

No. 1-12-0944

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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. 99 CR 2618
)	
MELVYN SANTOS,)	Honorable
)	Timothy Joseph Joyce,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Simon and Liu concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Where defendant failed to establish that he received ineffective assistance of counsel at his guilty plea hearing, the trial court abused its discretion in granting his petition for relief pursuant to section 2-1401 of the Code of Civil Procedure.
- ¶ 2 Defendant Melvyn Santos pleaded guilty to possession of a controlled substance and was sentenced to 24 months of "1410 probation." Eleven years later, he filed a petition for relief pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West

2010)), which was granted by the trial court. On appeal, the State contends that the trial court abused its discretion in granting the petition. The State argues that defendant's petition was untimely, that the case law relied upon by the trial court cannot be applied retroactively to defendant, that defendant has not established prejudice for purposes of claiming ineffective assistance of counsel, and that the trial court erred in finding that the arrest report put counsel on notice that defendant was not a U.S. citizen.

¶ 3 For the reasons explained below, we reverse.

¶ 4 In 1999, defendant, a citizen of the Philippines and legal permanent resident of the United States, pleaded guilty to one count of possession of a controlled substance and was sentenced to 24 months of "1410 probation." Defendant completed probation successfully and the arrest was expunged in 2006. In 2010, defendant made an application for adjustment of status to that of a citizen. In September of that year, the U.S. Department of Homeland Security, Citizenship and Immigration Services sent defendant a letter requesting information pertaining to his "conviction" "in order to assess possible removability from the United States."

¶ 5 Within one month of receiving the letter, defendant filed a petition for relief pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2010)). In the petition, defendant suggested that his guilty plea was not made voluntarily or with full knowledge of its consequences. He alleged that prior to entering his guilty plea, he was unaware of the ramifications that doing so would have on his ability to obtain citizenship and the consequences it would have on his immigration status. He stated that he was not advised of such consequences by the trial court and, citing *Padilla v. Kentucky*, 599 U.S. 356 (2010), alleged that his attorney was ineffective for failing to advise him that pleading guilty would trigger deportation proceedings. The State filed a motion to dismiss, which the trial court denied.

¶ 6 The court thereafter conducted a hearing on the petition. At the hearing, defendant testified that prior to pleading guilty, his attorney did not discuss his immigration status with him. He stated that had he known pleading guilty would impact his immigration status, he "would have done something differently." While he did not know exactly what he would have done, he would not have entered a guilty plea. Defendant further testified that he first learned of the immigration consequences of his plea when he received the letter from the U.S. Department of Homeland Security in September 2010.

¶ 7 Following the hearing, the trial court granted defendant's section 2-1401 petition. In the course of doing so, the trial court took judicial notice that defendant's arrest report indicated he had been born in the Philippines and accordingly found that defense counsel was on notice that defendant may not have been a U.S. citizen. The trial court found that under *Padilla*, which it determined applied retroactively, trial counsel was required to inform defendant that a guilty plea would carry a risk of deportation, and that his failure to do so constituted unreasonable performance. The court further found that while defendant made no claim regarding any efficacious defense to the charge he faced, he needed only to show that but for counsel's failure to advise him of potential adverse immigration consequences, he would not have pleaded guilty. Noting that the section 2-1401 petition was not filed within two years of the entry of the judgment from which relief was sought, the court nevertheless determined it could consider the petition because "no reasonable person could be deemed to have the wherewithal to know, or reasonably ought to have known, that his plea of guilty could have debilitating ramifications stemming from his original counsel's failure to provide effective assistance of counsel in 1999 until such time as a different sovereignty (and the very one with the exclusive authority to

administer the nation's immigration laws) so informed him." The trial court vacated defendant's guilty plea and placed the matter on the court's trial call.

¶ 8 The State appeals.

¶ 9 Section 2-1401 provides a comprehensive statutory procedure for defendants to challenge final orders, judgments, and decrees more than 30 days after they have been entered. *People v. Haynes*, 192 Ill. 2d 437, 460 (2000). The purpose of a petition brought pursuant to section 2-1401 is to correct errors of fact unknown at the time of trial but which, if then known, would have prevented the judgment. *People v. Coleman*, 206 Ill. 2d 261, 288 (2002). In general, 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 2010). However, exceptions to the two-year time period exist where the petitioner clearly shows that his delay was caused by legal disability or duress, the basis for relief was fraudulently concealed from him, or where the judgment being challenged is void. *People v. Harvey*, 196 Ill. 2d 444, 447 (2001). To be entitled to relief under section 2-1401, the petitioner must set forth specific factual allegations supporting (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition. *People v. Lee*, 2012 IL App (4th) 110403, ¶ 15. We review the disposition of a section 2-1401 petition for an abuse of discretion. *People v. Davis*, 2012 IL App (4th) 110305, ¶ 11.

¶ 10 On appeal, the State contends that the trial court abused its discretion in granting defendant's section 2-1401 petition. First, the State argues that the petition was untimely and no exceptions to the two-year filing period applied in defendant's case. Second, the State asserts that *Padilla* is not retroactively applicable, and that therefore, defendant cannot benefit from its holding that an attorney must inform his client whether a guilty plea will carry a risk of

deportation. Third, the State argues that defendant's claim of ineffective assistance of counsel must fail because he has merely stated that he would not have pleaded guilty had he been warned of the immigration consequences of his plea, and has not claimed he was innocent of the underlying charge or articulated a plausible defense that could have been raised at trial. Finally, the State asserts that the trial court was incorrect in determining that the arrest report was sufficient to put trial counsel on notice that defendant was not a U.S. citizen.

¶ 11 We agree with the State that, *Padilla* does require that "counsel must inform her client whether his plea carries a risk of deportation." However, in *Chiadez v. United States*, 133 S. Ct. 1103 (2013), the U.S. Supreme Court determined that *Padilla* is not retroactively applicable. Petitioner's conviction was final well before *Padilla* was decided on March 31, 2010. The circuit court improperly held that "*Padilla* is to be applied retroactively," and the ruling, predicated on that mistake, should be reversed.

¶ 12 However, defendant argues *Padilla* is not necessary to make a determination that counsel's performance fell below an objective standard of reasonableness; and that he established prejudice by asserting he would not have pleaded guilty had he known of the immigration consequences of doing so, and his petition was timely because he filed it immediately upon becoming aware of the immigration consequences of his plea.

¶ 13 We agree with the State that defendant failed to establish prejudice in making his claim of ineffective assistance of counsel. Because the petition fails on the merits, we need not address the issues of timeliness, whether the ruling in *Padilla* is necessary to make a determination that trial counsel's performance fell below an objective standard of reasonableness, or whether the arrest report put counsel on notice that his client may not have been a citizen.

¶ 14 The standard for determining whether a defendant was denied the effective assistance of counsel in entering a guilty plea is the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Hall*, 217 Ill. 2d 324, 334-35 (2005). To establish ineffective assistance of counsel under *Strickland*, a defendant must show that (1) his counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *Strickland*, 466 U.S. at 687. If a claim of ineffectiveness may be disposed of on the ground of lack of sufficient prejudice, a reviewing court need not consider whether counsel's representation was constitutionally deficient. *Strickland*, 466 U.S. at 697.

¶ 15 In the context of a challenge to a guilty plea alleging ineffective assistance of counsel, an attorney's conduct is considered deficient if the attorney failed to ensure that the defendant's guilty plea was entered voluntarily and intelligently. *Hall*, 217 Ill. 2d at 335. Prejudice exists if there is a reasonable probability that absent counsel's errors, the defendant would have pleaded not guilty and insisted on going to trial. *Hall*, 217 Ill. 2d at 335. However, a bare allegation that the defendant would have pleaded not guilty and insisted on trial is not enough to establish prejudice. *Hall*, 217 Ill. 2d at 335. Rather, such a claim must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial. *Hall*, 217 Ill. 2d at 335-36. Whether counsel's deficient representation caused the defendant to plead guilty is a question that largely depends on predicting whether the defendant likely would have been successful at trial. *Hall*, 217 Ill. 2d at 336.

¶ 16 In the instant case, defendant's claim of ineffectiveness fails because defendant has not established prejudice. See *Strickland*, 466 U.S. at 697 (if a claim of ineffectiveness may be disposed of due to lack of prejudice, a reviewing court is not required to address whether

counsel's performance was unreasonable). At the hearing on his petition, defendant asserted that had counsel informed him of the immigration consequences of his plea, he would not have pleaded guilty. However, defendant did not claim that he is innocent of the charges brought against him or articulate any kind of defense that could have been put forth at trial. He only stated that had he known pleading guilty would impact his immigration status, he "would have done something differently." In these circumstances, we find that defendant failed to show prejudice caused by counsel's alleged deficiencies and, therefore, that the petition should have been dismissed. See *Hall*, 217 Ill. 2d at 335-36; see also *People v. Hughes*, 2012 IL 112817, ¶¶ 64-66 (characterizing the defendant's claim "that had he known of the possibility for civil commitment he would not have pleaded guilty because he thought that it would resolve the matter" as insufficient to articulate prejudice under *Strickland*); *People v. Pena-Romero*, 2012 IL App (4th), ¶¶ 17, 19 (finding the defendant's "bare allegation" that he would not have pleaded guilty had he known of the deportation consequences of his plea insufficient to establish prejudice).

¶ 17 We are mindful that in his appellate brief, defendant maintains that he satisfied the prejudice prong of *Strickland*. Defendant suggests that had he been made aware of the immigration consequences of pleading guilty, he may have chosen "other avenues that would have ended in the same result for the People that would have avoided the immigration consequences entirely." In particular, defendant suggests that "[i]f he had entered a stipulated bench trial or agreed disposition, he would not have the plea, or admission, of guilt, which is the basis for the removal proceedings." While defendant may have had these options available to him, he still has not made a claim of actual innocence or articulated a plausible defense to the charges he faced, as required by *Hall*. Moreover, defendant's suggestion that he could have

taken the above actions is speculative. He has not cited any supporting authority indicating that these avenues were actually available to him or that they would have allowed him to avoid "immigration consequences." In addition, defendant has not made any type of showing that the State would have agreed to an alternate procedure in the trial court. Thus, defendant's argument fails.

¶ 18 Defendant has failed to establish that he received ineffective assistance of counsel. Accordingly, we find that the trial court's decision to grant defendant's section 2-1401 petition was an abuse of discretion. For the reasons explained above, we reverse the decision of the circuit court of Cook County.

¶ 19 Reversed.