

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-11583
Non-Argument Calendar

D.C. Docket Nos. 1:15-cv-03497-TWT; 1:14-cr-00383-TWT-RGV-1

GLORIA KEALY,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(January 16, 2018)

Before WILSON, JORDAN and HULL, Circuit Judges.

PER CURIAM:

After serving her imprisonment sentence, Gloria Kealy, now on supervised release, appeals the district court's denial of her counseled 28 U.S.C. § 2255 motion to vacate where she claims that her trial counsel did not correctly advise her of the immigration consequences of her guilty plea.

After an evidentiary hearing, the district court found: (1) that trial counsel did advise Kealy of the immigration consequences of her guilty plea; (2) that trial counsel provided effective assistance; and (3) that Kealy's plea agreement and the district court's plea colloquy also advised Kealy of the immigration consequences and cured any alleged deficiencies of counsel. Based on the particular factual record in this case and the fact findings after an evidentiary hearing, we affirm the district court's denial of Kealy's § 2255 motion.

I. BACKGROUND

A. Indictment

On October 14, 2014, a four-count indictment charged Kealy with: (1) misuse of a social security number ("SSN"), in violation of 42 U.S.C. § 408(a)(7)(B) (Count 1); (2) making a false statement in application and use of a passport, in violation of 18 U.S.C. § 1542 (Count 2); and (3) two counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A (Counts 3 and 4). The charges in the indictment involved Kealy's knowingly using the SSN of another individual, and falsely representing herself as that individual, to obtain a

car loan and a passport, and also using that passport to gain entry into the United States in 2013 via Hartsfield-Jackson International Airport in Atlanta, Georgia (“Hartsfield-Jackson Airport”).

At her arraignment and represented by counsel, Kealy pled not guilty.¹

Kealy later retained Jonathan Melnick as counsel.

B. Plea Agreement

Shortly before trial, Kealy agreed to plead guilty to Counts 1 and 2 of the indictment pursuant to a written plea agreement in exchange for dismissal of the remaining counts. In the plea agreement, Kealy agreed that, if the case went to trial, the government would prove the following facts.

As to Count 1, since 1991, Kealy has falsely represented that the SSN xxx-xx-7062 was her own, even though this SSN actually belonged to the victim identified in the indictment as “D.J.” On August 13, 2013, Kealy submitted a credit application for a car loan to CarMax Auto Finance and falsely listed that SSN xxx-xx-7062 as her own SSN when she knew it was not.

As to Count 2, Kealy grew up in Nigeria, where she was known as “Gloria Yemisi Oluwunmi.”² Kealy entered the United States illegally at least as early as 1988. In 1991, she applied for and received a United States passport (No.

¹Kealy first retained Corinne Mull and Ruth McMullin as counsel.

²We note that the indictment lists “Olunwuni” while the plea agreement lists “Oluwunmi.”

xxxxx7592) under the name of “D.J.” The passport listed D.J.’s date of birth (04/xx/1969) and SSN (xxx-xx-7062), not Kealy’s. In support of her application for that passport, Kealy submitted D.J.’s birth certificate and other identifying information, and did so falsely and knowing that none of this information was her own. In 1994, while living in London, Kealy sought and obtained a name change on the United States passport from D.J. to Gloria Yemisi Kealy.

In 2005, Kealy applied for and received a renewal passport (No. xxxxx9099). Kealy has used the passport she obtained through making false statements in her application to travel internationally on a regular basis, including in December 2013 when she returned from London and entered the United States at Hartsfield-Jackson Airport in Atlanta.

In addition to containing the above facts, the plea agreement outlined the immigration consequences of Kealy’s guilty plea, including that her offense was a removable offense and that removal was “presumptively mandatory” because she was pleading guilty to that offense in this case:

9. REMOVAL FROM THE UNITED STATES: The Defendant recognizes that pleading guilty may have consequences with respect to her immigration status if she is not a citizen of the United States. Under federal law, a broad range of crimes are removable offenses, including the offense to which the Defendant is pleading guilty. Indeed, because the Defendant is pleading guilty to this offense, removal is presumptively mandatory. Removal and other immigration consequences are subject to a separate proceeding, however, and the Defendant understands that no one, including her attorney or the district court, can predict to a certainty the effect of her conviction on

her immigration status. The Defendant nevertheless affirms that she wants to plead guilty regardless of any immigration consequences that her plea may entail, even if the consequence is her automatic removal from the United States.

Notably, Kealy thus affirmed she wanted to plead guilty, “even if the consequence is her automatic removal from the United States.”

C. Plea Colloquy

On March 4, 2015, the district court held a change-of-plea hearing. The district court confirmed with Kealy and her trial counsel, Melnick, that they had sufficient time to discuss the matter before her entering a guilty plea. When asked by the district court to summarize the terms of the plea agreement, the government pointed out that it contained “a removal provision that . . . puts the Defendant on notice that she may face consequences with respect to her immigration status if she is not a citizen of the United States[,] which we believe she is not.”

The district court asked Kealy if she understood “that as a result of this conviction [she] may be removed from the United States, denied citizenship and denied admission to the United States in the future.” Kealy replied, “My understanding [is] that that would be a different proceedings [sic].” The district court clarified if Kealy understood “that in that proceeding [she] may be removed from the United States, denied citizenship and denied admission to the United States in the future,” and Kealy stated that she understood. The district court further cautioned: “And you understand that I can’t tell you what’s going to

happen, your attorney can't tell you what's going to happen, the prosecuting attorney can't tell you what happens, that's a whole separate proceeding?" Kealy again stated that she understood.

Kealy further confirmed her understanding when asked again by the district court if she understood that "as a result of the conviction on Count 2 [she] may be removed from the United States, denied citizenship and denied admission to the United States in the future." The government then summarized the evidence it would present if the case went to trial, as set forth in the factual proffer contained in the plea agreement.

The district court asked whether Kealy disagreed with the government's characterization of the facts, and Kealy said, "No." The district court found: (1) there was a factual basis for the plea; (2) Kealy understood the charges against her and the consequences of her guilty plea; and (3) Kealy was competent to understand the proceedings and enter a knowing plea of guilty.

The district court accepted Kealy's guilty plea and adjudicated her guilty of Counts 1 and 2. Kealy did not object to the district court's findings or its acceptance of her plea. The district court sentenced Kealy to six months' imprisonment on Counts 1 and 2 to run concurrently, followed by six months' home confinement and three years' supervised release.

D. Subsequent Filings

Kealy pro se filed a notice of direct appeal as to the district court's sentencing order. Between August and October 2015, Kealy retained appellate counsel, voluntarily dismissed her direct appeal, and filed a § 2255 motion to vacate.

E. § 2255 Motion to Vacate

In her § 2255 motion, Kealy argued inter alia that her trial counsel, Melnick, failed to correctly advise her about the “truly clear” immigration consequences of her guilty plea.³ See Padilla v. Kentucky, 559 U.S. 356, 369, 130 S. Ct. 1473, 1483 (2010) (“[W]hen the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.”) Specifically, Kealy asserted that Melnick provided ineffective assistance because he did not clearly advise her that pleading guilty to misusing a social security number and obtaining/using a passport under false pretenses, which are both crimes of moral turpitude, would result in Kealy's being placed in removal proceedings. See 8 U.S.C. § 1227(a)(2)(A)(i), (3)(D)(i) (deeming “deportable” any alien who commits a

³Kealy also claimed that counsel was constitutionally ineffective for incorrectly advising Kealy that lack of intent was not a defense. Kealy later amended her § 2255 motion and dropped this claim while renewing her other arguments.

crime of moral turpitude or who falsely represents his or herself as a citizen of the United States).

Kealy argued that the plea agreement (which indicated presumptively mandatory removal) and the plea colloquy (wherein Kealy admitted several times her understanding of the removal consequences) were insufficient to properly advise Kealy of the immigration consequences of her guilty plea. Kealy also argued that the plea agreement and plea colloquy did not cure Melnick's alleged failure to advise her correctly. Kealy contended that if counsel had properly informed her of the immigration consequences of her plea, she would have gone to trial.

In support of her motion, Kealy submitted her own affidavit and her husband John Bearden's affidavit. On January 7, 2016, the magistrate judge conducted an evidentiary hearing on Kealy's § 2255 motion. Bearden, Kealy, and Melnick each testified.

F. Bearden's Testimony

Bearden testified that Kealy's original attorney, Corinne Mull, negotiated a plea offer for two years' imprisonment followed by mandatory deportation. Kealy refused this offer because it included deportation.

Bearden testified that Kealy then hired Melnick in the hope of avoiding deportation. Bearden's understanding of the plea agreement secured by Melnick was that it had no deportation provision and did not mandate deportation.

However, on cross-examination, Bearden admitted that he reviewed the plea agreement—including the provisions about presumptively mandatory removal and Kealy's desire to plead regardless of immigration consequences—prior to Kealy's plea. Bearden also admitted that Kealy had never told him that she was not a United States citizen. Rather, Kealy maintained to Bearden that she was “born in this country.”

G. Kealy's Testimony

Next, Kealy testified that her original attorney had provided her with a plea agreement mandating deportation. Kealy rejected the offer because she was not guilty, did not want to agree to deportation, and, as she put it, she has “always stated that I was born here, that's all knew, that I was born here and this was my life, this is where I've lived with my children.” As a result, Kealy hired Melnick because she thought he could help her avoid imprisonment and deportation. Kealy told Melnick that she wanted an attorney who was not afraid to go to trial.

Melnick sought and received an offer from the government, which Kealy understood as her pleading guilty to Counts 1 and 2 in exchange for no mandatory jail time or immigration referral. Initially, Kealy did not want to take the offer, but

Kealy testified that Melnick assured her that it would not impact her immigration status. Melnick told Kealy that the offer was time sensitive, and Kealy responded, “Thanks for your efforts so far, but I will take my chances tonight.” Kealy asked if she should consult an immigration attorney, and Melnick said that, at this point, the case had nothing to do with immigration.

Kealy did end up talking to an immigration attorney, Janise Miller, who agreed that the plea agreement did not require immediate deportation. In an email sent March 3, 2015, Melnick stated the following to Kealy about immigration consequences:

If you are a U.S. Citizen then the immigration consequences do not matter. Even if you are not, the Court does not get involved in immigration decisions other than to inform you that if you are not a U.S. citizen then you could be deported. I think you already know that. You could be deported regardless of the outcome of the case, even if you are found not guilty on all counts. INS is a whole separate entity.

Kealy testified that Melnick repeatedly assured her that she was just pleading guilty to criminal charges and that immigration consequences were typically something the prosecutor would recommend. Ultimately, Kealy claimed she agreed to plead guilty because of Melnick’s advice and the fact that deportation, her biggest concern, was now “off the table.”

Kealy testified that Melnick sent her a copy of the plea agreement, but she did not understand why it still contained removal provisions. When Kealy called

him, Melnick explained that these provisions were standard and that she did not need to worry because the wording was not applicable to her. Kealy also took issue with the factual bases stated in the plea agreement and, based on advice from another attorney, asked Melnick if she could plead guilty to the charges but not the facts.⁴ Kealy testified that Melnick told her she was pleading guilty only to the charges and that the facts could not be used against her in another proceeding.

As to the plea hearing before the district court, however, Kealy admitted that she remembered the government explaining the removal provision and potential immigration consequences if she was not a citizen of the United States, which the government maintained she was not. Kealy also remembered that the district court asked her if she agreed that she may be removed, denied citizenship, and denied future admission to the United States as a result of her conviction. Kealy contended that she answered affirmatively in these instances because of Melnick and advice she had received from him. Kealy testified that she would not have agreed to plead guilty if she had known it was virtually certain she would be removed based on her convictions and that staying in the country was more important than avoiding jail time.

⁴See North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970).

On cross-examination, Kealy admitted, however, that she had read the removal provisions of the plea agreement and had understood from the plea colloquy that deportation was a possibility.

Importantly, Kealy also testified and admitted that she never told Melnick that she was not a United States citizen. Kealy testified that she told Melnick: “I have never told anyone I’m not a U.S. citizen. I just said that I was born here and that’s all I knew.”

H. Melnick’s Testimony

Melnick also testified. Melnick stated that, in his career, he had represented thousands of criminal defendants and that several were non-citizens. With respect to these non-citizen defendants, Melnick stated that it was “quite clear” that a conviction for a felony or a crime of moral turpitude would result in deportation. Melnick also testified that, from the time she hired him, Kealy had maintained that she was born in the United States and never told him that she was not a United States citizen. Even Kealy admits she told Melnick she was born here and never told Melnick that she was not a U.S. citizen.

In his testimony, Melnick also pointed out that Kealy’s case was “very complicated as it pertain[ed] to [Kealy’s] immigration status” because a Nigerian birth certificate was obtained by the government “from Peter Kealy, who was Ms. Kealy’s estranged husband.” But Kealy disputed the authenticity of the

document and has always contended “she was born in this country.” As a result, Melnick provided immigration advice based on the contingencies in Kealy’s status and stated, among other things, that “deportation proceedings would be taken against [Kealy]” if she were not a citizen of the United States. Melnick and Kealy later discussed the immigration consequences of her guilty plea. Melnick testified that he told Kealy she could be removed as a result of her plea. Melnick also stated that he felt the plea agreement was “absolutely in [Kealy’s] best interest.”

On cross-examination, Melnick admitted that Kealy was concerned about immigration consequences and that she wanted to go to trial. Melnick asked the government to draft a plea agreement and instructed that Kealy would not agree to any language that mandated jail time or deportation.

I. Magistrate Judge’s Report and the District Court’s Order

After the parties filed post-hearing briefs, the magistrate judge issued a report recommending that Kealy’s § 2255 motion be denied. In his report, the magistrate judge found that “Kealy has consistently claimed that she is a United States citizen, and her persistence in repeating this claim of citizenship to Melnick and everyone else rendered the deportation consequences of Kealy’s guilty plea uncertain.”

He also found, “Since Kealy adamantly maintains that she is a United States citizen, despite evidence to the contrary, there was, and remains, a genuine factual

dispute regarding her citizenship, and were she ultimately successful in persuading immigration officials or a court of her claim to United States citizenship, she could not be deported, just as Melnick advised her.” The magistrate judge rejected that Kealy’s guilty plea foreclosed her claim of U.S. citizenship and continued:

Kealy confirmed that she had never told anyone, including Melnick, that she is not a United States citizen. Moreover, Bearden testified that Kealy told him that she was born in this country and that she never claimed to be an alien. Thus, since Kealy persisted in claiming United States citizenship throughout Melnick’s representation of her, and it remains a contested issue of fact today, she was not “virtually certain” to be removed based upon her convictions, and the issue now before the Court is whether Melnick’s advice was constitutionally adequate.

As to trial counsel’s performance, the magistrate judge concluded that Melnick’s advice was “plainly accurate” and that Melnick provided constitutionally effective assistance.

The magistrate judge also found that, even if Melnick’s advice were found to be deficient, Kealy could not show prejudice because the plea agreement and the plea colloquy cured any alleged deficiencies and put Kealy on notice of the immigration consequences of her guilty plea. Thus, the magistrate judge also concluded, “Kealy has not met her burden to show that she would not have pleaded guilty and would have insisted on going to trial had Melnick given her different advice on the immigration consequences of her convictions.”

Kealy objected to the magistrate judge's report. The district court overruled Kealy's objections, adopted the magistrate judge's report, and denied Kealy's § 2255 motion. The district court pointed out that Kealy still "continues to maintain that she is a United States citizen" and therefore the deportation consequences of Kealy's guilty plea were not "truly clear." The district court emphasized that "[i]t is truly clear that [Kealy] has led a life of lies, deceit and deception, and that she has no credibility whatsoever when it comes to issues such as the circumstances of her birth, identity, and nationality." The district court also stated that, "[i]n addition to the reasons given by the Magistrate Judge, the Defendant's claim for ineffective assistance of counsel must fail because she cannot demonstrate prejudice."

The district court noted that Federal Rule of Civil Procedure 11 requires only that the trial court advise a defendant pleading guilty "that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future." See Fed. R. Crim. P. 11(b)(O). The district court then pointed out that the committee note to the 2013 amendment of Rule 11 explains merely a "generic warning" of immigration consequences is required during the plea colloquy, and that this reflects the practical reality that immigration consequences are rarely "clear" to criminal defense lawyers or federal district judges. Because the district

court provided this warning to Kealy, it found she was precluded from asserting prejudice in her ineffective-counsel claim.

In denying her § 2255 motion, the district court granted a COA on whether Kealy's plea agreement and the Rule 11 colloquy preclude her from claiming ineffective assistance of counsel. We address the threshold question of whether Kealy has shown that her trial counsel was ineffective. If so, we then must address whether Kealy's plea agreement and the district court's plea colloquy bar her from asserting this claim.

II. DISCUSSION

In a § 2255 proceeding, this Court reviews legal conclusions de novo and factual findings for clear error. Osley v. United States, 751 F.3d 1214, 1222 (11th Cir. 2014). Ineffective-assistance-of-counsel claims are mixed questions of law and fact that we review de novo. Id.

A. Ineffective Assistance of Counsel

To successfully claim ineffective assistance of counsel, a defendant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced her defense. See Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). As to the first prong, the defendant must establish that counsel's performance was unreasonable under prevailing professional norms. Id. at 688, 104 S. Ct. at 2065.

As to the second prong, the defendant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 694, 104 S. Ct. at 2068. In the context of a guilty plea, the defendant must show a reasonable probability that she would have not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985).

In Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473 (2010), the Supreme Court established that “counsel must inform her client whether his plea carries a risk of deportation.” Id. at 374, 130 S. Ct. at 1486. It warned, however, that “[t]here will . . . undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain.” Id. at 369, 130 S. Ct. at 1483. Indeed, when the law in a case is “not succinct and straightforward,” a criminal defense attorney “need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” Id. (emphasis added). Yet, when deportation consequences are “truly clear,” then “the duty to give correct advice is equally clear.” Id.

B. Analysis

In this case, Kealy herself rendered her own immigration consequences unclear. During the hearing on the § 2255 motion, Bearden, Kealy, and Melnick each testified that Kealy consistently maintained that she was “born in this

country” and never told them she was not a U.S. citizen. The magistrate judge found that “Kealy has consistently claimed that she is a United States citizen, and her persistence in repeating this claim of citizenship to Melnick and everyone else rendered the deportation consequences of Kealy’s guilty plea uncertain.”

Immigration consequences cannot be “truly clear” when a client does not give his or her attorney all of the facts necessary to provide legal advice. When the law is obscured by the defendant’s factual misrepresentations, counsel “need do no more than advise . . . that pending criminal charges may carry a risk of adverse immigration consequences.” See id. at 369, 130 S. Ct. at 1483 (emphasis added).

Because Kealy maintained that she was a United States citizen, Melnick was required only to inform her of the possibility of immigration consequences, which he clearly did. See id. Based on the factual dispute and uncertainty surrounding Kealy’s immigration status, Melnick discussed the immigration consequences of her plea and informed Kealy that “deportation proceedings would be taken against her” if she were not a citizen of the United States. Similarly, Melnick advised Kealy in an email that “[i]f you are a U.S. Citizen then the immigration consequences do not matter.” Whether or not this advice was applicable was known only to Kealy.

As such, we conclude that given the particular record and the factual findings here, Kealy has not carried her burden to show Melnick rendered constitutionally ineffective assistance.

C. Plea Agreement and Plea Colloquy

Alternatively, even if we cannot say that a plea agreement and colloquy will always cure counsel's alleged deficient performance, they certainly did here. Both Bearden and Kealy acknowledged that they read the removal provision in the plea agreement, which specifically noted "presumptively mandatory" removal for Kealy's offense. The provision stated clearly that the specific statutory offense to which Kealy was pleading guilty mandated removal if she was not a citizen and affirmed Kealy's intent to plead guilty "even if the consequence is her automatic removal from the United States."

Likewise, on no less than four occasions at the plea hearing, the district court confirmed with Kealy that immigration consequences may well result from her plea. It even specifically noted that Count 2 was a removable offense. On each occasion, Kealy stated that she understood the district court's advisements. The district court found that Kealy understood the consequences of her plea and that she was competent to understand the proceedings and to enter a knowing plea.

Between the plea agreement and the Rule 11 colloquy, Kealy received sufficient notice that her offense made her subject to deportation, and thus she

cannot show prejudice. A defendant is not at liberty to ignore the documents she signs or the instructions provided by the district court. Kealy's purported misunderstanding had nothing to do with the statutory consequences of her plea, which were entirely clear from the plea agreement and the colloquy. The only thing that lacked clarity was their application to Kealy, a complication which she orchestrated and preserved.

III. CONCLUSION

In conclusion, the district court did not err (1) in finding that Kealy has not carried her burden to show her trial counsel was ineffective or (2) in denying Kealy's § 2255 motion.

AFFIRMED.