

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2116-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FRANK GONZALEZ,

Defendant-Appellant.

Submitted February 28, 2023 – Decided May 4, 2023

Before Judges Geiger and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 10-08-1254.

Joseph E. Krakora, Public Defender, attorney for appellant (David A. Gies, Designated Counsel, and Karen Lodeserto, on the briefs).

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (David M. Liston, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from an order denying him post-conviction relief (PCR) for ineffective assistance of counsel. Defendant argues prior counsel, was ineffective for failing to object to at sentencing that he to pay \$5,000 in restitution for the victim's funeral expenses. We affirm substantially for the reasons expressed by Judge Thomas Buck in his well-reasoned and thorough written opinion. We add the following brief comments.

On March 12, 2010, defendant scaled a building and entered the victim's apartment through a second-story window. The victim was a woman who previously maintained a relationship with defendant. Upon entering the apartment, the victim approached defendant and an argument ensued. Defendant struck the victim with a glass, took a knife she was holding, and stabbed her to death.

On August 21, 2012, defendant pleaded guilty to first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2), and third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a). The State agreed to recommend a term of incarceration of thirty years with a thirty-year period of parole ineligibility for first-degree murder, concurrent with a five-year sentence for third-degree endangering the welfare of a child, which was accepted in the plea agreement.

On October 17, 2012, defendant was sentenced in accordance with the terms of the plea agreement. In addition, defendant was ordered to pay \$5,000 in restitution payable to the Victims of Crime Compensation Office (VCCO) for the victim's funeral expenses. The plea forms do not mention the restitution requirement; however, the \$5,000 payment to the VCCO was mentioned at sentencing and is included in the presentence report and judgment of conviction.

Defendant filed a direct appeal of his sentence but later withdrew it. On March 31, 2015, defendant filed a motion to correct an illegal sentence, challenging his incarceration term for the murder conviction, which was denied on May 8, 2015. He appealed that decision, and this court heard oral argument on a sentencing calendar pursuant to Rule 2:9-11. Rejecting defendant's arguments, we affirmed on April 5, 2016. State v. Gonzalez, No. A.-0190-15 (App. Div. Apr. 5, 2016). Defendant did not challenge the restitution obligation in his appeal.

On or around July 19, 2019, defendant filed a pro se "Verified Petition in Support of Motion to Revoke an Unpaid Fine Pursuant to N.J.S.A. 2C:46-3." With the assistance of counsel, defendant filed an amended verified petition for PCR on January 24, 2020.

At the PCR hearing, PCR counsel argued ineffective assistance of counsel in all of defendant's prior representation, including sentencing and on appeal, pursuant to Strickland v. Washington, 466 U.S. 668 (1984), for failing to object to the restitution award due to defendant's financial circumstances. In support, PCR counsel maintained prior counsel failed to argue the plea agreement did not include the restitution payment to VCCO, failing to place defendant on notice of the obligation, and counsel should have requested a hearing to determine defendant's ability to pay the fine.

Judge Buck denied defendant's petition for PCR. In a well-reasoned written opinion, he first addressed the merits of defendant's petition, finding defendant failed to make a prima facie showing prior counsel was ineffective and no evidentiary hearing was necessary. Judge Buck reasoned, pursuant Strickland's first prong, counsel's performance was not deficient because defendant was on notice of the VCCO restitution payment. The amount payable was included in a letter to defendant from the VCCO and in the presentence report, defendant had already paid a substantial portion of the obligation, and ample time existed for him to pay off the remaining balance. Judge Buck determined it was clear defendant was able to pay restitution and there was ample information in the presentence report for the sentencing judge to evaluate

defendant's financial circumstances. Further, the sentencing court could not have modified the restitution "by any amount that the victim has received from the [VCCO], N.J.S.A. [2C:44-2(c)(2)]." Judge Buck also found defendant did not satisfy Strickland's second prong because the sentencing result would have been the same regardless of whether a restitution hearing was conducted to evaluate defendant's ability to pay.

Finally, Judge Buck also found defendant's PCR petition was time-barred pursuant to Rule 3:22-12(a)(1)(A). He reasoned defendant's petition should have been filed by October 17, 2017, five years from the date of the judgment of conviction, no excusable neglect existed to extend the filing deadline, and enforcement of the time bar would not result in fundamental injustice.

In reviewing a PCR petition, we afford deference to the PCR court's findings of fact, but our interpretation of the law is de novo. State v. Nash, 212 N.J. 518, 540-41 (2013). Pursuant to Strickland, which our Supreme Court adopted in State v. Fritz, 105 N.J. 42 (1987), a defendant is entitled to PCR for ineffective assistance of counsel if he proves "defendant's counsel's performance was deficient[.]" and counsel's "deficient performance prejudiced the defense." Fritz, 105 N.J. at 52 (quoting Strickland, 466 U.S. at 687). In addition, when a guilty plea is involved, the defendant must prove "a reasonable probability

[exists] that, but for counsel's errors, [the defendant] would not have [pleaded] guilty and would have insisted on going to trial." State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009) (second alteration in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)).

As Judge Buck correctly found, defendant's PCR petition is time-barred pursuant to Rule 3:22-12(a)(1)(A). The rule requires petitions for PCR to be brought within five years of the date of the judgment of conviction unless "it alleges facts showing that the delay beyond said time was due to defendant's excusable neglect and that 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." Rule 3:22-12(a)(1)(A). PCR is not a substitute for direct appeal, and its various procedural bars work to further the public policy of promoting "finality in judicial proceedings." State v. Peoples, 446 N.J. Super. 245, 254 (App. Div. 2006) (quoting State v. Echols, 199 N.J. 344, 357 (2009)). The five-year 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) (alteration in original) (quoting State v. Afanador, 151 N.J. 41, 52 (1997)). "[T]he extent and cause of the delay, the prejudice to the

State, and the importance of the petitioner's claim" should be considered in analyzing whether injustice would occur sufficient to loosen Rule 3:22-12(a)(1)(A)'s time bar. Goodwin, 173 N.J. at 594 (quoting Afanador, 151 N.J. at 52).

Defendant was required to file his PCR petition by October 17, 2017, five years from the date of the judgment of conviction. Defendant failed to file his PCR petition until January 24, 2020, over two years after the deadline expired. Despite this, he argues his neglect in filing the petition was excusable and the interests of justice permit delay due to prior counsels' failure to advise him he could appeal the restitution aspect of his sentence.

Defendant has not demonstrated excusable neglect exists or that fundamental injustice would result if the time bar were enforced. There are no exceptional circumstances present to justify evading the strong policy favoring finality and certainty in criminal judgments. See Goodwin, 173 N.J. at 594. At the sentencing hearing, the court specifically stated "[t]here's a \$5,000 repayment that must be made to the [VCCO]" and defendant has "a [forty-five]-day period to file an appeal of this sentence." Further, the restitution award is provided in the presentence report and the judgment of conviction. Defendant's contention prior counsel did not make him aware he could challenge restitution

is fruitless. See State v. Moran, 202 N.J. 311, 320 (2010) (reasoning the defendant's argument she did not have notice of reckless driving sentencing provisions fails because "[i]gnorance of a sentencing provision that is published in the codified laws of this State—and available in bound volumes located in most law firms, in county and state offices, and in many other locales, and on-line—is not a defense. Every person is presumed to know the law."). Defendant was made aware of the restitution payment and his right to file an appeal of its imposition.

Fundamental injustice would not result if the time bar were not relaxed. While defendant may claim to be experiencing difficulty now making the required restitution payments, there is no indication in the record he does not have the ability to pay. Defendant had satisfied a substantial portion of the \$5,000 obligation as of July 2019, maintains employment while incarcerated, and the record supported Judge Buck's finding that defendant would have no difficulty satisfying the obligation before his lengthy incarceration term expires.

Further, any argument advanced by counsel to vacate or lessen the restitution payable to the VCCO would have been fruitless as full reimbursement to the VCCO for expenses incurred by the victim is required by statute and the court is not permitted to reduce the amount. See N.J.S.A. 2C:44-2(c)(2) ("The

court shall not reduce a restitution award by any amount that the victim has received from the Violent Crimes Compensation Board, but shall order the defendant to pay any restitution ordered for a loss previously compensated by the Board to the Violent Crimes Compensation Board."). Therefore, defendant has not demonstrated that a fundamental injustice will result if the time bar is enforced.

Finally, defendant argues, for the first time on appeal, the PCR court erred in not addressing whether counsel at his motion to correct an illegal sentence was ineffective for failing to advance argument on his behalf by stating "in light of the argument put forward by [defendant], I'm going to ask him to carry the ball and make this argument." Defendant does not illustrate which position counsel should have advocated. The motion court found defendant's sentence for his murder conviction was legal, see N.J.S.A. 2C:11-3(b)(1), and any argument that could have been advanced to lessen or vacate restitution would have also been futile pursuant to N.J.S.A. 2C:44-2(c)(2). Because counsel's failure to raise an unsuccessful legal argument is not ineffective assistance of counsel, State v. Worlock, 117 N.J. 596, 625 (1990), and defendant has failed to illustrate how counsel's inaction at the motion hearing was clearly capable of producing an unjust result, R. 2:10-2, we reject this argument.

Judge Buck's denial of PCR relief without an evidentiary hearing is affirmed.

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

A handwritten signature in black ink, appearing to be 'JWA', is written over the printed text of the certification.

CLERK OF THE APPELLATE DIVISION