

No. 1-11-2460

**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. 05 CR 19850
	)	
JAVIER MEDINA,	)	Honorable
	)	William Timothy O'Brien,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE R. GORDON delivered the judgment of the court.  
Presiding Justice Lampkin and Justice Hall concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where defendant files a motion to withdraw his guilty plea on the grounds that he would not have pled guilty but for the ineffective assistance of his counsel but does not assert a claim of actual innocence or a plausible defense that could have been used at trial, defendant cannot show prejudice and his motion was properly denied. Where defendant is assessed a charge pursuant to a statute that did not exist at the time of his offense, the assessment violates the constitutional prohibition against *ex post facto* punishments and must be vacated.

¶ 2 After pleading guilty to one count of possession of less than 15 grams of cocaine, the trial court sentenced defendant Javier Medina to two years of probation. The trial court also assessed various monetary charges against defendant, including a \$30 charge to be paid to the Children's

No. 1-11-2460

Advocacy Center because the statute authorizes that "[i]n each county in which a Children's Advocacy Center provides services, the county board may adopt a mandatory fee of between \$5 and \$30 to be paid by the defendant on judgment of guilt." 55 ILCS 5/5-1101(f-5) (West 2008). Defendant subsequently filed a motion to withdraw his guilty plea and vacate his sentence, arguing that he was unaware that, as a non-U.S. citizen, a conviction for possession of a controlled substance<sup>1</sup> would render him deportable under the federal Immigration and Nationality Act (8 U.S.C. § 1227(a)(2)(B)(1)). As noted, the trial court denied defendant's motion. On appeal, defendant argues that the trial court improperly denied his motion to withdraw his guilty plea and improperly imposed the \$30 Children's Advocacy Center charge pursuant to a statute that did not exist at the time of his offense. 55 ILCS 5/5-1101(f-5) (West 2008); Pub. Act 95-103 (eff. Jan. 1, 2008) (adding 55 ILCS 5/5-1101(f-5)). The State agrees that the \$30 charge was improperly imposed. For the following reasons, we affirm his conviction, vacate the \$30 charge, and order the mittimus corrected.

¶ 3

### BACKGROUND

¶ 4 On August 19, 2005, the State filed a one-count information against defendant, alleging that he possessed less than 15 grams of cocaine. The trial court set an arraignment date for September 7, 2005, but defendant did not appear. On September 14, 2005, the trial court issued a warrant for defendant's arrest pursuant to the one-count information. The warrant remained outstanding until 2011, when defendant was arrested during a routine traffic stop on March 23,

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<sup>1</sup> The statute makes an exception for the possession of 30 grams or less of marijuana. 8 U.S.C. § 1227(a)(2)(B)(1).

No. 1-11-2460

2011, and an assistant public defender was assigned to represent defendant.

¶ 5

#### I. Arraignment

¶ 6 On March 24, 2011, the case proceeded to arraignment, and defense counsel informed the trial court that defendant and the State had agreed to a plea bargain of two years' probation, 10 days of community service, random drug testing, alcohol and drug evaluation, and DNA indexing. The trial court asked defendant questions in English, and defendant responded in English, using full, coherent sentences. The trial court asked defendant whether he spoke English fluently, and defendant responded "[e]nough." The trial court offered to provide defendant with a Spanish interpreter and defendant declined. Defendant indicated that he understood the terms of the probation, that he understood the consequences of pleading guilty, that he understood that he had a right to a trial, and that pleading guilty waives that right.

¶ 7 Defendant's attorney then informed the trial court that defendant was not a United States citizen and needed to be admonished concerning the immigration consequences of a guilty plea. Defendant's attorney informed the trial court that defendant's ability to remain in the United States would be affected by the plea, and defendant could be deported and unable to return to the United States. Defendant's attorney asked defendant, in open court, whether he still wished to proceed with a guilty plea. Defendant responded by saying that "[t]he last thing [he] want[s] to do is go back to Mexico." Defendant's attorney then stated that defendant needed to answer the question she had asked, and defendant responded that, if a guilty plea jeopardized his ability to remain in the United States, he did not want to continue with the guilty plea. Defendant's attorney asked the trial court for a continuance, and the trial court allowed the parties to take a

recess.

¶ 8 The trial court recalled the case that same day, and defendant's attorney stated that she discussed the "immigration consequences of a plea of guilty on a felony" with defendant. Defendant's attorney stated she informed defendant that if he pled guilty, he could be subject to deportation and his ability to return to the United States and become a United States citizen could be adversely affected. Defendant's attorney stated to the trial court that, after she informed defendant of the immigration consequences, he still wished to proceed with the guilty plea. The trial court asked defendant whether he did indeed wish to proceed with the guilty plea, and defendant responded "[y]es."

¶ 9 The trial court again admonished defendant of his rights, and defendant responded that he understood each of the trial court's statements. The trial court also admonished defendant of the immigration consequences of his guilty plea, and defendant responded that he understood the consequences. Defendant then pled guilty and stated that his plea was voluntary and uncoerced. The State offered a factual basis for the record, explaining the events leading to defendant's arrest. After the State concluded its factual basis, the trial court asked defendant whether he still wished to proceed with the guilty plea, and defendant responded "[y]es."

¶ 10 The trial court accepted defendant's guilty plea and entered a finding of guilty. The trial court heard factors in aggravation and mitigation, and accepted the plea agreement, stating that it would sentence defendant according to the agreement's terms. The trial court also assessed certain monetary charges against defendant, including a \$30 charge to be paid to the Children's Advocacy Center. However, the trial court indicated that it was troubled by the fact that

No. 1-11-2460

defendant's initial arrest occurred in 2005, and the warrant for his arrest remained outstanding for six years and defendant did nothing to return to court. The trial court stressed to defendant the importance of obeying the terms of the probation, namely, reporting to his probation officer. Defendant acknowledged that he understood. The trial court explained to defendant the other terms of the plea agreement, and defendant again indicated that he understood. The trial court admonished defendant of the consequences of violating the probation, and defendant again acknowledged that he understood. The trial court admonished defendant of his right to appeal, and defendant acknowledged that he understood. Finally, the trial court asked defendant whether he had any questions regarding the plea or the sentence, and defendant responded "[j]ust the costs and fines, how much time I have to pay." The trial court responded that defendant had to pay the fines during the period of his probation and asked defendant how many days he had been in custody. Defendant responded that he had been in custody two days and the trial court reduced the fines accordingly.

¶ 11 II. Motion to Withdraw Guilty Plea and Vacate Sentence

¶ 12 Subsequent to entering his guilty plea,<sup>2</sup> defendant was taken into custody by the Immigration and Naturalization Service (INS). On April 19, 2011, defendant, represented by private counsel, filed a motion to withdraw his guilty plea and vacate his sentence. The motion alleges that defendant "did not fully understand the [INS] advice that was given to him by defense counsel, insofar as counsel had informed him that by pleading guilty to straight probation, the chances were slim that immigration would actually take him into custody."

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<sup>2</sup> The record does not disclose the exact date when defendant was taken into INS custody.

Defendant believed that, if he was not sentenced to the penitentiary, he would face a small chance of deportation, and that, because he was sentenced to probation, he could expunge his record and "be restored the his pre-arrest condition, a belief that simply was unfounded, but that he understood from his attorney." Defendant asserted that, but for the incorrect advice from his appointed attorney, he would not have pled guilty, and he cited to his statement on the record that "[t]he last thing [he] want[s] to do is go back to Mexico.

¶ 13 On July 13, 2011, the trial court<sup>3</sup> held a hearing on the motion. Defendant had been temporarily released from INS custody on a writ of *ad testificandum* for the purposes of attending the hearing. Defendant argued that he did not understand the INS consequences of his plea because his attorney had provided incorrect information off the record. At the hearing, his attorney from the arraignment testified and confirmed that she had told defendant that the only way he could be released from custody at that point in time was to plead guilty.

¶ 14 A. Defendant's Testimony

¶ 15 At the hearing, defendant testified, through the use of a Spanish interpreter, to the following. Defendant is a citizen of Mexico who entered the United States in 1984 as an illegal alien. He does not have "any lawful claim to any status in the United States," but he has two American-born children. Defendant denied remembering that his attorney and the trial court admonished him concerning the immigration consequences of pleading guilty and he denied

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<sup>3</sup> The hearing judge was a different judge from the judge who had presided over the guilty plea. However, the hearing judge stated that he had read the transcript from the arraignment and guilty plea.

No. 1-11-2460

remembering that his attorney informed the trial court that he was not a United States citizen.

Defendant did remember his attorney asking him whether he wished to proceed with his guilty plea, and he did remember stating in open court that "[t]he last thing [he] want[s] to do is go back to Mexico." Defendant recalled that, on the day of the arraignment, the trial court allowed a recess, and during that recess, his attorney told him that he could go home if he pled guilty.

Defendant denied that his attorney informed him that he could be deported after pleading guilty.

Defendant recalled that his attorney told him that he "had no other option but to plead guilty."

Defendant remembered that, after the recess, his attorney stated in open court that she had advised him of the immigration consequences of the guilty plea. However, defendant did not understand what his attorney said because she spoke in English and he did not speak enough English to understand her.

¶ 16 On cross-examination, defendant testified to the following. During the recess, he and his attorney conversed in English. Defendant's attorney had admonished him of the charges against him and informed him of his "rights with respect to proceeding on this case." However, defendant's attorney failed to inform him that he had the right to proceed to trial. Defendant could not remember whether his attorney discussed his immigration status with him because he "was scared." Defendant's attorney did not admonish him of the immigration consequences from a guilty plea. Defendant's attorney did not inform him that she was not an immigration lawyer and did not offer to obtain a continuance to allow defendant and his family to consult with an immigration lawyer. Following the recess, the trial court asked defendant questions regarding his guilty plea and defendant's attorney stated on the record that defendant is not a United States

No. 1-11-2460

citizen. The trial court admonished defendant of the immigration consequences of pleading guilty, but although defendant stated on the record that he understood the consequences, he in fact had misunderstood what the trial court had said.

¶ 17 Defendant testified to the following on redirect examination. Defendant's attorney informed him that, if he pleaded guilty and received a sentence of probation, he could go home. However, defendant was taken into INS custody. Defendant's attorney did not inform him that he could be taken into INS custody, and if she had informed him of such, he would not have pled guilty. If defendant had known that he could be taken into INS custody after pleading guilty, he would have "hire[d] a lawyer \*\*\* [t]o get a continuance or maybe fight the case."

¶ 18 **B. Defendant's Daughter's Testimony**

¶ 19 Defendant's daughter, Lucy Medina, testified as follows. Lucy was present at defendant's arraignment and witnessed defendant's guilty plea. Lucy observed that defendant "seemed scared, like he didn't know what to say." Lucy observed that defendant's demeanor indicated to her that he seemed unsure of how he wanted to plead. When Lucy speaks to defendant, she does so in both English and Spanish, but he is not fluent in English.

¶ 20 **C. Defendant's Attorney's Testimony**

¶ 21 Ann Dykes, defendant's attorney at the arraignment and plea, testified to the following. Defendant's attorney is an assistant public defender in the Cook County public defender's office. When she met defendant for the first time, she introduced herself through a Spanish interpreter. She discussed with defendant his options for proceeding. Among the options she listed were: (1) plea bargaining for a sentence of probation, a plea agreement she believed to be likely because of

No. 1-11-2460

defendant's lack of criminal history; and (2) the consequences of proceeding to trial. Defendant responded that he wanted her to attempt to plea bargain for probation. Defendant's attorney met with the assistant State's Attorney assigned to the courtroom and began to negotiate a plea agreement. She did not request expungeable probation even though defendant was "theoretically eligible" for it because the warrant for his arrest had been outstanding for six years. Defendant's attorney informed defendant, through a Spanish interpreter, that the State agreed to the plea agreement, and she admonished defendant concerning the consequences of a guilty plea. She did not "stop and ask" defendant whether he understood the admonishment, but defendant "did not stop [her] and say he did not understand." At this time, defendant's attorney did not discuss immigration issues with defendant, nor did she admonish him of the immigration consequences of pleading guilty. After the arraignment began, defendant's attorney observed defendant's arrest report and noticed that defendant was born in Mexico. She then informed the trial court that defendant may be subject to immigration proceedings if he pled guilty. The trial court granted the parties a recess, and she admonished defendant concerning the immigration consequences of pleading guilty. She also informed defendant that she was not an immigration attorney and that, if defendant wanted to speak with an immigration attorney, he could exercise that option. However, if defendant chose to speak to an immigration attorney, she "could not get him out of custody." She "made it very clear to [defendant], at every point that [she] talked to him, that the only way for him to get out of custody was to accept the offer of probation. And [defendant's attorney] told [defendant] at that point that a plea of guilty might affect his immigration status." Prior to the recess, defendant stated, on the record, that he did not wish to return to Mexico, but

No. 1-11-2460

during the recess, he informed her that he did not want to be in custody. She told defendant that, "[i]n terms of getting out of custody," he had no other option than to plead guilty. However, she advised defendant that he had other options, but that they would not guarantee that he would be released from custody.

¶ 22 On cross-examination, defendant's attorney testified that she never discussed the possibility of defendant's deportation with the State during their plea negotiation.

¶ 23 **D. Ruling on the Motion**

¶ 24 When the trial court denied defendant's motion, the trial court stated that defendant has no absolute right to withdraw his guilty plea, and that he bears the burden of demonstrating why withdrawal is necessary. The trial court found that defendant was aware of his rights when he pled guilty, and that his plea was done knowingly and voluntarily. The trial court found defendant's attorney's testimony credible concerning what was said both on and off the record, and found defendant's testimony not credible because defendant had a hard time remembering what had happened.

¶ 25 The trial court indicated that it found that defendant's use of a Spanish interpreter during the recess but not during the arraignment strange. The trial court concluded that the judge who had presided over the arraignment and plea, "is a very conscientious, very good judge," and that the plea judge had asked defendant whether he needed an interpreter during the proceeding, and defendant declined the use of an interpreter. The trial court found that defendant demonstrated that he was able to respond appropriately to questions asked of him in English, and that he understood English, and that defendant's attorney and the plea judge repeatedly admonished

No. 1-11-2460

defendant as to the immigration consequences of pleading guilty. The trial court further indicated that when the plea judge asked defendant whether he had any questions, the only question defendant raised was in regard to the monetary charges assessed against him. The trial court concluded that defendant's attorney acted properly by raising the immigration issue when she discovered it and by requesting a recess to discuss the immigration consequences of a guilty plea with defendant.

¶ 26 Defendant filed a timely notice of appeal and this appeal follows.

¶ 27 ANALYSIS

¶ 28 On appeal, defendant argues: (1) that the trial court erred when it denied his motion to withdraw his guilty plea and to vacate his sentence because defendant's attorney improperly advised him during a recess off the record that he would be released from custody if he pled guilty, and (2) that the trial court improperly assessed a \$30 Children's Advocacy Center charge because the statute authorizing the assessment was not in effect at the time of his offense. 55 ILCS 5/5-1101(f-5) (West 2008); Pub. Act 95-103 (eff. Jan. 1, 2008) (adding 55 ILCS 5/5-1101(f-5)).

¶ 29 I. Standard of Review

¶ 30 The decision to grant or deny a motion to withdraw a guilty plea lies in the sound discretion of the trial court, and we therefore review the trial court's decision under an abuse of discretion standard. *People v. Delvillar*, 235 Ill. 2d 507, 519 (2009). An abuse of discretion exists "only where the court's ruling is arbitrary, fanciful, unreasonable, or no reasonable person would take the view adopted by the trial court." *Delvillar*, 235 Ill. 2d at 519.

No. 1-11-2460

¶ 31 Defendant argues in his motion that his trial counsel was ineffective under the sixth amendment to the United States Constitution, which states that criminal defendants shall "have the [a]ssistance of [c]ounsel for his defen[s]e." U.S. Const., amend. VI.

¶ 32 The question of whether counsel was ineffective requires a bifurcated standard of review. *People v. Bailey*, 375 Ill. App. 3d 1055, 1059 (2007). A reviewing court must defer to the trial court's findings of fact unless they are against the manifest weight of the evidence, and it must make a *de novo* assessment of the ultimate legal issue of whether counsel's assistance supports an ineffective assistance claim. *Bailey*, 375 Ill. App. 3d at 1059. "A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence." *Bazydlo v. Volant*, 164 Ill. 2d 207, 215 (1995). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 33 As for the second issue, regarding the \$30 Children's Advocacy Center charge, our review is *de novo*. The application of statutory terms and constitutional principles to undisputed facts is a matter of law. *City of Champaign v. Torres*, 214 Ill. 2d 234, 241 (2005). When a question on appeal is limited to the application of the law to undisputed facts, the standard of review is *de novo*. *Torres*, 214 Ill. 2d at 241.

¶ 34 II. Motion to Withdraw Guilty Plea and Vacate Sentence

¶ 35 Defendant argues first that the trial court improperly denied his motion to withdraw his guilty plea and vacate his sentence. A defendant does not have an automatic right to withdraw a guilty plea. *Delvillar*, 235 Ill. 2d at 520. To prevail on a motion to withdraw his guilty plea, a

No. 1-11-2460

defendant must show a "manifest injustice under the facts involved." *Delvillar*, 235 Ill. 2d at 520. The trial court's decision will not be disturbed unless the plea was entered through a misapprehension of the facts or of the law, or if the plea was entered in consequence of misrepresentations by defense counsel or the prosecution, or if there is doubt as to the guilt of the accused and justice would be better served by conducting a trial. *People v. Davis*, 145 Ill. 2d 240, 244 (1991). "In the absence of substantial objective proof showing that a defendant's mistaken impressions were reasonably justified, subjective impressions alone are not sufficient grounds on which to vacate a guilty plea." *Davis*, 145 Ill. 2d at 244. The defendant has the burden to establish that the existing circumstances at the time of the plea, judged by objective standards, justified his mistaken impression. *Davis*, 145 Ill. 2d at 244.

¶ 36 Defendant argues that his trial attorney misadvised him about the immigration consequences of pleading guilty. Claims of ineffective assistance of counsel arising from the plea bargaining process are evaluated under the test established in the United States Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Curry*, 178 Ill. 2d 509, 518 (1997). "To prevail under *Strickland*, a defendant must show that his attorney's assistance was both deficient and prejudicial." *Curry*, 178 Ill. 2d at 519. "More precisely, a defendant must show [1] that his attorney's assistance was objectively unreasonable under prevailing professional norms, and [2] that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Curry*, 178 Ill. 2d at 519 (quoting *Strickland*, 466 U.S. at 687). The failure of a defendant to satisfy either the deficiency prong or the prejudice prong of the *Strickland* test precludes a finding of ineffective

No. 1-11-2460

assistance of counsel. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 76.

¶ 37 Defendant relies on the United States Supreme Court's decision in *Padilla v. Kentucky*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 1473 (2010), to argue that his trial attorney's performance was deficient. In *Padilla*, the defendant had been a lawful permanent resident of the United States for over 40 years when he pled guilty to the transportation of "a large amount of marijuana" through Kentucky. *Padilla*, \_\_\_ U.S. at \_\_\_, 130 S. Ct. at 1477. After pleading guilty, INS initiated deportation proceedings against the defendant. *Padilla*, \_\_\_ U.S. at \_\_\_, 130 S. Ct. at 1477. The defendant filed a postconviction petition, arguing that his attorney informed him that he did not have to worry about the immigration consequences of a guilty plea because he had been in the United States for a long time. *Padilla*, \_\_\_ U.S. at \_\_\_, 130 S. Ct. at 1478. The defendant argued in his postconviction petition that he relied on the erroneous advice of his attorney "when he pleaded guilty to drug charges that made his deportation virtually mandatory," and that "he would have insisted on going to trial if he had not received incorrect advice from his attorney." *Padilla*, \_\_\_ U.S. at \_\_\_, 130 S. Ct. at 1478. The Kentucky Supreme Court denied the defendant's petition without holding an evidentiary hearing, reasoning that the sixth amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because deportation is a "collateral" consequence of a conviction. *Padilla*, \_\_\_ U.S. at \_\_\_, 130 S. Ct. at 1478 (citing *Commonwealth v. Padilla*, 253 S.W.3d 482, 485 (Ky. 2008)). A collateral consequence of a conviction is a matter not within the sentencing authority of the state trial court. *Padilla*, \_\_\_ U.S. at \_\_\_, 130 S. Ct. at 1481 (citing *Padilla*, 253 S.W.3d at 483-84). The United States Supreme Court reversed the Kentucky Supreme Court's decision and held that

No. 1-11-2460

"constitutionally competent counsel," for purposes of the sixth amendment, must advise criminal defendants that a conviction for drug distribution will render them subject to automatic deportation. *Padilla*, \_\_\_ U.S. at \_\_\_, 130 S. Ct. at 1478.

¶ 38 The United States Supreme Court stated that it had "never applied a distinction between the direct and collateral consequences to define the scope of constitutionally 'reasonable professional services' required under *Strickland*, [citation]." *Padilla*, \_\_\_ U.S. at \_\_\_, 130 S. Ct. at 1481. The United States Supreme Court reasoned that deportation is a severe penalty, albeit "not, in a strict sense, a criminal sanction." *Padilla*, \_\_\_ U.S. at \_\_\_, 130 S. Ct. at 1481.

Deportation proceedings are civil in nature, but deportation "is nevertheless intimately related to the criminal process." *Padilla*, \_\_\_ U.S. at \_\_\_, 130 S. Ct. at 1481. Furthermore, the federal Immigration and Nationality Act (8 U.S.C. § 1227(a)(2)(B)(1)), which allows for automatic deportation as a result of a conviction for certain crimes, makes deportation inextricably entwined with criminal penalties in the case of a noncitizen defendant. *Padilla*, \_\_\_ U.S. at \_\_\_, 130 S. Ct. at 1481. Therefore, the United States Supreme Court held that deportation as a consequence of a criminal conviction is "uniquely difficult to classify as either a direct or collateral consequence." *Padilla*, \_\_\_ U.S. at \_\_\_, 130 S. Ct. at 1482. "The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the risk of deportation," and that advice regarding deportation is "not categorically removed from the ambit of the Sixth Amendment right to counsel." *Padilla*, \_\_\_ U.S. at \_\_\_, 130 S. Ct. at 1482. The *Strickland* test thus applies to the claim presented in *Padilla*, \_\_\_ U.S. at \_\_\_, 130 S. Ct. at 1482, and to defendant's claim in the case at bar.

No. 1-11-2460

¶ 39 The *Strickland* test has two prongs. Under the deficiency prong, the reviewing court must "determine whether counsel's representation 'fell below an objective standard of reasonableness.'" *Padilla*, \_\_\_ U.S. at \_\_\_, 130 S. Ct. at 1482 (quoting *Strickland*, 466 U.S. at 688). Under the prejudice prong, the reviewing court must determine whether " 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Padilla*, \_\_\_ U.S. at \_\_\_, 130 S. Ct. at 1482 (quoting *Strickland*, 466 U.S. at 694). Although *Strickland* is a two-prong test, our analysis can proceed in any order. *People v. Land*, 2011 IL App (1st) 101048, ¶ 116. If a court finds that defendant was not prejudiced, it may dismiss on that basis alone, without further analysis. *Land*, 2011 IL App (1st) 101048, ¶ 116 (citing *People v. Albanese*, 104 Ill. 2d 504, 527 (1984)).

¶ 40 To satisfy the prejudice prong in the context of a motion to withdraw a guilty plea, our Illinois Supreme Court has held that " '[a] bare allegation that the defendant would have pleaded not guilty and insisted on a trial if counsel had not been deficient is not enough to establish prejudice.'" *People v. Hughes*, 2012 IL 112817, ¶ 64 (quoting *People v. Hall*, 217 Ill. 2d 324, 335 (2005)). Rather, the defendant's claim of prejudice must be accompanied either by a claim of actual innocence or the articulation of a plausible defense that could have been raised at trial. *Hughes*, 2012 IL 112817, ¶ 64; *Hall*, 217 Ill. 2d at 335-36. Defendant has done neither here. Although defendant argues that he would have hired a lawyer to obtain a continuance or fight the case, this does not amount to a claim of actual innocence or a plausible defense that could have been raised at trial. *Hughes*, 2012 IL 112817, ¶ 66 (holding that the defendant's statement that, had he known that his guilty plea could result in civil commitment proceedings against him he

No. 1-11-2460

would not have pled guilty because "he thought it would resolve the matter" was insufficient to establish prejudice). For this reason, we cannot say that defendant was prejudiced and, therefore, defendant cannot satisfy the prejudice prong of the *Strickland* test.

¶ 41 Since we cannot say that defense counsel's representation prejudiced defendant under the *Strickland* test, we cannot say that the trial court erred when it denied defendant's motion to withdraw his guilty plea and vacate the sentence.

¶ 42 III. Charges Assessed

¶ 43 The parties agree that the trial court improperly assessed a \$30 Children's Advocacy Center charge against defendant because the statute authorizing the charge (55 ILCS 5/5-1101(f-5) (West 2008); Pub. Act 95-103 (eff. Jan. 1, 2008) (adding 55 ILCS 5/5-1101(f-5))) was not in effect until after defendant's offense, and thus its imposition violates the constitutional provision against *ex post facto* penalties. U.S. Const. art. I, § 10; Ill. Const. 1970, art. I, § 16; *People v. Bishop*, 354 Ill. App. 3d 549, 561 (2004).

¶ 44 Both the United States and the Illinois Constitutions prohibit punishments greater than the one in effect when the crime was committed. U.S. Const. art. I, § 10; Ill. Const. art. I, § 16; *Bishop*, 354 Ill. App. 3d at 561. This ban on *ex post facto* punishments applies only to laws that are punitive in nature, and it does not apply to costs, which are compensatory, not punitive. *Bishop*, 354 Ill. App. 3d at 561. In *Bishop*, this court drew a distinction between "fines" and "fees." *Bishop*, 354 Ill. App. 3d at 562. A "fine" is a pecuniary punishment imposed as part of a criminal sentence, and a "fee" is a charge for labor or services, such as professional services. *Bishop*, 354 Ill. App. 3d at 562. As a punishment imposed as part of a criminal sentence, a fine

No. 1-11-2460

is subject to *ex post facto* laws, whereas a fee, as compensation for labor or services, is not subject to *ex post facto* laws. *Bishop*, 354 Ill. App. 3d at 562.

¶ 45 In *People v. Jones*, 397 Ill. App. 3d 651, 660 (2009), this court analyzed whether the statute authorizing courts to assess a charge against defendants to be paid to the Children's Advocacy Center (55 ILCS 5/5-1101(f-5) (West 2008)) constituted a fine or a fee. Relying on our Illinois Supreme Court's decision in *People v. Jones*, 223 Ill. 2d 569, 599 (2006), we determined that "[e]ven if the statute terms a charge a fee rather than a fine, that label is not determinative." *Jones*, 397 Ill. App. 3d at 660 (citing *Jones*, 223 Ill. 2d at 599). The statute authorizing charges be assessed against defendants reads, in pertinent part, that "[i]n each county in which a Children's Advocacy Center provides services, the county board may adopt a mandatory *fee* of between \$5 and \$30 to be paid by the defendant *on judgment of guilt*." (Emphasis added.) 55 ILCS 5/5-1101(f-5) (West 2008). In *Jones*, we found that although the statute refers to the charge as a fee, rather than a fine, "the fact that the charge is mandatory for convicted defendants, and does not reimburse the state for expenses incurred while prosecuting the defendant indicates that the Children's Advocacy Center charge is a fine rather than a fee." *Jones*, 397 Ill. App. 3d at 660. Furthermore, we held that a charge is more appropriately characterized as a fine than a fee when there is " 'no relevant connection' between the offense committed by the defendant and the public endeavor funded by the fee." *Jones*, 397 Ill. App. 3d at 660 (quoting *People v. Price*, 375 Ill. App. 3d 684, 700 (2007)). There is neither a "relevant connection" between the *Jones* defendant's theft of scrap metal pipes and children's advocacy, nor is there a "relevant connection" between this defendant's possession of cocaine and children's

No. 1-11-2460

advocacy, so this charge must be characterized as a fine. *Jones*, 397 Ill. App. 3d at 660-61.

Therefore, the Children's Advocacy Center charge is subject to the prohibition against *ex post facto* punishments.

¶ 46 Defendant's offense occurred in July 2005. The subsection of the statute authorizing the Children's Advocacy Center fine was made effective on January 1, 2008. Pub. Act 95-103 (eff. Jan. 1, 2008) (adding 55 ILCS 5/5-1101(f-5)). Therefore, the assessment violates the prohibition against *ex post facto* punishments because it did not exist at the time of defendant's offense. We order the clerk of the circuit court to correct the mittimus to reflect a \$30 reduction in charges assessed against defendant.

¶ 47

#### CONCLUSION

¶ 48 For the above reasons, we affirm the circuit court of Cook County because defendant failed to show how he was prejudiced under the *Strickland* test, as required by our Illinois Supreme Court, and, thus, the trial court properly denied his motion to withdraw his guilty plea. However, the statute authorizing the trial court to assess a charge against all defendants to be paid to the Children's Advocacy Center when it provides services in the county was not in existence at the time of defendant's offense, and, thus, its assessment violates the prohibition against *ex post facto* punishments in the United States and Illinois constitutions. We therefore vacate the \$30 charge and order the mittimus corrected to reflect a \$30 reduction in charges assessed against defendant.

¶ 49 Affirmed; \$30 assessment vacated; and mittimus corrected.