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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-2965-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MATTHEW ROLLE, a/k/a
MATTHEW D. ROLLE, and
CHEEKS DASHAUN,

Defendant-Appellant.

Submitted October 13, 2022 – Decided January 13, 2023

Before Judges DeAlmeida and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law
Division, Salem County, Indictment No. 15-07-0387.

Matthew Rolle, appellant pro se.

Kristin J. Telsey, Salem County Prosecutor, attorney
for respondent (David Galemba, Assistant Prosecutor,
of counsel and on the brief).

PER CURIAM

Defendant Matthew Rolle appeals from the March 3, 2021 order of the Law Division dismissing as untimely his second petition for post-conviction relief (PCR) without an evidentiary hearing. We vacate the order and remand for further proceedings.

In 2016, a jury convicted defendant of two counts of third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d); and two counts of second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1). The charges arose from defendant's brutal assault of his former friend and the friend's mother, resulting in serious bodily injury to the victims. The indictment described the weapon used as a "knife or machete type object." The court sentenced defendant to an aggregate term of twenty-six years, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2.

We affirmed defendant's conviction and sentence. State v. Rolle, No. A-5329-15 (App. Div. Aug. 15, 2017). The Supreme Court denied certification. State v. Rolle, 232 N.J. 285 (2018).

In his first PCR petition, defendant's principal claim was that his trial attorney was ineffective for failing to object to jury charges that used the term

"knife or machete type object," rather than the generic term "deadly weapon" contained in the model jury charge. He further claimed that his appellate counsel on direct appeal was ineffective for not arguing that there were inconsistencies in the testimony of the State's witnesses. Finally, he alleged that the trial court improperly corrected a discrepancy in the judgment of conviction without scheduling a hearing at which he would be allowed to appear.

On January 22, 2020, the trial court denied the first petition without an evidentiary hearing. The court found that defendant's ineffective assistance claims relating to trial counsel were procedurally barred under Rule 3:22-4(a). With respect to the remainder of the claims, the court concluded defendant failed to establish a prima facie case of ineffective assistance of trial or appellate counsel or an entitlement to an evidentiary hearing.

We affirmed. State v. Rolle, No. A-3907-19 (App. Div. July 19, 2021). The Supreme Court denied certification. State v. Rolle, 248 N.J. 553 (2021).

Defendant thereafter filed a second PCR petition. He alleged his: (1) trial counsel was ineffective for not moving to dismiss the indictment because the grand jury foreperson did not sign it and endorse it as a true bill, and by not advising him that he faced an extended term sentence as a persistent offender; (2) appellate counsel on his direct appeal was ineffective for failing to order the

April 12, 2016 transcript of jury selection; and (3) his first PCR counsel was ineffective because they failed to bring forward the claims alleged in the second PCR petition.

Defendant's second petition is dated January 15, 2021. The trial court's record indicates the petition was filed on January 27, 2021.

On March 3, 2021, the trial court issued a written opinion and order dismissing the second petition. The court found that the petition was untimely filed. The court concluded that the filing deadline for the second petition was January 22, 2021, one year after the January 22, 2020 dismissal of his first petition under Rule 3:22-12(2)(C). This is so, the court found, because defendant did not raise claims based on: (1) a newly recognized constitutional right, Rule 3:22-12(2)(A); or (2) a factual predicate that could not have been discovered earlier through the exercise of reasonable diligence, Rule 3:22-12(2)(B). The only potentially viable claim raised by defendant, the court found, is that his counsel on the first petition was ineffective, a claim that must be filed within one year of the dismissal of the first petition. R. 3:22-12(2)(C). Thus, the trial court found the second petition was filed five days late.

This appeal followed. Defendant makes the following argument.

DEFENDANT'S SECOND POST[-]CONVICTION
RELIEF PETITION WAS TIMELY FILED UNDER

THE MAILBOX RULE FOR PRISONERS AND RELEVANT CASE LAW HOUSTON V. LACK, 487 U.S. 266 (1988), BUT THE TRIAL COURT ERRED IN DENYING DEFENDANT'S SECOND POST-CONVICTION RELIEF AS PETITION UNTIMELY FILED UNDER RULE 3:22-12(a)(2)([C]).

For the first time on appeal, defendant, who is incarcerated, provided evidence that he gave his second petition to prison mailroom officials for mailing to the court on January 8, 2021. An East Jersey State Prison postage remit form, dated January 8, 2021, indicates that defendant paid \$9.40 in postage to mail a certified letter to the criminal division manager at the Salem County courthouse. The remit form includes the criminal division manager's name, the address of the courthouse, and the certified mail serial number. In addition, defendant produced a United States Postal Service certified mail return receipt with the same serial number for mail addressed to the criminal division manager at the Salem County courthouse. The receipt is stamped "Jan. 11 2021." Finally, defendant produced certified mail return receipt card with the same serial number with a stamped signature of a name other than the civil division manager followed by "State of New Jersey." The return receipt card does not show the date on which the mail addressed to the civil division manager was accepted by the person whose name is stamped thereon.

Defendant argues that the trial court erred by not applying the mailbox rule established in Houston v. Lack, 487 U.S. 266 (1988), to determine the filing date of his second petition. In Houston, the Court held that under the federal rules of appellate procedure, a habeas corpus appeal of an incarcerated person is considered filed at the moment of its delivery to prison authorities for mailing to the court. Id. at 270. He argues that the trial court should have applied this rule and considered his second petition to have been filed with the Law Division on January 8, 2021, when he placed it in the custody of prison mailroom officials to be forwarded to the court.

The State argues that defendant's failure to produce the evidence relating to the mailing of his second petition before the trial court, or to move to supplement the record in this court, precludes our consideration of his timeliness arguments. In addition, the State argues that even if we were to consider defendant's new evidence, the mailbox rule has not been adopted in our State and would, in any event, be inapplicable to the one-year filing period for a second PCR petition, given that the filing period involved in Houston was only thirty days.

According to Rule 3:22-4(b),

[a] second or subsequent petition for [PCR] shall be dismissed unless:

- (1) it is timely under [Rule] 3:22-12(a)(2); and
- (2) it alleges on its face either:
 - (A) that the petition relies on a new rule of constitutional law, made retroactive to defendant's petition by the United States Supreme Court or the Supreme Court of New Jersey, that was unavailable during the pendency of any prior proceedings; or
 - (B) that the factual predicate for the relief sought could not have been discovered earlier through the exercise of reasonable diligence, and the facts underlying the ground for relief, if proven and viewed in light of the evidence as a whole, would raise a reasonable probability that the relief sought would be granted; or
 - (C) that the petition alleges a prima facie case of ineffective assistance of counsel that represented the defendant on the first or subsequent application for post-conviction relief.

A second PCR petition is untimely if it is filed "more than one year after,"

the following:

- (A) the date on which the constitutional right asserted was initially recognized by the United States Supreme Court or the Supreme Court of New Jersey, if that right has been newly recognized by either of those Courts and made retroactive by either of those Courts to cases on collateral review; or
- (B) the date on which the factual predicate for the relief sought was discovered, if that factual predicate

could not have been discovered earlier through the exercise of reasonable diligence; or

(C) the date of the denial of the first or subsequent application for post-conviction relief where ineffective assistance of counsel that represented the defendant on the first or subsequent application for post-conviction relief is being alleged.

[R. 3:22-12(a)(2).]

The time limits established in the Rule "shall not be relaxed, except as provided herein." R. 3:22-12(b).

We begin with the question of whether defendant's timeliness arguments are precluded by his failure to produce in the trial court the evidence relating to his mailing of the second petition, or to move to supplement the record in this court. "The record on appeal shall consist of all papers on file in the court . . . below" R. 2:5-4(a). A party may move before this court to supplement the record with "evidence unadduced in the proceedings below [that] may be material to the issues on appeal" R. 2:5-5(b). Although Rule 2:5-5(b) refers only to supplementing the record on appeal from a decision of a state administrative agency, this court has the inherent authority to supplement a trial court record. Liberty Surplus Ins. Co. v. Nowell Amoroso, P.A., 189 N.J. 436, 452 (2007). Generally, the factors applicable to a motion to supplement the

record are the excusability of the omission of the evidence from the record and whether the evidence is likely to affect the outcome. Id. at 453.

It is undisputed that the evidence on which defendant relies was not adduced before the trial court. It is not clear, however, whether defendant had the opportunity to produce the evidence before his second petition was dismissed. The record before does not provide a precise description of the procedural history in the trial court.

The March 3, 2021 order does not indicate whether the State made a motion to dismiss the petition. The spaces on the form order for information regarding the movant, the type of motion, counsel, proceeding dates, and whether the matter was decided on the papers are all blank. The court's written opinion does not mention a motion having been made to dismiss the second petition. The opinion states only that the matter came before the court "by way of [d]efendant's second petition for" PCR and that the court considered "[d]efendant's pro se submission," which may be a reference to the petition itself.

The procedural history in the State's brief also does not mention the State having filed a motion to dismiss the second petition. It merely states that the second petition was filed on January 27, 2021. The order dismissing the petition

and the procedural events preceding issuance of that order are not mentioned in the State's brief. Defendant's brief states that the trial court "without oral argument heard the second PCR petition on the moving papers," but does not identify which party, if any, filed a motion, and whether defendant had an opportunity to file papers beyond the second petition.

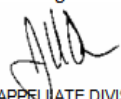
It is not, therefore, clear if defendant was aware that the timeliness of the second petition was before the court or had an opportunity to submit evidence on that question. In light of these circumstances, we sua sponte supplement the record with the evidence attached to defendant's brief concerning the certified mailing of the second petition. Given the significance of this evidence to the question of the timeliness of the second petition, we remand for findings by the trial court with respect to: (1) the date on which defendant gave the second petition to prison officials for mailing to the court; (2) the date on which the second petition was mailed to the court; and (3) the date on which the second petition was delivered to the person whose name appears on the return receipt card produced by defendant. The court may accept additional evidence produced by the parties, including records maintained by the United States Postal Service with respect to the delivery of certified mail.

Should the court find that the second petition was delivered to the court on or before January 22, 2021, it shall consider the second petition to have been timely filed and proceed to a consideration of defendant's substantive claims, the validity of which we do not address in this opinion. Should the court find that the second petition was delivered to the court on or after January 23, 2021, it shall consider defendant's arguments with respect to the applicability of the holding in Houston to the mailing of a second PCR petition by an incarcerated person under State law. We offer no opinion with respect to that issue.

We note the apparent discrepancy arising from defendant's claim that the second petition, which is dated January 15, 2021, was delivered to prison officials for mailing to the court on January 8, 2021. We leave resolution of that discrepancy to the trial court.

The March 3, 2021 order is vacated and the matter is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION