IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

MOHAMMAD A. BASHAR,
Defendant-Appellant.

Supreme Court No. 2013-SCC-0040-CRM

Superior Court No. 09-0036A

ORDER DENYING PETITION FOR REHEARING

Cite as: 2016 MP 2

Decided April 7, 2016

Janet H. King, King Law Office, Saipan, MP, for Defendant-Appellant.

James B. McAllister, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee.

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; PERRY B. INOS, Associate Justice.

PER CURIAM:

¶ 1 Bashar petitions for rehearing, arguing this Court erred by: (1) declining to rule that a post-sentence motion "to correct a manifest injustice" is without a time limit; (2) holding the trial court did not abuse its discretion in denying an evidentiary hearing; and (3) affirming the trial court's determination that Bashar failed to establish ineffective assistance of counsel. For the reasons stated below, we DENY the Petition.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 The Commonwealth of the Northern Mariana Islands ("Commonwealth") charged Defendant-Appellant Mohammad A. Bashar ("Bashar"), a citizen of Bangladesh, with marriage fraud and conspiracy to commit marriage fraud. After obtaining legal advice from Edward C. Arriola ("Arriola"), Bashar entered into a plea of nolo contendere to marriage fraud. Based on his marriage fraud conviction, United States Immigration Court found Bashar removable. Bashar filed a motion to set aside his plea and vacate the judgment, alleging ineffective assistance of counsel. Without holding an evidentiary hearing, the trial court denied Bashar's motion because it was untimely filed and Bashar failed to prove ineffective assistance of counsel. We affirmed the trial court's decision. *Commonwealth v. Bashar*, 2015 MP 4.

II. DISCUSSION

¶ 3 A petition for rehearing "must state with particularity each point of law or fact that the petitioner believes the Court has overlooked or misapprehended and must argue in support of the petition." NMI SUP. CT. R. 40(a)(2). The petitioner should not "raise the same issues and repeat the same arguments already heard and decided on appeal" or raise new issues not previously asserted on appeal, unless extraordinary circumstances exist. *N. Marianas Coll. v. Civil Serv. Comm'n*, 2007 MP 30 ¶ 2 (citing *In re Estate of Deleon Guerrero*, 1 NMI 324, 327–28 (1990)). To prevail, Bashar must show how "the Court ignore[d] or incorrectly construe[d] legal issues or factual matters" in resolving the case. *Commonwealth Ports Auth. v. Tinian Shipping Co*., 2008 MP 2 ¶ 3 (citing *In re Estate of Deleon Guerrero*, 1 NMI at 326).

A. Timeliness of Post-Conviction Motion

¶ 4 Bashar argues the Court erred by holding his Rule 32(d) post-sentence motion to withdraw a plea as untimely because the rule[1] provides no time limit.

[1] "A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his/her plea." NMI R. CRIM. P. 32(d)

Pet. Reh'g 1–2. He asserts a post-sentence motion to withdraw under the manifest injustice standard should be "freely allowed." *Id.* 2.

¶ 5 In support, Bashar cites to *United States v. Ruiz*, 257 F.3d 1030 (9th Cir. 2001); however, *Ruiz* is irrelevant because nothing in that case indicates post-sentence motions to withdraw under the manifest injustice standard should be freely allowed. The key analysis in *Ruiz* centered on resolving the discrepancy the Ninth Circuit faced between federal case law and an amended federal rule in regards to presentence motions—it does not address the timeliness of a post-sentence motion to withdraw. *Id.* at 1032.

¶ 6 We held the trial court did not abuse its discretion in denying Bashar's motion because timeliness is one of several factors the court can consider in a post-sentence motion to withdraw a plea. *Bashar*, 2015 MP 4 ¶¶ 9–10. The trial court considered the two-year time lapse between entry of the plea and the motion, and the multiple opportunities Bashar missed to withdraw his plea within this period. *Id.* ¶ 10. For instance, he was aware of his removal proceeding as early as 2011 but did not allege his cause for withdrawal until two years later. The trial court found this delay unreasonable, and we held there was no abuse of discretion. *Id.*

¶ 7 Implicit in our opinion was the conclusion that while Rule 32(d) does not by its terms contain a time limit, unwarranted postponement in filing a post-sentence motion could contribute to denial of relief. *Id.* ¶¶ 9–10. Although some courts have seemingly taken a different position, *see Pilkington v. United States*, 315 F.2d 204, 209-10 (4th Cir. 1963) (ignoring the untimeliness of defendant's post-sentence petition to withdraw a guilty plea), we did not interpret Rule 32(d) to preclude the trial court from weighing timeliness as one of several factors in a post-sentence motion to withdraw a plea.

¶ 8 Bashar is not entitled to relief as to this issue because he fails to establish that the Court overlooked or misapprehended points of law or fact pertaining to the timeliness of his motion to withdraw.

B. Refusal of Evidentiary Hearing

¶ 9 Next, Bashar claims an evidentiary hearing is required when the resolution of issues of material fact hinges on the credibility of the witnesses. Pet. Reh'g 6. He contends the Court erred by upholding the trial court's credibility determinations absent an evidentiary hearing because "[e]vidence of Mr. Arriola's ineffectiveness lies outside the record where Bashar and Mr. Arriola each made conflicting statements." *Id.* Bashar claims he made "specific allegations of misrepresentations and omissions against his former counsel," *id.* 4, which should have triggered an evidentiary hearing to determine "whether Mr. Arriola was in fact ineffective." *Id.* 6.

¶ 10 Bashar is correct in his assertion that an evidentiary hearing is required for a defendant who alleges "specific and detailed" facts of misrepresentation. *See Machibroda v. United States*, 368 U.S. 487, 496 (1962) ("But the specific and detailed factual assertions of the petitioner, while improbable, cannot at this

juncture be said to be incredible."). However, if the allegations attacking the guilty plea are vague or if the record decisively and unquestionably contradicts the defendant's allegations, an evidentiary hearing is not warranted. *Id.* at 495 ("What has been said is not to imply that a movant must always be allowed to appear in a district court for a full hearing if the record does not conclusively and expressly belie his claim . . . "); *United States v. Fournier*, 594 F.2d 276, 279 (1st Cir. 1979) ("In both types of proceedings, hearings have been said to be unnecessary when the allegations attacking a guilty plea are vague and conclusory, or . . . 'palpably incredible.'" (citations omitted) (quoting *Machibroda*, 368 U.S. at 495)).

¶ 11 We determined the trial court did not abuse its discretion in denying Bashar's request for an evidentiary hearing because he failed to "establish how the existing record was inadequate to resolve substantial issues of material fact regarding his ineffective assistance claim." *Bashar*, 2015 MP 4 ¶ 20. In other words, we concluded it was reasonable for the trial court to resolve Bashar's claim of ineffective counsel by looking at the records alone, because from the trial court's review of records, his allegations were vague and conclusory. Bashar's declaration did not specify the time, date or place where Arriola gave him legal advice, and he did not present any direct or circumstantial evidence to corroborate his allegations. His statement was contradicted by the declarations of Arriola and two other eye witnesses, who, unlike Bashar, detailed the date, time and place where Bashar was informed about the immigration consequences of his plea.

¶ 12 As stated in our opinion, Bashar's allegations are insufficient to warrant an evidentiary hearing, and he fails to demonstrate error in our decision. In support of the assertion he was entitled to substantiate his claims at an evidentiary hearing, Bashar cites *Machibroda*, 368 U.S. 487, *Fontaine v. United States*, 411 U.S. 213 (1973), and *Blackledge v. Allison*, 431 U.S. 63 (1977). These cases are distinguishable from the present case and are therefore, unpersuasive. Each of the defendants in *Machibroda*, *Fontaine*, and *Blackledge*, who sought federal writs of habeas corpus to withdraw their involuntary plea,[2] made detailed and specific allegations attacking the plea and specified either documentary evidence or an eye witness that reasonably could have altered the lower court's view of the facts. *Machibroda*, 368 U.S. at 495 ("The petitioner's motion and affidavit contain charges which are detailed and specific. It is not unreasonable to suppose that many of the material allegations can either be corroborated or disproved by the visitors' records of the county jail . . . and other such sources."); *Fontaine*, 411 U.S. at 214 ("Petitioner's motion . . . sets out detailed factual allegations regarding alleged

[2] The standards for determining the need of an evidentiary hearing under Rule 32(d) motion and a petition for a writ of habeas corpus proceedings are similar. *Fournier*, 594 F.2d at 278.

circumstances . . . describ[ing] physical abuse and illness from a recent gunshot wound that required hospitalization which was documented by records tendered in support of his petition."); *Blackledge*, 431 U.S. at 76 ("The petition indicated exactly what the terms of the promise were; when, where, and by whom the promise had been made; and the identity of one witness to its communication."). That is simply not the case here.

¶ 13 Bashar's allegations and supporting evidence were not only found to be vague and conclusory, but they were also devoid of any potential witnesses or evidence that would have bolstered his allegation that Arriola failed to advise him about the deportation consequences of his plea. *Bashar*, 2015 MP 4 ¶ 20.

¶ 14 While we acknowledge the necessity of granting a hearing when resolution of issues of material fact hinges on the credibility of the witnesses, we determine in cases, such as Bashar's, credibility determination could conclusively be resolved based on the moving papers and record. We do not see how an evidentiary hearing would have altered the court's view of the record.

C. Ineffective Assistance of Counsel Determination

¶ 15 Last, Bashar resurrects his argument on appeal that Arriola rendered ineffective assistance of counsel by failing to advise him of the deportation consequences of his plea. Pet. Reh'g 6–7.

¶ 16 We do not entertain issues already heard and decided unless extraordinary circumstances exist. *N. Marianas Coll.*, 2007 MP 30 ¶ 2 (citing *In re Estate of Deleon Guerrero*, 1 NMI at 326). Bashar's argument regarding ineffective assistance of counsel claim has been heard and decided on appeal. He states " Mr. Arriola failed to advise him that his plea of no contest plea of guilty [sic] would make him subject to automatic deportation," Pet. Reh'g 6, and that was "ineffective assistance of counsel under the *Padilla* standard." *Id.* We already determined this particular argument unavailing because the trial court made a finding that Arriola informed Bashar about the deportation consequences of his guilty plea. *Bashar*, 2010 MP 4 ¶¶ 22–23. The substance of the allegations has been considered, and Bashar alleges no extraordinary circumstance to merit a rehearing.

III. CONCLUSION

¶ 17 For the reasons stated above, the Court hereby DENIES the petition.

SO ORDERED this 7th day of April, 2016.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
PERRY B. INOS
Associate Justice