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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 06-CF-2268
)	
DAVID RUIZ,)	Honorable
)	David R. Akemann,
Defendant-Appellant.)	Judge, Presiding.

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 07-CF-547
)	
DAVID RUIZ,)	Honorable
)	David R. Akemann,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed defendant's postconviction petition, which alleged that his guilty pleas were induced by ineffective assistance

of counsel: in one case, defendant alleged only that counsel had failed to advise him of deportation consequences, which under the applicable law did not constitute deficient performance; in the other case, although defendant alleged that counsel had misadvised him of deportation consequences, he did not show prejudice, as per the stipulated factual basis there was no plausible defense that he could have raised at trial.

¶ 2 Defendant, David Ruiz, appeals from the second-stage dismissal of his postconviction petition in both appeal No. 2-12-0868 (No. 06-CF-2268) and appeal No. 2-12-0869 (No. 07-CF-547), contending that he made a substantial showing of the ineffective assistance of trial counsel, because his trial counsel did not adequately advise him of the deportation consequences of pleading guilty in either case. Because defendant failed to make a substantial showing of the denial of the effective assistance of counsel in either case, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted in the circuit court of Kane County (No. 06-CF-2268) on one count of aggravated discharge of a firearm for having knowingly discharged a firearm in the direction of another person (720 ILCS 5/24-1.2(a)(2) (West 2006)) and one count of the unlawful possession of cannabis (720 ILCS 550/4(a) (West 2006)). While those charges were pending, defendant was indicted in the circuit court of Kane County (No. 07-CF-547) on one count of residential burglary (720 ILCS 5/19-3(a) (West 2006)).

¶ 5 No. 06-CF-2268

¶ 6 Defendant entered a guilty plea to a reduced charge of attempted aggravated discharge of a firearm for having pointed a gun at the victim (720 ILCS 5/8-4(a),24-1.2(a)(2) (West 2006)).¹ Defendant signed a written plea agreement, which stated, among other things, that “defendant [understood] that if [he was] not a U.S. citizen that [the] plea could result in [his] deportation.” The box next to that section of the plea agreement was checked. At the guilty plea proceeding,

¹ Pursuant to the guilty plea, the indictment was amended to reflect the reduced charge.

the trial court did not admonish defendant regarding any potential deportation consequences. Defendant acknowledged that he read the plea agreement, understood it, and signed it.

¶ 7 The factual basis for the guilty plea established that, on the morning of the incident, defendant and the victim, who were members of street gangs, exchanged words at school. The victim left school and went to a friend's house.

¶ 8 Upon arriving at his friend's house, the victim heard a noise and went to the garage to investigate. When he did so, he encountered defendant and asked him what was going on. Defendant, who was a few feet away from the victim, pulled out a gun. Although the victim ran, defendant knowingly pointed the gun in the direction of the victim. Defendant stipulated to the factual basis, except for the fact of his being associated with a gang.

¶ 9 No. 07-CF-547

¶ 10 Defendant entered a guilty plea to the residential burglary charge. He signed a written plea agreement in which he indicated, as in the other case, that he understood that if he was not a United States citizen his plea could result in his deportation. In admonishing defendant, the trial court advised him that if he was not a United States citizen his conviction "may result in deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States." Defendant stated that he understood the potential deportation consequences.

¶ 11 The factual basis for the guilty plea established that, on the date of the incident, a neighbor of the victim saw a car driving through the neighborhood several times. The car appeared to be driving slowly, and its occupants were watching the victim's house. The neighbor then saw the car stop and two of its occupants approach the victim's house.

¶ 12 The police were called and responded. As they arrived, they saw two people exiting the victim's house carrying bags. The police observed a car, which had been parked nearby, drive away. They followed the vehicle and stopped it. Defendant was the driver.

¶ 13 Further investigation revealed that basement windows in the victim's house had been broken. The officers found three individuals in the house. The victim would have testified that over \$66,000 in electronics and jewelry had been taken from his home. The factual basis also stated that defendant "knowingly participated in the residential burglary," that he was the driver of the car, that the jewelry was found in the car, and that defendant intended to drive away with the jewelry. Defendant stipulated to the entire factual basis.

¶ 14 Nos. 06-CF-2268 & 07-CF-547

¶ 15 On the same date on which defendant pled guilty in case No. 07-CF-547, the trial court conducted a sentencing hearing in both cases. Defendant testified in case No. 06-CF-2268 that, on the date of the incident, he was walking home from school with another person when he encountered the victim. He denied having spoken to the victim, whom he knew, at school earlier that day. Defendant thought that his "life was threatened because [he] thought [the victim] was going to drop [him] because [defendant] was with another individual." When defendant was asked why the victim would attack him when they had been friends before, defendant said that they used to be friends but that the "next day he doesn't like me no more." Defendant admitted that he had a gun on him when he encountered the victim.

¶ 16 Defendant testified in case No. 07-CF-547 that he did not know the victim. He added that "it was a terrible mistake" on his part. The trial court sentenced defendant to three years' imprisonment in case No. 06-CF-2268 and to a consecutive four years in prison in case No. 07-

CF-547. The court recommended that defendant be placed in the impact incarceration program, conditioned on his acceptance by the Department of Corrections.

¶ 17 Defendant filed a motion to reconsider both of his sentences, or, alternatively, to withdraw his guilty pleas. The basis for the motion was that defendant had been led to believe that he would be accepted for impact incarceration, when in reality he was ineligible because he was not a United States citizen. Defendant later withdrew the motion as to both cases. He did not file a direct appeal in either case.

¶ 18 Upon being released from prison, defendant was taken into custody by Immigration and Customs Enforcement. While awaiting deportation, defendant filed a *pro se* postconviction petition, alleging, among other things, that both of his guilty pleas were involuntary, because of ineffective assistance of counsel related to the advice he received about his possible deportation upon pleading guilty.

¶ 19 The trial court appointed counsel, and defendant filed an amended petition. The amended petition alleged, among other things, that defendant's guilty pleas were involuntary, because he was misled by trial counsel's advice pertaining to the potential deportation consequences of his pleas.

¶ 20 Defendant attached his affidavit to the amended petition, in which he asserted that, while both cases were pending, he was a "lawful resident alien." According to defendant, the "subject of deportation did not come up during [his] conversation with [trial counsel]" before he pled guilty in case No. 06-CF-2268. Defendant asserted that in case No. 07-CF-547, while meeting with the same trial counsel, counsel told him that he "would not be deported *** because [he] was a first offender" and because he "had been a lawful resident alien for [13] years." Counsel also told him that, if asked by the trial court whether he understood the immigration

consequences of pleading guilty, he was to answer yes. He asserted that he had had only one conversation with counsel about deportation and that counsel had assured him that he would not be deported.

¶ 21 The State filed a motion to dismiss the amended postconviction petition in each case. The trial court, after hearing arguments, granted both motions to dismiss.

¶ 22 As to the claims that trial counsel was ineffective, the trial court stated in its order that defendant claimed that he was subjected to the ineffective assistance of counsel because of counsel's "failure to admonish [defendant] of the deportation consequences." The court found that defendant's claims based on counsel's "not advising [defendant] that his plea of guilty would constitute a basis for deportation, by advising [defendant] that he would not be deported, and by advising [defendant], prior to the entry of his plea of guilty, to answer any of the court's questions in the affirmative" were insufficient to demonstrate a substantial showing of a constitutional violation.

¶ 23 In so ruling, the trial court stated that case law made clear that a failure to inform a defendant of the potential immigration consequences of pleading guilty constitutes deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984). The court cited *People v. Gutierrez*, 2011 IL App (1st) 093499, which, in turn, cited *Padilla v. Kentucky*, 559 U.S. 356 (2010). The court concluded, therefore, that defendant's claims involving counsel's "failure to inform" him of the possibility of deportation made a substantial showing under the deficiency prong of *Strickland*.

¶ 24 Nonetheless, the trial court ruled that defendant did not demonstrate prejudice, because he was "aware of the possibility of deportation as a result of pleading guilty in both cases." The court noted that, in case No. 07-CF-547, he had signed a written plea agreement stating that he

understood that he could be deported, and he was admonished about the deportation consequences by the court. The court also noted that, in case No. 06-CF-2268, defendant signed a plea agreement with the same indication that he understood the potential deportation consequences of pleading guilty. Thus, the court concluded that, because the record demonstrated that defendant was “aware of the possibility of deportation at the time he entered guilty pleas in both cases,” defendant failed to show prejudice from trial counsel’s “failing to convey to [defendant] the possibility of deportation.” Accordingly, the court ruled that defendant failed to make a substantial showing of ineffective assistance of trial counsel and dismissed his petition in both cases. Defendant then filed this timely appeal.

¶ 25

II. ANALYSIS

¶ 26 A postconviction proceeding involves three distinct stages. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the first stage, the trial court must, within the prescribed time, review the petition and determine whether it is frivolous or patently without merit. *Hodges*, 234 Ill. 2d at 10. If the petition is not dismissed at stage one, then it advances to the second stage, where counsel may be appointed (725 ILCS 5/122-4 (West 2010)) and the State is allowed to file a motion to dismiss or an answer (725 ILCS 5/122-5 (West 2010)). *Hodges*, 234 Ill. 2d at 10-11.

¶ 27 At the second stage, the trial court must determine whether the petition and any supporting documents make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). If the defendant fails to make the showing, the petition is dismissed. *Edwards*, 197 Ill. 2d at 246. If a substantial showing is set forth, the petition is advanced to the third stage, where the trial court conducts an evidentiary hearing. *Edwards*, 197 Ill. 2d at 246. Our review of a second-stage dismissal is *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 28 A postconviction challenge to a guilty plea, alleging ineffective assistance of counsel, is subject to the standard of *Strickland*. *People v. Hall*, 217 Ill. 2d 324, 334-35 (2005). Under that standard, a defendant must establish that counsel's performance fell below an objective standard of reasonableness and that the defendant was prejudiced by the substandard performance. *Hall*, 217 Ill. 2d at 335.

¶ 29 An attorney's conduct is deficient if he fails to ensure that the defendant's guilty plea was entered voluntarily and intelligently. *Hall*, 217 Ill. 2d at 335. To establish prejudice, the defendant must show a reasonable probability that, absent counsel's errors, he would have pled not guilty and insisted on going to trial. *Hall*, 217 Ill. 2d at 335. A bare allegation in that regard, however, does not establish prejudice. *Hall*, 217 Ill. 2d at 335. Instead, the defendant's claim must be accompanied by either an assertion of actual innocence or the articulation of a plausible defense that could have been raised at trial. *Hall*, 217 Ill. 2d at 335-36. The question of whether counsel's deficient performance caused the defendant to plead guilty depends to a great extent on predicting whether the defendant likely would have prevailed at trial. *Hall*, 217 Ill. 2d at 336.

¶ 30 For a guilty plea to be deemed voluntary and intelligent, a defendant must be fully aware of the direct consequences of pleading guilty. *People v. Presley*, 2012 IL App (2d) 100617, ¶ 27. On the other hand, a defendant's lack of knowledge of the collateral consequences of a plea generally does not bear on the validity of the plea. *Presley*, 2012 IL App (2d) 100617, ¶ 27. Because the deportation consequences of a guilty plea are collateral (*People v. Huante*, 143 Ill. 2d 61, 71-72 (1991)), the failure to advise a defendant of the consequences of deportation would not provide a basis to invalidate his plea (*Presley*, 2012 IL App (2d) 100617, ¶ 28).

¶ 31 Although the aforementioned rule is no longer valid in light of the Supreme Court's decision in *Padilla*, 599 U.S. at 374 (sixth amendment requires counsel to advise a defendant of

the deportation consequences of pleading guilty), the Supreme Court subsequently held that *Padilla* does not apply retroactively to convictions that were final before it was decided (*Chaidez v. United States*, __U.S.__, __, 133 S. Ct. 1103, 1113 (2013)). Therefore, the pre-*Padilla* rule applies to defendant in our case, whose convictions were final before *Padilla* was decided.

¶ 32 Turning to the postconviction claim in appeal No. 2-12-0868 (case No. 06-CF-2268), defendant stated in his affidavit that “the subject of deportation did not come up during [his] conversations with [trial counsel] prior to the entry of [his] plea of guilty.” In other words, he asserted that he was not advised about any deportation consequences in that case. Because trial counsel was not required at that time (pre-*Padilla*) to advise defendant of such collateral consequences, he was not ineffective for failing to do so. Defendant’s guilty plea was not rendered involuntary or unintelligent because of counsel’s lack of advice about deportation consequences. Therefore, defendant did not make a substantial showing of deficient performance under *Strickland*.

¶ 33 Alternatively, as the trial court correctly noted, defendant was aware of the deportation consequences, because he signed the plea agreement notifying him of those consequences. He also acknowledged in court that he read, signed, and understood the plea agreement. Therefore, even if counsel was deficient, defendant suffered no prejudice as a result of counsel’s failure to advise him of the deportation consequences. Thus, defendant failed to make a substantial showing of the denial of his constitutional right to the effective assistance of counsel related to his guilty plea in appeal No. 2-12-0868.

¶ 34 We next address defendant’s claim in appeal No. 2-12-0869 (case No. 07-CF-547). Defendant asserted in his affidavit that his trial counsel advised him that he “would not be deported *** because [he] was a first offender” and “because [he] had been a lawful resident

alien for thirteen (13) years.” In the postconviction petition itself, defendant contended that, although counsel discussed deportation, defendant was misadvised as to the deportation consequences of his pleading guilty. Specifically, defendant claimed that he was affirmatively misled by his trial counsel into believing that he would not be deported. Therefore, defendant’s claim was distinct from a claim that he was not advised at all about deportation.

¶ 35 Such a distinction is critical in light of *People v. Correa*, 108 Ill. 2d 541 (1985). In that case, the Illinois Supreme Court held that an attorney’s erroneous and misleading advice about the deportation consequences invalidated the defendant’s guilty plea. *Correa*, 108 Ill. 2d at 553. Thus, there is a distinction between an attorney not offering any advice about deportation consequences and an attorney offering erroneous or misleading advice. *Huante*, 143 Ill. 2d at 68 (distinguishing *Correa*).

¶ 36 The trial court here did not appear to recognize that defendant’s claim was of erroneous or misleading advice about any deportation consequences. This is reflected in its ruling that defendant made a substantial showing of deficient performance because of counsel’s “failure to inform” defendant of the possibility of deportation. The trial court’s misunderstanding in that regard was further demonstrated by its reference to *Gutierrez* (and hence *Padilla*), which, even if retroactively applicable, would have applied to defendant’s claim only had he based it on a complete lack of advice regarding deportation. See *Padilla*, 599 U.S. at 374 (counsel must advise a defendant of the consequences of deportation).

¶ 37 Because the trial court apparently misunderstood defendant’s claim in appeal No. 2-12-0869, it necessarily misapplied the prejudice analysis. The fact that defendant indicated via the written plea agreement that he understood the deportation consequences, and the fact that the court so admonished him when he pled guilty, although pertinent to the question of prejudice

from having received no advice about deportation, had no bearing on whether he was prejudiced by having received misleading or erroneous advice. Thus, the court erred when it ruled that defendant did not show prejudice in light of his having been otherwise informed of the deportation consequences of his guilty plea.

¶ 38 Having said that, however, we may nonetheless affirm the trial court's dismissal on any basis in the record. See *People v. Davis*, 382 Ill. App. 3d 701, 706 (2008). Assuming that trial counsel was incorrect when he advised defendant that he would not be deported, because of his being a first-time offender and because of the number of years he had been a lawful resident,² defendant did not establish any prejudice resulting from that erroneous advice.

¶ 39 The factual basis for defendant's guilty plea stated that he was driving the vehicle involved in the residential burglary. A witness observed that vehicle driving slowly through the neighborhood several times and the occupants watching the victim's house. The investigation revealed that basement windows had been broken. Further, jewelry stolen from the house was found in the vehicle driven by defendant. Defendant also drove away when the police arrived. Moreover, the factual basis stated that defendant "knowingly participated in the residential burglary." Based on those facts, stipulated to by defendant, the State had a virtually airtight case against defendant.

¶ 40 Defendant contends that he could have raised a plausible defense that he did not knowingly commit the offense. In that regard, he asserts that the factual basis "was silent on the question of [his] knowledge" and that every fact "was compatible with the theory that [he] was an unwitting participant." We disagree, as the factual basis affirmatively showed that defendant

² The trial court never ruled on that precise issue because of its mischaracterization of defendant's claim.

was a knowing participant. There was nothing in the facts to show that defendant likely would have prevailed at trial on the residential burglary charge. See *Hall*, 217 Ill. 2d at 336. Thus, defendant did not substantially show the prejudice required to support his ineffective-assistance-of-counsel claim in appeal No. 2-12-0869. Accordingly, the trial court properly dismissed that claim as well.

¶ 41

III. CONCLUSION

¶ 42 For the foregoing reasons, we affirm the second-stage dismissal of defendant's postconviction petition in both appeal No. 2-12-0868 and appeal No. 2-12-0869.

¶ 43 Affirmed.