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This opinion shall not "constitute precedent or be binding upon any court." 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-1450-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ABELARDO LOPEZ, JR.,
a/k/a ANDRES LOPEZ,

Defendant-Appellant.

Submitted November 1, 2022 – Decided November 15, 2022

Before Judges Gilson and Rose.

On appeal from the Superior Court of New Jersey, Law
Division, Somerset County, Indictment No. 05-04-
0292.

Neal M. Frank, attorney for appellant.

Matthew J. Platkin, Attorney General, attorney for
respondent (Steven K. Cuttonaro, Deputy Attorney
General, of counsel and on the brief).

PER CURIAM

Defendant Abelardo Lopez, Jr., a non-citizen of the United States, appeals from a December 17, 2021 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm because the petition was procedurally barred and otherwise lacked merit.

In July 2005, defendant pled guilty to third-degree theft by deception, N.J.S.A 2C:20-4(a), the sole count charged in a Somerset County indictment.¹ During the plea hearing, defendant acknowledged he was employed as an assistant manager at the Bernards Township Eckerd Pharmacy when he stole \$741.07 from the store's cash register by "pretend[ing] somebody would return something and . . . pocket[ing] the cash." A Columbian national, defendant further acknowledged: he was a legal permanent resident of the United States; "by virtue of [his] guilty plea [he] may be deported"; he wished to "plead guilty anyway"; and he had "talked this all over thoroughly with [his] attorney."

Pursuant to the terms of the negotiated plea agreement, defendant was sentenced to non-custodial probation, and ordered to perform community service and pay fines and restitution. Defendant did not appeal from his December 2005 judgment of conviction.

¹ We glean from the record defendant initially was diverted to the pretrial intervention program for this charge but "was terminated for non-compliance."

In April 2012, defendant was issued a notice to appear (NTA) by the United States Department of Homeland Security (DHS), citing defendant's December 2005 conviction, and his 2010 disorderly persons conviction for possession of less than fifty grams of marijuana, N.J.S.A. 2C:35-10(a)(4).² In view of these charges, an immigration judge ordered defendant's removal in August 2018. Defendant's ensuing appeal was dismissed by the Board of Immigration Appeals in October 2020.

The following year, on October 6, 2021 – nearly sixteen years after his theft by deception conviction and nine years after DHS issued the NTA – defendant filed the present PCR petition with the assistance of retained counsel. Defendant claimed plea counsel was ineffective for failing to advise him of the immigration consequences of his guilty plea. Defendant also contended the trial court failed to advise him of his right to consult with immigration counsel regarding those consequences.

Following oral argument, the PCR judge, who had not presided over the plea or sentencing hearings, reserved decision. Shortly thereafter, the judge issued a cogent statement of reasons that accompanied the December 17, 2021

² N.J.S.A. 2C:35-10(a)(4) was repealed on February 22, 2021. See N.J.S.A. 24:6I-31 to -56.

order. The judge accurately recounted the procedural history; the colloquy between the trial court and defendant during the plea hearing; and the applicable legal principles.

Initially, the PCR judge determined defendant's petition was untimely under Rule 3:22-12(a), because it was filed more than the five years after the 2005 judgment of conviction was entered, and defendant failed to demonstrate excusable neglect and "a reasonable probability that if [defendant]'s factual assertions were found to be true, enforcement of the time bar would result in a fundamental injustice." The judge found the record clearly demonstrated defendant "was well aware that his resident alien status in the United States was in peril as early as 2012," when DHS issued the NTA.

Finding defendant "ignored every opportunity to file his petition from as early as 2012," the PCR judge was unpersuaded defendant had established excusable neglect for his late filing. The judge rejected defendant's "bald assertion" that he would have filed his petition "sooner," but he was not aware of the immigration consequences of his guilty plea until at least August 2018, when removal proceedings were initiated.

Citing our decision in State v. Brown, 455 N.J. Super. 460, 470 (App. Div. 2018), the judge correctly recognized the PCR court's "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." Because defendant failed to meet that standard here, the judge denied defendant's petition.

Nonetheless, the PCR judge considered the merits of defendant's PCR claims. Referencing defendant's plea colloquy, the judge found "defendant knew he might be deported as a result of his guilty plea and he knowingly pled guilty in the face of this fact." The judge also found "a reasonable inference that [plea] counsel spoke with defendant about the possibility of deportation as a result of his guilty plea." The judge further found defendant answered, "Yes," to Question 17 of the then-existing plea form: "Do you understand that if you are not a United States citizen or national, you may be deported by virtue of your guilty plea."

Applying the governing law at the time defendant entered his guilty plea, the PCR judge concluded defendant failed to demonstrate plea counsel rendered misadvice. The judge elaborated:

Defendant does not allege that plea counsel in 2005 misstated the law concerning possible immigration consequences as a result of his guilty plea, or gave [defendant] incorrect legal advice about immigration consequences that [defendant] relied on to his detriment. Rather, [defendant] complains that plea

counsel did not address the immigration issue at all with him. The plea transcript suggests otherwise.

Analyzing defendant's claims through the prism of the well-established two-prong test enunciated in Strickland v. Washington, 466 U.S. 668, 687 (1984), as adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987),³ the judge concluded defendant failed to satisfy either prong.

On appeal, defendant reprises the claims asserted before the PCR judge, raising the following point for our consideration:

[]DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND HIS RIGHT TO DUE PROCESS OF LAW AT THE TRIAL LEVEL DUE TO: A) HIS COUNSEL'S FAILURE TO INQUIRE OR ADVISE HIM AS TO THE IMMIGRATION CONSEQUENCES OF HIS GUILTY PLEA AND B) THE COURT'S FAILURE TO ADVISE HIM THAT HE MAY SEEK THE ADVICE [OF] IMMIGRATION COUNSEL BEFORE HE ENTERED HIS GUILTY PLEA, AND THE TRIAL COURT ERRED IN DENYING HIS PETITION FOR POST-CONVICTION RELIEF, NOT PERMITTING HIM TO WITHDRAW HIS GUILTY PLEA OR GRANTING HIM AN EVIDENTIARY HEARING.

³ To establish an ineffective assistance of counsel claim, a defendant must demonstrate: (1) "counsel's performance was deficient"; and (2) "the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687; see also Fritz, 105 N.J. at 58.

On this record, we are satisfied the PCR judge properly determined defendant's arguments were untimely. Even if defendant's PCR arguments were not procedurally barred, however, we are satisfied defendant failed to satisfy either prong of the Strickland/Fritz test. Because there was no prima facie showing of ineffective assistance of counsel, an evidentiary hearing was not necessary to resolve defendant's PCR claims. See State v. Preciose, 129 N.J. 451, 462 (1992). We affirm substantially for the reasons expressed by the PCR judge and thereby conclude defendant's contentions lack sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(2). We add only the following brief remarks.

Citing controlling precedent, the PCR judge implicitly recognized that when defendant pled guilty in 2005, applicable professional norms did not require defense attorneys render immigration advice, but if they did, they could not give "wrong advice" or "inaccurate and misleading information." State v. Gaitan, 209 N.J. 339, 373 (2012) (citing State v. Nuñez-Valdéz, 200 N.J. 129 (2009)). One year after our Supreme Court decided Nuñez-Valdéz, the United States Supreme Court imposed upon defense attorneys an affirmative duty to inform their clients of the mandatory deportation consequences attendant to their guilty pleas, when those consequences are "succinct, clear, and explicit." See

Padilla v. Kentucky, 559 U.S. 356, 368 (2010), see also Chaidez v. United States, 568 U.S. 342 (2013). As the PCR judge aptly recognized, however, the affirmative obligation imposed by Padilla announced a new rule of law and is not applied retroactively. See Gaitan, 209 N.J. at 367.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION