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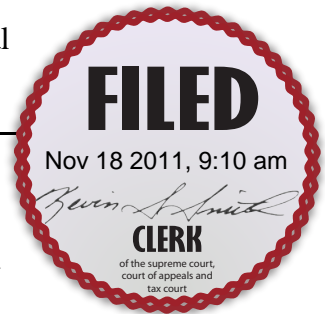
ATTORNEY FOR APPELLANT:

**RODOLFO S. MONTERROSA, JR.**  
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**BRIAN REITZ**  
Deputy Attorney General  
Indianapolis, Indiana



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**IN THE  
COURT OF APPEALS OF INDIANA**

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JOSE J. MARTINEZ, )  
 )  
Appellant-Petitioner, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Respondent. )

No. 20A03-1104-PC-139

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APPEAL FROM THE ELKHART SUPERIOR COURT  
The Honorable Stephen R. Bowers, Judge  
Cause No. 20D02-0910-PC-5

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**November 18, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Jose J. Martinez (“Martinez”) pleaded guilty to forgery<sup>1</sup> as a Class C felony. He now appeals the denial of his petition for post-conviction relief, raising the following restated issues:

- I. Whether Martinez received ineffective assistance of counsel when his trial counsel failed to advise him that a plea of guilty could result in deportation; and
- II. Whether Martinez knowingly, intelligently, and voluntarily entered his guilty plea.

We affirm.

### **FACTS AND PROCEDURAL HISTORY<sup>2</sup>**

Around 1995, Martinez, who was then nineteen or twenty years old and a Mexican citizen, entered the United States illegally. *Tr.* at 20. Once in the United States, Martinez obtained and used the identifying information of another person in order to obtain employment. *Id.* at 35-36. At some point, this deception was discovered, and on September 13, 2007, Martinez was charged by information with forgery as a Class C felony. *Appellant’s App.* at 67.

Martinez hired attorney Mike Yoder to defend him against the felony charge. *Id.* Yoder was aware of Martinez’s undocumented status and understood that, as general matter, criminal convictions can negatively influence a person’s ability to obtain citizenship and may

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<sup>1</sup> See Ind. Code § 35-43-5-2.

<sup>2</sup> The record before us does not include the charging information, the written plea agreement, a transcript of the sentencing hearing, or Martinez’s petition for post-conviction relief. Further, the Chronological Case Summary only includes entries commencing with Martinez’s petition for post-conviction relief. *Appellant’s App.* at 54.

even result in deportation. *Tr.* at 5, 23. Yoder informed Martinez that he would serve as Martinez's attorney for the criminal matter, but that Martinez would have to seek an immigration attorney for any immigration matters. *Id.* at 23.

Martinez entered into a plea agreement and was convicted of forgery as a Class C felony. The trial court imposed a three-year sentence with 978 days suspended. Thereafter, federal deportation proceedings were initiated against Martinez. It was then that Martinez learned that his forgery conviction precluded him from contesting his deportation. Martinez filed a petition for post-conviction relief, contending that (1) his trial attorney was ineffective for failing to alert him to the immigration consequences of his guilty plea, and (2) his plea was not knowingly and voluntarily made. A hearing on the petition for post-conviction relief was held on January 13, 2011.

On March 7, 2011, the trial court entered a detailed "Order on Defendant's Request for Post-Conviction Relief." *Appellant's App.* at 59-66. The "Conclusions of Law" provided as follows:

1. Under *Strickland v. Washington*, 466 U.[S]. 688 (1984), a court must first determine whether counsel's representation "fell below an objective standard of reasonableness." There a court must ask whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Kentucky [v. Padilla]*, 130 S. Ct. 1474,] 1482 [(2010)].
2. The performance of trial counsel was not deficient. Trial counsel did not misrepresent the nature or extent of his knowledge of immigration law, and although he did not advise Martinez of the immigration consequences of the plea of guilty herein, he made it clear that an immigration attorney would have to assist Martinez with such issues.
3. At the time Petitioner tendered his guilty plea, he was clearly and

unequivocally advised by the court as to the possibility of deportation as a result of the plea of guilty and the conviction of the offense of forgery.

4. Even if Martinez were able to show that the performance of trial counsel were deficient, Martinez has failed to show that there is a reasonable probability that if trial counsel's allegedly unprofessional error or errors had not been made that the results in this case would have been different in anyway [sic].
5. Deportation is an integral part of – indeed, sometimes the most important part – of the penalty imposed on non-citizen defendants who plead guilty to specified crimes. *Kentucky v. Padilla*, 130 S. Ct. 1474, 1480 (2010).
6. Martinez has failed to show special circumstances or specific facts which would support a claim for ineffective assistance of counsel stemming from counsel's failure to advise him of deportation as a possible consequence of pleading guilty.
7. The court's advisement of the possible consequence of deportation cured any deficiency in performance on the part of trial counsel in failing to advise the Defendant of possible immigration and naturalization consequences of a conviction.
8. Martinez has no right to a plea bargain and there is no basis for believing that trial counsel could have obtained a better result for the Petitioner.
9. The Petitioner has failed to carry his burden of proof with respect to the second part of the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 . . . (1984), in that he has failed to show that the allegedly deficient performance on the part of his attorney resulted in prejudice to the Petitioner. To establish prejudice, the Petitioner must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, [466 U.S.] at 694. The Petitioner apparently did not have a defense in this case, and has not suggested any colorable defense to the forgery charge for which he was charged and convicted.

*Id.* at 62-63. Under this rationale, the post-conviction court denied Martinez's petition for

post-conviction relief. Martinez now appeals. Additional facts will be supplied as necessary.

## **DISCUSSION AND DECISION**

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Brown v. State*, 880 N.E.2d 1226, 1229 (Ind. Ct. App. 2008), *trans. denied*. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Brown*, 880 N.E.2d at 1229. Post-conviction procedures do not afford petitioners with a “super appeal.” *Richardson v. State*, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003), *trans. denied*. Therefore, “[o]n review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court.” *Brown*, 880 N.E.2d at 1229.

Here, the post-conviction court entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). “A post-conviction court’s findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made.” *Brown*, 880 N.E.2d at 1230 (citation and quotation marks omitted).

### **I. Ineffective Assistance**

Martinez claims that he was provided ineffective assistance of counsel. Specifically, he argues that his attorney, Yoder, failed to inform him that pleading guilty to forgery would lead to automatic deportation. Claims of ineffective assistance of counsel are reviewed under a two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant must

demonstrate both that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006). Prejudice occurs when the defendant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 694). "Isolated poor strategy, bad tactics, a mistake, carelessness or inexperience do not necessarily amount to ineffective assistance of counsel unless, taken as a whole, the defense was inadequate." *Woods v. State*, 701 N.E.2d 1208, 1211 (Ind. 1998). There is a strong presumption that counsel's representation was adequate. *State v. McManus*, 868 N.E.2d 778, 790 (Ind. 2007), *cert denied*, 552 U.S. 1298 (2008).

Martinez contends that, pursuant to the Supreme Court's ruling in *Padilla v. Kentucky*, 130 S. Ct. 1473, 1477-78 (2010), Yoder was defective for failing to "inform [his] client whether his plea carri[e]d a risk of deportation." *Appellant's Br.* at 9. We do not reach the issue of whether *Padilla* retroactively applies to the instant case;<sup>3</sup> instead, we assume without deciding that Yoder's legal representation was deficient.

The two prongs of the *Strickland* test are separate and independent inquiries; therefore, to find ineffective assistance of counsel, we must also find that Yoder's deficient

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<sup>3</sup> "Indiana has chosen to adopt the federal retroactivity rule established by *Teague v. Lane*, 489 U.S. 288 (1989)." *Henderson v. State*, 953 N.E.2d 639, 643 (Ind. Ct. App. 2011). Under *Teague*, new rules of criminal procedure generally are not retroactively available on collateral review. *Id.* In *Chaidez v. United States*, the Seventh Circuit concluded that the scales tip in favor of finding that *Padilla* announced a new rule. 655 F.3d 684 (7th Cir. 2011). As a new rule, *Padilla* would not be retroactively applicable to Martinez's petition for post-conviction relief. Because we find the issue of prejudice dispositive, we do not analyze the facts of the case in light of *Padilla*.

performance resulted in prejudice. *Grinstead*, 845 N.E.2d at 1031. Here, Martinez has a young daughter who lives in the United States and, at the time of the post-conviction hearing, was about two-and-one-half years of age. While it is regrettable that Martinez will likely be separated from his daughter, Martinez has not demonstrated that Yoder's defective performance resulted in this prejudice. Although Yoder did not advise Martinez of the specific consequences of pleading guilty, Yoder did inform Martinez that any immigration issues would have to be handled by another attorney. *Appellant's App.* at 60-61. Prior to accepting Martinez's plea, the trial court asked him, "[d]o you understand that as a result of your pleading guilty to this offense [forgery] you could be deported[,]?" to which Martinez responded, "Yes." *Id.* at 60. As such, we find that Martinez was indeed aware that deportation was possible.

Martinez admitted that he knew he was using the indentifying information of somebody other than himself and did not deny that he was guilty of that offense. *Tr.* at 35-36, 44. The prejudice of being deported is the result of Martinez having been convicted of forgery, a Class C felony. Yoder's defective act of failing to inform Martinez that a conviction could result in deportation was remedied when the trial court informed him of that fact. Martinez was not prejudiced by Yoder's defective act and, like the post-conviction court, we find no ineffective assistance of counsel. The post-conviction court did not err in denying Martinez's petition for post-conviction relief.

## **II. Knowing, Voluntary, and Intelligent Plea**

Martinez next claims that he did not knowingly, voluntarily, and intelligently enter his

guilty plea. “A post-conviction petitioner must be allowed to withdraw his previous guilty plea whenever the withdrawal ‘is necessary to correct a manifest injustice’ that occurred because ‘the plea was not knowingly and voluntarily made.’” *Lineberry v. State*, 747 N.E.2d 1151, 1155 (Ind. Ct. App. 2001) (quoting Ind. Code § 35–35–1–4). A trial court should not accept a plea of guilty unless it has determined that the plea is voluntary. *Id.* at 1155-56 (quoting Ind. Code § 35–35–1–3(a)). Before accepting a guilty plea, a trial court must take steps to insure that the defendant’s plea is voluntary. *Id.* at 1156 (citing Ind. Code §§ 35–35–1–2, -3). Generally speaking, if a trial court undertakes these steps, a post-conviction petitioner will have a difficult time overturning his guilty plea on collateral attack. *Id.* (citing *State v. Moore*, 678 N.E.2d 1258, 1265 (Ind. 1997), *cert. denied*, 523 U.S. 1079 (1998)). However, a defendant who can show that he was coerced or misled into pleading guilty by the judge, prosecutor, or defense counsel will present a colorable claim for relief. *Id.* If a prosecutor made a promise to a defendant, and that promise comprised part of the inducement or consideration for the plea agreement, then that promise must be fulfilled because the breach of such a promise would render the defendant’s guilty plea involuntary. *Id.* At the same time, however, a trial court cannot be forced to provide a benefit that it does not have the power to confer. *Id.* at 1155 (citing Ind. Code § 35–35–1–2; *Parker v. State*, 542 N.E.2d 1026, 1030 (Ind. Ct. App. 1989)).

Martinez neither claims that he was coerced to plead guilty or that a promise induced



him to plead guilty.<sup>4</sup> Instead, he claims that his plea was involuntary because he did not fully understand the ramifications of his plea. Martinez hired Yoder to be his attorney because Martinez “liked what [Yoder] was going to be arguing.”<sup>5</sup> *Tr.* at 36. Yoder talked to Martinez “about the fact that [Martinez] was not going to be incarcerated. . . . He talked to [Martinez] about . . . being on probation, not incarcerated.” *Id.* at 37. Yoder was aware of Martinez’s undocumented status and understood that, as general matter, criminal convictions can negatively influence a person’s ability to obtain citizenship and may even result in deportation. *Id.* at 5, 23. Yoder informed Martinez that he would serve as Martinez’s attorney for the criminal matter, but that Martinez would have to seek an immigration attorney for any immigration matters. *Id.* at 23. Martinez understood that he had three options in connection with his case: (1) plead guilty to a negotiated plea agreement; (2) go to trial; or (3) plead guilty without a negotiated plea agreement. *Id.* at 7. Although the written plea agreement made no reference to the possible effect of a plea of guilty, the trial court asked Martinez, “[d]o you understand that as a result of your pleading guilty to this offense [forgery] you could be deported[,]” to which Martinez responded, “Yes.” *Appellant’s App.* at 60.

Martinez’s Class C felony conviction carried a sentencing range of from two to eight

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<sup>4</sup> “At the time Martinez entered his plea, the court asked him, ‘[h]ave you or anyone else received any promise or been given anything of value in order to get you to plead guilty[,]’ [t]o which the Petitioner responded, ‘No.’” *Appellant’s App.* at 61. “The court also asked Martinez, ‘[h]as anyone offered you any leniency or special treatment other than the plea agreement in order to get you to plead guilty[,]’ [t]o which the Petitioner responded, ‘No.’” *Id.*

<sup>5</sup> The record before us does not contain a transcript of the plea hearing. Evidence pertaining to the plea hearing is therefore taken from the transcript of the post-conviction hearing.

years, with the advisory being four years. Ind. Code § 35-50-2-6. Yoder was able to negotiate a plea agreement under which the trial court sentenced Martinez to three years with 978 days suspended. Martinez does not contend that a trial would have ended in a not-guilty verdict. Martinez had no defense to the charge of forgery and admitted that he knew he was using the indentifying information of somebody other than himself to obtain employment. *Tr.* at 35-36. We cannot say that Martinez has met his burden of proving that the withdrawal of his guilty plea is necessary to correct a manifest injustice. *Lineberry*, 747 N.E.2d at 1155. The post-conviction court did not err in denying Martinez's petition for post-conviction relief.

Affirmed.<sup>6</sup>

BAKER, J., and BROWN, J., concur.

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<sup>6</sup> We commend the post-conviction court on the thoroughness and clarity of its findings and order that have greatly facilitated our appellate review of this matter.