SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3157-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

M.C.-A.,

Defendant-Appellant.

Submitted November 9, 2023 – Decided June 18, 2024

Before Judges Vernoia and Walcott-Henderson.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 13-08-1143.

M.C.-A., appellant pro se.

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (Erin M. Campbell, Assistant Prosecutor, on the brief.)

PER CURIAM

Defendant M.C.-A. appeals from a December 22, 2021 order denying his second petition for post-conviction relief (PCR), without an evidentiary hearing.[1] The petition alleged the ineffective assistance of defendant's counsel on his first PCR.

We previously affirmed defendant's conviction and sentence on direct appeal and summarize only the facts pertinent to this appeal as we assume the parties' familiarity with our prior decision. State v. M.C.-A., No. A-1509-14 (August 8, 2017) (slip op. at 2-7) (M.C.-A. I). A jury convicted defendant of sexually assaulting his stepdaughter, E.D. between 2005 and 2012, when she was ten to sixteen years old. At trial, the State presented testimony about Child Sex Abuse Accommodation Syndrome (CSAAS) from Susan Esquilin, Ph.D., who was admitted as an expert in child sexual assault. Trial counsel did not object to Dr. Esquilin's qualifications or to the reliability of the social science supporting her opinions based on CSAAS.

On direct appeal, defendant had contended the admission of testimony about CSAAS was plain error. Id. at 2. However, we discerned "no error—

[1] Consistent with our previous opinion, State v. M.C.-A., No. A-4515-18 (July 26, 2021) (M.C.-A. II) (slip op. at 2), we employ initials to protect the privacy interests of appellant pursuant to N.J.S.A. 2A:82-46 and Rule 1:38-2(c)(9) and (12).

certainly none 'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.'" Id. at 10.

Defendant then filed his first PCR petition asserting claims of ineffective assistance of trial counsel for failing to object to testimony from Esquilin concerning CSAAS. On May 6, 2019, the court denied defendant's first PCR petition and we affirmed the PCR court's decision. See M.C.-A. II, (slip op at. 3) ("We first dispatch the CSAAS issue, which defendant raises in his counseled and pro se briefs. There is no merit to defendant's contention that his trial counsel, during a trial in 2014, was ineffective by failing to mount a challenge to the admissibility of CSAAS testimony[.]") A petition for certification was filed and subsequently denied on October 19, 2021. State v. M.C.-A., 248 N.J. 543 (2021).

On November 2, 2021, more than two years following the May 6, 2019 denial of defendant's first PCR petition, defendant filed a second PCR petition, which is the operative petition at issue on this appeal. Defendant argued PCR counsel had provided ineffective assistance by failing to argue appellate counsel on the direct appeal had been ineffective by not requesting a stay of the direct appeal pending the outcome of the Supreme Court's disposition of the then-pending matter in State v. J.L.G., 234 N.J. 265 (2018), which involved a

challenge to the admissibility of expert testimony concerning CSAAS. The PCR court dismissed defendant's second PCR petition as untimely under Rule 3:22-4(b), and under Rule 3:22-5. We agree and affirm.

Before the PCR court, defendant acknowledged his second petition was filed more than one year after disposition of the first PCR petition but asserted that the facts upon which it was based were unknown to him until we issued our decision affirming the denial of his first petition. See M.C.-A. II, (slip op. at 9-10). More particularly, defendant maintained that prior to our decision affirming the denial of his first PCR petition, he was unaware that he may have had a potential claim against appellate counsel for failing to move for a stay of his appeal pending the Supreme Court's decision in J.L.G.

In our decision on defendant's direct appeal from the denial of his first PCR petition, we explained that if the holding in J.L.G., that "expert testimony about CSAAS in general, and its component behaviors other than delayed disclosure, may no longer be admitted at criminal trials," 243 N.J. at 272, had applied to defendant's case, we would have determined it was error to admit Esquilin's CSAAS testimony at his trial. We explained:

> Defendant's appeal was submitted on February 7, 2017, and decided six months later. While his appeal was pending decision, the Supreme Court granted certification in J.L.G. on March 17, 2017, and

> remanded for an evidentiary hearing on CSAAS's scientific reliability. An attentive and forward-looking attorney may well have recognized the possibility of a change in the law and requested a stay of decision. . . . [b]ut, it is uncertain that it was constitutionally deficient not to request a stay.
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> . . . .
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> Ultimately, it is unnecessary to decide whether appellate counsel was deficient by not requesting a stay. Even if we sua sponte stayed the direct appeal to await decision in J.L.G. (or if the Supreme Court granted a motion to stay decision on defendant's petition for certification) thereby assuring that the J.L.G. rule applied to defendant's case, there is not a reasonable probability that the result of defendant's direct appeal would have been different. We acknowledge that if we applied the J.L.G. rule, we would hold that the CSAAS testimony in defendant's case was erroneously admitted. That is because [ED's] explanation that she was 'scared' to tell anyone about the abuse would not have been admissible to prove a fact beyond the ken of the average juror. But, for the reasons we stated on direct appeal, the CSAAS testimony had little, if any, impact on the jury's verdict. We remain 'convinced' that the expert's 'brief summary of the CSAAS did not affect the outcome of this case in light of the substantial evidence of guilt and the minor role her testimony played in the trial.'
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> [M.C.-A. II, (slip op. at 11-12) (citation omitted).]

The PCR court concluded defendant's second PCR petition—filed over one year after the denial of his first petition—was untimely under Rule 3:22-4(b). See R. 3:22-4(b) ("[a] second or subsequent petition for post-conviction

relief shall be dismissed unless: (1) it is timely under Rule 3:22–12(a)(2)[.]"); R. 3:22–12(a)(2) ("Notwithstanding any other provision in this rule, no second or subsequent petition shall be filed more than one year after the latest of . . . 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.").

The court also rejected defendant's contention that his second PCR was timely under Rule 3:22-12(a)(2)(A) or (B), finding defendant had failed to claim a newly recognized constitutional right. See R. 3:22-12(a)(2)(A). In response to defendant's argument that Rule 3:22-12(a)(2)(B) applied because "the PCR appeal court mentioned that direct appeal counsel may have been ineffective for failing to request a stay of defendant's sentencing due to [J.L.G.]," the court determined the claim was barred under Rule 3:22-5.

Additionally, the court found defendant had not established he suffered prejudice as a result of his first PCR counsel's alleged error in failing to argue appellate counsel on the direct appeal should have sought a stay of the appeal pending the Supreme Court's decision in J.L.G. Relying on our decision on defendant's appeal from the denial of his first PCR petition, the court stated, "direct appeal counsel's failure to request a stay (and PCR counsel's failure to

argue it) was inconsequential, given that the stay and application of [our] Supreme Court's ruling in the pending case would not have changed the outcome of the defendant's direct appeal."

Defendant appealed from the court's order denying the second PCR petition. On appeal, defendant presents the following arguments for our consideration.

> POINT I
>
> THE PCR COURT ERRED AND THE ORDER DENYING PCR SHOULD BE REVERSED AND THE MATTER REMANDED WHERE THE FACTS CAN BE RESEARCHED AND ARGUED BY COUNSEL.
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> (A) First PCR Counsel failed to raise [the] issue before the PCR Court to establish a record for Appellate review.
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> (B) Direct appellate counsel was constitutionally ineffective in failing to request a stay from the [A]ppellate [D]ivision (and first PCR Counsel was ineffective in failing to raise this issue).
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> POINT II
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> DEFENDANT HAS ESTABLISHED A PRIMA FACIE CASE SUFFICENT TO REQUIRE THE ORDERING OF AN EVIDENTIARY HEARING.

The State asserts the PCR court properly denied defendant's claims as both untimely—as more than one year had elapsed since the denial of his first

petition—and barred because the defendant's arguments had been previously addressed on the merits.

We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004). The de novo standard of review also applies to mixed questions of fact and law. Id. at 420. Where, as here, an evidentiary hearing has not been held, it is within our authority "to conduct a de novo review of both the factual findings and legal conclusions of the PCR court." Id. at 421.

In Strickland the United States Supreme Court established a two-part standard to determine whether a defendant has been deprived of the effective assistance of counsel. 466 U.S. at 687. Under Strickland's first prong, a petitioner must show counsel's performance was deficient by demonstrating counsel's handling of the matter "fell below an objective standard of reasonableness" and that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to] the defendant by the Sixth Amendment." Id. at 687-88.

Under the "'second, and far more difficult prong of the'" Strickland standard, State v. Gideon, 244 N.J. 538, 550 (2021) (quoting State v. Preciose, 129 N.J. 451, 463 (1992)), a defendant "'must show that the deficient performance prejudiced the defense[,]'" State v. O'Neil, 219 N.J. 598, 611

(2014) (quoting Strickland, 466 U.S. 687). To establish prejudice, "'[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Gideon, 244 N.J. at 550-51 (alteration in original) (quoting Strickland, 466 U.S. at 694). Proof of prejudice under Strickland's second prong "'is an exacting standard.'" Id. at 551 (quoting State v. Allegro, 193 N.J. 352, 367 (2008)). A defendant seeking PCR "must 'affirmatively prove prejudice'" to satisfy the second prong of the Strickland standard. Ibid. (quoting Strickland, 466 U.S. at 693).

Under Rule 3:22-12(a)(2), no second or subsequent petition for PCR, "[n]otwithstanding any other provision in [Rule 3:22-12], . . . 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
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> (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.
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> [R. 3:22-12(a)(2)(A) to (C).]

When a petitioner files a second or subsequent PCR, he must meet the requirements set forth in Rule 3:22-4. Rule 3:22-4(b)(1) requires dismissal of a second PCR petition unless:

> (1) it is timely under [Rule] 3:22-12(a)(2); and (2) it alleges on its face either:
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> (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
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> (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
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> (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.
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> [R. 3:22-4(b).]

Addressing first the timeliness argument, we are persuaded defendant's second petition was untimely and, thus, the court did not err in denying the petition. The record shows that the court dismissed defendant's first PCR petition on May 6, 2019, and it was not until more than two years later on November 2, 2021, that defendant filed his second petition. Moreover, as the PCR court correctly noted, defendant "here claims no newly recognized constitutional right," and therefore Rule 3:22-12(a)(2)(A) does not apply. Thus, given the passage of more than one year between the denial of the first petition and filing of the second PCR petition, the court properly dismissed defendant's petition under Rule 3:22-4(b)(1).

The court also correctly determined that our disposition of the CSAAS testimony issue in defendant's appeal from the denial of the first PCR petition precludes defendant from repackaging those same claims in his second PCR petition. State v. Marshall, 173 N.J. 343, 351 (2002) (explaining Rule 3:22-5 precludes "consideration of an argument presented in a [PCR] proceeding . . . if the issue is identical or substantially equivalent to that adjudicated previously on appeal" (citations omitted)). As we have explained, in our decision on defendant's direct appeal from his conviction, we addressed and rejected his contention that any potential error in the admission of Esquilin's CSAAS

testimony at trial had affected the outcome of his trial. And, because this argument was already addressed on the merits, it is procedurally barred. State v. McQuaid, 147 N.J. 464, 484 (1997) ("when the issue of ineffective assistance of counsel has already been raised on direct appeal, it may be procedurally barred on PCR[]") (citing R. 3:22–5).

In M.C.-A. II, we rejected defendant's argument appellate counsel's representation was constitutionally deficient because counsel failed to move to stay his appeal pending our Court's decision on this issue in J.L.G. M.C.-A. II, (slip op. at 11-12). According to defendant, had counsel obtained the stay, the direct appeal from the conviction would have been in the pipeline, and the holding in J.L.G. would have applied to bar the expert's testimony on CSAAS. Defendant therefore suggests he would have prevailed on his direct appeal and, as a result, he suffered prejudice given appellate counsel's alleged error in failing to request a stay of his direct appeal pending disposition of J.L.G.

Although we conclude defendant's second PCR petition is untimely and otherwise barred under Rule 3:22-5, we nonetheless determine the petition was correctly denied because defendant failed to sustain his burden of establishing prejudice under the second prong of the Strickland standard. State v. Gaitan, 209 N.J. 339, 350 (2012) ("Although a demonstration of prejudice constitutes

the second part of the Strickland analysis, courts are permitted leeway to choose to examine first whether a defendant has been prejudiced[.]") (citing Strickland, 466 U.S. at 697).

To satisfy his burden of proving prejudice, defendant was required to make an affirmative showing there is reasonable probability that but his first PCR counsel's alleged error in failing to argue appellate counsel on his direct appeal erred by failing to request a stay, the outcome of his direct appeal would have been different. Gideon, 244 N.J. at 551 (reiterating that the second prong of Strickland requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different[.]") (quoting Strickland, 466 U.S. at 694). As we have explained, however, we have previously determined that any putative error in admitting Esquilin's testimony concerning CSAAS constituted harmless error because it did not affect the outcome of defendant's trial. See M.C.-A. II, (slip op. at 12) ("We remain 'convinced' that the expert's 'brief summary of the CSAAS did not affect the outcome of this case in light of the substantial evidence of guilt and the minor role her testimony played in the trial.'") (quoting M.C.-A. I, (slip op. at 13)).

And, defendant otherwise failed to present any evidence affirmatively demonstrating he suffered prejudice under the Strickland standard as a result of his first PCR counsel's purported error. See Gideon, 209 N.J. at 249-50.

Defendant therefore could not and did not demonstrate he suffered prejudice as a result of appellate counsel's failure to request a stay of the direct appeal pending the Court's disposition of J.L.G. or the failure of PCR counsel on his first petition to argue appellate counsel was ineffective. Defendant's failure to satisfy his burden of establishing prejudice under Strickland's second prong required the rejection of his second PCR petition. See Strickland, 466 U.S. at 700 (explaining a failure to satisfy either prong of the Strickland standard requires rejection of a PCR petition).

Further, because defendant failed to establish a prima facie case of ineffective assistance of counsel under Strickland, no evidentiary hearing was warranted. See State v. Marshall, 148 N.J. 89, 158 (1992). To the extent we have not specifically addressed any of defendant's arguments, it is because we have determined they are of insufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.