

No. 1-12-0036

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. 09 CR 9366
)	
HECTOR SUAREZ,)	Honorable
)	Neil J. Linehan,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Simon and Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* Summary dismissal of defendant's post-conviction petition reversed where defendant made gist of a claim that he was denied effective assistance of counsel due to counsel's erroneous advice that pleading guilty would not have immigration-related consequences; reversed and remanded.

¶ 2 Defendant Hector Suarez¹ appeals from an order of the circuit court summarily dismissing his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He contends that the circuit court erred in summarily dismissing his

¹ Defendant's last name is also spelled "Surez" in the record. Here, we use the spelling on defendant's notice of appeal.

petition because he presented an arguable claim that his guilty plea resulted from his counsel's incorrect advice regarding the effect of his plea on his immigration status. We reverse.

¶ 3 The record shows that in May 2009, defendant was charged with one count of possession of a controlled substance. On November 9, 2009, defendant appeared with private counsel, who informed the court that a plea agreement had been reached with the State. In exchange for a guilty plea, defendant would be sentenced to 24 months of first offender probation and \$1,200 in fines and costs. Among other admonitions, the court informed defendant as follows:

"Sir, I want you to understand that if you are not a citizen of the United States, you are hereby advised that a conviction of the offense for which you have been charged may have a consequence of deportation, exclusion from admission to the United States[,] or the denial of naturalization under the laws of the United States.

Do you understand that, sir?"

Defendant indicated he understood.

¶ 4 The factual basis for the plea was as follows. On April 23, 2009, a police officer curbed defendant's vehicle at 3222 West 63rd Street in Chicago. After defendant failed to produce a driver's license or insurance, he was placed in custody. A subsequent custodial search yielded one bag of white powder that was determined to contain 5.6 grams of cocaine.

¶ 5 The court accepted defendant's plea and imposed the recommended sentence of 24 months of first offender probation and \$1,200 in fines and costs. Defendant did not file any postplea motions or a direct appeal.

¶ 6 On September 7, 2011, defendant, through counsel, filed the subject post-conviction petition, alleging his guilty plea was involuntary due to ineffective assistance of counsel.

Defendant asserted that he pleaded guilty on the basis of his counsel's erroneous advice that the plea would have no immigration-related consequences. The petition stated that defendant is a national and citizen of Mexico and was being held by the Cook County Sheriff, which was cooperating with United States Immigration and Customs Enforcement to locate and arrest undocumented aliens. As a result of defendant's guilty plea, he became ineligible for cancellation of removal procedures, was deprived of the opportunity to request legal permanent residency, and was rendered permanently inadmissible to the United States. An order of removal was entered against defendant on March 23, 2011. Citing *People v. Correa*, 108 Ill. 2d 541 (1985), defendant asserted that his counsel's advice was clearly not within the range of competence demanded of criminal defense attorneys. Additionally, defendant stated that if he had known the consequences of pleading guilty, he would have insisted on going to trial.

Defendant averred that he "maintains his innocence of the charges herein."

¶ 7 In support of his allegations, defendant attached his own affidavit that described his conversations with his counsel regarding his plea. Defendant averred that on November 9, 2009, after speaking with the Assistant State's Attorney, defendant's counsel informed him that the State's offer was 24 months' probation, after which the offense could be expunged from defendant's record and his "record would be clear." This offer seemed agreeable to defendant "if the conviction would have no effect." Defendant asked his counsel how the case would affect immigration matters because, as a result of his arrest in this case, he was also arrested and then released by United States Immigration and Customs Enforcement and given a notice to appear in immigration court for being in the country illegally—facts that his counsel knew. In response, counsel responded that if defendant successfully completed probation, "it would be clear from [his] record, including any immigration record." Relying on his counsel's professional expertise and advice, defendant accepted the plea, feeling it would have been unreasonable not to accept

his recommendation. At the time the plea was entered, defendant had been in the United States for approximately 19 years and was waiting for approval of an application that his father had filed on his behalf. Once in immigration court, defendant learned his plea was a conviction under immigration law and having it expunged would have no effect for immigration purposes. Defendant asserted that had he known this case would affect his immigration status, he would have elected to go to trial. On March 23, 2011, an immigration judge had ordered defendant's removal due to defendant's failure to vacate his conviction.

¶ 8 On October 7, 2011, the trial court summarily dismissed defendant's petition, finding that defendant could not demonstrate that he was prejudiced by his counsel's alleged advice. According to the court, the record indicates that defendant understood that deportation was a collateral consequence of his plea and would have pleaded guilty even if he had been given the correct advice. When the court informed defendant that a conviction could potentially lead to his deportation, defendant chose to plead guilty nonetheless.

¶ 9 Defendant filed a motion to reconsider, asserting in part that his counsel's erroneous advice undermined the court's admonition about immigration matters. In denying the motion, the court again stated that defendant failed to establish that he was prejudiced by his counsel's error because defendant chose to plead guilty after he was admonished that immigration consequences could follow his plea. The court also stated that defendant did not attempt to establish that he would have succeeded at trial.

¶ 10 In this court, defendant argues we should reverse the summary dismissal and remand for further post-conviction proceedings because he presented an arguable claim of ineffective assistance of counsel. According to defendant, counsel's performance was arguably deficient because he incorrectly advised defendant that his plea would have no impact on his immigration status if he successfully completed probation. Additionally, defendant contends he was arguably

prejudiced by counsel's erroneous advice because he relied on it when pleading guilty and had he known of the negative immigration consequences, he would have rejected the plea and proceeded to trial. Further, given that defendant had lived in the United States for 19 years and was awaiting approval of an application his father had filed, going to trial would have been rational.

¶ 11 The Act provides a three-step process for a defendant to challenge his conviction or sentence for violations of federal or state constitutional rights. 725 ILCS 5/122-1—122-7 (West 2010). Proceedings begin when a defendant files a petition in the circuit court where the original conviction occurred. 725 ILCS 5/122-1(b) (West 2010). At the first stage, the threshold for survival is low. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The petition need only set forth the gist of a constitutional claim and present a limited amount of detail, and need not set forth the claim in its entirety. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). Taking the allegations as true, if the court determines that the petition is either frivolous or patently without merit, the petition is dismissed. *Hodges*, 234 Ill. 2d at 10; 725 ILCS 5/122-2.1(a)(2) (West 2010). A petition is frivolous and patently without merit only if it has no arguable basis either in law or fact, meaning that it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16. The "frivolous and patently without merit" standard is the same whether the petition was prepared by an attorney or a *pro se* defendant. *People v. Tate*, 2012 IL 112214, ¶ 11-12. We review the circuit court's summary dismissal of a defendant's petition *de novo*. *Edwards*, 197 Ill. 2d at 247.

¶ 12 Generally, claims of ineffective assistance of counsel are subject to a two-prong test, in which a defendant must show that (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). This test also applies to

challenges to guilty pleas based on ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). A more lenient form of the *Strickland* test applies to first-stage post-conviction proceedings, where a defendant need only show that (1) it is arguable that counsel's performance fell below an objective standard of reasonableness and (2) it is arguable that the defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17.

¶ 13 Here, counsel's incorrect advice concerning the immigration-related consequences of defendant's guilty plea was arguably deficient performance. In 2009, the applicable case law held that providing misleading and erroneous advice in response to a defendant's specific inquiry about potential immigration consequences constituted deficient performance. *People v. Correa*, 108 Ill. 2d 541, 551-53 (1985). This was unchanged by *Padilla v. Kentucky*, 559 U.S. 356 (2010), which held that attorneys must inform their clients whether their pleas carry a risk of deportation. *Padilla*, 559 U.S. at 374. Here, defendant alleged that when he specifically asked his counsel how the case would affect his immigration issues, of which counsel was aware, counsel responded that if he successfully completed probation, the case would be clear from any immigration record. This advice was incorrect. It is true that in Illinois, first offender probation is not a conviction if completed successfully. 720 ILCS 570/410(g) (West 2008). However, a conviction in federal immigration law includes guilty pleas and situations where a judge has ordered some form of punishment, penalty, or restraint. 8 U.S.C.A. § 1101(a)(48)(A) (West 2009). Defendant's plea of guilty to cocaine possession had severe immigration consequences. Defendant became inadmissible to the United States and ineligible to have his removal order cancelled. 8 U.S.C.A. § 1182(a)(2)(A)(i)(II) (West 2009); 21 U.S.C.A. § 802(6) (West 2009); 21 U.S.C.A. § 812(c) Schedule II(a)(4) (West 2009); 8 U.S.C.A. § 1229b(b)(1)(c) (West 2009). Taking defendant's allegations as true, defendant sufficiently alleged that his counsel's performance was deficient when he gave incorrect advice on immigration matters in response to

defendant's specific question.

¶ 14 This leaves the question of whether defendant alleged arguable prejudice. For guilty pleas, the prejudice prong of the *Strickland* test is satisfied when the defendant shows there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 59. To obtain relief in this type of claim, a defendant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. *Padilla*, 559 U.S. at 372. Deportation is a particularly severe penalty, and it has been recognized that preserving the right to stay in the country may be more important to a defendant than any potential jail sentence. *Id.* at 365, 368.

¶ 15 However, *People v. Hall*, 217 Ill. 2d 324 (2005) and *People v. Huante*, 143 Ill. 2d 61 (1991), relied on by the State, hold that a defendant must allege more than that he would have gone to trial but for his counsel's erroneous advice. In *Huante*, the court found that the defendant failed to show prejudice where he only alleged that but for his counsel's failure to advise him of the deportation consequences of his guilty plea, he would have gone to trial, and raised no possible defense to the charges and said nothing to repudiate his admission of guilt. *Huante*, 143 Ill. 2d at 73. In *Hall*, the court explicitly defined what is required to show prejudice, holding that a defendant's bare allegation that he would have pleaded not guilty and insisted on a trial if his counsel had not been deficient is not sufficient, and a 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. *Id.* at 335-36. The court also stated that the question of whether counsel's deficient representation caused the defendant to plead guilty depends in large part on predicting whether the defendant likely would have been successful at trial. *Id.* at 336. Defendant argues that the State's reliance on *Hall* and *Huante* is misplaced because they did not apply the low threshold applicable to first stage petitions.

¶ 16 Here, defendant does not allege a plausible defense, and his allegation that he "maintains his innocence" is conclusory. Of note, *Hall* was reaffirmed in *People v. Hughes*, 2012 IL 112817, ¶ 64. However, *Hughes* also recognized that the question of whether a defendant has shown prejudice "will turn on the facts of a particular case." *Hughes*, 2012 IL 112817 at ¶ 65. Defendant's petition alleges in detail that he was actively attempting to stay in the country, where he had lived for approximately 19 years, and was awaiting approval of an application that his father had filed on his behalf. Given the low pleading threshold applicable to first-stage proceedings, we believe defendant has sufficiently alleged arguable prejudice.

¶ 17 We are not persuaded by the State's argument that the trial court's admonition about possible immigration consequences overcame any prejudice caused by counsel's erroneous advice. Although a trial court's admonitions are not a mere formality, they are not sufficient in every circumstance to negate the effect of counsel's erroneous advice. *Hall*, 217 Ill. 2d at 337. A key question is whether the trial court's admonitions were sufficiently related to counsel's erroneous advice to overcome the prejudice created by that advice. *Id.* at 339. Here, the trial court admonished defendant as follows:

"Sir, I want you to understand that if you are not a citizen of the United States, you are hereby advised that a conviction of the offense for which you have been charged may have a consequence of deportation, exclusion from admission to the United States[,] or the denial of naturalization under the laws of the United States."

The trial court's admonishment, although it fully complied with section 113-8 of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-8 (West 2008)), only raised a possibility of negative immigration consequences that defendant had already investigated with counsel and

was assured would not apply to him. The admonition did not contradict counsel's advice and so was not sufficiently specific to overcome the advice defendant allegedly received. *Cf. People v. Ramirez*, 162 Ill. 2d 235, 242-43 (1994) (where the trial court thoroughly questioned the defendant and was meticulous in ascertaining whether any promises or threats had been made to induce his guilty plea, the defendant's corresponding responses contradicted his claim that he pled guilty in reliance on counsel's promise that he would receive a specific sentence).

¶ 18 For the foregoing reasons, we reverse the judgment of the circuit court and remand for further post-conviction proceedings.

¶ 19 Reversed and remanded.