

2012 IL App (2d) 100883-U
Nos. 2-10-0883, 2-11-0018 cons.
Order filed February 17, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Respondent-Appellee,)	
)	
v.)	No. 06-CF-1230
)	
ALEXANDER E. RYAN,)	Honorable
)	Timothy Q. Sheldon,
Petitioner-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

Held: Where postconviction petitioner alleged that his counsel failed to inform him of the potential immigration consequences of stipulating to probation violations, but the record reflects that petitioner would have been subject to deportation even absent the stipulations, petitioner could not establish that counsel's actions caused him prejudice and the trial court properly denied leave to file a successive postconviction petition.

¶ 1 After immigration proceedings (that are not the subject of this appeal), petitioner, Alexander E. Ryan, was deported to Germany. Prior to his deportation, petitioner had pleaded guilty in Kane County to theft by deception (720 ILCS 5/16-1(a)(2)(A) (West 2006)). Thereafter, petitioner

stipulated to violating the terms of his probation and he received a sentence of 24 months' imprisonment.

¶ 2 In a *pro se* postconviction petition, petitioner argued generally that he had received ineffective assistance of trial counsel. The petition contained no specific information to support the claim, and the court dismissed the petition. Petitioner subsequently moved for leave to file a successive postconviction petition, arguing, in part, that counsel was ineffective for failing to explain to him the immigration consequences of pleading guilty and stipulating to probation violations. The trial court denied leave, dismissed the petition, and denied petitioner's motion to reconsider. Petitioner appeals. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On March 16, 2007, in exchange for a sentence of 24 months' probation and the imposition of various fines and fees, petitioner pleaded guilty to theft by deception. Before accepting the plea, the trial court admonished petitioner that:

“If you are not a citizen of the United States, you're hereby advised that conviction of the offenses for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States. Do you understand the penalties which could be imposed?”

Petitioner responded, “yes.” In addition, petitioner (not his counsel) personally signed a guilty plea form and checked the box stating that he “understands that if he/she is not a U.S. citizen that this plea could result in his/her deportation.”

¶ 5 One month after petitioner pleaded guilty, the State petitioned to revoke probation on the basis that petitioner failed to comply with the terms that he report to adult court services and notify

his probation officer of any change in residence or employment. The court advised petitioner that he had a right to a hearing and that, if the court revoked probation, the potential penalties could include a sentence of 2 to 5 years' imprisonment, with an extended term of 5 to 10 years, and 1 year of mandatory supervised release, as well as a \$25,000 fine. Petitioner stated that he understood his rights. On May 7, 2008, in exchange for a sentence of four days' imprisonment with credit for time served, petitioner stipulated to violating probation. Before accepting the stipulation, the court asked:

“THE COURT: [Petitioner,] have I advised you of the penalties and rights?

PETITIONER: I believe you have on a previous court date, Judge.

THE COURT: You understand that by stipulating, you will be giving up your rights; that there will be no hearing?

PETITIONER: Yes, Judge.

THE COURT: You understand the penalties that I could impose?

PETITIONER: Yes.”

The court did not specify that there could be immigration or deportation consequences if imprisonment were ordered. Thereafter, the court accepted petitioner's stipulation and imposed the agreed sentence.

¶ 6 Four months later, in September 2008, the State again petitioned to revoke petitioner's probation on the bases that: (1) after he pleaded guilty to the instant offense, petitioner committed a theft in De Kalb County; and (2) petitioner failed to notify his probation officer of the De Kalb County arrest. On October 2, 2008, in exchange for a two-year sentence to run *concurrent* to the sentence in the De Kalb case,¹ petitioner stipulated to failing to notify his probation officer of his

¹The record on appeal reflects that, on July 13, 2009, petitioner filed a motion for trial

arrest. At the time of the hearing, petitioner, although present for the hearing, was already incarcerated. Again, the court admonished petitioner regarding his right to a hearing and the potential penalties that could be imposed (terms of imprisonment and fines). The court did not specify that there could be immigration or deportation consequences if imprisonment was ordered. Thereafter, the court accepted petitioner's stipulation and the agreed sentence.

¶ 7 On April 28, 2009, petitioner, acting *pro se*, filed his first postconviction petition, asserting, in total, that "due to ineffective counsel my 6th amendment was violated of the U.S.C." On May 5, 2009, the trial court summarily dismissed the petition. On December 17, 2009, this court granted the appellate defender's motion, pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and *People v. Lee*, 251 Ill. App. 3d 63 (1993), to withdraw as counsel and affirmed the dismissal. *People v. Ryan*, No. 2-09-0580 (December 17, 2009) (summary order issued pursuant to Rule 23(c)(2)).

¶ 8 Two years later, on March 12, 2010, petitioner filed with the trial court a successive postconviction petition arguing that, at the original guilty plea hearing, he was confused and did not

transcripts and common law records. In that motion, petitioner represented to the Kane County court that, on March 26, 2009, in De Kalb County, a jury convicted him of the offense of deceptive practices (720 ILCS 50/17-1-B (West 2008)), and that he was serving a three-year sentence of imprisonment for that conviction. Petitioner's representations regarding the conviction and term of imprisonment are corroborated in the record by a document, filed November 16, 2009, by the Illinois State Police Bureau of Investigation, wherein that agency objects to petitioner's action to expunge various arrests and attaches thereto data regarding petitioner's entire criminal history. That document, however, lists the date of imprisonment for deceptive practices in De Kalb County as beginning June 13, 2008.

understand that a conviction could result in deportation. Petitioner asserted that his counsel, “knowing [petitioner’s] current mental condition and [] citizenship,” should have more fully advised him regarding potential immigration consequences. Further, regarding his stipulations to probation violations, petitioner noted that there was no admonishment at either hearing of the possible immigration consequences of those stipulations.

¶9 On May 24, 2010, the trial court dismissed the successive postconviction petition, noting that petitioner did not request leave to file it and, in any event, that the petition failed to establish the requisite cause and prejudice. Specifically, as to cause, the court noted that petitioner provided no explanation for why he was not able to raise his claims in his initial postconviction petition. As to prejudice, the court noted that petitioner failed to establish that the claims now raised so infected the trial as to render his conviction a due process violation.

¶10 Petitioner moved the court to reconsider, asserting that he did not raise the immigration claim in his first petition because, when he filed his first petition, he did not know that he could be deported. Further, he argued generally that his lack of knowledge that deportation would be pursued by immigration officials was “very” prejudicial. On July 23, 2010, the court denied the motion to reconsider, finding that the ruling on the first postconviction petition, denying petitioner’s ineffective-assistance claim, had a *res judicata* effect with respect to all claims that could have been raised in that petition. Further, the court determined that, even if petitioner could establish cause for his failure to raise the claims, he could not establish prejudice because: (1) a court’s failure to admonish regarding potential immigration consequences is not a constitutional violation; and (2) petitioner’s claim of ineffective assistance of counsel due to counsel’s failure to inform the court of petitioner’s immigration status was premised on the erroneous assumption that the court is required

to admonish regarding the potential deportation consequences of a guilty plea. Thus, the court found that petitioner could not establish prejudice and that his ineffective assistance claim was forfeited. Petitioner appeals the court's denial of leave to file a successive postconviction petition.

¶ 11

II. ANALYSIS

¶ 12

A. Standards of Review

¶ 13 A petitioner may be entitled to relief under the Post Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2006)) where he or she can demonstrate that there was substantial violation of his or her constitutional rights in the proceedings that produced the conviction or sentence being challenged. *People v. Jones*, 211 Ill. 2d 140, 143-44 (2004). The Act contemplates the filing of one postconviction petition; therefore, to file a successive petition, the petitioner must obtain leave of court, which “may be granted only if a petitioner demonstrates *cause* for his or her failure to bring the claim in his or her initial post-conviction proceedings and *prejudice* results from that failure.” (Emphases added.) 725 ILCS 5/122-1(f) (West 2006). “Cause” under section 122-1 of the Act is defined as “any objective factor, external to the defense, which impeded the petitioner’s ability to raise a specific claim at the initial postconviction proceeding.” *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). “Prejudice” is defined as an “error so infectious to the proceedings that the resulting conviction violates due process.” *People v. Gutierrez*, 954 N.E.2d 365, 372 (June 30, 2011) (citing *Pitsonbarger*, 205 Ill. 2d at 464).

¶ 14 Where the constitutional violation alleged in the successive petition is one of ineffective assistance of counsel, the petitioner must establish both that counsel’s performance: fell below an objective standard of reasonableness (performance prong) and prejudiced petitioner (prejudice prong). *Strickland v. Washington*, 466 U.S. 668, 689-90 (1984). In the context of a plea, a petitioner

establishes that counsel's errors were prejudicial by establishing that, but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial. *People v. Pugh*, 157 Ill. 2d 1, 15 (1993). Whether the alleged error was prejudicial largely depends on whether the defendant/petitioner would have likely succeeded at trial. *Id.* Where a petitioner seeks leave to file a successive postconviction petition alleging a constitutional violation based upon ineffective assistance of counsel, but cannot establish the prejudice prong of the *Strickland* test, he or she fails to establish the requisite prejudice under section 122-1's cause-and-prejudice test and denying leave to file the successive petition is proper. See *Gutierrez*, 954 N.E.2d at 379. We review *de novo* a trial court's denial of a motion to file a successive postconviction petition. *People v. LaPointe*, 227 Ill. 2d 39, 43 (2007).

¶ 15 B. Ineffective Assistance of Counsel

¶ 16 As noted above, petitioner's first postconviction petition, alleging ineffective assistance of counsel only generally, was denied. Nevertheless, petitioner argues that he has established both the cause and prejudice required to obtain leave to file a successive petition.

¶ 17 First, as to cause, petitioner notes that, in 2009, when he filed his first petition, the United States Supreme Court had not yet decided *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), a decision in which the Court held that, under *Strickland's* performance prong, prevailing professional norms require defense counsel to advise the client of the possible deportation consequences accompanying the offense to which he or she is pleading guilty. Thus, petitioner argues, where counsel failed to inform him that, by pleading guilty, he could possibly face deportation, and where he did not know that counsel was required to do so until *Padilla* was decided (*i.e.*, after he filed his first postconviction petition) he has established cause for not raising this claim of ineffective assistance

in the first petition. Petitioner notes that, in *Gutierrez*, the court found that the petitioner established cause under similar circumstances. *Gutierrez*, 954 N.E.2d at 372.

¶ 18 Second, as to prejudice, petitioner argues that, where trial counsel did not inform him of immigration consequences, first, when he pleaded guilty and, then, when he stipulated to probation violations more than one year after the trial court rendered its initial immigration admonishments, he was prejudiced because, had he known the stipulations would trigger deportation, he “would not have proceeded the same way.” More specifically, petitioner asserts that, had he known that he would be deported, he would have declined pleading guilty and stipulating to probation violations.

¶ 19 We note first that the parties dispute whether the *Padilla* decision is retroactive such that petitioner may rely upon it for his ineffective-assistance claim. We need not reach that question because, assuming *Padilla* is retroactive (indeed, the First District appellate court in *Gutierrez* held that *Padilla* may be applied retroactively (*Gutierrez*, 954 N.E.2d at 376)), and assuming (again based upon *Gutierrez*) that petitioner has established cause for not raising his ineffective assistance claim in his first postconviction petition, we conclude that petitioner fails to establish the prejudice necessary to warrant leave to file a successive postconviction petition.

¶ 20 We first distinguish between petitioner’s guilty plea to the crime of theft and his subsequent stipulations to probation violations. Petitioner conflates the two, suggesting that, had he known he would be deported, he would have neither pleaded guilty to theft, nor stipulated to violating probation. However, the two are separate actions and inquiries. As to the guilty plea, the record clearly reflects that petitioner entered his plea with knowledge that the plea might carry possible immigration or deportation consequences. First, the trial court admonished petitioner on the record that pleading guilty might result in deportation or other consequences, and petitioner stated that he

understood those admonishments. Second, the record reflects that petitioner personally signed a guilty plea form and checked the box stating that he “understands that if he/she is not a U.S. citizen that this plea could result in his/her deportation.” Thus, the record belies petitioner’s assertion that, had he known of potential immigration consequences, he would not have pleaded guilty to theft. Even if counsel allegedly failed to inform petitioner that he might be deported after pleading guilty, petitioner *was* informed in open court that his plea might carry deportation consequences and he nevertheless chose to enter his plea. Therefore, even if *Padilla* is retroactively applied and trial counsel’s performance was deficient for a failure to more fully explain to petitioner the potential immigration consequences of his guilty plea, petitioner cannot, given the trial court’s clear admonishments and petitioner’s repeated acknowledgment that he understood those admonishments, establish the prejudice prong of his ineffective assistance claim.

¶ 21 Next, as to the probation-violation stipulations, petitioner again cannot establish prejudice. Whether counsel’s alleged error was prejudicial depends largely on whether petitioner would have likely succeeded at a hearing on his probation violations. See, *e.g.*, *Pugh*, 157 Ill. 2d at 15. Petitioner asserts that the record does not reflect that there was overwhelming evidence that he committed probation violations and, therefore, it is possible that, had he gone to trial on those violations he might have presented evidence contradicting the violation to which he stipulated (*i.e.*, it is possible that he had evidence that he *did* report his arrest to his probation officer). We disagree. First, petitioner presented none of that alleged evidence with his successive postconviction petition. Second, Petitioner ignores that the *other* probation violation alleged by the State was his being arrested for another crime, specifically, theft in De Kalb County. Thus, while the ultimate conviction in the DeKalb case was for deceptive practices, not theft, the fact that petitioner was undisputedly

arrested and was, at the time of the probation violation hearing, already incarcerated (apparently for the deceptive practice conviction), presents overwhelming evidence to that probation violation.

¶ 22 Further, petitioner’s claim—that he would not have stipulated to the probation violations if counsel had informed him that, upon imposition of a term of imprisonment, deportation consequences would follow—*presumes* that, in fact, deportation resulted from the 24-month sentence of imprisonment related to the theft conviction. While petitioner correctly notes that the Immigration and Nationality Act of 1952 (Immigration Act) provides as grounds for deportation convictions for aggravated felonies, which include theft offenses for which the term of imprisonment is at least one year (8 U.S.C. § 1101(a)(43)(G) (West 2006)), petitioner *also* became eligible for deportation on separate grounds. Specifically, the Immigration Act provides that “any alien” (*i.e.*, any person not a citizen (8 U.S.C. § 1101(a)(3) (West 2006)) is deportable if he or she “at any time after admission[,] is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial[.]” 8 U.S.C. § 1227(a)(2)(A)(ii) (West 2006). Petitioner’s 2007 guilty plea (which qualifies as a conviction (8 U.S.C. § 1101(a)(48) (West 2006)) was for theft: theft is considered a crime of moral turpitude. See, *e.g.*, *Esquivel v. Mukasey*, 543 F.3d 919, 920-21 (7th Cir. 2008); *Korsunskiy v. Gonzales*, 461 F.3d 847, 848 (7th Cir. 2006). Petitioner’s 2009 conviction in De Kalb County was for deceptive practices: deceptive practices are considered crimes of moral turpitude. See, *e.g.*, *Hassan v. Immigration & Naturalization Service*, 110 F.3d 490, 493 (1997). Thus, even if petitioner had *not* stipulated to probation violations and had *not* received in the Kane County case a term of imprisonment, deportation based on two convictions for crimes of moral turpitude would have been possible (indeed, as petitioner does not state and as there is

nothing in the record reflecting one way or the other, section 1227(a)(2)(A)(ii) of the Immigration Act might have been the basis upon which petitioner was deported).

¶ 23 In sum, petitioner cannot establish *Strickland*'s prejudice prong because he cannot establish that, had counsel informed him of possible deportation consequences prior to his stipulations, he would not have stipulated to those violations or would likely have succeeded at a hearing on those violations. Further, petitioner mistakenly presumes that, had he avoided imprisonment on the theft conviction, he would also have avoided deportation. In fact, section 1227(a)(2)(A)(ii) of the Immigration Act provided an additional ground that mandated deportation. Therefore, where petitioner cannot establish that counsel's alleged error so infected the proceedings that petitioner's due process rights were violated, the court properly denied petitioner leave to file the successive postconviction petition. *Gutierrez*, 954 N.E.2d at 379.

¶ 24

III. CONCLUSION

¶ 25 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 26 Affirmed.