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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-2560-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHANNA RAMOS GRANDE,

Defendant-Appellant.

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Submitted January 9, 2018 – Decided April 20, 2018

Before Judges Fasciale and Sumners.

On appeal from Superior Court of New Jersey,  
Law Division, Somerset County, Accusation No.  
04-08-0563.

Leschak & Associates, LLC, attorneys for  
appellant (John P. Leschak, on the brief).

Michael H. Robertson, Somerset County  
Prosecutor, attorney for respondent (Perry  
Farhat, Assistant Prosecutor, of counsel and  
on the brief).

PER CURIAM

Defendant Johanna Ramos Grande, non-citizen of the United  
States, pled guilty to an accusation of third-degree exhibiting a  
simulated document (a fraudulent social security card) and fourth-

degree exhibiting a simulated document (a fraudulent resident alien card). On September 17, 2004, she was sentenced in accordance with her plea agreement to a one-year term of probation. She did not appeal her conviction or sentence. However, almost twelve years later, she filed a post-conviction relief (PCR) petition on June 27, 2016, alleging trial counsel failed to advise her that she was eligible for Pre-Trial Intervention (PTI); failed to advise her she could be deported due to her plea; and failed to advise her to consult with an immigration attorney regarding the immigration consequences of her plea. The PCR judge issued an order denying PCR without an evidentiary hearing together with a written statement of reasons. On appeal, defendant argues:

[POINT I:] APPELLANT'S PCR SHOULD HAVE NOT BEEN TIME-BARRED UNDER [RULE] [3:22-12(A)] BECAUSE THE TRIAL COURT'S FAILURE TO PROPERLY ADVISE THE APPELLANT OF THE IMMIGRATION CONSEQUENCES OF HER GUILTY PLEA CONSTITUTED EXCUSABLE NEGLIGENCE UNDER STATE V. ANTUNA, . . . 446 N.J. SUPER. 595 (APP. DIV. 2016), PERMITTING RELAXATION OF THE [FIVE] YEAR FILING DEADLINE UNDER BOTH [RULES] 7:10-2(b)(2) and/or . . . 1:1-2.

[POINT II:] IT WAS LEGAL ERROR FOR THE TRIAL COURT TO CONCLUDE THAT APPELLANT'S COUNSEL'S FAILURE TO ADVISE HER OF THE IMMIGRATION CONSEQUENCES DID NOT CONSTITUTE EXCUSABLE NEGLIGENCE JUSTIFYING THE LATE FILING OF HER PCR.

[POINT III:] IT WAS LEGAL ERROR TO CONCLUDE THAT PRIOR COUNSEL'S FAILURE TO HAVE [APPELLANT] APPLY FOR PTI WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE [APPELLANT] WAS

ELIGIBLE FOR PTI UNDER THEN-EXISTING GUIDELINES.

[POINT IV:] COUNSEL'S FAILURE TO ADVISE [APPELLANT] OF THE IMMIGRATION CONSEQUENCES OF HER GUILTY PLEA CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL PURSUANT TO ANTUNA AND THE COURT'S CONCLUSION TO THE CONTRARY WAS LEGAL ERROR.

For the reasons that follow, we affirm in part, reverse in part, and remand for an evidentiary hearing.

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 v. Washington, 466 U.S. 668, 687, 694 (1984); 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).

A first petition for PCR must be filed within five years of the date of the judgment of conviction. R. 3:22-12(a)(1). A late filing may be considered if the petition itself shows excusable neglect for the late filing and that a fundamental injustice will result if defendant's claims are not considered on their merits. State v. Brewster, 429 N.J. Super. 387, 400 (App. Div. 2013).

In determining whether to relax the time bar, a court should consider "the extent and cause of the 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. McQuaid, 147 N.J. 464, 485 (1997) (quoting State v. Mitchell, 126 N.J. 565, 580 (1992)). Absent compelling extenuating circumstances, the burden to justify filing a petition after the five-year period will increase with the extent of the delay. State v. Afanador, 151 N.J. 41, 52 (1997). "Where the deficient representation of counsel affected 'a determination of guilt or otherwise wrought a miscarriage of justice,' a procedural rule otherwise barring post-conviction relief may be overlooked to avoid a fundamental injustice." Brewster, 429 N.J. Super. at 400 (quoting Mitchell, 126 N.J. at 587).

We first address defendant's argument that the five-year time bar to seek PCR after her conviction should be relaxed because she first became aware that her conviction could result in her deportation when she sought to change her immigration status in 2016 seven years after her conviction. We agree with the PCR court that there was no excusable neglect for defendant's failure to file a timely claim that counsel failed to advise her regarding the immigration consequences of her plea, and therefore no

injustice would result in not relaxing the time bar for that reason.

When she pled guilty, 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?" With the assistance of a Spanish interpreter, she testified during her plea colloquy that she understood she had a right to go to trial, that she understood the charges and the terms of the plea offer, which she discussed with counsel. Defendant also acknowledged that she signed, initialed and understood the plea forms, and that no one forced, coerced, or encouraged her to plead guilty. Counsel represented to the trial court that, with the interpreter's assistance, he reviewed the plea form with defendant and she answered the plea form. Since it is clear that when she pled guilty defendant was aware that she could be deported, we see no reason to disagree with the PCR court that defendant sat on her rights and did not consult with an immigration attorney regarding the consequences of her plea.

Furthermore, 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, her 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 upon a demonstration that counsel affirmatively provided 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. Counsel therefore had no duty to inform a client of such consequences, and his or her representation was deemed constitutionally ineffective only if misinformation was given to the client about the immigration consequences of pleading guilty. State v. Gaitan, 209 N.J. 339, 375 (2012). And as the court properly recognized here, defendant did not allege counsel misadvised her about the immigration consequences of her plea; hence, there was no excusable neglect to relax the time bar and allow her to prosecute that PCR claim.

We further add that, even if the time bar did not apply, the same reasoning – defendant was fully aware that she could be deported due to her conviction – dictates that defendant did not establish a prima facie claim of ineffective assistance of counsel.

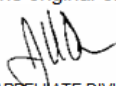
We, however, differ with the PCR court's finding that defendant's ineffective assistance claim regarding counsel's failure to advise her that she was eligible to apply to PTI should also be time barred. Although her 2004 plea form evinces she was aware of the deportation consequences of her plea, her failure to raise the PTI claim within five years of her conviction was excusable and not considering the merits of the claim is fundamentally unjust. She certifies she was unaware until 2016 that she was eligible for PTI – based upon the charges and her lack of a criminal record – to resolve the charges without pleading guilty or gambling on the inherent risk of a trial. Obviously, we cannot speculate and conclusively say she would have been accepted into PTI had she applied. Nonetheless, viewing the facts in the light most favorable to the defendant, Preciose, 129 N.J. at 462-63 (1992), she has established a prima facie case of ineffective assistance of counsel for not advising her that she was eligible for PTI. Consequently, we disagree with the PCR court that counsel's decision not to have her apply to PTI constitutes trial strategy because the question of a defendant's immigrant status as a disqualifier for PTI was not settled until after her 2004 conviction; in 2007 we held in State v. Liviaz, 389 N.J. Super. 401, 408 (App. Div. 2007), that the sole reason for denying entry into PTI due to illegal alien status is a patent and

gross abuse of a prosecutor's discretion. Based upon the record before us, we can envision no sensible reason why counsel would employ a trial strategy not to pursue PTI for defendant, a first-time offender, when pleading guilty threatened her ability to remain in this country.

Because we conclude defendant has made a prima facie claim of ineffective assistance of counsel, we remand for an evidentiary hearing to require defendant to prove that counsel in fact failed to advise her that she was eligible for PTI and the consequences thereof. Preciose, 129 N.J. at 462 (1992).

Affirmed in part, reversed in part, and remanded for an evidentiary hearing consistent with this opinion. 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