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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3209-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARVIN OLIVER GRAHAM,

Defendant-Appellant.

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Submitted January 10, 2023 – Decided April 18, 2023

Before Judges Smith and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 04-09-1305.

Joseph E. Krakora, Public Defender, attorney for appellant (Karen A. Lodeserto, 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 Marvin Oliver Graham appeals from the denial of his post-conviction relief (PCR) petition. Among other arguments, defendant contends he received ineffective assistance because plea counsel misadvised him about the potential immigration consequences of his plea and advised him to plead guilty over his protestations that he was innocent. We affirm.

## I.

In May 2004, defendant was observed by three officers engaging in a hand-to-hand narcotics transaction in a Paterson alley. After detaining and eventually arresting defendant, a search of defendant revealed \$296 in cash on his person. A search of defendant's immediate surroundings uncovered four bags of suspected crack cocaine.

In September 2004, defendant was charged by a Passaic County grand jury with: third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1); third-degree 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)(3); and third-degree possession of CDS with intent to distribute within 1000 feet of school property, N.J.S.A. 2C:35-7 and N.J.S.A. 2C:35-5(a).

On December 14, 2004, defendant pled guilty to third-degree possession of CDS with the intent to distribute within 1000 feet of school property, N.J.S.A. 2C:35-7 and N.J.S.A. 2C:35-5(a). The State dismissed the remaining charges.

In February 2005, defendant was sentenced to three years of probation, subjecting to him serving 364 days in the Passaic County Jail. Defendant did not file a direct appeal.

In April 2017, defendant pled guilty to a charge of second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7 and third-degree receiving stolen property, N.J.S.A. 2C:20-7. He was sentenced in October 2017 to concurrent prison terms of five and three years, respectively.

On July 23, 2018, defendant filed a PCR petition relating to his 2005 conviction. He made two arguments: plea counsel was ineffective for improperly advising defendant regarding the potential immigration consequences of pleading guilty; and defendant was pressured to plead guilty by his counsel and did not commit the 2004 crime.

Judge Marilyn Clark conducted an evidentiary hearing. Defendant and plea counsel each testified, and the judge made comprehensive credibility findings. The judge found defendant reviewed his plea form with counsel and answered a series of immigration questions in writing. Question 17b. stated:

"Do you understand that if you are not a citizen of the United States, this guilty plea may result in your removal from the United States and/or stop you from being able to legally enter or re-enter the United States?" The judge noted the record showed defendant circled "yes" on the plea form and initialed the page.

Turning to defendant's plea colloquy, the judge noted defendant admitted to his crimes and responded in the affirmative when the plea judge asked defendant whether he reviewed his plea form answers with counsel. The judge also found credible and gave weight to plea counsel's testimony that he always reviewed his clients' plea forms with them.

The judge concluded plea counsel was not ineffective, and defendant did not receive affirmative misadvice regarding the potential immigration consequences of his 2004 guilty plea. She further found defendant was not credible in his claim that he was innocent and pressured to plead guilty by counsel. Finally, she found defendant was successful in accomplishing his true objective: accepting the plea deal to avoid a prison term with a three-year period of parole ineligibility. The PCR court denied defendant's motion for post-conviction relief.

On appeal, defendant argues the following:

POINT I

THE PCR COURT ERRED IN DENYING [DEFENDANT'S] PETITION FOR [PCR] AS PRIOR COUNSEL WAS INEFFECTIVE IN AFFIRMATIVELY MISADVISING [DEFENDANT] REGARDING THE IMMIGRATION CONSEQUENCES OF HIS GUILTY PLEA.

POINT II

THE PCR COURT ERRED IN DENYING [DEFENDANT'S] PETITION FOR [PCR] AS PRIOR COUNSEL WAS INEFFECTIVE IN ALLOWING HIS CLIENT TO PROCEED WITH HIS GUILTY PLEA WHEN [DEFENDANT] WAS INNOCENT AND ALSO NOT AWARE OF HIS IMMIGRATION CONSEQUENCES

II.

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, 419 (2004). The de novo standard of review also applies to mixed questions of fact and law. Id. at 420 (citing McCandless v. Vaughn, 172 F.3d 255, 265 (3d Cir. 1999)).

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 v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 52 (1987) (adopting Strickland). Where the PCR involves 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) (quoting State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009)).

A defendant can establish ineffective assistance of counsel if their attorney provided false or inaccurate advice that the plea would not result in deportation. Nuñez-Valdéz, 200 N.J. at 139-42. The United States Supreme Court held a petitioner may meet the first Strickland prong by showing that their 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, the defendant's counsel has an affirmative duty to address the subject and give correct advice. Id. at 374. 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. Padilla does not apply retroactively. Gaitan, 209 N.J. at 373; Chaidez v. United States, 568 U.S. 342, 358 (2013). 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 had been on notice of the potential immigration consequences of the plea. Gaitan, 209 N.J. at 375-76.

There is a strong presumption counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. Further, because prejudice is not presumed, Fritz, 105 N.J. at 52, the defendant must demonstrate "how specific errors of counsel undermined the reliability" of the proceeding. United States v. Cronin, 466 U.S. 648, 659 n.26 (1984).

### III.

Defendant argues the court erred in denying his PCR petition because trial counsel was ineffective in affirmatively misadvising defendant regarding the immigration consequences of his guilty plea. Defendant relies on Nuñez-Valdéz and State v. Garcia, 320 N.J. Super. 332 (App. Div. 1999), for the proposition that he was entitled to notice of the immigration consequences of his plea, and that misadvising a client regarding the risk of deportation constitutes ineffective

assistance of counsel. Defendant also cites Padilla, 599 U.S. at 356, to support the theory that the Strickland standard can be met even in instances where the attorney did not affirmatively misadvise the client regarding immigration implications. Finally, defendant argues the trial court erred in not finding trial counsel ineffective because he testified that the potential immigration consequences were never "fully explored," and because the record was silent regarding deportation. We are not persuaded, and we affirm substantially for the reasons expressed in the meticulous and cogent opinion of Judge Clark. We add the following comments.

Defendant relies on Padilla to support its claim that the Strickland test for ineffective assistance of counsel can be met even in instances where the attorney did not affirmatively misadvise the client regarding immigration implications. However, we note Padilla was decided in 2010, and does not apply retroactively to the 2004 plea entered in this case. Gaitan, 209 N.J. at 372.

Defendant also relies on Nuñez-Valdéz to argue he was entitled to notice of deportation. While notice is a requirement set forth by Nuñez-Valdéz, the facts are clearly distinguishable. In Nuñez-Valdéz, two separate attorneys assured a defendant there would be no immigration consequences related to his guilty plea. 129 N.J. at 132. The defendant in that case was not provided a



Spanish copy of the plea form explaining he could face immigration consequences. Instead, the defendant had to rely on an oral translation. Id. at 135. The Court found the defendant received ineffective assistance of counsel because a central reason for accepting the plea deal was his belief that he would not suffer immigration repercussions related to his plea, and that this belief was reasonable under the circumstances. Ibid. Further, the Court found the defendant credible in his testimony that he had indeed been misinformed by his lawyers. Ibid.

This record is distinguishable from Nuñez-Valdéz. There is no language barrier in this matter which prevented defendant from understanding his plea form. The judge pointedly rejected defendant's testimony as not credible that plea counsel told him there would be no immigration consequences associated with his guilty plea. The judge cited defendant's affirmative answer to question 17b. of the plea form, an answer which showed defendant clearly understood he could be deported from the United States.

We discern no basis to disturb the judge's finding that defendant failed to meet his burden to show ineffective assistance of counsel for providing misadvice concerning possible deportation after a guilty plea.

Defendant next argues his plea was not knowing and voluntary because he did not know he was subject to deportation. The judge rejected this argument, finding defendant not credible. The record shows defendant was aware a guilty plea could result in deportation, having acknowledged this fact on this plea form.

Defendant further argues plea counsel was ineffective for advising him to plead guilty despite his innocence. The PCR judge rejected defendant's post-hoc claims of innocence, noting that he provided a detailed factual basis for his 2004 plea. We "owe deference to the trial court's credibility determinations . . . because it has 'a better perspective than a reviewing court in evaluating the veracity of a witness.'" C.R. v. M.T., 248 N.J. 428, 440 (2021) (quoting Gnall v. Gnall, 222 N.J. 414, 428 (2015)). We note defendant had the following exchange at the plea with counsel and the court:

[PLEA COUNSEL:] Did you and I have enough opportunity to discuss this matter and review the grand jury transcript and, in fact, the indictment and discovery in this case?

[DEFENDANT:] Yes.

[PLEA COUNSEL:] And after reviewing all that information and discussing the matter you feel that what you want to do today is plead guilty, is that correct?

[DEFENDANT:] Yes.

[PLEA COUNSEL:] And you're doing this because you want to?

[DEFENDANT:] Yes.

[PLEA COUNSEL:] And, in fact, because you are guilty of what you're being charged with?

[DEFENDANT:] Yes.

....

[THE COURT:] Are your answers truthful?

[DEFENDANT:] Yes.

[THE COURT:] Do you have any questions you want to ask your lawyer?

[DEFENDANT:] No, Your Honor.

[THE COURT:] Are you satisfied with his services?

[DEFENDANT:] Yes.

Judge Clark properly denied defendant's petition, finding plea counsel provided all of the immigration consequence advice our jurisprudence required pre-Padilla. Defendant engaged in a knowing and voluntary guilty plea on December 14, 2004, and the record reveals no suggestion defendant was pressured or misled in anyway by counsel to plead guilty, other than his bald assertions.

To the extent that we do not address any argument raised by defendant on appeal, we find they lack sufficient merit to warrant discussion in this 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