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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2922-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARCOS A. CASTILLO-
HIDALGO,

Defendant-Appellant.

Submitted April 19, 2023 – Decided July 3, 2023

Before Judges Firko and Natali.

On appeal from the Superior Court of New Jersey, Law
Division, Morris County, Accusation No. 19-04-0313.

Joseph E. Krakora, Public Defender, attorney for
appellant (Andrew R. Burroughs, Designated Counsel,
on the brief).

Robert J. Carroll, Morris County Prosecutor, attorney
for respondent (Paula Jordao, Assistant Prosecutor, on
the brief).

PER CURIAM

Defendant Marcos A. Castillo-Hidalgo appeals from the May 3, 2020 order denying his post-conviction relief (PCR) petition following an evidentiary hearing. He claims the court erred by finding he did not establish his trial counsel was ineffective by misleading him as to the immigration consequences of entering a guilty plea, and therefore, his plea was not knowingly, voluntarily, and intelligently made. We affirm the challenged order albeit for different reasons than those expressed by the PCR court.

I.

On October 16, 2018, defendant was arrested on a complaint warrant 1436-W-2018-000310 and charged with second-degree possession of cocaine with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(2) (count one); third-degree possession of cocaine, N.J.S.A. 2C:35-10(a)(1) (count two); third-degree money laundering, N.J.S.A. 2C:21-25(a) (count three); and disorderly persons possession of drug paraphernalia, N.J.S.A. 2C:36-2 (count four). He retained trial counsel to contest the charges, file a suppression motion, and proceed to trial, if necessary.

Defendant emigrated to this country from the Dominican Republic in 1992 when he was nine years old. He has been a lawful permanent resident for over twenty-five years and has three minor children who were born in the United

States and who continue to live here. Prior to his arrest, he worked as a truck driver to support his family.

In August 2018, a confidential informant (CI) notified Detective Sergeant Adam DelGuercio of the Roxbury police department that a man known as Francis Kennedy was selling cocaine obtained from two different sources. One of the sources was identified as defendant. The CI described an individual, later identified as defendant, as a Hispanic male, thirty to forty years old, who drove a black Lincoln vehicle, and sold cocaine for \$50 per gram. The CI agreed to assist police with a controlled buy of a controlled dangerous substance (CDS) from defendant through a meeting arranged by Kennedy. Defendant was observed by officers driving to a designated location and meeting with the CI, who purchased cocaine from defendant. The CI turned over what was purchased from defendant, which was field tested, and confirmed as cocaine.

The following month, the CI again agreed to assist police with a second controlled buy of a CDS, but this time, the CI contacted defendant directly. Defendant told the CI to contact Kennedy to set up a time for the buy to occur. Kennedy made the arrangements, and defendant met the CI and sold him cocaine. A third controlled buy between the CI and defendant took place in late September 2018, and a fourth controlled buy took place in October 2018. The

police conducted mobile surveillance of defendant's Lincoln and observed his conduct was what was believed to be hand-to-hand CDS transactions in Mount Arlington, the Rockaway mall, and Dover.

On October 10, 2018, a search warrant was obtained for defendant's person and vehicle. Five days later, the search warrant was executed, and \$1,940 was seized from defendant's person. He was transported to police headquarters and admitted to the officers that his Lincoln had a hidden trap the size of a shoebox located inside the center console armrest area. From the trap, officers seized forty grams of cocaine, ten small Ziploc baggies of cocaine, a large number of empty baggies, a digital scale, two socks filled with rice, \$2,000 in cash, and a cellular phone. Defendant stated to the officers that he had been selling cocaine for about eight months to pay for his son's baseball expenses.

On April 15, 2019, defendant pled guilty to count one of Morris County Accusation 19-04-0313-A, second-degree possession of cocaine with intent to distribute. During his plea colloquy, defendant testified that he reviewed the Accusation, understood its terms, was not forced, threatened, or coerced to sign the waiver of indictment, had ample time to speak to his counsel, and was satisfied with counsel's services. In addition, defendant stated he initialed and signed the plea and supplemental plea forms, he understood the forms, and

answered the questions after conferring with trial counsel. Defendant acknowledged that he discussed the charges, discovery, potential pre-trial motions, and defenses with trial counsel. Defendant testified he was advised of the consequences of his plea and the presumption of imprisonment for the crime to which he pled guilty. Defendant acknowledged that his guilty plea might result in deportation, and he discussed the potential immigration consequences of his guilty plea with an immigration attorney named Paul N. Gilbert. The State dismissed the remaining charges (counts two, three, and four of the complaint warrant) and motor vehicle offenses.¹

At the time of defendant's plea allocution, the State did not take a position on whether it would consent or object to Drug Court as an alternative sentence. Ten days later, defendant applied to the Drug Court Program as a Track I applicant. In connection with his application, defendant underwent a substance abuse evaluation, which determined he manifested symptoms of "severe cocaine use disorder" and "moderate alcohol use disorder." The evaluator recommended defendant attend Level I outpatient services.

¹ Defendant was also charged with following too closely, N.J.S.A. 39:4-89, and unsafe lane change, N.J.S.A. 39:4-88(b).

On July 2, 2019, based on the substance abuse evaluation, the State objected to defendant's admission into the Drug Court program because he was ineligible as factors N.J.S.A. 2C:35-14(a)(3),² and N.J.S.A. 2C:35-14(a)(9)³ could not be established. On July 5, 2019, the Drug Court team rejected defendant's application into the program, concluding he was legally ineligible to be sentenced to a term of special probation. The court found defendant "would pose a danger to the community" under N.J.S.A. 2C:35-14(a)(9).

On October 18, 2019, the sentencing court confirmed defendant was ineligible for Drug Court special probation because he "would pose a danger to the community" as defined by the Drug Court manual. The court sentenced defendant to three years' imprisonment on count one. The remaining counts and motor vehicle violations were dismissed. Defendant did not file a direct appeal of his conviction or sentence.

² N.J.S.A. 2C:35-14(a)(3) states a defendant can only be sentenced to Drug Court as a Track I applicant if a sentencing court finds that "the present offense was committed while the person was under the influence of a [CDS], controlled substance analog or alcohol or was committed to acquire property or monies in order to support the person's drug or alcohol dependency[.]"

³ N.J.S.A. 2C:35-14(a)(9) states a defendant can only be sentenced to Drug Court as a Track I applicant if a sentencing court finds that "no danger to the community will result from the person being placed on special probation pursuant to this section."

On December 2, 2020, defendant's PCR counsel, Elliot H. Fuld, filed a PCR petition comprised of certifications authored by Fuld, defendant, trial counsel, and immigration counsel Marissa Prianti. Fuld certified that defendant "made it very clear" to trial counsel that he "needed his help and guidance to ensure that he was not deported" for the sake of his children. Fuld asserted that trial counsel's "strategy" was to have defendant enter a guilty plea and contemporaneously apply to "Drug Court." According to Fuld, trial counsel advised defendant that "successful completion of 'Drug Court'" would lead to any guilty plea and conviction being "expunged." Fuld certified that trial counsel told defendant he "was a lock to get into Drug Court;" completion of the program would allow his conviction to be expunged; and "he could not be deported."

Fuld contended that trial counsel misinformed defendant about the consequences of his guilty plea to a drug offense, and trial counsel's advice that participation in a diversionary program would prevent defendant from being deported was "dead wrong." Fuld certified that had defendant been properly informed that his conviction alone would cause his deportation, defendant would have filed a suppression motion to defend the unlawful search and seizure that

may have occurred and proceeded to trial. Fuld requested defendant's plea be vacated and he be afforded the opportunity to defend the charges against him.

In his certification in support of PCR, defendant stated he emphasized to trial counsel that he did not want to be deported. Defendant certified trial counsel disclosed that he met with the prosecutor about a "deal" whereby defendant would waive his rights to a suppression hearing and a jury trial, and instead, plead guilty to second-degree possession with intent to sell a CDS. Defendant was advised by trial counsel the prosecutor would agree to have the court sentence him as a third-degree offender and a "three year flat" term.

Defendant stated trial counsel's strategy was to contemporaneously have defendant apply to Drug Court in the hopes that successful completion of the program would permit his guilty plea and conviction to be expunged. Because defendant's "primary concern" was the effect that a guilty plea would have on his immigration status, defendant certified he consulted an immigration attorney, whose name he did not recall,⁴ who expressed "reservations" about trial counsel's proposed plea deal, and the potential adverse immigration consequences that defendant might face even if Drug Court was approved.

⁴ The immigration attorney is Gilbert.

Defendant certified he later learned that according to federal immigration laws, an expungement after a guilty plea "accomplishes nothing" to prevent deportation, regardless of any participation in a diversionary program, such as Drug Court. Defendant claimed trial counsel either "misunderstood" or was "ignorant" of the law on this issue, thereby establishing a prima facie case of ineffective assistance of counsel. Defendant claimed that if he had been properly advised, he would not have entered a guilty plea and proceeded to trial.

Trial counsel submitted a certification in support of defendant's PCR. Trial counsel certified he was aware defendant was not a United States citizen, and a conviction for the CDS charges would result in his deportation. In negotiating a plea agreement, trial counsel stated he was "aware defendant needed to remain in the United States," because his three minor children were born here. Trial counsel advised defendant he had "an excellent chance of being admitted to the Drug Court program," and if he successfully completed the program, "he would not be subjected to deportation or any adverse immigration consequences." Based on this misunderstanding, trial counsel "recommended" defendant accept the plea offer.

Trial counsel certified he referred defendant to Gilbert, and the two met. Trial counsel sent a letter to Gilbert introducing defendant but did not mention

his "strategy" to obtain defendant's admission to Drug Court and upon completion of the program, expunge the conviction "thus saving defendant from adverse immigration consequences." Trial counsel stated he was not present at the meeting, but he spoke to Gilbert before and after the meeting and "at no time" did Gilbert explain to trial counsel that defendant's successful completion of the Drug Court program, and an expungement of the charges, could "still be used against [defendant] in his deportation hearing." It was not until November 2020, after reading Prianti's certification regarding the application of immigration law to defendant's case, did trial counsel understand defendant's conviction rendered him "deportable pursuant to Immigration and Nationality Act [INA][] § 237(a)(2)(A)[,] for conviction of an aggravated felony." See 8 U.S.C. § 1227(a)(2)(A). Trial counsel certified that at his plea allocution defendant "honestly" answered that he understood the conviction could result in his deportation based on the erroneous advice trial counsel gave him.

Prianti also submitted a certification in support of defendant's PCR. Prianti opined that defendant's guilty plea rendered him "deportable" under: "(1) INA § 237(a)(2)(B)(i) for a conviction relating to a CDS (other than a single offense involving possession for one's own use of [thirty] grams or less of marijuana); and (2) INA § 237(a)(2)(A)(iii) for conviction of an aggravated

felony." Prianti opined that regardless of defendant's participation in any diversionary program or later expungement of his criminal record, defendant is deemed convicted of an aggravated felony and is "ineligible for EOIR-42A[1] Cancellation of Removal For Certain Permanent Residents."⁵ Thus, Prianti certified that trial counsel's advice to defendant was "simply wrong" on this issue and "constituted ineffective assistance of counsel."

On March 18, 2021, the PCR court heard oral argument on defendant's PCR petition and reserved decision. On June 1, 2021, the PCR court entered an order scheduling the matter for an evidentiary hearing. In its accompanying statement of reasons, the PCR court applied both prongs of the Strickland⁶ two-part test, adopted by our Supreme Court in Fritz.⁷ The PCR court concluded that when applying both prongs of the Strickland test, defendant established a prima facie case that trial counsel's performance fell below an objective standard of reasonableness and because of his defective performance, defendant was prejudiced. Because the PCR court determined "certain specifics" were not clear from the certifications, an evidentiary hearing was required.

⁵ EOIR stands for "Executive Office for Immigration Review."

⁶ Strickland v. Washington, 466 U.S. 668, 687 (1984).

⁷ State v. Fritz, 105 N.J. 42, 58 (1987).

On May 3, 2022, the PCR court conducted an evidentiary hearing. Defendant testified on his own behalf. Defendant also called trial counsel and Prianti to testify. The State called Gilbert to testify. Each witness essentially reprised the facts and opinions contained in their respective certifications.

Defendant testified that trial counsel advised him that if he pled guilty to a third-degree offense, counsel would get him into a drug program and five years later, his conviction would be expunged. According to defendant, he did not ask Gilbert about any immigration consequences of participating in Drug Court. Defendant testified that Gilbert advised him he would have immigration consequences if he pled guilty to a second-degree CDS offense with third-degree sentencing, but trial counsel assured him that completion of Drug Court and expungement of his record would obviate any immigration consequences. Defendant stated that had he been properly advised, he would have not entered a guilty plea and would have proceeded to trial.

Trial counsel testified he "made it clear" to defendant that "he would not render any opinions regarding immigration." Trial counsel was evasive when asked if Drug Court would have affected defendant's immigration status, and he denied advising defendant that by entering Drug Court, he would "avoid immigration consequences." Trial counsel testified he expected defendant to

discuss "all immigration issues" with Gilbert, and trial counsel did not provide defendant any immigration related advice.

Gilbert testified about his immigration law experience and counseling clients about immigration consequences that may result from their criminal charges. Although Gilbert did not recall the specific advice he gave defendant at their meeting, he testified that for any legal permanent resident client about to plead guilty to second-degree possession of a CDS with intent to distribute, "in all likelihood," he would have told them they would be deported. Gilbert also testified that "under the immigration laws, an admission to the essential elements of a crime is equivalent to a conviction and a subsequent expungement of those charges would not erase that conviction," and successful completion of Drug Court would not extinguish the guilty plea. Gilbert testified that based upon his custom and practice, he typically would call the referring attorney to inform them of his advice. Gilbert testified he would have told trial counsel that defendant's "conviction would still be there after the expungement for immigration purposes."

The PCR court rendered an oral opinion at the conclusion of the hearing and made credibility findings. The PCR court found trial counsel's performance was not deficient since he "achieved a reasonably good result in a serious case

and brought in an outside attorney [Gilbert] for consultation in an area where he didn't have expertise." The PCR court noted the "case was essentially indefensible," and nothing in the record suggested that a motion to suppress would have been successful.

Turning to defendant's plea colloquy, the PCR court pointed out defendant admitted to his crimes and responded in the affirmative when the plea court asked defendant whether he reviewed his plea form answers with counsel. The PCR court stated the record showed defendant was asked if he understood that his guilty plea may result in his removal from the United States or stop him from reentering the country and defendant responded, "yes, sir." The PCR court noted defendant's immigration attorney answered all of his questions and that Gilbert's testimony was "straightforward and credible" as to his expertise in immigration matters and criminal matters.

The PCR court concluded trial counsel was not ineffective, and defendant did not receive affirmative misadvice regarding the potential immigration consequences of his guilty plea. Finally, the PCR court determined defendant was successful in accepting the plea deal, which provided for a downgraded charge and sentence, and an opportunity to get probation rather than a jail term

"for what is not a trivial drug case." The PCR court denied defendant's petition for PCR and entered a memorializing order.

On appeal, defendant argues the following point:

AS TRIAL COUNSEL MATERIALLY MISLED
DEFENDANT AS TO THE IMMIGRATION
CONSEQUENCES OF ENTERING A GUILTY PLEA,
DEFENDANT'S PLEA WAS NOT KNOWINGLY,
VOLUNTARILY, AND INTELLIGENTLY MADE.

II.

Our review of a PCR claim after a court has held an evidentiary hearing "is necessarily deferential to [the] court's factual findings based on its review of live witness testimony." State v. Nash, 212 N.J. 518, 540 (2013). We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004). The de novo standard of review also applies to mixed questions of fact and law. Id. at 420 (citing McCandless v. Vaughn, 172 F.3d 255, 265 (3d Cir. 1999)).

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; Fritz, 105 N.J. at 52. Where the PCR involves a plea bargain, "a defendant must prove that there is a reasonable probability that, but for counsel's errors, [they] would not

have pled guilty and would have insisted on going to trial." State v. Gaitan, 209 N.J. 339, 351 (2012) (alteration in original) (quoting State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009)).

A defendant can establish ineffective assistance of counsel if their attorney provided false or inaccurate advice that the plea would not result in deportation. Nuñez-Valdéz, 200 N.J. at 139-42. The United States Supreme Court held a petitioner may meet the first Strickland prong by showing that their attorney made misrepresentations, either affirmatively or by omission, regarding the potential immigration consequences flowing from a guilty plea. Padilla v. Kentucky, 559 U.S. 356, 369-71 (2010).

When deportation is a clear consequence of a guilty plea, the defendant's counsel has an affirmative duty to address the subject and give correct advice. Id. at 374; see also State v. Chau, 473 N.J. Super. 430, 444 (App. Div. 2022) (stressing in post-Padilla pleas, plea counsel was obligated to advise the client regarding the risk of deportation). When the deportation consequences of a plea are uncertain, counsel need only advise their client that the plea may carry a risk of adverse immigration consequences. Id. at 369. Padilla does not apply retroactively. Gaitan, 209 N.J. at 373; Chaidez v. United States, 568 U.S. 342, 358 (2013). Under Nuñez-Valdéz, a defendant's claim of ineffective assistance

of counsel fails when they do not present any evidence of mistaken advice, and the defendant had been on notice of the potential immigration consequences of the plea. Gaitan, 209 N.J. at 375-76.

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).

Here, defendant contends that he unwittingly pled guilty to a CDS charge post-Padilla because he detrimentally relied on trial counsel's misadvice about the certainty of being accepted into the Drug Court program and that acceptance would have no immigration consequences. Defendant claims that based on that incorrect advice, he faces the threat of deportation at any time. Defendant also asserts that based upon trial counsel's misadvice, his plea was not entered into knowingly, intelligently, and voluntarily. State v. Johnson, 182 N.J. 232, 236 (2005).

Based upon our de novo review of the record, we part company with the PCR court's finding that defendant failed to establish ineffective assistance of

counsel under the first Strickland prong. There is no reason to doubt that defendant wanted to avoid deportation, which is always "a particularly severe penalty." Padilla, 559 U.S at 365. Trial counsel's performance was deficient under Padilla and Núñez-Valdéz because his certification and testimony clearly show he improperly advised defendant that if he pled guilty and was accepted into Drug Court, his conviction would ultimately be expunged, and he would not be deported. Although trial counsel's advice was conditioned on actions beyond his control, such as defendant's admittance to Drug Court and a potential expungement, it was nonetheless incorrect and improperly informed defendant's consideration to plead guilty.

Prianti unequivocally certified and testified that even if defendant completed a Drug Court program and had his criminal record expunged, he would have faced immigration consequences—denial of relief and deportation. Prianti explained defendant presently had a removal order in place, and once an individual is convicted of an aggravated felony under the INA, that individual is "barred" from "42A relief" in the form of cancellation of removal. See 8 U.S.C. § 1227(a)(2)(A); 8 U.S.C. § 1229b(a)(1) - (3). In addition, Prianti testified that defendant "needed to be advised of that fact." Although Drug Court may have helped defendant from a "discretionary perspective," 8 U.S.C. §

1229(b), the guilty plea itself would still render defendant "statutorily ineligible for the 42A cancellation." Prianti highlighted that "the threshold issue is statutory eligibility," and discretion is "obviously a secondary issue."

On cross-examination, Prianti testified that "as soon as the immigration judge learned that defendant had been convicted of an aggravated felony" as defined by the INA, the immigration judge found defendant was "statutorily ineligible for cancellation of removal for certain permanent residents," and "[n]othing else was looked at." But for trial counsel's misadvice, defendant would have known and understood that accepting the plea agreement would certainly lead to deportation. Based on the substantial credible evidence in the record and Prianti's unrebutted testimony on the relevant immigration issues and law, we conclude that trial counsel gave incorrect advice to defendant, which fell below the objective standards of reasonableness and that the first prong of the Strickland test was met.

However, even though we conclude defendant's proofs established that trial counsel's performance did not meet the objective standard of reasonableness required for competent counsel, defendant nonetheless failed to establish Strickland's second prong. The second prong is satisfied by a defendant's showing that "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." State v. Castagna, 187 N.J. 314, 315 (2006) (quoting Strickland, 466 U.S. at 694).

That second prong—"that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,"—State v. Loftin, 191 N.J. 172, 197-98 (2007), is an exacting standard. "The error committed must be so serious as to undermine the court's confidence in the jury's verdict or the result reached." Castagna, 187 N.J. at 315 (citation omitted). When the United States Supreme Court extended the right to counsel to the plea stage, Hill v. Lockhart, 474 U.S. 52, 106 (1985), it held the same two-prong Strickland test applied.

In the context of a PCR petition challenging a guilty plea based on the ineffective assistance of counsel, the second prong of the Strickland standard is established when the defendant demonstrates a "reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial," Núñez-Valdéz, 200 N.J. at 139 (alteration in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994)), and that "a decision to reject the plea bargain would have been rational under the circumstances," Padilla, 559 U.S. at 372. Defendant failed to satisfy that burden here.

As the PCR court correctly found, and defendant effectively concedes, he had no defense to the charges here and a guilty verdict was a near certainty and would have resulted in the same immigration and deportation consequences defendant now faces, along with a lengthy custodial term. Given the abundance of evidence against defendant: the four controlled buys between him and the CI; police mobile surveillance of hand-to-hand CDS transactions in multiple locations; \$1,940 being found on his person; defendant's admission to having a trap in his Lincoln at the time of his arrest containing over forty grams of cocaine; and paraphernalia indicative of drug distribution, such as ten small baggies of cocaine, large empty baggies, a digital scale, two socks filled with rice, and a cellular phone, we are convinced the record is devoid of any evidence establishing a reasonable probability defendant would not have pled guilty and would have insisted on going to trial on at least one of [the] offenses, or that it would have been rational for him to have done so. Padilla, 559 U.S. at 372; Nuñez-Valdéz, 200 N.J. at 139. Defendant therefore failed to satisfy his burden of establishing Strickland's second prong, and for that reason, the court correctly denied his PCR petition.

To the extent that we do not address any argument raised by defendant on appeal, we find they lack sufficient merit to warrant discussion in this written opinion. 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