**IN THE COURT OF APPEALS OF IOWA**

No. 2-1033 / 12-0780
Filed January 24, 2013

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**ASMIR DZOPA,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer and George L. Stigler, Judges.

A citizen of Bosnia challenges the judgment entered following his guilty plea to lascivious acts with a child. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Linda Fangman, Assistant County Attorney, for appellee.

Considered by Potterfield, P.J., and Danilson and Tabor, JJ.

**TABOR, J.**

A citizen of Bosnia challenges the judgment entered following his guilty plea to lascivious acts with a child. Asmir Dzopa alleges his trial counsel was constitutionally remiss in allowing him to plead guilty without advice regarding the risk of deportation. Because the record does not establish counsel discussed the potential immigration consequences with Dzopa before he entered a guilty plea, we preserve his claim for postconviction relief proceedings.

## *I. Background Facts and Proceedings*

On June 7, 2011, Waterloo police arrested nineteen-year-old Dzopa for sexual abuse in the third degree. The criminal complaint alleged that Dzopa picked up a thirteen-year-old runaway in his vehicle and engaged in a sex act with her. The Black Hawk County Attorney filed a trial information against Dzopa on August 5, 2011, alleging he committed a class "C" felony, in violation of Iowa Code section 709.4(2)(b) (2011).

Dzopa struck a bargain with the State, agreeing to enter a plea of guilty to lascivious acts with a child, a class "C" felony, in violation of Iowa Code section 709.8(2). In contrast to third-degree sexual abuse, lascivious acts is not a forcible felony under Iowa Code section 702.11, and thus, did not subject Dzopa to a mandatory term of incarceration. Defense counsel explained at the November 18, 2011 plea hearing that both parties recommended the indeterminate ten-year prison sentence be suspended. Counsel also said her client "would like to exercise the delay" before sentencing. Dzopa told the court he was satisfied with the services of his counsel and acknowledged committing

lascivious acts with a child. After accepting Dzopa's plea of guilty, the court explained Dzopa could only challenge "the way we took your plea of guilty here today" by filing a motion in arrest of judgment. The district court did not mention federal immigration laws during the plea colloquy.

The parties appeared for a sentencing hearing on April 23, 2012. The defense had not filed a motion in arrest of judgment to challenge the guilty plea. Defense counsel made the following record:

> [T]his was set previously for sentencing. At that time I made a recommendation for a continuance so that we could check out some immigration issues. Those issues have been checked out. I have spoken to Asmir about those. The situation is simply that there is no hold from immigrations and customs enforcement on Mr. Dzopa at this time. I have explained in my talking to a couple of different people that practice immigration law there is no guarantee that there won't ever be a hold on Asmir, but as of right now there are no red flags that they are placing a hold or concerned about a resolution of this case, and it's my understanding that [the prosecutor] and myself certainly aren't going to go and call them after this hearing is resolved one way or the other.

The sentencing court asked counsel if the immigration issue was "gone into back in November of last year" at the plea hearing. Counsel responded: "We did talk about that, Your Honor, and then again we needed additional time at the time of sentencing previously so I could follow-up with two attorneys." The prosecutor also recalled: "[W]hen we did the plea, there was some discussion about the defendant's status, and as I understand it, he is here legally in the country under certain parameters and we did talk about that at the plea. He is not a citizen, but he is not here illegally."[1] The court sentenced Dzopa in

[1]The transcript of the plea hearing available for the appeal does not reflect the discussion of Dzopa's immigration status memorialized by the attorneys at sentencing.

conformity with the plea agreement, suspending the indeterminate ten-year term, and placing him on probation for two to five years. The court imposed a fine of one thousand dollars and a civil assessment of two hundred fifty dollars, ordered him to register as a sex offender, and informed him of the lifetime supervision mandated by Iowa Code section 903B.1. The court also ordered Dzopa to have no contact with the victim for five years.

Dzopa filed a timely notice of appeal from the judgment and sentence.

***II. Preservation of Error/Standard of Review***

Dzopa's failure to file a motion in arrest of judgment would normally prevent him from contesting his guilty plea on appeal. Iowa R. Crim. P. 2.8(2)(d). But he is not precluded from bringing his challenge under an ineffective-assistance-of-counsel claim. *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011). Claims of ineffective assistance stand as an exception to our normal rules of error preservation. *Id*. We save such claims for postconviction relief proceedings unless the parties provide a satisfactory record on direct appeal so that we can draw a conclusion about the constitutionality of counsel's performance. *Id*.

Because Dzopa is entitled to effective assistance of counsel under the Sixth Amendment, we review his claim de novo. *See id*. To succeed on his claim that counsel's performance violated constitutional norms, Dzopa "must show by a preponderance of the evidence that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted." *See id*. If he falls short on either prong, we will affirm his conviction. *See id*. In a guilty plea case, the prejudice

element "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). The *Hill* Court held: "to satisfy the 'prejudice' requirement, the 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.*; *see State v. Straw*, 709 N.W.2d 128, 135–36 (Iowa 2006).

### *III. Analysis*

Dzopa claims his trial counsel fell short in two measures: (1) by failing to file a motion in arrest of judgment to challenge the plea-taking court's failure to inform him that a criminal conviction "may affect a defendant's status under federal immigration laws" as required by Iowa Rule of Criminal Procedure 2.8(2)(b)(3), and (2) by failing to provide independent advice to her client regarding immigration consequences of the guilty plea as required by *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

Before accepting a plea of guilty, the district court must personally address the defendant in open court and inform him of, and determine he understands, the following:

> (1) The nature of the charge to which the plea is offered.
>
> (2) The mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered.
>
> (3) *That a criminal conviction, deferred judgment, or deferred sentence may affect a defendant's status under federal immigration laws.*
>
> (4) That the defendant has the right to be tried by a jury, and at trial has the right to assistance of counsel, the right to confront and

> cross-examine witnesses against the defendant, the right not to be compelled to incriminate oneself, and the right to present witnesses in the defendant's own behalf and to have compulsory process in securing their attendance.
>
> (5) That if the defendant pleads guilty there will not be a further trial of any kind, so that by pleading guilty the defendant waives the right to a trial.

Iowa R. Crim. P. 2.8(2)(b) (emphasis added). Iowa appellate courts require substantial compliance with this rule. *Straw*, 709 N.W.2d at 134.

The plea-taking court did not tell Dzopa during the colloquy that a criminal conviction could affect his status under the federal immigration laws as required by rule 2.8(3)(b)(3). While statements by the attorneys at sentencing before a different judge suggest that Dzopa's immigration status was discussed at the plea stage, those discussions do not appear in the record on appeal.

The immigration notification missing from the colloquy does not, standing alone, show counsel was ineffective in the plea process. There is nothing in this record to indicate whether Dzopa would have opted to go to trial on the original sexual abuse charge had he been informed by the court of possible immigration consequences arising from the guilty plea to lascivious acts. His claim of ineffective assistance of counsel cannot be decided without additional evidence to inform the prejudice analysis. Accordingly, we find it appropriate to preserve for postconviction relief proceedings. *See id.* at 138.

We next turn to Dzopa's claim that his trial attorney did not meet her professional obligation under *Padilla* to provide him with advice regarding the risk of deportation before he entered his guilty plea. In *Padilla*, the United States Supreme Court acknowledged "Immigration law can be complex, and it is a legal

specialty of its own." 130 S. Ct. at 1483. Still, the Court held that even when the deportation consequences of a particular plea are "unclear or uncertain," a criminal practitioner must advise a noncitizen client that "pending criminal charges may carry a risk of adverse immigration consequences." *Id*.

Dzopa's criminal counsel demonstrated an appreciation for the complexity of federal immigration law by investigating the likelihood of deportation through two attorneys who specialized in that practice. But it is not clear that she did so before her client entered his guilty plea. Counsel told the sentencing court on April 23, 2012, that she asked for the original sentencing hearing (scheduled for March 12, 2012) to be continued "so we could check out some immigration issues." The instant record does not reveal that counsel advised Dzopa about the risk of deportation before the guilty plea hearing—or in time to file a motion in arrest of judgment to contest the knowing and voluntary nature of his plea. Even the March 12, 2012 sentencing date would have been outside the forty-five days he had to file a motion in arrest of judgment to challenge his November 18, 2011 guilty plea.

The *Padilla* court emphasized the severity of deportation—"the equivalent of banishment or exile"—underscored how critical it is for defense attorneys to inform their noncitizen clients concerning the immigration consequences of a particular plea bargain, even if the consequences are uncertain. 130 S. Ct. at 1486. Even before the Supreme Court decided *Padilla*, Iowa courts determined such information was essential to ensure a knowing and voluntary guilty plea and

amended rule 2.8(2)(b) to include notice of immigration consequences in the mandatory colloquy. *See id*. at 1486 n.15.

The inadequacy of this record stands in the way of resolving Dzopa's claims on direct appeal. We have no means to evaluate whether his decision to forego a trial would have been different if he had received advice from counsel about possible deportation consequences before entering his guilty plea or if he had been informed at the plea hearing that a criminal conviction could affect his federal immigration status. We grant Dzopa's request to preserve his claims of ineffective assistance of trial counsel for possible postconviction relief proceedings.[2]

**AFFIRMED.**

[2] In those proceedings, to prove his counsel ineffective under *Padilla*, Dzopa will have to show not only that she failed to advise him of the risk of adverse immigration consequences before he pleaded guilty, but that "a decision to reject the plea bargain would have been rational under the circumstances." *Id.* at 1485.