STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: June 20, 2016]

VICTOR PEGUERO	:	
	:	
VS.	:	**PM No. 2016-0014**
	:	
STATE OF RHODE ISLAND	:	

DECISION

LANPHEAR, J. This matter is before the Court on Victor Peguero's (Mr. Peguero) application for postconviction relief.

Facts and Travel

The full recitation of the facts of Mr. Peguero's original conviction is set out in State v. Victor Peguero, P2-2006-2860C. This Decision recites facts pertinent to the application for postconviction relief.

On November 1, 2007, Mr. Peguero, represented by a seasoned, experienced, respected private attorney entered a plea of nolo contendere to two counts of possession of a stolen motor vehicle and one charge of operation of a "chop shop." Appl. 1, ¶ 4. He was sentenced to four years of probation on each charge, with sentences to be served concurrently.

Mr. Peguero filed the instant application on January 4, 2016. He alleges that his attorney failed to inform him that a plea of nolo contendere might negatively impact his immigration status, and that such omission constituted a denial of his right to effective assistance of counsel.[1]

[1] It is important to memorialize that at a pretrial conference Mr. Peguero's new counsel was given an opportunity to call the plea attorney as a witness. Believing the plea attorney to have a life-threatening illness, the Court was clear that any such hearing would be held promptly. Mr. Peguero declined to have a hearing, and presented only memoranda.

This case is now before the Court on Mr. Peguero's application for postconviction relief. He asserts ineffective assistance of counsel, and further asserts that the trial justice failed to adequately assess his understanding of the potential immigration consequences of the plea, as is required by G.L. § 1956 12-12-22. The State filed an objection on February 23, 2016, in which it asserted as affirmative defenses the doctrines of res judicata and laches.

Jurisdiction is pursuant to G.L. 1956 § 10-9.1-1. For the reasons stated below, this Court denies Mr. Peguero's application.

Standard of Review

On an application for postconviction relief, an applicant "bears the burden of proving his allegations by a preponderance of the evidence." Palmigiano v. Mullen, 119 R.I. 363, 377 A.2d 242 (1977). Section 10-9.1-6 of the Rhode Island General Laws provides that when the trial justice is:

> "satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply to the proposed dismissal."

Ineffective Assistance of Counsel

Mr. Peguero now argues that he was denied his right to effective counsel when his attorney did not advise him that a plea of nolo contendere could result in adverse immigration consequences. Mr. Peguero argues that counsel's alleged failure to advise him of said consequences constituted ineffective assistance of counsel such as to entitle him to postconviction relief.

An applicant '"bears the burden of proving a claim of ineffective assistance of counsel, and to succeed, he must satisfy the standard announced by the United States Supreme Court in Strickland v. Washington."' Anderson v. State, 878 A.2d 1049, 1050 n.1 (R.I. 2005) (quoting State v. Brennan, 627 A.2d 842 (R.I. 1993)). The "proper standard for attorney performance is that of reasonably effective assistance." Strickland v. Washington, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, petitioner must show that counsel's representation was deficient, and that '"errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."' Brennan, 627 A.2d at 845 (quoting Strickland, 466 U.S. at 687).

In the context of a case adjudicated by a plea, the analysis is guided by the Supreme Court decision in Hill v. Lockhart, 474 U.S. 52 (1985). In Hill, the Court enunciated that the first prong of the Strickland test is the same in the context of a plea as it is in a case that proceeds to trial. Id. at 58. That is, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Strickland, 466 U.S. at 686. Mr. Peguero, in his memorandum of January 7, 2016, simply states that his attorney's alleged failure to advise him of the potential immigration consequence of a plea of nolo contendere "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 686; see also Pet'r's Mem. of Law in Supp. of Appl. for Postconviction Relief. However, the United States Supreme Court did not hold that failure to inform a defendant of potential immigration consequences constitutes ineffective assistance of counsel until 2010. See Padilla v. Kentucky, 559 U.S. 356 (2010). As noted above, the plea that defendant seeks to vacate was entered in 2007. The Court declined to apply Padilla retroactively in 2013. See Chaidez v. U.S., 133 S. Ct. 1103, 185 L.Ed. 2d 149 (2013).

As to the second prong (prejudice to the defendant), Hill provides that to prove prejudice in the context of a plea, Mr. Peguero must show "a reasonable probability that, but for counsel's efforts, he would not have pleaded guilty but instead would have insisted on going to trial" and that the proceedings would have been different. Hill, 474 U.S. at 59; State v. Figueroa, 639 A.2d 495 (R.I. 1994). In the present case, Mr. Peguero does not provide any evidence that would satisfy the second prong of the test enumerated in Strickland, which requires a showing that but for the deficient performance of counsel, the result of the proceedings would have been more favorable to the defendant. Strickland, 466 U.S. at 687. Mr. Peguero does not provide evidence indicating that the outcome of his case would have been different had he been advised by his plea attorney of the potential immigration consequences of his plea. He instead focuses on the allegedly deficient performance of defense counsel and the sufficiency of the trial justice's inquiry of defendant during the plea.

In Padilla, 559 U.S. at 356, the United States Supreme Court held that failure to warn a defendant of potential adverse immigration consequences constitutes ineffective assistance of counsel. However, Padilla is not controlling in this case as the Supreme Court held that Padilla is not retroactively applicable to defendants whose cases had reached disposition when the decision was announced. Chaidez, 133 S. Ct. 1103,185 L.Ed. 2d 149 (2013).

Nonetheless, it is worth noting that in cases decided after Padilla, our Supreme Court continues to hold that a defendant claiming ineffective assistance of counsel because of a failure to warn of adverse immigration consequences '"must demonstrate a reasonable probability that but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial and, importantly, that the outcome of the trial would have been different."'

Neufville v. State, 13 A.3d 607, 610-11 (R.I. 2011) (quoting Figueroa, 639 A.2d at 500). Mr. Peguero has not presented any evidence that had he been made aware of the potential for adverse immigration consequences, the outcome of his case would have been different. He instead focuses on counsel's failure to warn of potential immigration consequences and the trial justice's inquiry into his understanding of the consequences of a plea.

Demonstration of prejudice to the defendant is crucial to a claim of ineffective assistance of counsel. As noted in Strickland:

> "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Strickland, 466 U.S. at 697.

Therefore, the Court should find that Mr. Peguero has not met his burden for the granting of his motion for postconviction relief.

Obligation of Trial Justice to Inform Defendant

As noted above, Rhode Island requires that prior to accepting a plea of nolo contendere, a court must inform the defendant "that if he or she is not a citizen of the United States, a plea of guilty or nolo contendere may have immigration consequences, including deportation, exclusion of admission to the United States, or denial of naturalization pursuant to the laws of the United States." Sec. 12-12-22. Mr. Peguero argues that in his case, the trial justice for the 2007 plea failed to adequately warn him of potential immigration consequences of his plea, and therefore, did not satisfy the statutory requirements noted above. Pet'r's Mem. of Law 3.

Our Court has held that, '"[t]he language of § 12-12-22(b) . . . is clear and unambiguous and requires no further interpretation."' Dossantos v. State, 897 A.2d 39 (R.I. 2006) (quoting Machado v. State, 839 A.2d 509 (R.I. 2003)). Here, the trial justice advised Mr. Peguero of the potential for adverse immigration consequences as required by § 12-12-22. Specifically, the justice addressed the defendant: "If you are not a US citizen, this plea could result in your deportation, your exclusion of admission to this country, and/or the denial of naturalization under the laws of this country. Those are matters outside the control of this Court. . . ." Pet'r's Mem. 4.

Mr. Peguero cites Frazar for the proposition that a trial court "'should engage in as extensive an interchange as necessary so that 'the record as a whole and the circumstances in their totality' will disclose to a court reviewing a guilty or nolo plea that the defendant understood the nature of the charge and the consequences of the plea."' State v. Frazar, 822 A.2d 931, 935 (R.I. 2003) (quoting State v. Feng, 421 A.2d 1258, 1267 (R.I. 1980)). However, in Frazar, the Court upheld a conviction based on a plea of nolo contendere where the trial justice provided less information to the defendant than in the present case. In that case, the trial justice said: "I tell you Mr. Frazar, I have no idea what immigration authorities may have to say about your situation in the United States. I have no jurisdiction in that regard. You understand that"? and defendant Frazar responded in the affirmative. Id. at 934. In the present case, as noted above, the trial justice made a more detailed inquiry as to Mr. Peguero's understanding of potential immigration consequences: "If you are not a U.S. citizen, this plea could result in your deportation, your exclusion of admission to this country, and/or the denial of naturalization under the laws of this country. Those are matters outside the control of this Court. . . ." Pet'r's Mem. 4; see Dossantos, 897 A.2d at 39. Therefore, Mr. Peguero's reliance on Frazar is thus misplaced,

and this Court should reject the argument that the trial justice did not meet the requirements of § 12-12-22 in his questioning of Mr. Peguero at the plea.

Conclusion

For the foregoing reasons, Mr. Peguero's claims for postconviction relief are without merit as Mr. Peguero has not met his burden of demonstrating that postconviction relief is warranted in his case. Mr. Peguero's application for postconviction relief is denied.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Victor Peguero v. State of Rhode Island
CASE NO:	PM No. 2016-0014
COURT:	Providence County Superior Court
DATE DECISION FILED:	June 20, 2016
JUSTICE/MAGISTRATE:	Lanphear, J.
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