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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-3709-16T2

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

BO SUN SEO,

Defendant-Respondent.

Submitted January 25, 2018 – Decided February 7, 2018

Before Judges Haas and Gooden Brown.

On appeal from Superior Court of New Jersey,
Law Division, Sussex County, Accusation No.
13-06-0256.

Francis A. Koch, Sussex County Prosecutor,
attorney for appellant (Shaina Brenner,
Assistant Prosecutor, of counsel and on the
brief).

Eric M. Mark, attorney for respondent.

PER CURIAM

The State of New Jersey appeals from the Law Division's April
24, 2017 order, granting defendant Bo Sun Seo's petition for post-

conviction relief (PCR) following an evidentiary hearing. We affirm.

Defendant is a citizen of South Korea. Defendant came to the United States with his family in 1980 when he was ten years old. He has permanent residence status in this country as a Green Card holder. Defendant was convicted of crimes in 1994 and 2004.

This appeal concerns defendant's conviction in 2013 for fourth-degree theft by unlawful taking, N.J.S.A. 2C:20-3(a), and a related disorderly persons offense. Defendant pled guilty to these offenses on June 17, 2013. Question No. 17 of defendant's plea form, which asks whether a defendant is a citizen of the United States, "was omitted" and left blank. Defendant's attorney did not ask defendant any questions about his residency status or the immigration consequences of his plea at the June 17, 2013 hearing, and the judge likewise failed to address this issue.

On August 5, 2013, the judge sentenced defendant in accordance with the negotiated plea to a three-year probationary term, together with 180 days in the county jail. After pronouncing sentence, the judge noticed for the first time that no one had ever addressed defendant's immigration status with him. After defendant stated he was a Green Card holder, his attorney asked for "a moment" during which he apparently conferred with defendant. After this conversation in the courtroom, the attorney asked

defendant several questions about his residency status, to which defendant replied with one-word "yes" or "no" answers. In response to these questions, defendant stated he understood the Immigration and Naturalization Service (INS) had the right to review his case, that "this conviction could form the basis of an action by the [INS] to revoke [his] [G]reen [C]ard and to return [him] to South Korea[,]" and that he still wished to plead guilty.

The trial judge did not offer defendant the opportunity to vacate his plea. Instead, the judge directed defendant's attorney to now complete Question No. 17 on the original plea form, which was quickly done in the courtroom. The judge then had defendant sworn, and his attorney asked him some questions about the immigration consequences of his plea. Defendant again gave one-word answers to his attorney's questions, and indicated he knew the INS "could use this plea of guilty as a basis to hold a hearing at which [his] resident [G]reen [C]ard could be revoked[.]" In response to a question from the prosecutor, defendant said he was not seeking to have an immigration attorney review his case at that time, but then stated "if I am in the process of the immigration, yea[h], I will you let you have an attorney represent me."

At the conclusion of this very brief series of questions, the judge did not make any of the findings required by Rule 3:9-2.

Thus, the judge did not find that defendant's amended plea was "made voluntarily, not as a result of any threats or of any promises or inducements not disclosed on the record[.]" Ibid. Even more significantly for the present case, the judge did not find that defendant continued to plead guilty to the offenses "with an understanding of the nature of the charge[s] and the consequences of the plea[,]" including any immigration consequences. Ibid. Once the attorneys completed their abbreviated questioning of defendant, the judge simply reimposed the same sentence he had ordered at the beginning of the sentencing hearing.¹

The INS thereafter instituted deportation proceedings against defendant in relation to his earlier convictions. Defendant then filed a PCR petition, and the matter was assigned for the first time to Judge William J. McGovern, III. On May 17, 2016, Judge McGovern denied the petition without an evidentiary hearing. In an oral decision, the judge stated that if "there are in the future other immigration proceedings that are either amended or initiated by the federal authorities, which deal with this particular case as a predicate for deportation, I suppose that would present a

¹ Defendant served his jail sentence and, on January 10, 2014, he was terminated from probation "as unimproved."

further opportunity on [defendant's] behalf to avail himself, or at least petition" for PCR.²

On December 12, 2016, defendant filed a second PCR petition. Defendant asserted that the INS had now added his August 5, 2013 theft conviction to the deportation proceedings. Judge McGovern conducted an evidentiary hearing on April 13, 2017 to address defendant's claim that his plea attorney had provided him with ineffective assistance of counsel during the plea and sentencing proceedings.

Defendant was the only witness who testified at the hearing. As Judge McGovern noted, it was obvious that because of a language barrier, defendant did not understand "legal jargon" or concepts. Defendant testified that the first time he met his attorney was on the day he originally pled guilty. Defendant stated the attorney asked him if he was a United States citizen and defendant told him no. The attorney's only response was to say, "okay."

The next time defendant spoke to the attorney was on the day of sentencing. Defendant testified the attorney asked him if the INS "ever came [to] pick [him] up, and [defendant] said no." The attorney then "said okay, that's fine, you don't have to worry

² Defendant filed an appeal from this decision under Docket No. A-0012-16, but he later withdrew it.

about it." The attorney never advised him of any possible immigration consequences to his plea.

Defendant testified that if he had known that he could be deported if he pled guilty and would "definitely lose [his] [G]reen [C]ard," he would not have proceeded with the plea because "[t]his is the only country that I know, so I would have fought all I can to keep that [G]reen [C]ard."

At the conclusion of the hearing, Judge McGovern rendered a thorough written decision, granting defendant's PCR petition, and vacating his plea and conviction. After making detailed findings of fact, the judge stated:

Having reviewed the sentence hearing transcript carefully, having reviewed the questions posed and answers given as to the "removal" issue, having listened to and considered defendant's testimony [at the evidentiary hearing], the court has a firm and abiding sense that the sentence hearing (wherein defendant was questioned as to removal[-]related issues and was thereafter resentenced) failed to provide a full, adequate, appropriate or meaningful opportunity for defendant to discuss these issues with his counsel, in the midst of a sentencing hearing. The record appears to reflect that this discussion likely took place in the courtroom, in the midst of [a] sentencing hearing, for an undisclosed period of time, with the [j]udge waiting on the bench. This is clearly not an environment that promotes an ample and pressure-free atmosphere to ask and answer questions between counsel and client on a topic of significance. Add to this that counsel likely had several

or more other cases on for sentencing that sentencing day, and there is an unstated yet inherent pressure, if not a hurry, to move the procedure along. This is both unseemly and unfair, given the substantial issues and the magnitude of the consequences involved.

As noted above, Judge McGovern further found that after observing defendant in court, it was clear that he

does not readily understand the nuances and finer details and distinctions of anything but basic English vocabulary. Thus, in this [c]ourt's view, the August 5, 2013 efforts to review the risk of removal, and consequences of what would or might occur due to INS removal procedures, and the effort to explain to defendant his right to consult with immigration counsel, at the sentencing hearing, were ineffective.

Thus, the judge concluded that there was "a serious and pervasive doubt that . . . defendant understood and fully appreciated the significance of the questions he was asked" at the sentencing hearing. Therefore, the judge granted defendant's PCR petition. This appeal followed.

On appeal, the State argues the trial court "erred in finding that . . . defendant was ineffectively represented by plea counsel[,]" and "that . . . defendant established actual prejudice." We disagree. We affirm the court's decision substantially for the reasons set forth in Judge McGovern's comprehensive written opinion. We add the following comments.

Our review of an order granting or denying PCR involves consideration of mixed questions of fact and law. State v. Harris, 181 N.J. 391, 415-16 (2004). We defer "to a PCR court's factual findings based on its review of live witness testimony" and will uphold findings that are "supported by sufficient credible evidence in the record." State v. Nash, 212 N.J. 518, 540 (2013). However, "we need not defer to a PCR court's interpretation of the law[,]" which we review de novo. Id. at 540-41.

"[A] defendant can show ineffective assistance of counsel by proving that his [or her] guilty plea resulted from 'inaccurate information from counsel concerning the deportation consequences of his [or her] plea.'" State v. Brewster, 429 N.J. Super. 387, 392 (App. Div. 2013) (quoting State v. Nuñez-Valdéz, 200 N.J. 129, 143 (2009)). Counsel's duty includes an affirmative responsibility to inform a defendant entering a guilty plea of the relevant law pertaining to mandatory deportation. Padilla v. Kentucky, 559 U.S. 356, 368-69 (2010). Our Supreme Court has made clear that counsel's "failure to advise a noncitizen client that a guilty plea will lead to mandatory deportation deprives the client of the effective assistance of counsel guaranteed by the Sixth Amendment." State v. Barros, 425 N.J. Super. 329, 331 (App. Div. 2012) (citing Padilla, 559 U.S. at 369). Defendant entered

his guilty plea on June 17, and August 5, 2013. Therefore, the Padilla rule clearly applies.

Here, the only "advice" that defendant's attorney provided to him concerning the immigration consequences of his plea was that defendant did not have to worry about deportation, even though he was pleading to his third criminal offense, because the INS had not previously initiated a deportation proceeding against him. By any measure, that advice was clearly incomplete, inaccurate, and ineffective. Counsel's subsequent statement on the record at the sentencing proceeding that defendant had the opportunity to consult with an immigration attorney before sentencing, even if understood by defendant, did nothing to ameliorate the misadvice he had already provided to his client.

Just as significantly, the record fully supports Judge McGovern's finding that the entire proceeding leading to defendant's sentencing was fatally flawed. Defendant pled guilty without ever being told that his plea could negatively affect his legal status in this country. On the next hearing date, the judge handling the case at that time sentenced defendant before it was discovered that defendant's attorney had never reviewed Question No. 17 on the record with him. The judge then attempted to "correct" this error, but did so in a manner that was rushed and

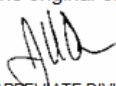
ultimately unfair to defendant, who demonstrated that he did not fully understand what was happening.

In addition, the judge failed to comply with the clear mandates of Rule 3:9-2. After defendant's attorney and the prosecutor elicited some cursory testimony from defendant, the judge immediately resentenced him to the same sentence imposed at the start of the proceeding. In doing so, the judge did not make the required finding that defendant pled guilty "with an understanding of the nature of the charge[s] and the [immigration] consequences of the plea." Ibid. Therefore, the plea cannot stand.

Under these idiosyncratic circumstances, we discern no basis to disturb Judge McGovern's decision to grant defendant's PCR petition.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION