

RECORD IMPOUNDED

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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-3981-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WILSON A. PENA, a/k/a
WILSON PENA-LOJO,

Defendant-Appellant.

Submitted May 6, 2024 – Decided May 29, 2024

Before Judges Sabatino and Chase.

On appeal from the Superior Court of New Jersey, Law
Division, Mercer County, Indictment No. 17-09-0465.

Jennifer Nicole Sellitti, Public Defender, attorney for
appellant (Monique D. Moyse, Designated Counsel, on
the brief).

Angelo J. Onofri, Mercer County Prosecutor, attorney
for respondent (Laura Sunyak, of counsel and on the
brief; Rita Essam Farag, on the brief).

PER CURIAM

Defendant Wilson A. Pena, also known as Wilson Pena-Lojo, appeals the trial court's March 12, 2021 order denying his petition for postconviction relief ("PCR"), and his related motion to set aside his 2018 guilty plea to third-degree endangering the welfare of a child. We affirm.

According to the State's investigation, on July 16, 2016, defendant pulled down the minor victim's pants and touched her posterior for a sexual purpose. The State charged defendant with, most seriously, first-degree aggravated sexual assault and several lesser included offenses.

Defendant's counsel negotiated a plea agreement in which the State amended the charges to third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a). The other charges were dismissed. As part of the agreement, the State agreed to recommend a sentence of a flat three years, subject to various conditions, including Parole Supervision for Life ("PSL") and Megan's Law registration and reporting obligations.

Defendant signed the plea forms, and on July 11, 2018, he entered a guilty plea before the court. At the plea hearing, defendant, who is an immigrant from Guatemala, acknowledged that he had discussed with his counsel the immigration consequences of his conviction. He also placed on the record a factual basis to the endangering charge.

The trial court sentenced defendant on November 2, 2018 to a three-year flat custodial term, with several conditions consistent with the plea agreement. Defendant did not appeal.

After completing his custodial sentence, defendant was detained by the Immigration and Customs Enforcement agency. That immigration detainer prompted him to file his PCR petition in October 2019.

Defendant contends his plea counsel was constitutionally ineffective in several respects. Among other things, he claims his plea counsel provided him with inadequate advice about the immigration consequences of his guilty plea and failed to tell him his conviction would result in mandatory deportation. He further alleges his guilty plea lacked a proper factual basis, and that counsel should have moved to withdraw his plea. Defendant further alleges his plea counsel should have made sure that an appeal was filed on his behalf.

Following oral argument, the PCR judge, who was the same judge who presided over defendant's plea hearing and imposed the sentence issued a twelve-page written opinion on March 12, 2021, denying defendant's application on the merits. The judge found no need for an evidentiary hearing.

In his brief on appeal, defendant presents the following points:

POINT I

[DEFENDANT'S] GUILTY PLEA MUST BE SET ASIDE OR THE MATTER REMANDED FOR AN EVIDENTIARY HEARING OR THE MATTER REMANDED FOR FURTHER FINDINGS BY THE PCR COURT.

POINT II

[DEFENDANT] IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT HIS ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO ADVISE HIM ADEQUATELY OF THE DEPORTATION CONSEQUENCES OF HIS PLEA AND FAILING TO FILE A DIRECT APPEAL.

Having considered these arguments in light of the record and the applicable law, we affirm the trial court's ruling, substantially for the sound reasons set forth in the written opinion of Judge Robert W. Bingham, II. We add only a few amplifying comments.

It is well settled that a person accused of crimes is constitutionally guaranteed the effective assistance of legal counsel in the accused's defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). To prove a deprivation of that right, a convicted defendant must satisfy the two-part test of Strickland by demonstrating that: (1) counsel's performance was deficient, and (2) the deficient performance actually prejudiced the accused's defense. Id. at 687; see

also State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the Strickland two-part test in New Jersey). When reviewing such claims, courts apply a strong presumption that defense counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690.

These principles have been applied specifically to the representation an attorney provides in the context of plea negotiations. Lafler v. Cooper, 566 U.S. 156, 162-63 (2012); Missouri v. Frye, 566 U.S. 134 (2012). The case law requires a defendant claiming such ineffectiveness by plea counsel to show with "reasonable probability" that the result would have been different had defendant received proper advice from the trial attorney. Lafler, 566 U.S. at 163 (citing Strickland, 466 U.S. at 694); see also Lee v. United States, 582 U.S. 357, 364-65 (2017) (holding that, when a defendant has pled guilty prior to trial based on alleged incorrect advice from counsel about deportation consequences, the court must determine "whether the defendant was prejudiced by the 'denial of the entire judicial proceeding . . . to which he had a right'" (quoting Roe v. Flores-Ortega, 528 U.S. 470, 483 (2000))).

In reviewing defendant's claims of ineffectiveness here, we apply a combination of standards of appellate review. We uphold a PCR court's factual

findings if they are "supported by sufficient credible evidence in the record." State v. Pierre, 223 N.J. 560, 576 (2015) (quoting State v. Nash, 212 N.J. 518, 540 (2013)). On the other hand, we review de novo the PCR court's legal conclusions. Nash, 212 N.J. at 540.

Additionally, in order to obtain an evidentiary hearing, a PCR applicant must set forth a prima facie case that his former counsel's performance was deficient and that such deficiency caused actual prejudice. State v. Preciose, 129 N.J. 451, 462-63 (1992). "Bald assertions" by a defendant will not suffice to warrant an evidentiary hearing. State v. Porter, 216 N.J. 343, 355 (2013) (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)).

Applying these principles, we concur with the PCR court that none of defendant's allegations have manifestly sufficient merit to require an evidentiary hearing. With respect to the immigration issues, the plea hearing transcript and plea forms substantiate that defendant was advised of immigration consequences at the time he entered his guilty plea. We are mindful that plea counsel spoke privately with defendant during the break in the plea hearing with the stated purpose of conferring about the subject. Even so, the recitals on the record show that defendant voluntarily went forward with his guilty plea after being provided with such an opportunity for consultation.

Other than defendant's own uncorroborated "bald assertions," there is no evidence that plea counsel provided deficient advice to him in violation of Padilla v. Kentucky, 559 U.S. 356, 372 (2010), concerning the likelihood of being deported after completing his prison term. Further, defendant fails to establish a "reasonable probability" that had he received different advice he would have rejected State's plea offer and risked facing at trial the far greater exposure of a sentence to a first-degree child sexual offense.

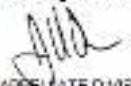
We also agree with the PCR court's rejection of defendant's claim that his plea counsel was ineffective by not moving to withdraw defendant's guilty plea at his sentencing in 2019. As the court reasonably found, such a motion would not have been likely to satisfy the criteria for withdrawal under State v. Slater, 198 N.J. 145, 155 (2009). Respecting those criteria, defendant has not presented a colorable claim of his innocence of child endangerment with the requisite "specific, credible facts." Id. at 158. Nor has defendant persuasively shown "fair and just reasons" for withdrawal. Id. at 159. Most importantly, defendant cannot surmount the "unfair prejudice" to the State, id. at 157, 161, that would surely arise if the State were forced to try allegations of sexual abuse to a child occurring eight years ago, and the associated trauma caused to that victim by resurrecting the case.

Lastly, there is no evidence that defendant requested his former counsel to file a direct appeal of his conviction, or that the failure to carry out such a request, assuming it had been made, deprived him of a reasonable probability of a reversal. The factual basis for the guilty plea was adequate, and the sentence imposed was fair and consistent with the plea agreement.

To the extent we have not addressed them, all other arguments raised by defendant lack sufficient merit to warrant discussion. 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