

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 26, 2012

v

AMRO IMADTALIB ZAK,

Defendant-Appellant.

No. 298441
Oakland Circuit Court
LC No. 2008-223588-FH

AFTER REMAND

Before: SERVITTO, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's denial of his motion to set aside his guilty plea. Defendant was convicted, by guilty plea, of possession of a controlled substance, MCL 333.7403(2)(b)(ii), and possession of marihuana, MCL 333.7403(2)(d). He was sentenced to two years probation on each count. We affirm.

This case comes to us after this Court's remand to the trial court for an evidentiary/Ginther¹ hearing to determine whether trial counsel provided any advice to defendant regarding the possible immigration consequences of a plea. In this Court's prior opinion ordering the remand,² we explained the facts as follows:

Defendant is a 21-year old citizen of Jordan and during the trial court proceedings was residing with his family in the United States. After pleading guilty as charged in the instant matter, defendant was placed on probation pursuant to MCL 333.7411. Defendant violated his probation on two occasions and, on each occasion, plead guilty to the violations. His plea on the second violation led to the revocation of his probation. At some point after he entered his guilty plea to the original charges, deportation proceedings were initiated against

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

² *People v Zak*, unpublished opinion per curiam of the Court of Appeals, issued December 6, 2011 (Docket No. 298441).

defendant. On May 5, 2010, defendant moved to set aside his plea of guilty to the original charges based upon his counsel's failure to advise him that his plea could subject him to deportation proceedings. According to defendant, the recent decision of *Padilla v Kentucky*, ___ US ___; 130 S Ct 1473; 176 L Ed 2d 284 (2010), in which the United States Supreme Court held that a defense counsel's failure to advise his client that his guilty plea made him subject to automatic deportation amounted to ineffective assistance of counsel, was retroactively applicable to defendant's case. As such, defendant argued he must be allowed to withdraw his plea. The trial court denied defendant's motion, for reasons discussed below. This Court granted leave to appeal the trial court's decision.

Defendant specifically argued that counsel failed to advise him of the immigration consequences of his plea which rendered him ineffective, as indicated in *Padilla v Kentucky*. Defendant further contended that the retroactive application of *Padilla* required that he be allowed to withdraw his guilty plea. While defendant properly supported his assertions with an affidavit, the prosecutor merely cited information in a brief that he purportedly obtained in a conversation with defendant's original attorney. The trial court denied defendant's motion, discrediting defendant's sworn affidavit in favor of unsupported factual assertions made in a brief. We found the same to be an abuse of discretion and thus remanded the matter to the trial court for an evidentiary hearing to determine whether, in fact, defense counsel provided any advice to defendant regarding the immigration consequences of his plea. The trial court has conducted an evidentiary hearing and issued an opinion, consistent with our remand order.

In the interim, a panel of this Court decided the matter of *People v Gomez*, ___ Mich App ___; ___ NW2d ___ (2012). In that case, it was announced that "*Padilla* established a new procedural rule" and thus "is not retroactive." Because defendant's conviction was final³ before *Padilla* was decided, absent retroactive application of *Padilla*, defendant is not entitled to relief, regardless of any factual record presented to this Court. Given the *Gomez* Court's holding that *Padilla* is to be given prospective application only, defendant is therefore not entitled to the relief sought.

Affirmed.

/s/ Deborah A. Servitto

/s/ Jane E. Markey

/s/ Kirsten Frank Kelly

³ In arguing that *Padilla* should be held to be retroactive to his case, defendant implicitly acknowledges that his convictions were final at the time the Supreme Court decided *Padilla*. He does not argue, for example, that his "7411 status" affected the finality of his convictions for the purposes of determining whether *Padilla* applied to his convictions.