

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

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-0713-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

OMAR LEWIN,

Defendant-Appellant.

Submitted January 9, 2018 – Decided May 9, 2018

Before Judges Sumners and Moynihan.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment Nos.
00-08-2284 and 07-08-2813.

Joseph E. Krakora, Public Defender, attorney
for appellant (Anderson D. Harkov, Designated
Counsel, on the brief).

Robert D. Laurino, Acting Essex County
Prosecutor, attorney for respondent (Tiffany
M. Russo, Special Deputy Attorney General/
Acting Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant Omar Lewin, a non-citizen of the United States, was
convicted of third-degree receipt of stolen property in 2000;

violation of probation (VOP) in 2007; and third-degree eluding, third-degree possession of a weapon (an automobile) for an unlawful purpose, and fourth-degree resisting arrest, (collectively the eluding incident) in 2008. The former and latter convictions were based upon guilty pleas. None of the convictions were appealed nor challenged in any way until defendant was threatened with deportation six-and-a-half years after his last conviction, when the United States Department of Homeland Security (DHS) served him with a detention notice, an arrest notice, and a Notice to Appear for deportation proceedings due to his convictions for receiving stolen property and the eluding incident.¹ In response, six months later, defendant filed a petition for post-conviction relief (PCR) – beyond the five-year time limitation under Rule 3:22-12(a)(1) following his convictions – contending the two different counsel who represented him in those matters wrongly advised him that he would not be deported due to entering guilty pleas.

In denying relief without an evidentiary hearing, the PCR court explained in its oral decision that defendant did not establish excusable neglect under Rule 3:22-12(a)(1)(A) to extend the five-year limitation period to seek PCR. The court found defendant was aware in 2000 that he could be deported for the

¹ Defendant is not presently confined.

ensuing conviction because he indicated "Yes" to question 17 of his plea form, which asked: "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?" The court further reasoned that since defendant was deportable for the 2000 conviction, it was irrelevant what advice counsel gave him about the immigration consequences of pleading guilty for the eluding incident in 2007 because under the PCR two-prong test in Strickland v. Washington, 466 U.S. 668, 687, 694 (1984), there could be no showing the advice caused him harm. In rejecting defendant's claim to withdraw the guilty pleas to VOP and to possession of a weapon for an unlawful purpose due to lack of a factual basis in his plea allocution, the court maintained that he failed to make a colorable assertion of innocence as required by State v. Slater, 198 N.J. 145, 158 (2009).

In this appeal, defendant contends the PCR court erred in finding that the time bar for filing his petition should not be relaxed, and that he was entitled to an evidentiary hearing because he established a prima facie case of ineffectiveness of counsel of being misadvised regarding the immigration consequences of his guilty pleas. He also argues that the court should have vacated his convictions for VOP and possession of a weapon for an unlawful purpose as his guilty pleas lacked a factual basis for the

offenses; and that counsel was ineffective for not assuring that a factual basis was given.

For the reasons that follow, we reverse the court's ruling not to vacate the convictions for VOP and possession of a weapon for an unlawful purpose. Regarding the VOP conviction, the record indicates that defendant did not plead guilty and we now vacate because he was not afforded due process in the VOP hearing. Furthermore, we reverse and remand for an evidentiary hearing because defendant established a prima facie case of ineffective assistance in being misadvised about the immigration consequences of his convictions in 2000 and 2008, which also is the reason for relaxing the five-year limitation period.

I.

Because the determination of whether the five-year time bar of Rule 3:22-12(a)(1)(A) is relaxed turns on defendant's contention that counsel provided ineffective assistance by misadvising him about the immigration consequences of his guilty pleas – we thus begin by discussing the merits of that claim before commenting on the petition's timeliness.

To prove ineffective assistance of plea counsel, a defendant must show that counsel's performance was deficient and but for counsel's errors, there is a reasonable probability that defendant would not have pled guilty. Strickland, 466 U.S. at 668, 687,

694; State v. DiFrisco, 137 N.J. 434, 457 (1994). The PCR court must consider the facts in the light most favorable to the defendant to determine if a defendant has established a prima facie claim. State v. Preciose, 129 N.J. 451, 462-63 (1992). Because defendant's convictions predated the Supreme Court's seminal 2010 opinion in Padilla v. Kentucky, 559 U.S. 356, 367 (2010), concerning deportation consequences to a criminal defendant, his claims are governed by the standards of State v. Nunez-Valdez, 200 N.J. 129, 143-44 (2009). Under those pre-Padilla standards, a defendant seeking relief based upon post-conviction deportation consequences can only prevail if he demonstrates that his prior counsel affirmatively provided him with misleading advice about such consequences flowing from a guilty plea. Id. at 139-43; see also State v. Santos, 210 N.J. 129, 143 (2012). Thus, the previous standard under State v. Chung, 210 N.J. Super. 427, 431 (App. Div. 1986) (citing State v. Reid, 148 N.J. Super. 263 (App. Div. 1977)), that a defendant's failure to understand a "collateral consequence" of his guilty plea, such as immigration status or possible removal, was not a basis to disturb an otherwise knowing and voluntary guilty plea. A trial counsel therefore had no duty to inform a defendant of such consequences, and was deemed constitutionally ineffective only if he or she misinformed his or

her client about the immigration consequences of pleading guilty. State v. Gaitan, 209 N.J. 339, 375 (2012).

A court reviewing a PCR petition based on claims of ineffective assistance has the discretion to grant an evidentiary hearing only if a defendant establishes a prima facie showing in support of the requested relief. Preciose, 129 N.J. at 462. The mere raising of a claim for PCR does not entitle a defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). The court should only conduct a hearing if there are disputed issues as to material facts regarding entitlement to PCR that cannot be resolved based on the existing record. State v. Porter, 216 N.J. 343, 354 (2013).

Here, defendant makes a prima facie showing that his counsel were ineffective in advising him of the immigration consequences concerning his three guilty pleas. In 2000, when pleading guilty to receiving stolen property, defendant circled "Yes" to plea form question 17, which asked: "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?" Yet, in addressing defendant at sentencing before imposing a five-year probationary term,² the

² The plea agreement had called for a maximum three-year prison term, but the court indicated at the plea hearing that it would sentence defendant to a term of probation.

judge stated: "You were born in Jamaica, you understand – I have no idea you understand that there could be adverse immigration consequences as a result of this plea. You're currently on probation; correct?" While defendant stated he was no longer on probation, he never indicated to the court nor did the court ask again whether he was aware of the deportation immigration consequences of his plea.³ Moreover, his petition contends that counsel told him not to worry about being deported because his crimes were not serious enough. Defendant asserts he would not have pled guilty had he not been misadvised that he would not be subject to deportation for his convictions.

In 2002, defendant moved to Georgia and was charged with a VOP when he failed to: report to probation, pay fines, and appear at a VOP hearing. About six years later, defendant was apprehended in Irvington after he collided his vehicle into another vehicle while eluding the police. This led to a multi-count indictment for second-degree eluding the police; second-degree aggravated assault by eluding (three counts); fourth-degree possession of a weapon (an automobile) under circumstances not manifestly appropriate for its lawful use; third-degree possession of a weapon

³ The plea form currently in effect has been significantly revised since 2000 and 2007, to avoid the concerns that are raised in this appeal.

(an automobile) for an unlawful purpose; and fourth-degree resisting arrest.

Before resolving the indictment, defendant appeared at a VOP hearing on January 12, 2007, when the court resentenced him on the 2000 receiving stolen property conviction to a four-year prison term. Defendant contends in his merits brief that he pled guilty to VOP. Instead, the record reveals that counsel, who also represented defendant in 2000, explained to the VOP court that defendant was under the impression that his probation supervision had been transferred to Georgia where he moved. The court was unpersuaded, and without counsel stating defendant intended to plead guilty, remarked: "Best as I can see, he hasn't done anything. All right, I accept your guilty plea Mr. Lewin to your violation of probation. I vacate the sentence of probation imposed . . . on November [17], 2000, and re-sentence as follows." Apparently, the court misspoke because during the VOP hearing defendant never spoke – and was not given the opportunity to do so – and counsel never stated that he was pleading guilty. No mention was made during the hearing that defendant could face immigration consequences for the VOP or the underlying conviction.

Seven months thereafter, on October 29, the indictment was resolved when defendant pled guilty to a downgraded charge of third-degree eluding, third-degree possession of a weapon (an

automobile) for an unlawful purpose, and fourth-degree resisting arrest. As with his 2000 guilty plea, defendant contends his new counsel also told him not to worry about being deported because his crimes were not serious enough. Despite being a non-citizen and contrary to his "Yes" response to question 17 on his plea form in 2002, this time defendant circled "N/A" meaning "not applicable." According to defendant, he did so because counsel mistakenly told him that his immigration status was irrelevant for the charges. Since there was no discussion between the court and defendant regarding the response or defendant's understanding of the immigration consequences of his plea, the record does not belie defendant's assertion. On January 2, 2008, he was sentenced to three years of probation in accordance with the plea agreement.

Considering the plea and sentencing colloquies, coupled with the confusing "N/A" response in the eluding incident plea form, in the light most favorable to defendant, his assertions that his counsel gave him misleading advice about the immigration consequences are more than bald assertions of ineffectiveness to support a prima facie case.

And because we conclude defendant established a prima facie claim that counsel were ineffective for misadvice about the immigration consequences, logic dictates that he established excusable neglect to relax the time bar for not filing for PCR

within five years after his convictions; in fact, it was a mere six months after DHS notified him that it was pursuing deportation proceedings due to the convictions. When deciding whether a defendant has asserted sufficient grounds to relax the time bar, the PCR court "should consider the extent and cause of delay, the prejudice to the State, and the importance of the petitioner's claim in determining whether there has been an 'injustice' sufficient to relax the time limits." State v. Afanador, 151 N.J. 41, 52 (1997) (quoting State v. Mitchell, 126 N.J. 565, 580 (1992)). Additionally, Rule 3:22-12 provides a petitioner must allege facts showing that there was excusable neglect in not filing within the five-year limitations period "and that there is a 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." R. 3:22-12(a)(1)(A). Although we appreciate the difficulty the State may have in re-prosecuting defendant for charges that arose in 2000 and 2007, on balance, fairness weighs in defendant's favor as it would be a fundamental injustice not to allow him to prove at an evidentiary hearing that he was in fact misadvised of the immigration consequences of his guilty pleas, the crux of his potential deportation. Indeed, it is reasonable to conclude the misadvice error, if proven, may have played a role in his willingness to plead guilty. See State v.

Brewster, 429 N.J. Super. 387, 400-01 (App. Div. 2013). Regardless that defendant may have had the opportunity and the incentive to learn whether he might be deported before the time of his arrest, as the State contends, the record here sufficiently establishes that misadvice serves as excusable neglect. Accordingly, defendant's PCR petition was timely filed.

II.

We decline to consider defendant's claims that counsel was ineffective for not assuring defendant gave a factual basis for the VOP and possession of a weapon for an unlawful purpose guilty pleas because they were not presented to the PCR court, and do not go to the court's jurisdiction nor pertains to a matter of public interest. See State v. Robinson, 200 N.J. 1, 20 (2009).

That said, we still conclude that those convictions should be vacated because no factual basis was given during the respective guilty pleas. In seeking PCR, a defendant may challenge the adequacy of a plea's factual basis provided to the trial court. State v. Urbina, 221 N.J. 509, 527 (2015). A guilty plea "shall not [be] accepted[ed]" without the court's determination that "there is a factual basis for the plea." R. 3:9-2. "Indeed, 'it is essential to elicit from the defendant a comprehensive factual basis, addressing each element of a given offense in substantial detail.'" State v. Perez, 220 N.J. 423, 432 (2015) (quoting State

v. Campfield, 213 N.J. 218, 236 (2013)). This requirement helps "to 'protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.'" State v. Barboza, 115 N.J. 415, 421 (1989) (quoting Fed. R. Crim. P. 11(f) advisory committee's note to 1966 amendments). "Because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." State v. Urbina, 221 N.J. 509, 526 (2015) (quoting McCarthy v. United States, 394 U.S. 459, 466 (1969)). "[I]f a factual basis has not been given to support a guilty plea, the analysis ends and the plea must be vacated." State v. Tate, 220 N.J. 393, 404 (2015). Our court "is in the same position as the trial court in assessing whether the factual admissions during a plea colloquy satisfy the essential elements of an offense." Ibid. Thus, where a defendant challenges the factual basis for a guilty plea, our review is de novo. Id. at 403-04.

A person guilty of third-degree possession of a weapon for an unlawful purpose "who has in his possession any weapon, except a firearm, with a purpose to use it unlawfully against the person or property of another." N.J.S.A. 2C:39-4(d). To establish a

factual basis for the guilty plea for this offense, the following colloquy occurred:

[DEFENSE COUNSEL:] Mr. Lewin[,] I'm going to direct your attention to December the 11th of 2006 at about 1:50 in the afternoon. At that time[,] were you driving a car in the city of Irvington -- or the township of Irvington?

[DEFENDANT:] Yes.

[DEFENSE COUNSEL:] And what kind of car was that?

[DEFENDANT:] It was a Honda Civic.

[DEFENSE COUNSEL:] And at some --

[DEFENDANT:] White.

[DEFENSE COUNSEL:] I'm sorry?

[DEFENDANT:] A white Honda Civic.

[DEFENSE COUNSEL:] And at some point in time did you become aware that the Irvington Police Department wanted you to pull over?

[DEFENDANT:] Yes.

[DEFENSE COUNSEL:] And how -- what did they do that made you know they were trying to pull you over?

[DEFENDANT:] They had turned the light on and come on the loud speaker and told me to pull the car over.

[DEFENSE COUNSEL:] And did you?

[DEFENDANT:] No.

[DEFENSE COUNSEL:] And in fact you took off through the streets of Irvington --

[DEFENDANT:] Yes.

[DEFENSE COUNSEL:] -- is that fair to say?

[DEFENDANT:] Yes.

[DEFENSE COUNSEL:] And at some point . . . while you were eluding the police[,] did you strike another vehicle?

[DEFENDANT:] Yes.

[DEFENSE COUNSEL:] And that was -- another white car I believe --

[DEFENDANT:] Right.

[DEFENSE COUNSEL:] -- was it not? And at that point in time then did you jump out of the car and attempt to run away from the scene?

[DEFENDANT:] Yes.

The trial court -- with the State's satisfaction -- accepted defendant's plea allocution. The PCR court agreed; stating defendant "was in possession of the car at the time [he crashed it into another car] and, therefore, in possession of a weapon." We are constrained to disagree. As defendant argues before us, he failed to specifically state what his purpose was when he drove his car to elude the police and collided into another car. Hence, his allocution is missing a key element of the offense: that he intended to use the car against a person or property as a weapon when eluded the police. We see no merit to the State's argument that defendant's use of the car as a weapon can be inferred from

defendant's remarks. No such inference can be drawn from defendant's undetailed admission; other than trying to escape capture by driving away, there is no insinuation that he used the car as a weapon to do so. Accordingly, the conviction for possession of a weapon for an unlawful purpose must be vacated.

Turning to the VOP conviction, our review of the VOP hearing, bears no indication that defendant pled guilty to the offense nor any suggestion by counsel that he intended to do so. Since defendant did not plead guilty, we are instead left with the conclusion that the VOP court "found" him guilty. However, the court did not follow the procedural requirements of a VOP hearing, which our Supreme Court recently reaffirmed in State v. Mosley, Nos. A-24, 078369 (Mar. 6, 2018) (slip op. at 25-26), stating

At the VOP hearing, a defendant has the specific rights "to hear and controvert the evidence against him, to offer evidence in his defense, and to be represented by counsel." N.J.S.A. 2C:45-4.

In addition to the statutory procedural protections conferred by the Code, a probationer in a VOP proceeding has the overlay of the protections of due process. The United States Supreme Court firmly established those protections in Gagnon v. Scarpelli, 411 U.S. 778, 781 . . . (1973). Although the Court noted in Gagnon that the revocation of probation occurs after sentencing is completed and is not "part of the criminal prosecution," it recognized that the potential for the loss of liberty represents "a serious deprivation" for the

probationer, requiring due process of law.
Id. at 781-82.

As noted, defendant was not afforded the right to present any evidence in his defense, including his testimony, nor confront the State's witnesses against him at the VOP hearing. Because he was not afforded due process, his VOP conviction is vacated.⁴

Finally, we point out that the Slater analysis engaged in by the PCR court – determining that the two challenged convictions should not be vacated because defendant presented no colorable claim of innocence⁵ – should not have been applied. As the Court held in Tate, "when the issue is solely whether an adequate factual basis supports a guilty plea, a Slater analysis is unnecessary. 220 N.J. at 404. Here, defendant was essentially seeking a declaration that the pleas never existed due to lack of factual basis, and that the resulting convictions should be vacated. In short, a court cannot withdraw what was not perfected.

In sum, we reverse and remand for an evidentiary hearing consistent with this opinion concerning the immigration consequences advice that he received. Because the PCR court made

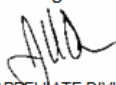
⁴ We suspect the VOP conviction will play no part in the deportation proceedings because the record shows that the DHS relied on the underlying conviction of receiving stolen property, not the VOP conviction, to support its deportation action.

⁵ Slater, 198 N.J. at 158.

credibility findings regarding defendant's claim that he was unaware of the immigration consequences, we are constrained to remand to a different court to conduct the evidentiary hearing. We also reverse and vacate the convictions for VOP and possession of a weapon for an unlawful purpose.

Reversed and 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