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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5457-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HERNAN A. CHICA,
a/k/a HERNAN A. CHICA TOMAYO,

Defendant-Appellant.

Argued July 18, 2017 – Decided August 18, 2017

Before Judges Ostrer and Leone.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 82-10-0947.

Jane M. Personette argued the cause for appellant.

Ian C. Kennedy, Assistant Prosecutor, argued the cause for respondent (Gurbir S. Grewal, Bergen County Prosecutor, attorney; Mr. Kennedy, on the brief).

PER CURIAM

Seeking to avoid deportation approximately thirty-two years after he was convicted of drug charges, defendant Hernan Chica

appeals from the June 22, 2015 denial of his petition for post-conviction relief (PCR). We affirm.

I.

Defendant is a citizen of Colombia but entered the United States in 1978. On October 19, 1982, a Bergen County grand jury charged defendant with three counts of possession of cocaine, N.J.S.A. 24:21-20(a)(1), and three counts of distribution of cocaine, N.J.S.A. 24:21-19(a)(1).[1]

On March 14, 1983, defendant pled guilty to two counts of possession of cocaine and one count of distribution of cocaine. Pursuant to the plea agreement, defendant would be sentenced to no more than six years in prison and all terms would run concurrent. At the plea hearing, defendant admitted to possessing one gram of cocaine and possessing and selling approximately three grams of cocaine on two separate occasions.

At the April 29, 1983 sentencing, the possibility of deportation was raised by the court.[2] The court sentenced

[1] N.J.S.A. 24:21-20(a)(1) and N.J.S.A. 24:21-19(a)(1) "were repealed by L. 1987, c. 106, § 25. The current version of N.J.S.A. 24:21-19a(1) is in N.J.S.A. 2C:35-5a(1)." State v. Cacamis, 230 N.J. Super. 1, 3 n.1 (App. Div. 1988), certif. denied, 114 N.J. 496 (1989). The current version of N.J.S.A. 24:21-20(a)(1) is in N.J.S.A. 2C:35-5(a)(1).

[2] According to the Presentence report, defendant was arrested by immigration authorities on April 20, 1982, and warned that

defendant to 360 days in jail in an effort to try to avoid deportation:

> As I understand a particular statute 8 U.S. Code Annotated Section 12:51[3] if I sentence you to over one year, even though you don't serve it, if I sentence you to over one year for a crime that you committed within 5 years after coming to this county you're liable to be deported and if I don't, if I sentence you to less than one year as I read that statute then you won't be deported and I think deportation would be too serious even though what you did was so serious I just think that that would be too harsh to have you return to Columbia [sic][.]

Defendant was deported on December 20, 1984. Nonetheless, on or about December 25, 1984, defendant reentered the United States at or near the Texas border. On December 28, 2000, defendant was served a notice to appear charging him with illegal entry, and an Immigration Judge ordered him removed to Colombia on December 6, 2001.[4] On April 15, 2015, the Newark Fugitive Operations Team arrested defendant following a motor vehicle stop

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conviction might lead to deportation proceedings. Moreover, defendant had immigration counsel.

[3] The court was apparently referring to 8 U.S.C.A. § 1251(a)(4) (1952), which provided that an alien shall be deported who was "convicted of a crime involving moral turpitude committed within five years after the date of entry and either sentenced to confinement or is confined therefore in a prison or correctional institution, for a year or more."

[4] The record is unclear whether defendant was deported as a result. Subsequently, defendant was convicted of theft.

and he was thereafter detained by Immigration and Customs Enforcement (ICE).

On April 21, 2015, approximately thirty-two years after his 1983 sentencing, defendant filed a petition for PCR or to withdraw his 1982 guilty plea, arguing that he was misadvised by the trial court and that his trial counsel failed to advise defendant that he might be deported. On May 15, 2015, defendant's counsel requested the PCR hearing be scheduled promptly to prevent defendant's deportation. Subsequently, the court issued a writ, but defendant already had been deported to Colombia.

The PCR court held a hearing on June 22, 2015. In an oral decision on the record, the court denied defendant's motion. The PCR court found there was no excusable neglect for defendant's late filing of PCR largely because following his deportation in 1984, defendant "chose to reenter the country, not seek any judicial intervention." The court further explained that even upon being charged again by immigration services in 2001, defendant chose again not to seek judicial intervention. Defendant appeals, arguing:

> POINT I - THE COURT BELOW ERRED IN DENYING DEFENDANT'S PETITION FOR POST CONVICTION RELIEF.
>
> a. THE COURT BELOW ERRED IN FAILING TO ORDER AN EVIDENTIARY HEARING AS DEFENDANT

MADE A PRIMA FACIE SHOWING OF INEFFECTIVE ASSISTANCE OF COUNSEL.

b. DEFENDANT SHOULD BE PERMITTED TO WITHDRAW HIS GUILTY PLEA AS SAME WAS NOT ENTERED VOLUNTARILY, KNOWINGLY AND INTELLIGENTLY.

POINT II - DEFENDANT'S PETITION FOR PCR SHOULD NOT BE BARRED BY PROCEDURAL CONSIDERATIONS.

II.

A PCR court need not grant an evidentiary hearing unless "'a defendant has presented a prima facie [case] in support of post-conviction relief.'" State v. Marshall, 148 N.J. 89, 158 (alteration in original) (citation omitted), cert. denied, 522 U.S. 850, 118 S. Ct. 140, 139 L. Ed. 2d 88 (1997). "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." Ibid. The court must view the facts "'in the light most favorable to defendant.'" Ibid. (citation omitted); accord R. 3:22-10(b). As the PCR court did not hold an evidentiary hearing, we "conduct a de novo review." 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). We must hew to that standard of review.

III.

The PCR court properly denied defendant's motion because his petition was untimely. Rule 3:22-12(a)(1) provides "no petition

shall be filed . . . more than 5 years" after the entry of the challenged judgment of conviction "unless it alleges facts showing that the delay beyond said time was due to defendant's excusable neglect." In addition, Rule 3:22-12(a)(1) was amended in 2010 to require defendants to allege facts also showing "that there is reasonable probability that if the defendant's factual assertions were found to be true enforcement of the time bar would result in a fundamental injustice." Ibid. Under the amended rule, "[t]hese time limitations shall not be relaxed, except" as provided in Rule 3:22-12. R. 3:22-12(c). Defendant requests relaxation under the principles of Rule 1:1-2, but under the 2009 amendment to Rule 1:3-4(c), "[n]either the parties nor the court may, however, enlarge the time specified by . . . R. 3:22-12[.]"[5]

Defendant failed to meet either of Rule 3:22-12(a)(1)'s requirements to avoid the five-year time limit. First, despite

[5] Procedural rules are generally applicable to actions pending on or after the date the rules become effective, and thus the amended PCR rules applied to defendant's PCR petition, which was filed after the amendments took effect. See State v. Reevey, 417 N.J. Super. 134, 148 n.2 (App. Div. 2010), certif. denied, 206 N.J. 64 (2011); e.g., State v. Brewster, 429 N.J. Super. 387, 398 (App. Div. 2013). "[C]ourt rules 'are given retrospective application if vested rights are not thereby disturbed.'" Shimm v. Toys from the Attic, Inc., 375 N.J. Super. 300, 304-05 (App. Div. 2005) (quoting Feuchtbaum v. Constantini, 59 N.J. 167, 172 (1971)); see also Kas Oriental Rugs, Inc. v. Ellman, 407 N.J. Super. 538, 549-52 (App. Div.), certif. denied, 200 N.J. 476 (2009). Defendant had no vested right in filing his PCR petition thirty-two years after sentencing.

his PCR petition being thirty-two years late, he asserted no excusable neglect for the delay in filing for PCR. Defendant's delay is particularly inexplicable given that he was deported in 1984, promptly reentered the United States, and was again ordered to be deported in 2001. These deportation orders provided sufficient notice of the need to challenge his 1982 conviction. However, as noted by the PCR court, defendant waited until his 2015 arrest to seek judicial intervention. "'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) (citation omitted); see, e.g., Brewster, supra, 429 N.J. Super. at 400 (finding a "lapse of almost seven years beyond the five-year deadline undercuts a finding of excusable neglect and fundamental injustice").

Indeed, defendant failed to file a verified complaint, certification, or affidavit "set[ting] forth with specificity the facts upon which the claim for relief is based" as required by Rule 3:22-8 and Rule 3:22-10(c). "A petition is time-barred if it does not claim excusable neglect, or allege the facts relied on to support that claim." State v. Cann, 342 N.J. Super. 93, 101-02 (App. Div.) (citing State v. Mitchell, 126 N.J. 565, 577 (1992)), certif. denied, 170 N.J. 208 (2001).

PCR counsel acknowledges the record is "silent" as to why defendant did not file for PCR after being deported in 1984, but speculates "it is possible, indeed perhaps even probable" defendant was unaware that such proceedings were available to him. However, even if defendant filed a certification making such an allegation to the PCR court, "[i]gnorance of the law and rules of court does not qualify as excusable neglect." State v. Merola, 365 N.J. Super. 203, 218 (Law Div. 2002), aff'd o.b., 365 N.J. Super. 82, (App. Div. 2003), certif. denied, 179 N.J. 312 (2004). Similarly, it is not excusable neglect that a defendant "lack[ed] sophistication in the law." State v. Murray, 162 N.J. 240, 246 (2000).

IV.

Additionally, defendant cannot show a reasonable probability of fundamental injustice because he has not established a prima facie case that ineffective assistance of counsel led to his 1982 guilty plea. Again, defendant failed to certify any facts showing ineffectiveness. Instead, he argues his trial counsel failed to advise him that he might be deported.

To show ineffective assistance of counsel, defendant must meet the two-pronged test set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and State v. Fritz, 105 N.J. 42 (1987). In the context of a guilty plea,

the defendant must show that "counsel's assistance was not 'within the range of competence demanded of attorneys in criminal cases' [and 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) (citation omitted) (quoting Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985)), cert. denied, 516 U.S. 1129, 116 S. Ct. 949, 133 L. Ed. 2d 873 (1996).

In 2010, the United States Supreme Court held "counsel must inform her client whether his plea carries a risk of deportation." Padilla v. Kentucky, 559 U.S. 356, 374, 130 S. Ct. 1473, 1486, 176 L. Ed. 2d 284, 299 (2010). However, the Court's ruling in Padilla is not retroactively applied to convictions that were "final" when Padilla was decided. Chaidez v. United States, 568 U.S. 342, 344, 133 S. Ct. 1103, 1105, 185 L. Ed. 2d 149, 154 (2013); State v. Gaitan, 209 N.J. 339, 372 (2012), cert. denied, 568 U.S. 1192, 133 S. Ct. 1454, 185 L. Ed. 2d 361 (2013). Because Padilla does not retroactively apply to defendant's long-final conviction, counsel's alleged ineffectiveness must be evaluated under the state of the law before that decision was issued.

Before Padilla, defendant's counsel was not required to advise defendant of the deportation consequences of his plea. See

State v. Chung, 210 N.J. Super. 427, 434-35 (App. Div. 1986) (holding the defendant "failed to establish the first prong of the Strickland test" by asserting defense counsel "never specifically advised [defendant] as to the immigration consequences of his plea."). Counsel could be deemed ineffective only if counsel "provide[d] false or misleading [material] information concerning the deportation consequences of a plea of guilty." State v. Nuñez-Valdéz, 200 N.J. 129, 138, 141-43 (2009); see also Chung, supra, 210 N.J. Super. at 435 (same). Defendant has not alleged counsel affirmatively misadvised him regarding removal consequences prior to entering his guilty plea, nor is there evidence in the record to support such a notion. In assessing a "belated claim of misadvice" when deciding whether to grant an evidentiary hearing, the reviewing court should "examine the transcripts of the plea colloquy and sentencing hearing . . . to determine if either transcript provides support for an after-the-fact assertion that counsel failed to provide advice affirmatively sought by a client." Gaitan, supra, 209 N.J. at 381.

The plea colloquy reveals that defendant entered his plea voluntarily and of his own free will. Additionally, defendant testified the only thing he was promised was that he would not serve more than six years in prison. In fact, the sentencing transcript reveals that trial counsel stated it "seemed very

likely" that defendant "may very well be deported." Counsel remarked "I think he's going to pay very dearly for this regardless of whether or not your Honor accepts my request to recommend against deportation because immigration has its own rules and regulations about this." Thus, defendant failed to show a prima facie case of deficiency.

Additionally, defendant has failed to show "'a reasonable probability that, but for counsel's errors, [he] would not have pled guilty and would have insisted on going to trial.'" Nunez-Valdez, supra, 200 N.J. at 139 (citation omitted). He received a favorable plea agreement and an even more favorable sentence. Defendant has not certified he would not have pled guilty but for any misinformation about the immigration consequences of his plea. PCR counsel so argues, but his argument lacks any factual support. Thus, defendant also failed to establish prejudice.

Defendant has failed to establish a prima facie claim of ineffective assistance of counsel. Accordingly, the denial of PCR did not result in a fundamental injustice.

V.

Defendant alleges the sentencing court misinformed defendant about the immigration consequences of his plea, and that this information created a fundamental injustice. However, any alleged misinformation from the court at sentencing could not have affected

defendant's earlier decision to plead guilty. The record reflects that defendant elected to plead guilty with no assurances regarding the immigration consequences of his plea. Further, any argument regarding misinformation from the sentencing court is waived because the arguments could have been raised on direct appeal. See R. 3:22-4(a) (stating a claim not raised on appeal is barred on PCR unless a court finds the claim "could not reasonably have been raised in any prior proceeding" or "would result in a fundamental injustice" if not heard).[6]

The remainder of defendant's claims lack sufficient merit to warrant discussion. 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

[6] Defendant briefly argues trial counsel was responsible for misstatements by the sentencing court regarding the immigration consequences of the plea. However, defendant alleged no facts to support that argument. Indeed, the trial court's comments indicated it reached its reading of the statute independent of trial counsel. Trial counsel's alleged failure to research the issue is not a viable claim given that counsel was not required to provide any advice prior to Padilla.