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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0430-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GLENROY A. DEER,

Defendant-Appellant.

Submitted August 1, 2017 – Decided August 8, 2017

Before Judges Sabatino and Whipple.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment Nos.
88-10-3258 and 86-04-1304.

Joseph E. Krakora, Public Defender, attorney
for appellant (Karen A. Lodeserto, Designated
Counsel, on the brief).

Robert D. Laurino, Acting Essex County
Prosecutor, attorney for respondent (Frank J.
Ducoat, Special Deputy Attorney
General/Acting Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

Defendant Glenroy Deer appeals the trial court's decision for post-conviction relief ("PCR") relating to his respective 1987 and 1989 convictions of various offenses. We affirm.

Although the documentation in the present appellate record is not comprehensive, it appears that defendant pled guilty in July 1987 to second-degree possession of a controlled dangerous substance with the intent to distribute, N.J.S.A. 24:21-19(a)(1), and was sentenced to a one-year period of probation. Thereafter, defendant was tried on separate charges and a jury in April 1989 found him guilty of second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a), and third-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b). The trial court in that weapons case sentenced defendant to a seven-year custodial term with a three-year parole ineligibility period. Defendant unsuccessfully appealed his 1989 conviction and sentence to this court, and certification was subsequently denied. State v. Deer, 122 N.J. 322 (1990).

In 1993, while defendant was still serving his sentence, federal officials deported him to Jamaica.¹ Twenty-one years later, defendant filed his first PCR petition. In his petition, he alleges that his respective attorneys in the 1987 drug case and

¹ Defendant's present whereabouts are unclear from the record supplied to us.

in the 1989 weapons case were constitutionally ineffective. Specifically, defendant contends that those prior attorneys failed to advise him about the deportation consequences that would ensue upon conviction, despite requests he allegedly made to them for advice concerning the consequences.

In an effort to excuse his long delay in filing his PCR petition, defendant asserts that he did not discover the availability of PCR until after he had been deported. He maintains that his alleged ignorance of the PCR process amounts to "excusable neglect" under Rule 3:22-12(a)(1), and thus permits the courts to provide him with a remedy despite the substantial passage of time.

After considering defendant's arguments and the State's opposition, Judge Siobhan A. Teare issued an oral opinion on August 23, 2016, concluding that defendant's petition was time-barred and also lacked merit. Among other things, the judge found that defendant had failed to demonstrate excusable neglect to overcome the five-year time bar of Rule 3:22-12. Additionally, the judge found that defendant's petition substantively lacked merit because he failed to show by a preponderance of the evidence that his prior counsel had affirmatively provided him with "misadvice" concerning deportation consequences. Consequently, the judge discerned no need to conduct an evidentiary hearing.

In his present brief on appeal, defendant raises the following points for our consideration:

POINT ONE

DEFENDANT SHOULD BE ENTITLED TO AN EVIDENTIARY HEARING UNDER STATE V. GAITAN AND UNITED STATES V. OROCIO.

POINT TWO

THE FIVE-YEAR TIME BAR SHOULD BE RELAXED DUE TO DEFENDANT'S EXCUSABLE NEGLIGENCE AND/OR THE INTERESTS OF JUSTICE.

Having considered these arguments in light of the record and the applicable law, we affirm the dismissal of defendant's PCR petition. We do so substantially for the reasons noted by Judge Teare. We add only a few comments.

Rule 3:22-12 plainly requires that a first petition for PCR be filed within five years after the date of a defendant's conviction, unless the defendant establishes that his delay beyond that deadline was due to "excusable neglect" and there also is "a reasonable probability that if the defendant's factual assertions were found to be true enforcement of the [five-year] time bar would result in a fundamental injustice." "Absent compelling, extenuating circumstances, the burden to justify filing a petition after the five-year period will increase with the extent of the delay." State v. Milne, 178 N.J. 486, 492 (2004) (quoting State v. Afanador, 151 N.J. 41, 52 (1997)).

Here, defendant has not proven the required elements of excusable neglect and fundamental injustice to excuse his delay of over two decades in pursuing relief from his 1987 and 1989 convictions. His vague and unsubstantiated allegation that he was not provided with proper advice in the late 1980s by his former counsel concerning deportation consequences is insufficient to overcome the extreme untimeliness of his petition. See, e.g., State v. Brewster, 429 N.J. Super. 387, 400-01 (App. Div. 2013) (concluding that the defendant in that case, who delayed twelve years before filing a PCR petition concerning deportation consequences, had not shown either excusable neglect or a fundamental injustice).

Apart from this procedural infirmity, defendant's substantive claims of his counsel's alleged ineffectiveness are insufficient to warrant an evidentiary hearing, let alone an order setting aside his prior convictions. Because defendant was convicted long before the United States Supreme Court issued its seminal 2010 opinion in Padilla v. Kentucky, 559 U.S. 356, 367, 130 S. Ct. 1473, 1482, 176 L. Ed. 2d 284, 294 (2010) concerning deportation consequences to a criminal defendant, his claims are governed by the standards of State v. Nuñez-Valdéz, 200 N.J. 129 (2009). Under those pre-Padilla standards, a defendant seeking relief based upon post-conviction deportation consequences can only prevail if he

demonstrates that his prior counsel provided him with affirmatively misleading advice about such consequences flowing from a guilty plea. Id. at 139-43, see also State v. Santos, 210 N.J. 129, 143 (2012).

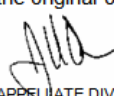
At most, defendant's petition alludes vaguely and generically to his former attorneys' failure to tell him about deportation consequences. Such "bald assertions" of ineffectiveness are inadequate to support a prima facie claim. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999); see also State v. Porter, 216 N.J. 343, 349 (2013).

Moreover, unlike the circumstances recently discussed in Lee v. United States, ___ U.S. ___, ___ S. Ct. ___, ___ L. Ed. 2d ___ (2017) (slip op. at 10)--in which the government conceded that the defendant's prior counsel had performed deficiently in mistakenly assuring him that he would not be deported if he pled guilty--we need not reach in the present case whether defendant was actually prejudiced by attorney error because no such error has been proven.

To the extent we have not commented on other contentions subsumed within defendant's brief, we reject them as unmeritorious. 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.


CLERK OF THE APPELLATE DIVISION