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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0350-08T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SARAH CREQUE,

Defendant-Appellant.

Submitted October 20, 2009 - Decided November 12, 2009

Before Judges Lihotz and Ashrafi.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 06-09-0227.

Yvonne Smith Segars, Public Defender, attorney for appellant (Adam W. Toraya, Designated Counsel, of counsel and on the brief).

Bruce J. Kaplan, Middlesex County Prosecutor, attorney for respondent (Nancy A. Hulett, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Sarah Creque appeals from an order of the Law Division dated May 2, 2008, dismissing her petition for post-conviction relief (PCR) without an evidentiary hearing. The Law Division determined that defendant could not possibly prove her

allegations of ineffective assistance of counsel because she was deported and could not return to testify. Her deportation was allegedly a result of being convicted of the crime from which she sought relief. We reverse and remand for an evidentiary hearing.

In July 2006, defendant, then age twenty, stabbed her brother with a knife or other kitchen utensil in their home in New Brunswick. After her arrest, an attorney from the Public Defender's Office in Middlesex County was assigned to represent her. In September 2006, defendant pleaded guilty, pursuant to a non-custodial plea agreement, to a one-count accusation charging third-degree aggravated assault, in violation of N.J.S.A. 2C:12-1b(2).

At the hearing for her guilty plea, defendant testified that she was involved in a fight with her brother, that he struck her first, that she "jabbed him in the arm a few times" with a fruit peeler, and that her brother "said it wasn't painful." The judge and the attorneys did not question defendant about her citizenship or immigration status, but she signed and filed a plea form in which question 17 asked, "Do you understand that if you are not a United States citizen or national, you may be deported by virtue of your guilty plea?" Circled in response was the answer "N/A," not applicable. The court accepted the guilty plea, and in November 2006, sentenced

defendant in accordance with the plea agreement to three years' probation.

Within five months of her sentencing, in March 2007, defendant filed a pro se PCR petition alleging ineffective assistance of counsel. She asserted that she was "undocumented" at the time of her plea, that her attorney had "marked not applicable where the [plea] form asked about immigration consequences (i.e. deportability)," and that she "did not think [her] immigration status would be a problem because that is what he led me to believe." The Public Defender's Office assigned an attorney from a different county to represent her for the PCR petition.

In August 2007, defendant signed a certification in support of her petition in which she stated that she is a citizen of the Dominican Republic and that removal proceedings were brought against her by U.S. Immigration and Customs Enforcement (ICE), a federal agency within the Department of Homeland Security. She certified further that her attorney at the time of the guilty plea had been aware that she had pending an application to adjust her immigration and residency status, and that he advised her that the guilty plea would not affect that status. She also said that all her family, including her children, reside in the United States, and that if she had known she might be deported, she would not have pleaded guilty but gone to trial on the

aggravated assault charge. Between the time that defendant signed her certification and the time that her PCR petition was scheduled for a hearing in April 2008, the federal government deported defendant to the Dominican Republic.

Nevertheless, in support of the petition, her attorney submitted defendant's certification and also the report of an investigator who had questioned the prior attorney about the guilty plea and the answer to question 17 on the plea form. According to the investigator, the attorney told him that the answer "N/A" is not "a standard response" to question 17 and, therefore, the attorney believed that defendant must have told him something that led to his marking that answer. The attorney also told the investigator that it is not his practice in all cases to review the criminal case intake form, although that form would likely have informed him of defendant's residency status.

The State filed an answer to the PCR petition alleging among other things that defendant had a lengthy juvenile record involving assaults; that she had reported "immigration problems" to a psychiatrist in August 2006, that is, before entry of her guilty plea; and that she could not enter the country legally to testify in support of her petition. The State argued that the PCR petition did not establish a prima facie case of ineffective assistance of counsel.

At oral argument on the PCR petition, defense counsel suggested several alternatives to contend with defendant's absence. He suggested that her testimony be taken by telephone or video, or that letters rogatory be issued for the taking of her testimony in the Dominican Republic. Alternatively, defense counsel said that defendant's testimony might not be necessary, that the court might decide the issue of ineffective assistance of counsel in her favor without it.

The prosecutor objected on several grounds, and the court was skeptical of the defense proposals. The court said:

> [T]he most obvious problem here is the impossibility problem. In other words, it is impossible for Miss Creque to prosecute this application. The burden is on her to establish . . . ineffective assistance of counsel. And she's got to be able to get to court to do that. She has to be subject to cross-examination to do that, and she can't. As a matter of federal law it's impossible for her to do that.
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> So, I mean ultimately the application has to be dismissed for that reason.

The PCR judge then commented that he did not think defendant's written submissions established a prima facie case entitling her to a hearing, but "quite frankly, if she was sitting here she would probably get a hearing."

On appeal, defendant makes the following arguments:

> POINT ONE
> THE COURT COMMITTED ERROR IN DISMISSING THE DEFENDANT'S PETITION FOR POST-CONVICTION

RELIEF SOLEY ON THE BASIS THAT SHE WAS NOT PRESENT FOR ORAL ARGUMENTS AND UNABLE TO BE PHYSICALLY PRESENT AT AN EVIDENTIARY HEARING.

POINT TWO
THE COURT ABUSED ITS DISCRETION BY DENYING DEFENDANT AN EVIDENTIARY HEARING TO ESTABLISH THAT SHE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL CONSTITUTIONALLY GUARANTEED TO HER AT TRIAL, BY THE U.S. CONST., AMENDS. VI, XIV; N.J. CONST. ART. I, PAR. 10.

POINT THREE
THE COURT'S FAILURE TO ADVISE DEFENDANT OF THE DEPORTATION CONSEQUENCE OF HER PLEA VIOLATES FUNDAMENTAL FAIRNESS.

Our standard of review is plenary on questions of law. See State v. Harris, 181 N.J. 391, 415 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005). Relevant factual findings of the trial court are granted deference if they are supported by adequate, substantial, and credible evidence. Ibid.

Defendant's third point of argument, that the court itself had a duty to advise defendant about the potential deportation consequences of her guilty plea, was rejected by State v. Chung, 210 N.J. Super. 427, 433 (App. Div. 1986). We see no reason to revisit Chung here. We find merit in defendant's first two points.

On a PCR petition, an evidentiary hearing is not required unless defendant makes a prima facie showing of entitlement to

relief. State v. Preciose, 129 N.J. 451, 462 (1992). The PCR court may exercise its discretion in determining whether an evidentiary hearing must be held. State v. Marshall, 148 N.J. 89, 157-58 (1997); R. 3:22-10. The Supreme Court has said, however:

> Post-conviction relief "courts ordinarily should grant evidentiary hearings . . . if a defendant has presented a *prima facie* [case] in support of post-conviction relief." . . . To establish such a *prima facie* case, the defendant must demonstrate a reasonable likelihood that his or her claim will ultimately succeed on the merits.
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> [Marshall, supra, 148 N.J. at 158 (quoting Preciose, supra, 129 N.J. at 462, 463).]

We conclude that defendant's written submissions established a prima facie case warranting an evidentiary hearing.

In Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), the United States Supreme Court identified a two-part test for evaluating claims of ineffective assistance of counsel.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the

> conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

To satisfy the second part of the Strickland test, "[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." Id. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. A defendant who has pleaded guilty instead of standing trial "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985). The Strickland test was adopted by the New Jersey Supreme Court in State v. Fritz, 105 N.J. 42 (1987).

In State v. Garcia, 320 N.J. Super. 332 (App. Div. 1999), we held it may be ineffective assistance of counsel to misinform a defendant about collateral consequences of a guilty plea, such as potential for deportation. Id. at 336-37. See also State v. Vieira, 334 N.J. Super. 681, 688 (Law Div. 2000) (ineffective assistance where counsel knew that defendant was not born in the United States, defendant did not read English or understand immigration issues, and counsel failed to advise defendant of potential immigration consequences).

Garcia involved factual circumstances very similar to this case, except the defendant was detained in New Jersey for an indefinite time because Cuba would not accept his return. 320 N.J. Super. at 334-35. Defense counsel in that case had also marked "N/A" in response to question 17 on the plea form. Id. at 336. The PCR court had implicitly concluded on the basis of affidavits that defendant Garcia must have misled his attorney about his immigration status. Id. at 340. We held that it was error for the PCR court to have determined without an evidentiary hearing whether the defendant misled his attorney or defense counsel had misinformed the defendant. Id. at 341.

The PCR court must assume contested facts most favorably to defendant and determine whether those facts would entitle defendant to relief from the conviction if they are true. Marshall, supra, 148 N.J. at 158; Preciose, supra, 129 N.J. at 462-63. In this case, defendant Creque certified that her prior attorney told her the guilty plea would not affect her immigration and residency status. To establish the second part of the Strickland test, she also certified that she would not have pleaded guilty if she knew she might be deported. If true, those facts establish a prima facie case of ineffective assistance of counsel.

In the circumstances here, where the State is not able to refute the facts alleged by defendant and they are not

inherently incredible, the PCR court must assume defendant's declarations to be true. She is entitled to an evidentiary hearing at which the court actually makes credibility determinations and fact findings from the evidence. If the court determines that defense counsel gave inaccurate advice, the court must then "explore whether 'there is reasonable probability that, but for counsel's error, [defendant] would not have pled guilty and would have insisted on going to trial.'" Garcia, supra, 320 N.J. Super. at 341 (quoting Hill v. Lockhart, supra, 474 U.S. at 59, 196 S. Ct. at 370, 88 L. Ed. 2d at 210). The PCR court here understood these legal principles but concluded that defendant could not establish her credibility and prove the truth of her allegations because she could not come to New Jersey to testify.

Defense counsel admitted that he had not made arrangements for any of the alternative procedures for testimony he suggested, stating he was awaiting the court's determination that defendant would have an evidentiary hearing before attempting to do so. The court responded that it would not give a "conditional ruling." The court then effectively dismissed the PCR petition without prejudice, inviting defense counsel to "bring [the petition] back" when he had "overcome the technical impasse," and the court would "take another look at it."

The court's legal error was in viewing the preliminary ruling of whether defendant had established a right to an evidentiary hearing as a conditional ruling. Because defendant showed a prima facie case of ineffective assistance, she is entitled to an evidentiary hearing, and the court should have so ruled and scheduled a hearing. At that hearing, defense counsel will have the burden of presenting sufficient evidence, with or without defendant, to prove her entitlement to relief.

Also at the hearing, defense counsel is entitled to use all available and reasonable procedural means to present defendant's testimony, which must necessarily occur without her presence in the courtroom. After all, it is the conviction under attack that allegedly is preventing defendant from attending court to testify. If the conviction is invalid because of constitutional infirmity, the conviction cannot itself be the obstacle to defendant's efforts to be relieved from its consequences.

Nothing in our court rules requires that defendant be present for a PCR hearing. See R. 3:16(b) and 3:22-10. In addition, "to prevent manifest injustice," our courts accommodate testimony when a witness cannot be personally present because of physical or mental incapacity. R. 3:13-2 (limited right to use videotaped depositions in criminal cases); cf. R. 4:12-3 (depositions taken in foreign countries for civil cases); R. 4:14-9 (videotaped depositions in civil cases); R.

4:16-1(c) (use of deposition of unavailable witness at trial of civil cases). The PCR court erred in concluding that defendant must be present in the courtroom to pursue relief from her conviction.

We also reject the State's speculative argument that taking defendant's testimony through alternative procedures is improper because the court lacks jurisdiction to hold defendant in contempt and, therefore, the oath to tell the truth has less force. As the court rules cited in the previous paragraph reflect, obstacles to contempt proceedings are not a bar to use of foreign or videotaped testimony in our courts. Furthermore, defendant has an interest in the outcome of the hearing and, consequently, an incentive not to disobey the directives of the court or to engage in contemptuous conduct.

Reversed and remanded for an evidentiary hearing. We do not retain jurisdiction.