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2013 IL App (3d) 120192-U

Order filed February 5, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
Plaintiff-Appellee,	)	Iroquois County, Illinois,
	)	
v.	)	Appeal No. 3-12-0192
	)	Circuit No. 06-CF-61
	)	
ROBERTO CARLOS VALDEZ-AVALOS.,	)	Honorable
	)	Gordon L. Lustfeldt,
Defendant-Appellant.	)	Judge, Presiding.
	)	

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JUSTICE O'BRIEN delivered the judgment of the court.  
Presiding Justice Wright and Justice Schmidt concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* The denial of a Post-Conviction Hearing Act petition was upheld on appeal because, although the petitioner's defense counsel rendered erroneous advice regarding deportation consequences to a permanent legal resident upon his guilty plea to a felony drug offense, the trial court's specific admonitions regarding the potential for deportation was sufficient to overcome the prejudice caused by counsel's advice.
- ¶ 2 The petitioner, Roberto Carlos Valdez-Avalos, pled guilty to the crime of unlawful

delivery of a controlled substance (720 ILCS 570/401(c)(2) (West 2008)) and was sentenced to 48 months' probation. While the petitioner was serving his probation, he was notified by the United States Department of Homeland Security that it was seeking to remove him under the provisions of the Immigration and Nationality Act (8 U.S.C. § 1101 *et seq.*(2008)). The petitioner sought relief in the trial court under the Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2008)), but the petition was denied after an evidentiary hearing. The petitioner appealed.

¶ 3

### FACTS

¶ 4 The petitioner, a permanent legal resident of the United States, was charged with two felony drug offenses, unlawful delivery of a controlled substance (720 ILCS 570/401(c)(2) (West 2008)) and unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/402(c)(2) (West 2008)). The petitioner was represented by an attorney, Martha Danhausen, and he pled guilty to unlawful delivery of a controlled substance, a class 1 felony, in exchange for a recommended sentence of 48 months' probation. At the plea hearing, through a Spanish language interpreter, the trial court asked:

¶ 5 "If he is not a natural citizen of the United States,...pleading guilty to this crime could cause him to be deported or could keep him from becoming a citizen of this county. Does he understand that?"

¶ 6 The defendant, through the interpreter, responded "yes." The trial court accepted the petitioner's guilty plea and sentenced him to 48 months' probation.

¶ 7 On May 27, 2011, the petitioner filed a "Motion to Vacate Conviction," seeking to vacate his conviction and withdraw his guilty plea. The State filed a motion to dismiss the motion,

arguing that it was untimely. In response, on July 5, 2011, the petitioner filed an amended motion to vacate, explicitly pleading under the Post-Conviction Hearing Act. In the motion, the petitioner argued that he would not have pled guilty if his attorney had advised him that his guilty plea would impact his immigration status or subject him to deportation. He alleged that he was not culpably negligent for the untimely filing of his request for relief. The State again moved to dismiss, arguing that the motion was untimely and that the petitioner lacked standing because he had been discharged from probation on June 18, 2011.

¶ 8 The trial court denied the motion to dismiss, and it held an evidentiary hearing on the postconviction petition. The petitioner testified that he was born in Mexico and that he came to the United States in approximately 1991. He married a U.S. citizen, and he had two children. He testified that he worked as a cook in various restaurants, and he complied with all the terms of his probation in this case. This case was his only involvement with the criminal justice system. The petitioner testified that he hired Danhausen to represent him in the criminal matter, and he met with her on a number of occasions. The petitioner testified that he told Danhausen that he was concerned about his immigration status. According to the petitioner, he and Danhausen discussed the guilty plea, and Danhausen advised him that a plea would not impact his immigration status. She advised him that if he pled guilty, complied with probation, and did not get into any more trouble, he would not be deported.

¶ 9 The petitioner testified that he relied on that advice and would not have entered a plea if he knew it subjected him to deportation. He heard the trial court's admonition that a guilty plea could cause him to be deported, but he did not question it because he did not think it conflicted with Danhausen's advice. Danhausen died soon after the plea, so she could not testify and it was

unknown whether any of her files still existed.

¶ 10 The petitioner testified that late in 2010, he received a notice from United States Department of Homeland Security advising him of removal proceedings under the Immigration and Nationality Act. Prior to receiving the notice, the petitioner did not know of any problem with his immigration status. After receiving the notice, the petitioner spoke with two immigration attorneys, and the motion to vacate was filed on their advice.

¶ 11 The trial court ruled that the petition was timely, finding that the July 5, 2011, filing under the Post-Conviction Hearing Act was a continuation of the motion to vacate filed on May 27, 2011. As of May 27, the petitioner was still on probation. Also, the trial court found that the petitioner was free from culpable negligence in filing his petition after the three-year limit, primarily because the government did not make their decision to begin deportation proceedings against the petitioner until after the three-year period.

¶ 12 The trial court applied the test from *Strickland v. Washington*, 466 U.S. 668 (1984), to the petitioner's claim of ineffective assistance of counsel, and found that Danhausen's representation was deficient. The trial court noted, however, that the petitioner was given the admonition required by section 113-8 of the Code of Criminal Procedure (725 ILCS 5/113-8 (West 2010)) at the plea hearing, and the petitioner acknowledged that he was so admonished. The trial court questioned whether the admonition alone was sufficient to overcome the counsel's deficient advice, but did not make a ruling on that basis. It denied the petition on the basis that the petitioner failed to show prejudice because he failed to show a reasonable probability that, if he had gone to trial, he would have prevailed. The petitioner appealed.

¶ 13

ANALYSIS

¶ 14 The Post-Conviction Hearing Act (the Act) provides a remedy to a criminal defendant whose constitutional rights were substantially violated in his original trial or sentencing hearing. 725 ILCS 5/122-1 et seq. (West 2008); *People v. Pitsonbarger*, 205 Ill. 2d 444 (2002). The Act provides a three-stage process, and, at the first stage, the trial court determines whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2008); *People v. Boclair*, 202 Ill. 2d 89 (2002). At the second stage, the trial court must determine whether the petition makes a substantial showing of a constitutional violation. *People v. Hodges*, 234 Ill. 2d 1 (2009). If the petition survives dismissal at the second stage, it proceeds to the third stage, where the trial court conducts an evidentiary hearing on the merits of the petition. 725 ILCS 5/122-6 (West 2008).

¶ 15 When there are fact-finding and credibility determinations to be made, we review the denial of a postconviction petition following a third-stage evidentiary hearing to determine whether it was manifestly erroneous. *People v. Pendleton*, 223 Ill. 2d 458 (2006). When no such determinations are necessary, and the issues are purely questions of law, we apply a *de novo* standard. *Id.*

¶ 16 The petitioner sought to vacate his conviction on the basis of ineffective assistance of counsel, and his claim proceeded to a third-stage evidentiary hearing. As an initial matter, the State argues that the petitioner lacked standing to file a postconviction petition because, when the petitioner filed his "Amended Motion to Vacate Conviction Pursuant to the Post Conviction Hearing Act," he was no longer on probation. The trial court found that the petition was timely because it was a continuation of the petitioner's "Motion to Vacate Conviction," which the State acknowledges was filed while the petitioner was still on probation. However, the State argues

that, since the petitioner's original motion did not reference the Post-Conviction Hearing Act, it should not be considered a continuation.

¶ 17 In the petitioner's motion to vacate, the petitioner sought to vacate his conviction and withdraw his guilty plea on the basis of ineffective assistance of counsel in the plea proceedings. The petitioner's amended motion alleged the same facts and the same deprivation of constitutional rights, but expressly invoked the Act. It is clear that a trial court can recharacterize a *pro se* filing as a request for relief under the Act, if the filing alleges a deprivation of constitutional rights cognizable under the Act. *People v. Shellstrom*, 216 Ill. 2d 45 (2005). This is allowed because a *pro se* petitioner's lack of knowledge might cause him to select the wrong method for collaterally attacking his conviction. *Id.* Although the petitioner was represented by counsel, we find that the petitioner's amended motion was a continuation of the original filing.

¶ 18 The State also argues that the petition was untimely because it was not filed within three years of the petitioner's conviction. Section 122-1 of the Act provides that, if the defendant does not file a direct appeal, the postconviction petition must be filed no later than three years from the date of conviction, unless the petitioner alleges facts that show that the delay was not due to his culpable negligence. 725 ILCS 5/122-1(a-5)(c) (West 2008). The State argues that the petitioner failed to allege facts in his original motion that showed a lack of culpable negligence.

¶ 19 At the evidentiary hearing, the petitioner testified that he first learned of the immigration proceedings in late 2010, he sought advice from more than one attorney, and the motion was filed in May 2011. The trial court found that the petitioner was free from culpable negligence because United States Department of Homeland Security waited more than three years to start deportation proceedings. Upon receiving notice, the petitioner acted quickly in conferring with attorneys,

and the trial court's conclusion that the additional six month delay in filing the motion to vacate did not rise to the level of culpable negligence was not manifestly erroneous.

¶ 20 Thus, we reach the issue of whether trial counsel rendered ineffective assistance when she advised the petitioner that he would not be deported if he pled guilty. To prevail on a claim of ineffective assistance, a petitioner must show that his counsel's performance was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984). The State does not challenge the trial court's determination that the petitioner satisfied the first prong, that Danhausen's performance was deficient. In fact, where deportation is a clear consequence, a defense attorney is required to advise her client of the risk of adverse immigration consequences. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

¶ 21 To show prejudice under *Strickland*, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have entered the plea. *People v. Hughes*, 2012 IL 112817 (2012). The question is whether counsel's constitutionally ineffective performance affected the outcome of the plea process. *People v. Royark*, 215 Ill. App. 3d 255 (1991). A bare allegation that the petitioner would have insisted on trial, though, is not enough to establish prejudice under *Strickland*. *People v. Rissley*, 206 Ill. 2d 403 (2003). While the petitioner need not show that he would have been acquitted at trial, he must articulate a plausible defense that likely would have been successful at trial. *People v. Hughes*, 2012 IL 112817, ¶ 60.

¶ 22 The State argues that the petitioner suffered no prejudice because he did not establish that he would not have pled guilty if counsel had told him that he risked deportation by pleading guilty. The State acknowledges that the trial court applied the wrong standard in determining prejudice. In this case, the petitioner did claim that he would have insisted on a trial if he had

been informed of the deportation consequences of his plea. Since the testimony at the evidentiary hearing established that there were problems with the videotaped transaction that the petitioner could have challenged at trial, we find that the petitioner arguably showed that as a plausible defense.

¶ 23 However, it is not necessary to the outcome of this case to determine whether the petitioner's defense likely would have been successful at trial. We agree with the State that the trial court's admonition in accordance with section 113-8 of the Code of Criminal Procedure (725 ILCS 5/113-8 (West 2008)) overcame any prejudice caused by Danhausen's erroneous advice. The petitioner acknowledges that the trial court substantially complied with section 113-8 of the Code of Criminal Procedure by admonishing him that his guilty plea subjected him to deportation consequences. Although a trial court's admonitions are not sufficient in every case to overcome erroneous advice from counsel, the trial court's admonitions in this case were sufficiently related to counsel's erroneous advice to overcome the prejudice created by that advice. See *People v. Hall*, 217 Ill. 2d 324 (2005). Since he cannot show prejudice, the petitioner cannot prevail on his claim of ineffective assistance of counsel.

¶ 24 CONCLUSION

¶ 25 The judgment of the circuit court of Iroquois County is affirmed.

¶ 26 Affirmed.