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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5219-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSE GUZMAN,

Defendant-Appellant.

Submitted December 19, 2017 – Decided February 7, 2018

Before Judges Hoffman and Gilson.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Indictment No.
07-07-1111.

Miller, Meyerson & Corbo, attorneys for
appellant (Gerald D. Miller and Paula
Odysseos-Panayiotou, on the brief).

Esther Suarez, Hudson County Prosecutor,
attorney for respondent (Roseanne Sessa,
Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Jose Guzman appeals from a March 24, 2016 order
denying his petition for post-conviction relief (PCR) without an

evidentiary hearing. We are constrained to vacate the order and remand for an evidentiary hearing.

I.

Defendant is a legal permanent resident of the United States of America. He came to this country from Colombia in 1999, when he was nineteen years old. He married another lawful permanent resident in 2005, and they have a child who was born in the United States.

In January 2008, defendant pled guilty to fourth-degree criminal sexual contact in violation of N.J.S.A. 2C:14-3(b). On his plea form, "yes" was circled in response to the question asking whether defendant understood that if he was not a United States citizen he could be subject to removal by virtue of his guilty plea. At the plea hearing, defendant testified that he understood the plea agreement, that he had enough time to discuss the case with his counsel, and that he had no remaining questions for counsel or the court. There was no discussion, however, concerning defendant's immigration status, his potential for removal, who completed the plea form, or whether defendant reviewed the plea form with his attorney.

On February 8, 2008, defendant was sentenced to two years of probation. At sentencing, there was also no discussion of defendant's immigration status or the potential for his removal

from the United States. Defendant successfully completed probation, and he has not been arrested or convicted of any other offenses.

On October 11, 2015, defendant filed a petition for PCR, certifying that he was arrested by the United States Immigration and Customs Enforcement (ICE) and that he was facing removal proceedings based on his 2008 fourth-degree conviction. Defendant asserted that his plea counsel had been ineffective in failing to: (1) review discovery and discuss the case and potential defenses with him, (2) investigate the case and any witnesses, (3) review the plea agreement with him before asking him to sign it, and (4) advise him of the effect of the plea on his immigration status.

Defendant was represented by counsel on his PCR petition, and in a brief filed in support of defendant's petition, counsel represented: "Defendant asserts that [plea] counsel mistakenly advised him that he would not be deported as a result of his plea because he was not being sentenced to prison." At oral argument, PCR counsel further represented that defendant had asked plea counsel whether he would have any trouble traveling to and from Colombia and, after conferring with the prosecutor, plea counsel told him that he would have no such problem. PCR counsel acknowledged that there was no certification from defendant setting forth the representations made by counsel. PCR counsel

also asserted, however, that defendant would testify to those facts at an evidentiary hearing.

After hearing oral argument, the PCR court denied defendant's petition without an evidentiary hearing. The court found that defendant's allegations that plea counsel failed to investigate or discuss his case with him were "bald assertions unsupported by the record." Moreover, the PCR court reasoned that defendant's certification did not support the allegation that counsel affirmatively misrepresented the immigration consequences of defendant's plea. In that regard, the court noted that at the time of defendant's plea in 2008, failure to discuss the immigration consequences of a plea did not amount to ineffective assistance of counsel.

II.

On appeal, defendant makes four arguments.

POINT I. DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BASED ON THE AFFIRMATIVE, INCORRECT IMMIGRATION ADVICE HE RECEIVED

POINT II. DEFENDANT MADE A PRIMA FACIE SHOWING THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, AND IS ENTITLED TO AN EVIDENTIARY HEARING

POINT III[. EVEN IF THIS COURT FINDS THAT DEFENDANT'S FACTUAL PROFFER IS LIMITED TO A FAILURE BY DEFENDANT'S COUNSEL TO DISCUSS IMMIGRATION CONSEQUENCES, AS A MATTER OF

POLICY, IT SHOULD RETROACTIVELY APPLY *NUNEZ-VALDEZ* HERE

POINT IV. THE TRIAL COURT'S COLLOQUY IN 2008 ON ITS [FACE] RAISES CONCERNS ABOUT THE FAIRNESS OF THE PLEA

PCR "is New Jersey's analogue to the federal writ of habeas corpus." State v. Goodwin, 173 N.J. 583, 593 (2002) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). Under Rule 3:22-2, defendants are permitted to collaterally attack a conviction based upon a claim of ineffective assistance of counsel within five years of the conviction. See R. 3:22-12(a)(1); see also Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 58 (1987).

To establish a claim of ineffective assistance of counsel, a defendant must satisfy the two-part Strickland 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, 466 U.S. at 687 (quoting U.S. Const. amend. VI); Fritz, 105 N.J. at 58-59 (adopting the Strickland two-part test in New Jersey).

Rule 3:22-10(b) provides that a defendant is entitled to an evidentiary hearing on a PCR petition if he establishes a prima facie case in support of PCR. To establish a prima facie case, a

defendant must demonstrate a "reasonable likelihood of succeeding under the test set forth in Strickland." Preciose, 129 N.J. at 463. Moreover, the judge deciding a PCR claim should conduct an evidentiary hearing when "material issues of disputed fact . . . cannot be resolved by reference to the existing record," and "an evidentiary hearing is necessary to resolve the claims for relief." State v. Porter, 216 N.J. 343, 354 (2013) (quoting R. 3:22-10(b)); see also Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R. 3:22-10 (2018) (noting that a PCR evidentiary hearing is required if there is a dispute of fact regarding matters which are not in the record).

Initially, we address whether defendant's petition was time-barred. Although the PCR court did not rely on this procedural bar in denying defendant's petition, the State argues that we should affirm on this alternative ground. See State v. Guzman, 313 N.J. Super 363, 371 n.1 (App. Div. 1998) (addressing the State's argument that a defendant's petition for PCR was procedurally barred as an alternative ground for affirmance). Thereafter, we will address defendant's right to an evidentiary hearing based on his allegations that his plea counsel gave him incorrect advice concerning the potential immigration consequences of his plea.

A. Whether the Petition Is Time Barred

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." In addition, "[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.'" Goodwin, 173 N.J. at 594 (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." Afanador, 151 N.J. at 52.

The State points out that defendant filed his PCR petition approximately seven years and eight months after he was sentenced in February 2008. Defendant contends that his delay was excusable

because he was affirmatively misled concerning the immigration consequences of his plea, and had no reason to suspect that he received ineffective assistance of counsel until he was taken into custody by ICE.

Here, we hold that defendant raised sufficient contentions to warrant an evidentiary hearing. While defendant's certification lacks specificity, the current record raises sufficient questions to warrant at least a limited evidentiary hearing. Defendant filed his petition in October 2015. He does not expressly state when he was actually detained by ICE and when he became aware that he would be subject to potential removal. If defendant acted within a reasonable time after becoming aware of the potential for removal, he may be able to establish excusable neglect. The record in this case does not demonstrate that defendant was ever affirmatively told that his plea could result in his removal apart from the reference in the plea form on question seventeen. The form at that time, however, was simply one question. Since then, the plea form has been significantly expanded. Just as importantly, there is nothing in the current record to reflect that defendant himself actually focused on and answered question seventeen as opposed to his plea counsel filling that form out with him.

We are not suggesting that a PCR court should engage in or entertain speculations that are not supported by the record before it. Nor are we condoning a PCR petition supported by a vague certification. Nevertheless, we must be mindful that the PCR petition is defendant's last opportunity to address a potential "fundamental-injustice claim[.]" See State v. Nash, 212 N.J. 518, 540, 547 (2013).

We also reject the State's reliance on this court's holding in State v. Brewster, 429 N.J. Super. 387 (2013). In Brewster, the defendant, seeking to avoid removal, filed a PCR petition twelve years after his conviction. Id. at 390. At the time of his plea, defendant was aware of the possible immigration consequences of a conviction and answered "yes" to question seventeen on the plea form. Id. at 391. Three years before he filed his PCR petition, defendant consulted an immigration attorney, who advised that the conviction "could be a problem." Id. at 399-400. Under those facts, we declined the invitation to relax the time-bar imposed by Rule 3:22-12.

Here, defendant's case is distinguishable from the facts in Brewster. Unlike the defendant in Brewster, defendant was either not expressly informed, or affirmatively misinformed about the potential immigration consequences of his guilty plea. Further, the record needs to be developed as to how quickly defendant

reacted after he learned of his potential removal. Moreover, because there has been no evidentiary hearing, the State has not presented any evidence of possible prejudice caused by the passage of time. In short, the current record warrants an evidentiary hearing to develop these issues.

B. The Potential for Immigration Consequences from the Plea

Since defendant's guilty plea in January 2008, the law governing counsel's obligation to inform a criminal defendant about the potential immigration consequences of a guilty plea has evolved. In 2009, our Supreme Court held that a defendant can show ineffective assistance of counsel by proving that his guilty plea resulted from "inaccurate information from counsel concerning the deportation consequences of his plea." State v. Nunez-Valdez, 200 N.J. 129, 143 (2009).

In 2010, the United States Supreme Court extended counsel's duty, holding that counsel had an affirmative duty to inform a defendant entering a guilty plea regarding the relevant mandatory removal law if it is "succinct, clear, and explicit[.]" Padilla v. Kentucky, 559 U.S. 356, 386 (2010) (Alito, J., concurring). Accordingly, in Padilla, the Supreme Court expanded the law to encompass both a duty not to provide misinformation, and a duty to affirmatively explain the potential removal consequences of a criminal guilty plea. Ibid.

In 2013, the Supreme Court clarified that Padilla imposed a new obligation and announced a new rule of law. Chaidez v. United States, 568 U.S. 342 (2013). Consequently, the holding in Padilla only applies prospectively, and defendants whose convictions became final prior to the holding in Padilla in 2010, cannot benefit from that holding. Chaidez, 568 U.S. at 358.

Here, the State argues that defendant's conviction, which predates Padilla, should not be set aside because plea counsel gave no advice regarding the potential immigration consequences of his plea. Moreover, the State argues that Padilla cannot and should not be applied retroactively.

As we just pointed out, the law is clear that the holding in Padilla is not to be applied retroactively. Instead, defendant's arguments concerning ineffective assistance of counsel must be assessed under the law as recognized in Nunez-Valdez, which focuses on whether counsel provided affirmative incorrect advice regarding the immigration consequences of a guilty plea. State v. Santos, 210 N.J. 129, 143 (2012) (citing State v. Gaitan, 209 N.J. 339, 373-74 (2012)).¹

¹ In defendant's brief, he argues that we should apply Nunez-Valdez retroactively. Nunez-Valdez did not establish a new law. Accordingly, the obligation of defense counsel recognized in Nunez-Valdez applies to cases that predated the issuance of Nunez-Valdez. See State v. Santos, 210 N.J. at 143.

In this case, there are sufficient disputed issues concerning whether plea counsel gave affirmative misinformation to defendant to warrant an evidentiary hearing. Again, we note that defendant's certification does not expressly allege affirmative misrepresentations by plea counsel concerning the potential immigration consequences of his plea. Defendant's PCR counsel, however, twice represented to the PCR court that defendant would testify to such affirmative misstatements at an evidentiary hearing. The better practice would have been for PCR counsel to have submitted a supplemental certification from defendant. Nevertheless, counsel's failure should not be visited on defendant. Instead, we hold that based on the representations of PCR counsel, defendant was entitled to an evidentiary hearing.

Accordingly, we vacate the order denying his PCR petition and remand for an evidentiary hearing. In light of this holding, we need not reach defendant's other arguments. We do point out, however, that defendant has presented no evidence to support his arguments that his plea counsel was ineffective in failing to review discovery and discuss the case and potential defenses with him, and in failing to investigate the case. Thus, those issues need not be addressed at the evidentiary hearing.

Reversed and remanded for an evidentiary hearing. 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