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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-5155-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KEIFFER BRYAN,

Defendant-Appellant.

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Submitted December 12, 2017 — Decided March 20, 2018

Before Judges Yannotti and Leone.

On appeal from Superior Court of New Jersey,  
Law Division, Passaic County, Indictment No.  
02-12-1596.

Joseph E. Krakora, Public Defender, attorney  
for appellant (David J. Reich, Designated  
Counsel, on the briefs).

Camelia M. Valdes, Passaic County  
Prosecutor, attorney for respondent  
(Christopher W. Hsieh, Chief Assistant  
Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Keiffer Bryan appeals the trial court's order denying his petition for post-conviction relief (PCR). We affirm.

On January 17, 2002, defendant allegedly fired an assault firearm, failed to stop his vehicle when directed by police, and was arrested with the assault firearm in his vehicle. A handgun and marijuana were allegedly found in the basement of his mother's house. Defendant was charged with second-degree eluding; second-degree possession of a handgun for an unlawful purpose; second-degree possession of an assault firearm for an unlawful purpose; third-degree unlawful possession of a handgun; third-degree possession of an assault weapon; fourth-degree possession of marijuana in a quantity in excess of fifty grams; second-degree possession of five or more pounds of marijuana with intent to distribute; and third-degree possession of marijuana with intent to distribute within one thousand feet of a school.

During trial in 2004, a jury convicted defendant of second-degree possession of an assault firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a), and third-degree unlawful possession of an

assault weapon, N.J.S.A. 2C:39-5(f).<sup>1</sup> However, the court vacated the conviction because defendant's attorney did not advise defendant before trial that the charge of possession of an assault weapon for an unlawful purpose subjected defendant to a mandatory ten-year sentence, which defendant said might have affected his decision not to plead guilty. See N.J.S.A. 2C:43-6(g).

On January 18, 2006, at a hearing prior to retrial, defendant's trial counsel told the trial court that the prosecutor had offered a plea bargain offering a time-served sentence in return for a plea to the fourth-degree marijuana possession offense. The court noted the plea offer was "pretty generous." The court also noted if defendant did not take the plea deal, defendant would receive the ten-year sentence for his assault weapon charge if a new jury ruled in a similar manner.

Trial counsel said he told defendant that he had never known anyone to be hurt by a fourth-degree marijuana possession conviction, which was expungable and could be removed from his record. The court informed defendant there would be no probation. Trial counsel added: "Time served and you're out of

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<sup>1</sup> The jury deadlocked on the eluding and drug charges, and the handgun charges were dismissed or led to acquittal.

here. You can go back to Florida, and you're gone." Defendant replied: "I'll take it then."

Prior to the plea, defendant signed a written plea form. Question 17 asked whether defendant understood that "if you are not a United States Citizen or national, you may be deported by virtue of your plea of guilty?" Defendant circled "Yes." Defendant told the court his answer was truthful, and said no other promises had been made to him by "the prosecutor, your defense attorney, or anyone else as part of this plea of guilty."

During the plea colloquy, defendant advised the trial court he was not a United States citizen but a resident from Jamaica. The following colloquy ensued:

THE COURT: Okay. I don't believe that this is going to affect your resident status at all, but . . . I have nothing to do with that. That would be the federal government. For straight possession, it's highly unlikely that they would do anything.

[TRIAL COUNSEL]: And I think it's important too, Judge, that it's a fourth degree. My experience — I'm not an immigration lawyer, but with my clients I've had in the criminal system, it seems that if it's a fourth degree, that it's a —

THE COURT: Yeah, on a straight possession I don't think it's a problem, but again, I can't guarantee that. That's up to the federal government, do you understand that?

DEFENDANT: Yes, Your Honor.

[THE PROSECUTOR]: And there is a chance you may be deported. . . . We have no control over that.

THE COURT: I have no control over what immigration does with this, do you understand that?

DEFENDANT: Yes, Your Honor.

The trial court also advised defendant that if he left the country, that could create a problem for him. The court found defendant was pleading guilty knowingly and voluntarily and understood the consequences of his plea.

On January 18, 2006, defendant pled guilty to fourth-degree possession of marijuana in violation of N.J.S.A 2C:35-10(a)(3). Under the plea agreement, all other charges were dropped. The court immediately sentenced him to the negotiated time-served sentence (three hundred and twenty-one days with immediate release without probation).

More than six years later, on July 3, 2012, defendant filed a PCR petition. His certification alleged his trial counsel "told me that if after five years I do not travel outside the country or pick up new charges, I could have this conviction

expunged and I would not be subject to deportation."<sup>2</sup> His certification also alleged "I would not have accepted the plea if I knew I faced deportation." After a brief was filed, defendant withdrew the petition without prejudice to pursue the matter with an immigration attorney. On November 7, 2014, defendant refiled his petition.

On November 2, 2015, the judge who had handled defendant's trial and plea denied his PCR petition. The court ruled the claim was time-barred and defendant failed to allege facts showing the delay was due to excusable neglect. The court also ruled defendant was advised of the possible immigration consequences of the plea deal.

Defendant raises the following issues on appeal:

POINT I. - THE TRIAL COURT ERRED IN DENYING BRYAN'S PETITION FOR POST-CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING CONCERNING HIS CLAIM THAT HE WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY MISINFORMED HIM ABOUT THE DEPORTATION CONSEQUENCES OF HIS PLEA.

POINT II. - BRYAN IS ENTITLED TO RELIEF FROM HIS PLEA BECAUSE IT WAS NOT GIVEN VOLUNTARILY WITH AN UNDERSTANDING OF ITS CONSEQUENCES.

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<sup>2</sup> Defendant had made similar allegations in an unsworn letter, which added that trial counsel "also informed me that he has had clients with the same charges that I received that has [sic] not had . . . any problem with immigration."

A. An Evidentiary Hearing Is Generally Required Where Ineffective Assistance of Counsel is Asserted and the Petitioner Has Established a Prima Facie Claim.

B. Bryan Has Established a Prima Facie Claim of Ineffective Assistance of Counsel.

POINT III. - BRYAN'S NEGLIGENCE IN NOT FILING HIS PETITION WITHIN FIVE YEARS SHOULD HAVE BEEN FOUND EXCUSABLE BECAUSE IT WAS CAUSED BY HIS ATTORNEYS MISADVICE.

I.

A PCR court does not need to grant an evidentiary hearing unless "a defendant has presented a prima facie [case] in support of post-conviction relief." State v. Marshall, 148 N.J. 89, 158 (1997). "To establish such a prima facie case, the defendant must demonstrate a reasonable likelihood that his or her claim will ultimately succeed on the merits." Ibid. The court must view the facts "in the light most favorable to defendant." Ibid.; see R. 3:22-10(b). As the PCR court did not hold an evidentiary hearing, we "conduct a de novo review." State v. Harris, 181 N.J. 391, 419 (2004). We must hew to that standard of review.

II.

The PCR court properly denied defendant's PCR claim because his petition was untimely. See State v Brewster, 429 N.J Super.

387, 398 (App. Div. 2013). At the time of the PCR hearing, Rule 3:22-12(a)(1) provided:

no petition shall be filed pursuant to this rule more than 5 years after the date of entry . . . of the judgment of conviction that is being challenged, unless 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.

Unless a defendant shows both excusable neglect and fundamental injustice, his claim is time-barred; the time limit cannot be relaxed. R. 3:22-12(c); see 1:3-4(c).

Here, defendant's judgment of conviction was entered on January 18, 2006. Under Rule 3:22-12(a)(1)'s five-year limit, defendant had until January 18, 2011 to file his PCR petition. However, defendant filed his PCR petition on July 3, 2012, withdrew it, and refiled it on November 7, 2014. Thus, defendant must show excusable neglect and a fundamental injustice. R. 3:22-12(a)(1).

A.

A PCR petitioner "must allege specific facts and evidence supporting his allegations." State v. Porter, 216 N.J. 343, 355 (2013); see R. 3:22-8. Moreover, "[a]ny factual assertion that provides the predicate for a claim of relief must be made by



affidavit or certification[.]" R. 3:22-10(c). "A petition is time-barred if it does not claim excusable neglect, or allege the facts relied on to support that claim." State v. Cann, 342 N.J. Super. 93, 101-02 (App. Div. 2001) (citing State v. Mitchell, 126 N.J. 565, 577 (1992)).

Defendant's certification made no attempt to demonstrate excusable neglect for failing to file a PCR petition within five years of his conviction. Defendant merely argued to the PCR court that it was not until he recently applied to be a permanent resident that he learned he was subject to deportation.

On appeal, defendant claims he failed to file a timely PCR petition because he relied on trial counsel's alleged advice if he did not leave the country for five years he could have his conviction expunged and avoid deportation. We have found such assertions inadequate to show excusable neglect:

Defendant cannot assert excusable neglect simply because he received inaccurate deportation advice from his defense counsel. If excusable neglect for late filing of a petition is equated with incorrect or incomplete advice, 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.

[Brewster, 429 N.J. Super. at 400 (citing State v. Goodwin, 173 N.J. 583, 595 (2002)).]

Defendant alleges that if he had known he was subject to deportation, he would have filed for timely relief. But in his plea form and at the plea colloquy, defendant was alerted to the risk of deportation. Cf. State v. Maldon, 422 N.J. Super. 475, 478-79, 482 (App. Div. 2011) (finding excusable neglect where neither the plea form nor the colloquy advised the defendant he could be civilly committed).

Defendant argues he should not be punished for his trial counsel's alleged misinformation. However, defendant had five years free from his trial counsel's influence in which to file a PCR petition. "Ignorance of the law and rules of court does not qualify as excusable neglect." State v. Merola, 365 N.J. Super. 203, 218 (Law Div. 2002) (citing State v. Murray, 162 N.J. 240, 246 (2000)), aff'd o.b., 365 N.J. Super. 82, 84 (App. Div. 2003). Therefore, the trial court properly found defendant failed to show excusable neglect.

B.

Additionally, defendant cannot show a reasonable probability of fundamental injustice. First, "to succeed on a claim of fundamental injustice, the petitioner must show that the error 'played a role in the determination of guilt.'"

Brewster, 429 N.J. Super. at 400-01 (quoting State v. Nash, 212 N.J. 518, 547 (2013)). "[U]nless a petitioner alleges and demonstrates that he can provide clear evidence that an innocent party has mistakenly pleaded guilty or has received a manifestly improper sentence, the Rule barring petitions for post-conviction relief more than five years after sentencing will not be deemed to create an 'injustice[.]'" State v. Mitchell, 126 N.J. 565, 583 (1992). Here, as in Brewster, "defendant has not claimed he was innocent of the charge[.]. His knowledge of the risk of deportation did not affect the truth-finding function of the court when it accepted his plea." 429 N.J. Super. at 401.

Second, defendant cannot show a fundamental injustice because he has not established a prima facie case that ineffective assistance of counsel led to his plea deal. To show ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42 (1987).

"First, defendant must show that counsel's performance was deficient." State v. Taccetta, 200 N.J. 183, 193 (2009). "Second, defendant must show that the deficient performance prejudiced the defense." Ibid. If a defendant pled guilty, he must show "that 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. DiFrisco, 137 N.J. 434, 457 (1994) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

In 2010, the United States Supreme Court ruled that "counsel must inform [his] client whether his plea carries a risk of deportation." Padilla v. Kentucky, 559 U.S. 356, 374 (2010). However, Padilla is not retroactively applied to convictions that were final when Padilla was decided. Chaidez v. United States, 568 U.S. 342, 344 (2013); State v. Gaitan, 209 N.J. 339, 372 (2012). Because Padilla does not retroactively apply to defendant's final conviction, counsel's alleged ineffectiveness must be evaluated under the state of the law before Padilla.

Prior to Padilla, counsel was not required to advise a defendant of the risk of deportation. See State v. Chung, 210 N.J. Super. 427, 434-35 (App. Div. 1986). Counsel could only be considered ineffective if counsel "provide[d] false or misleading [material] information concerning the deportation consequences of a plea of guilty." State v. Nunez-Valdez, 200 N.J. 129, 138, 141-43 (2009).

Defendant argues his attorney misinformed him about the deportation consequences of his plea. Defendant's plea colloquy

and his unsworn letter show that trial counsel merely related his own experience: that his clients with fourth-degree convictions had not had deportation problems. Trial counsel also cautioned that he was "not an immigration lawyer."

However, defendant's certification alleged trial counsel advised him he would not be subject to deportation if he had his conviction expunged. He established a prima facie case the alleged advice was deficient. Defendant pled guilty to possession of over fifty grams of marijuana. Federal law makes deportable any alien who has been convicted of violation of State law relating to a controlled substance, except for 30 grams or less of marijuana. 8 U.S.C. § 1227(a)(2)(B)(i). Moreover, under 8 U.S.C. § 1101(a)(48) as amended in 1996, "an expunged state conviction is a conviction for immigration purposes." Reyes v. Lynch, 834 F.3d 1104, 1107 & n.15 (9th Cir. 2016).

However, defendant cannot show he "would not have pled guilty and would have insisted on going to trial" if he had known he may be deported. Nunez-Valdez, 200 N.J. at 139 (citation omitted). In response to Question 17 on the plea form, he acknowledged he may be deported as a result of the plea. See Gaitan, 209 N.J. at 374 (finding the defendant, "at a minimum, was put on notice of the issue of potential immigration

consequences through [Question 17 on] the plea form"). Further, the prosecutor advised defendant he could be deported. Both the court and the prosecutor made clear that whether defendant was deported was out of their control. After all of this information was provided to him, defendant assured the court he understood the consequences and pled guilty.

Moreover, "[i]n the PCR context, to obtain relief from a conviction following a plea, 'a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.'" State v. O'Donnell, 435 N.J. Super. 351, 371 (App. Div. 2014) (quoting Padilla, 559 U.S. at 372). Defendant failed to do so.

A jury had already found defendant guilty of a second-degree offense with a mandatory minimum sentence of ten years, and a third-degree offense. Although those convictions were vacated because defendant was not aware of the sentencing consequences, he faced a real prospect he would be convicted and get at least ten years in prison. Indeed, defendant faced a retrial on three second-degree charges, two third-degree charges, and a fourth-degree charge. The plea bargain gave defendant the opportunity to dismiss all the second- and third-degree charges including those on which he had already been convicted, to plead guilty merely to possession of marijuana in

the fourth-degree, to be sentenced to time already served, and to immediate release without probation. Moreover, the fourth-degree offense was expungable, and defendant's concern was to avoid "having a criminal record for the rest of his life."

By contrast, defendant expressed no concern about deportation. Cf. Lee v. United States, \_\_ U.S. \_\_, 137 S. Ct. 1958, 1967-68 (2017) (citing "the unusual circumstances of this case" where "deportation was the determinative issue in Lee's decision whether to accept the plea deal"). Therefore, defendant cannot show it would have been rational to reject the plea bargain under the circumstances. Cf. Lee, \_\_ U.S. at \_\_, 137 S. Ct. at 1963, 1969 (finding it would have been rational to reject a plea offer to a year in jail which only avoided "a year or two more of prison time"); O'Donnell, 435 N.J. Super. at 364, 377 (finding it would have been rational for the defendant to reject the plea offer of a mandatory thirty years "that could result in her spending the rest of her life in prison"). Thus, defendant cannot show prejudice, let alone a fundamental injustice.

### III.

In his PCR brief, defendant argued his plea should be vacated because "the trial court did not make any inquiry as to the substance of counsel's advice and as to whether he was told

deportation was mandatory." That claim was barred by Rule 3:22-4(a) and was meritless, as "it is preferable that the trial court inquire directly of defendant regarding his knowledge of the deportation consequences of his plea," which the trial court did. Nunez-Valdez, 200 N.J. at 144.

On appeal, defendant instead argues he was entitled to withdraw his plea under State v. Slater, 198 N.J. 145 (2009), claiming the trial court pressured him into accepting the plea bargain. However, defendant did not file a motion to withdraw his plea, did not cite Slater to the PCR court, and made no claim of pressure by the trial court. He cannot fault the PCR court for not ruling on a claim he never raised.

In any event, defendant's claim is without merit. "[T]he withdraw of a guilty plea is not an 'absolute right'; it is a matter within the broad discretion of the trial court." State v. Simon, 161 N.J. 416, 444 (1999). Thus, an appellate court will reverse a "trial court's denial of [a] defendant's request to withdraw his guilty plea . . . only if there was an abuse of discretion which renders" the trial court's decision "clearly erroneous." Ibid.

A motion to withdraw a guilty plea after sentencing can be granted only "to correct a manifest injustice." R. 3:21-1. "The longer the delay in raising a reason for withdrawal . . .



the greater the level of scrutiny" in evaluating the claim. Slater, 198 N.J. at 160. The court must consider "(1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of the defendant's reasons for withdrawal; (3) the existence of a plea bargain; and (4) whether withdrawal could result in unfair prejudice to the State or unfair advantage to the accused." Id. at 157-58 (2009).

First, defendant argues he has a colorable claim of innocence because he has consistently proclaimed his innocence of all charges. However, Slater makes clear that a "bare assertion of innocence is insufficient to justify withdrawal of a plea. Defendants must present specific, credible facts and, where possible, point to facts in the record that buttress their claim." Id. at 158. Defendant also argues his colorable claim of innocence is supported by the fact his previous trial resulted in a hung jury on the fourth-degree charge. However, the jury did find defendant guilty of second- and third-degree charges. Additionally, in the plea colloquy he admitted facts that he possessed over fifty grams of marijuana and acknowledged that defendant committed the crime. Therefore, he does not have a colorable claim of innocence.

Second, defendant asserts he has a reason for withdrawing his plea because the trial court pressured him. He claims the

court said it agreed with the jury's verdict, but the court merely noted the jury convicted him of the assault firearm charges.

Defendant cites the trial court's comment that it was "very, very difficult" to understand why defendant initially would not take the plea bargain, but the court was referencing that defendant was "in a unique position" because he knew a jury had found him guilty, that he was "going to be in jail for the next ten years" if another jury agreed, and he had been offered a "pretty generous plea offer." In any event, the court immediately added it was "fine" with the court if defendant rejected the plea offer, because if "you're not guilty, you're not guilty." The court told defendant: "You do what you want to do."

Defendant also cites the trial court's statement that, if a trial witness became unavailable or changed her story, "I'll let that prior testimony in." Defendant does not dispute the prior testimony would be admissible in those circumstances. See N.J.R.E. 803(a)(1), 804(b)(1)(A). Finally, defendant notes the court's initial statement that it would not allow defendant to get a private investigator before the second trial, but the court immediately stated "you can get a private investigator"

after trial counsel stated defendant "wants certain things done."

Third, defendant entered into a highly-favorable plea bargain that dismissed the most serious charges and promised a time-served sentence on the remaining charge. See Slater, 198 N.J. at 160, 164 ("defendants have a heavier burden in seeking to withdraw pleas entered as part of a plea bargain").

Lastly, defendant claims there would be a little prejudice in this case because the transcript of the trial remains available to the state in the event of a retrial. However, "the passage of time has hampered the State's ability to present important evidence," through live witnesses. Ibid. at 161. The crimes occurred in 2002, over 16 years ago. Balancing all of the factors, defendant is not entitled to withdrawal of his guilty plea.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION