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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3222-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROMEO S. KONNEH,

Defendant-Appellant.

Submitted November 2, 2022 – Decided February 1, 2023

Before Judges Haas and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 16-10-1730.

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

Raymond S. Santiago, Acting Monmouth County Prosecutor, attorney for respondent (Alecia Woodard, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Romeo S. Konneh appeals from the March 25, 2021 order of the Law Division denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

I.

On January 14, 2016, defendant was arrested at a Tinton Falls outlet mall. Defendant admitted that he attempted to make or made purchases from several stores at the mall using fraudulent credit cards. Defendant also admitted that when he was questioned by a police officer at the mall immediately after making one of the purchases, he knew he was about to be arrested, and shoved the officer to the ground in order to escape on foot. Defendant admitted that the officer was injured as a result of the assault.

A grand jury indicted defendant, charging him with: third-degree aggravated assault on a police officer, N.J.S.A. 2C:12-1(b)(5)(a); third-degree resisting arrest, N.J.S.A. 2C:29-2(a)(3); fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a)(2); third-degree obstructing the administration of law or other government function, N.J.S.A. 2C:29-2(1); fourth-degree credit card theft, N.J.S.A. 2C:21-6(c)(2); fourth-degree receiving stolen property, N.J.S.A. 2C:20-7(a); and third-degree fraudulent use of credit card, N.J.S.A. 2C:21-6(h).

Pursuant to an agreement with the State, defendant entered a guilty plea to third-degree aggravated assault on a police officer, and third-degree fraudulent use of a credit card. In exchange, the State agreed to recommend a sentence of two years of non-custodial probation and to dismiss the remaining counts of the indictment.

Prior to entry of the plea, defendant, who is not a citizen, signed and initialed each page of the plea form. He acknowledged in question 17(b) of the form that his guilty plea may result in his removal from the United States and may prohibit him from being able to legally enter or re-enter the United States. Defendant also acknowledged that he understood he had a right to speak with an immigration attorney about the effect his guilty plea would have on his immigration status. He admitted in response to question 17(d) that he spoke to his attorney about the potential immigration consequences of his plea. In response to question 17(f), defendant acknowledged that he still wished to plead guilty after having been advised of the potential immigration consequences of his plea and of his right to seek individualized legal advice on those potential consequences.

At the plea hearing, the trial court asked defendant if he had "discussed with [plea counsel] the potential immigration consequences of [his] plea."

Defendant responded, "Yes." The court then asked defendant if he still wished to plead guilty after those discussions with plea counsel. Defendant responded, "Yes."

The court advised defendant there could be potential immigration consequences as a result of his plea. He acknowledged that he understood that the plea exposed him to immigration consequences. Defendant stated he was entering the plea voluntarily and freely after having discussed the immigration consequences with plea counsel.

In addition, defendant stated that he consulted with immigration counsel prior to the plea hearing:

[Defense Counsel]: And we talked about what to do, and essentially we were told by your immigration lawyer that as long as you capped the probation at two years it is something he can work with?

[Defendant]: Yes.

The assistant prosecutor sought clarification on this point:

[Assistant Prosecutor]: [Defense counsel] indicated that, something about a two-year cap might make it more probable, etcetera, that he would stay in this country having admitted to a crime. I just wanted that, I think, fleshed out a little bit more, because there are no promises and there are no guarantees, and there is absolutely no guarantee that if probation is one year, two years versus five years, that he would be allowed to remain in the country.

So I would just ask that under 17A, after we answers that he is not a citizen of the United States, that he just clarify a little bit on B through F that there are no promises and no guarantees, and despite that fact he's still entering a plea of guilty today knowing that fact.

[The Court]: Sir, let me just specifically go over those questions with you.

17B: Do you understand that if you are not a United States citizen, this guilty plea may result in your removal from the United States? Do you understand that?

[Defendant]: Yes.

[The Court]: And you in fact circled "yes" to that question. Correct?

[Defendant]: Yes.

[The Court]: And do you understand that you have the right to seek individual advice from an attorney about the effect your guilty plea will have on your immigration status? You circled "yes" on that?

[Defendant]: Yes.

[The Court]: And in fact you did seek that advice. Correct? You spoke with an immigration attorney, somebody who specializes in that area of the law?

[Defendant]: Yes.

[The Court]: And 17B. You discussed the potential immigration consequences, and you circled "yes" with regards to that. Correct?

[Defendant]: Yes.

[The Court]: Having been advised of the possible immigration consequences and your right to seek individualized legal advice and your immigration consequences, you still wish to plead guilty. Is that correct?

[Defendant]: Yes.

Satisfied defendant was making an informed and voluntary decision, the court accepted his plea. The court subsequently sentenced defendant to an aggregate two-year term of noncustodial probation and dismissed the remaining counts of the indictment. Defendant did not file a direct appeal.

In 2019, defendant filed a petition for PCR. He alleged that plea counsel failed to accurately advise him of the immigration consequences of his guilty plea. In a certification accompanying the petition, defendant alleged his plea attorney told him that the guilty plea would have no impact on his immigration status. He alleges that had he been aware that the guilty plea would result in his deportation he would not have accepted the plea agreement and gone to trial.¹

The trial court issued a detailed written opinion dismissing the petition without an evidentiary hearing. The court found that the record of the plea

¹ Defendant raised a number of other claims, none of which are before the court.

allocution clearly established defendant had consulted with both his plea attorney and an immigration attorney and was aware of the potential immigration consequences of his plea. To reach this conclusion, the court relied on the passages noted above which memorialize defendant's repeated recognition, with his trial counsel present, that his immigration status might be affected by his plea.

The court found that defendant's acknowledgement that his immigration counsel advised him that he could "work with" a sentence of two years of probation, was, in effect, a concession that his plea could result in a change in his immigration status. The court also noted that the assistant prosecutor made a point of confirming on the record that no guarantee was made to defendant that his immigration status would not be effected by his guilty plea. The court found defendant's allegations to the contrary to be nothing more than bald assertions contradicted by the record, which contains no indication defendant's counsel assured him his plea would have no impact on his immigration status.

Because it concluded defendant had not made a prima facie showing of ineffective assistance of counsel, the trial court entered a March 25, 2021 order dismissing the petition without an evidentiary hearing.

This appeal followed. Defendant makes the following argument.

MR. KONNEH 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 CONSEQUENCES OF HIS PLEA.

II.

Under Rule 3:22-2(a), a defendant is entitled to post-conviction relief if there was a "[s]ubstantial denial in the conviction proceedings of defendant's rights under the Constitution of the United States or the Constitution or laws of the State of New Jersey" "A petitioner must establish the right to such relief by a preponderance of the credible evidence." State v. Preciose, 129 N.J. 451, 459 (1992). "To sustain that burden, specific facts" which "would provide the court with an adequate basis on which to rest its decision" must be articulated. State v. Mitchell, 126 N.J. 565, 579 (1992).

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee criminal defendants the right to the effective assistance of counsel. State v. O'Neil, 219 N.J. 598, 610 (2014) (citing Strickland v. Washington, 466 U.S. 668, 686 (1984); State v. Fritz, 105 N.J. 42, 58 (1987)). To succeed on a claim of ineffective assistance of counsel, the defendant must meet the two-part test established by Strickland and adopted by our Supreme Court in Fritz. 466 U.S. at 687; 105 N.J. at 58.

Under Strickland, a defendant first must show that his attorney made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687. Counsel's performance is deficient if it "[falls] below an objective standard of reasonableness." Id. at 688.

A defendant also must show that counsel's "deficient performance prejudiced the defense[,]" id. at 687, because "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different[,]" id. at 694; accord State v. Nunez-Valdez, 200 N.J. 129, 138-39 (2009). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. Strickland, 466 U.S. at 694.

We review a judge's decision to deny a PCR petition without an evidentiary hearing for abuse of discretion. State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013) (citing State v. Marshall, 148 N.J. 89, 157-58 (1997)). A hearing is required only when: (1) a defendant establishes a prima facie case in support of PCR; (2) the court determines that there are disputed issues of material fact that cannot be resolved by review of the existing record; and (3) the court determines that an evidentiary hearing is required to resolve the claims asserted. State v. Porter, 216 N.J. 343, 354 (2013) (citing R. 3:22-10(b)). "A

prima facie case is established when a defendant demonstrates '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.'" Id. at 355 (quoting R. 3:22-10(b)).

The right to the effective assistance of counsel extends to legal assistance related to the entry of a guilty plea. State v. Gaitan, 209 N.J. 339, 350-51 (2012). A defendant seeking "[t]o set aside a guilty plea based on ineffective assistance of counsel . . . must show that . . . counsel's assistance was not 'within the range of competence demanded of attorneys in criminal cases.'" State v. DiFrisco, 137 N.J. 434, 457 (1994) (quoting Tollet v. Henderson, 411 U.S. 258, 266 (1973)). To establish prejudice under the second prong, a defendant must show "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. Nunez-Valdez, 200 N.J. at 139 (quoting DiFrisco, 137 N.J. at 457), and "that a decision to reject the plea bargain would have been rational under the circumstances," Padilla v. Kentucky, 559 U.S. 356, 372 (2010).

Where a defendant's immigration status is at stake and the law is "succinct, clear, and explicit," counsel must affirmatively inform the defendant that a conviction will result in removal from the country; when the law is not as clear,

counsel must advise the defendant of the "risk of adverse immigration consequences." Padilla, 559 U.S. at 368-69; see also Gaitan, 209 N.J. at 356. An attorney need not use specific "magic words" to convey the applicable risk or likelihood of removal. State v. Blake, 444 N.J. Super. 285, 299-300 (App. Div. 2016).

Having carefully reviewed the record in light of these legal principles, we affirm the March 25, 2021 order. We agree with the State's argument that it was not "succinct, clear, and explicit" that defendant would be deported as a result of his guilty plea. 8 U.S.C.A. § 1227 (a)(2)(A)(ii) provides that:

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

"The BIA deems a single scheme to exist 'where one crime constituted a lesser offense of another, or where the two crimes flow from and are the natural consequence of a single act of criminal misconduct.'" Chavez-Alvarez v. Attorney General, 850 F.3d 583, 586 (3d Cir. 2017) (quoting In re Adetiba, 20 I. & N. Dec. 106, 509 (BIA 1992)). "No single scheme exists simply because" one act "closely follow[s]" the another. Ibid. Where there is a "substantial interruption" between two crimes that give the defendant "the opportunity to

reflect on what he had done but chose – on two separate occasions – to" commit two criminal acts, those two acts will not arise from a single scheme of criminal misconduct. Id. at 587.

Here, it is arguable that defendant's two crimes involving moral turpitude arose out of a single scheme of misconduct. It is arguable that there was no substantial interruption between defendant's use of fraudulent credits cards and his aggravated assault on the police officer who confronted him immediately after he made one of his fraudulent purchases. The assault, arguably, directly flowed from the fraudulent use of a credit card, given that defendant did not have time to reflect before shoving the police officer to the ground to avoid arrest. While we do not opine with respect to whether such an argument would prevail, we are confident that it was not "succinct, clear, and explicit" that defendant would be subject to deportation as a result of his guilty plea. Thus, defendant's counsel provided effective assistance to defendant by alerting him to the potential immigration consequences of his plea. Defendant repeatedly admitted under oath that he was advised of the possibility that his immigration status would be effected by his guilty plea. His certification to the contrary is facially incredible and does not entitle defendant to an evidentiary hearing.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION