

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SOKOL NDREJAJ,

Defendant-Appellee.

UNPUBLISHED

May 14, 1999

No. 211057

Wayne Circuit Court

LC No. 93-005543

Before: Gage, P.J., and Gribbs and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the trial court's order granting defendant's motion for relief from judgment. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant, an Albanian national born in Yugoslavia, pleaded nolo contendere to criminal sexual conduct in the fourth degree, a two-year misdemeanor, MCL 750.520e; MSA 28.788(5). The trial court sentenced defendant to three years' probation. Defendant did not appeal.

Defendant's application for permanent residence status was denied on the grounds that he had been convicted of a crime involving moral turpitude. The decision by the Board of Immigration Appeals rendered defendant subject to deportation. Subsequently, defendant moved for relief from judgment. He sought to withdraw his plea based on a claim of ineffective assistance of counsel arising from counsel's failure to advise him that he would face deportation if convicted. At a hearing on the motion, defendant's counsel at the plea proceeding testified that he advised defendant that a conviction could constitute a deportable offense. The trial court granted defendant's motion, finding that defendant's lack of full awareness that he could be deported upon conviction constituted both good cause and actual prejudice.

In a motion for relief from judgment, if an issue was not but could have been raised in a prior appeal, the defendant must show good cause for the failure to raise the issue and actual prejudice from the alleged error. MCR 6.508(D)(3)(a) and (b). In the case of a conviction following a plea, actual prejudice means that "the defect in the proceedings was such that it renders the plea an involuntary one

to a degree that it would be manifestly unjust to allow the conviction to stand.” MCR 6.508(D)(3)(b)(ii).

In his motion for relief from judgment defendant sought to withdraw his plea on the ground that counsel’s ineffective assistance in failing to inform him that he would face deportation upon conviction rendered his plea involuntary. Defendant argued, and the trial court found, that his lack of full awareness regarding possible deportation consequences constituted both good cause and actual prejudice.

We disagree, and reverse the trial court’s decision. To establish ineffective assistance of counsel, a defendant must show that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms, and that the deficient representation resulted in prejudice. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994). Counsel is presumed to have afforded effective assistance. A defendant can overcome that presumption by showing that counsel’s failure to perform an essential duty resulted in prejudice. *People v Stubli*, 163 Mich App 376, 379; 413 NW2d 804 (1987). Here, trial counsel did not inform defendant that deportation was certain upon conviction; however, counsel advised defendant that deportation was a possible consequence of a conviction. Defendant did not assert that at the time he entered the plea he was unaware that deportation was a possible consequence of conviction. Defendant’s contention that counsel rendered ineffective assistance is not supported by the record. The evidence demonstrates that defendant’s plea was voluntary and understanding. *In re Oakland County Prosecutor*, 191 Mich App 113, 120; 477 NW2d 455 (1991).

People v Kadadu, 169 Mich App 278; 425 NW2d 784 (1988), the case on which defendant relied below and which the trial court cited, is distinguishable and does not support the trial court’s decision. In that case, the defendant sought to withdraw his guilty plea after sentencing when he became subject to deportation. The trial court granted the motion. We affirmed, concluding that we could not find an abuse of discretion where a trial court had allowed a defendant to proceed to trial, and where no prejudice to the prosecution had been shown. *Kadadu, supra*, at 285. In *Kadadu*, the decision to grant the defendant’s motion to withdraw his plea was within the discretion of the trial court, and a finding of good cause and actual prejudice was not required.

MCR 6.508(D)(3) limits a trial court’s ability to grant a motion for relief from judgment. Good cause and actual prejudice must be shown. *People v Brown*, 196 Mich App 153, 158; 492 NW2d 770 (1992). Defendant did not make the required showing in this case.

Reversed and remanded for entry of an order denying defendant’s motion for relief from judgment. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Roman S. Gribbs
/s/ Joel P. Hoekstra