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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1787-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GABRIEL A. TORRES, a/k/a  
ANGEL TORRES, LUIS CRUZ,  
GUMBY, and LOU GREEN,

Defendant-Appellant.

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Submitted January 10, 2023 – Decided February 14, 2023

Before Judges Whipple, Smith, and Marczyk.

On appeal from the Superior Court of New Jersey, Law  
Division, Camden County, Indictment No. 08-06-1951.

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

Grace C. MacAulay, Camden County Prosecutor,  
attorney for respondent (Krysten A. Russell, Assistant  
Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Gabriel Torres appeals from an August 14, 2020 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. After careful review of the record and the governing legal principles, we affirm.

I.

On October 31, 2007, defendant received a phone call from his nephew, during which his nephew stated that Daniel Gonzalez had taken some ATVs from him. Defendant went to Gonzalez's neighborhood with a gun and saw Gonzalez, who also had a gun. The men initially confronted each other verbally. However, the encounter escalated, and they shot each other. Gonzalez fell to the ground, and defendant admitted he shot him a second time. Gonzalez died at the scene.

On June 11, 2008, defendant was indicted for first-degree murder, N.J.S.A. 2C:11-3(a)(1) or (2) (Count One); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1) (Count Two); third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (Count Three); second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b) (Count Four); and first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2 and 2C:11-3(a)(1) or (2) (Count Seven). Defendant subsequently entered into a negotiated plea agreement on February 17, 2009, whereby he pled guilty to first-

degree aggravated manslaughter in exchange for a sixteen-year sentence. On March 27, 2009, defendant was sentenced to a sixteen-year term of imprisonment with an eighty-five percent parole ineligibility term pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Defendant also received 469 days of jail credits according to the judgment of conviction (JOC).

On December 7, 2007, prior to the above indictment, defendant was charged with violating his probation. On April 3, 2008, after a guilty plea, the court terminated defendant's probation and sentenced him to a four-year term of imprisonment with 365 days of jail credits.<sup>1</sup>

Defendant subsequently applied to the court for jail credits. On May 18, 2015, the trial court conferred with the State and defense counsel and amended the JOC so the violation of probation (VOP) and aggravated manslaughter charges would run concurrently. On May 19, 2015, the court also amended the JOC to reflect 469 days of jail credits.

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<sup>1</sup> "Rule 3:21–8 provides that '[t]he defendant shall receive credit on the term of a custodial sentence for any time served in custody in jail or in a state hospital between arrest and the imposition of sentence.'" State v. Hernandez, 208 N.J. 24, 36 (2011) (alteration in original). "Such credit for pre-sentence custody is commonly labeled 'jail credits.'" Ibid. (citing Richardson v. Nickolopoulos, 110 N.J. 241, 242 (1988)).

Defendant thereafter filed a pro se PCR petition, which counsel later supplemented, arguing: he was entitled to 834 days of jail credits; his JOC was never properly amended to reflect a concurrent sentence for the manslaughter and VOP; ineffective assistance of counsel for not filing certain pre-trial motions and addressing mitigating and aggravating factors at sentencing; his PCR was not time-barred; and cumulative errors by trial counsel amounted to ineffective assistance of counsel, denying defendant a fair trial.

On August 14, 2020, the PCR court rendered an oral decision denying defendant's petition. The court reasoned that the claim was time-barred, defendant had failed to establish excusable neglect, and enforcement of the time bar would not result in a fundamental injustice pursuant to Rule 3:22-12(a)(1). The controlling date for the PCR filing was March 27, 2009, because defendant's arguments stemmed from allegations of ineffective assistance of counsel rendered at that time. The court determined the fact that defendant's JOC was subsequently amended in 2015 was not relevant and did not "restart the clock" under Rule 3:22-12. Nevertheless, the PCR court went on to address defendant's arguments on the merits.

The PCR court noted the trial judge indicated at sentencing defendant had eight juvenile adjudications and five Superior Court convictions. The trial judge

ultimately found aggravating factors three, six, and nine. N.J.S.A. 2C:44-1(a)(3), (6), and (9). He further found no mitigating factors, and specifically noted mitigating factor three did not apply because there was no evidence defendant acted under strong provocation, and substantial grounds did not exist to excuse or justify defendant's conduct. N.J.S.A. 2C:44-1(b)(3).

The PCR court noted defendant was awarded 469 days of negotiated jail credits as well as 365 days of jail credits for the VOP. It further indicated when defendant petitioned the court in 2015, defendant received all lawful jail credits. Moreover, the plea he entered concerning the aggravated manslaughter charge did not include a concurrent sentence as to both the manslaughter and VOP charge. However, the trial court contacted the prosecutor and defense attorney, and both parties agreed the JOC could be amended to reflect negotiated jail credits and a concurrent sentence for both charges. This appeal followed.

## II.

Defendant raises the following points on appeal:

### POINT ONE

[DEFENDANT] IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT HIS ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO ARGUE ADEQUATELY AT SENTENCING AND HE

IS ENTITLED TO A REMAND DUE TO AN  
ILLEGAL SENTENCE.

POINT TWO

THESE MATTERS ARE NEITHER TIME-BARRED  
NOR PROCEDURALLY BARRED.

More particularly, defendant argues trial counsel failed to adequately argue for mitigating factors three and four, and against aggravating factors three, six, and nine. Defendant further contends he was entitled to 834 days of jail credits.

III.

Where, as here, a PCR judge does not hold an evidentiary hearing, we "conduct a de novo review of both the factual findings and legal conclusions of the PCR court." State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016) (quoting State v. Harris, 181 N.J. 391, 421 (2004)). However, "we review under the abuse of discretion standard the PCR court's determination to proceed without an evidentiary hearing." State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013) (citing State v. Marshall, 148 N.J. 89, 157-58 (1997)).

A.

Rule 3:22-12(a)(1)(A) precludes PCR petitions filed more than five years after entry of a JOC unless the delay was "due to defendant's excusable neglect<sup>2</sup> and . . . 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[.]" Our Supreme Court has stated "[t]he time bar should be relaxed only 'under exceptional circumstances' because '[a]s time passes, justice becomes more elusive and the necessity for preserving finality and certainty of judgments increases.'" State v. Goodwin, 173 N.J. 583, 594 (2002) (second alteration in original) (quoting Afanador, 151 N.J. at 52). We have held that when a first PCR petition is filed more than five years after the JOC, the PCR court should examine the timeliness of the petition, and defendant must submit competent evidence to satisfy the standards for relaxing the rule's time restriction. State v. Brown, 455 N.J. Super. 460, 470 (App. Div. 2018).

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<sup>2</sup> Excusable neglect "encompasses more than simply providing a plausible explanation for a failure to file a timely PCR petition." State v. Norman, 405 N.J. Super. 149, 159 (App. Div. 2009). To determine whether excusable neglect is present, the court "should consider the extent and cause of the delay, the prejudice to the State, and the importance of the petitioner's claim in determining whether there has been an 'injustice' sufficient to relax the time limits." Ibid. (quoting State v. Afanador, 151 N.J. 41, 52 (1997)).

Defendant failed to establish excusable neglect for filing the PCR petition more than ten years after the final JOC. We are unpersuaded by defendant's argument the PCR court should have utilized the amended JOC to determine the date by which the PCR petition had to be filed. State v. Dugan, which defendant relies upon, does not stand for this proposition. 289 N.J. Super. 15 (App. Div. 1996). In Dugan, we rejected this argument and noted it was "inconsistent with both the language and the essential objective of Rule 3:22-12." Id. at 19. The purpose of the PCR five-year time bar "is to encourage defendants reasonably believing they have grounds for [PCR] to bring their claims swiftly and discourages them from sitting on their rights until it is simply too late for a court to render justice." State v. Cummings, 321 N.J. Super. 154, 165 (App. Div. 1999). Defendant failed to file the PCR petition in a timely manner or articulate what caused the delay in filing the PCR petition. Here, the trial court correctly determined the claim was time-barred, and defendant has not demonstrated enforcement of the time bar would result in a fundamental injustice.

B.

Notwithstanding the PCR court's determination defendant's petition was time-barred, the court addressed the merits of defendant's claims. Ineffective assistance of counsel claims must satisfy the two-prong test set forth in



Strickland v. Washington, 466 U.S. 668, 687-88 (1984), and adopted by the Supreme Court of New Jersey in State v. Fritz, 105 N.J. 42, 57-58 (1987). Under the first prong, a "defendant must show that counsel's performance was deficient" and counsel's errors were so egregious that they were "not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. The second prong requires a defendant to demonstrate the alleged defects prejudiced his right to a fair trial to the extent "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694; Fritz, 105 N.J. at 60-61 (internal quotation marks omitted).

A petitioner for PCR is not automatically entitled to an evidentiary hearing. State v. Porter, 216 N.J. 343, 355 (2013); see also State v. L.G.-M., 462 N.J. Super. 357, 364 (App. Div. 2020) (citing Cummings, 321 N.J. Super. at 170) ("merely raising a claim for PCR does not entitle a defendant to an evidentiary hearing."). A court should conduct an evidentiary hearing on a PCR petition only if the petitioner establishes a prima facie case in support of PCR, material issues of disputed fact cannot be resolved by reference to the existing record, and an evidentiary hearing is necessary to resolve the claims for relief. Porter, 216 N.J. at 354 (citing R. 3:22-10(b)); see also State v. Preciose, 129

N.J. 451, 462 (1992) (PCR court should grant an evidentiary hearing "if a defendant has presented a prima facie claim in support of [PCR]."). Allegations that are "too vague, conclusory, or speculative" do not merit an evidentiary hearing. Marshall, 148 N.J. at 158.

A defendant seeking PCR must establish "by a preponderance of the credible evidence" they are entitled to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013) (quoting Preciose, 129 N.J. at 459). They must allege and articulate specific facts, which "provide the court with an adequate basis on which to rest its decision . . . ." State v. Pennington, 418 N.J. Super. 548, 553 (App. Div. 2011) (citing State v. Mitchell, 126 N.J. 565, 579 (1992)). A defendant "must do more than make bald assertions that he was denied the effective assistance of counsel." Cummings, 321 N.J. Super. at 170.

Guided by these legal principles, we affirm substantially for the reasons set forth in the PCR court's decision. We briefly add the following. Defendant failed to demonstrate a prima facie case of ineffective assistance of plea counsel. The court did not miscalculate defendant's negotiated jail credits.<sup>3</sup> Moreover,

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<sup>3</sup> "Jail credits are 'day-for-day credits.'" State v. Rawls, 219 N.J. 185, 193 (2014) (citing Hernandez, 208 N.J. at 37). "[Jail credits] are applied to the 'front end' of a sentence." Ibid. (citing Booker v. N.J. State Parole Bd., 136 N.J. 257, 263 (1994)). "Without jail credit, a defendant would serve 'double punishment'

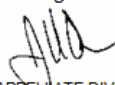
subsequent to the original JOC, the court amended the JOC so the VOP and aggravated manslaughter charges would run concurrently. The court also properly addressed jail credits at that juncture. Further, defendant cannot demonstrate the result of the sentencing proceeding would have been different even if plea counsel was somehow ineffective in advancing arguments regarding the mitigating and aggravating factors. There is no indication, based on our review of the record, the trial court's sentencing calculus would have been altered in any manner given the trial court's analysis of the aggravating and mitigating factors.

Measured by the Strickland standard, we find the PCR judge properly determined defendant failed to establish he received ineffective assistance of counsel. Defendant's assertions were further insufficient to entitle him to an evidentiary hearing. See Cummings, 321 N.J. Super. at 170; see also State v. Jones, 219 N.J. 298, 311-12 (2014).

To the extent we have not otherwise addressed defendant's arguments, they lack sufficient merit to warrant discussion. 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

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because the time spent in custody before sentencing would not count toward the sentence." Ibid. (citing Hernandez, 208 N.J. at 36).