

RECORD IMPOUNDED

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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-2300-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BOANERJES CASAMALHUAPA,

Defendant-Appellant.

Submitted May 16, 2022 – Decided May 31, 2022

Before Judges Fasciale and Firko.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 05-10-1323.

Joseph E. Krakora, Public Defender, attorney for appellant (Phuong V. Dao, Designated Counsel, on the brief).

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (Patrick F. Galdieri, II, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from an August 4, 2020 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. Defendant maintains his plea counsel rendered ineffective assistance by purportedly not advising him about the deportation consequences of his guilty plea. Judge Diane Pincus entered the order and rendered a thorough written opinion. We affirm.

The PCR judge determined that defendant failed to demonstrate excusable neglect for waiting eight years after the deadline before filing the petition. See R. 3:22-12(a)(1) (setting a five-year deadline from the judgment of conviction unless the defendant demonstrates excusable neglect or the circumstances set forth in paragraphs (a)(2)(A)-(B) of the rule). But on the merits, the PCR judge pointed out that defendant's plea form reflected he was not a United States citizen, which he corroborated at the plea hearing. And the PCR judge found defendant failed to show he pled guilty due to inaccurate information from plea counsel concerning deportation. At the plea hearing, plea counsel specifically covered deportation consequences:

[Plea counsel]: But you realize that—because you know you are not a U.S. citizen you may be deported as a result of this plea, correct?

Defendant: That is correct.

[Plea counsel]: And I've advised you to consult with an immigration attorney, correct?

Defendant: That is correct.

On appeal, defendant argues:

POINT I

IN THE INTEREST OF JUSTICE, DEFENDANT'S PCR CLAIM WAS NOT TIME[-]BARRED UNDER R[ULE] 3:22-12.

POINT II

BECAUSE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF [PLEA] COUNSEL, HE WAS DENIED A JURY TRIAL, AND THEREFORE, HE IS ENTITLED TO [PCR].

A. [Plea] Counsel Was Ineffective When He Told Defendant That His Guilty Plea Would Not Subject Him To Deportation.¹

POINT III

DEFENDANT HAS MADE A PRIMA FACIE SHOWING OF INEFFECTIVE ASSISTANCE OF COUNSEL, AND THUS, THE PCR [JUDGE] ERRED IN NOT GRANTING AN EVIDENTIARY HEARING.

We affirm substantially for the reasons given by the PCR judge. On the merits, defendant knew the immigration consequences at the time of his December 2005

¹ To comport with our style conventions, we altered the capitalization of defendant's subpoint A. We omitted these alterations for readability.

guilty plea. And as the PCR judge found, defendant has not shown excusable neglect for filing an untimely petition. We add the following remarks.

When a PCR judge does not conduct an evidentiary hearing—like here—we review the PCR judge's factual findings and legal conclusions de novo. See State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016). To establish a prima facie claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test enumerated in Strickland v. Washington, 466 U.S. 668, 687 (1984), which our Court adopted in State v. Fritz, 105 N.J. 42, 58 (1987). Defendant has not met either prong.

To meet the first Strickland/Fritz prong, a defendant must establish that his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687. The defendant must rebut the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." Id. at 689. Thus, we consider whether counsel's performance fell below an objective standard of reasonableness. Id. at 687-88. The record belies defendant's argument that plea counsel did not discuss deportation consequences.

To satisfy the second Strickland/Fritz prong, a defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial

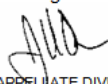
whose result is reliable." 566 U.S. at 687. A defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. "[I]f counsel's performance has been so deficient as to create a reasonable probability that these deficiencies materially contributed to defendant's conviction, the constitutional right will have been violated." Fritz, 105 N.J. at 58. Pertinent here, in the context of plea offers, "a defendant must show the outcome of the plea process would have been different with competent advice." Lafler v. Cooper, 566 U.S. 156, 163 (2012); see also State v. DiFrisco, 137 N.J. 434, 456-57 (1994) (applying Strickland/Fritz for an ineffective-assistance-of-counsel claim regarding a guilty plea).

Finally, a defendant bears the burden of establishing a prima facie claim. State v. Gaitan, 209 N.J. 339, 350 (2012). A defendant is entitled to an evidentiary hearing if the facts viewed "in the light most favorable to defendant," would entitle him to PCR. State v. Marshall, 148 N.J. 89, 158 (1997) (quoting State v. Preciose, 129 N.J. 451, 462-63 (1992)); R. 3:22-10(b). "If, with the facts so viewed, the PCR claim has a reasonable probability of being meritorious, then the defendant should ordinarily receive an evidentiary hearing in order to prove

his entitlement to relief." State v. Jones, 219 N.J. 298, 311 (2014). A defendant must "do more than make bald assertions that he was denied the effective assistance of counsel" to establish a prima facie claim entitling him to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). On this record, defendant did not demonstrate a hearing is warranted.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION