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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-5701-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FRANCISCO ALBERTO-HERRERA,

Defendant-Appellant.

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Argued telephonically November 3, 2016 –  
Decided April 21, 2017

Before Judges Koblitz and Summers.

On appeal from Superior Court of New Jersey,  
Law Division, Middlesex County, Indictment  
Nos. 02-09-1163 and 04-04-0585.

James P. Nolan, Jr. argued the cause for  
appellant (James P. Nolan & Associates,  
attorneys; Mr. Nolan, on the brief).

Brian D. Gillet, Deputy First Assistant  
Prosecutor, argued the cause for respondent  
(Andrew C. Carey, Middlesex County Prosecutor,  
attorney; Susan Berkow, Special Assistant  
Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Francisco Alberto-Herrera appeals from the July 29,  
2015 order denying his petition for post-conviction relief (PCR)

without an evidentiary hearing. For the reasons that follow, we affirm.

In this PCR petition, defendant alleged that his trial counsel was ineffective for giving him incorrect advice regarding the deportation consequences of guilty pleas he entered on two separate indictments before the same judge. On September 20, 2004, defendant pled guilty to count ten of indictment no. 04-04-0585, second-degree possession with intent to distribute on or near a public park, N.J.S.A. 2C:35-7.1, with all other charges to be to be dismissed. Four months later, on January 18, 2005, defendant pled guilty to count three of indictment no. 02-09-1169, fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d), with all other charges to be to be dismissed. Also on that date, defendant's plea on September 20, to count ten was withdrawn, and he pled to an amended count nine, third-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-10(a)(1).

At both plea hearings, defendant signed and responded "yes" to question 17 on the plea forms, which asks, "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?" In addition, during the September 20, 2004 plea colloquy with the judge, defendant admitted that he was not a United States citizen. He further acknowledged that he had spoken to his attorney and was aware that

by "entering a guilty plea to a second-degree offense, [he] would be subject to deportation[,]" and proceeded with the plea. A similar colloquy occurred on January 18, 2005, when defendant answered affirmatively to the judge's question that he was aware, from conferring with his attorney, that entering a guilty plea to the charge (a fourth-degree offense) "could impact [his] ability to remain in this country." That same day, defendant was sentenced on both pleas to an aggregate period of four years on probation.

Sometime after completing his probation, defendant was apprehended by the United States Immigration and Customs Enforcement (ICE) and advised that proceedings for his removal from the country had been instituted, based on his guilty pleas.<sup>1</sup> To avoid deportation, defendant sought to vacate his guilty pleas by filing a PCR petition on June 5, 2015, alleging trial counsel rendered ineffective assistance by not explaining the possibility of deportation at the time of his pleas. Additionally, defendant argued that the judge failed to fully explain the deportation consequences associated with his guilty pleas.

On July 29, 2015, Judge Michael A. Toto issued an order and written opinion denying PCR. The judge rejected defendant's contention that his claim was timely because he filed his petition

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<sup>1</sup> The record before us does not indicate when this occurred.

within five years after he became aware that he would be deported. Citing State v. Brewster, 429 N.J. Super. 387, 400 (App. Div. 2013), the judge found that under Rule 3:22-12(a)(1), the five-year time bar to file for PCR after his conviction could not be relaxed due to excusable neglect because during his plea colloquies, well before ICE took him into custody, defendant was made aware he might be deported. Judge Toto noted that "[i]n these colloquies, the [c]ourt unmistakably told [defendant] that his guilty plea may lead to certain immigration consequences, including deportation."

Notwithstanding the time bar ruling, Judge Toto considered the merits of defendant's petition. The judge found that pursuant to the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987), defendant failed to establish a prima facie case of ineffective assistance of counsel due to the alleged failure to fully explain the immigration consequences of his guilty pleas. With regard to the first prong, the judge stated that "[g]iven the absence of any argument that counsel affirmatively misinformed [defendant] as to the those same consequences, the [c]ourt finds counsel's assistance did not fall below the ordinary standard." The court found no reason to consider the second prong because

defendant failed to show that counsel made affirmative misrepresentations regarding the immigration consequences of defendant's plea.

On appeal, defendant argues:

POINT ONE

DEFENDANT/APPELLANT ESTABLISHED A PRIMA FACIE CASE OF [INEFFECTIVE] ASSISTANCE OF COUNSEL WARRANTING AN EVIDENTIARY HEARING.

POINT TWO

DEFENDANT/APPELLANT WAS ENTITLED TO AN EVIDENTIARY HEARING IN ORDER TO PROPERLY ADDRESS THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

We have considered these contentions in light of the record and applicable legal principles and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We affirm substantially for the reasons expressed by Judge Toto in his thorough written opinion. We only add the following comments.

Our Supreme Court has held that

to set aside a guilty plea based on ineffective assistance of counsel, a 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. Nuñez-Valdéz, 200 N.J. 129, 139 (2009) (alteration in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)).]

See also State v. Parker, 212 N.J. 269, 279 (2012). A defendant can establish ineffective assistance of counsel by proving that his guilty plea resulted from "inaccurate information from counsel concerning the deportation consequences of his plea." Nuñez-Valdéz, supra, 200 N.J. at 143. The focus is on "false or misleading information" from counsel as establishing the violation of the defendant's constitutional rights. Id. at 138.

Defendant did not raise more than "bald assertions" and thus was rightly denied a plenary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999). Defendant failed to show that counsel's assistance was not within the range of competence demanded of attorneys in criminal cases. On two separate occasions, both the court and defense counsel advised defendant that he may be deported due to his guilty pleas. Further, defendant twice acknowledged that he understood the deportation consequences of his guilty pleas. Accordingly, defendant was well aware that, prior to entering both pleas, he could be deported because of either of his guilty pleas.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION