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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-3007-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN FALLETTA,

Defendant-Appellant.

Submitted March 6, 2023 – Decided April 11, 2023

Before Judges Whipple and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 01-11-1496.

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

Bradley D. Billhimer, Ocean County Prosecutor, attorney for respondent (Samuel Marzarella, Chief Appellate Attorney, of counsel; Shiraz Deen, Assistant Prosecutor, on the brief).

PER CURIAM

After an open-ended plea to four first-degree crimes, including carjacking and robbery, defendant was sentenced in 2002 to a thirty-year term of incarceration, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Without directly appealing his conviction, defendant filed a petition for post-conviction relief (PCR) in 2020. In a written opinion, the PCR court denied an evidentiary hearing and rejected the petition as untimely. Defendant appeals the PCR court's order, contending his claims were not time-barred and that he was entitled to an evidentiary hearing. After carefully reviewing the record in light of our governing legal principles, we affirm.

I.

On September 2, 2002, defendant pled guilty to four counts in a twenty-one-count indictment. He admitted to two counts of first-degree carjacking, N.J.S.A. 2C:15-2(a)(3), and two counts of first-degree robbery, N.J.S.A. 2C:15-1. These crimes were committed against three separate victims in a span of less than two days. The victims included two senior citizens and a disabled Vietnam veteran. As part of the plea bargain, the remaining seventeen counts were dismissed. Defendant was sentenced on October 23, 2002. Defendant did not file a direct appeal, nor did he file his PCR application until January 25, 2020.

After argument, Judge Guy P. Ryan issued an order denying defendant's PCR application without an evidentiary hearing on December 15, 2020. The PCR judge concluded defendant failed to show excusable neglect sufficient to permit his PCR to be heard outside the five-year time bar established by Rule 3:22-12.¹ Finding defendant waited seventeen years to file his PCR, the judge concluded "[i]gnorance of the law and rules of court [did] not constitute excusable neglect under [Rule] 3:22-12 to relax the time limitation of five years."

Judge Ryan next analyzed whether exceptional circumstances existed sufficient to show injustice under the Rule. The judge balanced "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.'" (Quoting State v. Afanador, 151 N.J. 41 (1997)). The judge concluded, among other things, that defendant's delay was "entirely attributable to [him]" and that the State would be severely prejudiced by a retrial after seventeen years. Finding defendant had proven neither excusable neglect nor injustice, the judge

¹ The judge relied on State v. Murray, 162 N.J. 240 (2000), and State v. Dugan, 289 N.J. Super. 15 (App. Div. 1996), in making the finding.

concluded defendant's PCR claims simply did not vault the five-year time bar under Rule 3:22-12.

After dismissing defendant's PCR as untimely, the judge also rejected defendant's substantive claim that counsel failed to advise him of his appeal rights, as the record showed the sentencing court did so on October 23, 2002. Finding defendant failed to show a prima facie claim of ineffective assistance of counsel, the judge denied an evidentiary hearing.

On appeal, defendant argues the following points:

POINT ONE

MR. FALLETTA IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIMS THAT HIS ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY MISADVISING HIM AS TO HIS SENTENCE, AND FAILING TO MEET WITH HIM ENOUGH, INVESTIGATE, REVIEW OR OBTAIN WITNESS STATEMENTS, OR FILE APPROPRIATE MOTIONS.

POINT TWO

THE PCR COURT ERRONEOUSLY RULED THAT MR. FALLETTA'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL WERE TIME-BARRLED BECAUSE ANY DELAY IN FILING THE PETITION WAS DUE TO DEFENDANT'S EXCUSABLE NEGLECT 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.

II.

We reject defendant's claims and affirm substantially for the reasons expressed in the thorough and cogent opinion of Judge Ryan. We add the following brief comments.

We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). The de novo standard additionally applies to mixed questions of law and fact. Id at 420. Finally, we use a de novo standard of review when a PCR court does not conduct an evidentiary hearing. State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016) (citing Harris, 181 N.J. at 421).

Rule 3:22-12 states in pertinent part:

[N]o petition shall be filed pursuant to this rule more than [five] years after the date of entry pursuant to [Rule] 3:21-5 of the judgment of conviction that is being challenged unless:

(A) 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[.]

[R. 3:22-12(a)(1)(A).]

The five-year time bar may be relaxed only under the specified circumstances set forth in Rule 3:22-12(a)(1)(A). In assessing whether excusable neglect justifies relaxation of the time bar for PCR petitions set forth in Rule 3:22-12(a)(2), we "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." State v. Norman, 405 N.J. Super. 149, 159 (App. Div. 2009) (quoting Afanador, 151 N.J. at 52). More than "a plausible explanation for [the defendant's] failure to file a timely PCR petition" is required. Ibid. Our Supreme Court has required a showing of "compelling, extenuating circumstances," State v. Milne, 178 N.J. 486, 492 (2004) (quoting Afanador, 151 N.J. at 52), or alternatively, "exceptional circumstances" Murray, 162 N.J. at 246.

Defendant's judgment of conviction was filed on October 23, 2002. He filed his petition for PCR on January 25, 2020, more than twelve years past the five-year time bar in the Rule. Defendant's claim that he was depressed and therefore unable to timely pursue his PCR was unsupported by the record. Defendant's next assertion, that he did not file a PCR application sooner because he was transferred multiple times between prisons, was contradicted by his own

written statement in his PCR application. Our review of the record shows defendant failed to demonstrate excusable neglect, nor did he allege facts constituting "compelling, extenuating circumstances,"² or "exceptional circumstances,"³ elements which must be proven in order to relax the time bar under Rule 3:22-12(a)(1)(A).

Out of an abundance of caution, Judge Ryan addressed defendant's petition on the merits, found no ineffective assistance of counsel, and denied defendant's request for an evidentiary hearing. We agree for the reasons set forth in Judge Ryan's opinion. In light of our conclusion that the five-year time bar precludes defendant's application for relief, we decline further comment on the merits.

To the extent that we have not addressed them, any remaining arguments raised by defendant 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.



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² Milne, 178 N.J. at 492.

³ Murray, 162 N.J. at 246.