

**NOT FOR PUBLICATION WITHOUT THE
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-1419-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SANTHO T. MOHAPELOA,

Defendant-Appellant.

Submitted February 13, 2023 – Decided March 22, 2023

Before Judges Whipple and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Municipal Appeal No. 15-2021.

Levow DWI Law, PC, attorneys for appellant (Evan M. Levow, of counsel and on the brief; Joanna M. Perilli, on the brief).

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (Patrick F. Galdieri, II, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from a December 10, 2021, Law Division order, denying his petition for post-conviction relief (PCR) and upholding his 2013 driving while intoxicated (DWI) conviction. We affirm.

On July 4, 2013, Defendant Santho T. Mohapeloa was arrested in Old Bridge and charged with driving while intoxicated, N.J.S.A. 39:4-50. On September 3, 2013, defendant pled guilty to the DWI charge in municipal court. During the plea, defense counsel informed the municipal court that defendant had a .16 % blood alcohol content reading.

The following exchange occurred between the court and defendant at the plea colloquy:

Court: . . . [Defendant] you are pleading guilty to the charge of driving under the influence, you understand by pleading guilty to that charge you are . . . admitting to driving under the influence on July 4th, 2013 in the Township of Old Bridge, is that correct?

Defendant: Yes, Your Honor.

Court: [You were] [c]onsum[ing] intoxicating beverages which affected your driving, is that correct?

Defendant: Yes, Your Honor.

The municipal court sentenced defendant to a two-year license suspension as well as other mandatory fines and penalties. Defendant never filed a direct appeal, however he eventually retained new counsel, who filed a PCR on June

11, 2021, nearly eight years after his guilty plea in municipal court. In his PCR, defendant claimed his plea had an insufficient factual basis, and was not knowing, voluntary and intelligent. The municipal court rejected the application.

Defendant appealed to the Law Division. Without an evidentiary hearing, the Law Division affirmed the municipal court's order in a written opinion, finding defendant's application time barred under Rule 7:10-2(b).

Defendant makes the following arguments on appeal:

I. DEFENDANT-APPELLANT'S PETITION FOR POST CONVICTION RELIEF SHOULD HAVE BEEN GRANTED, AS HE DID NOT PROVIDE A COMPLETE FACTUAL BASIS FOR THE CHARGED OFFENSE, NOR WAS HIS PLEA KNOWING AND VOLUNTARY

II. DEFENDANT-APPELLANT'S POST CONVICTION RELIEF PETITION WAS NOT TIME-BARRED

We use a de novo standard of review when a PCR court does not conduct an evidentiary hearing. State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016) (citing State v. Harris, 181 N.J. 391, 421 (2004)). When petitioning for PCR, a defendant must establish he is entitled to "PCR by a preponderance of the evidence." State v. O'Donnell, 435 N.J. Super. 351, 370 (App. Div. 2014) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)).

Defendant contends he is not time barred from filing a PCR because a petition to correct an illegal sentence may be filed at any time under Rule 7:10-2(b)(1). Defendant alleges his failure to file the petition within five years should be excused because "he was unaware of the issues with the factual basis until he obtained counsel in this matter." Furthermore, citing State v. McQuaid, 147 N.J. 464, 485 (1997), defendant contends the time bar is not rigid and may be relaxed if a court considers the "extent and cause of the delay" in addition to the "importance of the petitioner's claim in determining whether there has been an 'injustice' sufficient to relax the time limits." (citing State v. Mitchell, 126 N.J. 565, 580 (1997)). We are not persuaded.

There is no illegal sentence on this record. The penalties imposed in 2013 by the municipal court were within the statutory guidelines permitted under N.J.S.A. 39:4-50. Rule 7:10-2(b)(1) does not apply.

The deadline for filing a PCR petition in municipal court is governed by Rule 7:10-2(b)(2)¹. To establish "excusable neglect," a defendant must demonstrate more than simply "a plausible explanation for a failure to file a

¹ Rule 7:10-2(b)(2) states the petition "shall not be accepted for filing more than five years after entry of the judgment of conviction or imposition of the sentence sought to be attacked, unless it alleges facts showing that the delay in filing was due to defendant's excusable neglect."

timely PCR petition." State v. Norman, 405 N.J. Super. 149, 159 (App. Div. 2009). Factors to be considered whether excusable neglect exists include "the extent and cause of the delay, the prejudice to the State, and the importance of the [defendant]'s claim in determining whether there has been an 'injustice' sufficient to relax the time limits." State v. Afanador, 151 N.J. 41, 52 (1997) (quoting Mitchell, 126 N.J. at 580). "[T]he burden to justify filing a petition after the five-year period will increase with the extent of the delay" unless there are "compelling, extenuating circumstances." Ibid. To establish a fundamental injustice, "there should at least be some showing that" the alleged violation "played a role in the determination of guilt." State v. Laurick, 120 N.J. 1, 13 (1990) (citing State v. Reynolds, 43 N.J. 597, 602 (1965)).

Defendant contends "he was unaware of the issues with the factual basis until he obtained counsel in this matter." However, the record shows defendant waited nearly eight years to obtain counsel, and defendant made no showing to explain his delay in seeking counsel beyond the five-year window provided in the Rule. On this record we conclude defendant has not met his burden to show excusable neglect under Rule 7:10-2(b)(2).

We do not reach the merits of the plea because defendant is time barred. For the sake of completeness, we add the following brief comments.

We analyze ineffective assistance of counsel claims using the two-prong test established by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). See Preciose, 129 N.J. at 463; see also State v. Fritz, 105 N.J. 42, 58 (1987). The first prong of the Strickland test requires a defendant to establish counsel's performance was deficient. Preciose, 129 N.J. at 463. "The second, and far more difficult, prong . . . is whether there exists 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 463-64 (quoting Strickland, 466 U.S. at 694).

The record shows a sufficient factual basis to support the guilty plea. Defendant admitted he was intoxicated and that his driving was impaired as a result. The record of defendant's plea colloquy shows defendant was satisfied with his representation and his plea was knowing, voluntary, and intelligent.

To the extent that we have not addressed any remaining arguments by defendant, it is because they lack sufficient merit to warrant discussion in a written 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