SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0460-17T4

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

D.K.,

Defendant-Respondent.

Submitted March 20, 2018 - Decided April 12, 2018

Before Judges Yannotti and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 12-04-0724.

Esther Suarez, Hudson County Prosecutor, attorney for appellant (Erin M. Campbell, Assistant Prosecutor, on the brief).

Joseph E. Krakora, Public Defender, attorney for respondent (Stefan Van Jura, Deputy Public Defender, of counsel and on the brief).

PER CURIAM

The State, on leave granted, appeals from a September 22, 2017 order, which granted defendant's petition for post-conviction

relief (PCR) for ineffective assistance of counsel and vacated defendant's plea. We reverse.

The following facts are taken from the record. On April 11, 2012, a Hudson County grand jury indicted defendant on one count of second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a), and one count of fourth-degree child abuse, N.J.S.A. 9:6-1 and 9:6-3. As defendant's trial date approached, defense counsel filed a motion to be relieved as counsel citing a breakdown in communications with defendant. In December 2012, defendant failed to appear in court. Therefore, the trial judge issued a bench warrant and bail forfeiture order. Defendant was arrested a few days later and charged with bail jumping, N.J.S.A. 2C:29-7.

On January 14, 2013, a hearing occurred to address defense counsel's motion to be relieved. The trial judge advised she could not relieve counsel from representing defendant until defendant retained new counsel. The trial judge rescheduled the matter for another hearing two weeks later and advised defendant to retain new counsel by then. When the matter returned on January 28, 2013, defendant had not retained a new attorney, and her defense counsel advised the judge defendant wanted to apply for a public defender. The assistant prosecutor placed the State's final offer on the record, namely, defendant would plead guilty to the second-degree endangering the welfare of a child charge,

which would be treated as a third-degree offense for sentencing purposes, the State would recommend a three-year prison sentence, and would not pursue the child abuse or bail jumping charges.

Defendant stated she wished to accept the State's offer and plead guilty. However, the trial judge granted defendant a recess to consider her decision and consult with defense counsel. Defense counsel advised the judge defendant was a Tibetan residing in the United States as an asylee. Defense counsel noted defendant "said she spoke to an immigration attorney and she may not be deported." Defense counsel also stated he was reviewing the plea form with defendant and said defendant "indicated a couple of times that she wanted to speak to an immigration attorney." When the trial judge asked defendant if she had consulted with an immigration attorney, defendant informed the judge a friend had consulted one on her behalf, but that defendant herself had not spoken with an attorney about the immigration consequences of her plea. Thus, the trial judge adjourned the matter to enable defendant to consult with an immigration attorney.

The matter returned on February 11, 2013, and on that date defendant pled guilty in accordance with the plea offer. During her plea colloquy, defendant confirmed she had reviewed the plea form with her attorney, understood the questions contained in the form, and had answered them truthfully. The trial judge questioned

defendant at length regarding her status as a legal permanent resident. The judge confirmed defendant was aware an Immigration and Customs Enforcement detainer had been issued for her. The judge confirmed defendant still wished to plead guilty. Defendant confirmed she had reviewed her criminal case with defense counsel, was satisfied with his representation, and did not require additional time or to speak with any other person before entering into the plea.

Defendant's answers on the plea form mirror her answers to the judge's questions and her counsel's representations that he had not provided her with any immigration related advice. In pertinent part, defendant answered as follows:

> 17 a. Are you a citizen of the United States?
>
> [No.]
>
> . . . .
>
> b. Do you understand that if you are not a citizen of the United States, this guilty plea may result in your removal from the United States . . . ?
>
> [Yes.]
>
> c. Do you understand that you have the right to seek individualized advice from an attorney about the effect your guilty plea will have on your immigration status?
>
> [Yes.]

> d. Have you discussed with an attorney the potential immigration consequences of your plea? If the answer is "No," proceed to question 17e. . . .
>
> [No.]
>
> e. Would you like the opportunity to do so?
>
> [No.]
>
> f. Having been advised of the possible immigration consequences and of your right to seek individualized legal advice on your immigration consequences, do you still wish to plead guilty?
>
> [Yes.]

Defendant then admitted she was the caregiver for the victim, a seven-month old infant. Defendant testified she hit the victim in the arm several times and kicked him knowing this could cause him harm. The trial judge concluded defendant's plea was voluntary and accepted it. The trial judge sentenced defendant in accordance with the plea agreement.

Defendant filed her PCR petition. The PCR judge granted defendant an evidentiary hearing. Defendant thereafter and her former defense counsel at the time of the plea and sentencing testified.

At the evidentiary hearing, defendant testified her defense attorney had provided her with no advice regarding the immigration consequences of her plea. Instead, she indicated that the only

advice she received was from her interpreter who said: "since I am a refugee, [I] won't get deported." Defendant further stated: "The interpreter who interpreted [for] me he said that I don't have to consult any immigration lawyer, [I] don't have to worry." Defendant testified the trial judge had afforded her an adjournment to speak with an immigration attorney. She also testified she told the trial judge she was satisfied with her defense counsel's representation.

Defense counsel testified he had represented non-citizen defendants. He stated his general practice with such clientele was "[t]o have them contact an immigration attorney to see whether or not their guilty plea . . . or conviction would affect their immigration status." Defense counsel described the plea negotiations in pertinent part as follows: ". . . no one wants to go to prison but [defendant] was acceptable to the offer and . . . she was advised to go speak to an immigration attorney to see how it would affect her status since she was a refugee."

Defense counsel testified similarly to defendant that the trial judge had granted an adjournment of the plea hearing to permit defendant to speak with an immigration attorney. The assistant prosecutor asked defense counsel what happened as a result, and the following colloquy occurred:

> [Assistant prosecutor]: Did [defendant] express having met with an immigration attorney prior to returning?
>
> [Defense counsel]: I don't recall who she exactly met with or what his name was but she, I believe, she advised me that she had met with someone . . . during that time.
>
> [Assistant prosecutor]: Did [defendant] ever express any hesitation in pleading guilty as a result of these immigration consequence to you?
>
> [Defense counsel]: Not that I recall.

As to the reasons why defendant would seek to avoid trial, the following colloquy ensued between the assistant prosecutor and defense counsel:

> [Assistant prosecutor]: Did [defendant] ever advise you of any defenses, potential defenses, she had to these charges?
>
> [Defense counsel]: No, there was never any question that what occurred in the video is what happened. She never said that's not me in the video, she never said the video is spliced. It is what it is.
>
> [Assistant prosecutor]: And what was your opinion then about the strength of [defendant's] case?
>
> [Defense counsel]: I believe she had a very weak case and plea negotiations and trying to give her the least amount of exposure was the appropriate way to proceed.

The PCR judge granted defendant's petition. He concluded petitioner had proven ineffective assistance of counsel because

defense counsel had failed to advise her of the immigration consequences of the plea. The judge also found defendant had been prejudiced by counsel's performance because defendant would not have pled guilty, but for counsel's failure to affirmatively advise her of the immigration consequences of the plea.

The State filed a motion for leave to appeal, and for a stay of the PCR judge's order, which we granted. On appeal the State argues the following point:

> POINT I — PETITIONER RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL.
>
> a. The record shows Petitioner was aware that by pleading guilty she faced the risk of deportation.
>
> b. Petitioner failed to demonstrate that she would not have pled guilty if not for counsel's deficient performance.

To establish ineffective assistance of counsel, defendant must satisfy a two-prong test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a

> breakdown in the adversary process that renders the result unreliable.
>
> [Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 52 (1987) (quoting Strickland, 466 U.S. at 687).]

Counsel's performance is evaluated with extreme deference, "requiring 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .'" Fritz, 105 N.J. at 52 (alteration in original) (quoting Strickland, 466 U.S. at 688-89). "To rebut that strong presumption, a [petitioner] must establish . . . trial counsel's actions did not equate to 'sound trial strategy.'" State v. Castagna, 187 N.J. 293, 314 (2006) (quoting Strickland, 466 U.S. at 689). "Mere dissatisfaction with a 'counsel's exercise of judgment' is insufficient to warrant overturning a conviction." State v. Nash, 212 N.J. 518, 542 (2013) (quoting State v. Echols, 199 N.J. 344, 358 (2009)).

The Supreme Court has stated:

> When a guilty plea is part of the equation, we have explained that "[t]o 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. DiFrisco, 137 N.J. 434, 457

> (1994) (citations omitted) (alteration in original).
>
> [State v. Nunez-Valdez, 200 N.J. 129, 139 (2009).]

To demonstrate prejudice, "'actual ineffectiveness' . . . must [generally] be proved[.]" Fritz, 105 N.J. at 52 (quoting Strickland, 466 U.S. at 692-93). Defendant must show the existence of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Ibid. (quoting Strickland, 466 U.S. at 694).

> In our review of a . . . PCR petition following an evidentiary hearing, we afford deference to the PCR judge's factual findings, as long as they are "supported by sufficient credible evidence in the record." Nash, 212 N.J. at 540; see also State v. Elders, 192 N.J. 224, 244 (2007) ("A trial court's findings should be disturbed only if they are so clearly mistaken 'that the interests of justice demand intervention and correction.'" (quoting State v. Johnson, 42 N.J. 146, 162 (1964))). However, we do not defer to legal conclusions, which we review de novo. Nash, 212 N.J. at 540-41; see State v. Gregory, 220 N.J. 413, 419-20 (2015).
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> [State v. Holland, 449 N.J. Super. 427, 434 (App. Div. 2017).]

The State argues defendant's counsel was not ineffective because counsel had advised defendant her plea may result in

deportation. Defendant argues the law was clear that she would be deported as a result of her plea and her counsel's failure to affirmatively advise of such was ineffective assistance of counsel.

The State also argues defendant failed to demonstrate any prejudice by entering into the plea agreement because she achieved a more favorable result than if she had proceeded to trial. Defendant argues she was prejudiced because she had valid defenses to the charges against her, and proceeding to a trial, even with the slim chance of acquittal, was a better option than deportation.

We recently recounted obligation of counsel to provide advice where a criminal defendant may face deportation as a result of a guilty plea. We stated:

> 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." The Court's focus was on "false or misleading information" from counsel as establishing the violation of the defendant's constitutional rights. Id. at 138.
>
> Later, in Padilla v. Kentucky, 559 U.S. 356, 486 (2010), the United States Supreme Court held that counsel's failure to give any advice whatsoever about deportation might also be deficient performance in violation of a defendant's constitutional rights. . . .

> The Court also added that counsel's constitutional duty is not limited to avoiding incorrect advice. Counsel has an affirmative duty to inform a defendant when a guilty plea will result in deportation, at least where the relevant law pertaining to mandatory deportation is "succinct, clear, and explicit." Id. at 381.
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> [State v. Brewster, 429 N.J. Super. 387, 392-93 (App. Div. 2013) (emphasis added).]

As noted, following the hearing, the PCR judge found the first Strickland prong was met because plea counsel failed to render affirmative advice to defendant regarding deportation as a result of her plea. We agree with the PCR judge plea counsel was ineffective for failing to affirmatively advise defendant she would be deported.

Pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii), a non-United States citizen "convicted of an aggravated felony at any time after admission is deportable." An aggravated felony includes "a crime of violence . . . for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F). Under 18 U.S.C. § 16, a crime of violence is defined as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the

> person . . . may be used in the course of committing the offense.

Additionally, 8 U.S.C. § 1227(a)(2)(E)(i) punishes a crime of child abuse with deportation.

Also, 8 U.S.C. § 1158(b)(2)(A)(ii) provides a person in the United States who has been granted asylum "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States[.]" A person "who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime." 8 U.S.C. § 1158(b)(2)(B)(i). The person convicted thus loses asylum status because they become "deportable." 8 U.S.C. § 1227(a) and (a)(2)(A)(iii).

Defendant's guilty plea to endangering the welfare of a child was a deportable offense because it was clearly an aggravated felony and a crime of child abuse. At the time, N.J.S.A. 2C:24-4(a)[1] stated:

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[1] Subsequent to defendant's plea, N.J.S.A. 2C:24-4(a)(2) was amended and now reads as follows:

> Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who causes the child harm that would make the child an abused or neglected child as defined in [N.J.S.A.] 9:6-1, [N.J.S.A.] 9:6-3, and [N.J.S.A.] 9:6-8.21[] is guilty of a crime of the second degree.

> Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who cause the child harm that would make the child an abused or neglected child . . . is guilty of a crime of the second degree.

N.J.S.A. 9:6-8.21 states, in pertinent part as follows:

> "Abused or neglected child" means a child less than 18 years of age whose parent or guardian,[2] as herein defined, (1) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ; (2) creates or allows to be created a substantial or ongoing risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted loss or impairment of the function of any bodily organ; . . . (4) or a child whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian, as herein defined, to exercise a minimum degree of care . . . (b) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of

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> Any other person who engages in conduct or who causes harm as described in this paragraph to a child is guilty of a crime of the third degree.

[2] N.J.S.A. 9:6-8.21(a) states: "'Parent or guardian' means . . . any person, who has assumed responsibility for the care, custody, or control of a child or upon whom there is a legal duty for such care."

> excessive corporal punishment; or by any other acts of a similarly serious nature requiring the aid of the court[.]

As noted, defendant testified she was the victim's caregiver, and that she punched him several times and kicked him. Defendant's conduct as a caregiver placed her seven-month old victim at risk of harm or serious injury. Therefore, defendant provided an adequate factual basis to meet the elements of the criminal offense of endangering the welfare of a child. Because the elements of the offense were met, defendant was clearly deportable for having committed an "aggravated felony," "a crime of child abuse," or a "particularly serious crime" as defined by federal statute.

We agree with the PCR judge that providing defendant with this advice would have required no more than basic legal research. It did not require an expertise in immigration law to point out defendant's exposure to deportation, which was clearly explicated by federal statute and did not require a nuanced legal analysis. The record demonstrates plea counsel instead suggested defendant speak with an immigration attorney rather than affirmatively providing the necessary legal advice contrary to the mandate of Padilla. For these reasons, the first Strickland prong was met.

Notwithstanding, the record fails to support the PCR judge's finding the second Strickland prong was met. The judge's only findings in this regard were that "despite the strength of the

[State's] case, [defendant] has shown . . . but for counsel's errors, that she would not have pled guilty."

Defendant argues she would not have pled guilty because she had valid defenses to the charge, namely, that she suffers from mental illness, and the victim was uninjured. Defendant also argues if she had known she would be deported she would have proceeded to trial. Citing Lee v. United States, ___ U.S. ___, 137 S. Ct. 1958 (2017), defendant asserts avoiding deportation was the determinative factor in agreeing to the plea. Thus, she asserts it would have been a better outcome if she had proceeded to trial on the slim chance she would be acquitted.

We reject defendant's argument and the PCR judge's reasoning that but for counsel's failure to affirmatively advise defendant regarding the deportation consequences defendant would not have pled guilty. As noted, the victim was a defenseless infant. There was video evidence of defendant's assault on the victim clearly proving the State's case pursuant to N.J.S.A. 2C:24-4(a)(2). Defendant's mental health and the lack of injury would not constitute valid defenses to the fact she endangered the welfare of the infant victim.

Furthermore, defendant misreads the facts and holding of Lee. Indeed, in Lee the United States Supreme Court stated:

> A grand jury indicted Lee on one count of possessing ecstasy with intent to distribute . . . . Lee retained an attorney and entered into plea discussions with the Government. The attorney advised Lee that going to trial was "very risky" and that, if he pleaded guilty, he would receive a lighter sentence than he would if convicted at trial. . . . Lee informed his attorney of his noncitizen status and repeatedly asked him whether he would face deportation as a result of the criminal proceedings. The attorney told Lee that he would not be deported as a result of pleading guilty. Based on that assurance, Lee accepted the plea . . . .
>
> [Lee, ____ U.S. ____, 137 S. Ct. at 1963 (citations omitted) (emphasis added).]

Finding the prejudice prong had been established in Lee, the Court stated:

> A defendant without any viable defense will be highly likely to lose at trial. And a defendant facing such long odds will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial. But that is not because the prejudice inquiry in this context looks to the probability of a conviction for its own sake. It is instead because defendants obviously weigh their prospects at trial in deciding whether to accept a plea. Where a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the Government offers one.
>
> But common sense (not to mention our precedent) recognizes that there is more to consider than simply the likelihood of success at trial. The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and

> by plea. See INS v. St. Cyr, 533 U.S. 289, 322-323 (2001). When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. For example, a defendant with no realistic defense to a charge carrying a [twenty]-year sentence may nevertheless choose trial, if the prosecution's plea offer is [eighteen] years. Here Lee alleges that avoiding deportation was the determinative factor for him; deportation after some time in prison was not meaningfully different from deportation after somewhat less time. He says he accordingly would have rejected any plea leading to deportation—even if it shaved off prison time—in favor of throwing a "Hail Mary" at trial.
>
> [Id. at 1966-67 (citations omitted).]

The facts here are different than Lee. As noted, Lee was affirmatively advised by his counsel, albeit erroneously, that he would be deported unless he entered into the plea. Here, defendant received no advice from defense counsel other than, perhaps, to confer with an immigration attorney.

Moreover, the consequences of proceeding to trial as opposed to accepting a plea were not "similarly dire" for defendant as the Lee Court contemplated might impel a defendant to proceed to trial. Indeed, defendant was sentenced in accordance with the plea agreement, which treated the offense as a third-degree offense and received a three-year-term. Defendant avoided a prosecution on the child abuse and bail jumping charges, which were dismissed. She avoided a trial and conviction on the endangering of a child

charge as a second-degree offense for which defendant faced a maximum sentence of ten years.

Finally, we note defendant's testimony during the plea hearing and the testimony of her PCR counsel dispel her argument here that deportation was the prime motivator for her decision to accept the plea. Therefore, Lee is inapposite. For these reasons, the second Strickland prong was not met.

Reversed. Defendant's conviction is reinstated.