2019 IL App (2d) 190160-U
No. 2-19-0160
Order filed September 30, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. FRANCISCO J. NUNEZ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 13-CF-3350 Honorable Victoria A. Rossetti, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's postconviction petition, which alleged that his guilty plea was induced by ineffective assistance of counsel: defendant did not show prejudice under *Lee*, as the record refuted his assertion that, had he known the certainty of deportation, he would have rejected the State's offer of probation and gone to trial despite the absence of a plausible defense.

¶ 2 Defendant, Francisco J. Nunez, pleaded guilty to unlawful possession of a controlled substance (720 ILCS 570/401(c)(2) (West 2016)) and was sentenced to 48 months' intensive probation. He filed a postconviction petition claiming that his counsel was ineffective for failing

to inform him that the plea would result in his deportation. The trial court granted the State's motion to dismiss the petition, and defendant timely appeals. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was initially charged with possession of a controlled substance with the intent to deliver as well as simple possession. At his arraignment, defendant was informed that convictions of those offenses could result in his deportation. Ultimately, defendant was allowed to plead guilty to simple possession, a probationable Class 1 felony, in exchange for 48 months of intensive probation. At the plea hearing, the following colloquy occurred:

> "THE COURT: And I know we did a 402 conference quite a long time ago, August 4th of 2015. And at that time I was told that there are some immigration issues. And although he's a permanent resident, have you gone over with him that even though he is, he's not a citizen, that this conviction could result in him being deported, excluded from the United States, or denied naturalization; have you gone over that with him?
>
> MR. NIKITAS [DEFENSE COUNSEL]: We did discuss that. He has been here since he's two. But you have correctly stated his status. Our hope is that with this offer and this resolution, it will keep him. But he understands that they could review that, his status, because of this plea.
>
> THE COURT: Do you understand that, sir?
>
> THE DEFENDANT: I understand.
>
> THE COURT: Do you have any other questions or issues about that that you need to go over with Mr. Nikitas?
>
> THE DEFENDANT: I do not, [Y]our Honor.

THE COURT: And you understand, sir, that no one can make you any promises with regard to your status here; you understand that?

THE DEFENDANT: Yes, [Y]our Honor."

¶ 5 The trial court accepted the plea and sentenced defendant accordingly. Defendant did not file a direct appeal.

¶ 6 On September 10, 2018, defendant filed a postconviction petition. The petition, prepared by an attorney, alleged the following. Defendant was not a citizen of the United States. The conviction resulting from his plea was an aggravated felony, for which federal law mandated his deportation. See 8 U.S.C. § 1227(a)(2)(B)(i) (2017). In fact, defendant was in the custody of immigration officials. Defense counsel was aware that defendant was not a citizen and advised him that his guilty plea could result in his deportation. However, counsel should have advised him that his plea *would* result in his deportation. Defendant alleged that he "would NOT have pled guilty if he had received completely accurate advice and would instead have proceeded to trial even though that trial could have and likely even would have resulted in a finding of guilty to enhanced charges and greatly enhanced punishment."

¶ 7 The trial court found that the petition stated the gist of a claim of ineffective assistance of counsel and granted the State time to respond. The State moved to dismiss the petition, arguing that defendant cited no contemporaneous evidence that, had he known that a guilty plea would almost certainly result in his deportation, he would have rejected the plea offer and gone to trial. The State argued that defendant's *post hoc* assertions were insufficient and that, in any event, the court's correct admonishments cured any prejudice.

¶ 8 The court granted the motion, noting that it admonished defendant pursuant to statute about the possible immigration consequences of his plea. Following the admonishment,

defendant stated that he understood, that he did not have any further questions, and that he wanted to go forward with the plea. Thus, defendant could not show that his attorney's advice prejudiced him. Defendant timely appeals.

¶ 9 II. ANALYSIS

¶ 10 Preliminarily, the State contends that defendant's fact statement does not comply with Illinois Supreme Court Rule 341(h)(6) (eff. Nov. 1, 2017)) in that it is argumentative and contains statements not supported by citations to the record on appeal. The State moves to strike it. Because the violations are not serious enough to hinder our review, we deny the motion to strike, but we will disregard any inappropriate statements.

¶ 11 Defendant contends that counsel was ineffective for informing him that he "could" be deported as a result of his plea, allowing him to believe that he had a realistic chance of remaining in the country, although immigration law made deportation a virtual certainty following a conviction of such an offense. He argues that the trial court reinforced this belief by admonishing him that he "could" be deported.

¶ 12 The State responds, as it did in the trial court, that defendant provides no contemporaneous evidence that the immigration consequences attached to the plea were critical to his decision. In other words, defendant offers no proof that, had he known that deportation was almost certain, he would have rejected the State's offer and elected to go to trial on the admittedly small chance of an acquittal. The State notes that, after the court admonished him that deportation was possible, defendant did not seek clarification.

¶ 13 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2018)) permits a defendant to challenge his conviction for violations of his federal or state constitutional rights. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). To be entitled to that relief, a defendant must

demonstrate that he has suffered a substantial deprivation of his constitutional rights in the proceedings that produced the conviction or sentence being challenged. *Id.* We review *de novo* the dismissal of a postconviction petition at the second stage. *Id.* at 182-83.

¶ 14 A defendant has a right to the effective assistance of counsel at all critical stages of a criminal proceeding, including the entry of a guilty plea. *People v. Hughes*, 2012 IL 112817, ¶ 44. Claims of ineffective assistance are governed by the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984). To succeed on an ineffective-assistance claim, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced him. *Id.* at 687, 688. "[W]en a defendant claims that his counsel's performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' " *Lee v. United States*, 582 U.S.___, ___, 137 S. Ct. 1958, 1965 (2017) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

¶ 15 It is now clear that, to fulfill his or her duties in advising a client during plea negotiations, an attorney must inform the client that the plea carries a risk of deportation. *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010). In Illinois, prior to accepting a guilty plea from a noncitizen, the court must inform the defendant that a 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.' " 725 ILCS 5/113-8 (West 2018).

¶ 16 In *Lee*, the defendant came to the United States from South Korea at the age of 13, but never became a United States citizen. While running a successful business, he also engaged in illegal activity and was indicted for possessing ecstasy with the intent to distribute. Lee's

attorney advised him that he would receive a lighter sentence by pleading guilty. Lee informed his attorney of his immigration status and asked repeatedly whether he would be deported. His attorney told him that he would not. Lee accepted a plea agreement and was sentenced to one year in prison. *Lee*, 582 U.S. at ___, 137 S. Ct. at 1962-63. However, he later learned that he would indeed be deported. He moved to vacate his conviction, contending that his attorney had provided ineffective assistance. *Id.* at ___, 137 S. Ct. at 1963.

¶ 17 The case reached the Supreme Court, where the parties agreed that Lee's attorney's advice was objectively unreasonable. They disagreed, however, about whether Lee was prejudiced. The government argued that he was not, because he would almost certainly have lost at trial. He would have received a longer sentence, following which he would have been deported anyway. The Court disagreed, noting that the decision whether to plead guilty involves more "than simply the likelihood of success at trial." *Id.* at ___, 137 S. Ct. at 1966. The decision "also involves assessing the respective consequences of a conviction after trial and by plea," and when "those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive." *Id.*, at ___, 137 S. Ct. at 1966. Lee argued that avoiding deportation was the dispositive factor in his decision whether to accept the plea and, thus, "deportation after some time in prison was not meaningfully different from deportation after somewhat less time." Id. at ___, 137 S. Ct. at 1967. He argued that he "would have rejected any plea leading to deportation—even if it shaved off prison time—in favor of throwing a 'Hail Mary' at trial." *Id.* at ___, 137 S. Ct. at 1967.

¶ 18 The Court concluded that, under the unusual circumstances of the case, Lee had demonstrated a reasonable probability that he would have rejected the plea had he known that it would inevitably lead to deportation. *Id.* at___, 137 S. Ct. at 1967. The Court cautioned that

courts should not upset a defendant's guilty plea "solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." *Id.* at ___, 137 S. Ct. at 1967. But the Court found that Lee had presented substantial evidence that he contemporaneously demonstrated his concern about the immigration consequences of the plea. The Court concluded that, under the circumstances, a decision to reject the plea and gamble on even a small chance of acquittal at trial would have been rational. Thus, Lee had demonstrated a reasonable probability that, but for his counsel's faulty advice, he would have rejected the plea and gone to trial. *Id.* at ___, 137 S. Ct. at 1969.

¶ 19 This court confronted similar circumstances in *People v. Hoare*, 2018 IL App (2d) 160727. There, the defendant pleaded guilty to drug crimes and was sentenced to "410 probation." See 720 ILCS 570/410 (West 2012). Under this provision, if the defendant successfully completes probation, the charges are dismissed (*id.* § 410(f)) and the disposition is not considered a conviction under Illinois law (*id.* § 410(g)). However, following his plea, the defendant was deported. He then filed a postconviction petition in which he alleged that he told his trial counsel that he was not a United States citizen and asked about the immigration consequences of the plea agreement. His attorney told him that completing probation successfully would result in the charges being dismissed. The defendant took this to mean that, on completing his probation, he would not be convicted and, thus, could not be deported. *Hoare*, 2018 IL App (2d) 160727, ¶ 9.

¶ 20 The defendant's affidavit stated that he pleaded guilty in reliance on counsel's representation that his plea would not result in a conviction that would permit the federal government to deport him. Had he known that he would be deported after pleading guilty, he

would have gone to trial in the hope of an acquittal. He had a wife and children in this country and "would have done everything he could" to keep his family together. *Id.* ¶ 12.

¶ 21 We held that the defendant stated the gist of a meritorious claim for postconviction relief. We held that defense counsel should have known that the guilty plea would make the defendant automatically deportable and was obliged to "give him more than the tentative and vague advice that his plea 'could result' in 'adverse immigration consequences.' " *Id.* ¶ 22.

¶ 22 Defendant argues that *Lee* and *Hoare* control here, but both are distinguishable for two important reasons. First, both attorneys affirmatively misled their clients. In *Lee*, the attorney told his client that the conviction would *not* result in deportation. In *Hoare*, while the attorney did not say anything that was literally untrue, he gave his client the false impression that successfully completing probation would allow him to avoid deportation. Here, in stark contrast, counsel, as well as the trial court, correctly informed defendant that deportation was a possibility.

¶ 23 More importantly, however, the defendants in *Lee* and *Hoare* presented evidence that, prior to accepting the pleas, they made clear to their attorneys that even a remote possibility of remaining in the country was better than accepting pleas that would certainly result in deportation.

¶ 24 Here, defendant points to no such evidence. Defendant's statement of facts asserts that defendant "informed his defense attorney of his noncitizen status and repeatedly asked his attorney whether he would face deportation as a result of the criminal proceedings." However, there is no record citation for this statement, and the postconviction petition does not contain such an allegation. To the extent the record speaks to this issue at all, it casts doubt on defendant's assertion. After the court admonished defendant that he could be deported as a result

of his conviction, defendant said that he had no questions. See *People v. Simms*, 192 Ill. 2d 348, 359 (2000) (petitions subject to dismissal when refuted by the record).

¶ 25 If, as defendant now asserts, the hope of avoiding deportation was the determinative factor in his decision to accept the plea, he should have been able to allege in good faith that he at least asked his attorney for more specifics. At the very least, he would have accepted the court's invitation to inquire further, rather than simply leaving the matter to chance.

¶ 26 Defendant points to his counsel's statement that he "hoped" the plea would allow defendant to remain in the country as proof that counsel misled him into believing that he would not be deported as a result of the plea. But the vague statement of hope cannot be equated with the type of misinformation provided in *Lee* and *Hoare*. The very vagueness of the statement should have prompted defendant to inquire further.

¶ 27 The reason this is important is that, to succeed on his claim, defendant must show that, but for his attorney's allegedly deficient performance, he would have rejected the State's plea offer and insisted on going to trial. *Lee*, 582 U.S. at ___, 137 S. Ct. at 1964. To do so, defendant must show that rejecting the plea agreement and going to trial would have been rational. *Padilla*, 559 U.S. at 372. If the decision to accept the plea was the only rational one under the circumstances, then defendant suffered no prejudice.

¶ 28 The defendants in *Lee* and *Hoare* wanted to make what most people would consider irrational choices: to reject offers of reduced prison terms and risk the possibility of longer sentences with only a small chance of acquittal. These were rational choices under the circumstances only because of the extraordinary importance they placed on avoiding deportation.

¶ 29 Here, defendant faced a minimum of nine years in prison if he lost at trial but, as a result of his plea, he was given probation. He has never claimed to have a viable defense to the

charges. Thus, to make rejecting the State's offer rational, defendant would have to prove that he placed paramount importance on the possibility—however slight—of avoiding deportation. Yet he can point to nothing to show that, after being warned that a conviction could potentially lead to his deportation, he ever asked his attorney or the court for clarification. The only allegation in the petition touching on the issue is the statement that defendant "would NOT have pled guilty if he had received completely accurate advice and would instead have proceeded to trial even though that trial could have and likely even would have resulted in a finding of guilty to enhanced charges and greatly enhanced punishment." This, however, is nothing more than the type of "*post hoc* assertions" that *Lee* held insufficient. *Lee*, 582 U.S. at ___, 137 S. Ct. at 1967.

¶ 30 III. CONCLUSION

¶ 31 The judgment of the circuit court of Lake County is affirmed.

¶ 32 Affirmed.