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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4100-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HIOKA N. MYRIE,

Defendant-Appellant.

Submitted January 31, 2022 – Decided April 21, 2022

Before Judges Sumners and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 14-01-0003.

Joseph E. Krakora, Public Defender, attorney for appellant (Abby P. Schwartz, Designated Counsel, on the brief).

Andrew J. Bruck, Acting Attorney General, attorney for respondent (Amanda G. Schwartz, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Hioka N. Myrie appeals from an order denying her petition for post-conviction relief (PCR) following an evidentiary hearing. In a single point, she argues:

THE [PCR JUDGE'S] FINDINGS OF CREDIBILITY WERE INCONSISTENT WITH THE FINDINGS OF FACTS, ALLOWING THE [PCR JUDGE] TO RULE, ERRONEOUSLY, THAT DEFENDANT WAS NOT DEPRIVED OF HER RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE CONSTITUTION.

A. Introduction.

B. Defendant Was Not Properly Informed Of Her Sentence As Part Of The Plea Bargain.

C. Contrary To The [PCR Judge's] Findings, Had [Defendant] Been Aware Of Her Immigration Status, She Would Not Have Entered A Plea Of Guilty.

D. Conclusion.

Because we conclude that defendant was aware she could receive a sentence of incarceration before her guilty plea was accepted by the trial judge and that she was not prejudiced by counsel's misadvice regarding the deportation consequences of her guilty plea, defendant did not prove her trial counsel rendered ineffective assistance and we affirm.

I.

Following a two-year investigation by the New Jersey State Police and the federal Drug Enforcement Agency, culminating in charges against fifteen defendants for various conspiracy and drug trafficking crimes, defendant was indicted on charges of first-degree conspiracy and first-degree distribution or possession with intent to distribute cocaine. According to defendant's trial counsel, the State had a strong case against defendant based upon many wiretapped conversations between her and a co-defendant Kemar Davis implicating her involvement in drug trafficking crimes.

On January 16, 2015, defendant, a Jamaican citizen who had been in the United States for approximately six years through a permanent resident card, entered an open guilty plea to an amended count of second-degree conspiracy to distribute cocaine, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:35-5(b)(1), with the State's agreement to recommend a sentence in the third-degree range and dismiss the first-degree distribution or possession with intent to distribute cocaine charge. Defendant circled "yes" on the plea form to the question asking whether she was pleading guilty to a crime that contains a presumption of imprisonment. The State announced its position at the plea hearing that incarceration of defendant was appropriate. During her plea colloquy with the judge, defendant stated she

understood the State's recommendation that being sentenced in the third-degree range could expose her to up to five years imprisonment.

At sentencing on February 20, 2015, the judge adhered to the plea agreement by imposing a three-year flat prison term. Prior to imposing sentence, the judge corrected trial counsel's statement that there was "no presumption of jail time," explaining "the presumption attaches because [she pled to] a second[-]degree offense." The judge rejected counsel's request that defendant be sentenced to probation. The court noted that defendant may qualify and apply for the Intensive Supervision Program (ISP)¹ to curtail her actual time in prison, to which the State indicated it would not object.

After serving nine months in prison, defendant was accepted into ISP but was not released into the program because the U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE) held a detainer against her for deportation due to her conviction of second-degree conspiracy to distribute cocaine. She was subsequently deported to Jamaica.

¹ ISP is "a post-sentence, post-incarceration program of judicial intervention and diversion back to the community." State v. Clay, 230 N.J. Super. 509, 512 (App. Div. 1989). The program is "between traditional probation and parole but is definitely a product of the judiciary," and in a sense, "is more like probation." Id. at 513.

In May 2016, defendant filed a PCR petition contending her trial counsel did not advise her that she would face mandatory deportation because of her conviction. Defendant maintained counsel assured her that she would "be alright" after counsel spoke to "an immigration friend." She contended also counsel misled her by indicating that she would qualify for ISP, which was inaccurate because a noncitizen cannot participate in the program if he or she has a detainer from immigration authorities. Finally, she contended counsel assured her there was not a presumption of imprisonment for her guilty plea, when in fact there was, as she was given a three-year prison term.

The PCR judge denied relief without an evidentiary hearing. We reversed and remanded for an evidentiary hearing so that "the judge [can] make credibility findings as to whether defendant knew about the presumption of imprisonment and related immigration consequences." State v. Myrie, No. A-1342-16 (App. Div. Feb. 5, 2018) (slip op. at 2).

On remand, a different PCR judge² conducted the evidentiary hearing, where defendant, her husband, and her trial counsel testified. The judge entered an order denying relief for reasons explained in an oral decision.

² The first PCR judge had retired.

II.

To establish ineffective assistance of counsel, the defendant is obligated to show not only the particular way counsel's performance was deficient, but also that the deficiency prejudiced defendant's right to a fair trial. Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 58 (1987). Under the first prong of this test, the defendant must demonstrate that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Under the second prong, the defendant must show that the deficient performance prejudiced the defendant. This requires showing "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Ibid. Because prejudice is not presumed, Fritz, 105 N.J. at 52, a defendant must demonstrate with "reasonable probability" that the result would have been different had trial counsel gave proper advice. Strickland, 466 U.S. at 694.

Where the PCR judge conducts an evidentiary hearing, we must uphold the judge's factual findings, "so long as those findings are supported by sufficient credible evidence in the record." State v. Rockford, 213 N.J. 424, 440 (2013) (quoting State v. Robinson, 200 N.J. 1, 15 (2009)). Additionally, we

defer to the findings that are "substantially influenced by [the trial judge's] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Ibid. (alteration in original).

III

We first address defendant's argument that the PCR judge erred in finding trial counsel was not deficient for failing to advise her she would receive a prison term sentence and misleading her about the possibility of probation. She maintains trial counsel incorrectly told her that her guilty plea carried a presumption of non-incarceration. She argues the PCR judge erred in ruling there was not ineffective assistance of counsel because of contradictory findings of fact. She also asserts the judge incorrectly found both her and trial counsel credible, despite their conflicting testimonies. Conversely, defendant argues the judge's acceptance of trial counsel's testimony was erroneous and not supported by substantial credible evidence. We are unpersuaded.

A defendant's right to effective assistance of counsel applies in the context of plea bargaining. Padilla v. Kentucky, 559 U.S. 356, 373 (2010). To vacate a guilty plea due to ineffective assistance of counsel, "a defendant must show that (i) counsel's assistance was not 'within the range of competence demanded of attorneys in criminal cases,' and (ii) '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) (alteration in original) (citations omitted).

At the evidentiary hearing, defendant testified trial counsel advised her there was no presumption of jail time, she would not go to jail, and she would receive probation. She said she learned for the first time of the presumption of prison time when the sentencing judge corrected trial counsel's remark that there was no presumption incarceration.

Trial counsel painted a different picture, testifying that it was his, defendant's, and the State's understanding that there would be a presumption of incarceration. When asked about his statement at sentencing that there was no such presumption, he said, "that may have been the way it was taken, but I was arguing . . . that I did believe that [defendant] should get probation." He added that he sought probation for defendant because his prior clients received probation despite the same presumption of incarceration.

Ultimately, the PCR judge found:

[Defendant] was informed by both trial counsel and the [trial judge] regarding the presumption of incarceration. Tr[ia]l counsel testified multiple times that he advised [defendant] on the presumption of incarceration that would be applicable under the guilty plea.

Furthermore, [defendant] testified that she understood that sentencing decisions were in the [trial judge's] discretion. Although [defendant] testified that her trial counsel did not . . . advise her on the presumption of incarceration, the [c]ourt finds that the record presented supports the conclusion that trial counsel did advise [defendant] regarding the presumption of incarceration of a guilty plea.

While finding both defendant and trial counsel gave credible testimony, the PCR judge's ruling that defendant was aware there was a presumption she would be incarcerated was supported by sufficient evidence in the plea record. As noted, the State made clear at defendant's plea it was seeking a prison term for defendant; defendant advised the judge that she understood the State was seeking a prison term in the third-degree range, a maximum sentence of five years; and defendant acknowledged on her plea form that there was a presumption of imprisonment for her offense. We are satisfied defendant was not entitled to PCR based on her claim that she was unaware there was a presumption of imprisonment arising from her guilty plea.

IV

Defendant contends trial counsel was ineffective in advising her that ISP was a way to minimize incarceration "because [he] had no idea that the charge that [she] was pleading guilty to would mandate her deportation." Defendant

asserts that "had she known that she was going to be deported, she never would have plead guilty."

We are unpersuaded that counsel gave ineffective advice to defendant regarding her admission into ISP. As the PCR judge correctly reasoned, because defendant was accepted into ISP, trial counsel gave her proper advice. It was the decision of ICE, which neither the trial judge nor trial counsel could influence, to deport defendant after she was admitted into ISP.

V

Finally, we address defendant's contention that she was unaware of the deportation consequences of her guilty plea. The PCR judge found that trial counsel was deficient in not advising defendant that the "risk of [her] deportation from [her] guilty plea was succinct, clear[,] and explicit."³ However, the judge denied defendant relief, finding the deficient advice did not prejudice her because "there was no reasonable probability that [she] would not have pled and insisted on going to trial had she known of the immigration consequences."

³ Under the relevant immigration law, "any alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). The "illicit trafficking in a controlled substance" qualifies as an aggravated felony. 8 U.S.C. § 1101(a)(43)(B).

Defendant argues the judge erred in weighing the evidence and assuming she would have accepted a plea offer resulting in her deportation despite being in this country for some time and intending to raise her young daughter here. Had she been properly informed about the deportation consequences of her plea, defendant claims she would not have pled guilty. She testified trial counsel told her that based upon the State's discovery, she was "going to look really guilty," but she believed she "had a great chance of defending [her]self" and wanted to go to trial, until she was advised her guilty plea would only result in probation. She did not want to leave the United States because she had a young daughter who was born here, a great support system, employment, and opportunities that would not be the same in Jamaica.

When a defendant satisfies the burden of demonstrating that trial counsel's advice "fell below professional norms, the [judge] must then consider whether defendant 'demonstrate[d] that he [or she] would not have pled guilty if he [or she] had been provided with accurate information'" from counsel. State v. Aburoumi, 464 N.J. Super. 326, 342 (App. Div. 2020) (quoting State v. Gaitan, 209 N.J. 339, 351 (2012)). In Aburoumi, this court concluded the defendant would likely not have pled guilty but for his counsel's errors because the State

would have had difficulty proving his culpability beyond a reasonable doubt based on the lack of evidence in the case. Ibid.

Unlike in Aburoumi, the State would not have had difficulty proving the charges against defendant. Trial counsel testified the wiretap transcripts included one conversation between defendant and co-defendant Davis, wherein defendant says she does not want her co-defendant to leave "something" at her house. However, on re-direct, trial counsel testified that was just one of many calls involving defendant, and that he believed there was enough evidence from the transcripts for a jury to find that defendant was aware of what was in the packages and that she was guilty of conspiracy. The PCR judge noted that "[d]uring the evidentiary hearing, incriminating evidence was produced, specifically wiretap[ped] conversations in which [defendant] was recorded discussing some aspects of the conspiracy." Consequently, the judge found defendant's testimony that she had a viable defense "unreasonable" because of the weight of the State's evidence against defendant.

Defendant's plea hearing also indicated she would have likely still pled guilty despite her trial counsel's deficient advice. She testified she understood her plea would subject her to deportation. She further stated she engaged in

conduct that aided the distribution of cocaine, permitted the storage of cocaine at her residence, and it was her voice on the wiretaps.

Defendant fails to explain what her theory of defense would have been if she had gone to trial. Hence, the PCR judge's determination that she had not shown by a reasonable probability that she was prejudiced by trial counsel's failure to advise her of immigration consequences was supported by substantial evidence. Hence, denial of defendant's PCR petition should stand.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION