

No. 1-12-3292

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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. 12 CR 967
)	
BEATA MAKAL,)	Honorable
)	William T. O'Brien,
Defendant-Appellant.)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Palmer and Justice Gordon concurred in the judgment.

O R D E R

¶ 1 *Held:* Court erred in dismissing postconviction petition claiming ineffective assistance of trial counsel for erroneous advice regarding immigration consequences of guilty plea; defendant showed prejudice from counsel's advice even absent a claim of actual innocence or a plausible defense.

¶ 2 Pursuant to a negotiated guilty plea, defendant Beata Makal was convicted of felony retail theft and sentenced to one year of imprisonment with fines and fees. Defendant now appeals from the dismissal on State motion of her postconviction petition, contending that the court erred in dismissing the petition when it stated a substantially meritorious claim that trial

counsel rendered ineffective assistance by erroneously advising her regarding immigration consequences of her guilty plea.

¶ 3 Defendant was charged with retail theft as she allegedly took merchandise – a "DVD and medicine" – worth not more than \$300 in a Jewel store on or about December 22, 2011, without having paid the full retail value thereof and with the intent to retain the merchandise or permanently deprive the merchant of its possession, use, or benefit, having been previously convicted of retail theft in case 11CR1509601. The complaint for preliminary examination (filed December 23, 2011) and superseding information (filed January 6, 2012, on a probable-cause finding of December 29, 2011) charged retail theft pursuant to section 16A-3 of the Criminal Code. 720 ILCS 5/16A-3 (West 2010).

¶ 4 On February 24, 2012, trial counsel stated for the record that defendant would be accepting a plea-conference offer of one year's imprisonment in the instant case with her existing probation terminated unsatisfactorily. The court read the charge and plaintiff acknowledged the charge and pled guilty thereto. The court admonished her regarding her potential sentence – one to three years' imprisonment with one year of mandatory supervised release (MSR), or up to 30 months' probation, and/or fines up to \$25,000 – and ascertained that defendant understood she would receive one year of imprisonment, one year of MSR, and fines and fees. The court admonished defendant "You understand that if you are not a citizen of the United States, you are hereby advised that a conviction of the offense of which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States?" Defendant replied "Yes." The court

admonished her of, and defendant waived, her rights to a bench and jury trial, and the court ascertained that she was pleading guilty freely, without threat or promise.

¶ 5 The court was informed of the stipulated factual basis for the plea. Jewel security guard Gregory Pena would testify that he was working there on the afternoon in question when he saw defendant place items of merchandise in her purse and pass the last cash register without paying for those items and that, when defendant was detained, a bottle of Maalox and a movie DVD priced \$29.99 were recovered and she was arrested. The parties stipulated to defendant's prior conviction for retail theft in case 11CR1509601, for which she was serving probation. The court accepted the plea, finding that "defendant understands the nature of the charge placed against her, the possible penalties involved, [and] her rights under the law," that her plea was voluntary, and that there was a factual basis therefor. The court found defendant guilty of retail theft and terminated her probation unsatisfactorily. Defendant waived her right to a pre-sentencing investigation, and the court sentenced her as agreed and advised her of her appeal rights.

¶ 6 In July 2012, defendant filed through counsel a postconviction petition alleging that trial counsel rendered ineffective assistance by erroneously advising her regarding the immigration consequences of her plea. She alleged that she is a lawful permanent resident, but not a citizen, of the United States and that she apprised trial counsel of this. Counsel assured her that she "would have no immigration problems" because of her lawful residency. However, retail theft with a sentence of at least one year's imprisonment is deemed an aggravated felony by federal immigration law and is thus a mandatorily deportable offense, she argued. Though the court warned her of possible immigration consequences of her plea, her confidence in counsel caused her to discount the admonishment as a formality. She accepted the plea offer upon trial counsel's

advice, and alleged that she was prejudiced thereby because she would have either proceeded to trial or "insisted" on a plea agreement with less than a year of imprisonment had she known that retail theft with one year or more of prison would render her subject to deportation. In June 2012, federal Immigration and Customs Enforcement (ICE) took her into custody and initiated deportation proceedings.

¶ 7 Defendant argued that a plea agreement, like most contracts, may be rescinded if the withholding of information caused a party to be materially mistaken regarding the subject of the agreement. She argued that she waived her rights to trial (cross-examination and the like) and to trial by jury, in exchange for a certain sentence but the penalty for her offense has since been expanded to one more severe than the trial court's penalty. In this regard, she alleged that deportation would mean "permanent removal from the United States and separation from her domestic partner, their minor child, parents, extended family, friends and all those who love and need her." She argued that she could have consulted with an immigration attorney had she known of the "possibility of such dreadful consequences." She argued that the United States Supreme Court held in *Padilla v. Kentucky*, 559 U.S. 356 (2010), that a guilty plea entered in the mistaken belief that it does not subject the defendant to deportation is not knowing and voluntary and is the result of ineffective assistance of counsel.

¶ 8 The petition was supported by defendant's affidavit that she: is a lawful permanent resident but not a citizen, was unaware of possible immigration consequences of a conviction before she pled, informed trial counsel of her status but he assured her "that since I had a Green Card, I would have no immigration problems," considered the trial court admonishment of possible immigration consequences a mere formality in light of counsel's assurance, pled in

reliance on that assurance, and "would not have agreed to accept such terms of the plea agreement and would have chosen to proceed to trial instead" had she known that retail theft with a sentence of one year or more in prison results in "virtually mandatory" deportation.

¶ 9 The postconviction petition also raised an argument that defendant was convicted of retail theft under a repealed statute (Pub. Act 97-597 (eff. Jan. 1, 2012)(repealing 720 ILCS 5/16A-3)), and the petition was accompanied by defendant's motion to vacate the conviction on the same grounds.

¶ 10 The State filed a motion to dismiss the petition and response to defendant's motion to vacate. The State argued that, assuming *arguendo* that trial counsel gave erroneous advice regarding immigration consequences of a plea, it is insufficient to show prejudice for a defendant to allege that she would not have pled guilty but proceeded to trial absent counsel's error. Instead, prejudice requires that a defendant present a plausible defense or a claim of actual innocence; the State argued that defendant has not done so. The State also argued that the plea admonishments of the trial court, particularly mentioning the possibility of deportation, rendered defendant's plea knowing and voluntary and "cured any prior defect or erroneous advice by trial counsel." The State noted that defendant faced "the same threat of deportation" from a conviction upon trial. Regarding the motion to vacate, the State argued that it does not cite any statutory authority such as section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)) and substantively that defendant was charged under a statute valid at the time of her offense in December 2011 and that Public Act 97-597 merely renumbered the retail theft statute (720 ILCS 5/16-25 (West 2012)) so that her conviction was not void.

¶ 11 On October 17, 2012, defendant asked the court for a conference to reach an agreed disposition acceptable to the federal immigration authorities. She argued that she was subject to "guaranteed deportation without any possible relief" because retail "theft with a sentence of one year or more is classified as an aggravated felony under federal immigration law." She argued that "if somehow or other *** she would have been sentenced to 364 days, we wouldn't be here before you today," stating that ICE took her into custody as soon as she completed her prison term. She clarified for the court that she is a lawful permanent resident, not "here illegally." She argued that a conference was appropriate because the "statute that she pled to has not existed and does not exist, and has been declared void and annulled." The case was recessed for an unrecorded discussion between the court and parties.

¶ 12 After the recess, the court considered defendant's petition and the State's motion to dismiss. The State reiterated its arguments from the motion to dismiss, and defendant reiterated the argument in her motion to vacate her conviction. Regarding the ineffective-assistance claim, defendant argued that trial counsel could have negotiated a non-deportable plea agreement; that is, "if the alternative proposition could have been afforded to [the court, it] might have considered placing her in jail for 364 days." The court stated that the plea conference was on the Class 4 felony version of retail theft and that the court cannot impose a prison sentence of less than a year on a Class 4 felony so "the only way that I would have considered that is if it was reduced to a Class A misdemeanor" by the State. The court noted that defendant could have rejected the one-year offer but did not, and defendant argued that "we're not saying that the plea was not voluntary" but "I suppose a legal treatise could be written as to what is or is not voluntary." Defendant clarified that her plea was voluntarily made but based on trial counsel's

advice that the plea would have no immigration consequences, so that the erroneousness of that advice prejudiced her. Defendant also asserted that her prior conviction does not affect her immigration status (and thus she did not file a postconviction petition challenging that conviction); that is, the instant conviction with its one-year prison term is sufficient to subject her to mandatory deportation. The court expressed reluctance to modify defendant's conviction or sentence on "some kind of a legal fiction" when she pled guilty to the Class 4 felony version of retail theft, so that "I'm not interested in alternative sentences." The court noted that trial counsel asking for a lesser sentence in the plea conference would not have obliged the State to agree and thus it is speculative that trial counsel could have achieved an undeportable sentence with proper knowledge of immigration law. Defendant argued that "judicial admonishment does not cure a deficient performance by a lawyer" so that the court's proper immigration admonishment of defendant should not be dispositive. Lastly, defendant noted that a plea agreement and resulting judgment would be reversible if the agreement did not mention part of the sentence, and argued that *Padilla* was a "landmark case" because it placed deportation into the same category. The court granted the State's motion to dismiss, finding that unreasonable performance of counsel may have been shown but prejudice was not shown. This appeal followed.

¶ 13 On appeal, defendant contends that the court erred in dismissing her postconviction petition when it stated a substantially meritorious claim that trial counsel was ineffective for erroneously advising her regarding immigration consequences of her guilty plea. The State responds that defendant has failed to show the requisite prejudice from counsel's advice.

¶ 14 A postconviction proceeding is a collateral attack on the trial court proceedings, allowing a defendant to challenge substantial deprivations of constitutional rights that were not, and could

not have been, adjudicated previously. *People v. Davis*, 2014 IL 115595, ¶ 13. There are three stages in postconviction proceedings. *People v. Hommerson*, 2014 IL 115638, ¶ 7. A petition may be summarily dismissed within 90 days if frivolous or patently without merit; that is, lacks an arguable basis in law or fact. *Id.*; *People v. Domagala*, 2013 IL 113688, ¶ 32. A petition not summarily dismissed proceeds to the second stage, where the State may move to dismiss it.

Hommerson, 2014 IL 115638, ¶ 8. On such a motion, the court must determine whether the petition makes a substantial showing of a constitutional violation. *Domagala*, 2013 IL 113688, ¶ 33. A petition not dismissed upon the State's motion proceeds to the third stage, an evidentiary hearing. *Hommerson*, 2014 IL 115638, ¶ 8. While the court in a third-stage evidentiary hearing serves as a fact-finder, determining witness credibility and weighing the evidence, evidentiary questions are not resolved at the first or second stages but only the legal sufficiency of the petition. *Domagala*, 2013 IL 113688, ¶¶ 34-35. All well-pleaded facts not positively rebutted by the trial record are to be taken as true. *Id.* Our review of the dismissal of a postconviction petition is *de novo*. *Hommerson*, 2014 IL 115638, ¶ 6.

¶ 15 A criminal defendant has a constitutional right to the effective assistance of counsel, and a claim of ineffective assistance is subject to a two-prong test whereby the defendant must demonstrate that counsel's performance was deficient – that is, objectively unreasonable under prevailing professional norms – and that the deficient performance prejudiced the defendant in that there is a reasonable probability that the result of the proceeding would be different absent counsel's unprofessional errors. *Domagala*, 2013 IL 113688, ¶ 36, citing *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 16 In *Padilla*, the Supreme Court "held that criminal defense attorneys must inform non-citizen clients of the risks of deportation arising from guilty pleas" so that failure to do so may be the subject of a *Strickland* ineffectiveness claim. *Chaidez v. U.S.*, 133 S. Ct. 1103, 1106 (2013). *Padilla* first reached a threshold question of whether advice about deportation is categorically removed from the constitutional right to counsel because it involves a collateral consequence of a conviction rather than a component of the criminal sentence. *Chaidez*, 133 S. Ct. at 1108-10. Specifically, *Padilla* held that deportation is a unique and particularly severe penalty, intimately related to the criminal process though itself civil, and that deportation is the virtually-automatic result of some convictions. *Chaidez*, 133 S. Ct. at 1110. Therefore, the Supreme Court held in *Chaidez* that *Padilla* stated a new rule of law not applicable retroactively to convictions that became final prior to *Padilla*. *Chaidez*, 133 S. Ct. at 1110-13. Here, defendant's guilty-plea conviction became final in 2012, well after the *Padilla* decision.

¶ 17 As to prejudice, this court has held in the context of a *Padilla* claim that a defendant shows prejudice by showing that, but for counsel's errors, there is a reasonable probability that she would not have pled guilty but would have insisted on going to trial, which in turn "depends largely on whether the defendant would have likely succeeded at trial." *People v. Gutierrez*, 2011 IL App (1st) 093499, ¶ 20, citing *People v. Pugh*, 157 Ill. 2d 1, 15 (1993). Similarly, this court has held that a *Padilla* claim alleging that a defendant would have rejected a plea "must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial." *People v. Pena-Romero*, 2012 IL App (4th) 110780, ¶ 16.

¶ 18 However, this court has also held that a defendant with a *Padilla* claim must show that a decision to reject the plea deal would have been rational under the circumstances. *People v.*

Guzman, 2014 IL App (3d) 090464, ¶ 33, citing *Padilla*, 559 U.S. at 372; see also *Pena-Romero*, 2012 IL App (4th) 110780, ¶ 18 (citing *Padilla* rational-under-the-circumstances test). Having a plausible defense is a rational basis for rejection, but so are a defendant's family ties and other bonds to the United States. *Id.*, ¶ 35, citing *Padilla*, 559 U.S. at 368. Even where a defendant would face the risk of deportation at trial as she does from a plea, going to trial allows the defendant to contest the State's case. *Id.* "Since *Padilla*, a trial court should not determine whether the negotiated agreement resulted in a shorter sentence but, rather, whether defendant *knew*, based on the advice of defense counsel, that admitting a particular offense would accelerate deportation proceedings." (Emphasis in original.) *People v. Guzman-Ruiz*, 2014 IL App (3d) 120150, ¶ 25 (following *Guzman*).

¶ 19 Here, we note that the record rebuts defendant's allegation that she was unaware of the "possibility of such dreadful consequences" as deportation. The court advised her before accepting her plea that her conviction as a non-citizen "may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States," and she replied that she understood. The issue before us is whether defendant can nonetheless show prejudice on the allegations that trial counsel failed to (1) advise her properly regarding the immigration consequences of her plea so that she was unaware that deportation *would* (rather than *may*) result from her plea and (2) craft a conviction and sentence that reduced the likelihood of deportation. See *Guzman-Ruiz*, 2014 IL App (3d) 120150, ¶ 22 (court's admonishments mentioning deportation did not correct erroneous advice of counsel).

¶ 20 We find that it would be rational under the circumstances for defendant to decline the plea agreement and go to trial had she known of the immigration consequences of her charge.

The State emphasizes that defendant has not made a claim of actual innocence or posited a plausible defense. However, in light of the severity of deportation, we conclude that whether there is a reasonable probability that a defendant would not have pled guilty but insisted on going to trial does not depend in deportable cases primarily on whether the defendant would have likely succeeded at trial as stated in *Gutierrez*. Instead, as intimated in *Guzman*, opting for the chance of an acquittal at trial, even if remote, becomes much more rational when the most severe consequences of a conviction include permanent removal from the United States and estrangement from family and acquaintances here rather than a few years in prison or on probation as defendant faced under Illinois law alone.

¶ 21 In sum, we find that defendant's petition states a substantially meritorious claim of ineffective assistance of trial counsel, on both unreasonable performance and prejudice, so that dismissal of the petition was erroneous. Accordingly, the judgment of the circuit court is vacated and this cause is remanded for further postconviction proceedings.

¶ 22 Vacated and remanded.