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2013 IL App (3d) 120510-U

Order filed March 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 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois,
	)	
v.	)	Appeal No. 3-12-0510
	)	Circuit No. 09-CF-2415
	)	
DAVID COLINLOVERA,	)	Honorable
	)	Daniel J. Rozak,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE O'BRIEN delivered the judgment of the court.  
Justices Schmidt and McDade concurred in the judgment.

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**ORDER**

¶ 1 *Held:* The trial court did not err in dismissing defendant's postconviction petition at the first stage.

¶ 2 Defendant, David Colinlovera, pled guilty to aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2008)). Because he was a Mexican national, defendant's guilty plea subjected him to mandatory deportation. Defendant filed a postconviction petition, alleging that defense counsel failed to properly inform him of the immigration consequences of his guilty plea. He

further claimed that, had he been properly informed, he would not have pled guilty. The trial court dismissed defendant's petition at the first stage, noting that defendant was admonished of the immigration consequences prior to pleading guilty. Defendant appeals, arguing that the court erred in dismissing his petition at the first stage because it contained the gist of a constitutional claim. Alternatively, defendant argues that the decision should be reversed and the cause remanded pursuant to *Padilla v. Kentucky*, 559 U.S. 356 (2010). We affirm.

¶ 3

### FACTS

¶ 4 On October 19, 2009, the State charged defendant with one count of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2008)). Defendant pled guilty to the offense and was sentenced to probation. No transcript of the guilty plea hearing appears in the record. Because defendant was a Mexican national, his guilty plea subjected him to mandatory deportation.

¶ 5 After defendant was seized by United States Immigration and Customs Enforcement authorities, a postconviction petition was filed with the trial court. The petition alleged that defendant was not correctly advised as to the immigration consequences of his guilty plea. Defendant claimed that he would not have pled guilty had he been properly advised. The petition further claimed that defendant asked his counsel on multiple occasions whether a guilty plea would have any effect on his immigration status. On all occasions, according to defendant, counsel advised him that "he was not sure, did not know, could not say, and had no knowledge of immigration law and rules and regulations[.]"

¶ 6 The trial court dismissed defendant's petition at the first stage. In its written order, the court stated its reasoning as follows:

"Pursuant to 725 ILCS 5/113-8, defendant was advised of the immigration consequences

of pleading and being convicted of the offense. Defendant indicated he understood and still wished to persist in a plea of guilty."

Defendant appeals.

¶ 7

#### ANALYSIS

¶ 8 Defendant first argues that the trial court erred in dismissing his postconviction petition at the first stage because he raised the gist of a constitutional claim. A postconviction petition is a collateral attack on a prior conviction and sentence. *People v. Rissley*, 206 Ill. 2d 403 (2003).

The Post-Conviction Hearing Act provides a three-step procedure for the adjudication of petitions for postconviction relief. 725 ILCS 5/122-1 *et seq.* (West 2010). At the first stage, the trial court must independently determine whether the petition is frivolous or patently without merit. *People v. Morris*, 236 Ill. 2d 345 (2010). A petition is frivolous or patently without merit if its allegations, when taken as true, fail to present the gist of a constitutional claim. *People v. Brooks*, 233 Ill. 2d 146 (2009). An example of an indisputably meritless legal theory is one which is completely contradicted by the record. *People v. Hodges*, 234 Ill. 2d 1 (2009). A trial court's dismissal of a postconviction petition as frivolous or patently without merit is reviewed *de novo*. *Morris*, 236 Ill. 2d 345.

¶ 9 Defendant's postconviction petition alleged that defense counsel failed to correctly advise him as to the immigration consequences of his plea. Defendant contends that he would not have pled guilty had he known that the plea could subject him to deportation. Because defendant's petition was dismissed at the first stage, we must take all of defendant's well-pled facts as true, unless they are otherwise rebutted by the record. *People v. Peebles*, 205 Ill. 2d 480 (2002).

¶ 10 After a review of the record, we conclude that it contradicts defendant's contention that he

would not have pled guilty had he known he would be subject to deportation. In its written order dismissing defendant's postconviction petition, the trial court noted that prior to pleading guilty, defendant was advised by the court of the immigration consequences of his plea. After being so advised, defendant stated that he understood and still wished to persist in a plea of guilty. We note that the record on appeal does not contain a transcript from the guilty plea hearing.

However, defendant had the burden of producing a sufficiently complete record of the proceedings, and in the absence of a complete record it is presumed that the order entered by the trial court had a sufficient basis in fact. *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984). Therefore, we conclude that defendant was aware of the immigration consequences when he pled guilty and his argument failed to set forth the gist of a constitutional claim.

¶ 11 Alternatively, defendant argues that, pursuant to *Padilla*, 559 U.S. 356, defense counsel was ineffective. To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). In *Padilla*, the Supreme Court found that a counsel's failure to advise a defendant that a guilty plea would subject him to automatic deportation amounted to deficient performance. *Id.* However, the Court noted that the deficient performance alone did not amount to ineffective assistance of counsel, as defendant was still tasked with satisfying *Strickland's* second prong, prejudice. *Id.*

¶ 12 Here, as noted above, the record demonstrates that defendant was admonished of the immigration consequences during his guilty plea hearing. Because defendant knew of the immigration consequences prior to pleading guilty, he cannot establish that he would have pled

differently had he been properly advised. See *People v. Pena-Romero*, 2012 IL App. (4th) 110780. Thus, we find that defendant has not shown prejudice or that counsel was ineffective. Therefore, the trial court's dismissal of defendant's postconviction petition was not error.

¶ 13

#### CONCLUSION

¶ 14 The judgment of the circuit court of Will County is affirmed.

¶ 15 Affirmed.