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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-3479-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DWAYNE BECKFORD,

Defendant-Appellant.

Submitted May 31, 2017 – Decided July 27, 2017

Before Judges Leone and Vernoia.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No. 10-
01-0068.

Joseph E. Krakora, Public Defender, attorney
for appellant (William Welaj, Designated
Counsel, on the brief).

Carolyn A. Murray, Acting Essex County
Prosecutor, attorney for respondent (Lucille
M. Rosano, Special Deputy Attorney General/
Acting Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant Dwayne Beckford appeals from a December 4, 2015
order denying his petition for Post-Conviction Relief (PCR)

without an evidentiary hearing. Defendant claims his trial counsel misinformed him of the immigration consequences of his plea. We affirm.

I.

Defendant sold cocaine to an undercover officer. Defendant was charged with third-degree distribution of cocaine, N.J.S.A. 2C:35-5 (Count One); third-degree distribution of cocaine within 1000 feet of school property, N.J.S.A. 2C:35-7 (Count Two); and second-degree possession of cocaine with intent to distribute within 500 feet of public housing, a public park, or a public library, N.J.S.A. 2C:35-7.1 (Count Three).

On January 22, 2010, defendant pled guilty to Count Two pursuant to a negotiated plea deal under which Count One and Count Three would be dismissed, and the prosecutor would recommend four years' probation conditioned on defendant serving 364 days in county jail.

Defendant completed a written plea form and stated "yes" in response to question number 17, which asked "Are you a citizen of the United States?" Defendant stated that he had sufficient time to review the plea form with his attorney before initialing and signing it, that he understood it, that he had no questions regarding it, and that all of his answers were true. However, his presentence report subsequently revealed he was a Jamaican

national and permanent United States resident. Sentencing was adjourned to address this issue.

At defendant's April 19, 2010 sentencing, trial counsel indicated she "addressed the issue of immigration" with defendant and his family and informed them she did not specialize in immigration law. She also stated: "I believe they've had time to speak to an immigration attorney. It is Mr. Beckford's wish to go forward with the sentencing today."

The trial court then questioned defendant. The court warned "this could result . . . in your being removed because of this plea." Defendant said he understood. The court asked if defendant understood that trial counsel was not an immigration attorney, and that trial counsel and the court were unable to give him any advice concerning the immigration consequences of his plea. Defendant said he understood. The court also observed that defendant had "had the opportunity to talk to an immigration attorney." The court asked defendant if he wished to proceed with sentencing that day. Defendant repeatedly affirmed that he did. The court proceeded to impose the negotiated sentence. Defendant did not file a direct appeal.

On January 28, 2015, defendant filed his PCR petition claiming ineffective assistance of counsel during his plea. After hearing

argument, the PCR court denied defendant's petition on December 4, 2015. Defendant appeals, raising the following argument:

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE WAS ENTITLED TO WITHDRAW HIS GUILTY PLEA ON THE BASIS HE HAD FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL REGARDING THE DEPORTATION CONSEQUENCES ARISING OUT OF HIS GUILTY PLEA, RESULTING IN A GUILTY PLEA WHICH HAD NOT BEEN FREELY, KNOWINGLY AND VOLUNTARILY ENTERED.

II.

Where the PCR court has not held an evidentiary hearing, we "conduct a de novo review." State v. Harris, 181 N.J. 391, 420-21, cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005). We must hew to our standard of review.

"A defendant shall be entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of post-conviction relief." R. 3:22-10(b). "To establish a prima facie case, defendant must demonstrate a reasonable likelihood that his or her claim . . . will ultimately succeed on the merits." Ibid. The court shall not grant an evidentiary hearing "if the defendant's allegations are too vague, conclusory or speculative." R. 3:22-10(e)(2).

To show ineffective assistance of counsel, a defendant must satisfy the two-pronged test of Strickland v. Washington, 466 U.S.

668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), adopted in State v. Fritz, 105 N.J. 42 (1987).

III.

In the context of a guilty plea, defendant must show "that (i) counsel's assistance was not 'within the range of competence demanded of attorneys in criminal cases, and (ii) 'that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial.'" State v. DiFrisco, 137 N.J. 434, 457 (1994) (citations omitted), cert. denied, 516 U.S. 1129, 116 S. Ct. 949, 133 L. Ed. 2d 873 (1996); see Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985). Defendant must also show "a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284, 297; see State v. Maldon, 422 N.J. Super. 475, 486 (App. Div. 2011).

Defendant raises two related claims. First, he claims his trial counsel provided misinformation about the immigration consequences of his plea. "In State v. Nunez-Valdez, 200 N.J. 129, 143 (2009), our State Supreme Court held that a defendant can show ineffective assistance of counsel by proving that his guilty plea resulted from 'inaccurate information from counsel concerning the deportation consequences of his plea.'" State v. Brewster,

429 N.J. Super. 387, 392 (App. Div. 2013). "[I]n order to establish a prima facie claim, a petitioner . . . must allege [specific] facts sufficient to demonstrate counsel's alleged substandard performance." State v. Porter, 216 N.J. 343, 355 (2013) (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999)). Here, "defendant's allegations are too vague, conclusory, or speculative to warrant an evidentiary hearing." State v. Marshall, 148 N.J. 89, 158, cert. denied, 522 U.S. 850, 118 S. Ct. 140, 139 L. Ed. 2d 88 (1997).

In his PCR petition, defendant alleged that prior to sentencing the judge questioned his citizenship and "advised my attorney to speak to [an] Immigration Lawyer before he sentenced me," and that on the sentencing date "my attorney told me I will be getting sentence[d] today and that my case will not be passed onto Immigration because my charge is not deportable." In his supplemental certification, defendant alleged trial counsel told him prior to his plea that she did not practice in immigration law and that she did not know how the guilty plea would affect his immigration status, but that "later, she specifically told [him] that my guilty plea was not the type that would result in deportation" and that he "would be able to avoid being deported"

because his guilty plea was to probation and a county jail sentence, rather than a state prison sentence.

Defendant's claim of misinformation did not establish a prima facie case under Nunez-Valdez because his allegations were flatly contradicted by the trial record. Defendant's immigration status was not an issue prior to his sentencing because when he entered his plea, he misstated to his counsel and the court that he was an American citizen. Further, when it was determined after his plea that he was not a citizen, the record showed and defendant acknowledged that it was defendant and his family who were to speak with an immigration lawyer, that trial counsel could not and did not give defendant advice on the immigration consequences of his plea, that defendant was aware his guilty plea could result in his deportation, and that he nonetheless chose to be sentenced that day.

Courts must "evaluate the sufficiency of a belated claim of misadvice [about deportation] before granting a hearing. In so doing, the court should examine the transcripts of the plea colloquy and sentencing hearing[.]" Gaitan, supra, 209 N.J. at 381. Here, "it does not appear to us that anything in the record available would support [defendant's] version of events." State v. Santos, 210 N.J. 129, 144 (2012) (reversing the grant of an evidentiary hearing on a claim under Nunez-Valdez because the plea

form advised the defendant he "may be deported"). "The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." Blackledge v. Allison, 431 U.S. 63, 74, 97 S. Ct. 1621, 1629, 52 L. Ed. 2d 136, 147 (1977); cf. State v. Jones, 219 N.J. 298, 315 (2014) (requiring a hearing where "the record is entirely compatible with defendant's claim").

Second, defendant claims his trial counsel failed to give him correct immigration advice. After defendant's guilty plea but before his sentencing, the Supreme Court held that to provide effective assistance to a criminal defendant, "counsel must inform her [noncitizen] client whether his plea carries a risk of deportation." Padilla, supra, 559 U.S. at 374, 130 S. Ct. at 1486, 176 L. Ed. 2d at 299. Under Padilla, trial counsel normally "need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." Id. at 369, 130 S. Ct. at 1484, 176 L. Ed. 2d at 296. "But when the deportation consequence is truly clear" because "the terms of the relevant immigration statute are succinct, clear, and explicit," such that the removal consequences of a plea can "easily be determined from reading the removal statute," "the duty to give correct advice is equally clear." Id. at 368-69, 130 S.

Ct. at 1483, 176 L. Ed. 2d at 295-96. Here, the immigration consequences were clear, as defendant's plea to a drug distribution offense, an aggravated felony, "made him subject to automatic deportation." Id. at 360 & n.1, 130 S. Ct. at 1478 & n.1, 176 L. Ed. 2d at 290 & n.1; see State v. Gaitan, 209 N.J. 339, 347 (2012); see also 8 U.S.C.A. § 1101(a)(43)(B), 1227(a)(B)(i).

Defendant's January 22, 2010 guilty plea took place before Padilla was decided on March 31, 2010, so that counsel was unaware of it at the time of the plea.¹ Moreover, defendant's April 19, 2010 sentencing occurred less than three weeks after Padilla. While the timing of defendant's plea and sentencing does not make Padilla inapplicable, it does cast counsel's performance in a different light.

Moreover, at the time of his plea, defendant represented to trial counsel and the court that he was a United States citizen by his answer on the plea form and by testifying he had answered

¹ The "Court announced a new rule in Padilla" which applies to defendants whose convictions became final after Padilla. Chaidez v. United States, 568 U.S. 342, 358, 133 S. Ct. 1103, 1113, 185 L. Ed. 2d 149, 162 (2013); accord Gaitan, supra, 209 N.J. at 372-73. Thus, Padilla applies to defendant's conviction because he was sentenced after Padilla was decided. Nonetheless, "[i]t is not insignificant to note that when [defendant] pleaded guilty on [January 22, 2010], the failure of counsel to advise him of the collateral consequences of deportation would not have caused her assistance to be found ineffective." Nash v. United States, 153 F. Supp. 3d 584, 587 (E.D.N.Y. 2015).

truthfully. As a result, counsel had no reason to advise defendant of the immigration consequences the guilty plea would have if he were a non-citizen. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, . . . on information supplied by the defendant." State v. DiFrisco, 174 N.J. 195, 228 (2002) (quoting Strickland, supra, 466 U.S. at 691, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695). "Counsel cannot be faulted for failing to expend time or resources analyzing events about which they were never alerted." Ibid.

In any event, defendant cannot establish that he would not have pled guilty had he been advised differently. In his supplemental PCR certification, he alleged that if he had known he was pleading guilty to an aggravated felony subject to automatic deportation, he would have gone to trial rather than take the plea bargain. However, "[c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." Lee v. United States, 582 U.S. __, __, __ S. Ct. __, __, 198 L. Ed. 2d 476, 487 (2017).

The contemporaneous evidence contradicts defendant's allegation. After it was discovered that defendant was not an

American citizen, he was given the opportunity to consult with an immigration attorney, and was expressly advised by the trial court that this guilty plea "could result . . . in [his] being removed." Defendant said he understood. Nevertheless, he insisted upon proceeding with being sentenced pursuant to his plea bargain.²

"Generally, representations made by a defendant . . . concerning the voluntariness of the decision to plead, . . . constitute a 'formidable barrier' which defendant must overcome." State v. Simon, 161 N.J. 416, 444 (1999) (quoting Blackledge, supra, 431 U.S. at 74, 97 S. Ct. at 1629, 52 L. Ed. 2d at 147 (1977)). "That is so because [defendant's] '[s]olemn declarations in open court carry a strong presumption of verity.'" Ibid. (quoting Blackledge, supra, 431 U.S. at 74, 97 S. Ct. at 1629, 52 L. Ed. 2d at 147). Again, "[t]he subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." Blackledge, supra, 431 U.S. at 74, 97 S. Ct. at 1629, 52 L. Ed. 2d at 147.

² Interestingly, defendant subsequently contradicted his PCR claim that he would not plead guilty to an aggravated felony. In 2013, defendant pled guilty to robbery, N.J.S.A. 2C:15-1, and was sentenced to state prison. That too was an aggravated felony, both as a crime of violence and as a theft offense. 8 U.S.C.A. § 1101(a)(43)(F), (G); see 18 U.S.C.A. § 16; Thap v. Mukasey, 544 F.3d 674, 677 (6th Cir. 2008).

Here, when the issue of deportation was raised, and defendant was told he could be deported if he proceeded, he proceeded without hesitation to seek sentencing under the highly-advantageous plea offer. See Gaitan, supra, 209 N.J. at 378-79 (ruling that where the defendant went ahead after the court advised the guilty plea could result in his deportation, there was no evidence of prejudice); cf. Lee, supra, 198 L. Ed. 2d at 487-88 (stressing that "[w]hen the judge warned him that a conviction 'could result in your being deported,' and asked '[d]oes that at all affect your decision about whether you want to plead guilty or not,' Lee answered 'Yes, Your Honor.'").

Additionally, under Padilla, "a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." 559 U.S. at 372, 130 S. Ct. at 1485, 176 L. Ed. 2d at 297; see Maldon, supra, 422 N.J. Super. at 486. Defendant sold cocaine to an undercover officer. Trial counsel negotiated an exceedingly advantageous plea agreement for defendant, and rejecting that deal would have exposed him to conviction on all counts at trial and a much harsher prison sentence, after which he would face an equal or greater risk of deportation. Counts One and Two charged defendant with third-degree distribution of a controlled dangerous substance offenses, N.J.S.A. 2C:35-5 and N.J.S.A. 2C:35-7, each of which carried a

potential sentence of three to five years imprisonment. Count Three charged defendant with second-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-7.1, which carried a sentence of five to ten years imprisonment.

Instead of being sentenced to at least three years and up to twenty years in state prison, defendant accepted a plea bargain of guilty to one count and a sentence of probation conditioned on service of a county jail sentence of less than one year. Defendant did not make a prima facie case that rejecting the highly favorable plea deal would have been rational under the circumstances. Thus, defendant has failed to establish a prima facie case pursuant to the Strickland/Fritz test. Accordingly, the PCR court properly denied his petition without an evidentiary hearing.³

Affirmed.

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



CLERK OF THE APPELLATE DIVISION

³ Defendant has not renewed on appeal his claim in the PCR court that he should have been allowed to withdraw his guilty plea under State v. Slater, 198 N.J. 145, 157-58 (2009). Accordingly, we need not address the denial of the Slater motion.