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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1542-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHAN GONZALEZ, a/k/a
JOHAN M. GONZALEZ-
AQUINO, JOHON
GONZALEZ, JOHAN M.
GONZALEZ, JOHAN M.
AQUINO, and MANUEL
AQUINO,

Defendant-Appellant.

Submitted March 29, 2023 – Decided July 7, 2023

Before Judges Mayer and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law
Division, Passaic County, Indictment No. 18-01-0001.

Joseph E. Krakora, Public Defender, attorney for
appellant (Karen A. Lodeserto, Designated Counsel, on
the brief).

Matthew J. Platkin, Attorney General, attorney for respondent (Ashlea D. Newman, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant appeals from the November 18, 2021 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm for the reasons expressed in the oral decision of Judge Marybel Mercado-Ramirez.

I.

In January 2018, defendant was indicted by a Passaic County Grand Jury charged with sixteen offenses, including multiple first-degree charges for murder, felony murder, robbery, as well as various weapons related charges.

In May 2018, pursuant to a negotiated plea agreement and with the assistance of an interpreter, defendant pleaded guilty to third-degree conspiracy to commit theft from a person. The State dismissed the remaining charges and recommended a three-year sentence to be concurrent to any sentence defendant received in a separate indictment in Essex County.¹

At the plea hearing, defendant acknowledged he understood the State's plea offer of a three-year flat prison sentence to run concurrently with any other

¹ On June 5, 2017, defendant pleaded guilty to third-degree theft by unlawful taking under an Essex County indictment.

sentence imposed, and that he faced a maximum of five years imprisonment if he proceeded to trial and was convicted by a jury.

During the plea colloquy, defendant told the judge he was born in Santo Domingo, Dominican Republic. Initially, defendant said he was a citizen. When Judge Mercado-Ramirez asked when defendant became a citizen, he responded he did not know, but his mother was a citizen. Defendant then stated to the "best of his knowledge" he was a citizen. The judge reviewed the plea form and noted in responding to question 17a, defendant stated that he was a United States citizen.

The judge then explained to defendant that, if he was not a citizen, then by entering a guilty plea, he would be "removed from the United States" and would be "stopped from legally entering or reentering the United States." Defendant stated he understood the consequences of a guilty plea as well as his right to speak with an immigration lawyer. When the judge asked defendant if he sought any time to speak with an immigration lawyer, he declined. The judge specifically questioned defendant about the potential immigration consequences of his guilty plea. Defendant again said he understood that if he accepted the plea he would be deported if he was not "legal" or a citizen.

Responding to the judge's questions regarding communications with plea counsel, defendant testified all communications with counsel were in English and he "understood everything." Defendant further testified that he was satisfied with plea counsel's advice and counsel answered all his questions.

After the plea colloquy, the judge accepted defendant's guilty plea, finding he "under[stood] the nature of the charges, the proceedings[,] and the consequences of his [guilty] plea." The judge determined defendant's plea was not "as a result of any threats, promises, or inducements not disclosed on the record." The judge then entered the guilty plea after finding defendant consulted with "competent counsel with whose advice, assistance, and services he[] expressed his satisfaction." The judge acknowledged defendant signed the plea forms, then adopted and incorporated the plea forms into her findings.

In June 2018, Judge Mercado-Ramirez also conducted the sentencing hearing. Defense counsel stated the presentence report was accurate. Both the prosecutor and defense counsel requested that defendant be sentenced in accordance with the plea agreement. The judge sentenced defendant to a three-year prison term, imposed fines and fees, and entered a judgment of conviction. Defendant did not move to vacate his guilty plea before or after sentencing and did not file a direct appeal from his conviction or sentence.

Defendant timely filed a pro se PCR petition. Defendant claimed ineffective assistance of counsel (IAC) because his trial counsel advised that he would lose at trial and face life imprisonment. Defendant claimed he was "forced" and "intimidated" into entering a guilty plea due to his mental issues and family stress. Defendant also argued he was forced to enter a guilty plea because he was charged in a new indictment two years and seven months after the original indictment, and he waited a long period of time for trial. Lastly, he asserted that he was not adequately advised of the immigration consequences as a result of entering the guilty plea.

Following the assignment of PCR counsel, defendant filed an amended petition and supplemental brief. Counsel's brief reiterated the argument presented in defendant's pro se petition that he was not adequately advised of the immigration consequences of his guilty plea. Additionally, defendant claimed trial counsel failed to: engage in meaningful plea negotiations with the State; file pretrial motions; adequately advise defendant of the consequences of his guilty pleas on his immigration status; challenge the State's evidence presented to the grand jury; and "persuade" the State and the court that he was married and the sole provider for his family as mitigating factors at sentencing. Counsel also asserted defendant's claims raised in the PCR petition were not

procedurally barred pursuant to Rules 3:22-4, 3:22-5, or 3:22-12, and defendant established a prima facie case to warrant an evidentiary hearing. Defendant sought a reversal of his conviction, vacation of the sentence, and a new trial or, in the alternative, an evidentiary hearing.

At oral argument on November 18, 2021, defendant limited his request for relief to a remand for an evidentiary hearing. Following oral argument, Judge Mercado-Ramirez rendered an oral decision and entered an order denying defendant's petition without an evidentiary hearing.

The judge concluded defendant failed to satisfy the two-prong test articulated in Strickland v. Washington.² The judge noted under Padilla v. Kentucky³, an attorney's failure to advise a non-citizen client that a criminal conviction may lead to deportation was sufficient to satisfy the first prong of the Strickland test. She further noted a review of defendant's plea forms in the Essex County matter he also indicated that he was citizen. The judge concluded defendant failed to show plea counsel's representation was deficient.

² 466 U.S. 668, 687 (1984) and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987).

³ 559 U.S. 356, 369 (2010).

The judge next addressed the second prong and defendant's assertion that he would not have pleaded guilty if he had known he would be deported. The judge again cited defendant's signed plea forms and the plea hearing transcript which indicated defendant understood the possibility he could be deported. She reasoned the plea transcript revealed defendant reviewed the plea forms with counsel with the assistance of a Spanish interpreter despite stating he could read, write, and understand English and declined to complete the plea forms in Spanish. The judge recognized defendant faced "devastating immigration consequences" because he pleaded guilty; however, he had not "demonstrated [] a reasonable probability that but for counsel's alleged failure to advise him, the outcome would have been different." The judge also noted defendant elected to forego his right to a jury trial since he entered the plea before jury selection was set to begin. The judge concluded that a rejection of the plea offer by defendant would not have been rational under the circumstances.

The judge also rejected defendant's argument that he was "forced" and "pressured" into accepting the plea offer because he was "stressed" by his mental health, the superseding indictment, his mother's "poor health," and family issues. The judge found defendant did not present any evidence in support of his claim that counsel forced him to enter into a plea. The judge stated, "While the [c]ourt

[was] sympathetic to [defendant's] situation, his personal circumstances in the superseding indictment had nothing to do with [counsel's] representation." The judge found counsel's "only contribution to these circumstances was allegedly advising the petitioner not to go to trial." She also noted jury selection was set to begin and defendant was aware of his right to go to trial and he "chose to forego" that right. The judge concluded defendant "took the plea bargain because it was a good offer and spared him from facing the possibility of a significant term of imprisonment."

The judge also found defendant's argument that "competent counsel" would have persuaded the court to weigh the mitigating facts heavily in defendant's sentence unpersuasive. Although trial counsel failed to argue mitigating factors at sentencing, such failure did not mean trial counsel was deficient. Based on defendant's certification, it was "unlikely" trial counsel was aware of defendant's familial circumstances at the time of sentencing. In the pre-sentence report, defendant stated he had one child who resides in Puerto Rico with his mother. In his certification in support of the PCR petition, defendant provided no information regarding the number of children, the ages of the children, or whether his spouse or children were employed.

The judge also rejected defendant's argument that she should have considered defendant's status as the main provider for his family at the time of sentencing. The judge stated defendant had been unemployed for over four months prior to his arrest, was not the primary caregiver, did not have any open child support cases, and lived apart from the child and the child's mother. Defendant also lived with his mother and brother. The judge concluded "it [was] unclear if [defendant was] being truthful about his familial circumstance based on [those] inconsistencies." The judge further concluded even if such arguments had been made at sentencing, the ultimate sentence would not have changed given the totality of the circumstances. Thus, there was no prejudice to defendant.

II.

On appeal, defendant raises the following arguments:

POINT ONE

THE PCR COURT ERRED IN DENYING [DEFENDANT'S] PETITION FOR POST-CONVICTION RELIEF WITHOUT GRANTING AN EVIDENTIARY HEARING AS TESTIMONY IS NEEDED FROM PRIOR COUNSEL TO DETERMINE THE SUBSTANCE OF HIS ADVICE TO [DEFENDANT] REGARDING THE IMMIGRATION CONSEQUENCES OF ACCEPTING THE GUILTY PLEA.

POINT TWO

THE PCR COURT ERRED IN DENYING [DEFENDANT'S] PETITION FOR POST-CONVICTION RELIEF WITHOUT GRANTING AN EVIDENTIARY HEARING AS TESTIMONY IS NEEDED FROM PRIOR COUNSEL REGARDING WHY HE PRESSURED [DEFENDANT] TO PLEAD GUILTY.

POINT THREE

THE PCR COURT ERRED IN DENYING [DEFENDANT'S] PETITION FOR POST-CONVICTION RELIEF WITHOUT GRANTING AN EVIDENTIARY HEARING AS PRIOR COUNSEL WAS INEFFECTIVE AT SENTENCING.

POINT FOUR

THIS MATTER MUST BE REMANDED FOR THE APPOINTMENT OF NEW PCR COUNSEL AS SUPPORT WAS NOT PROVIDED FOR [DEFENDANT'S] ARGUMENTS REGARDING DEPORTATION, LEAVING THE PCR COURT UNABLE TO PROPERLY ADDRESS THIS ISSUE.
(not raised below)

Applying these principles, we discern no abuse of discretion in Judge Mercado-Ramirez's denial of defendant's PCR petition without an evidentiary hearing, and we affirm for the reasons stated in the judge's well-reasoned oral opinion. We add only the following comments.

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 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). Our "standard of review is necessarily deferential to a PCR court's factual findings," and findings "supported by sufficient credible evidence in the record" should be upheld. State v. Nash, 212 N.J. 518, 540 (2013).

To establish a claim of IAC, a defendant must satisfy the two-prong test articulated in Strickland, 466 U.S. at 687; Fritz, 105 N.J. at 58. First, a defendant must show counsel's performance was deficient, such that his or her performance falls below an objective standard of reasonableness. Strickland, 466 U.S. at 687. Second, a defendant must show counsel's deficient performance prejudiced the case, which requires demonstrating a reasonable probability that the result of the proceeding would have been different but for counsel's performance. Id. at 694.

A defendant is not automatically entitled to an evidentiary hearing by simply raising a PCR claim. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). To sustain the burden, defendant must present legally competent evidence rather than mere "bald assertions." Id. at 170. "[A] defendant must

allege specific facts and evidence supporting [their] allegations." State v. Porter, 216 N.J. 343, 355 (2013). "Defendant must demonstrate a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits." R. 3:22-10(b). An evidentiary hearing is required only when: a defendant establishes a prima facie case in support of PCR; the court determines there are material issues of disputed fact that cannot be resolved by a review of the existing record; and the court finds an evidentiary hearing is required to resolve the claims asserted. Id. at 354 (citing R. 3:22-10(b)).

The Strickland/Fritz two-part test applies to a PCR petition challenging a guilty plea based on an IAC claim. The second prong is satisfied when defendant demonstrates a "reasonable probability that, but for counsel's errors, [the defendant] would not have [pleaded] guilty and would have insisted on going to trial." State v. Nunez-Valdez, 200 N.J. 129, 139 (2009) (first alteration in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)); see also State v. McDonald, 211 N.J. 4, 30 (2012). Additionally, the defendant must establish that a "decision to reject the plea bargain would have been rational under the circumstances." State v. Maldon, 422 N.J. Super. 475, 486 (App. Div. 2011) (quoting Padilla, 559 U.S. at 372).

Failure to meet either prong of the Strickland/Fritz test results in the denial of a petition for PCR. State v. Parker, 212 N.J. 269, 280 (2012) (citing State v. Echols, 199 N.J. 199, 358 (2009)). That said, "courts are permitted leeway to choose to examine first whether a defendant has been prejudiced, and if not, to dismiss the claim without determining whether counsel's performance was constitutionally deficient." State v. Gaitan, 209 N.J. 339, 350 (2012) (citation omitted) (citing Strickland, 466 U.S. at 697).

Applying these principles, we discern no abuse of discretion in the judge's decision denying defendant's PCR petition without an evidentiary hearing. The record fails to support defendant's conclusory assertions. Defendant eventually admitted he was not born in the United States, but misrepresented during the plea colloquy and on the signed plea forms that he was a United States citizen. The judge twice confirmed, and defendant twice acknowledged that he understood that his guilty plea "may" result in his removal and prohibit him from legally entering or re-entering the United States. Defendant declined the judge's allowing him an opportunity to consult with an immigration attorney regarding the consequences of his guilty plea. Based on the plea colloquy, defendant's guilty plea was knowing and voluntary.

Moreover, defendant failed to demonstrate he would not have pleaded guilty but for his attorney's alleged misadvice. Here, defendant offers nothing more than bald assertions that trial counsel failed to investigate his citizenship status, confirm defendant's certainty as to his immigration status, and use a Spanish interpreter to communicate with defendant throughout the proceedings. We reject defendant's contention that plea counsel was responsible for confirming defendant was a citizen or investigating defendant's mistaken belief about his immigration status.

We are satisfied defendant was properly advised of the possibility of deportation before pleading guilty during his plea hearing. As such, he is unable to establish a prima facie case of IAC under either of the Strickland/Fritz prongs. Accordingly, he was not entitled to an evidentiary hearing.

Similarly, we conclude defendant's contention that he was "forced" or "pressured" into pleading guilty is without merit. Defendant proffered no evidence to support such a claim.

Additionally, we are not persuaded plea counsel failed to argue certain mitigating factors at the sentencing hearing. Under N.J.S.A. 2C:44-1(b)(11), in reviewing the aggravating and mitigating factors at sentencing, the sentencing judge should consider whether "[t]he imprisonment of the defendant would

entail excessive hardship to himself or his dependents." While a sentencing judge should consider these mitigating factors, they need only do so when there is credible evidence in the record to support those factors. State v. Dalziel, 182 N.J. 494, 504-05 (2005).

Contrary to defendant assertions, plea counsel relied on defendant to provide facts that would support any mitigating factors. State v. DiFrisco, 174 N.J. 195, 228 (2002). In the presentence report and during the sentencing hearing, defendant stated he had one child who lived with his mother in Puerto Rico, there were no open child support cases against him, and he had been unemployed for four months prior to his arrest. Thus, defendant failed to satisfy Strickland's second prong that plea counsel was ineffective at sentencing; and, for that reason, the PCR court correctly rejected the claim. See Gaitan, 209 N.J. at 350. We discern no abuse of discretion in the judge concluding counsel's performance was not deficient and the outcome at sentencing would not have been different.

Lastly, defendant claims his PCR counsel was ineffective because counsel failed to provide support for defendant's arguments regarding deportation. We are not persuaded. R. 3:22-6(d). Defendant made no showing there were any meritorious arguments PCR counsel failed to make on his behalf and therefore

failed to demonstrate that PCR counsel's performance was deficient or that he suffered any prejudice as a result of any error by PCR counsel. The judge thoroughly and accurately addressed defendant's contentions, and the arguments raised on appeal, which are identical to the ones rejected by the judge.

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

Affirmed.

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



CLERK OF THE APPELLATE DIVISION