

2012 IL App (2d) 110710-U
No. 2-11-0710
Order filed September 12, 2012

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
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of De Kalb County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 05-CF-472
)	
ALEXANDER E. RYAN,)	Honorable
)	Robbin J. Stuckert,
Defendant-Appellant.)	Judge, Presiding.

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

ORDER

Held: The trial court properly dismissed defendant's postconviction petition, which alleged that trial counsel was ineffective for failing to advise him of the immigration consequences of conviction and for failing to pursue a plea bargain that might have avoided those consequences: defendant did not make a showing of prejudice, as he merely assumed that such a plea bargain was a reasonable probability, and the plea bargain that he posited—reducing defendant's restitution—would not have avoided deportation, which had an independent basis.

¶ 1 Defendant, Alexander E. Ryan, appeals the second-stage dismissal of his amended petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)), seeking relief from his seven convictions of deceptive practices (720 ILCS 5/17-1b(d) (West 2004)). He contends

that the petition made a substantial showing that his trial counsel had been ineffective for failing to inform him of the immigration consequences of any convictions and for failing to pursue a negotiated guilty plea that might have avoided those consequences. We affirm.

¶2 We set out the pertinent facts. On September 29, 2005, defendant, a legal resident alien, was charged with seven counts of deceptive practices. Each count alleged that, in June 2005, with the intent to defraud, he presented a check for payment to the National Bank and Trust Co. in De Kalb, knowing that the check would not be paid by the depository on which it had been drawn, Associated Bank. The checks were allegedly for \$1,150, \$1,150, \$1,600, \$1,500, \$3,300, \$4,000, and \$3,000, totaling \$15,700. Defendant retained counsel. On April 9, 2006, he waived his right to a jury trial.

¶3 On January 24, 2008, after a bench trial, defendant was found guilty on all counts. Later, he was sentenced to concurrent three-year prison terms and ordered to pay \$15,700 in restitution and a \$500 fine, with the judgment modified on appeal to provide a \$70 credit against the fine. *People v. Ryan*, No. 2-09-0441 (2010) (unpublished order under Supreme Court Rule 23).

¶4 On March 30, 2010, defendant filed a petition for relief under the Act, contending that, under *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2010), his trial counsel had been ineffective for failing to inform him that he faced automatic deportation upon a conviction of any of the offenses as charged. On January 3, 2011, defendant's appointed counsel filed an amended petition.

¶5 As pertinent here, the amended petition alleged as follows. Defendant's trial attorney, Robert Nolan, had been ineffective for failing to advise defendant of the immigration consequences of being convicted of the charges and for failing to adapt his defense strategy to those consequences. These failures were crucial: under section 1227(a)(2)(A)(iii) of the Immigration and Nationality Act (Immigration Act) (8 U.S.C. § 1227(a)(2)(A)(iii) (2006)), defendant's convictions of deceptive

practices amounted to an “aggravated felony” because the restitution exceeded \$10,000 (see 8 U.S.C. §1101(a)(43)(M)(i) (West 2006)). Therefore, he was subject to automatic deportation. The amended petition continued:

“[H]ad Defendant’s counsel defended this case with immigration consequences being the paramount concern, plea negotiations could have taken place wherein Defendant used some of the bond money [that he had left over] to reimburse *** National Bank *** on some of the counts, thus getting the full amount he was charged and convicted of reduced to below that \$10,000 threshold. Because Defendant was not advised of the immigration consequences, that was not done.”

¶ 6 Among the exhibits that defendant attached to his amended petition was an order dated November 16, 2010, issued by Judge James R. Fujimoto of the United States Department of Justice Immigration Court in Chicago. The order stated that defendant was to be deported to Germany, per sections 1227(a)(2)(A)(ii) and 1227(a)(2)(A)(iii) of the Immigration Act (8 U.S.C. §§ 1227(a)(2)(A)(ii), (iii) (2006)). The order contains the following statements of fact. Defendant, a German citizen, was admitted to the United States in 1979. In February 1999, the federal government initiated removal proceedings against him, but they were terminated that month. However, in April 2003, the government again started removal proceedings, based on numerous convictions, including three counts of deceptive practices. Defendant applied for cancellation of removal, and, in August 2003, the application was granted.

¶ 7 The order continued as follows. The government had once again started removal proceedings against defendant, based upon the following convictions: (1) May 8, 1998, in De Kalb County—domestic battery; (2) May 8, 1998, in Ogle County—deceptive practices; (3) January 25,

1999, in Ogle County—deceptive practices; (4) June 14, 2002, in Ogle County—deceptive practices; (5) April 2, 2003, in De Kalb County—attempted aggravated battery; (6) April 2, 2003, in De Kalb County—forgery; (7) April 2, 2003, in De Kalb County—deceptive practices; (8) April 2, 2003, in De Kalb County—battery (two counts); (9) March 28, 2005, in Ogle County—forgery; (10) March 16, 2007, in Kane County—theft by deception; (11) the present case—June 13, 2008, in DeKalb County—deceptive practices; and (12) March 26, 2009, in De Kalb County—deceptive practices. Conviction (9) had since been vacated, but all the others were final for removal purposes.

¶ 8 The order made the following findings on “each ground of removability.” Defendant’s convictions of deceptive practices were “crime[s] involving moral turpitude” under section 1227(a)(2)(A)(ii) of the Immigration Act (8 U.S.C. § 1227(a)(2)(A)(ii) (2006)) because they involved fraud. Defendant’s conviction of theft by deception was also a crime of moral turpitude. Thus, the present convictions, as well as convictions (2), (3), (4), (7), (10), and (12), all crimes of moral turpitude, made him removable under section 1227(a)(2)(A)(ii) of the Immigration Act.

¶ 9 The immigration court held further that the present convictions and conviction (10) were aggravated felonies and thus also made defendant subject to removal per section 1227(a)(2)(A)(iii) of the Immigration Act (8 U.S.C. § 1227(a)(2)(A)(iii) (2006)). The convictions in the present case were, collectively, an aggravated felony because they involved fraud and deceit and the loss to the victim exceeded \$10,000 (see 8 U.S.C. § 1101(a)(43)(M)(i) (2006)). The immigration court ordered defendant deported. The record says nothing further on the removal proceedings.

¶ 10 The State moved to dismiss defendant’s amended petition, contending (as pertinent here) that *Padilla* applies only to a defendant who has pleaded guilty and does not require trial counsel to advise a client of the immigration consequences of a conviction that may occur after a bench trial.

¶ 11 The trial court dismissed the amended petition. The court's written order discussed defendant's *Padilla* claim as follows. Defendant had cited no authority holding that, before a defendant elects a bench trial, his attorney must advise him of the immigration consequences of a conviction. Further, defendant's implicit assertion that he had been unaware of those consequences was difficult to believe, as he had been through removal proceedings in 1999 and 2003. Also, Nolan's decision not to pursue plea negotiations had been reasonable trial strategy and therefore did not support a claim of ineffective assistance. Defendant timely appealed.

¶ 12 On appeal, defendant contends that his amended petition made a substantial showing that Nolan had been ineffective for failing to learn about, and inform defendant of, the immigration consequences of a possible conviction and for failing to pursue plea negotiations that could have avoided deportation. Defendant asserts that, had he known of these consequences, "he would have directed counsel to negotiate a plea agreement to avoid deportation."

¶ 13 Defendant provides few specifics as to what Nolan could have done had he attempted to negotiate a plea. As he did in his amended petition, he notes that his convictions were an "aggravated felony," subjecting him to automatic deportation, because the total restitution exceeded \$10,000 (8 U.S.C. § 1227(a)(2)(A)(iii) (2006)), and he theorizes that, had Nolan realized this, he and the State "may have been able to negotiate an agreement to reduce the charge or restitution amount to under \$10,000" to avoid defendant's deportation.

¶ 14 To survive the State's motion to dismiss, a postconviction petition must make a substantial showing that the defendant suffered a constitutional deprivation in the proceedings that led to his conviction or sentence. 725 ILCS 5/122-1 (West 2010); *People v. McNeal*, 194 Ill. 2d 135, 140 (2000). The trial court must accept the well-pleaded allegations of the petition as true unless they

are rebutted by the record. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). Our review is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). Moreover, we are not bound by the trial court's reasoning but may affirm its judgment on any basis called for by the record. *People v. Snow*, 2012 IL App (4th) 110415, ¶ 17.

¶ 15 To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) counsel's performance was objectively unreasonable; and (2) it is reasonably probable that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984); *People v. Evans*, 369 Ill. App. 3d 366, 383 (2006). Because defendant must satisfy both prongs, we may affirm the judgment if we conclude that he failed to show prejudice. *People v. Evans*, 186 Ill. 2d 83, 94 (1999). Here, we need not decide whether the trial court correctly refused to extend *Padilla*, a guilty-plea case, to one in which the defendant pleads not guilty and is eventually convicted. We hold that, whatever the scope of counsel's obligations, defendant's amended petition did not make a substantial showing of prejudice.

¶ 16 The resolution of the prejudice issue is straightforward. The amended petition's sole specific theory as to how Nolan's allegedly defective representation prejudiced defendant is that he and the State might have worked out a bargain under which defendant used some of his bond money to reduce restitution to less than \$10,000, thus avoiding any conviction of an "aggravated felony" under section 1227(a)(2)(A)(iii) of the Immigration Act (8 U.S.C. § 1227(a)(2)(A)(iii) (2006)). Defendant acknowledges that the parties made no progress in plea negotiations. The probability that defendant's attorney would have procured a successful plea agreement is dim. In any event, there is an even more serious defect in defendant's theory.

¶ 17 Defendant's argument ignores that, even were we to make the unfounded assumption that the plea bargain he posits would have been a reasonable probability, it would have made no difference. As the immigration court's order plainly states, defendant's multiple convictions of deceptive practices, an offense involving "moral turpitude," also made him automatically deportable regardless of the amount of restitution involved. See 8 U.S.C. § 1227(a)(2)(A)(ii) (2006)). Indeed, the immigration court specifically relied on "moral turpitude" as an independent ground for deportation. And the finding of moral turpitude was not limited to the offenses in the present case. Thus, even were there some reason to believe that the State would have agreed to a plea that reduced restitution to less than \$10,000, this would have helped defendant not at all. The amended petition offered nothing that remotely made a substantial showing that Nolan's alleged failings prejudiced defendant in any way. Therefore, the dismissal of the amended petition was correct.

¶ 18 For the foregoing reasons, the judgment of the circuit court of De Kalb County is affirmed.

¶ 19 Affirmed.