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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1248-22**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BARRINGTON MCCAIN,

Defendant-Appellant.

Submitted May 1, 2024 – Decided May 30, 2024

Before Judges Firko and Vanek.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Accusation No. 93-09-0474.

Michael J. Pastacaldi, LLC, attorney for appellant (Michael J. Pastacaldi, on the briefs).

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (David Michael Liston, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Barrington McCain appeals from a November 21, 2022 Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing, filed twenty-eight years after his guilty plea and conviction. Based upon our careful review of the record and application of prevailing law, we affirm both the procedural and substantive denial of defendant's PCR petition.

I.

We note at the outset that our determination of defendant's PCR appeal is somewhat circumscribed since crucial portions of the record below have been lost to time. At this point, minimal documentation exists consisting of a plea form, supplemental plea form, order of commitment, waiver of indictment, initial intake form, two Accusation documents and two motions to lower bail. There was no transcript of the plea or sentencing hearing provided to us, and all discovery has been destroyed.¹ Thus, we glean the following facts from our review of the limited record.

¹ Defendant asserts generally that transcripts were requested but they could not be produced since the tapes or transcription notes had been destroyed due to the age of this matter. No evidence of any requests for transcripts of specific proceedings, aside from the subject PCR hearing, were provided to us.

On August 10 and 27, 1993, defendant distributed marijuana within 1,000 feet of a school, specifically St. Matthew's Parochial School in Edison. On August 27, 1993, defendant was arrested and charged with two counts of third-degree possession of a controlled dangerous substance (CDS) with an intent to distribute, N.J.S.A. 2C:35-5(a), and two counts of distribution of CDS in a school zone, N.J.S.A. 2C:35-7. The intake form specifies that the charges were for possession of marijuana "over fifty grams and under five pounds," N.J.S.A. 2C:35-10(a)(3)(a), "with the intent to distribute to an undercover officer on both dates."² This intake form also mistakenly states that defendant is a United States citizen who was born in Jamaica, raised in Canada, and had been in the United States for ten to fifteen years.

On September 29, 1993, defendant pleaded guilty to two counts of distribution of a CDS (marijuana) under N.J.S.A. 2C:35-5(b)(11), with the description of the charges specifying that the culpable conduct was "in [a] school zone." Defendant signed a plea form on which he circled "N/A" and underlined the word "citizen" in response to question seventeen stating: "Do you understand that if you are not a United States citizen or national, you may be

² The charge for violation of N.J.S.A. 2C:35-10(a)(3)(a) is not listed on defendant's Accusation documents or order of commitment. However, the additional charge does not impact our analysis of this appeal.

deported by virtue of your plea of guilty?" Defendant marked the box at question twenty-three, setting forth that he was satisfied with the services of his attorney. The plea form also contained question twenty-four asking if defendant had "any questions at all" concerning his plea, to which he marked "No." Defendant initialed each page and signed the last page of the plea form on September 29, 1993.

On November 10, 1993, defendant was sentenced to two concurrent three-year periods of incarceration with one year of parole ineligibility.³ Defendant was also ordered to forfeit certain funds, pay certain fines and surrender his driver's license for six months. Defendant served the sentence and paid all fines.

Defendant did not file a direct appeal and, instead, filed a PCR petition on December 20, 2021, twenty-eight years after his plea, arguing he had been denied effective assistance of counsel because his trial counsel failed to advise him of the immigration consequences of accepting the plea offer and did not inform him of the right to file a PCR petition. Defendant also argued to the PCR court his plea should be vacated due to the "manifest injustice" that resulted from the immigration consequences of the plea; he has demonstrated "excusable

³ The prosecutor waived the mandatory minimum parole ineligibility.

neglect" justifying relaxation of the five-year time limitation on filing a PCR petition; and he has a right to an evidentiary hearing.

Defendant's certification sets forth that when he pleaded guilty to distribution of marijuana in 1993, neither the court nor his attorney ever informed him that the offense would affect his immigration status. He alleges that his attorney never asked him if he was a United States citizen and no immigration issues were discussed at any time during the representation. Defendant asserts that he legally emigrated to the United States from Jamaica with his mother in 1986. Defendant contends that he never would have proceeded with the plea had he been told it would prevent him from becoming a United States citizen or subject him to deportation. There is no statement in defendant's certification proclaiming his innocence to the crimes he was charged with or pleaded guilty to.

Defendant certified that after his release from incarceration in 2002, he was detained by Immigration and Customs Enforcement (ICE) who sought his deportation to Jamaica, where he is a citizen. Defendant's immigration attorney successfully applied for a waiver of deportation and that case was dismissed. Defendant asserts he remained in the United States as a legal permanent resident, and, in 2005, the Immigration Court denied his citizenship application due to his

guilty plea to an "aggravated felony" in this case. Defendant asserts the Immigration Court's determination was affirmed on October 26, 2006. Defendant posits his then-immigration attorney advised him a further appeal was filed but he later learned, on an unspecified date, that had not occurred.

Defendant claims the immigration attorney representing him on the waiver application and appeal passed away. No date of death was set forth. Defendant asserts he hired another immigration attorney "in 2020" and that attorney advised him of his PCR rights. Defendant then hired his present counsel "in 2021" to pursue PCR. He continues to reside in the United States with his wife and two children.

On November 21, 2022, the PCR court denied the petition as time-barred pursuant to Rule 3:22-12(a)(1), in a written decision. The PCR court found that defendant's request for relief was precluded as it was filed more than five years after the November 10, 1993 order of commitment from which defendant seeks relief.

The PCR court also found that defendant did not present a factual predicate sufficient to relax the five-year time bar such as excusable neglect or late-discovered evidence. The PCR court found that the petition was filed well beyond one year from "the date on which the factual predicate for the relief

sought was discovered," which would have been September 29, 1993, when defendant signed the plea agreement. The PCR court further found that defendant was aware, at the very least in 2002, of the immigration consequences of his plea when he was detained by ICE, which sought his deportation.

Based on the failure to justify the untimely filing twenty-eight years later, the PCR court rejected defendant's arguments and denied relief. The PCR court also rejected defendant's argument that the sequelae of the plea agreement he accepted constituted, "twenty-eight years of adverse immigration consequences [and] r[o]se to the level of a 'manifest injustice'" under State v. Slater, 198 N.J. 145, 158-62 (2009), sufficient to warrant vacating defendant's plea.

The PCR court also concluded an evidentiary hearing was not warranted since defendant had not established a prima facie claim that he would ultimately succeed on the merits under the standard set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984), adopted by our State in State v. Fritz, 105 N.J. 42, 58 (1987). First, the PCR court rejected defendant's argument that because he was not informed of the potential immigration consequences of his plea, counsel's conduct fell short of the standard set forth in both the Court's decision in State v. Nunez-Valdez, 200 N.J. 129 (2009), and the United States Supreme Court's decision in Padilla v. Kentucky, 559 U.S. 356 (2010), finding that both cases

were decided long after defendant's 1993 guilty plea. In its thorough decision, the PCR court went on to consider defendant's substantive argument under Nunez-Valdez and Padilla, finding defendant's trial counsel had no objective reason to know there would be an impact on defendant's immigration status, as the records at the time of the 1993 plea reflected that defendant was a United States citizen.

The PCR court went on to analyze the second Strickland prong, finding defendant did not establish a defense to the criminal charges or a factual predicate that defendant would otherwise have been found not guilty. The PCR court also found defendant did not establish that in the absence of his ignorance of post-conviction rights, he would not have pleaded guilty and would otherwise have been found not guilty.

Defendant raises the following arguments on appeal:

POINT I

THE PCR COURT ERRED WHEN IT FAILED TO GRANT [PCR] OR GRANT AN EVIDENTIARY HEARING.

(1) The Trial Court Erred In Failing To Find Ineffective Assistance Of Counsel.

(2) Trial Court Erred [I]n Failing [T]o Vacate [T]he Plea [I]n This Matter [U]nder [Slater].

POINT II

THE PCR COURT ERRED WHEN IT TIME-BARRED DEFENDANT'S PETITION FOR [PCR].

II.

We begin our analysis by acknowledging the legal principles governing this appeal. PCR serves the same function as a federal writ of habeas corpus. State v. Preciose, 129 N.J. 451, 459 (1992). When petitioning for PCR, a defendant must establish, by a preponderance of the credible evidence, that he is entitled to the requested relief. Ibid. To sustain this burden, the petitioner must allege and articulate specific facts, "which, if believed, would provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

To establish an ineffective assistance of counsel claim, a defendant must demonstrate: (1) "counsel's performance was deficient"; and (2) "the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687; see also Fritz, 105 N.J. at 58. "That is, the defendant must establish, first, that 'counsel's representation fell below an objective standard of reasonableness' and, second, that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" State v. Alvarez,

473 N.J. Super. 448, 455 (App. Div. 2022) (quoting Strickland, 466 U.S. at 688, 694).

Under Strickland's second prong, "the defendant must show that the deficient performance prejudiced the defense." Id. at 687. That is, "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Ibid. It is insufficient "for the defendant to show that the errors had some conceivable effect on the outcome." Id. at 693. Ultimately, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if [it] had no effect on the judgment." Id. at 691.

A defendant may show that an evidentiary hearing is warranted to develop the factual record in connection with an ineffective assistance claim. Preciose, 129 N.J. at 462-63. However, the mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

The PCR court should grant an evidentiary hearing

only when: (1) the defendant establishes a prima facie case in support of PCR; (2) the court determines that there are disputed issues of material fact that cannot be resolved by review of the existing record; and (3) the court determines that an evidentiary hearing is required to resolve the claims asserted.

[State v. Vanness, 474 N.J. Super. 609, 623 (App. Div. 2023) (citing State v. Porter, 216 N.J. 343, 354 (2013)).]

"If the court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to [PCR], . . . then an evidentiary hearing need not be granted." State v. Marshall, 148 N.J. 89, 158 (1997) (citations omitted).

"Where, as here, the PCR court has not conducted an evidentiary hearing, we review its legal and factual determinations de novo." State v. Aburoumi, 464 N.J. Super. 326, 338 (App. Div. 2020). However, "we review under the abuse of discretion standard the PCR court's determination to proceed without an evidentiary hearing." State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013) (citing Marshall, 148 N.J. at 157-58).

Rule 3:22-12(a)(1) prescribes the time limitations for filing first PCR petitions. Pertinent here, the Rule generally provides that "no petition shall be filed . . . more than [five] years after the date of the entry . . . of the judgment of conviction (JOC) that is being challenged . . ." R. 3:22-12(a)(1).⁴

⁴ In State v. Dugan, we held that a defendant must file his petition "within five years of whatever judicial action he is attacking." 289 N.J. Super. 15, 19-21 (App. Div. 1996).

There are two exceptions to the five-year time limitation. First, the five-year time limitation does not apply where the PCR 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 . . . defendant's factual assertions were found to be true enforcement of the time-bar would result in a fundamental injustice." R. 3:22-12(a)(1)(A). Second, the five-year limitation does not apply where the PCR petition "alleges a claim for relief as set forth in [Rule 3:22-12(a)(2)(A) or (a)(2)(B)] and is filed within the one-year period set forth in [Rule 3:22-12(a)(2)]." ⁵ R. 3:22-12(a)(1)(B).

⁵ Rule 3:22-12(a)(2) sets forth:

Notwithstanding any other provision in this rule, no second or subsequent petition shall be filed more than one year after the latest of

- (A) the date on which the constitutional right asserted was initially recognized by the United States Supreme Court or the Supreme Court of New Jersey, if that right has been newly recognized by either of those Courts and made retroactive by either of those Courts to cases on collateral review; or
- (B) the date on which the factual predicate for the relief sought was discovered, if that factual predicate could not have been discovered earlier through the exercise of reasonable diligence; or
- (C) the date of the denial of the first or subsequent application for [PCR] where ineffective assistance of counsel that represented the defendant on the first or subsequent application for [PCR] is being alleged.

Defendant filed his petition on December 20, 2021, far more than five years after he pleaded guilty and was sentenced. He did not establish before the PCR court that any of the exceptions to the five-year time bar applied. On appeal, defendant asserts his petition should not be time-barred because there is no record he was advised of his PCR rights and applicable filing time limits, which he claims constitutes excusable neglect under the first Rule 3:22-12 exception.

"Excusable neglect provides the means for a court to address and correct a criminal judgment where 'adherence to it would result in an injustice.'" State v. Norman, 405 N.J. Super. 149, 159 (App. Div. 2009) (quoting State v. McQuaid, 147 N.J. 464, 485 (1997)). To establish "excusable neglect" under Rule 3:22-12(a)(1)(A), a defendant must demonstrate "more than simply providing a plausible explanation for a failure to file a timely PCR petition." Ibid.

In assessing whether a defendant has demonstrated excusable neglect, a court must weigh "'the extent of the delay,'" "the purposes advanced by the five-year rule," "the nature of defendant's claim[,] and the potential harm presumed or realized" by defendant, State v. Murray, 162 N.J. 240, 251 (2000) (quoting Mitchell, 126 N.J. at 580), as well as the "'cause of the delay, the prejudice to

the State, and the importance of the [defendant's] claim in determining whether there has been an "'injustice'" sufficient to relax the time limits," Norman, 405 N.J. Super. at 159 (quoting State v. Afanador, 151 N.J. 41, 52 (1997)).

"Ignorance of the law and rules of court does not qualify as excusable neglect," State v. Merola, 365 N.J. Super. 203, 218 (Law Div. 2002) (citing Murray, 162 N.J. at 246), and a defendant's decision "to remain intentionally ignorant of . . . legal consequences" does not support a finding of excusable neglect, State v. Brown, 455 N.J. Super. 460, 471 (App. Div. 2018).

Measured against these principles, defendant's PCR petition—filed twenty-eight years after his conviction—does not support a finding of excusable neglect. As we have articulated, defendant failed to assert any explanation to establish excusable neglect under Rule 3:22-12(a)(1)(A). Defendant makes a bald assertion that he was unaware and uninformed of his right to file a PCR petition, but defendant makes no colorable claim of innocence, fails to set forth the steps he took following his 2002 ICE detainment to address the conviction, or support his claim asserting excusable neglect as recognized by our case law. "[M]ore than simply . . . a plausible explanation" is required, and defendant has failed to establish "'compelling, extenuating circumstances,'" as determined by

the PCR court. See Norman, 405 N.J. Super. at 159; Murray, 162 N.J. at 251 (quoting Mitchell, 126 N.J. at 580).

Moreover, even considering defendant's excusable neglect argument, there is still an insufficient basis to relax the time restraints because of the severe prejudice to the State. See Brewster, 429 N.J. Super. at 400 ("If excusable neglect for late filing of a petition is equated with incorrect or incomplete advice, long-convicted defendants might routinely claim they did not learn about the deficiencies in counsel's advice on a variety of topics until after the five-year limitation period had run."). Defendant pleaded guilty over twenty-eight years ago, and memories of witnesses, if the individuals can even be located, have likely faded or have completely dissipated. The goal of Rule 3:22-12(a)(1) is to ensure the finality of this matter and resolve any uncertainty with regard to a potential re-trial.

III.

Even if defendant's claim were not time-barred, we find no error in the PCR court's order. After review of the record, we conclude defendant failed to establish a prima facie claim of ineffective assistance of counsel in connection with the plea agreement sufficient to warrant an evidentiary hearing or reversal of the PCR court's denial of his petition.

Defendant has not met his burden under the first prong of Strickland to establish counsel's handling of the matter "fell below an objective standard of reasonableness" based upon our deferential review of the PCR court's factual findings. Strickland, 466 U.S. at 688. Defendant argues that the later-decided cases of Nunez-Valdez, 200 N.J. at 142 and Padilla, 559 U.S. at 366, 370, warrant the granting of PCR since he was not informed of the immigration consequences of his plea. Our ability to consider defendant's plea for relief on this issue is hampered since evidence of defendant's verbal assent to the plea form or any other questions that may have been posed by the court or counsel are not in the record before us.

According to defendant's certification, he did not consult with counsel regarding the consequences of his guilty plea. Even if we accept that defendant's first immigration counsel failed to inform him of the right to file a PCR petition during the immigration proceedings which concluded in 2006, there is no information regarding when that attorney passed away and why defendant waited until 2020 to consult with another attorney. In addition, defendant does not indicate when he retained the second immigration attorney in relation to the filing of the PCR petition.

The case law cited by defendant in support of his PCR petition does not warrant a finding of ineffective assistance of counsel with respect to the 1993 plea. Defendant relies on subsequent decisions in Nunez-Valdez, 200 N.J. at 142, Padilla, 559 U.S. at 366, 367, and State v. Molina, 187 N.J. 531, 536 (2006), to impose an obligation on counsel to advise defendant of his rights to PCR and of the immigration consequences at the time of plea. However, these cases were all decided years after defendant entered his guilty plea. See State v. Gaitan, 209 N.J. 339, 371-72 (2012) (finding the requirement that attorneys "advise noncitizen clients of the risk of immigration consequences" is a "new constitutional pronouncement [and] not entitled to retroactive application on collateral review based on federal retroactivity standards").

Counsel simply cannot be held to have known of a standard that had not yet been articulated by our courts. Thus, counsel's performance was not objectively unreasonable and there was no need for an evidentiary hearing on this issue. In State v. Antuna, cited by defendant as support for his argument, we concluded if the "[d]efendant's plea was entered prior to the United States Supreme Court's holding that requires 'counsel must inform her client whether his plea carries a risk of deportation,'" the defendant is unable to retroactively benefit from the newly established mandate. 446 N.J. Super. 595, 600 (App.

Div. 2016) (quoting Padilla, 559 U.S. at 374). In Antuna, we remanded the defendant's petition to the PCR court, not because he was not adequately advised of the adverse immigration consequences of his conviction following his guilty plea, but because "the attorney's performance was deficient for failing to have [the] defendant review every question on the plea form." Id. at 602-03. We lack the evidence required to conduct the same analysis of the sufficiency of defendant's plea in this case.

Defendant does not allege he did not complete the plea form which contains his initials on each page and his signature at the end of the form. There is no assertion that a language barrier precluded him from understanding what he was agreeing to. Question seventeen on the plea form asked whether defendant understood that if he was not a United States "citizen or national" he may be deported by virtue of his guilty plea. In response, defendant circled "N/A" and underlined the word "citizen." Defendant answered "yes" to questions twenty-three and twenty-four representing he was satisfied with the advice he received from his lawyer and had no questions "at all" concerning the plea.

IV.

Not only do we view defendant's application to vacate the plea untimely as it seeks PCR well beyond the proscribed time limits, we also conclude the PCR court did not err in ruling that application of the Slater factors did not warrant relief. Under Slater,

[J]udges are to consider and balance four factors in evaluating motions to withdraw a guilty plea: (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.

[198 N.J. at 157-58.]

"No single Slater factor is dispositive; 'if one is missing, that does not automatically disqualify or dictate relief.'" State v. McDonald, 211 N.J. 4, 16-17 (2012) (quoting Slater, 198 N.J. at 162).

With respect to the first factor, "[a] bare assertion of innocence is insufficient to justify withdrawal of a plea." Slater, 198 N.J. at 158. Instead, "[d]efendants must present specific, credible facts and, where possible, point to facts in the record that buttress their claim." Ibid. According to Slater, the second factor, the nature and strength of defendant's reasons for withdrawal, "focuses 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." Id. at 159. Although we are not to approach the reasons for withdrawal with "skepticism," we "must act with 'great care and realism' because defendants often have little to lose in challenging a guilty plea." Id. at 160 (quoting State v. Taylor, 80 N.J. 353, 365 (1979)).

With respect to the third Slater factor, whether the plea was entered as the result of a plea bargain, the Court noted that "defendants have a heavier burden in seeking to withdraw pleas entered as part of a plea bargain." Ibid. However, the Court did "not suggest that this factor be given great weight in the balancing process." Id. at 161.

As to the fourth factor, unfair prejudice to the State or unfair advantage to the accused, the Court stated there was "no fixed formula to analyze the degree of unfair prejudice or advantage that should override withdrawal of a plea" and that "courts must examine this factor by looking closely at the particulars of each case." Ibid. "The critical inquiry . . . is whether the passage of time has hampered the State's ability to present important evidence." Ibid. The State need not "show prejudice if a defendant fails to offer proof of other factors in support of the withdrawal of a plea." Id. at 162.

The PCR court properly rejected defendant's argument under the first Slater factor that a colorable claim of innocence had been established by his plea being tainted through his attorney's failure to appropriately advise him of the immigration consequences. Defendant included no facts in his certification in support of PCR alleging that he did not commit the crime to which he pleaded guilty, such that we can conclude there is any colorable claim of defendant's innocence.

The second Slater factor does not weigh in defendant's favor as there is no merit to the ineffective assistance of counsel claim. In analyzing the third Slater factor, the PCR court found the fact that defendant has a wife and two children is outweighed by the benefits that defendant received from the plea agreement. Defendant conceded the fourth Slater factor weighed against him in that too long of a time has passed to re prosecute the case.

In light of the heavy burden defendant bears to withdraw his guilty plea under Slater, we find no error in the PCR court's analysis of the Slater factors and denial of defendant's application to withdraw his guilty plea twenty-eight years later, based upon the failure to establish relief is necessary "to correct a manifest injustice." See id. at 156.

V.

Thus, the PCR court was correct in determining defendant's petition for post-conviction relief was untimely, defendant failed to establish a prima facie claim under Strickland with regard to his claim for ineffective assistance of counsel based upon the record before the PCR court, and defendant failed to establish a basis for withdrawing his guilty plea under Slater. To the extent we have not addressed any of defendant's remaining arguments, we conclude they 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