2014 IL App (1st) 123463-U

FOURTH DIVISION
May 22, 2014

No. 1-12-3463

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. 11 CR 4385
	)	
MARIA ZARCO,	)	Honorable
	)	Kay M. Hanlon,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Epstein concurred in the judgment.

O R D E R

¶ 1 *Held*: Court erred in dismissing post-conviction petition claiming ineffective assistance of trial counsel for not advising defendant regarding immigration consequences of guilty plea; defendant showed prejudice with successful affirmative defense to the pled charge.

¶ 2 Pursuant to a negotiated guilty plea, defendant Maria Zarco was convicted of forgery and sentenced to two years' probation with fines and fees. Defendant now appeals from the dismissal on State motion of her post-conviction petition, contending that the court erred in dismissing the petition when it stated a substantially meritorious claim that trial counsel rendered ineffective

assistance by not advising her regarding immigration consequences of her guilty plea and not crafting a conviction and sentence that reduced the likelihood of deportation.

¶ 3 Defendant was charged with forgery as she allegedly "made" a document – an employment eligibility verification form ("I-9") "for Kimco Co[mpany]" – capable of defrauding another and with the intent to defraud. She was also charged with possession of a fictitious or unlawfully altered identification card, and possession of a fraudulent identification card, for allegedly on or about February 22, 2011, possessing a false Social Security card ("Card") in the name of Denise Erocoli.

¶ 4 On April 11, 2011, trial counsel and the State told the court that they had reached a plea agreement: defendant would plead guilty to forgery and receive two years' probation with fines and fees, with the other charges nol prossed. Defendant personally pled guilty to forgery, and the court admonished her regarding her trial rights and potential sentence and ascertained that she was pleading guilty freely, without threat or promise. The court also admonished defendant "Do you understand that if you are not a citizen of the United States, the following consequences could take place if you're convicted: you could be deported, denied admission to the United States, or denied naturalization." Defendant replied that she understood.

¶ 5 The court was informed of the stipulated factual basis for the plea. When Erocoli was informed that her Social Security number ("Number") was being used to apply for employment with Kimco, Erocoli reported the matter to police as she did not know defendant and had not given her permission to use her Number. When the police investigated, they found that defendant gave Erocoli's Number on an I-9 dated December 20, 2005, and thereby obtained employment with Kimco. Defendant was arrested and gave a statement admitting that she used

Erocoli's Card and Number "for purposes of employment and welfare," that her uncle gave her the Card, and that she used it subsequently though knowing that the Number was not hers.

¶ 6 The court found that "defendant understands the nature of the charges against her and the possible penalties and her rights under the law," and that her plea was voluntary. The court accepted the plea, defendant signed a jury waiver and waiver of pre-sentencing investigation, and it was spread of record that she had no prior convictions. Trial counsel argued in mitigation that defendant has worked and paid taxes since 1991 to support her children and emphasized that she has no criminal history. Defendant herself acknowledged "I know what I did was wrong, but I didn't do it with any bad intention. I have always taken care of my record and my credit with that" Number. Defendant was sentenced for forgery to two years' probation with fines and fees, and the court informed her of her appeal rights, including that if she withdrew her plea, "any charges dismissed by the State may be reinstated."

¶ 7 In April 2012, defendant filed through counsel a post-conviction petition alleging that trial counsel rendered ineffective assistance by not advising her regarding the immigration consequences of her plea and by not crafting a conviction and sentence to avoid deportation. She alleged that she was eligible for cancellation of removal from the United States under the Immigration and Nationality Act (the Act) (8 U.S.C. § 1229(b)(1) (2010)) before her April 2011 guilty plea but since her plea is no longer eligible and instead is ineligible to remain in the United States. She alleged that she is now in the custody of federal Immigration and Customs Enforcement ("ICE"), the subject of removal proceedings by ICE and "subject to mandatory detention" without release on bond. She alleged that trial counsel never advised her of the immigration consequences of a guilty plea but nonetheless advised her to plead guilty. She

stated that forgery is a crime of moral turpitude under the Act rendering an alien deportable (8 U.S.C. § 1182(a)(2)(A)(i)(I) (2010)) and that a "felony conviction for use of a fraudulent document results in probable deportation" under the Act even if punished by probation. She alleged that she "had no knowledge that her conviction would lead to her deportation" until ICE sought her deportation. She alleged that she "had no knowledge of the possibility of deportation because she was not so informed by her attorney," and that "[d]efendant and her family were totally unaware of the possibility of deportation until immigration charges were filed against her." She alleged that she "has a valid defense to the crime" in that she "never forged any document" and had "witnesses who will testify that there was no forgery," and she would not have pled guilty had she been properly advised of the immigration consequences of a plea. Defendant noted that the United States Supreme Court held in *Padilla v. Kentucky*, 559 U.S. 356 (2010), that deportation is not a mere collateral consequence of a guilty plea in a criminal case.

¶ 8 The petition was supported by defendant's affidavit that "I did not alter any document in any manner whatsoever as required" for the offense of forgery, that trial counsel advised her to plead without advising her of the immigration consequences of pleading, that she has "never been informed that the conviction bars me from any relief from deportation," that she "did not know that a conviction and sentence of this crime would cause me to be deported," and that "I would not have pled guilty to the charges if I had known the immigration consequences." No other affidavits were attached to the petition.

¶ 9 The State moved to dismiss the petition, arguing that defendant provided no documentation for the claim that she is being deported, and that her allegation of being subject to mandatory detention is belied by her presence in court on August 3, 2012. The State also argued

that the plea admonishments of the trial court, particularly mentioning the possibility of deportation, refute defendant's allegation of lack of knowledge. The State argued that it is insufficient to show prejudice for a defendant to allege that she would not have pled guilty but for the inadequate advice of counsel. A defense to the charge must be alleged, and the State argued that defendant's averment that she did not alter the I-9 does not defeat a charge of forgery; that is, of *making* or altering a document capable of defrauding.

¶ 10 Defendant (through counsel) responded to the motion to dismiss, arguing that ICE took her into custody in August 2011, that she was found removable under section 212(a)(2)(A)(i)(I) of the Act so that she is subject to mandatory custody under section 236(c)(1)(A) of the Act (8 U.S.C §§ 1182(a)(2)(A)(i)(I); 1226(c)(1)(A) (2010)), that an immigration judge ordered her removal in January 2012, that her appeal to the Board of Immigration Appeals was denied in May 2012, and that ICE "allowed her release *after* the case was completed" due to her disabled child but "the order of deportation remains outstanding" and would "very likely" be enforced upon dismissal of the instant petition. (Emphasis in original.) Defendant also argued that the Act pre-empts State criminal charges based on an I-9 (*see* 8 U.S.C. § 1324a(b)(5) (2010)) so that the forgery charge was improper and trial counsel was ineffective for not challenging it. Documents from the immigration proceedings, including the orders of January and May 2012, were attached to the response. The allegations included the instant forgery conviction, described as a "crime involving moral turpitude," and that defendant entered the United States as a non-citizen without being "admitted or paroled after inspection by an Immigration Officer."

¶ 11 On November 14, 2012, the circuit court granted the motion to dismiss after argument thereon. The court found that, while defendant showed unreasonable performance by trial

counsel, she failed to show that she was prejudiced thereby. In particular, the court deemed it insufficient to allege that defendant would not have pled guilty had counsel advised her properly. The court rejected defendant's argument that federal law pre-empts the forgery charge so that the case should be dismissed outright for lack of jurisdiction. This appeal timely followed.

¶ 12 On appeal, defendant contends that the circuit court erred in dismissing her post-conviction petition when it stated a substantially meritorious claim that trial counsel rendered ineffective assistance by not advising her regarding immigration consequences of her guilty plea and not crafting a conviction and sentence that reduced the likelihood of deportation.

¶ 13 A post-conviction 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. English*, 2013 IL 112890, ¶¶ 21-22. There are three stages in post-conviction proceedings. *Id.*, ¶ 23. A petition may be summarily dismissed within 90 days if frivolous or patently without merit; that is, if it has no arguable basis in law or fact. *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. *Id.*, ¶ 33. On such a motion, the circuit court must determine whether the petition makes a substantial showing of a constitutional violation. *Id.* If the defendant succeeds in bearing the burden of making that showing, the petition proceeds to the third stage, an evidentiary hearing. *Id.*, ¶ 34. 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. *Id.*, ¶¶ 34-35. All well-pleaded facts not positively rebutted by the trial record are to be taken as true. *Id.*, ¶ 35. Unless an evidentiary hearing was

held involving fact-finding and credibility determinations, our review of the disposition of a post-conviction petition is *de novo*. *English*, 2013 IL 112890, ¶ 23; *People v. Brown*, 2013 IL App (1st) 091009, ¶ 52.

¶ 14 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 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).

¶ 15 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). Because *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, 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 1113. Defendant's guilty-plea conviction became final in 2011, well after the *Padilla* decision.

¶ 16 As to prejudice, we have held in the context of a *Padilla* claim that a defendant shows prejudice by showing that there is a reasonable probability that, but for counsel's errors, he would not have pleaded 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). This court has similarly held on another *Padilla* claim that a claim 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. *Cf. People v. Guzman*, 2014 IL App (3d) 090464, ¶ 33, quoting *Padilla*, 559 U.S. at 372 (defendant with *Padilla* claim must show that " 'a decision to reject the plea bargain would have been rational under the circumstances.' "); *People v. Guzman-Ruiz*, 2014 IL App (3d) 120150, ¶ 25 ("Since *Padilla*, a [post-conviction] 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.") We need not resolve which of these prejudice standards should apply in *Padilla* cases because, for reasons stated below, we find that defendant can articulate a plausible defense and thus satisfy the strictest standard.

¶ 17 Here, we note initially that the record directly rebuts defendant's allegation that she "had no knowledge of the *possibility* of deportation" and was "totally unaware of the *possibility* of deportation until immigration charges were filed against her." (Emphasis added.) The court advised her before accepting her plea that "you could be deported, denied admission to the United States, or denied naturalization" if she was convicted as a non-citizen, and she replied that she understood. The issue before us is whether defendant can nonetheless show prejudice from the unrebutted allegation that trial counsel failed to (1) advise her regarding the immigration consequences of her plea so that she was unaware that deportation *would* (rather than *could*)

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).

¶ 18 In particular, defendant argues that her forgery charge was pre-empted by federal law so that she had an affirmative defense not asserted by trial counsel because of his unfamiliarity with the Act. We note that the post-conviction court did not rule upon this claim but rejected defendant's argument that the pre-emption deprived the court of jurisdiction. The court was correct on that point: even if the forgery charge is invalid, the other charges were nol prossed and subject to reinstatement if the plea agreement is vacated.

¶ 19 That said, we agree with defendant that her forgery charge regarding an I-9 is pre-empted by the Act. The Act, at 8 U.S.C. § 1324a(b), authorizes the I-9 form and provides in relevant part that the "form designated or established by the Attorney General under this subsection and any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter and sections 1001, 1028, 1546, and 1621 of Title 18;" that is, the federal criminal provisions on perjury, false statement, and false documents. 8 U.S.C. § 1324a(b)(5) (2010), citing 18 U.S.C. §§ 1001, 1028, 1546, 1621 (2010). Using the information on an I-9 for a similar State criminal charge, as was done here, is not one of the enumerated uses. *See State v. Reynua*, 807 N.W. 2d 473, 480-81 (Minn. App. 2011) (Section 1324a(b)(5) of the Act pre-empts a State charge based on a false I-9).

¶ 20 This leads us to defendant's other key argument: that while forgery is a crime involving moral turpitude under the Act, possessing an altered, fictitious or fraudulent identification card is not. The existence of another alternative (to pleading guilty to forgery or going to trial) that

avoids or reduces immigration consequences shows that she was prejudiced by trial counsel's advice to plead guilty to forgery, she argues. In support of this argument, she cites *Matter of Serna*, 20 I. & N. Dec. 579 (Bd. of Immigration Appeals, 1992). In *Serna*, the Board noted that neither the seriousness of an offense nor the severity of its sentence is determinative of whether a crime involves moral turpitude, but rather the offender's evil intent or corruption of the mind; that is, "a crime involving moral turpitude is an act which is *per se* morally reprehensible and intrinsically wrong or *malum in se*." *Id*. at 581-82. Thus, the Board found that "the crime of possession of an altered immigration document with the knowledge that it was altered, but without its use or proof of any intent to use it unlawfully, is not a crime involving moral turpitude." *Id*. at 586. "The statute under which the respondent was convicted does not specifically include the element of fraud." *Id*. at 585. Similarly, at least one of defendant's charges alleging her possession of the Card, possession of a fictitious or unlawfully altered identification card (15 ILCS 335/14A(b)(1) (West 2010)) – to "knowingly possess, display, or cause to be displayed any fictitious or unlawfully altered identification card." – does not have an element of fraud. *Cf. Marin-Rodriguez v. Holder*, 710 F. 3d 734, 739 (7th Cir. 2013)(while "Board precedent establishes that a conviction for merely possessing an altered immigration document does not constitute a crime involving moral turpitude," the "use of a false Social Security card was directly deceptive [where the defendant] presented the card to an employer with the intent to deceive that employer into thinking that he was legally employable" and thus a crime of moral turpitude.)

¶ 21 We conclude that defendant has presented not only a viable affirmative defense but a successful one. The pled forgery charge being pre-empted, the plea agreement is void and the

case must be remanded for trial or other appropriate proceedings on the Card-based charges that were nol prossed under the void plea agreement. A "plea agreement is void when an essential part of the agreed exchange is unenforceable or illegal under the relevant statutes" and "the essential terms of the plea agreement [are] the charges to which defendant pled guilty and the overall or total sentence of imprisonment for those offenses." *People v. Donelson*, 2011 IL App (1st) 092594, ¶ 14, *aff'd*, 2013 IL 113603.

¶ 22 Accordingly, the underlying judgment of conviction is vacated and this cause is remanded for further proceedings consistent with this decision.

¶ 23 Vacated and remanded.