

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3231-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SELWIN O. BASCOM,

Defendant-Appellant.

Submitted May 25, 2017 – Decided July 6, 2017

Before Judges Lihotz and Hoffman.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Accusation No.
11-05-0993.

Joseph E. Krakora, Public Defender, attorney
for appellant (Alan I. Smith, Designated
Counsel, on the brief).

Gurbir S. Grewal, Bergen County Prosecutor,
attorney for respondent (Ian C. Kennedy,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant Selwin Bascom appeals from a Law Division order denying his petition for post-conviction relief (PCR), seeking to withdraw his guilty plea and vacate his conviction and sentence

for possession of marijuana with intent to distribute, N.J.S.A. 2C:35-5(a)(1), (b)(12). Although the record shows defendant told probation officials and the trial court he was a United States citizen, he now admits he is not. In his certification accompanying his PCR petition, defendant states he told his plea counsel that he was not a United States citizen. Based upon this assertion, defendant claims he received ineffective assistance when his counsel failed to correct the record or inform him of the legal consequences regarding his immigration status. Because the record does not support defendant's recent bald assertions, we reject defendant's arguments and affirm the PCR court's order.

A.

We discern the following facts from the record. On April 7, 2011, a police officer observed a vehicle cross into the left-hand shoulder on the Palisades Interstate Parkway. As the vehicle reentered the left lane, it nearly forced another vehicle off the road. Because of rush-hour traffic, the officer had to wait several minutes before pursuing the vehicle. After the officer approached the vehicle, it quickly moved from the left to right lane. At the same time, the officer observed something thrown from the rear passenger window. The officer consequently signaled the vehicle to pull over.

When the officer walked up to the vehicle, he saw defendant in the rear passenger seat. The officer asked defendant what he had thrown out the window; defendant replied, "Nothing." The officer also smelled "raw" marijuana and saw "green flakes of suspected marijuana" on the middle console. As a result, the officer called for backup.

Once another officer arrived, the police searched defendant but found nothing. After a third officer came to the scene, the police searched defendant a second time and found eleven small bags containing marijuana. The police therefore arrested defendant and placed him in a patrol car. When the police returned to headquarters, they suspected defendant was trying to hide something because he had been moving around a lot in the back of the patrol car. When they searched the back of the patrol car after removing defendant, they found forty-nine grams of cocaine.

On May 25, 2011, defendant pled guilty to fourth-degree possession of marijuana with intent to distribute, N.J.S.A. 2C:35-5(a)(1), (b)(12), pursuant to a plea agreement with the State, which provided for a recommend two-year probationary term. During the plea hearing, the court asked defendant, "Are you a U.S. citizen?" Defendant replied, "Yes." Defendant also said he provided truthful answers on the plea form and voluntarily signed it of his own free will. On the plea form, defendant circled

"Yes" after the question, "Are you a citizen of the United States?" He also circled "Yes" after the question, "Do you understand that if you are not a United States citizen or national, you may be deported by virtue of your plea of guilty?"

Defendant's presentence report stated defendant was born in Guyana, South America. It also stated defendant was a United States citizen. On July 15, 2011, the court sentenced defendant to two years of probation. Defendant did not file a direct appeal.

On August 22, 2014, defendant filed a pro se PCR petition. Defendant included a certification stating he had told his trial counsel he is not a United States citizen, and his counsel failed to tell the court this or advise him of the immigration consequences of his plea. On September 4, 2014, the PCR court assigned defendant an attorney, who submitted a brief in support of the application for PCR.

On December 4, 2015, the PCR court heard oral argument. Defendant did not appear because he had been deported to Guyana. After summarizing the relevant facts and applicable law, the court concluded, "[T]here is no indication, other than [defendant's] bald . . . allegation that the attorney was aware that he was not a United States citizen, . . . support[ing] a hearing to . . . determine whether or not the PCR should be granted." The court therefore concluded defendant had failed to establish a prima

facie case of ineffective assistance of counsel. Defendant appealed, presenting the following arguments for consideration:

POINT I

IN POST-CONVICTION RELIEF, WHEN THE DEFENDANT CERTIFIES UNDER OATH THAT HE ADVISED TRIAL COUNSEL THAT HE WAS NOT A CITIZEN OF THE UNITED STATES AND THAT TRIAL COUNSEL NOT ONLY FAILED TO ADVISE HIM OF THE IMMIGRATION CONSEQUENCES OF HIS GUILTY PLEA BUT ALSO REMAINED MUTE AT THE PLEA HEARING AND FAILED TO CORRECT THE RECORD WHEN DEFENDANT MISTAKENLY ADVISED THE TRIAL COURT THAT HE WAS A CITIZEN, A PRIMA FACIE SHOWING OF INEFFECTIVE ASSISTANCE OF COUNSEL IS MADE IF THE STATE DOES NOT FIND IT APPROPRIATE TO SUBMIT AN AFFIDAVIT OR CERTIFICATION FROM TRIAL COUNSEL CONTESTING DEFENDANT'S CLAIMS.

POINT II

THE PCR COURT'S RULINGS VIOLATED DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

B.

On this appeal, we review the trial court's decision de novo. State v. Harris, 181 N.J. 391, 421 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005). Having reviewed the record, we find no basis to disturb the court's decision. Based on the record, the court's legal conclusions are unassailable.

Defendant argues he "was entitled to post-conviction relief because he established that the performance of his trial counsel

was deficient and he was prejudiced thereby." On this record, defendant's argument lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We add the following comments.

If defense counsel provides affirmatively misleading or false advice about the immigration consequences of a guilty plea, that advice may constitute ineffective assistance of counsel. State v. Nuñez-Valdéz, 200 N.J. 129, 131 (2009). However, this court cannot expect a defense attorney to provide advice about possible immigration problems if a client falsely claims he is a United States citizen. In this case, the record shows defendant told probation officials and the trial court that he is a United States citizen. He also said he is a United States citizen on his plea form. This same form informed defendant that he could be deported if he pled guilty. The record does not support defendant's recent bald assertions that he told his plea counsel otherwise. See State v. Jones, 219 N.J. 298, 311-12 (2014) (stating "'bald assertions' are not enough" to warrant an evidentiary hearing regarding a PCR petition). The record fails to support defendant's assertion that he received ineffective assistance of counsel. See State v. DiFrisco, 137 N.J. 434, 456-57 (1994); State v. Fritz, 105 N.J. 42, 50 (1987).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION