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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2299-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHRISTIAN ORTEGA REY,  
a/k/a CHRISTIAN REY,  
CHRISTIAN ORTEGA,

Defendant-Appellant.

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Submitted December 6, 2022 – Decided February 21, 2023

Before Judges Gilson and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 11-04-0607.

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

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (Joie D. Piderit, Assistant Prosecutor, of counsel and on the brief).

## PER CURIAM

Defendant Christian Ortega Rey appeals from a February 26, 2021 order denying his petition for post-conviction relief (PCR). He argues that he was entitled to an evidentiary hearing because he established a prima facie showing that his counsel had provided ineffective assistance. We affirm because the petition was time-barred and otherwise lacked merit.

### I.

In the fall of 2010, a series of residential burglaries and robberies occurred in and around Edison. Defendant and two codefendants were indicted for twenty-four crimes related to seven burglaries and robberies.

The charges against defendant and his two codefendants were addressed at two jury trials. In the first trial, defendant was convicted of second-degree robbery, N.J.S.A. 2C:15-1; second- and third-degree burglary, N.J.S.A. 2C:18-2; and other crimes related to two home invasions. Defendant was sentenced to ten years in prison, with seven years of parole ineligibility as prescribed by the No Early Release Act, N.J.S.A. 2C:43-7.2(a).

On direct appeal, we affirmed the convictions from the first trial. State v. Ortega-Rey, No. A-4235-12 (App. Div. March 22, 2016). The Supreme Court denied defendant's petition for certification. 227 N.J. 130 (2016). Defendant filed a PCR petition from his convictions in the first trial, a PCR court denied

his petition, and we affirmed. State v. Ortega-Rey, No. A-2765-17 (App. Div. Jan. 24, 2019).

This appeal is from the denial of defendant's PCR petition related to his convictions and sentence from the second trial. At the second trial, a jury convicted defendant of second-degree robbery, N.J.S.A. 2C:15-1; second-degree burglary, N.J.S.A. 2C:18-2; two counts of third-degree burglary, N.J.S.A. 2C:18-2; two counts of third-degree theft by unlawful taking, N.J.S.A. 2C:20-3(a); second-degree theft by unlawful taking, N.J.S.A. 2C:20-3(a); second-degree kidnapping, N.J.S.A. 2C:13-1(b); and three counts of second- and third-degree conspiracy, N.J.S.A. 2C:5-2. Those convictions related to three home invasions. Defendant was acquitted of charges related to two other home invasions. Based on his convictions at the second trial, defendant was sentenced to an aggregate prison term of twenty-two years, with eight and a half years of parole ineligibility.

Defendant filed a direct appeal from his convictions and sentence from the second trial, but we rejected his arguments and affirmed. State v. Ortega-Rey, No. A-2057-15 (App. Div. Dec. 19, 2017). On May 4, 2018, the Supreme Court denied defendant's petition for certification. 233 N.J. 318 (2018).

In a petition, which was signed on October 5, 2018, defendant, representing himself, sought post-conviction relief related to his convictions and

sentence from the second trial. He was assigned PCR counsel, who assisted defendant in preparing an amended petition.

In his amended PCR petition, defendant alleged that his attorney was ineffective when he failed to (1) provide the State with his counter-offer to a plea deal; (2) adequately investigate defendant's alibi defense; (3) move to sever his trial from the trial of his codefendants; (4) obtain full discovery, particularly as it related to DNA evidence; (5) adequately meet with defendant; and (6) preclude a Spanish interpreter from appearing before the jury. Defendant also argued that his sentence was excessive given his young age at the time the crimes were committed.

The PCR judge heard arguments on defendant's petition on February 26, 2021. That same day, the judge entered an order denying the petition and explained the reasons for the denial on the record.

Initially, the PCR judge questioned the timeliness of the petition but stated that he would give defendant "the benefit of the doubt" and address the petition on its merits. The judge then evaluated each of the alleged grounds for ineffective assistance of counsel and determined that they lacked support, were rebutted by the evidence at trial, or had previously been considered and rejected in defendant's other PCR petition and appeals and that defendant had failed to establish any prejudice.

## II.

On this appeal, defendant repeats the same arguments he made before the PCR court concerning the alleged ineffective assistance of his counsel at his second trial and contends that at a minimum he was entitled to an evidentiary hearing. He articulates that argument as follows:

THE [PCR] COURT ERRED IN DENYING AN  
EVIDENTIARY HEARING ON DEFENDANT'S  
PETITION FOR POST-CONVICTION RELIEF.

Where, as here, the PCR court did not conduct an evidentiary hearing, we conduct a de novo review. State v. Jackson, 454 N.J. Super. 284, 291 (App. Div. 2018) (citing State v. Harris, 181 N.J. 391, 419 (2004)). The decision to proceed without an evidentiary hearing is reviewed for abuse of discretion. State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013).

### A. Defendant's PCR Petition Was Time-Barred.

The judgment of conviction following defendant's second trial was entered on September 13, 2013. Defendant filed a PCR petition from his convictions in both the first and second trials in 2017. The petition related to the second trial was dismissed without prejudice pursuant to Rule 3:22-6A(2) because defendant's direct appeal was still pending.

The Supreme Court denied certification on defendant's direct appeal from his conviction and sentence in the second trial on May 4, 2018. 233 N.J. 318

(2018). Defendant refiled his PCR petition concerning the convictions and sentence from his second trial some time in or after October 2018. The petition that defendant prepared and signed is dated October 5, 2018. The copy of the petition that defendant included in the record contains a stamp indicating it was filed with the trial court on April 16, 2019.

Even if we give defendant the benefit of all doubts and assume that the petition was filed on October 5, 2018, it is time-barred. Rule 3:22-12(a)(1) precludes PCR petitions filed more than five years after entry of the judgment of conviction, unless the delay was "due to defendant's excusable neglect and [] there is a reasonable probability that if defendant's factual assertions were found to be true, enforcement of the time-bar would result in a fundamental injustice."

R. 3:22-12(a)(1)(A). The Rule also provides:

A petition dismissed without prejudice pursuant to R. 3:22-6A(2) because a direct appeal, including a petition for certification, is pending, shall be treated as a first petition for purposes of these rules if refiled within 90 days of the date of the judgment on direct appeal, including consideration of a petition for certification, or within five years after the date of the entry pursuant to Rule 3:21-5 of the judgment of conviction that is being challenged.

[R. 3:22-12(a)(3).]

The ninety-day-time-period expired on August 4, 2018. The five-year time-period expired on September 13, 2018. Because defendant's petition was filed at the earliest in October 2018, it is time-barred.

Our Supreme Court has stated that "[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 State v. Afanador, 151 N.J. 41, 52 (1997)). Moreover, we have held that when a first PCR petition is filed more than five years after the date of entry of the judgment of conviction, the PCR court should examine the timeliness of the petition and defendant must submit competent evidence to satisfy the standards for relaxing the time restriction. State v. Brown, 455 N.J. Super. 460, 470 (App. Div. 2018).

Having conducted a de novo review of the record, defendant has not demonstrated excusable neglect. Indeed, the PCR court did not find any excusable neglect.

**B. Defendant's PCR Petition Lacks Substantive Merit.**

Even if we were to consider the substance of defendant's petition, it lacks merit. To establish a claim of ineffective assistance of counsel, a defendant must satisfy the two-part Strickland test: (1) "counsel made errors so serious

that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) "the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984); accord State v. Fritz, 105 N.J. 42, 57-58 (1987).

A petitioner is not automatically entitled to an evidentiary hearing. State v. Porter, 216 N.J. 343, 355 (2013). An evidentiary hearing should be granted only "if a defendant has presented a prima facie claim in support of post-conviction relief." State v. Preciose, 129 N.J. 451, 462 (1992). Here, defendant failed to make a prima facie showing of ineffective assistance of counsel and he was not entitled to an evidentiary hearing.

The PCR judge analyzed each of defendant's allegations of ineffective assistance of counsel. Having conducted a de novo review, we agree with the PCR judge that none of those contentions satisfied both prongs of the Strickland test.

Defendant first claims that his counsel was ineffective in not presenting a counter plea offer. The record establishes that defendant never identified what plea offer he sought to make and, therefore, there is no factual support that defendant authorized a counter plea offer. Moreover, there is no showing of prejudice because defendant has not established that the State would have considered and accepted the unidentified counteroffer.



Next, defendant claimed that his counsel failed to adequately investigate his alibi defense. Defendant contended that he was in Texas in the fall of 2010. The only materials defendant submitted in support of that contention indicate that he may have been in Texas on certain days in 2010, but not on any of the days when he was found by a jury to have invaded three homes in New Jersey. Moreover, there was DNA evidence establishing that defendant was present at one of those homes.

The record does not support defendant's arguments concerning counsel's alleged failure to obtain discovery or to evaluate DNA evidence. Defendant identified no discovery that should have been obtained, and he offered no proof that a separate DNA analysis by the defense would have disputed the State's DNA evidence.

The record also rebuts defendant's arguments that his counsel did not adequately meet with him. Defendant claims that his counsel met with him only twice before trial. At trial, however, defense counsel told the trial court that he had met with defendant numerous times and defendant, who was present, did not dispute that representation. Just as significantly, defendant does not identify what prejudice he suffered because of a lack of meeting with his counsel.


There is also no merit to defendant's arguments about the presence of a Spanish interpreter. Defendant now suggests that an interpreter should not have

been present during trial because the jury might have thought that defendant spoke only Spanish and that might have prejudiced him because some victims testified that the perpetrators spoke Spanish. That argument is speculative.

Finally, defendant argues that his sentence is excessive because he was under the age of twenty-six when he committed the crimes, and his age should have been considered as a mitigating factor. He argues that his sentence should be vacated, and the matter should be remanded for a new sentencing hearing. In making that argument, defendant relies on mitigating factor 14. See N.J.S.A 2C:44-1(b)(14). Mitigating factor 14 was added by a statutory amendment on October 19, 2020. Our Supreme Court has held that mitigating factor 14 does not apply retroactively. State v. Lane, 251 N.J. 84, 97 (2022).

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION