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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0905-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROGER COLEY,

Defendant-Appellant.

Submitted March 14, 2018 – Decided April 11, 2018

Before Judges Koblitz and Manahan.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Indictment No.
13-07-0726.

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

Camelia M. Valdes, Passaic County Prosecutor,
attorney for respondent (Christopher W. Hsieh,
Chief Assistant Prosecutor, of counsel and on
the brief).

PER CURIAM

Defendant appeals from an August 17, 2016 order denying his
first petition for post-conviction relief (PCR) without a plenary

hearing. We reverse and remand for an evidentiary hearing because defendant has established a prima facie case of receiving inaccurate advice regarding the deportation consequences of his guilty plea.

At defendant's September 9, 2013 arraignment, after finding out that defendant was born in Jamaica, the court advised defendant:

THE COURT: All right. I wish to inform you that you have the right to seek individualized legal advice as to what effect a criminal disposition will have — criminal disposition in this case will have on your ability to remain in the United States or lawfully enter the United States. Do you understand?

THE DEFENDANT: Yeah. I —

THE COURT: All right? You understand that?

[DEFENSE COUNSEL]: Yeah. They're saying you have the right to talk to an immigration lawyer if you want to, but they're not going to supply one. You have to hire one on your own. If you want to find out what the results — in other words, if you want — if you want to find out what the immigration consequences are for being convicted of any one of these offenses, you have a right to speak [to] an immigration lawyer but the Court doesn't supply one.

On October 28, 2013, defendant pled guilty to a 2010 indictment charging third-degree possession of marijuana with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-

5(b)(11), and a 2013 indictment charging third-degree possession of marijuana within 1000 feet of school property, N.J.S.A. 2C:35-7, and second-degree unlawful possession of a handgun, N.J.S.A. 2C:-39(5)(b). After placing the factual bases for the pleas on the record, defense counsel asked defendant about his citizenship:

Q: Okay. You are not a United States citizen. Is that correct?

A: Yes. No, it's not.

Q: Okay. You were born in Jamaica. Is that right?

A: Yes.

Q: Okay. Do you understand that by pleading guilty to these . . . charges that you will be deported back to the country of Jamaica when you finish your sentence here. Do you understand that?

A: Yes.

Q: You and I've had discussions about that. Is that correct?

A: Yes.

Defendant further testified that he had completed the plea forms with his attorney's assistance, that he was able to read and understand everything on the forms, and that his answers to the questions were true and accurate. His answers to question 17 on the plea form for each indictment indicated that defendant was not a citizen of the United States, that he understood his guilty plea could result in his removal, and that he understood he had the

right to seek advice from an attorney as to the effect of his guilty plea on his immigration status. "Yes" was circled in response to question 17(d), which asked if he had discussed the potential immigration consequences of his plea with an attorney. However, "yes" was also circled in response to question 17(e) which asked if he "[w]ould like the opportunity to do so." "Yes" was also circled in response to question 17(f), which asked "[h]aving 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?"

The judge addressed the immigration consequences of defendant's plea as follows:

THE COURT: All right. And you already indicated that you are not a U.S. citizen, correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Now I have to advise you of a number of things that [counsel] went over with you as well. Do you understand that if you are not a U.S. citizen, these guilty pleas may result in your removal from the United State[s] and may stop you from being able to legally enter or re-enter the United States? Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You have the right to seek individualized legal advice from an immigration attorney about the effect your guilty plea will have on your immigration status. Do you understand that?

THE DEFENDANT: Yes, Your Honor, but excuse me. I . . . don't got no money to hire no immigration lawyer right now.

THE COURT: I see. All right. But you've discussed the issue with [defense counsel]. Is that right?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. [Counsel], you have consulted with people in your office who are knowledgeable about immigration consequences?

[DEFENSE COUNSEL]: We have access to an immigration attorney who is associated with the Appellate Section of the Public Defender's Office. But from my knowledge, this is the kind of a case, possession with intent to distribute drugs and possession of a handgun, which require deportation just from prior experience. So that's what I told him. I advised [defendant] that.

THE COURT: All right. Sir, 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?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Now with everything I've just gone over with you, again, are you sure that you want to plead guilty?

THE DEFENDANT: Yes, Your Honor.

Before accepting the guilty plea, the court asked defendant if he had "any other questions." The following colloquy then took place:

THE DEFENDANT: I would like to talk to immigration lawyer, but . . . I don't got no money to hire one. How . . . could I - -

[DEFENSE COUNSEL]: I think you probably want to talk to an immigration lawyer about not being deported, right?

THE DEFENDANT: Yes.

[DEFENSE COUNSEL]: That's . . . the reason. That's separate and apart. In other words, . . . when the [j]udge asks you and the question's framed in the plea form would you like to speak to an immigration lawyer, it has to do with speaking with an immigration lawyer and deciding whether or not you want to accept a guilty plea. Okay?

THE DEFENDANT: Yeah. Oh.

[DEFENSE COUNSEL]: Whether or not you get deported is a separate issue that you - - my understanding is that you want to speak to an immigration lawyer about. Is that correct?

THE DEFENDANT: Yes.

[DEFENSE COUNSEL]: Yeah. That's right. That's 'cause you have other issues. You have a child who was born in the United States. You had a relationship. You think that that may have some relevance in preventing you from being deported. Is that correct?

THE DEFENDANT: Yeah. I got two kids . . . here.

[DEFENSE COUNSEL]: Two. Right. That's right. So it's a different issue than the issue of whether or not you want to speak to an immigration lawyer in deciding whether or not you want to enter the guilty plea. Do you understand that?

THE DEFENDANT: Yes.

[DEFENSE COUNSEL]: Okay.

THE COURT: [T]he bottom line question is this. Do you want to proceed with your guilty plea today and then be sentenced on December 6th, or do you want to not plead today because you want the opportunity to speak to an immigration lawyer?

THE DEFENDANT: I want to plead. I want to plead.

THE COURT: You want to plead.

THE DEFENDANT: Yes.

THE COURT: Okay. All right. Any other questions?

THE DEFENDANT: No.

THE COURT: Is there anything about these proceedings or the consequences of your guilty pleas that you don't understand?

THE DEFENDANT: I understand everything, Your Honor.

The court then accepted defendant's guilty pleas finding that he understood the charges against him and the consequences of the plea agreement.

On December 6, 2013, defendant was sentenced in accordance with the plea agreement to an aggregate sentence of five years in prison with one year of parole ineligibility. There was no mention of the immigration consequences at the sentencing hearing.

On appeal, defendant argues:

POINT I: THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE WAS ENTITLED TO WITHDRAW HIS GUILTY PLEA ON THE BASIS HE HAD FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL REGARDING THE DEPORTATION CONSEQUENCES ARISING OUT OF HIS GUILTY PLEA, RESULTING IN A GUILTY PLEA WHICH HAD NOT BEEN FREELY, KNOWINGLY AND VOLUNTARILY ENTERED.

Defendant submitted a certification stating that defense counsel told him "he did not know if [he] would be deported and [his] immigration question was a separate matter that was to be handled at a different time and place." Defendant alleged he understood that deportation was a possibility, but he was not told "the crimes that [he] was pleading guilty to were considered aggravated felonies and therefore [his] deportation would not be something that [he] could fight against." He certified that "[h]ad [he] known that [his] guilty plea was going to make [his] deportation mandatory [he] never would have entered into the plea [and] would have taken the matter to trial."

The PCR judge conducted a non-evidentiary hearing, reviewing the testimony and colloquy from the plea hearing as well as the plea forms. The judge stated that the transcript of the plea hearing "clearly indicate[d] that defendant was advised . . . if he plead[ed] guilty to the charges, he would be deported." The judge further opined that "[d]efendant's contention that he was

misled by [defense counsel] when he stated that his deportation was a separate issue from his guilty plea [was] without merit." The PCR judge explained that "[d]efendant's contention that he has two children to support [was] a separate hardship issue, which could be made to the Board of Immigration Appeals." He found that "[d]efendant did not receive incorrect or misleading . . . immigration advice from [defense counsel]." The judge noted defendant's "plea offer was very favorable, involving a Graves Act departure" and "[t]he plea transcript clearly indicate[d] [defendant] wished to plead guilty."

Defendant argues an evidentiary hearing was required because he established a prima facie case of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 687, 694 (1984). Defendant contends that defense counsel "should have unequivocally informed [him] his deportation would be mandatory [and] the fact he had two children born in the United States would not prevent his deportation."

The State responds that under Padilla v. Kentucky, 559 U.S. 356, 367-69 (2010), defense counsel was required to advise defendant of the deportation consequences of his guilty plea but was not required to advise him as to the "legal ramifications of having U.S.- born children."

A defendant is entitled to an evidentiary hearing on a petition for PCR when (1) he establishes a prima facie case in support of PCR; (2) "there are material issues of disputed fact that cannot be resolved by reference to the existing record"; and, (3) "an evidentiary hearing is necessary to resolve the claims for relief." R. 3:22-10(b). "To establish a prima facie case, defendant must demonstrate a reasonable likelihood that his . . . claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits." Ibid.; accord State v. Porter, 216 N.J. 343, 355 (2013).

To prove ineffective assistance of defense counsel, a defendant must show that counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability he would not have pled guilty. Strickland, 466 U.S. at 687; State v. DiFrisco, 137 N.J. 434, 457 (1994). Further, "to satisfy a defendant's Sixth Amendment right to effective assistance of counsel, counsel has an affirmative obligation to inform a client-defendant when a plea places the client at risk of deportation." State v. Gaitan, 209 N.J. 339, 356 (2012) (citing Padilla, 559 U.S. at 374). "[C]ounsel's failure to point out to a noncitizen client that he . . . is pleading to a mandatorily removable offense [constitutes] deficient performance of counsel." Id. at 380.

Here, defense counsel clearly informed defendant that he would be deported as a result of his guilty pleas. The record, however, also supports defendant's contention that his counsel told him the fact of parenting two children in the United States might allow him to remain in this country. Defendant has certified that his "understanding, after speaking with [his] attorney, was that it was still possible to remain in the United States because [he had] two children that were born here." Defense counsel's advice in open court was, at best, ambiguous and contradictory. Defendant certified that he would not have pled guilty had he known that deportation was mandatory. As recognized by the United States Supreme Court, "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." Padilla, 559 U.S. at 368 (quoting INS v. St. Cyr, 533 U.S. 289, 322 (2001)).

Defendant has established a prima facie case of ineffective assistance of counsel under Strickland. We therefore remand for an evidentiary hearing to determine whether defense counsel provided false or misleading advice as to the impact defendant's children would have on the likelihood of deportation and whether any inaccurate advice caused defendant to plead guilty.

Reversed and remanded for an evidentiary hearing. We express no view on the outcome nor do we retain jurisdiction.

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