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2011 IL App (3d) 100782-U

Order filed November 1, 2011

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal No. 3-10-0782
	)	Circuit No. 2002--CF-1372
	)	
JAROSLAW TEREFEFENKO,	)	Honorable
Defendant-Appellant.	)	Robert P. Livas,
	)	Judge Presiding.

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JUSTICE WRIGHT delivered the judgment of the court.  
Justices Holdridge and Schmidt concurred in the judgment.

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#### ORDER

¶ 1 *Held:* The amended postconviction petition made a substantial showing that defendant received ineffective assistance of counsel when his attorney, in response to questions, provided incorrect legal advice concerning whether defendant's guilty plea would affect defendant's immigration status. Consequently, the trial court erroneously summarily dismissed defendant's amended postconviction petition without conducting an evidentiary hearing.

¶ 2 Defendant filed an amended postconviction petition claiming he received ineffective assistance of counsel. The amended postconviction petition included affidavits asserting defendant acted on his attorney's incorrect legal advice that defendant's guilty plea in would not affect defendant's immigration status. In 2009, the federal government filed deportation proceedings against defendant, shortly before defendant was released on mandatory supervised

release, after serving his prison sentence for the 2003 offenses of burglary and attempted burglary. The affidavits attached to the amended postconviction petition established that, in spite of his claim of actual innocence for these charges, defendant elected to enter a plea of guilty in 2003 based, in part, on his attorney's incorrect advice that there would be no deportation consequences. The court held a second stage hearing and summarily granted the State's motion to dismiss without ordering a third stage evidentiary hearing. The defendant filed a timely notice of appeal.

¶ 3 We reverse the and remand this case to the circuit court for a third stage evidentiary hearing.

¶ 4 **BACKGROUND**

¶ 5 Defendant Jaroslaw Terefenko filed an amended postconviction petition, under the Post Conviction Relief Act (Act) (725 ILCS 5/122 *et seq.* (West 2010)), on August 13, 2010, claiming he received ineffective assistance of counsel before pleading guilty, in 2003, to one count of burglary and one count of attempted burglary in exchange for T.A.S.C. probation ((20 ILCS 301/40-10 and 7130 ILCS 5/5-6-3 (West 2002)).<sup>1</sup> The amended postconviction petition stated defendant was 17 years old in 2003 and had been a lawful permanent resident of the United States since he was 9 years of age.

¶ 6 In his amended postconviction petition, defendant alleged that, since he had a valid defense to the underlying 2003 burglary and attempted burglary charges, he would not have entered a guilty plea to the charges in 2003, but for the advice of his attorney who assured him

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<sup>1</sup> The record shows that defendant was first sentenced to T.A.S.C. probation, then drug court, and was eventually sentenced to a prison term on these charges.

that accepting the plea agreement would not affect his immigration status. According to the petition, U.S. Immigration and Customs Enforcement (ICE) started deportation proceedings against defendant in late 2009. Finally, defendant argued in his amended postconviction petition that the recent United States Supreme Court case , *Padilla v. Kentucky*, 559 U.S. \_\_\_, 130 S. Ct. 1473 (2010), applied retroactively and supported his amended postconviction petition.

¶ 7 Defendant attached four affidavits to his amended postconviction petition, including his own affidavit. Defendant, in the relevant portions of his affidavit, stated,

“5. Prior to the entry of the plea agreement, both my family and I discussed the possible entry of a plea agreement and the consequences of a plea agreement on my lawful immigration status.

6. I advised my attorney that I did not participate in any auto burglary. He stated that it was better to plead guilty and get probation than to take a chance at trial. He advised me to plead guilty despite the fact that I left the scene and I did not take part in the burglary of the car or any other crime.

7. At various meetings and court proceedings that I attended, neither the Judge nor my attorney ever advised me of the immigration consequences of a guilty plea.

8. My father asked Mr. Deboer on multiple occasions whether a plea of guilty would have any impact on my immigration status. Mr. Deboer said that it would not affect me because I am here legally.

9. I did not know that a guilty plea would cause me to be deported and that there is no defense from deportation for this type of conviction. I am now

informed that the crimes for which I entered a guilty plea will result in my deportation.

10. \*\*\* I would not have pleaded guilty to the charges if I had known it would cause me to be deported from the United States.”

¶ 8 A second affidavit was prepared jointly by defendant’s parents, and the parents stated that they hired Mr. Deboer, a criminal defense lawyer, to represent their son and to advise them as to what was in their son’s interests. The relevant portions of the parents’ affidavit provided:

“5. \*\*\*[A]fter obtaining legal advice from the attorney and discussing our choices, as a family we decided it was best for [defendant] to plead guilty and he received four (4) years probation.

6. We did ask Mr. Deboer about how this would affect [defendant’s] immigration status and his ability to stay here in the United States with us. We were especially concerned about this because we were not yet American citizens at the time, but legal residents. Our son has lived most of his life in the United States and his entire family lives here. We did not want to take any chance that he would be separated from us.

7. We were advised by Mr. Deboer not to worry because we were here legally. As immigrants and adults who were not fluent in English, we lacked the information and knowledge concerning how this case might jeopardize [defendant’s] legal residence and result in his deportation. This is why we sought out the advice of an attorney and we relied on that advice when we decided that [defendant] should plead guilty even though he told us he did not commit the

crime.

8. \*\*\* This all happened and came to our attention when the immigration court case started after he finished his one year punishment on December 31<sup>st</sup> of 2009.

9. If we knew or were informed this is what would happen we would have fought the criminal case and not advised our son to plead guilty. From our point of view it would have been better to fight for his innocence even if that could have meant a longer sentence, rather than to accept this bitter punishment of deportation, which is far greater than the criminal punishment, and in order to try and prevent what is now happening.

\* \* \*

11. As parents we tried to get legal advice for our son and advised him what to do based on what the attorney told us. Our only desire is and was to obtain a result that is best for our son. It has now turned out that our worst fears are being realized. The situation that we most wanted to avoid, deportation of our son, is now happening. Now our son is being deported for a crime he did not commit.

12. We have been in a constant state of worry and fear about what will happen to our son and wish that we had not advised [defendant] to plead guilty.”

¶ 9 The two other affidavits attached to defendant’s amended postconviction petition were prepared by the two codefendants, Jorge Pantoja and Omar Pantoja. Both affidavits stated that they were charged with the same offenses as defendant, and that they committed the criminal offenses but defendant was not involved in the commission of those offenses. Both affidavits

specifically stated that they were personally aware that defendant was not involved in the breaking into vehicles “situation” that occurred on August 5, 2002. Both affidavits claimed that defendant was with them “at some point that evening, yet he had nothing to do with the events that occurred.” Both affidavits further claimed, “On that evening we [\*\*\*] picked him up at home but we never informed [defendant] of our plans for that night. We deeply regret that we got him involved.” Additionally, both affidavits provided, “[Defendant] was not involved in, had nothing to do with and was not informed about any auto burglaries occurring on August 5, 2002.”

¶ 10 The State filed a motion to dismiss defendant’s amended postconviction petition, on August 23, 2010, asserting that the claim of ineffective assistance of counsel did not entitle defendant to an evidentiary hearing on his amended postconviction petition. The State argued that the recent case of *Padilla v. Kentucky*, which now requires counsel to voluntarily advise any client who is not a citizen of the United States about possible collateral consequences of deportation, did not apply retroactively. *Padilla v. Kentucky*, 559 U.S. \_\_\_, 130 S. Ct. 1473 (2010). Finally, the State’s motion to dismiss claimed that, even if prejudice did occur due to counsel’s inaccurate advice, defendant’s amended postconviction petition did not demonstrate a reasonable probability that defendant would have requested a trial in 2003 or that he had a valid defense to the charges had the case gone to trial wherein the outcome of the conviction might have been different.

¶ 11 On September 21, 2010, the court ruled on the State’s motion to dismiss. In his ruling, the judge made no specific findings, but stated:

“I have gone through the cases, transcript, and I understand that the status of the

law is in flux. I am not satisfied. At this point I am going to grant the State’s motion to dismiss the defendant’s post-conviction petition.”

¶ 12 Defendant filed a timely notice of appeal.

¶ 13 ANALYSIS

¶ 14 On appeal, defendant claims his amended postconviction petition sufficiently set out a constitutional claim of ineffective assistance of counsel. Consequently, defendant argues that the circuit court erred by refusing to order a third stage evidentiary hearing on the merits. The State contends that the trial court correctly granted its motion to dismiss because defendant’s amended postconviction petition failed to make a substantial showing of either ineffective assistance of counsel or actual innocence rising to the level of a constitutional violation requiring an evidentiary hearing.

¶ 15 Our supreme court has held that a second stage hearing requires the reviewing court to make its own independent assessment of the allegations set out in the petition. *People v. Coleman*, 183 Ill. 2d 366, 388 (1998). Thus, we review the issues raised in this appeal *de novo*. *Coleman*, 183 Ill. 2d at 389; *People v. Williams*, 209 Ill. 2d 227, 234 (2004).

¶ 16 A claim alleging ineffective assistance of counsel requires this court to apply the well-established, two-part *Strickland* test (*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984)). The Supreme Court has applied this test to cases involving guilty pleas, as well as trials. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S. Ct. 366, 370 (1985). The first prong requires a showing that counsel’s representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88, 104 S. Ct. at 2065. The second prong requires a showing that counsel’s unprofessional errors resulted in prejudice and, without counsel’s errors, there is a

reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

¶ 17 For purposes of review, we examine the legal sufficiency of defendant's postconviction claims regarding ineffective assistance of counsel by considering all well-pleaded facts contained in the petition as true. See *People v. Williams*, 209 Ill. 2d 227, 233 (2004). Further, this court has held that all reasonable inferences, drawn from the facts of defendant's postconviction petition, should be taken in favor of finding that the petition should proceed to an evidentiary hearing. *People v. Knight*, 405 Ill. App. 3d 461, 471 (2010).

¶ 18 Here, defendant's amended postconviction petition alleged defendant's attorney provided incorrect legal advice, in response to direct inquiries, that defendant's 2003 guilty plea would not affect his immigration status or result in deportation. The petition and accompanying affidavits also allege defendant did not commit the crimes, but relied on counsel's erroneous advice and defendant entered a guilty plea. Defendant's affidavit claimed that, if his attorney had correctly advised that deportation would be a certain consequence stemming from defendant's guilty plea, defendant would not have plead guilty.

¶ 19 In 2003, the applicable case law provided that, only when asked about potential collateral deportation consequences, counsel had a duty to provide correct legal advice to his client. *People v. Correa*, 108 Ill. 2d 541, 552 (1985). The principle that an attorney must give accurate advice related to direct inquiries from his client concerning immigration status has been established in Illinois since 1985 and remains unchanged by the recent decision of the Supreme Court in *Padilla* (*Padilla v. Kentucky*, 559 U.S. \_\_\_, 130 S. Ct. 1473 (2010)).

¶ 20 We agree that, prior to the recent decision in *Padilla*, the case law did not impose an

obligation for counsel to *volunteer* legal advice about immigration concerns without a specific inquiry from his client. However, *Correa* teaches us that when counsel provides advice regarding deportation consequences, the advice provided by an attorney to his client must be accurate. *Correa*, 108 Ill. 2d at 552-53. Like the facts in *Correa*, the advice provided by counsel in this case was clearly erroneous.

¶ 21 The State argues that, in this case, the affidavits are unclear whether defendant was present when defendant's father asked the attorney about any impact a guilty plea would have on his son's immigration status and received counsel's advice. Due to this distinguishing fact, the State urges us to find that *Correa* does not dictate the outcome in this case and urges us to apply the rule set out in *People v. Huante*, 143 Ill. 2d 61 (1991). *Huante* holds that, in 2003, the case law provided that an attorney was not required to volunteer legal advice about collateral consequences affecting the immigration status of a client in the absence of a direct inquiry. *Huante*, 143 Ill. 2d at 68.

¶ 22 However, a careful review of the amended postconviction petition and attached affidavits indicates defendant's father asked Attorney Deboer, on several occasions, whether a plea of guilty would negatively impact defendant's immigration status. According to the petition and affidavits, Attorney Deboer responded to this inquiry and unequivocally advised that a plea of guilty would not affect defendant's status because defendant was in the United States legally. This advice was erroneous.

In this case, unlike *Huante*, counsel was not silent concerning deportations concerns but, instead, answered questions and provided incorrect legal advice upon which defendant relied. Additionally, defendant's parents' affidavit stated that they hired Attorney Deboer to represent

their son (defendant) because they were concerned specifically about defendant's immigration status. Additionally, in defendant's affidavit, defendant said that, "[p]rior to the entry of the plea agreement, both my family and I discussed the possible entry of a plea agreement and the consequences of a plea agreement on my lawful immigration status." Defendant argues that, although he was actually innocent of the charges, defendant entered a plea of guilty only after learning that there would not be any deportation consequences.

¶ 23 Taking these statements as true, at this stage of the proceedings, we conclude that counsel actually provided incorrect legal advice in response to a direct inquiry, which was relied upon by defendant, making the mandates of *Correa* applicable. We note that, during appellate argument, the State conceded, if we conclude *Correa* applies to the facts in the instant case, it becomes unnecessary to determine whether *Padilla* should be applied retroactively to the ineffective assistance claims raised in this case. We agree, and do not consider whether *Padilla* applies retroactively in this case because counsel, in response to specific inquiries, provided inaccurate legal advice in this case.

¶ 24 In *Correa*, which involved a third phase evidentiary hearing, the court discussed that reliance on the incorrect legal advice must be reasonable. In that case, our supreme court held:

“If the defendant's pleas were made in reasonable reliance upon the advice or representation of his attorney, which advice or representation demonstrated incompetence, then it can be said that the defendant's pleas were not voluntary; that is, there was not a knowing and intelligent waiver of the fundamental rights which a plea of guilty entails.” *Correa*, 108 Ill. 2d at 549.

¶ 25 Here, the affidavits alleged defendant's family had a limited understanding of the English

language and hired private counsel for the purpose of assisting their son to make an informed decision regarding whether a guilty plea would affect his immigration status. The legal consequences to defendant's immigration status was not an ancillary issue, but was the motivating factor for defendant's parents to hire private counsel to represent their son in this criminal proceeding. Defendant's affidavit contends he expressly relied on the incorrect advice provided by his attorney concerning immigration status before deciding to plead guilty. We conclude defendant's reliance on the advice provided by this lawyer was reasonable since his family hired counsel to specifically provide advice about the potential negative impact a guilty plea could have on their son's existing legal immigration status.

¶ 26 Next, we consider whether defendant's amended postconviction petition satisfies the second prong of the *Strickland* test by also making a substantial showing that defendant was prejudiced by his attorney's misrepresentations. See *Hill*, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985). The State argues that, to show prejudice due to "actual innocence," defendant's postconviction petition must allege newly discovered evidence. The State asserts that the affidavits of the codefendants do not constitute newly discovered evidence for purposes of a postconviction petition because defendant knew of those facts in 2003. The State also contends that the affidavits in this case do not establish the codefendants would be willing to testify at trial.

¶ 27 We reject the State's contentions. This court has held "that a freestanding claim of actual innocence [without proving newly discovered evidence] is cognizable in postconviction proceedings following a conviction resulting from a guilty plea when the defendant can show the plea was not knowing or was not voluntary." *Knight*, 405 Ill. App. 3d at 466 (citing *People v. Barnslater*, 373 Ill. App. 3d 512, 527 (2007)).

¶ 28 The facts stated in defendant's and codefendants' affidavits, when taken as true, make a substantial showing that defendant was not involved in the burglaries and defendant could have presented evidence at a trial, including his own testimony, to establish a reasonable doubt that he was not guilty of those offenses. Since nothing in the record contradicts these statements, we conclude defendant has made a substantial showing, with these statements, that there was a probability that the results of the case could have been different if defendant had received accurate legal advice and not entered a guilty plea but requested a trial on the merits.

¶ 29 After drawing all reasonable inferences from the facts, taken as true, contained in defendant's amended postconviction petition, we conclude defendant's amended postconviction petition also made a substantial showing that defendant was prejudiced by his attorney's incorrect advice.

¶ 30 CONCLUSION

¶ 31 In the case at bar, defendant has made a substantial showing that his constitutional rights were violated and his guilty plea and eventual convictions resulted from ineffective assistance of counsel, and that defendant was prejudiced by his attorney's actions. Therefore, we reverse the dismissal of the amended postconviction petition and remand the matter to the trial court for an evidentiary hearing.

¶ 32 Reversed and remanded.