

RECORD IMPOUNDED

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3712-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JUAN CARLOS MELENDRES,

Defendant-Appellant.

Submitted May 10, 2023 – Decided June 7, 2023

Before Judges Accurso and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 93-02-0194.

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

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Leandra L. Cilindrello, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from a Law Division order denying his post-conviction relief (PCR) petition and motion to withdraw his guilty plea following an evidentiary hearing. We affirm.

I.

Defendant was indicted in 1993 and charged with two counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2a(1); two counts of second-degree sexual assault, N.J.S.A. 2C:14-2b; and two counts of endangering the welfare of a child, N.J.S.A. 2C:24-4. After his first trial resulted in a hung jury, defendant appeared before the court to plead guilty to reduced charges but the plea hearing was adjourned due to defendant's "concern about potential deportation."

With the assistance of new counsel, defendant pled guilty on November 4, 1996, to amended charges of two counts of third-degree endangering. In exchange, the State agreed to dismiss the remaining charges and recommend a non-custodial probationary sentence.

At his plea hearing, defendant testified he entered the plea "freely and voluntarily," no one "threatened or forced" him to plead guilty, and that he was doing so because he was "in fact guilty." He also acknowledged signing and understanding all questions and responses on his plea forms, including his

affirmative answer to question seventeen in which he confirmed he understood as a non-United States citizen or national he "may be deported by virtue of [his] plea of guilty."

Defendant further illuminated his understanding regarding the immigration consequences of his plea when, in response to questioning from his counsel, he stated he was "aware . . . there is the possibility of deportation back to [his] home country as a result of [his] plea of guilty" but the court had "nothing to do with" that possibility. The court interjected and emphasized that the decision to institute immigration proceedings is up to immigration authorities.

In support of his factual basis for the endangering charges, defendant admitted to having engaged in "sexual conduct" with two children under the age of thirteen in his apartment when he touched their "genital area" over their clothing for his "own sexual gratification." Defendant was sentenced in accordance with his plea agreement to a three-year probationary term and ordered to perform community service, register as a sex offender pursuant to Megan's Law, N.J.S.A. 2C:7-1 to -23, and pay applicable fines and penalties. The court entered a judgment of conviction on January 10, 1997.

In January 2020 defendant was arrested by Immigration and Customs Enforcement (ICE) authorities. Approximately three months later in March 2020, and more than twenty-three years after his judgment of conviction was entered and fourteen months after the death of his plea counsel, defendant filed his PCR petition and motion to withdraw.

In his petition, defendant claimed he "has always maintained his innocence and denied any sexual touching of the children." He also stated his plea counsel misinformed him "that there was a possibility . . . he would be deported" if he pled guilty to the endangering charges, despite the mandatory deportation consequences resulting from that conviction. See 8 U.S.C.A. 1227(a)(2)(A)(i)(1).¹ He specifically stated his:

Former counsel was ineffective by providing inaccurate immigration advice. His status as a deportable foreign national materialized immediately upon his conviction to the above offenses. [Defendant] understood that the chances of being deported for these charges was possible but not certain, absolute or mandatory. [Defendant] recalls [counsel] advising him that he would be ok with immigration and that he would not be deported.

¹ U.S.C.A. 1227(a)(2)(A)(i)(1) places within the class of deportable aliens any alien who "is convicted of a crime involving moral turpitude"

Defendant further contended "[a] viable resolution not explored by former defense counsel would have been applying for [pre-trial intervention (PTI)]" and, if counsel had done so, defendant "would not be subject to mandatory detention . . . and deportation proceedings." On this point, defendant attested his plea counsel "never discussed the option of PTI with [him]."

Defendant also claimed he was unaware until his January 2020 arrest by ICE he could be deported because of his guilty plea. Defendant therefore contended his PCR petition was thus not time-barred under Rule 3:22-12(a)(1)(A) as his belated filing was excusable.² In the alternative, he argued his petition was not time-barred because he filed for relief within one year of discovering the factual predicate for his petition—his January 2020 arrest. R. 3:22-12(a)(2)(B).

In his counseled brief, defendant also argued: (1) his PCR petition was not time-barred; (2) he was denied effective assistance of counsel due to counsel's

² Under Rule 3:22-12(a)(1), PCR petitions must be filed within five years of entry of the judgment of conviction that is being challenged with few exceptions. One exception, under subsection (a)(1)(A), applies when the petition "alleges facts showing that the delay beyond said time was due to defendant's excusable neglect and that there is a reasonable probability that if the defendant's factual assertions were found to be true enforcement of the time bar would result in a fundamental injustice." A second exception, under subsection (a)(1)(B), applies when the petition is filed within one year of "the date on which the factual predicate for the relief sought was discovered."

failure to explain the consequences of his plea and adequately defend his case; (3) he was entitled to withdraw his guilty plea under State v. Slater, 198 N.J. 145 (2009); and (4) he was denied effective assistance of counsel due to his counsel's failure to apply for PTI. Judge Marilyn C. Clark, who also presided over defendant's plea and sentencing proceedings, conducted an evidentiary hearing with respect to defendant's petition.

At that hearing, defendant provided incongruous testimony with respect to whether his plea counsel ever discussed the immigration consequences of pleading guilty and, if so, the content of his counsel's advice. Defendant testified his plea counsel advised "that if [he] abided by all the conditions of [p]robation, and [he] stay[ed] out of trouble everything would be fine." He also stated his counsel never told him whether he "would be deported, . . . could be deported, [or] wouldn't be deported." Defendant then clarified rather than never speaking to him about deportation, his counsel affirmatively told him he would not be deported. In response to the court's questioning, however, defendant testified his counsel "never said to [him] don't worry, you won't be deported. There was just no discussion of any kind."

Additionally, defendant claimed none of the subsequent attorneys he consulted in connection with his immigration status ever "told [him] that there

was any risk of deportation," even after he disclosed his 1997 judgment of conviction. According to defendant, he would have gone to trial had he received accurate advice regarding the immigration consequences of his plea.

Defendant also stated he did not remember portions of his plea colloquy, including those in which he admitted to having committed the crimes to which he pled guilty and his admission he understood he could be deported as a result of his convictions. He further disavowed responses he had provided in various immigration documents in which he admitted his guilt, stating he either did not remember them or his answers were provided by counsel or their staffs without his input. Defendant also testified he told his immigration attorneys that he was innocent of the crimes for which he pled guilty.

After considering the documentary evidence and defendant's testimony, Judge Clark entered an order denying defendant's petition and rendered a thorough oral opinion explaining her reasons for doing so. Judge Clark first detailed the numerous communications between defendant and immigration authorities since his guilty plea. For example, in September 2011, in a sworn statement in support of his application for immigration status adjustment, defendant stated he had been arrested only five times since 1992 and failed to disclose his 1997 judgment of conviction. In a subsequent letter, United States

Citizenship and Immigration Services (U.S.C.I.S.) denied defendant's application without prejudice because he failed to provide documentation with respect to that conviction and two other arrests. The letter also explicitly informed defendant the "Department of Homeland Security is instituting removal proceedings against you."

Further, in May 2013, U.S.C.I.S. sent defendant a "Request for Evidence" which referenced the 1997 judgment of conviction and stated he was inadmissible for status adjustment. Defendant then applied for a waiver of inadmissibility, which the Department of Homeland Security denied. In that application, he explained he pled guilty to endangering the welfare of a child and "accept[s] that [his] actions in the past were wrong and [he] paid the consequences." U.S.C.I.S. again denied defendant's application for status adjustment in a March 20, 2017 letter in which it informed defendant he was "inadmissible to the United States" and was not "authorized to remain in the United States and should make arrangements to depart as soon as possible."

Based on these documents, as well as defendant's responses to the questions in his plea forms and at the plea hearing, Judge Clark found defendant "was clearly told and should have known that these convictions were not only preventing him from attaining legal residence but were also actively leading to

deportation proceedings." The judge also rejected defendant's contentions his counsel was ineffective for failing to file certain motions or seek PTI, as the record was devoid of evidence the State would have been amenable to recommending defendant to such a diversionary program, particularly in light of the severity of the crimes to which defendant was charged.

"With respect to [defendant] maintaining his innocence," Judge Clark noted defendant pled guilty and clearly admitted wrongdoing in his U.S.C.I.S. submissions. On this point, she explicitly rejected defendant's testimony that "he [did] not remember pleading guilty," or that paralegals compiled the immigration documents in which he admitted to having committed the crimes to which he pled guilty. She specifically found, "[a] paralegal may have prepared the statement, but he signed it. I have no doubt that he knew what was in it"

The judge also expressly rejected defendant's argument "that excusable neglect [was] present because no attorney told him to file a [PCR] motion." According to Judge Clark, it "was unequivocally clear that these convictions were major . . . issues" as early as 2013. She also found it was plain from the plea transcript that defendant "had been thoroughly warned on the record that

[he] could be deported" and that he acknowledged he could be deported in question seventeen on the plea agreement.

With respect to any alleged misrepresentation of counsel, Judge Clark explained, when plaintiff pled guilty "there was a difference between mis-advice, you will never be deported, and advice that says you could be deported. . . . This latter advice would not be mis-advi[ce]." On this point, she noted defendant pled guilty in 1996, well before the United States Supreme Court's seminal decision in Padilla v. Kentucky, 556 U.S. 356 (2010).

Judge Clark also refused to credit defendant's testimony regarding his conversations with his plea counsel, stating in light of counsel's death "we will never know what [counsel] said." The judge specifically observed, however, she could not "help but believe if [defendant] had [asserted his current claims] to any one of the multiple attorneys, that at some point, probably early on, he would have been advised to file a [PCR] motion." She also found, "at least generally, [defendant] was not a credible witness."

Finally, Judge Clark determined the State would be "fatally prejudiced" should relief be granted as it would be "virtually impossible" to reconstruct the case, and the victims should not be asked to testify "about this awful event many

years later." This appeal followed in which defendant presents the following arguments:

POINT I

THE COURT ERRED IN FINDING THAT POST-CONVICTION RELIEF WAS BARRED UNDER THE FIVE YEAR TIME LIMIT IN R. 3:22-12(a) BECAUSE THE DEFENDANT DEMONSTRATED EXCUSABLE NEGLIGENCE FOR THE LATE FILING OF THE PETITION AND ENFORCEMENT OF THE TIME BAR RESULTED IN A FUNDAMENTAL INJUSTICE.

POINT II

HAD THE COURT CONSIDERED DEFENDANT'S PCR PETITION ON THE MERITS, THE COURT WOULD HAVE GRANTED RELIEF BASED UPON THE SHOWING THAT DEFENDANT SUFFERED INEFFECTIVE ASSISTANCE OF COUNSEL AND THE RESULT WOULD HAVE BEEN DIFFERENT.

POINT III

THE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA SHOULD HAVE BEEN GRANTED.

II.

We accord substantial deference to the PCR court's findings after an evidentiary hearing, particularly when they "are substantially influenced by [the court's] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy," State v. Johnson, 42 N.J. 146, 161

(1964), as long as those findings "are supported by sufficient credible evidence in the record," State v. Nash, 212 N.J. 518, 540 (2013). We review the PCR court's legal conclusions de novo. Id. at 540-41. Through that lens, we are unpersuaded by defendant's arguments and affirm essentially for the reasons expressed by Judge Clark in her cogent oral opinion. We add the following.

Pursuant to Rule 3:22-12(a)(1), a first petition for PCR must be filed within five years of the entry date of the challenged judgment of conviction. A defendant seeking relief from the time bar under Rule 3:22-12(a)(1) must show excusable neglect and that a fundamental injustice will result from enforcement of the time bar. R. 3:22-12(a)(1)(A). "Ignorance of the law and rules of court does not qualify as excusable neglect." State v. Jackson, 454 N.J. Super. 284, 295 n. 6 (App. Div. 2018) (quoting State v. Merola, 365 N.J. Super. 203, 218 (Law. Div. 2002)). Additionally, a late petition may be considered if filed within one year from the date of discovery of the factual predicate on which relief is sought "if that factual predicate could not have been discovered earlier through the exercise of reasonable diligence." R. 3:22-12(a)(2)(B).

"[A] court should relax Rule 3:22-12's bar only under exceptional circumstances. The court should consider the extent and cause of the delay, the prejudice to the State, and the importance of the petitioner's claim in determining

whether there has been an 'injustice' sufficient to relax the time limits." State v. Mitchell, 126 N.J. 565, 580 (1992). A procedural rule otherwise barring post-conviction relief may be overlooked to avoid a fundamental injustice where the deficient representation of counsel affected "a determination of guilt or otherwise wrought a miscarriage of justice." Nash, 212 N.J. at 546 (quoting Mitchell, 126 N.J. at 587 (internal quotations omitted)). "Absent compelling, extenuating circumstances, the burden to justify filing a petition after the five-year period will increase with the extent of the delay." State v. Afanador, 151 N.J. 41, 52 (1997) (citing Mitchell, 126 N.J. at 580).

We are satisfied defendant failed to satisfy his burden of establishing excusable neglect, as the record overwhelmingly establishes defendant was put on notice his 1997 judgment of conviction could lead to his deportation years before he filed for PCR. As noted, defendant acknowledged the possibility of deportation in his initial plea forms and colloquy. He was similarly advised in several communications with immigration authorities, including the March 20, 2017 U.S.C.I.S. letter, which informed him, he was not "authorized to remain in the United States and should make arrangements to depart as soon as possible." Simply put, defendant failed to provide any persuasive explanation, let alone establish "exceptional circumstances," Mitchell, 126 N.J. at 580, to justify his

failure to file for PCR despite notice from immigration authorities that his 1997 judgement of conviction rendered him inadmissible to the United States.

For similar reasons, Judge Clark correctly determined defendant was not entitled to relief under Rule 3:22-12(a)(1)(B), as he would have discovered "through the exercise of reasonable diligence" that he could be deported due to his 1997 judgment of conviction more than one year before he filed his petition. Defendant's petition is therefore time-barred. Rule 3:22-12(a).

Even if defendant's PCR petition was not time barred, we would not conclude his trial counsel was ineffective. To establish ineffective assistance of counsel claim, a defendant must satisfy the two-part test under Strickland v. Washington, 466 U.S. 668, 687 (1984), and show: (1) "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[.]" and (2) "the deficient performance prejudiced the defense." Accord State v. Fritz, 105 N.J. 42, 57-58 (1987).

A defendant satisfies the first Strickland prong by showing counsel's performance fell short of the "prevailing professional norms of effective representation." Padilla, 559 U.S. at 367. The second component of Strickland is met by establishing "a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

A strong presumption exists that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. at 689. And because prejudice is not presumed, "defendant must demonstrate 'how specific errors of counsel undermined the reliability' of the proceeding." State v. Drisco, 355 N.J. Super. 283, 289-90 (App. Div. 2002) (quoting United States v. Cronin, 466 U.S. 648, 659 n.26 (1984)).

When defendant pled guilty in 1996, applicable professional norms did not require attorneys representing non-citizen criminal defendants to give immigration advice, but if they did, they could not give "wrong advice, followed by inaccurate and misleading information" about the possibility of deportation. State v. Gaitan, 209 N.J. 339, 373 (2012) (citing State v. Nuñez-Valdéz, 200 N.J. 129, 143 (2009)). Only in 2010 did the United States Supreme Court newly hold "correct" advice must be given about the possibility of deportation when the risk of deportation was "truly clear." Padilla, 559 U.S. at 369. It was later determined Padilla's new rule had prospective effect only, thereby depriving non-citizen defendants — like defendant here — of Padilla's holding if their

"convictions became final prior to Padilla." Chaidez v. United States, 568 U.S. 342, 358 (2013).

Thus, because defendant's convictions became final well before the decision in Padilla, and he failed to establish his trial counsel gave false or affirmatively misleading advice about his risk of deportation if he pled guilty to the charges he faced in 1996, defendant failed to satisfy prong one of the Strickland test. We reiterate defendant acknowledged his understanding of potential deportation consequences in his plea forms and during his plea colloquy. And, although defendant testified his counsel told him he would not be deported, Judge Clark found him not to be a credible witness and rejected that testimony, a finding fully supported by the record. See State v. Locurto, 157 N.J. 463, 474 (1999) ("Appellate courts should defer to trial courts' credibility findings . . .").

On this point, we note throughout the PCR hearing defendant provided conflicting testimony as to whether his counsel failed to discuss deportation with him, or affirmatively advised that he would not be deported. We also observe defendant's claim directly contradicts his PCR petition, in which he certified that when he pled guilty he understood "that the chances of being deported for these charges w[ere] possible but not certain, absolute or mandatory."

We are therefore unpersuaded based on the court's findings that counsel's representation fell short of prevailing professional norms. See Padilla, 559 U.S. at 367. As we have explained, it was not mis-advice at the time defendant pled guilty for counsel to "predict[] that defendant would not have an immigration issue, in conjunction with the warning that he may be deported[.]" State v. Brewster, 429 N.J. Super. 387, 397-98 (App. Div. 2013). In light of Judge Clark's findings, defendant failed to establish his counsel's representation deviated from that professional norm. Even defendant's appointed counsel conceded during the PCR hearing his plea counsel provided the advice that was "typically . . . given back then."

III.

Finally, we reject defendant's contention he was entitled to withdraw his guilty plea under Slater. The decision to grant or deny a motion to retract a guilty plea is discretionary and is governed by four factors: "(1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant's reasons for withdrawal; (3) the existence of a plea bargain; and (4) whether withdrawal would result in unfair prejudice to the State or unfair advantage to the accused." Slater, 198 N.J. at 156-158. Application of these factors does not depend on the timing of the motion, but different

standards apply depending on when the motion is filed in relation to sentencing. Id. at 158.

A motion to withdraw a plea made before sentencing is governed by the "interests of justice" standard in Rule 3:9-3(e). Id. at 156. By contrast, a motion made after sentencing is subject to a "manifest injustice" standard set forth in Rule 3:21-1. Ibid. Regardless of the timing, "the burden rests on the defendant, in the first instance, to present some plausible basis for his request, and his good faith in asserting a defense on the merits." Id. at 156 (quoting State v. Smullen, 118 N.J. 408, 416 (1990)).

Although Judge Clark did not specifically analyze defendant's withdrawal motion within the Slater framework, we are satisfied she set forth factual findings sufficient to conclude all four factors weigh in favor of the State, and therefore did not abuse her discretion in denying defendant's requested relief. As noted, Judge Clark found defendant's plea colloquy and submissions to immigration authorities undermined his claim of innocence, and she rejected his testimony that his admissions of guilt were prepared by counsel without his imprimatur. Additionally, defendant did not file for PCR to assert a claim of innocence, but rather to avoid the deportation consequences of his guilty plea based on the alleged mis-advice of counsel.

Under the second Slater factor, we "focus[] on the basic fairness of enforcing a guilty plea by asking whether defendant has presented fair and just reasons for withdrawal, and whether those reasons have any force." Slater, 198 N.J. at 159. We conclude defendant has failed to do so, again due to his failure to establish his counsel mis-advised him with respect to the deportation consequences of his guilty plea or that he pled guilty without understanding those consequences. The third factor also clearly weighs in favor of the State, as defendant pled guilty as part of a negotiated plea bargain in which the State dismissed four charges against him and downgraded the two counts for which he pled guilty from second-degree to third-degree charges.

Finally, Judge Clark found the State would be "fatally prejudiced" should defendant's guilty plea be withdrawn over twenty-six years after judgment of conviction was entered. As the judge noted, there was no support in the record for defendant's contention that the State would have accepted pretrial intervention and it would be "virtually impossible" for the State to reconstruct its case. We have no reason to question these findings and are therefore satisfied defendant failed to establish a "manifest injustice" entitling him to withdraw his guilty plea under Slater. 198 N.J. at 156.

To the extent not addressed, defendant's remaining arguments lack sufficient merit to warrant discussion in a 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