

**NOT FOR PUBLICATION WITHOUT THE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-3698-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANDREW C. LUMSDEN,

Defendant-Appellant.

Submitted December 21, 2017 – Decided January 11, 2018

Before Judges Simonelli and Rothstadt.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Indictment No.
08-09-1508 and Accusation No. 05-03-0381.

Joseph E. Krakora, Public Defender, attorney
for appellant (Kisha M. Hebbon, Designated
Counsel, on the briefs).

Gurbir S. Grewal, Bergen County Prosecutor,
attorney for respondent (Elizabeth R. Rebein,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant Andrew Lumsden appeals from two March 14, 2016 Law Division orders, which denied his petitions for post-conviction relief (PCR) following an evidentiary hearing. On appeal, defendant raises the following contentions:

POINT I:

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S PETITION FOR [PCR] BECAUSE THERE WAS SUFFICIENT EVIDENCE PRESENTED DURING THE EVIDENTIARY HEARING TO PROVE THAT DEFENDANT WAS DENIED THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

- A. The Prevailing Legal Principles Regarding Claims Of Ineffective Assistance Of Counsel And Petitions for [PCR].
- B. Both Trial Attorneys Rendered Ineffective Legal Representation By Virtue Of Their Failure To Inform Defendant Of The Fact That He Would Be Deported Due To His Guilty Pleas.

We reject these contentions and affirm.

On March 7, 2005, defendant waived indictment and pled guilty under Accusation No. 05-03-0381-A to third-degree possession with intent to distribute a controlled dangerous substance (CDS), N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(11). In exchange,

the State agreed to recommend a non-custodial probationary term.

The following colloquy occurred at the plea hearing:

[THE COURT]: All right, Mr. Lumsden, do you understand the proceedings here today?

[DEFENDANT]: Yes, Your Honor.

[THE COURT]: And are you a United States citizen?

[DEFENDANT]: No, Your Honor.

[THE COURT]: Do you understand that it's possible if you plead guilty to this third-degree offense today that it can affect your immigration status?

[DEFENDANT]: Yes.

[THE COURT]: Have you had ample time to discuss that issue with your attorney?

[DEFENDANT]: Yes, Your Honor.

[THE COURT]: And do you need any more time to discuss that issue with your attorney or with an immigration specialist?"

[DEFENDANT]: No, Your Honor.

In addition, defendant answered "Yes" to Question 17 on the plea form asking whether he understood that if he was not a United States citizen or national he may be deported by virtue of his guilty plea.

On May 6, 2005, the trial court sentenced defendant to a two-year non-custodial probationary term. Defendant did not appeal his conviction or sentence.

On September 22, 2008, a grand jury indicted defendant for third-degree distributing a CDS, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(11) (count one); third-degree distribution of a CDS within 1000 feet of school property, N.J.S.A. 2C:35-5(a) and N.J.S.A. 2C:35-7 (count two); and fourth-degree possession of a CDS, N.J.S.A. 2C:35-10(a)(3) (count three). Represented by different plea counsel, on February 23, 2009, defendant pled guilty to count one. In exchange, the State agreed to recommend a maximum four-year term of imprisonment with a two-year period of parole ineligibility. The following colloquy occurred at the plea hearing:

[THE COURT]: And have you had enough time to discuss the charges and the plea agreement with [plea counsel]?

[DEFENDANT]: Yes, Your Honor.

[THE COURT]: Has [plea counsel] answered any questions that you may have had?

[DEFENDANT]: Yes, Your Honor.

[THE COURT]: Are you satisfied with the legal services that he has provided to you?

[DEFENDANT]: Yes, Your Honor.

. . . .

[THE COURT]: Are you a United States citizen?

[DEFENDANT]: No, Your Honor.

[THE COURT]: Okay. Do you understand that by pleading guilty to this charge that it could affect your immigration status and could perhaps lead to being deported?

[DEFENDANT]: Yes, Your Honor.

[THE COURT]: And have you spoken about that with your attorney?

[DEFENDANT]: Yes, Your Honor.

[THE COURT]: All right. Now, knowing there's a possibility that you could be deported as a result of pleading guilty do you still wish to plead guilty to this charge?

[DEFENDANT]: Yes, Your Honor.

Defendant had answered "Yes" to Question 17b on the plea form that asked whether he understood that if he was not a United States citizen or national, he may be deported by virtue of his guilty plea. The following colloquy occurred regarding the plea form:

[THE COURT]: Okay. Now you have in front of you there a copy of the plea form. I'm going to ask that you please take a look at that again and tell me if those are your initials on pages one, two and three and your signature on pages four and five.

[DEFENDANT]: Yes, Your Honor.

[THE COURT]: Okay. Now, before you signed that plea form did you have a chance to go over it with your attorney?

[DEFENDANT]: Yes, Your Honor.

[THE COURT]: And did you provide all of the answers on the form to your attorney?

[DEFENDANT]: Yes, Your Honor.

[THE COURT]: Are all of those answers truthful and accurate?

[DEFENDANT]: Yes, Your Honor.

. . . .

[THE COURT]: All right. Now, based on everything that we've just gone over do you still wish to plead guilty to this charge today?

[DEFENDANT]: Yes, Your Honor.

On April 17, 2009, the court sentenced defendant to a four-year term of imprisonment with a two-year period of parole ineligibility. Defendant did not appeal his conviction or sentence.

In August 2009, the United States Department of Homeland Security served defendant with a notice to appear for deportation. On January 19, 2011, defendant filed a PCR petition regarding his 2009 conviction, arguing plea counsel (hereinafter second plea counsel) rendered ineffective assistance by affirmatively misrepresenting that he would not be deported if he pled guilty. On October 28, 2100, defendant filed a second PCR petition regarding his 2005 conviction, arguing plea counsel (hereinafter first plea counsel) rendered ineffective assistance by failing to advise him that he was subject to mandatory deportation as a result of his guilty plea.

After consolidating the two petitions, the PCR judge heard oral argument, but did not conduct an evidentiary hearing, and denied both petitions. Defendant appealed. We reversed and remanded for an evidentiary hearing on the merits of defendant's ineffective assistance of counsel claims. State v. Lumsden, No. A-1178-12 (App. Div. Apr. 17, 2014).

At the evidentiary hearing, first plea counsel testified that his notes indicated he knew defendant had a green card and was not a United States citizen. Counsel testified that when reviewing Question 17 on the plea form with non-citizen clients, such as defendant, he always advised them a guilty plea could have immigration consequences, he was not an immigration attorney and could not give advice about immigration consequences, and they should consult an immigration attorney before pleading guilty. Counsel also testified that he would not have proceeded with the plea if defendant said he wished to consult an immigration attorney. Counsel confirmed he never advised defendant he would not be deported or that the nature of his crime or sentence of probation would not result in deportation.

Second plea counsel testified that he reviewed Question 17b on the plea form with defendant and advised him "there was a very high probability that he would be deported," and he should consult an immigration attorney before pleading guilty. Counsel confirmed

he would not have said to defendant or any client in this country illegally, "I guarantee you will not be deported[.]"

Defendant testified that first plea counsel failed to advise him of the mandatory deportation consequences of his guilty plea, and said his plea would only affect his ability to become a United States citizen. Defendant testified that second plea counsel advised he would not be deported by virtue of his guilty plea, and he would not have pled guilty had he known the deportation consequences of both pleas.

The PCR judge issued a written opinion denying both petitions. The judge found the record devoid of evidence that first plea counsel gave defendant no advice about the immigration consequences of his plea, and the plea colloquy indicated defendant understood he could be deported if he pled guilty. The judge also found the record devoid of evidence that second plea counsel gave false or misleading advice that defendant would not be deported. The PCR judge emphasized that the plea colloquy and defendant's affirmative responses to Question 17b on the plea form indicated defendant understood his guilty plea could affect his immigration status and could result in deportation. The judge reasoned as follows:

In this matter, both attorneys testified and were clear: they informed defendant of the immigration consequences of his guilty plea.

They both also testified that they suggested defendant speak to an immigration attorney; each time he apparently refused or failed to do so. The attorneys' testimony combined with the defendant's statement to the [c]ourt during his pleas, prove that conversations took place where the consequences of his plea were explained to the defendant, by his attorney, and that defendant was aware of the consequences of his plea.

Contrary to the testimony given by both [plea counsel], defendant testified two separate lawyers on two separate occasions misinformed him about the immigration consequences of his plea. Defendant testified that [first plea counsel] told him that his guilty plea would only affect his ability to later obtain citizenship. However when defendant was told by the [c]ourt [during the plea colloquy] that his guilty plea could 'affect your immigration status,' not the ability to obtain citizenship, defendant acknowledged he understood and that he wanted to proceed with the plea. Defendant did not state that [first plea counsel] gave him contrary information. Defendant further testified that [second plea counsel] affirmatively told him that he would not be deported. However, when questioned by [the court at the plea hearing], defendant stated that he understood his plea 'could perhaps lead to him being deported.' Once again, defendant did not state that [second plea counsel] had given him contrary information to what was now being presented to him at the plea [hearing].

The judge concluded the evidence showed defendant was adequately advised about the immigration consequences resulting from his two pleas by both plea counsel, and defendant's testimony to the contrary was not credible. This appeal followed.

Our Supreme Court has established the standard of review in PCR cases where the court held an evidentiary hearing:

In reviewing a PCR court's factual findings based on live testimony, an appellate court applies a deferential standard; it "will uphold the PCR court's findings that are supported by sufficient credible evidence in the record." Indeed, "[a]n appellate court's reading of a cold record is a pale substitute for a trial judge's assessment of the credibility of a witness he has observed firsthand." However, a "PCR court's interpretation of the law" is afforded no deference, and is "reviewed de novo." "[F]or mixed questions of law and fact, [an appellate court] give[s] deference . . . to the supported factual findings of the trial court, but review[s] de novo the lower court's application of any legal rules to such factual findings."

[State v. Pierre, 223 N.J. 560, 576-77 (2015) (Alterations in original) (citations omitted).]

Applying these standards, we discern no reason to reverse.

To establish a prima facie claim of ineffective assistance of counsel, the defendant

must satisfy two prongs. First, he must demonstrate that counsel made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." An attorney's representation is deficient when it "[falls] below an objective standard of reasonableness."

Second, a defendant "must show that the deficient performance prejudiced the defense." A defendant will be prejudiced when

counsel's errors are sufficiently serious to deny him a "fair trial." The prejudice standard is met if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A "reasonable probability" simply means a "probability sufficient to undermine confidence in the outcome" of the proceeding.

[State v. O'Neil, 219 N.J. 598, 611 (2014) (quoting Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984)).]

"[I]n order to establish a prima facie claim, [the defendant] must do more than make bald assertions that he was denied the effective assistance of counsel. He must allege facts sufficient to demonstrate counsel's alleged substandard performance." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999). The defendant must establish, by a preponderance of the credible evidence, that he is entitled to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013).

With respect to a guilty plea, our Supreme Court has explained that

[T]o set aside a guilty plea based on ineffective assistance of counsel, a defendant must show that (i) counsel's assistance was not "within the range of competence demanded of attorneys in criminal cases"; and (ii) "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. Nuñez-Valdéz, 200 N.J. 129, 139 (2009) (second alteration in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994), cert. denied, 516 U.S. 1129 (1996)).]

See also State v. Parker, 212 N.J. 269, 279 (2012). The defendant must also show "a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 367 (2010); see also State v. Maldon, 422 N.J. Super. 475, 486 (App. Div. 2011). "Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." Lee v. United States, 582 U.S. ___, 137 S. Ct. 1958, 1967 (2017).

The Supreme Court of the United States has held that defense attorneys are affirmatively obligated to inform their clients about the deportation risks of entering a guilty plea. Padilla, 559 U.S. at 367. However, the Court held Padilla did not apply retroactively, Chaidez v. United States, 568 U.S. 342, 344 (2013), and our Supreme Court held that Padilla is a new rule to be applied prospectively only. State v. Gaitan, 209 N.J. 339, 371-72 (2012), cert. denied, 568 U.S. 1192 (2013); see also State v. Santos, 210 N.J. 129, 143 (2012).

Here, defendant's two guilty pleas occurred before Padilla. Therefore, his "guilty plea[s are] not vulnerable because neither the court nor counsel warned the defendant about the deportation consequences of the guilty plea." Gaitan, 209 N.J. at 361.


A limited exception to this rule arises when defense counsel provided affirmatively misleading advice about the immigration consequences of a guilty plea. See Nuñez-Valdéz, 200 N.J. at 139-43 (where defense counsel informed the defendant there would be no immigration consequences arising from his plea); see also Santos, 210 N.J. at 143. That exception is inapplicable here as to first plea counsel because counsel did not misinform defendant about the mandatory deportation consequences of his plea. Rather, counsel gave no advice at all about mandatory consequences. Accordingly, defendant cannot establish that first plea counsel rendered ineffective assistance by failing to inform him of the mandatory deportation consequences of his plea. See Gaitan, 209 N.J. at 374.

In addition, the contemporaneous evidence contradicts defendant's assertions that first plea counsel misadvised his plea would only affect his ability to become a United States citizen and second plea counsel misadvised he would not be deported. When the issue of deportation was raised at both plea hearings, defendant was told his guilty plea could affect his immigration

status and he could be deported if he pled guilty. Defendant, nevertheless, proceeded without hesitation to plead guilty. See Gaitan, 209 N.J. 378-79 (ruling there was no evidence of prejudice where the defendant proceeded to plead guilty after the court advised the plea could result in his deportation).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION