SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2790-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

OLGA CRISSY,

Defendant-Appellant.

Submitted April 23, 2018 – Decided April 30, 2018

Before Judges Sabatino and Rose.

On appeal from Superior Court of New Jersey, Law Division, Union County, Indictment No. 89-05-0869.

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

Michael A. Monahan, Acting Union County Prosecutor, attorney for respondent (Alexandra L. Pecora, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Olga Crissy appeals from the trial court's January 26, 2017 order denying her motion for relief from her 1989 guilty

plea and conviction of possession of a controlled dangerous substance ("CDS"). We affirm.

The pertinent background is as follows. On February 9, 1989, police officers executed a search warrant at an apartment building in Linden. Defendant was then in the hallway, knocking on co-defendant Lewis Chapman's apartment door. Upon seeing the police, defendant discarded a tin foil packet and a clear plastic vial into Chapman's apartment. The items were recovered and tested positive for cocaine.

After defendant was charged with unlawful drug possession, she applied for admission into the pretrial intervention ("PTI") program. The program director rejected her application, finding her unsuitable for the program.

Thereafter, through the efforts of her trial attorney, defendant negotiated a plea agreement with the State. Pursuant to those negotiated terms, defendant agreed to plead guilty to a single count of possession of CDS, N.J.S.A. 2C:35-10(a)(1), with the State agreeing in turn to recommend a probationary sentence.

At defendant's plea hearing on August 21, 1989, she admitted under oath that she had knowingly possessed cocaine at the time when the police encountered her. Two months later, on October 27, 1989, the trial court sentenced defendant to a two-year period of probation, consistent with the terms of the agreement.

More than two decades after her probationary term concluded, defendant moved for post-conviction relief ("PCR") in the trial court in May 2016. In essence, her application had two components. First, she asserted her former counsel was ineffective in failing to provide her with advice that she would likely be deported if she pled guilty. She claimed her counsel also was ineffective in failing to appeal the denial of her PTI application. Second, defendant sought to set aside the trial court's denial of her motion to withdraw her guilty plea.

After hearing oral argument, Judge John M. Deitch denied defendant's PCR application in all respects, issuing a written opinion on January 26, 2017. This appeal ensued.

In her brief on appeal, defendant raises the following points:

> POINT I
>
> THE DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO APPEAL THE STATE'S OBJECTION TO PTI ADMISSION.
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> POINT II
>
> THE DEFENDANT'S PLEA SHOULD BE VACATED DUE TO THE MANIFEST INJUSTICE CAUSED BY THE FAILURE OF TRIAL DEFENSE COUNSEL TO PROPERLY INFORM HER AS TO THE IMMIGRATION CONSEQUENCES OF HER GUILTY PLEA.

POINT III

THE DEFENDANT HAS DEMONSTRATED EXCUSABLE NEGLECT, JUSTIFYING A RELAXATION OF THE FIVE YEAR FILING PERIOD UNDER R. 3:22-12(A)(1).

Having fully considered these arguments, we affirm. We do so substantially for the sound reasons articulated in Judge Deitch's opinion. We add only a few comments.

As this court explained in State v. O'Donnell, 435 N.J. Super. 351, 368 (App. Div. 2014), the analysis of a defendant's PCR petition and her motion to withdraw a guilty plea are governed by two distinct set of legal criteria. Applying those separate criteria, defendant's claims for relief were properly rejected.

First, with respect to her claims alleging ineffective assistance of her former counsel, defendant's petition was both time barred and without any glimmer of merit. As we have already noted, defendant pled guilty in August 1989 and was sentenced in October 1989. She did nothing to seek relief until she filed her PCR petition twenty-six years later, apparently prompted by enforcement actions by federal immigration authorities against her as a non-citizen. Her petition is long past the five-year time bar of Rule 3:22-12 and was aptly characterized by the PCR judge as "woefully late." In addition, defendant has shown no excusable neglect for her delay. In fact, defendant encountered difficulty getting an immigration "green card" in 1991 after her visa expired.

Surely that experience should have alerted her to the need to pursue some form of remedial action at that time with respect to her criminal record.

Moreover, defendant's claims of counsel's ineffectiveness fall far short of the requirements of Strickland v. Washington, 466 U.S. 668, 694 (1984). Given the highly deferential standard for judicial review of PTI denials, an appeal by defendant seeking to overturn her exclusion from the program would have been exceedingly difficult and almost certainly unsuccessful. See State v. Nwobu, 139 N.J. 236, 246 (1995) (requiring a judicial finding of a "patent and gross abuse of discretion" in order to overturn a prosecutor's denial of PTI admission).

Defendant relies upon State v. Jones, 446 N.J. Super. 28 (App. Div. 2016), in asserting that her former attorney had an obligation to file an appeal of the PTI denial. However, she does not state in her supporting certification that she ever made such a request of her former counsel to file such an appeal. In any event, she has not demonstrated that such an appeal would have been fruitful.

Nor has defendant presented a prima facie claim of ineffectiveness relating to her former counsel's conduct in 1989 under the then-applicable standards governing criminal defense lawyers concerning a client's risks of deportation. Under State

v. Nuñez-Valdéz, 200 N.J. 129 (2009), no ineffectiveness claim was viable under the prevailing law before the United States Supreme Court's watershed opinion in Padilla v. Kentucky, 559 U.S. 356 (2010), unless plea counsel affirmatively gave the defendant misadvice about the risks of deportation if he or she pled guilty. The record is bereft of any competent proof that such affirmative misadvice was provided to defendant here. Defendant acknowledged on her plea form that she was not a citizen of the United States and was alerted on the plea form that she may be subject to deportation.

Defendant complains that the deportation consequences of her guilty plea and conviction were never discussed with her by her former counsel. That would pose a problem under post-Padilla law but this is a pre-Padilla situation. Hence, she has no viable claim of ineffective assistance of counsel on that basis. Given that lack of a viable prima facie claim, there was no need for the trial court to conduct an evidentiary hearing. State v. Preciose, 129 N.J. 451, 462-63 (1992).

We also readily concur with Judge Deitch's denial of defendant's very belated motion to withdraw her plea under the withdrawal standards of State v. Slater, 198 N.J. 145, 154-62 (2009). Given the police observations and the other factual circumstances noted in the record, defendant fails to present a

colorable claim of innocence to the drug possession charge. Her reasons for withdrawal stem from her own lack of diligence. The plea bargain she reached – and now belatedly wishes to repudiate – resulted in the advantageous dismissal of charges against her spouse. Moreover, as defendant concedes, the State would be prejudiced in having to reopen a drug prosecution involving events that transpired almost three decades ago.

Affirmed.