

2011 IL App (1st) 100261-U

FOURTH DIVISION
September 30, 2011

No. 1-10-0261

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 07 CR 229
)	
IVAN LINARES,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Sterba concurred in the judgment.

ORDER

Held: Defendant's trial counsel was ineffective for erroneously advising non-citizen defendant that a guilty plea to the robbery of a person over 60 years old would not affect his immigration status or his eligibility for impact incarceration. However, no prejudice was shown where evidence of defendant's guilt was overwhelming and there was little likelihood that he would have not pleaded guilty even with full knowledge of the possible consequences.

Defendant Ivan Linares appeals from an order of the circuit court of Cook County denying his post-conviction challenge to his guilty plea, which he contends was made because of the erroneous legal advice of his trial attorney concerning the immigration consequences of that

plea as well as the consequences for the impact incarceration recommended by the trial court as part of the plea agreement.

The plea was entered on April 18, 2007. Defendant had been a legal permanent resident of the United States for over 20 years at that time. According to two affidavits filed by defendant in support of his post-conviction petition, he hired trial counsel because of his expertise in immigration law because he was concerned about the effect on his immigration status of the case filed against him. According to the factual basis for the plea, which was read into the record, Delores Maloff would testify that she was a 74-year-old woman who, on November 26, 2006, was walking on the sidewalk in front of 3221 North Kildare in Chicago when defendant approached her on his bicycle. Defendant grabbed the strap of her purse, knocking her to the ground and causing her to fracture her clavicle. Defendant then fled with the purse, leaving his bicycle behind. Daniel Olave and Daniel Gertner would testify that they observed this incident and chased and apprehended defendant. Officer Beren would testify that he observed these two men struggling with defendant, who had \$22 in his hand. Beren recovered Maloff's purse, which defendant had dropped.

The trial court advised defendant that he was pleading guilty to a Class 1 felony of robbery, which was punishable by a prison term of four to fifteen years, but that defendant would receive a six-year term. Defense counsel then informed the court that defendant had a question about a recommendation for "boot camp" (impact incarceration) and the court affirmed that it would be recommending that for defendant. Immediately thereafter, defendant stated that he was pleading guilty.

On November 21, 2008, defendant, through newly retained counsel, filed a post-conviction petition in which he stated that he was denied transfer to impact incarceration because federal immigration authorities had placed a detainer on him while he was in prison. Although

his projected parole date was October 22, 2009, he was in fact subject to deportation.¹ The detainer made him ineligible for impact incarceration and required that, when he had completed his prison term, he would be transferred to federal custody for deportation proceedings. In his second affidavit defendant stated that he had specifically and repeatedly asked trial counsel if because of his status as a non-citizen, a guilty plea would have an impact on his immigration status as well as affecting his impact incarceration. According to defendant, trial counsel repeatedly assured him that his plea of guilty would not harm or alter his immigration status and further, that his immigration status would not affect his impact incarceration, which would last four to six months, followed by his release.

The case advanced to the third-stage evidentiary hearing phase, by which point defendant had been deported to Mexico, after having served his prison sentence. Post-conviction counsel had represented to the court that he would have additional witnesses who would corroborate defendant's account of trial counsel's erroneous advice. But on the date of the hearing, January 13, 2010, trial counsel advised the court without further explanation that he had "lost" one witness he previously had available. Post-conviction counsel did state that defendant's mother was in court and could testify to conversations she had with trial counsel concerning defendant's situation. But the court cut off post-conviction counsel's account of what defendant's mother would say, stating that this was "[n]ot an offer of proof hearing." When the court asked if counsel had anything additional to add, counsel rested, relying upon defendant's affidavits, a certified transcript of the guilty plea proceedings, and an entry from Sullivan's Law Directory which listed trial counsel as specializing in immigration law. Counsel represented to the court, without objection from the State, that an immigration detainer was placed on defendant within 24

¹Orders of deportation are now called orders of removal. *Calcano-Martinez v. I.N.S.*, 533 U.S. 348, 350, n.1 (2001).

hours of his guilty plea but that defendant did not become aware of this until more than 30 days after his guilty plea was entered.

The circuit court apparently accepted the statements of fact contained in defendant's affidavits. But the court held that trial counsel should not be required to "learn every rule and regulation" of the Illinois Department of Corrections (DOC). Furthermore, the court found that defendant had failed to show that the outcome would have been different because defendant told the court at the time of the plea that he would not do this again, and apologized to the victim. For these reasons the court found that neither ineffective assistance of counsel nor prejudice had been shown by defendant, and post-conviction relief was denied. This appeal followed.

The State first contends that this case is moot because defendant has now been deported to Mexico and so any relief granted by this court would be unavailing. We are not persuaded by this argument. In *Lotero v. People*, 203 Ill. App. 3d 160 (1990), the defendant voluntarily departed from the United States during the pendency of deportation proceedings brought against him after he pleaded guilty to drug charges. This court determined that defendant's actions did not moot his claim for post-conviction relief because nothing in the record indicated that if defendant voluntarily returned, his deportation proceeding would not be reopened. *Lotero*, 203 Ill. App. 3d at 164. Here, the single cause of defendant's deportation was his guilty plea to aggravated robbery. There is nothing in the record to indicate that should his plea be vacated, defendant, a legal resident of the United States for over 20 years, would not be able to challenge his deportation.

For post-conviction relief based on ineffective assistance of counsel, defendant must allege facts establishing that his attorney's representation fell below an objective standard of competence and that there is a reasonable probability this ineffective assistance affected the outcome of the proceeding. *Lotero*, 302 Ill. App. 3d at 162-63. The United States Supreme

Court has recently held that a criminal defense counsel provides ineffective assistance when he fails to advise a non-citizen client that his guilty plea carries with it a risk of deportation, although the court remanded for a prejudice determination. *Padilla v. Kentucky*, 559 U.S. ____, ____, 130 S. Ct. 1473, 1486 (2010). This court has held that *Padilla* is to be applied retroactively. *People v. Gutierrez*, No. 1-09-3499, slip op. at 21 (Ill. App. June 30, 2011). Accordingly, we find that defendant's un rebutted affidavit establishes the first prong of ineffectiveness of counsel. The court below accepted the allegations of defendant's affidavit, but held that counsel should not be held to a standard of knowing all of the DOC's rules and regulations. This was a misreading of what had occurred. Defendant stated in his affidavits that he had repeatedly and directly asked trial counsel about any negative consequences of his plea for purposes of boot camp assignment or his immigration status. Trial counsel was unaware of and failed to research sufficiently what the result of defendant's plea would be. Nor did counsel minimally even warn defendant that there might be adverse consequences. As was stated in *Padilla*:

"Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward *** a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the

duty to give correct advice is equally clear." (Footnote omitted.)

Padilla, 559 U.S. at ____, 130 S. Ct. at 1483.

In this case, where trial counsel held himself out as an expert on immigration and erroneously assured defendant, in response to repeated questions, that his plea would not affect his "boot camp" recommendation or his immigration status, we find that counsel was clearly ineffective and did not meet an objective standard of competence.

However, we also find that defendant has failed to establish that he was prejudiced by his trial counsel's ineffectiveness. To establish such prejudice, a defendant must show the reasonable probability that but for the actions of counsel, he would not have pleaded guilty and would instead have gone to trial. *Gutierrez*, slip op. At 21; see *People v. Hall*, 217 Ill. 2d 324, 335-336 (2005). In *Hall*, our supreme court stated that a defendant's bare allegation that he would not have pleaded guilty is not enough to establish prejudice; instead, the defendant's claim "must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial." *Hall*, 217 Ill. 2d at 335. Here, the evidence against defendant was overwhelming. In addition to the victim's testimony, two eyewitnesses saw defendant forcibly take the victim's purse, knocking her to the ground and causing her to break her clavicle. The two eyewitnesses apprehended the defendant and a police officer on the scene recovered the purse, which the defendant had dropped. Defendant was permitted to plead guilty to one count of robbery, although he was also originally charged with four counts of aggravated battery. Under these circumstances, we do not find it to be a reasonable probability that the defendant would have turned down the plea bargain he was offered even had he known of the possible consequences to his chances of receiving impact incarceration and to his immigration status. Therefore, we find that defendant has failed to show prejudice and his post-conviction petition was properly denied.

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For the reasons set forth in this order, we affirm the judgment of the circuit court denying defendant's post-conviction petition.

Affirmed.