

**NOT FOR PUBLICATION WITHOUT THE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-1933-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NARADA HOUSEN,

Defendant-Appellant.

Submitted March 21, 2018 – Decided April 11, 2018

Before Judges Alvarez and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Indictment No.
10-02-0119.

Joseph E. Krakora, Public Defender, attorney
for appellant (Karen A. Lodeserto, 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 Narada Housen appeals from the November 4, 2016
denial of his petition for post-conviction relief (PCR) without

an evidentiary hearing. After a review of the arguments in light of the record and applicable principles of law, we affirm.

Defendant was born in Jamaica and is not a United States citizen. On February 4, 2010, defendant was indicted for fourth-degree distribution of marijuana, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(12) (count one); third-degree distribution of marijuana within 1000 feet of school property, N.J.S.A. 2C:35-7 and N.J.S.A. 2C:35-5(a) (count two); fourth-degree distribution of marijuana, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(12) (count three); third-degree distribution of marijuana within 1000 feet of school property, N.J.S.A. 2C:35-7 and N.J.S.A. 2C:35-5(a) (count four); fourth-degree distribution of marijuana, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(12) (count five); third-degree distribution of marijuana within 1000 feet of school property, N.J.S.A. 2C:35-7 and N.J.S.A. 2C:35-5(a) (count six); fourth-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)(12) (count seven); and third-degree possession of heroin with intent to distribute, N.J.S.A. 2C:35-7 and N.J.S.A. 2C:35-5(a) (count eight).

Trial counsel was successful in arranging for defendant to enter into pre-trial intervention (PTI) without a guilty plea in order to minimize the immigration consequences of his criminal charges. Defendant violated the PTI conditions by failing to

report to his supervising officer and failing to complete the required community service. Defendant absconded and failed to appear for his PTI termination hearing, which resulted in his subsequent arrest and incarceration. On June 14, 2011, defendant's enrollment in PTI was terminated for non-compliance.

Thereafter, the State extended a non-custodial probation plea offer, which defendant rejected. Trial counsel engaged in further plea negotiations resulting in the State offering to recommend vacating the prior PTI termination and re-enrolling defendant into PTI in exchange for defendant conditionally pleading guilty to count three.

On January 30, 2012, defendant accepted the plea offer and conditionally pled guilty to count three in exchange for the prosecutor agreeing to recommend his re-enrollment into PTI for six months. In his answers to questions on the plea forms, defendant admitted he was not a U.S. citizen and acknowledged he understood his plea might result in his removal from the United States and prevent him from being able to re-enter. He indicated he understood he had the right to speak with an immigration attorney and acknowledged he had discussed the potential immigration consequences of his plea with an attorney. In his answer to question 17(e) on the plea form, defendant specifically

declined the opportunity to "get an attorney to discuss" the immigration consequences of his plea.

During the plea hearing, defendant testified he answered all of the questions on the plea forms truthfully. He stated he was born in Jamaica in 1991 and confirmed he was not a citizen of the United States. The trial court explained entry of a guilty plea could result in his deportation. Defendant responded he understood and still wished to plead guilty after having been advised of the possible immigration consequences of his plea.

The trial court questioned defendant regarding his understanding of the plea. Defendant confirmed counsel had explained all of the elements of the plea agreement and the plea forms. He also acknowledged that he understood everything, and that he had no questions. Defendant then confirmed he had enough time to discuss the case with counsel and that he was pleading guilty of his own volition.

The trial court determined defendant entered his plea freely, knowingly, and voluntarily. The court warned defendant that if he failed to complete his community service or any of the conditions of PTI, including a continued violation of the terms of his plea agreement, he would be placed on probation and risk incarceration and deportation.

Defendant was re-enrolled into PTI. As part of his PTI conditions, defendant was required to perform community service. Defendant again failed to comply with his PTI conditions. On April 12, 2013, defendant failed to appear at his termination hearing. As a result, defendant was terminated from PTI a second time and scheduled for sentencing on count three. On July 19, 2013, defendant was sentenced to probation conditioned upon completing requirements similar to his PTI program; his community service requirement was increased to 100 hours. The trial court again informed defendant he could be deported and noted he had been told of the immigration consequences at the plea hearing.

On July 11, 2014, defendant was arrested by police in Paterson, New Jersey for unlawful possession of a handgun and third-degree resisting arrest. He pled guilty under Accusation No. 14-08-0742 and was subsequently sentenced to a four-year prison term with one year of parole ineligibility.

Defendant was also charged with violation of probation (VOP) for possessing a handgun without a permit. On January 23, 2015, defendant appeared for the VOP hearing. The State noted defendant was deportable as a result of his violation of probation and the court also confirmed defendant had been previously informed of the deportation consequences of his actions. Defendant's probation

was terminated, and he was sentenced on the VOP to a concurrent one-year flat prison term.

On January 6, 2016, defendant filed his PCR petition. Defendant claimed his plea counsel did not investigate his case and failed to inform him of the nature and consequences of the charges against him. Defendant was assigned PCR counsel who filed a supplemental brief. PCR counsel alleged that plea counsel was ineffective because defendant was misadvised of the deportation consequences of his plea and argued defendant was entitled to withdraw his plea.

During oral argument, counsel informed the PCR court that defendant was the subject of deportation proceedings and claimed plea counsel had informed defendant he would not be subject to deportation as a result of his plea. PCR counsel asked the PCR court to either vacate defendant's plea or order an evidentiary hearing.

The PCR court denied defendant's petition without an evidentiary hearing. The PCR court determined that there was nothing in the record to support defendant's contention that trial counsel did not investigate the case. The PCR court also determined the argument alleging misrepresentation by counsel regarding the immigration consequences of defendant's plea lacked merit because there was no colorable claim of innocence and the

record belied defendant's claim. On the contrary, the PCR court found plea counsel was "extremely effective" by procuring the initial plea agreement, which allowed defendant to enter into PTI without a guilty plea, thereby avoiding the potential for deportation had he successfully completed the PTI requirements. The PCR court also found plea counsel was effective by obtaining a second plea offer for defendant to re-enroll into PTI in exchange for a conditional guilty plea after defendant was terminated from PTI due to noncompliance.

The PCR court emphasized the immigration consequences of defendant's plea were discussed "at every step of the way on the record." The PCR court also noted defendant failed to complete PTI a second time and was placed on probation, which he later violated. Taking into consideration that the immigration consequences were addressed on the record and on the plea forms, the PCR court concluded there was no basis for an evidentiary hearing. This appeal followed.

On appeal, defendant raises the following issue:

DEFENDANT SHOULD BE ENTITLED TO AN EVIDENTIARY
HEARING UNDER STATE V. GAITAN AND UNITED
STATES V. OROCIO.

The standard for determining whether counsel's performance was ineffective for purposes of the Sixth Amendment was formulated in Strickland v. Washington, 466 U.S. 668 (1984), and adopted by

our Supreme Court in State v. Fritz, 105 N.J. 42 (1987). In order to prevail on a claim of ineffective assistance of counsel, defendant must meet a two-prong test, establishing both that: (1) counsel's performance was deficient and he or she made errors that were so egregious that counsel was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution; and (2) the defect in performance prejudiced defendant's rights to a fair trial such that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

In the context of a guilty plea, "a defendant must prove that there is a reasonable probability that, but for counsel's errors, [he or she] would not have pled guilty and would have insisted on going to trial." State v. Gaitan, 209 N.J. 339, 351 (2012) (alteration in original) (citations omitted) (quoting State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994))). A defendant must also convince the court that "a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010) (citation omitted). The "defendant must allege specific facts and evidence supporting his allegations," State v. Porter, 216 N.J. 343, 355 (2013), and "must do more than make bald

assertions that he [or she] was denied the effective assistance of counsel," State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

Defendant contends the court erred when it denied his request for an evidentiary hearing. He claims he was never made aware that his plea would affect his immigration status and could lead to his deportation. An evidentiary hearing is required only when a defendant establishes: (1) a prima facie case in support of PCR; (2) material issues of disputed fact lie outside of the record; and (3) the resolution of those issues necessitate a hearing. State v. Preciose, 129 N.J. 451, 462-63 (1992); R. 3:22-10(b). "To establish a prima facie case, defendant must demonstrate a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits." R. 3:22-10(b). We agree with the PCR judge that defendant has not established a prima facie claim under the Strickland-Fritz test.

"[T]o 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." Gaitan, 209 N.J. at 356 (citing Padilla, 559 U.S. at 373-74 (concerning deportation consequences to a criminal defendant)). Importantly, "[c]ourts should not

upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." Lee v. United States, 582 U.S. ___, 137 S. Ct. 1958, 1967 (2017).

The record demonstrates defendant was informed of the immigration consequences of his plea. His answers to the questions of the plea form confirmed that he understood the immigration consequences of his plea, discussed the immigration consequences with an attorney, and had the opportunity to further discuss the immigration consequences with an attorney, which he declined.

There is no support for his contention that his attorney provided him with affirmatively misleading advice. Defendant fails to provide specific details about the alleged off-the-record conversation with plea counsel, does not point to any specific facts and evidence to support his claims, and only presents bald assertions. Thus, he does not allege facts "sufficient to demonstrate counsel's alleged substandard performance." State v. Jones, 219 N.J. 298, 312 (2014) (quoting Porter, 216 N.J. at 355). Bald assertions are insufficient to entitle a defendant to an evidentiary hearing. Cummings, 321 N.J. Super. at 170.

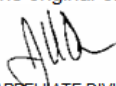
Moreover, defendant presented no colorable claim of innocence or other credible evidence that he would have rejected the plea

agreements and insisted on going to trial but for the alleged deficiencies in trial counsel's performance. See State v. Banks, 349 N.J. Super. 234, 245 (App. Div. 2001), aff'd, 171 N.J. 466 (2002) (per curiam). He has not demonstrated a "reasonable likelihood" that his claims "will ultimately succeed on the merits." R. 3:22-10(b).

We are satisfied from our review of the record that defendant failed to make a prima facie showing of ineffective assistance of trial counsel within the Strickland-Fritz test. Accordingly, the PCR court correctly concluded that an evidentiary hearing was not warranted.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION