

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

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-3221-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANTIONETTE P. STEPHEN,

Defendant-Appellant.

Submitted January 18, 2023 – Decided February 9, 2023

Before Judges Messano and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Indictment No. 12-06-0665.

Joseph E. Krakora, Public Defender, attorney for appellant (Richard Sparaco, Designated Counsel, on the brief).

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

PER CURIAM

Defendant Antoinett Stephen appeals from the order denying her petition for post-conviction relief (PCR) without an evidentiary hearing. Defendant was indicted with her paramour, Kashif Parvaiz, for the murder of Parvaiz's wife, Nazish Noorani. State v. Parvaiz, No. A-5029-14 (App. Div. June 18, 2018) (slip op. at 1–2). We explained defendant's and Parvaiz's conspiracy in our prior opinion.

After sunset, [Parvaiz] and Noorani went for a walk, with [Parvaiz] pushing their youngest son in a stroller. Pursuant to an elaborate scheme hatched months earlier, [defendant] lay in wait, armed with two different handguns. She approached, shot and killed Noorani, then shot and wounded [Parvaiz] to make it appear as if the assault were a robbery.

[Id. at 2.]

Pursuant to a plea agreement, defendant pled guilty to murder, conspiracy to commit murder, unlawful possession of a weapon, and possession of a weapon for an unlawful purpose, and testified against Parvaiz at trial.

On June 5, 2015, the judge sentenced defendant on the murder conviction to imprisonment for thirty years with a thirty-year period of parole ineligibility under the No Early Release Act, N.J.S.A. 2C: 43-7.2. The judge imposed either concurrent sentences on the remaining counts or merged them into the murder conviction. Defendant filed but later withdrew a direct appeal.

Defendant filed a PCR petition on July 17, 2020, alleging, among other things, ineffective assistance by the two attorneys representing her at the time of her guilty plea.¹ In her brief, defendant's appointed PCR counsel explained that plea counsel failed to advise defendant she would face mandatory deportation as the result of her guilty plea. PCR counsel claimed that defendant faced "probable death" if deported to India, however, defendant only sought "a lesser sentence," which would allow defendant to fight deportation and remain in the United States after completing her sentence.

The State argued that when she pled guilty, the judge offered defendant the opportunity to speak with an immigration attorney, but defendant waived her right on the record. Further, the State noted that when defendant testified at Parvaiz's trial, she acknowledged understanding the deportation consequences of her guilty plea. Lastly, the State argued that defendant failed to establish that but for her plea counsel's ineffective assistance, she would not have pled guilty and instead have insisted on proceeding to trial.

¹ The PCR judge, who was not the plea judge, found that defendant's petition was not filed within the five-year period set forth in Rule 3:22-12(a)(1). However, because of difficulty receiving mail at the courthouse during the COVID-19 pandemic, the judge found defendant had attempted to file her petition in a timely fashion and any delay was excusable. The State does not challenge that finding or conclusion.

After considering oral argument, the PCR judge issued a written decision supporting his order denying defendant's petition without an evidentiary hearing.

Before us, defendant contends the PCR judge erred because an evidentiary hearing was necessary to determine what advice plea counsel provided defendant "as to the immigration consequences of pleading guilty." We are unpersuaded and affirm.

To establish a claim of ineffective assistance of counsel (IAC), a defendant must meet the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984), and recognized by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). A defendant must first show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Fritz, 105 N.J. at 52 (quoting Strickland, 466 U.S. at 687). As to this prong, "there is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" State v. Castagna, 187 N.J. 293, 314 (2006) (quoting Strickland, 466 U.S. at 689).

Additionally, a defendant must prove she suffered prejudice due to counsel's deficient performance. Strickland, 466 U.S. at 687. "In the specific

context of showing prejudice after having entered a guilty plea, a defendant must prove 'that there is a reasonable probability that, but for counsel's errors, [he or she] 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. Nunez-Valdez, 200 N.J. 129, 139 (2009)).

In State v. Peoples, the court held:

The mere raising of a claim of IAC does not entitle the defendant to an evidentiary hearing. "A defendant shall be entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of post-conviction relief" A "prima facie case" requires that a defendant "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[.]" and must be supported by "specific facts and evidence supporting his allegations."

[446 N.J. Super. 245, 254 (App. Div. 2016) (first citing State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999), then quoting R. 3:22-10(b), and then quoting State v. Porter, 216 N.J. 343, 355 (2013)).]

No evidentiary hearing is necessary in this case because the record is clear.

During her plea allocution, while under oath, defendant stated she was born in India and was not a United States citizen.² Defendant acknowledged her

² At sentencing, defense counsel and the prosecutor agreed that defendant had legally entered the country and had a "green card."

understanding of the judge's statement her guilty plea "may" result in her removal and prohibit her from legally entering or re-entering the United States. The judge advised defendant that she had the right to seek advice from an immigration attorney. Plea counsel advised the judge that she and defendant had discussed possible immigration consequences, but that plea counsel was not "an immigration expert." When asked by the judge if she wanted extra time to consult with an immigration expert about the consequences of her plea, defendant said she "wish[ed] to waive that." The plea colloquy continued with defendant entering knowing and voluntary guilty pleas.

As to immigration consequences, it is well-settled following the Supreme Court's decision in Padilla v. Kentucky that "when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear." 559 U.S. 356, 369 (2010). In Gaitan, the Court explained:

[C]ounsel's failure to point out to a noncitizen client that he or she is pleading to a mandatorily removable offense will be viewed as deficient performance of counsel; affirmative advice must be conveyed as part of the counseling provided when a client enters a guilty plea to a state offense that equates to an aggravated felony, triggering eligibility for mandated removal.

[209 N.J. at 380.]

However, as we have since explained, "None of these formulations impose a duty to advise a client that removal is a certainty, even if the client's offense makes him clearly 'deportable' under federal law" State v. Blake, 444 N.J. Super. 285, 300 (App. Div. 2016).

Conviction of an aggravated felony such as murder is a ground for deportation. 8 U.S.C. § 1227(a)(2)(A)(iii), INA § 237 (a)(2)(A). Moreover, the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, "made the classification of a legal permanent resident as an 'aggravated felon' a complete bar to relief from deportation." Nunez-Valdez, 200 N.J. at 141 (quoting Melinda Smith, Criminal Defense Attorneys and Noncitizen Clients: Understanding Immigrants, Basic Immigration Law & How Recent Changes in Those Laws May Affect Your Criminal Cases., 33 Akron L. Rev. 163, 200 (1999)).

In this case, it remains unclear whether plea counsel advised defendant, as did the plea form and plea judge, that she "may" be deported as a result of pleading guilty to murder; or she was "eligibl[e] for mandated removal," Gaitan, 209 N.J. at 380; or she unequivocally would be deported after completing her sentence. But,

an attorney may fail to provide effective assistance if he or she minimizes the risk of removal, and thereby

misleads a client. . . . [A]n attorney must advise a client convicted of clearly deportable offenses . . . that if enforcement is commenced, the client faces virtually inevitable removal, although the manner of conveying that fact is as variable as the English language.

[Blake, 444 N.J. Super. at 301.]

However, nowhere in the record has defendant asserted she was unaware of the virtual certainty of deportation as a result of pleading guilty to the murder. Although we do not view it as dispositive, because it occurred well after defendant pled guilty, defendant acknowledged while testifying at Parvaiz's trial that she knew she would be deported after serving her sentence. The lack of any factual dispute about the extent of defendant's knowledge regarding the deportation consequences of her guilty plea is fatal to her claim that plea counsel deficiently performed.

Even if we are incorrect that defendant failed to establish a prima facie case of deficient performance pursuant to the first Strickland/Fritz prong, defendant failed to demonstrate that but for counsel's errors, she would not have pled guilty and would have insisted on going to trial. See Nunez-Valdez, 200 N.J. at 139. The record is bereft of any proof in this regard because defendant has never made such a claim.

Moreover, to establish prejudice under the Strickland/Fritz standard in these circumstances, a defendant must make more than a blanket assertion that she would have rejected the plea bargain and gone to trial if properly advised of the deportation consequences of her plea. To be successful, a defendant must also demonstrate that "it would have been rational for h[er] to decline the plea offer and insist on going to trial and, in fact, that [s]he probably would have done so[.]" State v. Maldon, 422 N.J. Super. 475, 486 (App. Div. 2011) (citing Padilla, 559 U.S. at 372). Defendant faced life imprisonment without the possibility of parole if she went to trial; instead, she received the minimum sentence for murder by pleading guilty and testifying for the State.

Defendant asserts that an evidentiary hearing is necessary to determine whether she would have rejected the plea bargain and opted for trial. "[T]he court is not obligated to conduct an evidentiary hearing to allow [a] defendant to establish a prima facie case not contained within the . . . PCR petition." State v. Bringhurst, 401 N.J. Super. 421, 436–37 (App. Div. 2008); see also R. 3:22-10(e)(3) ("A court shall not grant an evidentiary hearing . . . for the purpose of permitting a defendant to investigate whether additional claims for relief exist for which defendant has not demonstrated a reasonable likelihood of success as required by R. 3:22-10(b).").

Affirmed.

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

A handwritten signature in black ink, appearing to be 'JWA', is written over the printed text 'CLERK OF THE APPELLATE DIVISION'.

CLERK OF THE APPELLATE DIVISION