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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-0828-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TRAVIS DAVIS,

Defendant-Appellant.

Submitted October 26, 2022 – Decided June 29, 2023

Before Judges Accurso and Firko.

On appeal from the Superior Court of New Jersey,
Law Division, Hudson County, Indictment No.
08-10-1987.

Travis Davis, appellant pro se.

Esther Suarez, Hudson County Prosecutor, attorney
for respondent (Andrew Guarini, Assistant Prosecutor,
on the brief).

PER CURIAM

Defendant Travis Davis appeals from the December 22, 2020 order denying his second petition for post-conviction relief (PCR) claiming the attorney who represented him on his first PCR application rendered ineffective assistance. The trial court dismissed the claim as time-barred. We agree and affirm.

Defendant was convicted by a jury in 2010 of carjacking, kidnapping, robbery, and weapons charges, including a certain persons offense, and sentenced to an aggregate term of forty years in State prison subject to the periods of parole ineligibility and supervision required by the No Early Release Act, and the periods of parole ineligibility mandated by the Graves Act. We affirmed defendant's conviction and sentence on direct appeal, State v. Davis, No. A-5954-10 (App. Div. Oct. 31, 2013), and the Supreme Court denied certification, 218 N.J. 531 (2014).

Defendant filed a timely petition for PCR claiming ineffective assistance of trial counsel. Specifically, defendant claimed his trial counsel failed to discuss defense strategy with him; neglected to call witnesses who would have exonerated him; failed to retain a DNA expert; coerced him into not testifying on his own behalf; and failed to challenge allegedly inconsistent police reports. The trial judge denied the petition on December 16, 2016, which we

summarily affirmed on our own motion on January 24, 2018. The Supreme Court denied defendant's petition for certification. State v. Davis, 233 N.J. 618 (2018).

Defendant sent his second petition for PCR for filing on July 20, 2020, claiming he received ineffective assistance of PCR counsel, who failed to assert that defendant's trial counsel was ineffective for failing to properly advise defendant as to his exposure to consecutive sentences, prompting him to reject a twelve-year pre-indictment plea offer from the State. The judge denied the petition on the papers as obviously time-barred. Defendant appeals, raising the following issues.

POINT I

THE TRIAL COURT ERRED IN DENYING PETITIONER'S SECOND PCR APPLICATION, BECAUSE PCR COUNSEL'S ABSTRACT FAILURE TO RAISE A MERITORIOUS INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL DURING PRETRIAL PLEA PROCESS IS NOT PROCEDURALLY BARRED. A REMAND IS REQUIRED TO ADDRESS PETITIONER'S CLAIM THAT PCR COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE FOR FAILURE TO RAISE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL DURING PLEA AND BECAUSE PETITIONER WAS PREJUDICED THEREBY, PETITIONER IS ENTITLED TO POST-CONVICTION RELIEF.

POINT II

AS PETITIONER ASSERTS A COGNIZABLE CLAIM THAT HIS TRIAL COUNSEL'S FAILURE TO PROPERLY ADVISE HIM DURING PLEA SIXTH AMENDMENT RIGHTS WERE VIOLATED, DEFENDANT IS ENTITLED TO POST-CONVICTION RELIEF. ALTERNATIVELY, AN EVIDENTIARY HEARING ON THE ISSUE.

POINT III

AS THERE IS A GENUINE DISPUTE AS TO A MATERIAL FACT, AN EVIDENTIARY HEARING IS REQUIRED, BECAUSE DEFENDANT HAS ESTABLISHED A PRIMA FACIE CASE ON INEFFECTIVENESS OF COUNSEL. RULE 3:22-4(a)(2).

We reject defendant's arguments as plainly without merit. See R. 2:11-3(e)(2).

Pursuant to Rule 3:22-12(a)(2), no second or subsequent petition for PCR, "[n]otwithstanding any other provision in [Rule 3:22-12], . . . shall be filed more than one year after the latest of:" (A) the United States Supreme Court's or the Supreme Court of New Jersey's recognition of a new constitutional right on which the defendant relies, which the Court has "made retroactive . . . to cases on collateral review"; (B) a newly discovered factual predicate, which could not have been earlier discovered through reasonable diligence; and (C) "the date of the denial of the first . . . application for post-conviction relief" where the defendant alleges ineffective assistance of counsel representing him on that petition.

A 2009 amendment to the rule makes clear beyond question that the one-year limitation for second or subsequent petitions is non-relaxable. R. 3:22-12(b); State v. Jackson, 454 N.J. Super. 284, 292 (App. Div. 2018) (noting the Supreme Court's 2009 amendment to Rule 1:3-4 providing that "[n]either the parties nor the court may . . . enlarge the time specified by . . . R. 3:22-12 (petitions for post-conviction relief)"). Rule 3:22-4(b)(1) requires dismissal of a second petition if untimely under Rule 3:22-12(a)(2).

Application of those rules here makes plain the trial court was required to dismiss defendant's second PCR petition as untimely. Defendant has not provided us a file-stamped copy of his second PCR petition, but he has provided his certification of service of July 20, 2020, transmitting his second PCR petition and brief, both dated July 5, 2020, to the court for filing. Both dates are well more than one year beyond the denial of his first petition on December 16, 2016. See Jackson, 454 N.J. Super. at 292 (finding a second PCR petition not filed within a year of the denial of the defendant's first PCR petition untimely).

Having reviewed the record, we are also satisfied defendant's second PCR petition is utterly without merit. Although defendant claims in his second PCR petition that he would have accepted the State's alleged pre-indictment

twelve-year plea offer, he offers no proof of any such offer, rendering his claim no better than a "bare assertion" insufficient to establish a prima facie case of ineffectiveness. See State v. Cummings, 321 N.J. Super. 154, 171 (App. Div. 1999).

Moreover, defendant has steadfastly maintained his innocence of these charges, up to and through sentencing, making it impossible for any court to accept his guilty plea. As our Supreme Court has explained, "a defendant does not have the right to commit perjury in giving a factual basis for a crime that he insists he did not commit." State v. Taccetta, 200 N.J. 183, 194 (2009). Thus, even if defendant could establish his counsel was ineffective in advising defendant in plea negotiations under the first prong of the Strickland¹ standard, he couldn't establish he was prejudiced by the misadvice under the second prong. See Strickland, 466 U.S. at 687-96 (explaining that to establish right to relief under the Strickland test, a defendant must show not only that his attorney rendered ineffective assistance of counsel, but that the attorney's substandard representation prejudiced the defense).

¹ Strickland v. Washington, 466 U.S. 668 (1984).

Having reviewed defendant's allegations in light of the applicable law, we are satisfied defendant's second PCR petition is time-barred, thus requiring its dismissal by the trial court.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION