

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
PREBLE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-03-001
	:	
- vs -	:	<u>OPINION</u>
	:	1/17/2012
EDUARDO AGUIRRE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 09-CR-10364

Martin P. Votel, Preble County Prosecuting Attorney, Kathryn N. Worthington, 101 East Main Street, Eaton, Ohio 45320, for plaintiff-appellee

George A. Katchmer, 1886 Brock Road, N.E., Bloomingburg, Ohio 43601, for defendant-appellant

HENDRICKSON, P.J.

{¶1} Defendant-appellant, Eduardo Aguirre, appeals from a judgment of the Preble County Court of Common Pleas denying his motion to withdraw a guilty plea and vacate his conviction. For the reasons discussed below, we affirm the trial court's decision.

{¶2} Aguirre is a citizen of Mexico but has been a legal permanent resident of the United States since 2008. In October 2010, Aguirre was indicted on one count of criminal

simulation, a fourth-degree felony in violation of R.C. 2913.32(A). The charge arose after a police officer discovered nearly 1,200 bootleg CDs in the rear of Aguirre's vehicle following a traffic stop. On January 13, 2010, the trial court held a plea hearing, at which time the trial court advised Aguirre of the possibility of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to R.C. 2943.031 as a result of his plea. Aguirre indicated on the record that he understood that such consequences were possible, and he pleaded guilty to the charge. Aguirre was sentenced to 30 days incarceration and one year of community control, and fined \$2,000.

{¶3} On January 3, 2011, Aguirre filed a motion to withdraw his guilty plea. In his motion, Aguirre asserted that he is subject to deportation proceedings by the United States Immigration and Customs Enforcement. Aguirre claimed that prior to entering his guilty plea, his trial counsel told him that she would make sure that his plea would not impact his immigration status. Aguirre further claimed that if he had been warned by his trial counsel of the possible severe immigration sanctions, including removal from the United States, he would not have pleaded guilty to the underlying charge.

{¶4} After holding a hearing, the trial court denied Aguirre's motion to withdraw. The trial court found that there was no manifest injustice to correct, and that Aguirre had been advised of the possible consequences of his guilty plea. The trial court further found that there was no credible evidence to demonstrate that his trial counsel was ineffective. Aguirre timely appeals the trial court's decision, alleging a sole assignment of error.

{¶5} Assignment of Error No. 1:

{¶6} "THE COURT ABUSED ITS DISCRETION IN OVERRULING APPELLANT'S MOTION TO WITHDRAW [HIS] PLEA."

{¶7} Crim.R. 32.1 provides that "to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her

plea." A defendant seeking to withdraw a guilty plea after the imposition of sentence bears the burden of establishing the existence of a manifest injustice. *State v. Smith*, 49 Ohio St.2d 261 (1977), paragraph one of the syllabus. "In general, manifest injustice relates to a 'fundamental flaw in the proceedings [that] results in a miscarriage of justice or is inconsistent with the demands of due process.'" *State v. Degaro*, 12th Dist. No. CA2008-09-227, 2009-Ohio-2966, ¶10, quoting *State v. Taylor*, 12th Dist. No. CA2007-12-037, 2009-Ohio-924, ¶12.

{¶8} A motion made pursuant to Crim.R. 32.1 "is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court." *Smith* at 264. "An appellate court will not reverse the trial court's decision absent an abuse of discretion." *State v. Mootispaw*, 12th Dist. No. CA2004-02-007, 2005-Ohio-2372, ¶6.

{¶9} Aguirre maintains that he should be permitted to withdraw his guilty plea because his trial counsel provided ineffective assistance by failing to properly advise him of the deportation consequences of his guilty plea and subsequent conviction. "When an alleged error underlying a motion to withdraw a guilty plea is the ineffective assistance of counsel, the defendant must show (1) that his counsel's performance was deficient and (2) that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty." *State v. Guerrero*, 12th Dist. No. CA2010-09-231, 2011-Ohio-6530, ¶5, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

{¶10} In *Padilla v. Kentucky*, ___ U.S. ___, 130 S.Ct. 1473, 1483 (2010), the United States Supreme Court held that when the deportation consequences of pending criminal charges are "truly clear," a criminal defense attorney has an equally clear duty to give correct advice regarding those charges. However, recognizing that immigration law is often "complex" and creates "numerous situations in which the deportation consequences of a particular plea are unclear or uncertain," the Supreme Court held that where the law is not

"succinct and straightforward," a criminal defense attorney need only "advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.*

{¶11} In *Padilla*, the defendant had pleaded guilty to the transportation of a large amount of marijuana. As the Supreme Court noted in its decision, "Padilla's crime, like virtually every drug offense except for only the most insignificant marijuana offenses, is a deportable offense [expressly provided for] under 8 U.S.C. 1227(a)(2)(B)(i)." *Id.* at 1477, fn. 1. "Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses." *Id.* at 1483. Accordingly, Padilla's attorney had a duty to provide clear advice to Padilla that his deportation was presumptively mandatory. *Id.*

{¶12} In the case sub judice, Aguirre was convicted on one count of criminal simulation, a fourth-degree felony. Deportation for a conviction of criminal simulation is not expressly provided for by 8 U.S.C. 1227. Rather, a conviction for criminal simulation may fall within one or more of the "broad classification of crimes" covered by the statute, for example, a crime of moral turpitude (8 U.S.C. 1227(a)(2)(a)(i))¹ or an aggravated felony (8 U.S.C. 1227(a)(2)(a)(iii)).² Accordingly, Aguirre's trial attorney was under the obligation to advise Aguirre that his pending criminal charge carried a risk of adverse immigration consequences, including the possibility of removal. See *Padilla* at 1483.

1. Pursuant to federal law, "[a]ny alien who * * * is convicted of a crime involving moral turpitude committed within five years * * * after the date of admission and * * * is convicted of a crime for which a sentence of one year or longer is imposed, is deportable." 8 U.S.C. 1227(a)(2)(a)(i).

2. "Any alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. 1227(a)(2)(a)(iii).

{¶13} At a hearing on Aguirre's motion to withdraw his guilty plea, the trial court heard testimony from both Aguirre and his trial counsel. Aguirre testified that prior to pleading guilty, his trial counsel had never discussed the impact of his plea on his immigration status. He further testified that at the time he entered his plea, he was unaware that he could be deported if he was convicted of a crime involving moral turpitude or if the crime carried a potential sentence of one year or longer.

{¶14} Aguirre's trial counsel testified that she is fluent in Spanish and that she has previously worked as a federal court interpreter. She further testified that she had no issues communicating with Aguirre and that they were able to understand one another. Aguirre's trial counsel testified that at each and every visit she had with Aguirre, she discussed the possibility that he could be deported or be denied U.S. citizenship as a result of pleading guilty to the criminal simulation charge. When asked if she discussed the term "crime of moral turpitude" with her client, Aguirre's trial counsel testified as follows:

{¶15} "[AGUIRRE'S TRIAL COUNSEL]: Yes. There's two types of criminal categories, if you want to call it [that]. Aggravated felonies that may cause a lawful permanent to be deported or crimes of moral turpitude. And I always go over both of them just in case, even if it doesn't qualify as an aggravated felony, to explain as to why. And then also to a moral turpitude, how this type of penalty for this type of criminal offense that becomes a conviction can be seen as a crime of moral turpitude and may cause a lawful permanent resident to be deported.

{¶16} "[PROSECUTOR]: And is it your testimony today that this Defendant was made aware of that and understood that at the time you represented him?

{¶17} "[AGUIRRE'S TRIAL COUNSEL]: Absolutely.

{¶18} "[PROSECUTOR]: All right. Before he entered his guilty plea to the crime of Criminal Simulation, did you inform him of all the possible consequences of that guilty plea, including deportation or inability to become a U.S. citizen?

{¶19} "[AGUIRRE'S TRIAL COUNSEL]: Absolutely.

{¶20} "[PROSECUTOR:] Did he appear to understand that his plea could result in either one of those things?

{¶21} "[AGUIRRE'S TRIAL COUNSEL]: Yes. Especially with the questions that he asked and that I responded to. There was no misunderstanding in terms of language.

{¶22} "[PROSECUTOR]: Did you have any doubt that he understood the effect of his guilty plea in that regard?

{¶23} "[AGUIRRE'S TRIAL COUNSEL]: No, I don't. * * *"

{¶24} After hearing the competing testimony, the trial court entered its decision denying Aguirre's motion, holding that there was no credible evidence that Aguirre's trial counsel was ineffective. Rather, the trial court specifically concluded that Aguirre's trial counsel properly advised him of the possible immigration consequences he faced by pleading guilty.

{¶25} We find that the trial court did not abuse its discretion by denying Aguirre's motion to withdraw his guilty plea since the record demonstrates he was represented by competent counsel during the plea proceedings. Aguirre's trial counsel testified that she discussed the removal implications of Aguirre's plea "each and every time" she met with him. Aguirre's trial counsel was adamant that Aguirre understood the consequences of his guilty plea. Given that the trial court was in a better position to evaluate the credibility of Aguirre's testimony and the testimony of his trial counsel, we decline to second guess the trial court's findings on this question. "We defer to the judgment of the trial court, because 'the good faith, credibility and weight of the movant's assertions in support of the motion are matters to

be resolved by that court." *State v. Burns*, 12th Dist. Nos. CA2004-07-084, CA2004-10-126, 2005-Ohio-5290, ¶16, quoting *State v. Smith*, 49 Ohio St.2d at 264.

{¶26} Further, even if we were to assume that Aguirre's trial counsel was deficient, Aguirre is unable to establish that he was prejudiced by his attorney's alleged deficiency as he was advised by the trial court, prior to entering his plea, of the adverse immigration consequences of his guilty plea. As the trial court noted in its decision, it had provided Aguirre with the statutory warnings under R.C. 2943.031 that his conviction could result in deportation or impact his ability to become a U.S. citizen. Nonetheless, Aguirre pleaded guilty to criminal simulation immediately after being warned of these possible adverse immigration consequences. Aguirre is therefore unable to establish the second prong of *Strickland*.

{¶27} Aguirre's assignment of error is therefore overruled.

{¶28} Judgment affirmed.

PIPER and DINKELACKER, JJ., concur.

Dinkelacker, J., of the First Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 5 (A)(3), Article IV of the Ohio Constitution.