

No. 1-12-0945

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 Cook County, Illinois. |
| Respondent-Appellant, |) | |
| |) | |
| v. |) | No. 94 CR 12438 |
| |) | |
| JOSE CAHUE, |) | Honorable Timothy Joyce, |
| |) | Judge Presiding. |
| Petitioner-Appellee. |) | |

JUSTICE SIMON delivered the judgment of the court.
Justices Pierce and Liu concurred in the judgment.

ORDER

¶ 1 *HELD*: Where the United States Supreme Court held in *Chaidez v. United States*, ___ U.S. ___, 133 S.Ct. 1103 (2013), that the decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), holding that defense counsel's failure to advise a defendant of the likelihood of deportation in response to a guilty plea was subject to the test for ineffective assistance of counsel did not apply retroactively, trial court erred in granting a 2011 petition to vacate a guilty plea entered in 1994.

¶ 2 On May 21, 1994, petitioner, Jose Cahue, plead guilty to a charge of possession of a controlled substance and was sentenced to 18-months probation. Petitioner successfully served his probation sentence without issue, his probation was terminated, and he was discharged.

Petitioner subsequently filed a petition to expunge his arrest that led to his guilty plea. That petition was granted. On October 17, 2008, a final order was entered ordering the United States Immigration and Naturalization Services to deport petitioner from the United States. Petitioner was deported to his home country of Mexico, where he now resides. Petitioner was purportedly deported as a result of his guilty plea to the possession of a controlled substance charge.

¶ 3 Petitioner sought a stay of the immigration order in federal court in January 2011 and filed a postconviction petition in state court pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)) (Act). Because petitioner was not imprisoned, the Act did not apply and his petition was rejected. On April 12, 2011, petitioner filed the underlying petition to vacate his guilty plea and judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)).

¶ 4 Petitioner argued that he suffered a substantial violation of his sixth amendment rights because he received ineffective assistance of counsel prior to entering his plea of guilty in the criminal case. Petitioner claimed that his counsel failed to advise him of the potential ramifications pleading guilty could have on his immigration status and that it was possible it could lead to deportation. Petitioner also noted that, at his hearing, the trial court failed to advise him of this potential negative impact on his immigration status.

¶ 5 In support of his petition, petitioner cited the Supreme Court of the United States' holding in *Padilla v. Kentucky*, 559 U.S. 356 (2010), which held that the seriousness of deportation and the effect on families supported the holding that counsel must inform a client whether a plea carries the risk of deportation. Accordingly, petitioner asserted that he could not have raised the issue within the time required by section 2-1401 as the right had not been announced by the Supreme Court until 2010. He also asserted that the right was retroactive in effect, citing the rule in *Teague*

v. Lane, 489 U.S. 288 (1989). Petitioner concluded that the failure of counsel, and the court, to advise him of the risk of deportation violated the sixth amendment and supported his claim that the judgment was void and that judgment be vacated.

¶ 6 The State moved to dismiss the petition pursuant to section 2-615 of the Code of Civil Procedure. 735 ILCS 5/2-615 (West 2010). The State argued that the petition was untimely under the requirements of section 2-1401 and dismissal was required because petitioner did not meet the exceptions by showing a legal disability or duress or that the grounds for relief were fraudulently concealed. The State also argued that section 2-1401 relief is available only for matters that antedate the rendition of the judgment. *Russell v. Klein*, 58 Ill. 2d 225 (1974). Therefore, the State argued, *Padilla* could not be retroactively applied as a basis for relief. Petitioner filed a lengthy response memorandum to the State's motion to dismiss, including extensive treatment of its argument that *Padilla* was retroactive in application. On February 22, 2012, a hearing was conducted on petitioner's claim of ineffective assistance of counsel.

¶ 7 Petitioner submitted an affidavit in support of the claims in the petition. Petitioner's wife, Fanny Cahue, testified that while petitioner was in custody in 1994 she and her mother-in-law, Martha, engaged defense counsel to represent petitioner in his drug possession case. Defense counsel met with Fanny and Martha at a Huck Finn restaurant for approximately 20-30 minutes to discuss petitioner's case. Fanny testified that they discussed that petitioner was incarcerated, was not a citizen, and did not have any papers. Defense counsel responded that he could get a minor conviction and a term of 18-months probation for petitioner. They did not discuss deportation. Fanny testified that she relayed this information to petitioner and he stated that he would agree to that deal.

¶ 8 Fanny testified that petitioner had very little understanding of English and an interpreter was present in court for his case. She testified that defense counsel did not meet petitioner prior to his court appearance and only met with petitioner for a one-minute conversation before petitioner's guilty plea. Fanny testified that she was able to hear this conversation and testified that defense counsel informed petitioner that he could get him 18-months' probation for the offense. Defense counsel did not advise petitioner that his guilty plea could affect his immigration status and did not discuss immigration at all. Fanny testified that petitioner was satisfied at the time because he was released from jail and he later sought expungement of his record, believing he would not have a problem with immigration if it was expunged.

¶ 9 Defense counsel testified on behalf of the State that he had been a licensed attorney in the State of Illinois since 1967. Defense counsel recalled representing petitioner in 1994 for a small possession of controlled substance case. He testified that on May 31, 1994, he had a 402 conference with the judge and Assistant State's Attorney on the case where the judge indicated that if petitioner pled guilty, the judge would place petitioner on 1410 probation. Defense counsel explained that this meant that if the probation was successfully completed without any new arrests or violations, the accused would be discharged.

¶ 10 Defense counsel testified that he did not know petitioner's exact immigration status, but that he knew that petitioner was not a citizen of the United States. He informed petitioner that pleading guilty could be an eventual detriment to obtaining citizenry or harm his immigration status. Defense counsel did not inform petitioner that he could be deported based on the guilty plea, nor did he believe that deportation would result from possession of such a small amount of narcotics as petitioner was charged with. However, defense counsel testified that immigration

laws later changed and became much more stringent with harsher penalties for immigrants with convictions for small quantities of illegal drugs.

¶ 11 Defense counsel testified that he talked with an associate of petitioner's current counsel about the case. Defense counsel denied saying that he did not know that someone could get deported for a charge of possession of 0.8 grams of cocaine. Defense counsel denied saying that he did not admonish petitioner about the immigration consequences of pleading guilty, but stated that he did tell the associate that trial judges at the time were not advising defendants of the immigration consequences of guilty pleas. Defense counsel maintained that he told petitioner that if his guilty plea and probation were the only items on his record, he would likely have an argument against deportation if it came to that. Petitioner called the associate as a rebuttal witness and he testified that defense counsel was surprised that someone would be deported for possession of such a small amount of drugs and that he told the associate that he did not regularly advise clients on immigration consequences because that was not standard practice at the time.

¶ 12 Following closing arguments, the trial court entered an oral order for petitioner. The court found the witnesses to all be credible and did not fault defense counsel's representation of petitioner because of the changing immigration laws and enforcement of those laws and the interplay between federal and state laws. However, in vacating the guilty plea, the court placed more reliance on the fact that petitioner did not speak or understand English well requiring the trial court to order an interpreter and held that petitioner was not advised that his pleading guilty could result in deportation. Pursuant to *People v. Gutierrez*, 2011 IL App (1st) 093499, the court retroactively applied *Padilla* and vacated petitioner's guilty plea for counsel's failure to properly advise petitioner of the potential for deportation. The trial court also entered an eight-page written order granting the petition and vacating the guilty plea. The State appealed.

¶ 13 Under section 2-1401, a petitioner must affirmatively set forth specific factual allegations that support, by a preponderance of the evidence, the following three elements: (1) the existence of a meritorious claim; (2) due diligence in presenting this claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 221 (1986). Specifically, the petition must be filed not later than two years after the entry of the order or judgment. 735 ILCS 5/2-1401(c) (West 2006). However, despite these requirements, a party may attack a void order at any time through the filing of a 2-1401 petition. *Capital One Bank, N.A. v. Czekala*, 379 Ill. App. 3d 737, 741 (2008).

¶ 14 We agree with the State that the trial court erred in granting petitioner relief in this case because he does not have a meritorious claim. Petitioner's claim rests on the applicability of *Padilla* and *Gutierrez* to his case. However, after the trial court's ruling, and before the parties' briefing of this appeal, the Supreme Court held that *Padilla* established a new rule and does not apply retroactively to cases where a defendant's conviction was final prior to *Padilla*. *Chaidez v. United States*, ___ U.S. ___, 133 S.Ct. 1103, 1109 (2013). The State argues that *Chaidez*, which was decided two years after this court issued *Gutierrez*, applies to this case and requires reversal.

¶ 15 Petitioner asserts that this court should not even consider the State's argument that *Padilla* is not retroactive because it did not raise the issue before the trial court and it is well settled that a party is barred from raising for the first time a new argument on appeal. *People v. Blair*, 215 Ill. 2d 427, 443-44 (2005). The State's motion to dismiss argued that "since the holding in *Padilla* post-dates judgment in petitioner's case it cannot be the basis for relief." In acknowledgment of this argument, petitioner devoted 11-pages of his memorandum in response to the motion to dismiss to a section entitled "*Padilla* is Retroactive and Entitles Mr. Cahue to Relief from His 1994 Conviction." Accordingly, we reject petitioner's claim that the State forfeited this issue.

¶ 16 In *Padilla*, the defendant argued in a postconviction petition that defense counsel was ineffective for failing to advise him of the consequence of deportation in the event of a conviction because he would have insisted on going to trial rather than entering a guilty plea. *Padilla*, 559 U.S. at 359. The Supreme Court noted that immigration law had consistently evolved to the point that the consequence of deportation for noncitizens accused of crimes was more likely and, therefore, more essential for counsel to render legal advice on that issue. *Id.* at 364-65. The Court held that because of this legal evolution, deportation could not be classified as either a direct or collateral consequence of a conviction and was a necessary component of effective assistance of counsel. *Id.* at 366-69. The Court held that counsel's performance was deficient under the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984), because counsel "could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute." *Padilla*, 559 U.S. at 368. In conclusion, the Court held that "counsel must inform her client whether his plea carries a risk of deportation" to satisfy the responsibilities of the sixth amendment. *Id.* at 374.

¶ 17 In 2011, this court issued the decision in *Gutierrez* holding that *Padilla* can be applied retroactively to a successive postconviction petition because it did not announce a new rule. *Gutierrez*, 2011 IL App (1st) 093499, ¶¶ 26-42. The court noted that under *Teague v. Lane*, 489 U.S. 288 (1989), retroactive application turns on whether *Padilla* announced a new rule or merely expanded on an existing rule. *Id.* at ¶ 33. A holding that announces a new rule cannot have retroactive application unless it (1) decriminalizes conduct or prohibits a class of punishment or (2) where it requires adherence to procedures implicit in the concept of ordered liberty. *Id.* at ¶¶ 27-28, citing *Teague* at 311. The *Gutierrez* court found that *Padilla* did not mention retroactivity or *Teague* in its holding, which *Teague* mandates as a threshold question before addressing a

constitutional claim. *Id.* at ¶ 37. Furthermore, the *Gutierrez* court noted, the *Padilla* court found that *Strickland* applied to Padilla's claim and applied the established rule of *Strickland* to Padilla's claim. *Id.* at ¶ 33. Accordingly, it held that *Padilla* did not announce a new rule of criminal procedure, but simply applied and expanded *Strickland*. *Id.*

¶ 18 However, in *Chaidez*, the Supreme Court recently addressed whether *Padilla* had retroactive effect. The Court found that *Padilla* did not simply apply the standard from *Strickland*. Rather, the *Padilla* Court did not settle the question of "how" the *Strickland* test applied, but "whether" *Strickland* applied to deportation advice cases, thereby announcing a new rule. (Emphasis in original.) *Chaidez* at 1108. Accordingly, the Court found that, under *Teague*, *Padilla* announced a new rule as it answered questions that had previously been left open and does not apply retroactively. *Id.* at 1110-13.

¶ 19 This court recently rejected a defendant's argument that the reasoning of *Gutierrez* should be followed and *Chaidez* rejected for a postconviction petition. *People v. Greco*, 2014 IL App (1st) 112582. The *Greco* court first noted that *Gutierrez* was decided before *Chaidez*. *Id.* at ¶ 29. The court then accepted the *Chaidez* court's recognition that *Padilla* departed from case law applying the distinction between collateral and direct consequences, finding that framework unsuitable in resolving this "unsettled question." *Id.* We agree with the reasoning of *Chaidez* and *Greco* and find that the trial court erred in retroactively applying *Padilla* to this case.

¶ 20 Finally, petitioner's claim that the State waived the argument that the guilty plea was void also fails. Petitioner has provided no support for the assertion that the plea or judgment against him were void, but merely provides a conclusory statement that the order is void. However, petitioner's arguments before the trial court, and the trial court's reasoning, for vacating the guilty plea and judgment were based on the applicability of *Padilla*, not that the judgment was void. As

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we have found that *Padilla* does not have retroactive effect and does not apply to petitioner's case, we reverse the trial court's order granting the petition to vacate.

¶ 21 For the foregoing reasons, the judgment of the circuit court is reversed.

¶ 22 Reversed.