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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-3562-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ARTHUR ELLIOTT,

Defendant-Appellant.

Submitted March 14, 2017 — Decided March 31, 2017

Before Judges Reisner and Koblitz.

On appeal from the Superior Court of New
Jersey, Law Division, Somerset County,
Indictment No. 09-10-0744.

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

Michael H. Robertson, Somerset County
Prosecutor, attorney for respondent (Perry
Farhat, Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant Arthur Elliott appeals from a February 8, 2016
order denying his petition for post-conviction relief (PCR)
without an evidentiary hearing. We remand this case to the trial

court for an evidentiary hearing, because the PCR evidence, viewed in the light most favorable to defendant, created a material dispute of fact as to whether defendant's second trial attorney misadvised him about his immigration status and misadvised him about the immigration consequences of his guilty plea.

Defendant came to this country from Sierra Leone as a refugee in 2000. He became a permanent legal resident in 2004. In 2009, defendant was indicted for first-degree robbery, second-degree possession of a firearm for an unlawful purpose, and fourth-degree possession of a defaced firearm.

On August 10, 2010, prior to his trial, defendant's first trial attorney, Maureen O'Reilly, wrote him a letter advising him that the State was offering a plea deal in which he would plead guilty to second-degree weapons possession for an unlawful purpose, in exchange for a recommended sentence of six years, with a three year parole bar. O'Reilly's letter explicitly advised defendant: "Please note that because you are a legal resident and not a citizen you will be deported after you serve your prison sentence. You may want to contact an immigration lawyer to discuss this before we go back to court on September 15, 2010." On December 7, 2010, O'Reilly also wrote a memorandum to her supervisor at the Office of the Public Defender (OPD) documenting her discussions with defendant, including her advice about the

immigration consequences of pleading guilty, and documenting her view that the State had a strong case against defendant.

Despite his attorney's advice, defendant insisted on going to trial. Prior to the 2013 trial, O'Reilly was replaced by a new defense attorney, Robert Lane. On February 21, 2013, a jury convicted defendant of fourth-degree possession of a defaced firearm, but could not reach a verdict on the other charges. In March 2013, defendant avoided a re-trial by pleading guilty to second-degree possession of a firearm for an unlawful purpose, in exchange for dismissal of the first-degree robbery charge. Notably, the written plea form indicated that defendant was a citizen, and neither his immigration status nor the immigration consequences of his plea were mentioned at the plea hearing.

In April 2013, defendant was sentenced to an aggregate term of seven years in prison, half to be served without parole. Defendant did not file a direct appeal. However, after the federal government initiated deportation proceedings on June 18, 2013, defendant filed a PCR petition.¹ In his petition, defendant

¹ On February 17, 2015, an immigration judge ordered that defendant be deported, and denied his application for deferral of removal under the Torture Convention. On this appeal, defendant argues that his second-degree conviction was fatal to his deferral application, which might have been granted if he only had a fourth-degree conviction for possession of a defaced firearm. He also claims that the second-degree conviction will preclude him from ever being able to reapply for admission to this country.

claimed that "[a] few weeks after receiving" O'Reilly's August 2010 letter, he had another conversation with O'Reilly "about my family in the United States which led her to determine that I was a citizen of the United States and, she advised [me] accordingly. I was not convinced, but I am not an attorney. However, she was removed from my case before we further discussed the issue and was replaced by Attorney Lane." That claim is inconsistent with O'Reilly's December 2010 memo to her supervisor, which clearly documented her advice to defendant that he was not a citizen and would be deported if he pled guilty.

Defendant's PCR certification further attested that after Lane took over his case, he had a discussion with Lane about his immigration status. According to defendant, he told Lane that his grandmother was a citizen, and his father married a citizen when defendant was fifteen years old. Defendant attested that Lane advised him that as long as his father had married a citizen before defendant was eighteen years old, that made defendant a citizen. Defendant claimed that Lane assured him that he "would be fine" in terms of his immigration status. Defendant attested that he later learned that Lane's advice was wrong, because unless his parents "included me on their naturalization papers at the time that I was under 18, I cannot obtain citizenship through my

parents, being married to a citizen of the United States does not confer citizenship automatically."

According to defendant, Lane also told him that if he pled guilty, the assistant prosecutor would "note in my file that the conviction would go on my record as unlawful possession of a firearm only, which . . . is not an aggravated felony" and would not prevent him from applying for suspension of removal, should deportation proceedings occur. Defendant claimed that he agreed to plead guilty because his attorney advised him "off the record" that the prosecutor would make the above-described favorable notation in his file. Defendant further attested that on the day he pled guilty, Lane visited him in the bull pen, and told him to just sign the plea form, without discussing the form with him or discussing any immigration issues with him. Defendant claimed that he would not have pled guilty had he known that it would lead to his deportation.

Lane had passed away by the time the PCR petition was filed. However, in support of his petition, defendant submitted a certification from Anne T. Picker, a Public Defender attorney assigned to an OPD unit tasked with providing in-house immigration advice to OPD staff and pool attorneys. Picker attested that Robert Lane never requested that her unit provide him with any advice about Arthur Elliott's immigration status. She also

attested that, had she been asked, she would have advised that defendant was not a citizen, pleading guilty to the charges in the indictment would lead to deportation, and a private notation in a prosecutor's file would be worthless for immigration purposes.

In an amended PCR petition, defendant asserted that O'Reilly and Lane were both ineffective in providing affirmatively inaccurate immigration advice, and failing to get defendant a better plea offer that would not have immigration consequences. He also asserted that Lane was ineffective in urging the court to accept his guilty plea with an inadequate factual basis.²

In a written opinion, the PCR judge reasoned that O'Reilly clearly advised defendant of his immigration status and the consequences of a guilty plea. He also reasoned that defendant's charges against Lane were "suspect" because defendant knew that Lane was deceased and "cannot defend himself." He concluded that defendant's claims about Lane's and O'Reilly's alleged mis-advice were "unpersuasive." The judge also found no legally competent evidence that Lane or O'Reilly could have gotten defendant a better plea deal.

On this appeal, defendant asserts that he was entitled to an evidentiary hearing on his immigration-related claims of

² Defendant has not pursued that claim on appeal and accordingly we do not address it.

ineffective assistance. Although this is a close case, we are constrained to agree with respect to the claims about Lane. Our Supreme Court has recently emphasized that evidentiary hearings should be held where a PCR petition raises material factual disputes. See State v. Porter, 216 N.J. 343, 347 (2013) ("[T]o the extent that a petition for post-conviction relief (PCR) involves material issues of disputed facts that cannot be resolved by reference to the trial record, an evidentiary hearing must be held.").

[I]f a defendant has presented a prima facie case in support of PCR, an evidentiary hearing generally should be conducted. When determining the propriety of conducting an evidentiary hearing, the PCR court should view the facts in the light most favorable to the defendant. If, with the facts so viewed, the PCR claim has a reasonable probability of being meritorious, then the defendant should ordinarily receive an evidentiary hearing in order to prove his entitlement to relief.

[State v. Jones, 219 N.J. 298, 311 (2014) (citations omitted).]


Although defendant's PCR certification was clearly self-serving, it finds some corroboration in the plea form, which indicates that defendant was a citizen. That, in turn raises a distinct issue about Lane's representation of, and advice to, defendant. If Lane had read defendant's file, he would have seen the letter and memo from O'Reilly, clearly stating that defendant

was not a citizen and that he was subject to deportation. Lane should not have let his client sign a plea form stating that he was a citizen. Picker's certification also raises an issue as to whether Lane gave defendant proper advice. Defendant filed a timely PCR petition, and the fact that Lane is deceased does not mean defendant is not entitled to an evidentiary hearing.

However, Lane's unavailability does not automatically mean that the PCR judge will find defendant's testimony credible. Moreover, in weighing defendant's claim that he would not have pled guilty had he known the immigration consequences of his guilty plea, the judge may consider whether it would have been rational to insist on a retrial of the remaining charges. See Padilla v. Kentucky, 559 U.S. 356, 372, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284, 297 (2010). We infer no view as to the outcome of the evidentiary hearing. We only decide that defendant is entitled to his day in court. Because this PCR judge has already expressed a view as to defendant's credibility, to avoid any possible appearance of prejudgment, we direct that the hearing be conducted by another judge.

Remanded. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION