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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3168-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JERMAINE KING,

Defendant-Appellant.

Submitted December 7, 2022 – Decided February 2, 2023

Before Judges Accurso and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 94-06-2304.

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

Theodore N. Stephens II, Acting Essex County Prosecutor, attorney for respondent (Barbara A. Rosenkrans, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

In 1995, a jury convicted defendant Jermaine King of first-degree robbery, felony-murder, first-degree murder, third-degree unlawful possession of a weapon, second-degree possession of a weapon for an unlawful purpose, and fourth-degree aggravated assault. At sentencing, the court merged the robbery and murder convictions into defendant's felony-murder conviction and imposed a life sentence with a thirty-year period of parole ineligibility on the latter charge, as well as an aggregate consecutive eighteen-month sentence on the remaining charges. Defendant appeals from an order dismissing his 2019 post-conviction relief (PCR) petition based on findings the petition is untimely under Rule 3:22-12 and otherwise did not establish any prima facie claims entitling defendant to either PCR or an evidentiary hearing. We affirm.

I.

Defendant's Trial, Conviction, and Sentencing

Following a mistrial resulting from a hung jury, the State re-tried defendant before a new jury on charges arising from a robbery and murder that took place in Newark on May 6, 1994. The evidence showed that following an evening of drinking together, during the early morning hours of May 6, 1994, Michael Fronzak and Mark Nascimento drove to Newark in Nascimento's vehicle to solicit a sex worker.

They located a sex worker, reached an agreement with her, and alternated receiving her services in the back seat of Nascimento's vehicle. After the sex worker left the vehicle, and as Fronzak made his way to the front passenger seat, an individual approached the open driver's side window, placed a gun against Nascimento's temple, and said, "Give me your money." Nascimento pushed the gun away from his temple, placed the car in gear, and "floored the gas." Nascimento later reported he got a "clear look" at the assailant's face.

As he drove from the scene, Nascimento turned to speak to Fronzak and noticed he was not in the vehicle. Nascimento believed he heard one or two shots after which he turned the vehicle around to locate Fronzak. As he did so, Nascimento saw the same individual who placed the gun against his temple running up the street in the opposite direction he was driving.

Nascimento saw police officers at the corner of Frelinghuysen Avenue and Wright Street. He told them he was looking for a friend, but the officers told him, "there was something going on" and he should leave the area. Nascimento complied with the directive and returned home believing Fronzak had obtained a ride and left the area.

Then-Newark police officer Darius Smith testified that, on May 6, 1994, he was in the area of Frelinghuysen Avenue and Wright Street while on his way

to his girlfriend's home. Although he was off duty, he stopped at the intersection of the two streets after hearing several gunshots and seeing a man standing on the corner pointing a gun "in an easterly direction down Wright Street." According to Smith, he made eye contact with the man, who dropped the weapon and "jumped into a white car that . . . pulled up to the sidewalk."

Smith then exited his vehicle, retrieved the gun, re-entered his vehicle, and followed the white car. Smith later abandoned his pursuit of the white vehicle, called in the incident to the police department, and returned to the location where he observed the man drop the handgun. Smith returned the gun to the place he found it so police could photograph it. It was later determined the handgun contained three live rounds and two spent shells.

At the scene, Smith also found a wallet with a dollar next to it on the ground. A later examination of the wallet revealed it contained Fronzak's driver's license. Smith filed a police report identifying the wallet and its contents as "found property" because, at that time, Fronzak's body had not been discovered.

About three hours after Smith first observed the man with the gun, police received a report of a body on the sidewalk of Miller Street, which runs parallel

to, and one block over from, Wright Street. The body was later identified as Fronzak, who had been shot and killed.

Nascimento later identified defendant's picture in a photo array presented by the police. In a separate identification procedure, Smith identified defendant's photograph as the individual he observed pointing the handgun and fleeing in the white vehicle. Smith later recalled he arrested defendant in a separate incident four days after Fronzak's murder, but he did not at that time recognize defendant as the individual he had observed pointing and dropping the handgun.

Ballistics evidence established the bullet recovered from Fronzak's body was fired from the gun Smith recovered. The medical examiner testified Fronzak died from injuries resulting from a bullet wound.

Following defendant's 1995 conviction and sentencing, the Office of the Public Defender filed a notice of appeal on defendant's behalf. Defendant subsequently hired private counsel to handle the appeal. In a February 7, 1997 order, we dismissed the appeal because defendant did not file a "timely brief."

On April 3, 2000, the same counsel defendant retained for his direct appeal filed a letter brief in support of what he described as defendant's "petition for

post[-]conviction relief."¹ The brief asserted defendant was denied his right to a fair trial because the trial court failed to provide the jury with a cross-racial identification jury instruction. Defendant argued the identification of Fronzak's assailant was the primary issue at trial and, therefore, a cross-racial identification instruction under State v. Cromedy, 158 N.J. 112 (1999), was required because Nascimento, who is White, made one of the two identifications of defendant, who is Black.²

Defendant's counsel also submitted a June 29, 2001 additional "letter memorandum" in support of defendant's "[m]otion for [p]ost-[c]onviction [r]elief/[m]otion for a [n]ew [t]rial." Defendant argued he was entitled to PCR because the State failed to provide exculpatory material — information provided to the police by the sex worker — in violation of his due process rights under

¹ The April 3, 2000 letter brief states it is submitted "in support of the attached petition for post-conviction relief." The record on defendant's pending appeal does not include the petition to which reference is made in the April 3, 2000 letter brief. See R. 2:6-1(a)(1)(I).

² In Cromedy, the Court held "[a] cross-racial instruction should be given only when . . . identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability." 158 N.J. at 132. We observe Smith's identification of defendant, which was not cross-racial, provided an "other eyewitness account" corroborating Nascimento's identification of defendant. Thus, there was no support for a Cromedy instruction based on the circumstances presented at defendant's trial. See id. at 132-33.

Brady v. Maryland, 373 U.S. 83 (1963). See State v. Brown, 236 N.J. 497, 518 (2019) (quoting Brady, 373 U.S. at 87) (explaining, under Brady, "'suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'"). Defendant further argued he was entitled to a new trial based on newly discovered evidence — statements made by the sex worker and another putative witness defendant claimed were exculpatory — under the standard established in State v. Carter, 85 N.J. 300, 314 (1981).

At the September 21, 2001 hearing on defendant's PCR petition and motion, the court noted defendant presented "partially a [p]ost[-][c]onviction [r]elief application and partially a [n]ewly-[d]iscovered [e]vidence application for a new trial." In its oral decision, the court addressed the merits of defendant's claim his constitutional right to due process was violated by the State's purported failure to turn over Brady material. The court rejected the claim, finding the State did not fail to turn over the information provided by the sex worker, and, even if the State had failed to turn it over, the information was not exculpatory. The court also rejected defendant's claim he was denied a fair trial because the trial court did not give a cross-racial jury instruction under Cromedy.

The court also denied defendant's new-trial motion, determining the information from the two witnesses did not qualify as newly discovered evidence warranting a new trial under the Carter standard.³ The court executed a September 21, 2001 order denying defendant's "[p]etition for [p]ost[-c]onviction [r]elief," but it appears the order was not filed until April 3, 2005.

In April 2005, defendant filed a motion for a new trial and for reconsideration of the court's April 3, 2005 order. The motion was based on what defendant claimed was newly discovered evidence related to Smith's indictment on official misconduct charges. Defendant also sought discovery and in-camera inspection of Smith's personnel file. Defendant argued that, "upon information and belief," the indictment charged Smith with "planting evidence, taking money from drug dealers[,] and filing false reports." Defendant asserted the evidence supporting the criminal charges could have been used to challenge Smith's credibility at trial, and, at a minimum, the court should review Smith's

³ In Carter, the Court held that to qualify as newly discovered evidence warranting a new trial, the purported new evidence must be "(1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the trial and not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury's verdict if a new trial were granted." 85 N.J. at 314.

personnel file to determine if it included information that might have supported a challenge to Smith's credibility.⁴

Defendant later filed a supplemental brief supporting his motion for a new trial. Defendant argued in part the State had failed to turn over exculpatory Brady material concerning Smith's alleged crimes and police investigations of Smith during the criminal proceedings against defendant.

The court granted defendant's application for an in-camera inspection of Smith's disciplinary and internal affairs files for the period 1994 through 1996. After reviewing the materials, the court denied defendant's motion in an August 19, 2009 order. The same counsel who filed defendant's direct appeal from his 1995 conviction, and who represented defendant in his 2000 and 2005 petitions and motions, filed a direct appeal from the court's April 19, 2009 order. We dismissed the appeal on August 12, 2010, because defendant "failed to file a timely brief."

Almost nine years later, on March 20, 2019, defendant filed a pro se "Second Verified Petition for Post[-]Conviction Relief." The petition asserted defendant's counsel on his direct appeal was ineffective in 1997 by failing to file

⁴ In support of the new trial motion, defendant relied on the Supreme Court's decision in State v. Ways, 180 N.J. 171, 187 (2004), for the standard for granting a new trial based on newly discovered evidence.

a brief, thereby causing his appeal to be dismissed. Defendant's petition also recounted the filing of his 2000 PCR petition, which he asserted included claims his trial counsel was ineffective by failing to request a cross-racial identification jury charge and his due process rights were violated because the State failed to turn over exculpatory evidence as required in Brady.⁵

Defendant's verified petition detailed the filing of his 2005 motions for a new trial and reconsideration of the April 5, 2005 order denying his 2000 PCR petition and new trial motion. He explained his counsel appealed from the denial of his motions, and in 2009, the appeal was dismissed due to his counsel's failure to file a timely brief.

Defendant further averred he filed his 2019 "second [p]etition" for PCR to assert trial counsel was ineffective by failing to request a cross-racial identification jury instruction and because he "was denied his right to the effective assistance of appellate counsel in all respects." Defendant also

⁵ The record on appeal does not reflect defendant included an ineffective-assistance-of-counsel claim in his 2000 PCR petition.

requested the court exercise its "discretionary authority in not imposing a procedural bar to the issues raised" in his petition.⁶

After the filing of additional briefs by defendant's PCR counsel and the State, the court heard argument and rendered a detailed and thorough written decision denying the petition. The court first determined the petition is time-barred as a second or subsequent PCR petition under Rule 3:22-12(b).⁷ The PCR court also addressed and rejected the merits of the claims made by defendant's PCR counsel that: defendant was denied a fair trial because the court failed to instruct the jury on criminal attempt as part of its charge on the elements of the charged robbery of Fronzak; defendant was denied a fair trial because the court did not correctly address, and instruct the jury concerning, a juror's report that jury members felt intimidated at the courthouse by defendant's family; and

⁶ In his pro se brief in support of his PCR petition, defendant also claimed: trial counsel was ineffective by not challenging the absence of a jury instruction on the elements of criminal attempt in the "robbery/felony[-]murder" charge and PCR counsel was ineffective by failing to identify trial and appellate counsels' error. Defendant also argued his asserted claims should not be barred under Rule 3:22-4 and Rule 3:22-5.

⁷ The court found defendant's 2019 PCR petition was his third. For reasons we explain, we disagree with the court's determination, and we conclude the 2019 PCR petition is defendant's second. Our rejection of the PCR court's finding does not affect the result here, because Rule 3:22-12(b) applies to "second or subsequent petition[s]."

defendant was denied the effective assistance of trial, appellate, and prior PCR counsel. The court entered an order denying defendant's PCR petition without an evidentiary hearing, and this appeal followed.

On appeal, defendant presents the following points for our consideration:

POINT I

[DEFENDANT] IS ENTITLED TO RELIEF ON HIS CLAIMS THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE.

A. Counsel Failed to Appeal.

B. Counsel Failed to Secure an Impartial Jury and R.D. Failed to Raise This Issue.

C. Counsel Failed to Object to an Erroneous and Prejudicial Jury Charge [W]hich Omitted an Instruction on an Essential Element of Felony Murder and Robbery.

POINT II

IN THE ALTERNATIVE, [DEFENDANT] IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIMS THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE.

POINT III

THE PCR COURT ERRONEOUSLY RULED THAT [DEFENDANT]'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL WERE TIME-BARRLED BECAUSE ANY DELAY IN FILING THE PETITION WAS DUE TO DEFENDANT'S

EXCUSABLE NEGLIGENCE 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 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 also applies to mixed questions of law and fact. Id. at 420. Where an evidentiary hearing has not been held, we "conduct a de novo review of both the factual findings and legal conclusions of the PCR court" Id. at 421 (emphasis in original). We apply that standard here. Id.

The PCR court determined defendant's petition is time-barred under Rule 3:22-12(b), which provides the time limitations for filing second or subsequent PCR petitions. Defendant argues the Rule does not apply to his 2019 petition. He claims the petition is his first and therefore Rule 3:22-12(a), which defines the time limitations for filing a first PCR petition, is applicable. Defendant recognizes he filed a 2000 petition for PCR and motion for a new trial, and later filed the April 2005 motion for a new trial, but he claims they cannot be

considered PCR petitions because neither expressly asserted a claim of ineffective assistance of counsel.

We agree with defendant his April 2005 motion for a new trial based on newly discovered evidence — the indictment of Smith for official misconduct, including the filing of false reports — did not constitute a PCR petition under Rule 3:22-1. Defendant's motion sought relief — a new trial based on the alleged newly discovered evidence — under Rule 3:20-1. As explained by the Supreme Court, motions for a new trial based on newly discovered evidence under Rule 3:20-1 are governed by different standards than those applicable to PCR petitions, State v. Szemple, 247 N.J. 82, 97-99 (2021), and "[u]nlike petitions for post-conviction relief, '[a] motion for a new trial based on the ground of newly-discovered evidence may be made at any time,'" id. at 99 (second alteration in original) (quoting R. 3:20-2). We therefore do not consider defendant's April 2005 motion, which was denied in 2009, a PCR petition for the purposes of determining the applicable time limitations for the filing of the 2019 PCR under Rule 3:22-12.⁸

⁸ Defendant's April 2005 motion also sought reconsideration of the April 5, 2005 order denying defendant's PCR petition and motion for a new trial that was filed in 2000. Requesting reconsideration of the April 5, 2005 order did not, however, constitute the filing of a PCR petition for purposes of applying the various time limitations set forth in Rule 3:22-12.

The same cannot be said of defendant's 2000 petition for PCR and motion for a new trial. Defendant claims the joint application in 2000 did not constitute, even in part, a first PCR petition because it did not include an ineffective-assistance-of-counsel claim. The argument ignores that ineffective-assistance-of-counsel claims are only one of the many grounds upon which PCR may be based.

Rule 3:22-2 sets forth the cognizable grounds for PCR including: a denial of federal and state constitutional rights during the criminal proceedings; a lack of jurisdiction of the court to impose the judgment on a conviction; any ground previously available as basis of a collateral attack on a conviction by habeas corpus or other statutory and common-law remedies; and imposition of a sentence not authorized by law if raised with the any of the aforementioned grounds. R. 3:22-2(a), (b), (c), and (d). Rule 3:22-2 also provides an additional ground supporting a PCR petition, "[a] claim of ineffective assistance of counsel based on trial counsel's failure to file a direct appeal of the judgment of conviction and sentence upon defendant's timely request." R. 3:22-2(e).

Thus, contrary to defendant's contention, although ineffective-assistance-of-counsel claims constitute grounds for a PCR petition under Rule 3:22-2(a) and (e), see, e.g., State v. Fritz, 105 N.J. 42, 58 (1987) (explaining standard for

PCR under the New Jersey Constitution for ineffective-assistance-of-counsel claims), the cognizable grounds for PCR are not limited to ineffective-assistance-of-counsel claims. They include claims for denial of constitutional rights during a defendant's criminal proceedings, R. 3:22-2(a), including the denial of a defendant's due process right to disclosure of exculpatory evidence. See, e.g., Szemple, 247 N.J. at 97-99 (analyzing PCR claim the defendant's due process rights were violated based on the State's alleged failure to turn over exculpatory material under Brady); State v. Nash, 212 N.J. 518, 544-45 (2013) (same); State v. Martini, 160 N.J. 248, 268-70 (1999) (same).

Here, the record shows that in 2000, defendant's counsel filed a pleading entitled in part a "petition for post-conviction relief." In support of the petition, counsel argued defendant's constitutional right to due process was violated because the State failed to provide exculpatory Brady material during the proceedings that resulted in the defendant's conviction, and defendant's right to a fair trial was denied because the trial court failed to provide proper jury instructions. Those claims are based on alleged violations of defendant's constitutional rights during the criminal proceedings that resulted in his convictions, and they constituted PCR claims cognizable under R. 3:22-2(a). The PCR court addressed the merits of the claims and rejected them. See, e.g.,

State v. Hannah, 248 N.J. 148, 176 (2021) (concluding subsequent PCR court "should have adhered to the finality of" decision entered by prior PCR court on newly discovered evidence claim). As a result, defendant's 2000 application was his first PCR petition for purposes of determining the time limitations applicable to his 2019 second petition under Rule 3:22-12. That defendant's 2000 application separately sought a new trial under Rule 3:20-1 does not require a different conclusion.

Because we conclude defendant's 2019 PCR is his second, we reject his reliance on Rule 3:22-12(a) as defining the time limitations applicable to the petition. Rule 3:22-12(a) applies to the filing of a first PCR petition and provides no refuge where, as here, a defendant files a second. The time limitation applicable to defendant's 2019 PCR petition is set forth Rule 3:22-12(a)(2).

Rule 3:22-4(b) provides, "[a] second or subsequent petition for post-conviction relief shall be dismissed unless" it is both "timely under [Rule] 3:22-12(a)(2)," and "alleges on its face":

(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.

[(emphasis added).]

Rule 3:22-12(a)(2) provides:

[n]otwithstanding any other provision in this rule, no second or subsequent petition shall be filed more than one year after the latest of:

(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)(A), (B), and (C) (emphasis added).]

The specified time limitations "shall not be relaxed," except as otherwise "provided" within the Rule. R. 3:22-12(b); see also R. 1:3-4(c). And, as noted, Rule 3:22-4(b)(1) dictates that "a second or subsequent" PCR petition "shall be dismissed" unless it is filed within the time limitations set forth in Rule 3:22-12(a)(2).

In State v. Jackson, we detailed the historical progression resulting in the Supreme Court's adoption of the current Rules governing the time limitations for the filing of PCR petitions. 454 N.J. Super. 284, 292-94 (App. Div. 2018). We explained that "[n]either the parties nor the court may . . . enlarge the time specified by . . . [Rule] 3:22-12," 454 N.J. Super. at 292 (quoting Rule 1:3-4(c)), and concluded, "[t]hus enlargement of Rule 3:22-12's time limits 'is absolutely prohibited,'" ibid. We also noted, "[b]y mandating in Rule 3:22-12(a)(2) that the one-year time limit applied '[n]otwithstanding any other provision of this rule,' the Supreme Court made clear that the late filing of a second or subsequent PCR petition" under Rule 3:22-12(a)(2), "could not be excused in the same manner as the late filing of a first PCR petition" under Rule 3:22-12(a)(1). Id. at 293 (second alteration in original).

Here, defendant's brief on appeal does not address the application of Rule 3:22-12(a)(2) to his second PCR petition, which he filed in 2019. It is undisputed the petition was filed twenty-four years after defendant's 1995 conviction, fourteen years after the April 2005 order denying his first petition, and almost ten years after the denial of his motion for a new trial in 2009. Yet, his verified petition does not "on its face" provide any competent evidence demonstrating it is timely under Rule 3:22-12(a)(2)(A), (B), or (C), and the record otherwise establishes it was not. See R. 3:22-4(b). Indeed, the record presented in support of defendant's PCR petition offers no basis to conclude the petition was timely filed under Rule 3:22-12(a)(2), and, for that reason, we affirm the PCR court's denial of the petition without an evidentiary hearing.

Because defendant's second PCR petition, filed in 2019, is untimely under Rule 3:22-12(a)(2), this court does not have authority to review the merits of his claims. State v. Brown, 455 N.J. Super. 460, 470 (App. Div. 2018); Jackson, 454 N.J. Super. at 297. We therefore do not address defendant's contentions the PCR court erred by rejecting on the merits his claim he is entitled to PCR based on the purported errors of the trial court and his trial, appellate, and prior PCR counsel.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION