FOURTH DIVISION
December 13, 2018

No. 1-17-0112



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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>BEATA MAKAL,<br><br>Defendant-Appellant. | ) | Appeal from the Circuit Court of Cook County<br><br>No. 12 CR 967<br><br>Honorable William T. O'Brien, Judge Presiding. |

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JUSTICE REYES delivered the judgment of the court.
Justices Gordon and Burke concurred in the judgment.

**ORDER**

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook county where the denial of defendant's postconviction petition based on her failure to establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), was not manifestly erroneous.

¶ 2 Defendant Beata Makal appeals from an order of the circuit court of Cook County

denying her petition for relief under the Post-Conviction Hearing Act (Act) 725 ILCS 5/122-1 *et seq.* (West 2012)) following a third-stage evidentiary hearing where the circuit court found she was not prejudiced by trial counsel's failure to inform her that deportation was likely following a guilty plea admitting she committed felony retail theft. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Defendant was charged with retail theft (720 ILCS 5/16A-3 (West 2010)) 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. Defendant was, in fact, on probation for the prior retail theft conviction at the time this offense occurred.

¶ 5 Subsequent to her arraignment, 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 circuit court read the charge and plaintiff acknowledged the charge and pled guilty thereto. The circuit 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 circuit court further 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.

¶ 6 The circuit court was then 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 observed 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, for which she was currently serving probation. The circuit 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 circuit court found defendant guilty of retail theft and terminated her probation unsatisfactorily. Defendant waived her right to a presentencing investigation, and the court sentenced her as agreed and advised her of her appeal rights.

¶ 7 Thereafter, 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 circuit court warned her of possible immigration consequences of her plea, her confidence in trial 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) placed her in custody and initiated deportation proceedings.

¶ 8 Defendant further 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.

¶ 9 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's 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.

¶ 10 The State filed a motion to dismiss the petition and response to defendant's motion to vacate in which it argued that assuming *arguendo* that trial counsel gave erroneous advice regarding immigration consequences of a plea, it is insufficient to demonstrate defendant suffered prejudice. The State also argued that the plea admonishments of the trial court "cured any prior defect or erroneous advice by trial counsel." The circuit court granted the State's motion to dismiss, finding that unreasonable performance of counsel may have been established but prejudice was not demonstrated.

¶ 11 Defendant then appealed to this court. We reversed the judgment of the circuit court holding there were sufficient facts alleged regarding prejudice and remanded the matter for a third-stage evidentiary hearing. *People v. Makal*, 2015 IL App (1st) 123292-U (unpublished order pursuant to Illinois Supreme Court Rule 23 (eff. July 1, 2011)).

¶ 12 On remand, defendant and her former immigration attorney Michel Kern testified at the evidentiary hearing. Defendant testified via Skype (as she had been deported to Poland) and with the assistance of a Polish interpreter. According to defendant, she moved to the United States with her father in 1993 at the age of 19. Defendant obtained a green card and was thus a legal permanent resident of the United States. After attending 18 months of schooling, she became a certified nursing assistant in 2004 and was employed at Alexian Brothers Hospital. In 2006 she became a stay-at-home mother to her son who is a United States citizen. Her husband also resided in the United States with her.

¶ 13 Regarding this case, defendant testified that she asked her public defender about the potential immigration consequences of pleading guilty. According to defendant, her counsel

advised her that if she pleaded guilty she would be released sooner and that the guilty plea would not impact her status as a legal permanent resident. The public defender did not suggest that she speak with an immigration attorney.

¶ 14 Defendant further testified that during the plea hearing she was nervous, disoriented, and crying. She could not recall the judge's admonishments, but only remembered "listening to the public defender who was standing next to me." Defendant admitted she did not ask for a break during the hearing nor did she request an explanation of the admonishment at issue.

¶ 15 Regarding her deportation, defendant testified that she received a notice of removal while she was incarcerated in June 2012. She could not read the paper because it was in English and eventually hired immigration counsel. Despite contesting the removal, she was eventually deported to Poland. Her father moved with her to Poland while her husband and her son remained in the United States. According to defendant, she did not have any family in Poland, which is why her father moved to Poland with her.

¶ 16 On cross-examination, defendant admitted she had pleaded guilty in 2007 and 2011 for retail theft.[1] She was aware at those times that deportation was a possibility to pleading guilty to those offenses. Defendant also acknowledged that a Polish interpreter was standing next to her during the plea hearing.

¶ 17 Michael Kern, defendant's immigration attorney, testified as follows. He was retained by defendant in June 2012 after she received a notice to appear (the charging instrument used to initiate removal proceedings). The notice to appear listed three separate cases of retail theft. According to Kern, the 2007 and 2011 retail theft cases were crimes of moral turpitude, which meant that defendant had a defense to the removal hearing. There was no defense to the 2012

[1] The record indicates that defendant received two days' imprisonment for the 2007 retail theft guilty plea and two years' probation after pleading guilty to the 2011 retail theft.

retail theft case, however, as it qualified as an aggravated felony under the immigration statute. Kern testified that pursuant to the immigration statute when a defendant is convicted of an aggravated felony the result is mandatory deportation. According to Kern, defendant was ultimately deported; however, it was unclear whether defendant was deported based on the retail theft convictions (as crimes of moral turpitude) or because she was convicted of retail theft and sentenced to one year imprisonment (an aggravated felony pursuant to the immigration statute).

¶ 18 The State moved for a directed finding, which the circuit court granted. The circuit court determined that defendant failed to meet her burden regarding the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984). In rendering this determination, the circuit court did not make any findings of fact.

¶ 19 Defendant then filed a motion to reconsider. After hearing argument, the circuit court denied the motion stating that defendant failed to meet her burden of proof regarding the prejudice prong of Strickland because the trial court admonished defendant at the time of her guilty plea. This appeal followed.

¶ 20 ANALYSIS

¶ 21 On appeal, defendant maintains that the circuit court erred when it denied her postconviction petition based on its finding that she was not prejudiced by trial counsel's failure to properly advise her as to the immigration consequence of her guilty plea. Defendant asserts that the consequence of her guilty plea was certain deportation and that the trial court's admonishment that she "may" face immigration consequences failed to cure the prejudice from her counsel's incorrect advice.

¶ 22 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. The Act provides a three-stage process for adjudicating postconviction petitions. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). In this case, the petition advanced to a third-stage hearing. See 725 ILCS 5/122-6 (West 2012). At such a hearing, the circuit court serves as the fact finder, and, therefore, it is the court's function to determine witness credibility, decide the weight to be given testimony and evidence, and resolve any evidentiary conflicts. *People v. Domagala*, 2013 IL 113688, ¶ 34. The circuit court must determine whether the evidence introduced demonstrates that the petitioner is, in fact, entitled to relief, *i.e.*, that the defendant established a substantial deprivation of federal or state constitutional rights in the proceedings that produced the challenged judgment. *People v. English*, 2013 IL 112890, ¶ 21.

¶ 23 Generally, our review of the denial of a postconviction petition is *de novo*. *People v. Hommerson*, 2014 IL 115638, ¶ 6. However, after an evidentiary hearing where fact-finding and credibility determinations are involved, the circuit court's decision will not be reversed unless it is manifestly erroneous. *Beaman*, 229 Ill. 2d at 72. "Manifest error" is an error that is clearly evident, plain, and indisputable. *People v. Stark*, 365 Ill. App. 3d 592, 598 (2006). Because the circuit court did consider the credibility of the witnesses, we review the matter for manifest error.

¶ 24 In her petition, defendant contended that her trial counsel rendered ineffective assistance by erroneously advising her regarding the immigration consequences of her guilty plea. Typically, to determine whether a defendant was denied her right to effective assistance of counsel, we apply the two-prong test set forth in *Strickland*. Under *Strickland*, a defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness" and that she was prejudiced such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466

U.S. at 688, 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; see *People v. Briones*, 352 Ill. App. 3d 913, 917 (2004).

¶ 25 *Counsel's Performance*

¶ 26 We first turn to examine whether the first prong of *Strickland* was met. In *Padilla*, the Supreme Court considered whether Padilla's trial counsel engaged in deficient performance by failing to advise Padilla that his plea of guilty made him subject to automatic deportation. *Padilla*, 559 U.S. at 359. There, Padilla, a native of Honduras and a lawful permanent resident of the United States for more than 40 years, pleaded guilty to drug charges in Kentucky. *Id.* Padilla alleged in his postconviction petition that at the time he entered his plea, his trial counsel failed to advise him that he would be subject to "virtually mandatory" deportation and also informed Padilla that he "did not have to worry about immigration status since he had been in the country so long." (Internal quotation marks omitted.) *Id.*

¶ 27 The Supreme Court granted *certiorari* to decide whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country. *Id.* at 360. The Court, however, did not consider the prejudice prong of *Strickland*. *Id.* The Court agreed with Padilla, holding that "constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation." *Id.* In so holding, the Court reasoned that the terms of the relevant immigration statute were "succinct, clear, and explicit in defining the removal consequence for Padilla's conviction." *Id.* at 368. The Court observed that Padilla's trial counsel could have easily determined that his plea would make him eligible for deportation "simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for

the most trivial of marijuana possession offenses." *Id.* Accordingly, "[t]he consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect." *Id*. at 369.

¶ 28 The Supreme Court went on to note that "[i]mmigration law can be complex" and that "[t]here will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain." *Id.* In those situations, the Court stated that a criminal defense counsel's duty is to "do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.* The Court, however, couched this language by further stating "[b]ut when the deportation risk is truly clear, as it was in this case, the duty to give correct advice is equally clear." *Id.*

¶ 29 Recently, in *People v. Valdez*, 2016 IL 119860, our Illinois Supreme court addressed the same issue presented in *Padilla*, but came to a different conclusion based on the facts. In *Valdez*, the defendant pleaded guilty to burglary and was sentenced to three years of probation. *Id.* ¶ 1. At the time of his plea, the defendant was a citizen of the Dominican Republic and a resident alien of the United States based on his marriage to a United States citizen. *Id.* During the plea hearing, the circuit court advised the defendant that a burglary conviction " 'may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States.' " *Id.* The defendant indicated that he understood the potential consequences of a burglary conviction on his immigration status and still wished to plead guilty. *Id.*

¶ 30 Thereafter, the defendant filed a motion to withdraw his guilty plea, alleging involuntariness and ineffective assistance of counsel. *Id.* ¶ 2. The circuit court denied the motion indicating that while the facts demonstrated that defense counsel never informed the defendant

that a burglary conviction might affect his immigration status, any prejudice resulting from that deficiency was cured by the court's own admonishments to defendant that the burglary conviction " 'may have the consequences of deportation.' " *Id.* ¶ 10. On appeal, the defendant maintained that his attorney never warned him of the immigration consequences of pleading guilty to burglary, in violation of *Padilla*. *Id.* ¶ 2. The appellate court agreed that defense counsel was ineffective and reversed the circuit court's judgment. *Id.*

¶ 31 The defendant then appealed to our supreme court where he maintained that his defense counsel was ineffective for failing to inform him, prior to pleading guilty, that a burglary conviction subjected him to mandatory deportation from the United States. *Id.* ¶ 13. In considering the first prong of *Strickland*, whether counsel was deficient, the supreme court examined *Padilla* and its holding that "defense counsel has a duty to give correct advice to a defendant about immigration consequences before the defendant enters a plea." *Id.* ¶ 16. Our supreme court stated that this holding also applies to "affirmative misadvice, as well as the failure to give any advice at all." *Id.* (citing *Padilla*, 559 U.S. at 370).

¶ 32 Applying the law of *Padilla* to the facts of the case before it, our supreme court concluded that *Valdez* differed from *Padilla* in that it was "not clear on the face of the immigration statute that defendant's burglary conviction rendered him deportable." *Id.* ¶ 20. In regards to burglary, our supreme court observed that the Immigration and Nationality Act "does not identify burglary as a deportable offense. Instead, the Act sets forth general categories of offenses, including crimes involving moral turpitude (8 U.S.C. § 1227(a)(2)(A)(i) (2012)) and aggravated felonies (*id.* § 1227(a)(2)(A)(iii) (2012)), which may or may not include burglary." *Id.* The *Valdez* court further acknowledged that "*Padilla* strongly suggests that where a crime falls within a 'broad classification' of offenses, such as crimes involving moral turpitude, the law

is not 'succinct and straightforward.' " *Id.* ¶ 22 (citing *Padilla*, 559 U.S. at 368-69).

¶ 33 The *Valdez* court, however, did not examine the defendant's offense of burglary as an aggravated felony, but instead as a crime involving moral turpitude. *Id.* ¶ 22. This is likely because the defendant was sentenced to three years of probation and thus the offense did not fall within the Act's definition of "aggravated felony" as "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(G) (2012)). In considering the consequences of trial counsel's failure to advise the defendant of the repercussions of his guilty plea within the context of burglary being a crime of moral turpitude, the *Valdez* court set forth numerous reasons that the law was not "succinct, clear, and explicit." First, the court observed that there was "no clear consensus in the federal courts about how to define a 'crime involving moral turpitude' " and that neither the Immigration and Nationality Act nor the Code of Federal Regulations defined the term or listed examples of crimes in this category. *Id.* ¶ 23. Second, burglary "is not universally regarded as a [crime of moral turpitude] in immigration law" and such an inquiry "turns on multiple factors, including the elements of the burglary statute at issue." *Id.* ¶ 24. Third, the federal circuit courts of appeals were, at the time, "split on which test is appropriate" to determine whether a particular crime is one of moral turpitude. *Id.* ¶25. In light of all these factors, our supreme court concluded that "we cannot agree that the immigration consequences of defendant's conviction were 'succinct, clear, and explicit,' so as to require a warning by counsel that deportation was presumptively mandatory." *Id.* ¶ 26. Accordingly, the court held that trial counsel was "required to give defendant only a general warning of the possibility of immigration consequences." *Id.* Therefore, because the defendant's trial counsel provided him with no advice about the immigration consequences prior to entering his guilty plea counsel's performance was constitutionally

deficient under the first prong of *Strickland*. *Id.* ¶ 27.

¶ 34 Here, there is no question that trial counsel's failure to advise defendant of the consequences of his guilty plea constituted deficient performance under *Strickland*. Defendant pleaded guilty to retail theft and was sentenced to one year of imprisonment. At the postconviction evidentiary hearing, defendant testified that she specifically asked her trial counsel about the potential immigration consequences of pleading guilty. According to defendant, her trial counsel advised her that if she pleaded guilty she would be released sooner and that the guilty plea would not impact her status as a legal permanent resident. Pursuant to the Immigration and Nationality Act, a noncitizen convicted of an aggravated felony is subject to mandatory deportation. 8 U.S.C. §§ 1101(a)(43)(G), 1227(a)(2)(A)(iii) (2012), see *Lee v. United States*, 582 U.S.__, __, 137 S. Ct. 1958, 1963 (2017). The federal immigration statutes define an aggravated felony as, *inter alia*, a theft or burglary offense "for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(G) (2012). The term of imprisonment referenced in that subsection is the term actually imposed, not the statutorily available sentence. *United States v. Guzman-Bera*, 216 F.3d 1019, 1021 (11th Cir. 2000). As in *Padilla*, the consequences of defendant's plea could have been easily determined from a reading of the immigration statutes. See *Padilla*, 559 U.S. at 369. Because defendant was sentenced to one year of imprisonment, her retail theft conviction "succinctly, clearly, and explicitly" qualified as an aggravated felony subject to mandatory deportation. Accordingly, the first prong of *Strickland* has been satisfied. See *id.* at 374.

¶ 35 *Prejudice*

¶ 36 We now turn to consider the second prong of the *Strickland* analysis, whether defendant suffered prejudice. Defendant maintains that she was prejudiced by counsel's deficient advice

which led her to believe that by pleading guilty her immigration status would not be affected and she would be able to return to her young son, a United States citizen, and her husband upon serving her term of imprisonment.

¶ 37 In response, the State argues that defendant did not suffer the required prejudice where she cannot demonstrate this conviction led to her deportation and that defendant's claims merely consist of post hoc assertions that she would not have pleaded guilty had she known about the deportation consequences. The State further asserts that any prejudice defendant may have suffered was cured by the trial court's admonishments pursuant to section 113-8 of the Criminal Code of 1963 (Code) (725 ILCS 5/113-8 (West 2010)).

¶ 38 Our supreme court recently had the opportunity to explain the legal standard employed when considering the prejudice prong of an ineffective assistance of counsel claim in the guilty plea context in *People v. Brown*, 2017 IL 121681. In that case, Brown pleaded guilty to armed habitual criminal and was sentenced to 18 years' imprisonment. *Id.* ¶ 5. Later, Brown learned that his trial counsel's advice, that he would only serve 50% of his sentence, was incorrect—he, in fact, would be required to serve 85%. *Id.* ¶ 10. Brown filed a postconviction petition, asserting in part that he received ineffective assistance of trial counsel because counsel misinformed him on his potential eligibility for good time credit and incorrectly advised him that he would serve only 50% of his 18-year sentence. *Id.* ¶ 13. The trial court dismissed the petition at the second stage, finding Brown was not prejudiced by any error in counsel's advice on sentencing. *Id.* ¶ 19. The appellate court affirmed. *Id.* ¶ 20.

¶ 39 Pertinent to this case, before our supreme court, Brown challenged the proper legal standard for a claim of ineffective assistance. According to Brown, Illinois courts required post-conviction petitioners alleging ineffective assistance of guilty plea counsel to assert a claim of

innocence or state a plausible defense that could have been raised at trial to satisfy the prejudice prong of *Strickland*. *Id.* ¶ 29.

¶ 40 In light of the recent United States Supreme Court decision *Lee*, our supreme court concluded that a guilty-plea defendant was not required to establish actual innocence or a plausible defense in order to establish prejudice. *Id.* ¶¶ 40, 46. The court reiterated that while the first prong of *Strickland* remains the same for guilty-plea defendants (*Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985)), for purposes of the prejudice prong, a guilty-plea defendant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial" (*id.* at 59). *Brown*, 2017 IL 121681, ¶ 26; see *Valdez*, 2016 IL 119860, ¶ 29. This inquiry requires a "case-by-case examination of the totality of the evidence." (Internal quotation marks omitted.) *Lee*, 582 U.S. at ___, 137 S. Ct. at 1966. However, "[c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Id.* at ___, 137 S. Ct. at 1967; see *Brown*, 2017 IL 121681, ¶ 48.

¶ 41 With this legal standard in mind, we turn to examine *Lee*, which we find to be instructive regarding the prejudice issue. In that case, Lee, a native of South Korea and a lawful permanent resident of the United States for 35 years, was indicted on one count of possessing ecstacy with intent to distribute. *Lee*, 582 U.S. at ___, 137 S. Ct. at 1962. Lee's attorney assured him that the government would not deport him if he pleaded guilty. *Id.* Lee followed his attorney's advice, pleaded guilty, and was sentenced to a year and a day in prison. *Id.* at ___, 137 S. Ct. at 1963. Lee, however, had pleaded guilty to an aggravated felony under the Immigration and Nationality Act, which subjected him to mandatory deportation. *Id.* Upon learning he would be deported

after serving his sentence, Lee filed a motion to vacate his conviction and sentence, arguing that his attorney had provided constitutionally ineffective assistance. *Id.* At an evidentiary hearing on Lee's motion, both Lee and his plea-stage attorney testified that " 'deportation was the determinative issue in Lee's decision to accept the plea' " and a magistrate judge recommended that Lee's plea be set aside and his conviction vacated because he had received ineffective assistance of counsel. *Id.* at ___, 137 S. Ct. at 1963-64. The District Court, however, denied the relief, concluding that in light of the overwhelming evidence of Lee's guilt, he would have almost certainly been found guilty and received a significantly longer prison sentence, and subsequent deportation had he gone to trial, thus Lee was unable to demonstrate he was prejudiced by his attorney's erroneous advice. *Id.* at ___, 137 S. Ct. at 1964. The Court of Appeals for the Sixth Circuit affirmed the denial of relief. *Id.*

¶ 42 The Supreme Court granted *certiorari* and considered only the second prong of the *Strickland* analysis as the Government conceded that Lee's plea-stage attorney provided inadequate representation. *Id.* Accordingly, the only question before the Court was whether Lee could demonstrate he was prejudiced by counsel's erroneous advice. *Id.*

¶ 43 The Court first explained that typically, a claim of ineffective assistance of counsel involves a claim of attorney error during the course of the legal proceeding and that when a defendant raises such a claim he or she "can demonstrate prejudice by showing 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Id.* (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 482 (2000)). In a case involving a guilty plea, however, "counsel's 'deficient performance arguably lead not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself.' " *Id.* at ___, 137 S. Ct. at 1965 (citing *Flores-Ortega*, 528 U.S. at 483). Thus, we consider not whether the

result of the proceeding would have been different, but "whether the defendant was prejudiced by the 'denial of the entire judicial proceeding *** to which he had a right.' " *Id.* (citing *Flores-Ortega*, 528 U.S. at 483). This can be established when the defendant demonstrates "a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' " *Id.* (citing *Hill*, 474 U.S. at 59).

¶ 44 In determining whether Lee demonstrated prejudice, the Supreme Court advised that "Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Id.* at ___, 137 S. Ct. at 1967. Upon reviewing the contemporaneous evidence, the Court held that Lee demonstrated a reasonable probability that, but for his counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Id.* at ___, 137 S. Ct. at 1969. In so holding, the Court recited the "unusual circumstances of this case" that: Lee asked his attorney repeatedly whether there was any risk of deportation; deportation was the determinative issue in his decision to accept the plea deal; he had lived in the United States for nearly three decades, had two businesses in Tennessee, and was the only family member in the United States who could care for his elderly parents—both naturalized American citizens; there was no indication that he had any ties to South Korea. *Id.* at ___, 137 S. Ct. at 1967-68. In addition, the Court noted that during his plea colloquy, the judge "warned him that a conviction 'could result in your being deported,' and asked '[d]oes that at all affect your decision about whether you want to plead guilty or not,' Lee answered, 'Yes, Your Honor.' [Citation.] When the judge inquired '[h]ow does it affect your decision,' Lee responded, 'I don't understand,' and turned to his attorney for advice. [Citation.] Only when Lee's counsel assured him that the judge's statement was a

'standard warning' was Lee willing to proceed to plead guilty." *Id.* at ___, 137 S. Ct. at 1968.

¶ 45 The case at bar is distinguishable from the facts which demonstrated prejudice in *Lee*. Here, the facts do not establish with "substantial and uncontroverted evidence" that defendant would not have accepted a plea had she known it would lead to deportation. See *id.* at ___, 137 S. Ct. at 1969. Unlike *Lee*, defendant did not have any business ties to the United States. While defendant testified that she had attended school in the United States and became a certified nursing assistant, she also testified that she did not maintain that career for long. Furthermore, while Lee demonstrated he had "strong connections" to this country and no other ("there is no indication that he had any ties to South Korea; he had never returned there since leaving as a child"), here it was not established whether defendant had visited Poland or maintained any connections with Poland after coming to the United States. See *id.* at ___, 137 S. Ct. at 1968. And although defendant's child is a United State's citizen, the record is unclear as to whether her husband is also a United States citizen. In comparison, Lee was "the only family member in the United States who could care for his elderly parents—both naturalized American citizens." *Id.* Moreover, we do not know whether defendant would have gone to trial had she been apprised of the immigration consequences as there was no corroborating testimony or affidavits in the record to that effect. See *id.* at ___, 137 S. Ct. at 1967-68 ("both Lee and his attorney testified at the evidentiary hearing below that Lee would have gone to trial had he known about the deportation consequences").

¶ 46 Most notably, whereas in *Lee* the defendant immediately inquired as to the immigration consequences at the guilty plea hearing and made it known to the court that those consequences effected his decision to plead guilty (see *id.* at ___, 137 S. Ct. at 1968), defendant here did not hesitate in responding in the affirmative to the trial court's admonishment regarding the

immigration consequences of her guilty plea. Although defendant testified at the postconviction evidentiary hearing that she was nervous, disoriented, crying, and could not recall the judge's admonishments, defendant admitted on cross-examination that she did not request an explanation of the admonishment. Accordingly, based on its ultimate determination, the circuit court did not consider her testimony to be credible. Examining the circumstances and facts existing at the time of this particular guilty plea, we conclude that defendant has not demonstrated a reasonable probability that, but for her counsel's error, she would not have pleaded guilty and would have insisted on going to trial. See *id.* at ___, 137 S. Ct. at 1969.

¶ 47 Because we conclude that defendant has failed to demonstrate prejudice, we need not consider the State's argument that the trial court's admonishment pursuant to section 113-8 of the Code (725 ILCS 5/113-8 (West 2010)) cured any prejudice resulting from counsel's deficiency.

¶ 48 CONCLUSION

¶ 49 For the reasons stated above, the judgment of the circuit court of Cook County is affirmed.

¶ 50 Affirmed.