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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-1966-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JONATHAN PINTO,

Defendant-Appellant.

Submitted March 20, 2018 – Decided April 23, 2018

Before Judges Hoffman and Gilson.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Indictment Nos.
05-09-1326 and 06-03-0342.

Joseph E. Krakora, Public Defender, attorney
for appellant (Monique Moyse, 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 Jonathan Pinto appeals from a November 15, 2016
order denying his petition for post-conviction relief (PCR)

without an evidentiary hearing. We affirm because defendant's petition was time-barred under Rule 3:22-12(a)(1), and otherwise lacks merit.

I.

In 2006, defendant pled guilty to two counts of first-degree possession of heroin with the intent to distribute, N.J.S.A. 2C:35-5(b)(1), and one count of second-degree conspiracy to possess heroin with the intent to distribute, N.J.S.A. 2C:35-5(b)(1) and N.J.S.A. 2C:5-2. In November 2006, defendant was sentenced to an aggregate term of ten years in prison with fifty-four months of parole ineligibility as called for in his plea agreements.

When defendant pled guilty, he filled out the plea form and, in response to question seventeen, acknowledged that he was not a United States citizen and that he understood that he could be deported as a consequence of his guilty pleas. During the plea colloquy, the court asked defendant specifically about his immigration status. Defendant acknowledged that he was not a citizen of the United States and that he understood that he could be deported to his native country, which was Colombia. Indeed, the court reviewed that issue with defendant twice.

Defendant did not file a direct appeal. Years later, he filed a motion to reduce his sentence, but the trial court denied that motion in February 2010.

In May 2016, defendant, representing himself, filed a PCR petition. He certified that he was a citizen of Colombia who was currently in deportation proceedings because of his drug convictions. He also stated: "Neither the [j]udge nor my attorney ever told me that I was subject to mandatory removal for aggravated felony by accepting the plea to [c]ontrolled [d]angerous [s]ubstance pursuant to N.J.S.A. 2C:35-5(b)(1) [and] 2C:5-2."

Defendant was assigned PCR counsel, and the PCR court heard oral argument. On November 15, 2016, the PCR court entered an order denying defendant's petition and explained the reasons for its ruling on the record. The court found that defendant's petition was time-barred because he could show no excusable neglect nor a fundamental injustice. The court also considered the petition on its merits, but denied it because defendant had not established a prima facie showing of ineffective assistance of counsel.

II.

On appeal, defendant makes two arguments, which he articulates as follows:

POINT ONE — MR. PINTO IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT HIS ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL FOR MISINFORMING HIM ABOUT THE DEPORTATION CONSEQUENCES OF HIS PLEA AND ON HIS CLAIM THAT HE SHOULD BE ALLOWED TO WITHDRAW HIS PLEA

POINT TWO — THE PCR COURT ERRONEOUSLY RULED THAT MR. PINTO'S PETITION WAS TIME BARRED BECAUSE ANY DELAY IN FILING THE PETITION WAS DUE TO DEFENDANT'S EXCUSABLE NEGLIGENCE AND 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

We reject defendant's arguments because his petition is time-barred. Defendant has made no showing of excusable neglect. Just as critically, defendant has made no showing that enforcement of the time bar would result in a fundamental injustice. Moreover, defendant's PCR petition failed to establish a basis for relief.

Rule 3:22-12(a)(1) precludes PCR petitions filed more than five years after entry of a judgment of conviction unless the delay was "due to defendant's excusable neglect and . . . 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). Our Supreme Court has stated that "[t]he time bar should be relaxed only 'under exceptional circumstances' because '[as] time passes, justice becomes more elusive and the necessity for preserving finality and certainty of judgments increases.'" State v. Goodwin, 173 N.J. 583, 594 (2002) (quoting State v. Afanador, 151 N.J. 41, 52 (1997)).

To establish "excusable neglect," a defendant must demonstrate "more than simply . . . a plausible explanation for a failure to file a timely PCR petition." State v. Norman, 405 N.J. Super. 149, 159 (App. Div. 2009). Factors to be considered include "the extent and cause of the delay, the prejudice to the State, and the importance of the [defendant's] claim in determining whether there has been an 'injustice' sufficient to relax the time limits." Ibid. (quoting Afanador, 151 N.J. at 52).

Here, defendant was sentenced in November 2006. His petition for PCR was filed almost ten years later in May 2016. Defendant argues that there was excusable neglect for the late filing because he did not learn that he was going to be removed from the United States until sometime in 2016. Defendant, however, has failed to offer a plausible explanation for his time delay. At his plea hearing, defendant was twice informed that his conviction could result in his removal from the United States. He acknowledged that he understood that consequence and that he still wanted to plead guilty.

Defendant also has failed to demonstrate a reasonable probability that enforcement of the time bar would result in a fundamental injustice. Nowhere in defendant's certification does he allege that he was innocent. Instead, the record establishes that defendant gave a knowing, voluntary, and intelligent guilty

plea. In pleading guilty, defendant admitted that in 2005, he went to the home of a co-defendant and signed for a package that he knew contained heroin. He also admitted that in January 2006, he arranged for co-defendants to receive another package containing heroin.

Furthermore, there was no showing that required an evidentiary hearing on defendant's PCR petition. A defendant is entitled to an evidentiary hearing on a PCR petition if he or she establishes a prima facie showing in support of the petition. R. 3:22-10(b). To establish a claim of ineffective assistance of counsel, a defendant must satisfy a two-part test: (1) "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[,]" and (2) "the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 58-59 (1987).

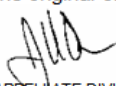
Defendant also has not presented a prima facie showing of ineffective assistance of legal counsel concerning his immigration status. When defendant pled guilty in 2006, there was no requirement that defense counsel review a defendant's immigration status with defendant. Instead, at that time, defense counsel was only ineffective if he or she provided inaccurate information concerning the immigration consequences of a plea. See Chaidez

v. United States, 568 U.S. 342, 357-58 (2013); Padilla v. Kentucky, 559 U.S. 356, 386 (2010) (Alito, J., concurring); State v. Nunez-Valdez, 200 N.J. 129, 143 (2009).

Here, defendant has failed to provide a detailed certification warranting a hearing on the alleged incorrect advice of trial counsel. Moreover, his contention that it was incorrect to be told that he "may" be deported, as opposed to that he "would" be deported does not, on this record, support a claim of misadvice. Read in context, defendant was clearly told that by pleading guilty he could be deported. Since a state court does not make the deportation decision, and that decision would be made in the future by a federal immigration court, it is not misadvice or incorrect advice to inform the defendant that he or she may be deported.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION