2012 IL App (2d) 110900-U
No. 2-11-0900
Order filed June 28, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROLLYVER ESTEBAN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 99-CF-653 Honorable Victoria A. Rossetti, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Bowman and Birkett concurred in the judgment.

Held: The trial court properly denied defendant's motion to withdraw his guilty plea under Padilla: defense counsel accurately told defendant that he faced a risk of deportation, which was not a practical certainty notwithstanding what the law purported to mandate.

ORDER

¶ 1 Defendant, Rollyver Esteban, a legal resident alien, pleaded guilty to attempted unlawful possession of a controlled substance with intent to deliver (720 ILCS 5/8-4(a) (West 1998); 720 ILCS 570/402(a)(2)(B) (West 1998)) and was sentenced to two years' probation. He moved to withdraw his guilty plea, contending that, under *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473

(2010), his trial counsel had been ineffective for failing to advise him that his guilty plea meant that he could not avoid deportation. The trial court denied the motion. Defendant appeals. We affirm.

¶ 2 On March 17, 1999, defendant was indicted for unlawful possession of 100 or more but less than 400 grams of a substance containing cocaine with intent to deliver (720 ILCS 570/401(a)(2)(B) (West 1998)); the lesser included offense of unlawful possession of a controlled substance (720 ILCS 570/402(a)(2)(B) (West 1998)); and possession of a firearm without a firearm owner's identification card (430 ILCS 65/2(a)(1) (West 1998)). On April 19, 2010, he entered a negotiated guilty plea to the amended second count, attempted unlawful possession of a controlled substance, and the State dismissed the other counts. Per the agreement, defendant was sentenced to two years' probation.

¶ 3 On May 14, 2010, defendant moved to withdraw his guilty plea, claiming that his trial counsel, David Weinstein, had been ineffective. As pertinent here, the motion alleged the following facts. On April 13, 2010, Weinstein wrote defendant, telling him that the State had lost crucial evidence and that he believed that he could get the charges dismissed. On April 19, 2010, however, Weinstein told defendant that he had to plead guilty or he would be sent to prison. Defendant thus entered the negotiated plea. According to defendant's immigration lawyer, the conviction meant that he would lose his status as a legal immigrant and would be deported.

¶ 4 Defendant's motion attached a memorandum of law. As pertinent here, it stated as follows. On March 31, 2010, the Supreme Court issued *Padilla*, an ineffective-assistance opinion holding that an attorney must advise his client accurately about the immigration consequences of a potential conviction. Weinstein, however, did not advise defendant that, under federal law, his conviction of attempted possession of cocaine subjected him to automatic deportation. Defendant did not want to leave his family behind in the United States, so he sought to withdraw his guilty plea.

¶ 5 Defendant's motion attached several exhibits. The first was the transcript of the guilty-plea hearing of April 19, 2010. After the parties explained the plea agreement, the hearing continued:

"THE COURT: And are there issues with regard to Mr. Esteban's status here?

MR. WEINSTEIN: Judge, he's a legal resident. I have advised him as to the possibility—the consequences of this negotiation to [*sic*] immigration status.

THE COURT: Sir, did you go over all of that with your attorney?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you understand, sir, that no one can make you any promises with regard to your status here, but you have to be informed that with a conviction, this could result in you being deported, excluded from admission or denied naturalization. Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you have any other questions or issues about this that you need to go over with your lawyer?

THE DEFENDANT: No, ma'am."

¶ 6 The judge admonished defendant that attempted unlawful possession was a Class 2 felony with the possibility of probation. The State presented the factual basis of the plea, also noting that, in 1999, an arrest warrant was issued because defendant failed to appear in court. The police later destroyed the cocaine and the gun. The judge accepted defendant's plea and sentenced him per the agreement to two years' probation.

¶ 7 The second exhibit attached to the motion was defendant's affidavit, in which he stated as follows. He pleaded guilty because Weinstein had told him that, if he did not, he would definitely

be sent to prison. When he first spoke to Weinstein after hiring him, he expressed his concerns about deportation. He consulted an immigration attorney, who gave him some documents, which he gave to Weinstein. The only thing that Weinstein told him was that "he didn't know anything about immigration law, and could not provide any detailed information on that topic." The motion next attached the aforementioned documents, consisting of articles and printouts discussing the consequences of *Padilla* and the immigration consequences of various Illinois offenses.

¶ 8 In its response to defendant's motion, the State argued as follows. *Padilla* was distinguishable. Padilla had pleaded guilty to a drug charge that made deportation "virtually mandatory," yet, before he entered the plea, his attorney had advised him that he "did not have to worry about immigration status since he had been in the country so long." (Internal quotation marks admitted.) *Padilla*, 559 U.S. at ___, 130 S. Ct. at 1478. Here, by contrast, Weinstein advised defendant accurately several times that a conviction carried a risk of deportation. Further, defendant could not show prejudice, because the plea spared him a probable conviction of a Class X felony and substantial prison time.

¶ 9 On November 12, 2010, the trial court held an evidentiary hearing on defendant's motion. We summarize the evidence. Defendant first called Jo-An Rochene-McLinn, an immigration attorney. After being qualified as an expert, she testified on direct examination as follows. The immigration consequences of criminal convictions are controlled by federal law. For drug offenses, the Immigration and Naturalization Act states that any criminal conviction, other than possession of 30 grams or less of marijuana for personal use, makes a legal alien "removable." See 8 U.S.C. § 1227(a)(2)(B)(i) (2000). After defendant's attorney described the offense to which defendant had pleaded guilty, Rochene-McLinn testified that immigration authorities "would probably find them

removable." The offense would "be enough to issue a notice to appear in immigration court." Rochene-McLinn agreed with defendant's attorney that "removable" means "you get deported." She said that she knew of no exception that defendant could invoke to avoid deportation. Asked whether his deportation was inevitable, she said that "it [was] very inevitable that he could go through a proceeding in immigration Court [*sic*]." She agreed with counsel that deportation would be "nearly automatic."

¶ 10 Rochene-McLinn testified on cross-examination that she had known defendant for about a year and a half; her colleague, an immigration attorney, had been helping him with immigration issues. However, her colleague was primarily concerned with areas other than deportation, and Rochene-McLinn was not sure whether she was aware that a cocaine-related conviction makes an alien removable. Rochene-McLinn explained that, by "nearly automatic," she meant that a bureaucratic oversight or error of some sort could result in a person not being deported. Also, the federal government does not necessarily deport every person who is removable. Defendant had not been deported yet.

¶ 11 Rhoda Cordera, defendant's sister, testified as follows. Defendant was first arrested in this case in 1999. He fled to the Philippines, and a bench warrant was issued for his arrest. He returned to the United States in 2003 or 2004. Defendant had told Cordera that he feared going to prison. When she, defendant, and their uncle first spoke with Weinstein, defendant's immigration status did not come up. The next time that Cordera heard Weinstein discuss the case was on April 19, 2010, when she, Weinstein, and defendant spoke in the hallway just before the guilty-plea hearing. Weinstein told defendant that he had to plead guilty or he would go to prison, but he did not mention anything about the possibility of deportation.

¶ 12 Defendant testified on direct examination as follows. In 1993, he became a lawful resident alien in the United States. In 1999, he was arrested in this case. He later "skipped out on bond" but was eventually arrested and made bond. In February 2010, he first met with Weinstein and hired him. While Weinstein was representing him, he told Weinstein that he was a permanent resident alien. Asked whether they discussed the topic of deportation, defendant testified, "No, he said he doesn't know about immigration law."

¶ 13 Defendant testified that, after hiring Weinstein, he also consulted Veda Maniquis, Rochene-McLinn's colleague. Sometime in March, defendant told Weinstein to talk to Maniquis about immigration law if he had the time, and he gave Weinstein the documents that he had received from Maniquis. Weinstein said that he was a criminal lawyer and did not know about immigration law. Defendant did not believe that the two attorneys ever spoke to each other.

¶ 14 Defendant testified that, between hiring Weinstein and pleading guilty, he went to court with Weinstein about four or five times. Between April 13, 2010, when Weinstein hand-delivered the letter mentioning a possible dismissal, and April 19, 2010, defendant talked to Weinstein once by phone; Weinstein told him to show up in court and that he could get the charges dismissed. The April 13, 2010, letter said nothing about a proposal for a guilty plea and did not say that defendant would be subject to deportation if he pleaded guilty. On April 19, 2010, defendant came to court. Weinstein pulled him into the hallway and told him to plead guilty. Defendant mentioned the April 13, 2010, letter, but Weinstein responded, " 'What do you want? Do you want to go to prison or plead for this charge.' " Defendant testified, "Of course, I was thinking I don't want to go to prison, so I just—I did what he told me to do."

¶ 15 Defendant testified that Weinstein never told him that he would be deported after pleading guilty. When defendant pleaded guilty, he was not aware that he would be subject to nearly automatic deportation. Had he known, he would not have entered into the plea.

¶ 16 Defendant testified on cross-examination as follows. When he was arrested in 1999, he knew that he was facing a long sentence, and he fled to the Philippines that year. He left because of the "possible penalties" but also because he was receiving death threats from gang members (apparently those involved with him in his drug business). Defendant returned to the United States in 2001 or 2002 but was not arrested until January 2010. At the initial meeting with Weinstein, defendant told Weinstein that he was a legal resident. Weinstein responded that he was a criminal lawyer and did not know about "immigration things." After the first meeting, defendant asked Weinstein "two times" whether he was going to get deported. Weinstein did not give him any advice but told him that he needed to talk to an immigration attorney. Defendant already knew Maniquis, so, with Weinstein's approval, he consulted her.

¶ 17 Defendant testified that he spoke to Maniquis about his case five or six times. She specifically said that, if he pleaded guilty, he "might" be deported.

¶ 18 Defendant testified that the first time that he heard that the State would offer him a plea bargain with a promise of probation was when he went to court on April 19, 2010. In the hallway conversation, Weinstein told defendant to accept the offer, primarily because the alternative was prison. Weinstein did not say anything about getting the case dismissed. At the hearing, defendant listened to everything but did not understand all of it. He admitted that, at the hearing, both he and Weinstein stated that they had discussed the possible immigration consequences of the guilty plea, but he now testified that no such discussions took place.

¶ 19 Defendant rested. The State called Weinstein, who testified as follows. At his first consultation with defendant, and a number of times thereafter, he did discuss the possible effect of the case on defendant's immigration status as a legal nonresident. Weinstein advised defendant that "a conviction [of] a felony could affect his immigration status. He could be deported for that." Weinstein also told defendant that he was not an immigration lawyer and that defendant would need to speak to an immigration lawyer about the subject.

¶ 20 Weinstein recalled that Maniquis called him about defendant's case. She asked about the status of the case. He told her that the chances of defendant's not being convicted of anything were "very slim," because, even if the drug and weapon evidence were suppressed, the State could charge defendant with a felony bail-bond violation and could easily prove it. He told Maniquis that defendant's "number one interest was to stay out of jail." Defendant called Weinstein two or three times a week, and "he was very, very scared of going to jail and his number one thing was to stay out of jail." When Weinstein and defendant discussed the case, defendant often raised the immigration situation. Weinstein always gave him the same answer: "If he is convicted, that he could be deported."

¶ 21 Weinstein testified that, after learning that the police had lost crucial evidence, he concluded that there was a very good chance that he could get the case dismissed. However, the assistant State's Attorney assigned to the case told Weinstein that, if that happened, the State would charge defendant with a felony bail-bond violation. Weinstein told defendant about his alternatives, mentioning that the State might be able to obtain convictions even without the drug and weapons evidence that had been lost or might be suppressed. When Weinstein spoke to defendant just before the guilty-plea hearing, he told defendant that "he could still be deported" based on his plea of guilty.

When he presented the probation-only plea offer to defendant, defendant was "very, very happy with the offer," because it meant that he could avoid prison.

¶ 22 Asked on cross-examination whether deportation was actually mandatory for "these types of convictions," Weinstein responded, "No, I have clients who have been deported for misdemeanor convictions. I had clients who had Class X convictions who don't get deported. I think it's more likely than not, yes, but I have not, you know, there is no rhyme or reason to it." Weinstein testified that *Padilla* was issued in March 2010 and that he became aware of the opinion "[r]ight away."

¶ 23 After hearing arguments, the trial judge stated as follows. Defendant's expert had testified that he had pleaded guilty to a "removable offense," but also that "it would require a hearing." Nobody knew what would happen at a removal hearing; that would be "up to the hearing officer as to the background and facts surrounding the circumstances surrounding [*sic*] this defendant." Weinstein had advised defendant that "there was a risk of deportation, that he was eligible for deportation," and defendant had also spoken to an immigration attorney. The judge continued:

> "[T]his attorney, immigration lawyer, also talked to Mr. Weinstein, and the immigration lawyer advised that she wanted the charges dismissed. He indicated that would not happen, not likely. There were also bail issues.
>
> Again the defendant advised [*sic*] that he talked to his immigration lawyer four or five times and talked to Mr. Weinstein about the consequences of the negotiation with regards to his immigration status. Mr. Weinstein indicated he had talked to the defendant a number of times regarding the consequences of immigration. It is reflected in the transcripts of the plea of guilty[.] *** [Based on all the evidence] this Court finds that Mr.

Weinstein was not ineffective in his advisals of this defendant of the consequences of immigration; that the plea was knowing and voluntary."

After the trial court denied his motion to withdraw his guilty plea, he appealed. We remanded for compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). *People v. Esteban*, No. 2-10-1269 (2011) (unpublished order under Supreme Court Rule 23). On remand, the parties and the court proceeded on the evidence from the hearing on defendant's motion to withdraw his guilty plea. The court denied the motion, for the reasons given before. Defendant timely appealed.

¶ 24 On appeal, defendant contends that the trial court erred in denying his motion to withdraw his guilty plea and vacate the judgment. Defendant argues that, under *Padilla*, his trial attorney's giving of equivocal advice about the immigration consequences of his offense was not objectively reasonable. He maintains that, because his offense—like the defendant's offense in *Padilla*—made him subject to automatic deportation, Weinstein was obligated to tell him so, and not merely to tell him that he "might" or "could" be deported. We disagree.

¶ 25 To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) counsel's performance was objectively unreasonable; and (2) it is reasonably probable that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984); *People v. Evans*, 369 Ill. App. 3d 366, 383 (2006). Defendant's claim of ineffectiveness is based on *Padilla*, in which the Court held that the defendant's attorney failed the first prong of the *Strickland* test by misinforming the defendant about the immigration consequences of his guilty plea. For the reasons that follow, we hold that the trial court correctly concluded that Weinstein did not render ineffective assistance.

¶ 26 We decide this case on its own facts, leaving broader questions about the application of *Padilla* for another day. Under *Padilla*, a noncitizen defendant's attorney must advise him whether his plea carries a risk of deportation. *Padilla*, 559 U.S. at ___, 130 S. Ct. at 1486. Unlike the attorney in *Padilla*, Weinstein did not tell his client that he could not or would not be deported. Instead, he put defendant on notice that he could be deported. Defendant's expert, Rochene-McLinn, conceded that, whatever the state of the law, actual deportation was not inevitable; it was possible that defendant would not be deported. Notably, at the time of the first hearing on his motion to withdraw his guilty plea, and apparently at all times of record thereafter, defendant had not been deported. Therefore, Weinstein's advice was not unreasonable under the circumstances.

¶ 27 Because the trial court did not err in rejecting defendant's ineffective-assistance claim, the judgment of the circuit court of Lake County is affirmed.

¶ 28 Affirmed.