

**NOT FOR PUBLICATION WITHOUT THE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-0142-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MOHAMED E. ABDALLAH,

Defendant-Appellant.

Submitted December 14, 2022 – Decided July 24, 2023

Before Judges Enright and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 16-06-1040.

Joseph E. Krakora, Public Defender, attorney for appellant (Anthony J. Vecchio, Designated Counsel, on the brief).

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (Nancy A. Hulett, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Mohamed E. Abdallah appeals from the July 20, 2021 order, denying his petition for post-conviction relief (PCR) and motion to withdraw his guilty plea following an evidentiary hearing. We affirm.

I.

The facts and procedural history are set forth at length in the PCR judge's written decision that accompanied the order under review. Defendant was born in Egypt and raised in the United States. In 2016, defendant, along with others, was indicted by a Middlesex County Grand Jury and charged with third-degree conspiracy to distribute a controlled dangerous substance (CDS), N.J.S.A. 2C:35-5 and N.J.S.A. 2C:5-2 (count one); third-degree distribution of a CDS, N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(3) (counts two through four); second-degree possession of a firearm while possessing CDS with intent to distribute, N.J.S.A. 2C:39-4.1 (counts five and thirteen); second-degree possession of a weapon for unlawful purposes, N.J.S.A. 2C:39-4(a) (counts six and fourteen); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (count seven); third-degree possession of CDS, N.J.S.A. 2C:35-10(a)(1) (counts eight and ten); possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(2) to -(3) (counts nine and eleven); fourth-degree possession with intent to distribute drug paraphernalia, N.J.S.A. 2C:36-3 (count

twelve); second-degree possession of a weapon (large capacity ammunition magazine), N.J.S.A. 2C:39-3(j) (count fifteen); fourth-degree unlawful possession of a weapon (a machete), N.J.S.A. 2C:39-5(d) (count sixteen); and second-degree possession of a weapon (a machete) while possessing CDS with intent to distribute, N.J.S.A. 2C:35-5 and N.J.S.A. 2C:39-4.1(c) (count seventeen).

Pursuant to a negotiated plea agreement, on March 17, 2017, defendant pled guilty to two counts of third-degree distribution of a CDS, and second-degree transportation of firearms, as amended from possession of a weapon for an unlawful purpose. Defendant entered a provisional guilty plea, conditioned on his right to withdraw his plea after consultation with an immigration attorney. At the plea hearing, the following exchange occurred:

[The Court:] You're a citizen of the U.S.?

[Defendant:] I'm a temporary citizen.

[Defense Counsel:] Judge, this is the case we've discussed. He's not a citizen. We were going to leave time today for the immigration counsel after the plea is put in prior to sentencing.

[The Court:] Right. Let me talk to you right quick though, you understand if you're not a U.S. citizen, your guilty plea may result in your removal or deportation?

[Defendant:] Yes, Your Honor.

[The Court:] Do you understand that if you're not a U.S. citizen [it] may prevent you from legally reentering the U.S. if you leave for any reason?

[Defendant:] Yes, Your Honor.

[The Court:] You understand it may also prevent you from obtaining citizenship or any other form of residency?

[Defendant:] Yes.

[The Court:] You understand that this [c]ourt has no jurisdiction over -- or control over any decisions made by a Federal Court regarding your deportation, removal, your ability to reenter, or your application for residency at some future point?

[Defendant:] Yes, Your Honor.

[The Court:] Do you understand you can . . . seek legal advice from an attorney prior to entering your plea today about the effect your plea may have on your immigration status?

[Defendant:] Yes, Your Honor.

[The Court:] Okay. And you're going to discuss it with an immigration attorney, seek the advice. And . . . you're reserving the right to withdraw your guilty plea based on the advice that you get from your immigration attorney prior to your sentencing date, correct?

[Defendant:] Correct.

Additionally, plea counsel requested defendant's release pending his sentencing to consult with an immigration attorney. The judge denied counsel's request and directed that any immigration consultation should take place at the jail.

During the plea hearing, defendant testified he was not forced or threatened to plead guilty, he did so of his "own free will," and he was "guilty" of the offenses to which he pled. He further advised the court he was "satisfied with his lawyer's advice."

Two months prior to the sentencing hearing, defendant filed a letter with the court to mitigate his sentence. In the mitigation letter, defendant affirmed that he committed the crimes charged while in the "grip of a drug addiction." Defendant also informed the judge that he was advised by an immigration lawyer that if he was convicted of a crime higher than the fourth degree, his residency status would be jeopardized. He therefore requested that his plea and sentencing be restructured so that he was not convicted of an offense above the fourth degree.

On August 21, 2017, the same judge sentenced defendant in accordance with the negotiated plea agreement to concurrent four-year prison terms on the CDS charges and a concurrent three-year term with an eighty-five percent period

of parole ineligibility pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2, on the second-degree weapons charge. The remaining charges were dismissed. Prior to the judge imposing sentence, defendant was afforded the right to speak to the court and stated: "Your Honor, I beg you not to send me down to prison because it would affect my immigration status, which is going to be a death sentence for me due to the ongoing revenge between my family and [others]."

On September 20, 2017, the judgment of conviction was amended to change the total custodial term from three years to four years in state prison.

Rather than file a direct appeal, on December 17, 2018, defendant filed a PCR petition alleging ineffective assistance of counsel and requested an evidentiary hearing while in the custody of U.S. Immigration and Customs Enforcement awaiting deportation. Defendant argued plea counsel provided ineffective assistance of counsel by misinforming him of the immigration consequences of his plea. Defendant also certified he did not learn about the negative immigration consequences of his guilty plea until the commencement of deportation proceedings against him. Defendant also moved to withdraw his guilty plea pursuant to the factors enunciated in State v. Slater, 198 N.J. 145, 157-58 (2009).

Judge Pedro J. Jimenez presided over an evidentiary hearing on defendant's PCR petition on June 4, 2021. By that time, defendant had already been deported to Egypt. At the hearing, plea counsel testified that he had "consistently" advised defendant that he was not an immigration attorney. Further, plea counsel stated defendant's family assumed the responsibility of obtaining an immigration consult and plea counsel advised them of the need for the consultation. Counsel testified that he learned through defendant's sister and defendant that an immigration consult had occurred prior to sentencing. Moreover, plea counsel testified he and defendant discussed the "seriousness" of defendant's charges and the "great exposure" of prison time defendant faced under the original charges defendant's consultation with an immigration attorney. Plea counsel stated defendant agreed to move forward with the sentencing, given the favorable terms of the plea agreement.

Plea counsel also testified he did not specifically address the letter of mitigation with the court at the sentencing hearing. Instead, counsel requested defendant's sentence be modified so it could be served in a halfway house.

Defendant also testified at the evidentiary hearing. He stated that he relied on plea counsel's advice that he would be "fine" because his sentence was going to be less than five years. Defendant testified that he did not consult an

immigration attorney nor did an immigration attorney come to the Middlesex County jail before his sentencing. But he also stated he learned from his family about the negative immigration consequences that his guilty plea had triggered.

Defendant claimed that on the day of his sentencing, he raised immigration concerns with plea counsel and was again assured that he would be "fine" since his sentence was to be less than five years. Defendant further asserted he would not have proceeded with sentencing and would instead have moved to withdraw his guilty plea but for his reliance on plea counsel's advice.

Following oral argument, Judge Jimenez reserved decision. On July 20, 2021, the judge issued an order, accompanied by a well-reasoned written decision, denying defendant's PCR petition. In his opinion, the judge made comprehensive credibility findings and concluded plea counsel was credible. In contrast, he discredited defendant because his testimony was "clearly contradicted by [the] [c]ourt's record, the plea agreement form, [defendant's] own letter to the [c]ourt, and his attorney."

The judge concluded defendant failed to show ineffective assistance of counsel under the two-prong test articulated in Strickland v. Washington, 466 U.S. 668, 687 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). The judge also noted the Strickland test applies to an

ineffective assistance of counsel claim arising out of the plea process, "with a modification to the second prong." See Hill vs. Lockhart, 474 U.S. 52, 57-59 (1985). Specifically, to satisfy the "prejudice" requirement, a defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Ibid.

Judge Jimenez rejected defendant's argument that plea counsel failed to properly advise defendant of the immigration consequences of his guilty plea and that had he known of the consequences, he would not have pled guilty. The judge determined that consistent with State v. Nuñez-Valdéz, "the immigration [issue] was addressed because [defendant] was put on notice of the potential immigration consequences, had the opportunity to consult with counsel regarding his immigration status, and did so." 200 N.J. 129, 140-141 (2009). He concluded the "well-documented" record which consisted of defendant's plea forms, the voir dire by the court during the plea colloquy, defendant's mitigation letter, and evidentiary hearing, "all overwhelmingly reveal[ed] that [defendant] was both advised and fully aware of the potential immigration consequences of pleading guilty."

The judge further stated,

No further probing by the [c]ourt became necessary at the sentencing hearing as both the [defendant] and [plea

counsel] appeared on the date scheduled and advised the [c]ourt that they were ready to proceed without issue. As a result of that representation, this [c]ourt did not probe further into the immigration consequences the [defendant] could face as a result of his guilty plea.

In denying defendant's motion to withdraw his guilty plea, the judge found defendant failed to satisfy the Slater factors. 198 N.J. at 157-58. Citing to the plea hearing transcript, the judge stated defendant did not assert a colorable claim of innocence. The judge also noted defendant affirmed his guilt in his mitigation letter, hoping to "mitigate either the severity of the charges or the sentence to be imposed in order to improve his chances of defending against his deportation."

Second, the judge determined defendant failed to provide "any credible reason" for withdrawing his guilty plea since the facts asserted by defendant were "unfounded" and "contradicted by statements in the record made by the [c]ourt, the [p]rosecutor, [plea counsel], and [defendant's] own correspondence to the [c]ourt." Additionally, the judge determined defendant's claim that he was never advised of the possibility of deportation was contradicted by the record "on several fronts."

As to the third factor, the judge found defendant pled guilty pursuant to a negotiated plea arrangement. Lastly, he concluded withdrawal of defendant's

guilty plea could result in unfair prejudice to the State and an unfair advantage to defendant given the five-year passage of time. This appeal followed.

II.

On appeal, defendant renews the arguments asserted before the PCR judge, contending:

POINT I

DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF TRIAL COUNSEL'S ERRONEOUS IMMIGRATION ADVICE.

POINT II

DEFENDANT'S GUILTY PLEA SHOULD BE VACATED BECAUSE IT WAS NOT ENTERED KNOWINGLY AND VOLUNTARILY.

Our review of a PCR claim after a court has held an evidentiary hearing "is necessarily deferential to [the] court's factual findings based on its review of live witness testimony." State v. Nash, 212 N.J. 518, 540 (2013). We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 420 (2004). The de novo standard of review also applies to mixed questions of fact and law. Ibid. (citing McCandless v. Vaughn, 172 F.3d 255, 265 (3d Cir. 1999)). Through that prism, we are unpersuaded by defendant's arguments and affirm

essentially for the reasons expressed by Judge Jimenez in his well-reasoned opinion. We add the following.

To establish a prima facie claim of ineffective assistance of counsel, a defendant must show: (1) counsel's performance was deficient; and (2) the deficiency prejudiced the defense. Strickland, 466 U.S. at 687; Fritz, 105 N.J. at 52. Where a PCR petition arises from a plea bargain, "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) (internal quotation marks omitted) (quoting Nuñez-Valdéz, 200 N.J. at 139).

Under Nuñez-Valdéz, a defendant may establish an ineffective assistance of counsel claim if his or her attorney provided false or inaccurate advice that the plea would not result in deportation. 200 N.J. at 139-42. But also, under Nuñez-Valdéz, a defendant's claim of ineffective assistance of counsel fails when he or she does not present any evidence of mistaken advice, and the defendant was on notice of the potential immigration consequences of the plea. Gaitan, 209 N.J. at 375-76.

A defendant may satisfy the first Strickland prong by showing that his or her attorney made misrepresentations, either affirmatively or by omission,

regarding the potential immigration consequences flowing from a guilty plea. Padilla v. Kentucky, 559 U.S. 356, 369-71, 374 (2010). When deportation is a clear consequence of a guilty plea, counsel has an affirmative duty to address the subject and give correct advice. Id. at 374. However, when the deportation consequences of a plea are uncertain, counsel need only advise their client that the plea may carry a risk of adverse immigration consequences. Id. at 369. A strong presumption exists that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689.

As to the second prong, 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. Cronic, 466 U.S. 648, 659 n.26 (1984)).

Based on these standards and the record before us, defendant's reliance on Núñez-Valdéz and Padilla is untenable. We perceive no error in the judge's finding "there was no credible evidence showing [plea counsel's] representation was deficient" under Strickland and that defendant "made an informed decision with the proper aid of counsel and with full knowledge of the potential consequences, to plead guilty." The judge properly rejected as not credible

defendant's testimony that plea counsel told him that he would be "fine" because his prison sentence would be less than five years.

We are satisfied the judge properly determined the motion record "overwhelmingly" showed defendant was "both advised and fully aware of the potential immigration consequences" of his guilty plea. Therefore, we discern no basis to disturb the judge's denial of defendant's PCR petition.

We next address defendant's contention that the judge erred in denying his motion to vacate his guilty plea because his guilty plea was not knowingly or voluntarily made. As noted above, Judge Jimenez rejected this argument after finding defendant not credible and analyzing the four Slater 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 157-58.

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 the "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." Ibid. (quoting State v. Smullen, 118 N.J. 408, 416 (1990)).

For the reasons explained by Judge Jimenez, we find no merit to defendant's claim that he was entitled to withdraw his guilty plea under the "manifest injustice" standard. Defendant did not present facts establishing a colorable claim of innocence after pleading guilty and affirming his guilt in his mitigation letter to the judge. Defendant also failed to offer any meritorious arguments for his withdrawal request. Further, defendant entered his plea pursuant to an advantageous plea bargain, and defendant's five-year delay would result in prejudice to the State if the requested relief were granted. See id. at 157-58. For these reasons, we concur with the judge's determination that defendant failed to satisfy the "manifest injustice" standard entitling him to withdraw his guilty plea under Slater. Id. 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