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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3254-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WAYNE GREENE,

Defendant-Appellant.

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Submitted April 26, 2023 – Decided July 25, 2023

Before Judges Mayer and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 09-09-0799.

Joseph E. Krakora, Public Defender, counsel for appellant (Steven M. Gilson, Designated Counsel, on the brief).

William A. Daniel, Union County Prosecutor, counsel for respondent (Meredith L. Balo, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Wayne Green appeals from the June 7, 2021 order denying his second petition for post-conviction relief (PCR) as time-barred. We agree with the PCR judge and affirm.

In 2011, defendant was found guilty of aggravated manslaughter, N.J.S.A. 2C:11-4(a), a lesser-included offense to first-degree murder, N.J.S.A. 2C:11-3(a)(1)-(2) (count one); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (count two); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count three); first-degree robbery, N.J.S.A. 2C:15-1 (count four); felony murder, N.J.S.A. 2C:11-3(a)(3) (count five); and second-degree witness tampering, N.J.S.A. 2C:28-5 (count nine). Defendant was sentenced to thirty-five years in prison, with a thirty-year period of parole ineligibility under the No Early Release Act, N.J.S.A. 2C:43-7.2, on the felony murder conviction. He was also sentenced to a consecutive term of ten years in prison on the witness tampering conviction.<sup>1</sup>

The details of defendant's offenses are recounted in our unpublished opinion affirming defendant's conviction and sentence on direct appeal. State v. Greene (Greene I), No. A-3387-11 (App. Div. Oct. 30, 2014) (slip op. at 3-

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<sup>1</sup> In 2016, defendant was resentenced to thirty-five years in prison on felony murder, with a thirty-year period of parole ineligibility and a consecutive six-year prison term on witness tampering.

10). The Supreme Court denied defendant's petition for certification. State v. Greene, 221 N.J. 285 (2015).

On May 30, 2018, defendant's first PCR petition was denied without an evidentiary hearing. Defendant raised a claim of ineffective assistance of trial and appellate counsel. Specifically, defendant asserted trial counsel failed to investigate or obtain the telephone records of the State's chief witness which was "unduly prejudicial" to defendant. He also claimed appellate counsel was ineffective because he did not address on appeal trial counsel's failure to request a mistrial. We affirmed the denial of defendant's first PCR petition. State v. Greene (Greene II), No. A-5859-17 (App. Div. Jan. 21, 2020) (slip op. at 2-3). The Supreme Court denied his petition for certification. State v. Greene, 244 N.J. 368 (2020).

On August 5, 2020, defendant filed a second PCR petition. Defendant claimed trial counsel rendered ineffective assistance of counsel by failing to address the prosecutor's alleged violation of Brady v. Maryland<sup>2</sup> by not turning over discoverable material.

On May 17, 2021, defendant's PCR counsel on the second PCR petition signed a certification on defendant's behalf, pending receipt of the signed

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<sup>2</sup> 373 U.S. 83 (1963).

original from defendant. During a brief court recess, on June 7, 2021, defendant signed his certification, which bore the initial May date.

The same day, following oral argument, the PCR judge denied defendant's second petition. The judge rejected defendant's argument that the time bar for the filing of his second petition for PCR should not run until the New Jersey Supreme Court rejected his petition for certification on appeal from denial of his first PCR petition. She concluded the petition was untimely under Rules 3:22-4(b) and 3:22-12(a)(2) since it was filed more than nine years after the 2011 conviction and two years after the 2018 denial of his first PCR petition.

Citing the strict limitations imposed under Rule 3:22-4(b)(1), the judge determined defendant's pending petition for certification as to his appeal of the denial of his first PCR petition did not change the fact that the defendant missed the one-year filing deadline for the second PCR petition. She noted Rules 1:3-4, 3:22-4(b) and 3:22-12(b) precluded enlargement or relaxation of the one-year period of limitation for filing a second PCR petition. See State v. Jackson, 454 N.J. Super. 284, 288 (App. Div. 2018). Lastly, the judge concluded an appeal from the denial of a first PCR petition was not considered a direct appeal under Rule 3:22-6A(1); and therefore, the court did not have the authority to review the merits of defendant's claims in his second PCR. This appeal followed.

On appeal, defendant argues:

POINT I

THE PCR COURT PROPERLY DENIED DEFENDANT'S SECOND PETITION FOR POST-CONVICTION RELIEF AFTER FINDING IT WAS TIME BARRED.

POINT II

DEFENDANT FAILED TO ESTABLISH A PRIMA FACIE SHOWING OF INEFFECTIVE ASSISTANCE OF TRIAL, APPELLATE, AND PCR COUNSEL.  
(Not Addressed Below)

The rules governing PCR petitions are set forth in Rule 3:22. Second or subsequent PCR petitions must comply with the requirements of Rules 3:22-4(b) and 3:22-12(a)(2). To avoid dismissal of a second PCR petition, a defendant must present evidence to satisfy one of three enumerated exceptions: a new rule of law, newly discovered evidence, or ineffective assistance of prior PCR counsel. R. 3:22-4(b)(2). Even when a defendant's PCR contentions fit within these exceptions, a second or subsequent PCR petition must be timely filed. R. 3:22-4(b)(1).

Rule 3:22-12 prescribes the time limitations for post-conviction relief. Particularly, Rule 3:22-12(a)(2)(C) provides "no second or subsequent petition shall be filed more than one year after . . . the date of the denial of the first . . .

application for post-conviction relief" based on ineffective assistance of counsel. There is no fundamental or manifest injustice exception under Rule 3:22-5, providing that prior rulings on appeal are conclusive and preclude reassertion of litigated issues in a PCR petition.

Guided by these rules, we are satisfied the PCR judge was required to dismiss defendant's second PCR petition as untimely. Defendant's second PCR had to be filed within one year of the denial of his first petition. Here, defendant's second PCR petition was filed more than two years after the denial of his first PCR application.

Additionally, we are satisfied the PCR judge properly concluded defendant's pending petition for certification of the first PCR petition did not toll the time to file the second PCR petition. It is well-established the time to file a PCR petition is neither stayed nor tolled by appellate or other review proceedings. See State v. Dillard, 208 N.J. Super. 722, 727 (App. Div. 1986) (citing R. 3:22-12); State v. Dugan, 289 N.J. Super. 15, 19 (App. Div. 1996).

In Point II, defendant asserts that he satisfied the two-prong Strickland<sup>3</sup> test that his trial, appellate, and first PCR attorney rendered ineffective

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<sup>3</sup> Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 58 (1987).

assistance of counsel and an evidentiary hearing is warranted. We are unpersuaded. "Post-conviction relief is neither a substitute for direct appeal, . . . nor an opportunity to relitigate cases already decided on the merits." State v. Preciose, 129 N.J. 451, 459 (1992) (citations omitted).

Moreover, defendant never raised this argument on direct appeal or in the first PCR petition, and we decline to consider it for the first time on appeal. See, e.g., State v. Witt, 223 N.J. 409, 419 (2015) (quoting State v. Robinson, 200 N.J. 1, 20 (2009)) ("[W]ith few exceptions, 'our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available.'").

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION