later charged in a forty-nine-count indictment. Most seriously, he was charged with two counts of first-degree aggravated sexual assault of Alicia, N.J.S.A. 2C:14–2(a), –2(a)(2)(A); and five counts of first-degree endangering the welfare of a child, Alicia and Betty, N.J.S.A. 2C:24–4(b)(3). With respect to both daughters, he was also charged with multiple counts of second-degree sexual assault, N.J.S.A. 2C:14–2(b), –2(c)(3); second-degree endangering the welfare of a minor, N.J.S.A. 2C:24–4(a), –4(b)(3), –4(b)(4); third-degree aggravated criminal sexual contact, N.J.S.A. 2C:14–3(a); fourth-degree criminal

sexual contact, N.J.S.A. 2C:14–3(b); and fourth-degree endangering the welfare of a minor, N.J.S.A. 2C:24–4(b)(5)(B).

Defendant pled guilty to two counts of first-degree and two counts of second-degree endangering the welfare of a child. Before sentencing, defendant underwent a psychological evaluation at the Adult Diagnostic and Treatment Center (ADTC). The examiner opined that defendant's conduct was repetitive, compulsive, and stemmed from feelings of sexual attraction toward his daughters, notwithstanding his claims that he was simply attempting to educate them and express an openness to nudity similar to those who reside in nudist colonies. The examiner further stated that defendant was amenable to treatment and recommended that he be incarcerated at the ADTC.

At the conclusion of the sentencing proceedings, the court entered an October 1, 2018 Judgment of Conviction (JOC) in which it imposed an aggregate sentence of twenty-two years, with eleven years of parole ineligibility, subject to Megan's Law, N.J.S.A. 2C:7-1 to -23 and Community Supervision for Life, N.J.S.A. 2C:43-6.4, requirements. The court also directed defendant to pay applicable fines and penalties and mandated that he reside at the ADTC because he fell within the purview of the sex offender statute and was a repetitive and compulsive sex offender.

Defendant filed an unsuccessful application that requested the court reconsider it sentence, and thereafter a timely direct appeal which we heard on an Excessive Sentencing Oral Argument calendar. After arguments, we held that defendant's aggregate sentence was not excessive. We remanded, however, for the court to consider whether the second-degree conviction for each child should be merged into the first-degree offense. We also vacated that portion of the JOC that obligated defendant to pay restitution and directed the court "to consider the quantum and defendant's ability to pay." Finally, we ordered the court to correct the imposition of certain imposed penalties. State v. [T.L.], No. A–2928–08 (App. Div. July 30, 2010).

Consistent with our instructions, the court resentenced defendant and issued a November 9, 2010 order that amended the original JOC. Specifically, the court dismissed one of the first-degree charges upon the application of the State, merged the remaining first-degree charge with a second-degree charge, reduced certain penalties, and vacated defendant's restitution obligation. Defendant later appealed but we dismissed the appeal noting in a May 21, 2012 order that it was withdrawn at defendant's request.

Defendant filed a timely petition for PCR. His lengthy pro se petition was accompanied by a 219-page pro se brief, which was followed by three

subsequent counseled briefs. After consideration of the parties' submissions and oral arguments, the PCR judge entered a June 2, 2015 order denying defendant's petition without an evidentiary hearing. In his accompanying oral decision, the judge concluded defendant failed to establish a prima facie claim of ineffective assistance under the two-part test detailed in Strickland v. Washington, 466 U.S. 668, 687 (1984).[2]

Defendant appealed the court's denial of his PCR petition and we affirmed in an unpublished opinion. See State v. T.L., No. A-0745-15 (App. Div. Jan. 17, 2018) (slip op. at 21). We rejected all of defendant's arguments substantially for the reasons expressed by the PCR court and, absent one issue not relevant here, concluded defendant's remaining arguments lacked sufficient merit to warrant discussion in a written opinion, Rule 2:11–3(e)(2). Id. slip op. at 11.

Notably, our opinion itemized in a supplemental appendix the dozens of arguments raised by defendant before the PCR court and us. Id. slip op. app. We specifically noted that defendant repeatedly asserted his trial counsel's representation was constitutionally deficient for failing to challenge the

[2] To prove ineffective assistance of counsel, a convicted defendant must demonstrate that: 1) counsel's performance was deficient, and 2) the deficient performance actually prejudiced the accused's defense. Strickland, 466 U.S. at 687. The Strickland test has been adopted in New Jersey. See State v. Fritz, 105 N.J. 42, 58 (1987).

psychological evaluation prepared by the ADTC. For example, when challenging the PCR court's June 2, 2015 order, defendant argued:

> THE PCR COURT'S ORDER THAT DENIED DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF MUST BE REVERSED BECAUSE DEFENDANT CLEARLY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN THE PROCEEDINGS BELOW.
>
> A. Sentencing Counsel Provided Ineffective Assistance of Counsel
>
> 1. Sentencing Counsel Failed to Challenge the ADTC Report and [Parole Supervision of Life].
>
> Id. slip op. at 9-10.

Further, in his pro se brief, we noted defendant raised the following similar point:

> THE SUSSEX COUNTY POST CONVICTION RELIEF COURT FAILED TO FIND THAT [T.L.] WAS DENIED HIS RIGHT TO CHAL[L]ENGE THE ADULT DIAGNOSTIC & TREATMENT CENTER' S PSYCHOLOGICAL EXAMINATION.
>
> Id. slip op. at 10.

We also stated that in a pro se brief filed before the PCR court, defendant contended:

> UNDER THE UMBRELLA OF INEFFECTIVE ASSISTANCE, THE DEFENSE COUNSEL FAILED

> TO CHALLENGE THE ADULT DIAGNOSTIC & TREATMENT CENTER' S EVALUATION AGAINST THE PETITIONER['S] REQUEST.
>
> Id. slip op. app. at 22.

Finally, we observed that before the PCR court, defendant's appointed counsel also argued that defendant's trial counsel improperly failed to challenge the Avenel report. Id. slip op. app. at 26.

As noted, we rejected all of defendant's arguments and affirmed the PCR court's June 2, 2015 order. The Supreme Court denied defendant's petition for certification, see State v. T.L., 233 N.J. 380 (2018), and later denied his motion for reconsideration, see State v. T.L., 235 N.J. 343 (2018).

On or about May 16, 2019, defendant submitted an "Affidavit in Support of Petition for Continu[ed] Indigent Status and Assignment of Counsel," along with a pro se motion for an "Independent Psychiatric Re-evaluation of Defendant to Determine His Sexual Classification Pursuant to State v. Horne, 56 N.J. 372 (1970)." Defendant acknowledged that he underwent an evaluation at ADTC in June 2008 but informed his then-trial counsel that he believed the evaluator was biased and verbally abusive. He contended that his counsel took no action to challenge the ADTC report, rejected his request for a re-examination, misinformed him regarding his right to challenge the report, and incorrectly

advised him that he would be responsible for the costs associated with an "independent" evaluation. He argues the ADTC report influenced the court's sentencing decision as reflected in the court's comments at the sentencing proceeding and in the October 1, 2008 JOC. Finally, as noted, in his affidavit, defendant requested that the court "grant [him] continu[ed] indigent status and assignment of counsel."

The court dismissed defendant's application with prejudice in a February 7, 2020 order in which it noted that the application lacked a "legal basis and raises an issue identical to the issue raised by the defendant in a previous petition for post-conviction relief, the denial of which was raised and addressed on appeal to the Superior Court, Appellate Division." This appeal followed.

II.

As best we can discern from defendant's appellate submissions, he challenges the court's February 7, 2020 order on three grounds. First, he contends the court committed error when it failed to order a new ADTC evaluation.

Second, defendant states his pro se motion "was, for all practical purposes, a second petition for post-conviction relief," and argues he "submitted a bona fide claim of ineffective assistance of counsel in his motion papers" that

warranted an evidentiary hearing. Third, he maintains the court committed error in effectively denying his request for assignment of counsel under Rule 3:22-6(b) and by failing to address the issue. He accordingly requests a remand for the court to determine defendant's indigent status, appoint counsel, and schedule an evidentiary hearing on defendant's newly characterized PCR petition. We disagree with all of these arguments.

III.

We first address the relief specifically requested by defendant and rejected by the court: his request for a psychiatric re-evaluation to address his sexual classification pursuant to Horne, 56 N.J. at 377.[3] We reject any such challenge to the court's February 7, 2020 order as defendant has failed to provide support for his position that he is entitled to a new ADTC report.

Rule 3:21-3, cited by defendant in support of his application before the court and us, provides:

> Whenever the defendant is convicted of an offense enumerated in N.J.S.A. 2C:47-1 et seq., the court, before imposing sentence or making disposition of the offender under the provisions of said chapter shall

[3] Referred to as a Horne hearing, a defendant charged under the sex offender statute who challenges the sufficiency of the ADTC report is entitled to a plenary hearing with the right "to be confronted with the witnesses against him, . . . to cross-examine[,] and . . . to offer evidence on his own behalf." Horne, 56 N.J. at 375.

> furnish to the prosecutor, defendant or defendant's attorney a copy of the report of the Diagnostic Center, shall advise defendant of the opportunity to be heard thereon and shall afford the defendant such hearing. The report of the Diagnostic Center shall be confidential unless otherwise provided by rule, statute or court order.
>
> [R. 3:21-3 (emphasis added).]

A sentencing judge is clearly not bound by the recommendations in an ADTC report and may reject any included recommendations and impose a sentence to the general prison population, notwithstanding an ADTC recommendation for treatment. See State v. Hamm, 207 N.J. Super. 40, 43 (App. Div. 1986) (citing State v. Chapman, 95 N.J. 582, 591-93 (1984)). Any departure from the report's recommendation, however, "should be rare and then only for cogent reasons." State v. Tissot, 152 N.J. Super. 42, 44 (App. Div. 1977). Because of the "substantial influence" an ADTC report has on a defendant's sentence, it must be made available to defendants for review, similar to a presentence report. State v. Tucker, 169 N.J. Super. 334, 337 (App. Div. 1979). As such, a defendant has the right to challenge conclusions therein, including any determination that he is a repetitive and compulsive offender. Ibid.

The State must prove at a Horne hearing, by a preponderance of the evidence, that a defendant is a repetitive and compulsive sex offender amenable to sex offender treatment. State v. Howard, 110 N.J. 113, 130–31 (1988). Finally, in certain circumstances, the Office of the Public Defender has an obligation to pay for expert defense witnesses for indigent criminal defendants. Matter of Kaufman, 126 N.J. 499 (1991).

Defendant's request for a new ADTC report is, under the clear terms of Rule 3:21-3, grossly out of time, as it was not made prior to sentencing. Indeed, defendant's request for a new ADTC evaluation was made eleven years after he was sentenced. Further, as discussed infra, the sentencing transcript reveals that defendant not only failed to lodge any objection to the report when asked by the court, he acknowledged the terms and agreed to the recommended treatment. In addition, according to the State, defendant is no longer confined, having been released from custody on April 25, 2020. Simply put, there is no support under Rule 3:31-3, or the applicable case law, for defendant's request, and accordingly we find no error in the court's decision to deny defendant's application for a new ADTC evaluation.

IV.

Defendant's argument that the court erred when it failed to grant an evidentiary hearing on his ineffective assistance of counsel claim is also without merit. As we alluded to earlier, defendant's application before the court primarily sought a new ADTC evaluation. It was neither captioned as a PCR petition nor briefed as such.[4] Because defendant appeared pro se, however, we have liberally construed his motion papers and acknowledge that he alleged errors by his trial counsel. We accordingly address defendant's Strickland arguments. Our decision to address defendant's ineffective assistance of counsel claims is also supported by the court's February 7, 2020 order, wherein it observed that defendant's application "raises an issue identical to the issue raised by the defendant in a previous petition for post-conviction relief," suggesting the court's awareness of defendant's prior PCR petition, and its substantive consideration of the issue.

We review the legal conclusions of a PCR judge de novo. State v. Harris, 181 N.J. 391, 420-21 (2004). The same scope of review applies to mixed questions of law and fact. Id. at 420. Where no evidentiary hearing has been

[4] Under Rule 3:22-8, a PCR petition requires that a petition be verified by the defendant, and, among other information, the application must "set forth with specificity the facts upon which the claim for relief is based."

held, however, we "may exercise de novo review over the factual inferences drawn from the documentary record by the PCR judge." Id. at 421. Thus, it is within our authority "to conduct a de novo review of both the factual findings and legal conclusions of the PCR court . . . ." Ibid.

Although we acknowledge that that the court's brief statement in its February 7, 2020 order would not typically satisfy its Rule 1:7-4(a) obligations, based on our de novo review of the record, we are satisfied that defendant's arguments are without merit.

First, to the extent defendant raises any argument that should have been raised on direct appeal, those contentions are barred from assertion in a PCR petition. R. 3:22-4(a). Second, defendant is barred from raising any issue previously adjudicated. See R. 3:22-5. As the court correctly noted in its February 7, 2020 order, defendant unsuccessfully raised before the first PCR court the precise challenges asserted in his second PCR petition. Specifically, defendant argued before the initial PCR court, and to us, that his trial counsel violated his Sixth Amendment rights by failing to challenge the ADTC evaluation and misinforming him regarding his right to do so.

Further, Rule 3:22-4(b) requires dismissal of a second or subsequent PCR petition, even if timely filed under Rule 3:22-12(a)(2), unless it facially alleges

reliance on a previously unavailable and newly recognized constitutional rule of law, Rule 3:22-4(b)(2)(A); discovery of a "factual predicate" that "could not have been discovered earlier through the exercise of reasonable diligence," and "the facts underlying the ground for relief, if proven and viewed in light of the evidence as a whole, would raise a reasonable probability that" the sought relief would be granted, Rule 3:22-4(b)(2)(B); or the petition alleges a prima facie case that defendant's first PCR counsel was ineffective, Rule 3:22-4(b)(2)(C).

Here, defendant does not rely on any new constitutional principle, and the issues relating to his counsel's failure to challenge the ADTC report were apparent as evidenced by their inclusion in defendant's first PCR petition. Further, we are satisfied that those previously addressed issues do not raise a reasonable probability of success; and defendant does not make any claim of ineffective assistance of his first PCR counsel. Defendant's second petition, therefore, did not allege on its face a basis to preclude dismissal under Rule 3:22-4.

Third, we are satisfied that defendant's application failed to satisfy either prong of the Strickland test. Despite giving defendant every factual and legal indulgence, we note that at the sentencing hearing defendant clearly acknowledged that he reviewed the ADTC report, accepted it as part of his

sentencing, and agreed to the recommendation for treatment, as evidenced by the following colloquy:

> COUNSEL: [Addressing defendant], the Judge is talking about when we reviewed the PSR report, the Presentence Report, you recall that part of that was the report of the Adult Diagnostic and Treatment Center in Avenel, following your interview with them down at that facility in Avenel. Do you remember that report?
>
> DEFENDANT: Yes.
>
> COUNSEL: It's shown to you now, PSR dated June 25, 2008?
>
> DEFENDANT: Yes.
>
> COUNSEL: You had an opportunity to review that?
>
> DEFENDANT: Correct.
>
> COUNSEL: And you and I had an opportunity to discuss it, and it's in the sentencing –
>
> DEFENDANT: Correct.
>
> COUNSEL: And, you will accept this report being part of the sentencing today. And we discussed also that you're willing to engage the treatment at the facility, correct?
>
> DEFENDANT: Yes.

Defendant's statements are significant, as "'[s]olemn declarations in open court carry a strong presumption of veracity,'" and we therefore find no basis to

conclude on the current record that defendant's trial counsel misinformed him regarding his right to object to the ADTC report and accompanying recommendations. State v. Simon, 161 N.J. 416, 444 (1999) (quoting Blackledge v. Allison, 431 U.S. 63, 74 (1977) (alteration in original)).

We also observe that the record is devoid of any evidence or sworn statements to support the contention that defendant's counsel could have obtained a conflicting report or opinion, contrary to the ADTC recommendations, and which would have concluded that defendant was not a repetitive and compulsive sex offender. We will not speculate that such a report existed, or could have been obtained, particularly where no such evidence was submitted in the context of defendant's original PCR petition, when he was represented by counsel. See Fritz, 105 N.J. at 64 ("[P]urely speculative deficiencies in representation are insufficient to justify reversal" of a conviction.); State v. Petrozelli, 351 N.J. Super. 14, 23 (App. Div. 2002) ("[A] defendant 'must do more than make bald assertions that he was denied the effective assistance of counsel.'" (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999))). In sum, we are satisfied defendant did not satisfy either the performance or prejudice prong of the Strickland test, and having

failed to establish a prima facie case, was not entitled to an evidentiary hearing. See State v. Preciose, 129 N.J. 451, 462 (1992).

V.

For similar reasons, it is clear defendant failed to establish "good cause" sufficient to require appointment of counsel under Rule 3:22-6(b). Indigent defendants who file second or subsequent PCR petitions are not entitled to appointment of counsel unless a judge determines that "good cause" exists. R. 3:22-6(b); State v. McIlhenny, 333 N.J. Super. 85, 90 (App. Div. 2000). Under Rule 3:22-6(b), "[g]ood cause exists only when the court finds that a substantial issue of fact or law requires assignment of counsel and when a second or subsequent petition alleges on its face a basis to preclude dismissal under R. 3:22-4." This section of the Rule limits "good cause" to circumstances where the court finds "a substantial issue of fact or law" that signals some merit in the petition. See Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 3:22-6(b) (2020). For the reasons we previously detailed, defendant failed to establish the existence of a substantial factual or legal question as to the merits of his petition.

To the extent we have failed to address specifically any other argument raised by defendant, it is because we have deemed any such contention without sufficient merit to warrant discussion in this opinion. 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