SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0521-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROLANDO A. VASQUEZ,

Defendant-Appellant.

Submitted October 4, 2022 – Decided November 4, 2022

Before Judges Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 09-11-1961.

Bramnick, Rodriguez, Grabas, Arnold and Mangan, LLC, attorneys for appellant (Michael Noriega, of counsel and on the brief).

Yolanda Ciccione, Middlesex County Prosecutor, attorney for respondent (David M. Liston, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Rolando Vasquez appeals from the August 23, 2021 Law Division order dismissing his petition for post-conviction relief (PCR) without an evidentiary hearing. Defendant contends his plea counsel rendered ineffective assistance by failing to inform him that by pleading guilty to drug offenses, he would be removed from the United States by Immigration and Customs Enforcement (ICE). The PCR court ruled that defendant's petition—filed more than ten years after he was sentenced to probation—is time-barred pursuant to Rule 3:22-12(a). After carefully reviewing the record in view of the applicable legal principles, we affirm.

I.

Defendant was born in El Salvador. In January 2000, he entered the United States by crossing the border with Mexico as a seventeen-year-old. He applied for and was granted Temporary Protected Status (TPS), protecting him from removal from the United States.

On July 22 and August 11, 2009, defendant sold cocaine to an undercover police officer and was charged in November 2009 with seventeen third-degree offenses. On February 24, 2010, defendant appeared before Judge Frederick P. DeVesa and, pursuant to a plea agreement, entered a guilty plea to two counts of third-degree distribution of controlled dangerous substances (CDS) in

exchange for the imposition of concurrent three-year prison terms and the dismissal of the remaining counts.

The plea form signed by defendant asked, "[d]o you understand that if you are not a United States citizen or national, you may be deported by virtue of your plea of guilty?" Defendant answered, "[y]es."

At the plea hearing, defendant's attorney stated on the record that defendant was "aware that he may be deported as a result of this guilty plea." Counsel further advised Judge DeVesa that he had "spoken to [defendant] as to whether or not he wishe[d] to speak to an immigration attorney," and that defendant "indicate[d] that he wishe[d] to continue [and] plead guilty . . . to begin this process. And there are no further promises other than the negotiated plea."

Defendant stated on the record that he had understood what his attorney explained to the judge. The trial court proceeded to conduct a colloquy to determine whether the guilty plea was knowing and voluntary, during which the following exchange occurred:

> THE COURT: And finally, do you understand that when someone who is not a citizen is convicted of a serious crime it is possible that even after you get out of jail you could be deported? Do you understand that?
>
> THE DEFENDANT: Yes, sir.

> THE COURT: And this Court has nothing to do with that issue. Mr. Arango has advised you that you have a right to seek advice from an immigration attorney and you may have a hearing in another court. It's just my job to make you understand that if you're convicted of these charges by pleading guilty you may be deported; and you do understand that, right?
>
> THE DEFENDANT: Yes, sir.

At the July 23, 2010 sentencing hearing, the State reduced its recommended sentence to five years noncustodial probation. In accordance with the prosecutor's modified recommendation, Judge DeVesa sentenced defendant to two concurrent five-year periods of noncustodial probation and dismissed the remaining counts. The Judgment of Conviction (JOC) included instructions for "Probation to notify Immigration." Defendant did not file a direct appeal from his conviction or sentence.

On November 10, 2014, the United States Department of Homeland Security served defendant with a notice to appear for removal proceedings. That notice—which defendant received before the expiration of the five-year deadline for filing a PCR—explicitly advised defendant he was subject to removal from the United States because of his 2010 convictions. The notice stated he would have to appear on a date "[t]o be set." On March 21, 2015, defendant received notice that the matter would be heard by the Immigration Court on November

29, 2019. On December 13, 2017, defendant received notice that the matter had been rescheduled for August 6, 2018.[1]

Defendant did not file the present PCR until November 5, 2020—almost six years after federal immigration officials advised him they were initiating removal procedures based on his 2010 convictions. The PCR court heard oral argument on August 13, 2021, after which the court issued an order and concise written opinion denying PCR without an evidentiary hearing on the grounds that defendant's petition was not timely filed in accordance with Rule 3:22-12(a).

This appeal follows. Defendant raises the following contentions for our consideration:

> POINT I
>
> THE LOWER COURT ERRED IN DENYING DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING WHERE DEFENDANT PRESENTED SUFFICIENT EVIDENCE OF EXCUSABLE NEGLECT.
>
> POINT II
>
> DEFENDANT HAS PRESENTED A PRIMA FACIE CASE THAT COUNSEL PROVIDED INCORRECT ADVICE CONCERNING HIS IMMIGRATION CONSEQUENCES.

[1] Defendant's brief indicates he was scheduled to appear before the Immigration Court on April 4, 2022. The record does not indicate whether that hearing occurred.

POINT III

DEFENDANT'S COUNSEL WAS CONSTITUTIONALLY DEFICIENT AT THE TIME THE PLEA WAS ENTERED, BASED ON THE STANDARD USED AT THE TIME UNDER STATE V. NU[Ñ]EZ-VALD[É]Z, AS DEFENSE COUNSEL PROVIDED AFFIRMATIVE MISADVICE.

POINT IV

DEFENDANT'S COUNSEL WAS CONSTITUTIONALLY DEFICIENT, PURSUANT TO PADILLA V. KENTUCKY, IN FAILING TO ADVISE PETITIONER OF THE AUTOMATIC DEPORTATION CONSEQUENCES HE FACED BY PLEADING GUILTY TO DISTRIBUTION OF CONTROLLED DANGEROUS SUBSTANCES, THEREBY PREJUDICING PETITIONER WHO WOULD HAVE PROCEEDED TO TRIAL BUT FOR THIS ERRONEOUS ADVICE.

II.

PCR serves the same function as a federal writ of habeas corpus. State v. Preciose, 129 N.J. 451, 459 (1992). Both the Sixth Amendment of the United States Constitution and Article 1, Paragraph 10 of our State Constitution guarantee to criminal defendants the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984) (citing McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)); State v. Fritz, 105 N.J. 42, 58 (1987). In order to demonstrate ineffectiveness of counsel, "[f]irst, the

defendant must show that counsel's performance was deficient . . . . Second, the defendant must show that the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687. In Fritz, our Supreme Court adopted the two-part test articulated in Strickland. 105 N.J. at 58.

In State v. Nuñez-Valdéz, our Supreme Court held a defendant could establish ineffective assistance of counsel if the defendant's attorney provided false or inaccurate advice that the plea would not result in deportation. 200 N.J. 129, 139–42 (2009). In Padilla v. Kentucky, the United States Supreme Court held a petitioner may meet the first Strickland prong by showing that his attorney made misrepresentations, either affirmatively or by omission, regarding the potential immigration consequences flowing from a guilty plea. 559 U.S. 356, 369–71, 374 (2010). The Court explained, when deportation is a clear consequence of a guilty plea, the defendant's counsel has an affirmative duty to address the subject and give correct advice. Ibid. However, the Court also held, when the deportation consequences of a plea are uncertain, counsel need only advise his or her client that the plea may carry a risk of adverse immigration consequences. Id. at 369.

The New Jersey Supreme Court later held Padilla established a new rule of law, which would not be applied retroactively. State v. Gaitan, 209 N.J. 339,

373 (2012). The United States Supreme Court reached the same conclusion in Chaidez v. United States, 568 U.S. 342, 358 (2013). This court, in State v. Barros, made clear that Gaitan "determined, in applying both federal and state law, that Padilla created a 'new rule' and, for that reason, the level of attorney competence described in Padilla has no application to guilty pleas entered prior to March 31, 2010, the day the decision in Padilla was announced." 425 N.J. Super. 329, 332 (App. Div. 2012) (citing Gaitan, 209 N.J. at 372, 373, 375–76). The Court in Gaitan also stressed that, under Nuñez-Valdéz, a defendant's claim of ineffective assistance of counsel fails when he or she does not present any evidence of mistaken advice and the defendant had been on notice of the potential immigration consequences of the plea. Gaitan, 209 N.J. at 375–76.

Importantly for purposes of this appeal, a PCR petition must be filed within five years of the entry of the judgment of conviction unless the defendant demonstrates "excusable neglect" for missing the deadline and that "enforcement of the time bar would result in a fundamental injustice."[2] R. 3:22-

[2] As we explain in Section III of this opinion, defendant did not expressly argue to the PCR court, nor in his appeal brief, that enforcement of the time bar would result in a fundamental injustice.

12(a)(1).[3] Rule 3:22-12(b) further states, "[t]hese time limitations shall not be relaxed, except as provided herein."

In State v. Mitchell, our Supreme Court explained the policy reasons underlying these time limitations, noting:

> As time passes after conviction, the difficulties associated with a fair and accurate reassessment of the critical events multiply. Achieving "justice" years after the fact may be more an illusory temptation than a plausibly attainable goal when memories have dimmed, witnesses have died or disappeared, and evidence is lost or unattainable . . . . Moreover, the Rule serves to respect the need for achieving finality of judgments and

[3] Rule 3:22-12(a)(1) provides with regard to first PCR petitions:

> (1) First Petition For Post-Conviction Relief. Except as provided in paragraphs (a)(2), (a)(3), and (a)(4) of this rule, no petition shall be filed pursuant to this rule more than 5 years after the date of entry pursuant to Rule 3:21-5 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; or
>
> (B) it alleges a claim for relief as set forth in paragraph (a)(2)(A) or paragraph (a)(2)(B) of this rule and is filed within the one-year period set forth in paragraph (a)(2) of this rule.

> to allay the uncertainty associated with an unlimited possibility of relitigation.
>
> [126 N.J. 565, 575–76 (1992).]

"The five-year time limit is not absolute." State v. Milne, 178 N.J. 486, 492 (2004). But, in State v. Cummings, we explained, "the time bar of R[ule] 3:22-12 should be relaxed only under truly exceptional circumstances" and "absent compelling, extenuating circumstances, the burden of justifying a petition filed after the five-year period increases with the extent of the delay." 321 N.J. Super. 154, 168 (1999). "The concept of excusable neglect encompasses more than simply providing a plausible explanation for a failure to file a timely PCR petition." State v. Norman, 405 N.J. Super. 149, 159 (App. Div. 2009).

For example, in State v. Brewster, we held a "[d]efendant cannot assert excusable neglect simply because he received inaccurate deportation advice from his defense counsel." 429 N.J. Super. 387, 400 (App. Div. 2013) (citing State v. Goodwin, 173 N.J. 583, 594 (2002)). We added, "[i]f 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." Ibid.

In State v. Brown, we remarked,

> [W]e hold that a PCR judge has an independent, non-delegable duty to question the timeliness of the petition, and to require that defendant submit competent evidence to satisfy the standards for relaxing the rule's time restrictions pursuant to Rule 3:22-12. Absent sufficient competent evidence to satisfy this standard, the court does not have the authority to review the merits of the claim.
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> [455 N.J. Super. 460, 470 (App. Div. 2018).]

In State v. Chau, we recently considered when and in what circumstances the PCR time bar should be relaxed. 473 N.J. Super. 430 (App. Div. 2022). Although neither party submitted a letter pursuant to Rule 2:6-11(d) advising us of this new precedent—which was published after the briefs were filed in the matter before us—we deem it appropriate to carefully examine Chau to highlight the significant differences between the facts in that case and the circumstances here.

In Chau, the defendant pled guilty to shoplifting and receiving stolen property—two crimes of moral turpitude not arising out of a single occurrence, thereby rendering him deportable under section 237(a)(2)(A)(ii) of the Immigration and Nationality Act. 473 N.J. Super. at 438; see 8 U.S.C. § 1227(a)(2)(A)(ii). Chau was sentenced to three years' probation. Chau, 473 N.J.

Super. at 438. The sentencing judge advised defendant of his appeal rights and that he had five years in which to file a petition for PCR. Ibid.

Chau was taken into ICE custody in December 2014, nearly two years after his guilty plea. Ibid. He hired an immigration attorney in Texas shortly after being detained. Ibid. In a certification in support of Chau's petition, the Texas attorney explained that the federal government had agreed to exercise prosecutorial discretion to terminate the deportation proceedings in November 2015. Id. at 438–39. The Texas attorney argued Chau had been rehabilitated and was eligible to "readjust status" because, while in ICE custody, he had married his long-time girlfriend, a United States citizen. Id. at 439. That attorney advised defendant in 2015 "he eventually could naturalize without fear of being removed." Ibid. Chau certified that the Texas attorney "thought that if we just waited out this [then-]current presidential administration's immigration policy that [he] could become a [United States citizen]." Ibid. (first and second alterations in original).

The Texas attorney acknowledged that he did not advise Chau about the availability of PCR to solve his deportation problem until September 2019. Ibid. Based on that belated advice, Chau immediately hired his New Jersey counsel, who filed the petition three months later. Ibid.

Although the Texas lawyer "obviously represented defendant zealously in the removal proceedings, successfully securing his release from ICE custody and convincing the government to defer prosecution of his deportation," the lawyer "also advised defendant, wrongly, that he could end the threat of deportation through naturalization proceedings." Id. at 441. It was not until after the five-year period for filing a PCR had expired that the Texas lawyer advised Chau he could only remove the threat of deportation through a PCR proceeding in New Jersey. Ibid. Importantly, the Texas lawyer conceded his error in not advising defendant earlier that he needed to file a PCR petition in New Jersey. Id. at 442. When first told about the need to pursue PCR relief, Chau retained New Jersey counsel, who filed the PCR promptly. Ibid.

On those facts, we held that Chau established excusable neglect for his failure to timely file the PCR petition. Ibid. We stressed that when "counsel finally advised defendant he needed to file a PCR petition, defendant acted immediately to do so." Ibid. "Based on those facts, we cannot find defendant slept on his rights." Ibid.

III.

Defendant asserts that, prior to pleading guilty, he discussed the issue of immigration and his TPS classification with his defense counsel.[4] Defendant claims his attorney advised him that ICE could "review his case" for possible deportation, but they would not take his TPS status.

The gravamen of defendant's argument is that his attorney gave incorrect advice by failing to "explicitly advise [d]efendant of the certain removal he faces." Defendant contends it was insufficient for counsel to advise him he

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[4] Defendant has not submitted an affidavit or sworn certification from his attorney. See R. 3:22-10(c) ("Any factual assertion that provides the predicate for a claim of relief must be made by an affidavit or certification pursuant to Rule 1:4-4 and based upon personal knowledge of the declarant before the court may grant an evidentiary hearing."). However, defendant has submitted an unsworn verified petition in which he asserts:

> 13. Prior to entering a plea of guilty, I spoke with my attorney and he advised me that I would not lose my TPS status based on the drug charges or the plea offer that was being extended by the State.
>
> 14. I accepted the advice of my attorney to mean that the charges in this case would not cause my removal from the United States.
>
> 15. I was advised that immigration would "review my case" but that this would "not cause me to lose TPS."

could be deported; rather, defendant contends the Sixth Amendment required counsel to inform him he would be deported if he pled guilty. We note defendant's guilty plea was entered on February 24, 2010, one month before Padilla was decided on March 31, 2010.[5]

Even if we were to disregard our Supreme Court's instruction in Gaitan and apply the Padilla rule retroactively to defendant's guilty plea, we are not persuaded that the immigration consequences in this case were "truly clear." See Padilla, 559 U.S. at 369. Given the complexity of immigration laws and the vicissitudes of federal immigration policy, a lawyer could not forecast with certainty whether defendant's drug convictions would actually lead to deportation. Defendant was made well aware that his plea put him at risk of deportation, which is all that was known in 2010. We, therefore, do not accept the foundational premise of defendant's argument that his attorney was required to advise him removal was virtually certain. As Padilla explains, "[w]hen the

[5] We are unpersuaded by defendant's argument that his plea and sentencing "came up during a wholly unique moment in time" by "occurring during the precise moment in time between the diverging decisions in State v. Nu[ñ]ez-Vald[é]z . . . and Padilla v. Kentucky." As we have noted, this court has made clear that "in applying both federal and state law, . . . the level of attorney competence described in Padilla has no application to guilty pleas entered prior to March 31, 2010, the day the decision in Padilla was announced." Barros, 425 N.J. Super. at 332 (emphasis added) (citing Gaitan, 209 N.J. at 372, 373, 375–76).

law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." Ibid.

In any event, even accepting defendant's factual assertions as true and his legal contentions as valid for the sake of argument, he is hard pressed to demonstrate "excusable neglect." He was notified that ICE initiated removal proceedings in November 2014—four months before the PCR period expired. Upon receipt of that notice, defendant was clearly alerted as to the deficiency in counsel's advice that defendant now alleges. Defendant has offered no justification for why the PCR was not filed until almost six years after receiving formal notice from ICE. We note the PCR was not just filed more than five years after the five-year deadline had expired; it was also filed more than one year after "the date on which the factual predicate for the relief sought was discovered." R. 3:22-12(a)(1)(B) and (a)(2)(B). Indeed, we reiterate that it was filed almost six years after ICE initiated the removal process.

These circumstances are different from those in Chau that led us to relax the deadline. In Chau, the immigration attorney conceded he had given wrong advice. The plea was entered after Padilla. 473 N.J. Super. at 443 (noting "[t]hese were post-Padilla pleas, meaning defendant's plea counsel was

obligated to 'advise her client regarding the risk of deportation'" (citing Padilla, 559 U.S. at 367)). Most significantly, Chau promptly filed the PCR after learning he had been given mistaken advice. None of those circumstances is present here.

To the contrary, the record before us suggests defendant pursued a conscious strategy to delay initiating the PCR process. In his appeal brief, defendant acknowledges, "[w]hile the consequences are entirely real and dramatically critical, the pace and nature of the [removal] process is enough to lull anyone into a plan of 'wait and see.'" (emphasis added). At oral argument before the PCR court, counsel acknowledged that defendant's plan was to "fight that [removal] battle when the battle appears" and defendant believed "he somehow had an option of what he could do about it when it came up." A defendant has no right under the PCR rules to bide his time in this manner. Defendant's apparent hope that his immigration problem would simply resolve itself does not constitute excusable neglect. On the contrary, such willful procrastination is exactly the defense strategy that Rule 3:22-12 is designed to foreclose.

Finally, we note in the interest of completeness that defendant did not argue before the PCR court nor before us on appeal 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." R. 3:22-12(a)(1)(A). Cf. N.J. Dep't of Env't Prot. v. Alloway Twp., 438 N.J. Super. 501, 505 n.2 (App. Div. 2015) ("An issue that is not briefed is deemed waived upon appeal."). In State v. Afanador, the Supreme Court provided guidance on when a defendant would suffer a fundamental injustice absent relaxation of the PCR time bar, explaining, "[t]he [PCR] court should consider the extent and cause of the delay, the prejudice to the State, and the importance of the petitioner's claim." 151 N.J. 41, 52 (1997) (citing Mitchell, 126 N.J. at 580); see also Chau, 473 N.J. Super. at 442.

In this instance, the PCR court made no findings with respect to whether application of the time bar would result in a fundamental injustice, ostensibly because defendant offered no argument with respect to that portion of Rule 3:22-12(a). Ordinarily, we might deem it prudent to remand for the PCR court to make findings with regard to the Afanador factors. Cf. Price v. Himeji, LLC, 214 N.J. 263, 294–96 (2013) (explaining that Rule 2:10-5 "allow[s an] appellate court to exercise original jurisdiction to eliminate unnecessary further litigation, but discourage[s] its use if factfinding is involved" (alterations in original) (quoting State v. Santos, 210 N.J. 129, 142 (2012))); Tomaino v. Burman, 364

N.J. Super. 224, 234–35 (App. Div. 2003) (explaining that appellate courts should exercise original jurisdiction "only 'with great frugality'" (quoting In re Boardwalk Regency Corp. Casino License Application, 180 N.J. Super. 324, 334 (App. Div. 1981))).

In this instance, we see no purpose to be served by remanding for the PCR court to make additional findings. As we have already noted, we reject defendant's foundational contention that his lawyer was required by the Sixth Amendment to advise him deportation was certain. Furthermore, and most importantly for purposes of determining whether to relax the time bar, defendant's acknowledgment that he embraced a "wait and see" strategy leads us to conclude he "slept on his rights." Cf. Chau, 473 N.J. Super. at 442. In these circumstances, we are satisfied that defendant cannot show enforcement of the time bar would result in a fundamental injustice.

To the extent we have not addressed them, any remaining arguments raised by defendant lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.