SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3104-16T2

STATE OF NEW JERSEY,

    Plaintiff-Respondent,

v.

STEVE GREGORY BROWN,
a/k/a STEVE GREGORY BALBOSA,

    Defendant-Appellant.

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Submitted January 29, 2018 — Decided March 8, 2018

Before Judges Messano and O'Connor.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No.
05-09-0820.

Eric M. Mark, attorney for appellant.

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

PER CURIAM

    Defendant Steve Gregory Brown appeals from an order denying

his petition for post-conviction relief (PCR). We affirm.

In 2005, defendant pled guilty to third-degree possession of a controlled dangerous substance (cocaine) with intent to distribute, N.J.S.A. 2C:35-5. On November 7, 2005, he was sentenced to a four-year term of probation. He did not file a direct appeal.

In March 2016, the Department of Homeland Security initiated removal proceedings against defendant, a non-citizen of the United States, based upon his conviction. With the assistance of PCR counsel, in November 2016 defendant filed a verified petition for post-conviction relief. The issues defendant raised in his petition relevant to those he asserts on appeal are plea counsel was ineffective because he failed to: (1) advise defendant he would be removed if he pled guilty to the subject offense, and (2) negotiate a plea agreement whereby defendant would plead guilty to a "non-deportable" offense.

On February 14, 2017, the PCR court denied defendant the relief requested in his petition. The court found defendant's petition time-barred pursuant to Rule 3:22-12(1)(a), because it had been filed more than five-years after the judgment of conviction was entered on November 7, 2005. The court rejected defendant's claims he demonstrated excusable neglect for the delay in filing his petition and that enforcement of the time

bar would result in a fundamental injustice. Substantively, the

court found there were no facts to support that plea counsel had

been ineffective.

<center>II</center>

On appeal, defendant argues the PCR court erred because it

rejected his contentions plea counsel had been ineffective and

found his petition was time-barred. As for the procedural bar,

defendant claims plea counsel's failure to advise he could be

removed from the country as a result of the conviction

constituted excusable neglect. He further contends removal will

result in a fundamental injustice because he will be separated

from his fiancée and three children.

We concur with the PCR court that defendant's petition is

time-barred. <u>Rule</u> 3:22-12(a)(1) provides in pertinent part:

> [N]o petition shall be filed pursuant to
> this rule more than [five] years after the
> date of entry . . . of the judgment of
> conviction that is being challenged unless:
>
>> (A) it alleges facts showing that
>> the delay beyond said time was due
>> to defendant's excusable neglect
>> 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 . . . .
>
> [<u>Rule</u> 3:22-12(a)(1).]

<center>3</center>

In <u>State v. Brewster</u>, 429 N.J. Super. 387, 400 (App. Div. 2013), we considered but rejected a similar argument, specifically, that receiving inaccurate deportation advice from counsel constitutes excusable neglect. We held imparting allegedly deficient advice does not equate with excusable neglect because, if it did, "long-convicted defendants might routinely claim they did not learn about the deficiencies in counsel's advice on a variety of topics until after the five-year limitation period had run." <u>Ibid.</u>

Further, defendant has not demonstrated a "fundamental injustice" will result if the five-year bar is enforced. Our Supreme Court has held that a "fundamental injustice" requires "'some showing' that an error or violation 'played a role in the determination of guilt.'" <u>State v. Nash</u>, 212 N.J. 518, 547 (2013) (quoting <u>State v. Laurick</u>, 120 N.J. 1, 13 (1990)). Defendant's claim he will be separated from his family if removed does not implicate his guilt of the subject charge. In sum, defendant's petition was filed beyond the five-year deadline, and he failed to establish excusable neglect and a fundamental injustice. Accordingly, his petition is time-barred.

Second, defendant has failed to make out a prima facie case plea counsel had been ineffective. To prevail on a claim of

ineffective assistance of counsel, defendant must meet a two-prong test. Strickland v. Washington, 466 U.S. 668, 694 (1984). The first prong requires defendant prove counsel's performance was deficient and his errors so egregious counsel was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution. Ibid.

In a matter where a defendant has pled guilty, the second prong requires defendant show "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial." State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009) (alteration in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)).

At the time Nuñez-Valdéz was decided, an attorney was not required to give any advice about the deportation consequences of pleading guilty. However, in that case our Court held a defendant meets the first prong of the Strickland test if the attorney renders false or affirmatively misleading advice about the deportation consequences of pleading guilty. Id. at 140-42.

Within a year Nuñez-Valdéz was decided, the United States Supreme Court held in Padilla v. Kentucky, 559 U.S. 356, 368 (2010), that the Sixth Amendment obligation to render effective assistance requires criminal defense attorneys to inform clients of the possible immigration consequences of entering a guilty

plea. Notwithstanding, our Supreme Court in State v. Gaitan, 209 N.J. 339, 373 (2012), held that because Padilla established a new rule of law, the holding in Padilla applied prospectively only. Thereafter, the United States Supreme Court reached the same conclusion, finding Padilla did not apply retroactively. Chaidez v. United States, 568 U.S. 342, 357-58 (2013).

Accordingly, guilty pleas entered prior to Padilla are reviewed to determine whether counsel provided affirmatively false or misleading information regarding the plea's immigration consequences. State v. Santos, 210 N.J. 129, 143-44 (2012). "Only if defendant's attorney affirmatively gave incorrect advice about the deportation consequences of his guilty plea might he be entitled to set aside his conviction in accordance with the holding of Nuñez-Valdéz." Brewster, 429 N.J. Super. at 394-95.

Here, defendant entered his plea prior to Padilla. He does not claim counsel rendered false or affirmatively misleading advice about the removal consequences of pleading guilty; he merely claims counsel failed to give him any advice about such consequences. Therefore, Padilla is unavailing to defendant.

Defendant also argues counsel was ineffective for failing to negotiate a plea agreement in which defendant could have pled to an offense that did not have removal consequences. We note

defendant fails to provide any evidence the State would have consented to and the trial court would have approved of an agreement different from the one the State offered.

Accordingly, the PCR judge correctly determined defendant's application for post-conviction relief had to be denied, because defendant did not establish a prima facie case of ineffective assistance of counsel.

Affirmed.