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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-1839-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DEMETRIUS CORVIL,
a/k/a DEMETRUIS CORVIL,

Defendant-Appellant.

Submitted October 3, 2023 – Decided October 25, 2023

Before Judges Whipple, Mayer and Paganelli.

On appeal from the Superior Court of New Jersey,
Law Division, Union County, Indictment No. 13-05-
0480.

Joseph E. Krakora, Public Defender, attorney for
appellant (Steven M. Gilson, Designated Counsel, on
the brief).

William A. Daniel, Union County Prosecutor, attorney
for respondent (Paulina Gashi, Assistant Prosecutor,
of counsel and on the brief).

PER CURIAM

Defendant Demetrius Corvil appeals the November 30, 2021 denial of his petition for post-conviction relief (PCR). He raises the following issue on appeal:

THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF TRIAL COUNSEL'S INEFFECTIVENESS FOR ACKNOWLEDGING THAT A SUSPECT INATTENTIVE JUROR HAD NOT BEEN SLEEPING, THEREBY PRECLUDING THE TRIAL COURT FROM QUESTIONING THE JUROR; AND APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT RAISING THE ISSUE ON DIRECT APPEAL.

The charges stemmed from a home invasion in 2011. On May 29, 2013, a grand jury returned an indictment charging defendant with first-degree robbery, N.J.S.A. 2C:15-1; seven counts of first-degree kidnapping—one count pursuant to N.J.S.A. 2C:13-1(a) and six pursuant to N.J.S.A. 2C:13-1(b)(1); seven counts of third-degree terroristic threats, N.J.S.A. 2C:12-3(b); seven counts of fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(4); second-degree burglary, N.J.S.A. 2C:18-2; second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); fourth-degree possession of an imitation firearm, N.J.S.A. 2C:39-4(e); and third-degree resisting arrest, N.J.S.A. 2C:29-2(a). Defendant was tried and convicted. We affirmed his conviction and sentence on August 1, 2019. The underlying facts are recounted in detail in State v. Corvil, No. A-

4078-15 (App. Div. Aug. 1, 2019) (slip op. at 6) and need not be repeated fully here. The Supreme Court denied his petition for certification. State v. Corvil, 240 N.J. 427 (2020).

In the pro se supplemental brief defendant submitted in his direct appeal, defendant raised the issue of an inattentive juror, arguing the trial judge abused his discretion in not conducting a voir dire of the allegedly sleeping juror. We found the argument lacked sufficient merit to warrant discussion in a written opinion. Thus, when defendant raised the issue in a more nuanced ineffective assistance of counsel claim, the PCR court found the issue had already been adjudicated and was barred from being considered under Rule 3:22-5. Additionally, the court reasoned that even if it were not barred by Rule 3:22-5, it would be barred by Rule 3:22-4 because it should have been raised on direct appeal. We agree with the PCR court.

During the trial, a witness on the stand pointed out juror ten was asleep. This juror was excused. While discussing the issue with the judge during a sidebar conference, co-defendant's counsel mentioned another juror—juror seven—sometimes had her eyes closed. Both sides acknowledged that juror seven had her eyes closed "occasionally like to concentrate" Defendant's counsel said: "I have seen that juror's eyes closed, but I did not interpret that

to mean she was asleep. I took it she was listening to the testimony." Thus, the parties and the judge agreed, rather than excusing juror seven, the court would give an instruction reminding the jury of the importance of listening to the testimony and that they could inform the judge any time they needed a break.

Defendant's PCR arguments before the trial judge raised numerous assertions of ineffective assistance of trial counsel, but defendant only argues the inattentive juror issue here. Regarding that juror, number seven, defendant asserts his trial counsel should have asked the court to voir dire number seven and that alone entitled him to an evidentiary hearing. Defendant also argues his appellate counsel was ineffective for failing to bring trial counsel's alleged error to our attention.

The PCR court denied the petition without an evidentiary hearing, setting forth its reasoning in a written opinion. The court found most of the arguments were barred by Rule 3:22-4(a) because they could have been raised on direct appeal or by Rule 3:22-5 because they had already been adjudicated on direct appeal. Despite the procedural bars, the court addressed the merits of defendant's contentions as well, finding they did not pass the two-prong test in

Strickland v. Washington.¹ Notably, the court found defendant's argument regarding juror seven was barred by Rule 3:22-4. Even if it was not, the PCR court determined it would still be unsuccessful because the decision to not inquire further into the juror's attentiveness (or lack thereof) was within the trial judge's discretion. Thus, there was no prejudice to defendant.

The PCR court also rejected defendant's argument appellate counsel was ineffective because appellate counsel was not required to raise arguments that would not have been successful.

"[PCR] is New Jersey's analogue to the federal writ of habeas corpus." State v. Pierre, 223 N.J. 560, 576 (2015) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). PCR provides "a built-in 'safeguard that ensures that a defendant was not unjustly convicted.'" State v. Nash, 212 N.J. 518, 540 (2013) (quoting State v. McQuaid, 147 N.J. 464, 482 (1997)).

Rule 3:22-5 provides: "A prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any post-conviction proceeding brought pursuant to this rule or prior to the adoption thereof, or in any appeal taken from such proceedings." "[P]rior adjudication of an issue, including a decision on direct

¹ 466 U.S. 668, 687 (1984).

appeal, will ordinarily bar a subsequent [PCR] hearing on the same basis." State v. Afanador, 151 N.J. 41, 51 (1997). However, the rule applies "only if the issue raised is identical or substantially equivalent to that adjudicated previously on direct appeal." State v. Marshall, 173 N.J. 343, 351 (2002).

On direct appeal, defendant asserted juror seven was inattentive and the trial court should have conducted an investigation to determine whether the juror was sleeping. We reviewed it and considered the argument "without sufficient merit to warrant discussion in a written opinion."

Defendant now asks us to consider the issue anew, not as an error of the trial judge, but of his trial counsel. In particular, he contends "trial counsel's proactive acknowledgement that the juror had not been sleeping . . . preclud[ed] the trial court from questioning the juror." Defendant framed the ineffective assistance of counsel claim as a failure to request further inquiry into the juror's attentiveness—not as an improper preclusion of the trial court's questioning. We do not consider this distinction significant considering the record.

A defendant has "a due process right to an 'impartial and mentally competent' tribunal." State v. Mohammed, 226 N.J. 71, 83 (2016) (quoting Jordan v. Massachusetts, 225 U.S. 167, 176 (1912)); U.S. Const. amend. XIV.

"Jury 'irregularity,' including sleeping, may violate a defendant's federal and state constitutional rights to a fair tribunal if it results in prejudice." Mohammed, 226 N.J. at 83 (quoting State v. Scherzer, 301 N.J. Super. 363, 486 (App. Div. 1997)).

"Instances of juror inattentiveness at trial will be brought to the court's attention in one of two ways: either the court will personally observe that a juror's attention is diverted or otherwise in question, or one of the parties will bring the issue to judge's attention." Id. at 89. A court must investigate an allegation that a juror was sleeping during the trial. Id. at 83-84; 89. However, "[a] finding based on the trial court's personal observations that the juror was alert and attentive generally ends the inquiry" Id. at 89. If the court "did not personally observe the juror, [it] should conduct an individual voir dire to determine if the juror was inattentive, and make appropriate findings." Ibid.


Here, the judge made no personal observations of juror seven. Rather, counsel for the State and a co-defendant brought to the judge's attention that this juror had her eyes closed, but—unlike juror ten—they did not believe she was asleep. All parties—including defendant's counsel—agreed juror seven was closing her eyes to concentrate or listen to the testimony. Therefore, the

judge had no obligation or reason to conduct a voir dire; no one alleged the juror was inattentive and it can be inferred from the transcript he did not even personally observe juror seven closing her eyes. See Mohammed, 226 N.J. at 89.

Defendant argues his counsel erred, because he should have said something to trigger a voir dire by the court. But the record affirmatively demonstrates counsel thought the juror was awake and listening with her eyes closed. There is nothing in the record suggesting the juror was sleeping and that enforcement of the bar to preclude claims—including one for ineffective assistance of counsel—would result in fundamental injustice; or that denial of relief would be contrary to a new rule of constitutional law under either the Constitutions of the United States or of the State of New Jersey. R. 3:22-4(a).

Affirmed.

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



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