RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2731-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BERNARDO CHAVEZ-PADILLA,

Defendant-Appellant.

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Submitted September 26, 2023 – Decided November 3, 2023

Before Judges Gilson and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 13-06-1545.

Herlihy, Young & Niemiec, attorneys for appellant (Jeff Thakker, of counsel; Kevin E. Young, on the briefs).

Bradley D. Billhimer, Ocean County Prosecutor, attorney for respondent (Samuel Marzarella, Chief Appellate Attorney, of counsel; Cheryl L. Hammel, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Chavez-Padilla appeals from an April 6, 2022 order denying his petition for post-conviction relief (PCR) after oral argument but without an evidentiary hearing. Judge Guy P. Ryan determined that defendant's PCR petition was time-barred and otherwise lacked merit. Having conducted a de novo review, we agree and affirm.

I.

In October 2012, defendant allegedly entered his neighbor's apartment and sexually assaulted a five-year-old girl. A forensic examination confirmed that there was a laceration in the victim's vagina. On October 9, 2012, defendant was arrested. The following day, an Immigration and Customs Enforcement (ICE) detainer was lodged against defendant. In June 2013, defendant was indicted for first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1); second-degree sexual assault, N.J.S.A. 2C:14-2(b); and second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a).

In October 2013, defendant pled guilty to an amended charge of fourth-degree criminal trespass, N.J.S.A. 2C:18-3(a). At the plea hearing, defendant's counsel informed the court that defendant was not a United States citizen and was not in the United States legally. Counsel then advised the court that defendant and his family had consulted with at least three immigration attorneys.

Counsel also pointed out that he had gone over the plea form with defendant, including question seventeen, which concerned the immigration consequences of defendant pleading guilty. In answering that question, defendant had acknowledged that he was not a United States citizen, that he had consulted with immigration attorneys, and that he was aware he could be deported as a consequence of his guilty plea.

The judge overseeing the plea hearing then questioned defendant about whether he understood that the plea could affect his status and that he could be removed from the United States if he pled guilty. Defendant confirmed that he understood those consequences. Thereafter, he pled guilty.

In accordance with his plea agreement, defendant was sentenced to time served of 396 days and the remaining charges in the indictment were dismissed. At his sentencing on November 8, 2013, defendant was questioned about his plans. Defendant responded: "I don't know yet. If [ICE] allows me to stay here, I will stay here. Otherwise, I will go to Mexico." Following his sentence, defendant was released from county jail and transferred to the custody of ICE.

Almost eight years later, in August 2021, defendant filed his first PCR petition. He contended that plea counsel had been ineffective in failing to properly advise him of the deportation consequences of his plea.

Judge Ryan heard arguments on the PCR petition. At that proceeding, defendant contended that he did not realize he was facing deportation until April 2018. Defendant then argued that his plea counsel should have asked the court to sentence him to 179 days so that he could have argued for a cancellation of removal before the federal Immigration Court.

On April 6, 2022, Judge Ryan issued an order denying defendant's petition. The judge supported that ruling with a twenty-seven-page written opinion. Judge Ryan first found that defendant's PCR petition was time-barred under Rule 3:22-12. The judge also addressed the merits of defendant's petition and found that defendant had not established either prong of the Strickland test. See Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 58 (1987).

II.

On this appeal, defendant, through his counsel, makes two arguments, which he articulates as follows:

> I. AS A MATTER OF LAW, THE "TIME-SERVED" SENTENCE NEEDLESSLY COST [DEFENDANT] THE OPPORTUNITY TO CANCEL REMOVAL PROCEEDINGS; THE LAW DIVISION'S DENIAL OF PCR WAS ERRONEOUS AND SHOULD BE REVERSED.

II. THE DELAY IN THE PETITION WAS DUE TO EXCUSABLE NEGLECT, AND IT WAS ERRONEOUS FOR THE [LAW DIVISION] TO DENY THE PETITION ON PROCEDURAL GROUNDS.

When a PCR court does not conduct an evidentiary hearing, legal and factual determinations are reviewed de novo. State v. Harris, 181 N.J. 391, 419 (2004). The decision to proceed without an evidentiary hearing is reviewed for an abuse of discretion. State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013).

The arguments defendant makes on appeal are essentially the same arguments he presented to Judge Ryan. We reject those arguments for the reasons explained by Judge Ryan in his well-reasoned written opinion.

First, Judge Ryan found that defendant's PCR petition was filed several years after the five-year limit of Rule 3:22-12. In that regard, Judge Ryan found that defendant had shown no excusable neglect because defendant was aware of the immigration consequences when he pled guilty in 2013. Judge Ryan also found that defendant was aware of his arguments concerning the cancellation of deportation in April 2018, but took no action to file a timely petition. Finally, Judge Ryan found that defendant presented no facts to support a finding of

fundamental injustice. In that regard, the judge noted that defendant was not claiming innocence; rather, he was seeking an amendment of his sentence.

Judge Ryan correctly summarized the law concerning the five-year limitation on seeking a PCR petition. The judge's findings concerning lack of excusable neglect and no showing of a fundamental injustice are amply supported by the facts in the record.

Judge Ryan also correctly set forth the law governing ineffective assistance of counsel, see Strickland, 466 U.S. at 687; Fritz, 105 N.J. at 58, and what counsel must do when representing a non-citizen who pleads guilty to a crime, see Padilla v. Kentucky, 559 U.S. 356, 366-69 (2010); State v. Gaitan, 209 N.J. 339, 380-81 (2012); Brewster, 429 N.J. Super. at 392. Judge Ryan then reviewed the record and found that defendant was accurately informed that his plea would likely result in his removal from the United States.

Defendant appears to contend that he was misadvised when he was told that he might be, could be, or likely would be deported if he pled guilty. We reject that argument. The final determination on whether someone is removed from the United States is made by federal immigration officials who have control over the removal process. Consequently, it is not inaccurate when defense counsel or a state judge informs a defendant who is pleading guilty to a

crime that he is likely to be, could be, or may be deported. See State v. Blake, 444 N.J. Super. 285, 300-01 (App. Div. 2016). Because such advice is a prediction of future events over which another authority has the final say, there is nothing inaccurate about informing a defendant he may be, could be, or likely will be deported. The critical question is whether a defendant understood that by pleading guilty he faced the likely consequences of being removed from the United States.

The record at defendant's plea hearing confirmed that he understood that if he pled guilty, he would probably be removed from the United States. When defendant pled guilty, there was already an ICE detainer lodged against him. When defendant was released from county jail in November 2013, he was taken into custody by federal immigration authorities.

We, therefore, agree with Judge Ryan's analysis and rejection of defendant's contentions concerning the ineffectiveness of his plea counsel. The facts in the record amply support Judge Ryan's finding that defendant failed to show that his counsel was ineffective. Indeed, counsel had informed the judge taking the plea that defendant had consulted with at least three immigration attorneys and defendant confirmed that he understood that he could be deported.

We also agree with Judge Ryan's determination that defendant did not prove prejudice under the second prong of the Strickland test. Defendant is not seeking to withdraw his guilty plea. Instead, as Judge Ryan correctly pointed out, defendant is arguing that his sentence should be amended and that he should be sentenced to 179 days in jail credit, as opposed to the 396 days that he was sentenced to and that he had already served when he was sentenced.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION