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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1538-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANIBAL GARCIA-JEREZ,

Defendant-Appellant.

Submitted March 27, 2023 – Decided April 5, 2023

Before Judges Whipple and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Accusation No. 16-09-0969.

Joseph E. Krakora, Public Defender, attorney for appellant (Monique Moyse, Designated Counsel, on the briefs).

Mark Musella, Bergen County Prosecutor, attorney for respondent (William P. Miller, Assistant Prosecutor, of counsel and on the brief; John J. Scaliti, Legal Assistant, on the brief).

PER CURIAM

Defendant Anibal Garcia-Jerez appeals from the denial of his post-conviction relief (PCR) petition. Defendant argues his counsel: (1) failed to advise he was pleading guilty to a second-degree offense; and (2) failed to advise defendant he would be deported as a result of the plea deal. The PCR court denied the petition without a hearing, finding defendant failed to meet his burden to show ineffective assistance of counsel under Strickland.¹ We affirm.

I.

Defendant Anibal Garcia-Jerez was charged with second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(b)(4), for recording his thirteen-year-old sister-in-law bathing, and waived prosecution by indictment.

Defendant pled guilty on September 15, 2016, and was provided with a Spanish interpreter. Defendant initially stated he did not film his sister-in-law for his sexual gratification, as required by the statute, and the State declared the plea unsatisfactory as a result. After consultation with counsel, defendant admitted he did.

At the hearing, defendant and the court discussed the proposed plea agreement on the record:

¹ Strickland v. Washington, 466 U.S. 668 (1984).

[Court:] Do you understand by pleading guilty you'll have a criminal conviction for second-degree endangering the welfare of a child . . . ?

[Defendant:] Yes.

. . . .

[Court:] Are you telling me the truth that you are in fact guilty of committing the crime of second-degree endangering the welfare of a child Are you telling me the truth that you're guilty of committing that crime?

[Defendant:] Yes.

The court confirmed defendant was aware he was pleading guilty to a second-degree crime:

[Court:] After consulting with your attorney and understanding that you have a right to have the evidence in this case submitted to a grand jury for a grand jury to decide whether there's enough to charge you, do you understand that you have a right to have the evidence against you submitted to a grand jury?

[Defendant:] Yes.

[Court:] Do you want to waive your right to have the evidence submitted to a grand jury?

[Defendant:] How does that work? I don't understand that.

[Court:] By waiving your right to have the evidence submitted to the grand jury and proceeding on this accusation you are essentially agreeing that the State

has what's called a prima facie case against you, that there is some evidence of each of the elements of the crime that you are charged with. In order for us to proceed with this case at this stage you would have to waive your right to have the evidence submitted to the grand jury.

Now, that is your decision and your decision alone?

[Defendant:] Yes.

[Court:] Do you want to proceed with your guilty plea today and waive your right to have the evidence submitted to the grand jury?

[Defendant:] Yes.

Defendant's presentence report noted his wife reported him to the police after discovering approximately seventy-nine images and fifteen videos taken between March 13, 2016 and April 2, 2016 depicting her thirteen-year-old sister showering. After his plea, defendant admitted the following at his Avenel exam:

I did it just for the sake of doing it. Maybe I wanted to fool around with her, but I didn't want to do anything bad. Maybe I was going to show her the video when she was [eighteen]. . . . I couldn't help myself and kept on going back each day and recorded her. I told myself I wouldn't do it again.

At sentencing, the court confirmed defendant understood he would be deported as a result of pleading guilty to a second-degree crime:

[Court:] Do you understand that . . . [trial counsel] says that you're going to try to fight the deportation[,] but based upon your plea and my sentence today you will -- there will be a deportation order issued and if you are deported, you will not be able to come back into this country . . . do you understand all of those consequences?

[Defendant:] Yes.

Defendant pled guilty to second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(b)(4). On January 27, 2017, the sentencing court imposed a three-year custodial term at the Adult Diagnostic Treatment Center (ADTC) at Avenel, Megan's Law penalties, a Nicole's Law restraining order, and related fines.

Defendant did not file a direct appeal. However, on June 17, 2021, he filed a pro se PCR. The PCR court held a non-evidentiary hearing on November 9, 2021, and denied the petition. The court noted defendant knew he faced deportation as a result of his guilty plea. The court found nothing in the record to show counsel's representation fell below an objective standard of reasonableness. Defendant appeals and argues the following:

I. [DEFENDANT] IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO INFORM HIM OF THE DEPORTATION AND PENAL CONSEQUENCES OF HIS PLEA.

II.

A judge's decision to deny a PCR petition without an evidentiary hearing is reviewed under an abuse of discretion standard; however, we may review the factual inferences and legal conclusions drawn by the court de novo. State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013) (citing State v. Marshall, 148 N.J. 89, 157-58 (1997)); 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 show: (1) counsel's performance was deficient; and (2) the deficiency prejudiced the defense. Strickland, 466 U.S. at 687; State v. Fritz, 105 N.J. 42, 52 (1987) (adopting Strickland).

There is a strong presumption counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. Further, because prejudice is not presumed, Fritz, 105 N.J. at 52, the defendant must demonstrate "how specific errors of counsel undermined the reliability" of the proceeding, United States v. Cronin, 466 U.S. 648, 659 n.26 (1984).

III.

Defendant argues trial counsel was ineffective because he failed to advise he would be pleading guilty to a second-degree offense and would be deported as a result of his plea. Defendant relies on Padilla v. Kentucky, 559 U.S. 356 (2010), which imposes an affirmative duty on counsel to inform their client about deportation consequences. Defendant also contends there were issues at the plea colloquy: he says he did not understand several questions posed by the court; and his counsel of record was not present at the plea hearing, resulting in him being represented by substitute counsel, who, in defendant's words, "was not invested in making sure [defendant] understood the terms of his plea."

After a thorough examination, the record reveals defendant failed to establish counsel's performance was deficient under the first prong of Strickland. The record shows counsel complied with the affirmative duty requirement in Padilla. Although there is a discussion in the record regarding trial counsel "fighting" the prospective deportation, it does not negate the fact that defendant was informed about potential immigration consequences during his plea colloquy.

During the plea colloquy, the court asked defendant if he understood he would face deportation at the conclusion of his sentence. Defendant answered

"yes." The court next asked defendant if he spoke to an immigration attorney regarding deportation consequences. Defendant responded "yes." The court gave defendant the option to take more time to speak with an immigration attorney. Defendant declined. The court asked defendant again if he understood a deportation order would be entered at the conclusion of his sentence. Defendant stated he did.

The record also shows defendant was aware of his charges. The court asked defendant if he wanted to waive his right to have his case heard by a grand jury. Defendant consented. The court asked defendant if he understood he was pleading guilty to a second-degree offense and defendant said "yes." In addition, defendant indicated his satisfaction with counsel. The court asked defendant: if he had an opportunity to review discovery with counsel; if they discussed the strengths and weaknesses of the case; whether his counsel answered all of his questions; and whether he was satisfied with counsel's representation. Defendant answered "yes" to each question.

Defendant knowingly and voluntarily entered his guilty plea, and the record shows he was aware of both the automatic deportation consequence and his second-degree charges. We find that trial counsel's actions "fell within the wide range of reasonable professional assistance." See Strickland, 466 U.S. at

689-90. In addition, we find defendant failed to prove the allegations he did not understand the plea and its consequences. No evidentiary hearing is merited.

Were defendant able to show ineffective assistance of counsel, the PCR petition would still fail. The second prong of Strickland is not satisfied where defendant has failed to draw the required nexus between the alleged ineffective assistance from counsel and how the alleged errors detract from the reliability of the proceeding. See State v. Drisco, 355 N.J. Super. 283, 290 (App. Div. 2002) (citation omitted).

To the extent that we do not address any argument raised by defendant on appeal, the contention lacks sufficient merit to warrant discussion in this written opinion. R. 2:11-3(e)(1)(E).

Affirm.

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



CLERK OF THE APPELLATE DIVISION