

RENDERED: NOVEMBER 14, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001350-MR

WASSIM KARIM-ABDUL AYYAD

APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NOS. 01-CR-01013, 02-CR-00139, & 02-CR-00139-0

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; STUMBO, JUDGE; GUIDUGLI,¹ SENIOR JUDGE.

STUMBO, JUDGE: Wassim Karim-Abdul Ayyad appeals from an opinion and order of the Fayette Circuit Court denying his motion for RCr 11.42 relief. He argues that the circuit court erred in failing to find that he was denied effective assistance of counsel when his counsel misinformed him that he would not be

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

deported if he plead guilty to the charges in the indictment. For the reasons stated below, we affirm the opinion and order on appeal.

In October, 2001, and February, 2002, the Fayette County grand jury indicted Ayyad on one count each of first-degree trafficking in a controlled substance, tampering with physical evidence, possession of marijuana, and two counts of first-degree robbery. The charges arose from events occurring in August, 2001, and November, 2001, when Ayyad was arrested for selling cocaine out of a Lexington hotel room and later committing two armed robberies.

On April 19, 2002, Ayyad entered guilty pleas under each indictment. In exchange for the pleas, the trafficking charge was reduced to possession of a controlled substance; the possession of marijuana charge was dismissed; and, one count of first-degree robbery was dismissed. On May 24, 2002, Ayyad was sentenced to serve 3 years in prison under the first indictment, and 13 years under the second indictment, to be served consecutively for a total of 16 years in prison.

Ayyad is a Jordanian citizen and native of Kuwait. On September 29, 2003, the United States Immigration and Naturalization Service notified Ayyad that he was subject to deportation from the United States based on his convictions.

On May 14, 2004, Ayyad filed a *pro se* RCr 11.42 motion seeking relief from judgment. As a basis for the motion, Ayyad argued that his counsel was ineffective for informing him that he would not be deported if he pled guilty. He maintained that he would not have pled guilty and would have gone to trial had he known that his guilty pleas and subsequent conviction would have resulted in

the deportation proceedings. Sometime thereafter, the trial court held Ayyad’s motion in abeyance pending resolution of the appeal in *Commonwealth v. Fuartado*, 170 S.W.3d 384 (Ky. 2005), which was then pending before the Kentucky Supreme Court.

Fuartado was rendered, and held in relevant part that a counsel’s failure to advise a defendant of the potential deportation consequences of a guilty plea did not form the basis for a claim of ineffective assistance of counsel. Relying on *Fuartado*, the Fayette Circuit Court rendered its opinion and order on June 22, 2006, denying Ayyad’s motion for RCr 11.42 relief. This appeal followed.

Ayyad now argues that the circuit court erred in denying his motion for RCr 11.42 relief. He contends that his guilty plea was not made knowingly and voluntarily because it was induced by counsel’s ineffectiveness. According to Ayyad, that ineffectiveness came in the form of counsel’s alleged statement to Ayyad that a guilty plea would not result in Ayyad’s deportation. He directs our attention to *Strickland v. Washington*, 466 U.S. 668, 104, S.Ct. 2052, 80 L.Ed.2d 674 (1984), and attempts to distinguish *Fuartado* from the matter at bar by noting that *Fuartado* addressed counsel’s failure to advise a defendant of the potential for deportation, whereas in the instant case involves the affirmative act of “gross misadvice” regarding deportation consequences. He also points to the ABA Standards of Criminal Justice which provides that, where possible, counsel should advise the defendant as to the possible collateral consequences of a contemplated

plea. Ayyad also claims that he was entitled to an evidentiary hearing, and he seeks an order vacating his judgment of conviction.

We have closely examined the record and the law, and find no error in the Fayette Circuit Court's order denying Ayyad's motion for relief. The Kentucky Supreme Court held in *Fuartado* that defense counsel has no affirmative duty to give advice as to the collateral consequences of a plea, and that such advice does not support a claim of ineffective assistance. It stated that,

In cases where defendants are agreeing to plead guilty in accordance with a plea bargain, this principle of protecting a criminal defendant's right to be fairly tried and justly convicted is extended to include investigating and advising the criminal defendant on all aspects of the plea and the direct consequences thereof—such as the sufficiency of the evidence supporting the plea, the availability of substantial defenses, the loss of several fundamental constitutional rights, and the punishment that may be imposed by the trial court. *See Brady v. United States*, 397 U.S. 742, 755, 90 S.Ct. 1463, 1472, 25 L.Ed.2d 747 (1970) (defendant must be “fully aware of the *direct consequences*” of a guilty plea) (emphasis added); *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir.1974) (setting forth standards for effective assistance of counsel). The existence of collateral consequences is irrelevant to the determination of a defendant's guilt or innocence and completely outside the authority or control of the trial court. Accordingly, we find, along with the majority of other courts determining the issue, that the Sixth Amendment requires representation encompassing only the criminal prosecution itself and the direct consequences thereof. *Because the consideration of collateral consequences is outside the scope of representation required under the Sixth Amendment, failure of defense counsel to advise Appellee of potential deportation consequences was not cognizable as a claim for ineffective assistance of counsel.* (Emphasis added).

Fuartado at 386.

Fuartado is dispositive. Ayyad seeks to distinguish *Fuartado* from the instant facts by pointing out that while *Fuartado* addressed non-feasance, his counsel allegedly engaged in malfeasance by giving misadvice regarding the possibility of deportation. We see no rational distinction between *Fuartado* and the instant case, because the effect of not giving advice regarding the possible deportation consequences of pleading guilty (i.e., the non-feasance addressed in *Fuartado*) is the same as the effect of giving bad advice (i.e., the alleged malfeasance of Ayyad's counsel). In either circumstance, *Fuartado* concluded that counsel is not responsible for the possible collateral consequences of deportation. It holds that counsel is responsible for the accused's criminal defense, but not the litany of consequences - many of which are not foreseeable - affecting the accused's life resulting from a guilty plea.

Having determined that *Fuartado* is applicable to the instant matter, and that the Fayette Circuit Court properly so found, we have no authority to reverse the order on appeal. Since the motion was justiciable by reference to the record, no hearing on the motion was required. *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001). Accordingly, we affirm the opinion and order of the Fayette Circuit Court.

GUIDUGLI, SENIOR JUDGE, CONCURS.

COMBS, CHIEF JUDGE, CONCURS, WITH SEPARATE
OPINION.

COMBS, CHIEF JUDGE, CONCURRING: I most assuredly concur with the sound reasoning of the majority opinion that *Fuartado* is dispositive of this case. However, I again lament that such a grave consequence as deportation is not made apparent to a defendant prior to entering a plea of guilty. RCr 11.42 now provides no recourse for a non-citizen criminal defendant as to the “collateral consequence” of deportation. *Fuartado* was stretched even further to cover not only absence of advice but even incorrect legal advice. In *Commonwealth v. Padilla*, 253 S.W.3d 482 (Ky. 2008), counsel who was unaware of deportation issues nonetheless offered incorrect advice when asked by his client. Finally, in *Renya v. Commonwealth*, 217 S.W.3d 274 (Ky. App. 2007), this Court held that CR 60.02 was unavailable in such a case.

I again urge that our Supreme Court and/or our General Assembly scrutinize this issue and direct that the *Boykin* colloquy by the trial court contain a clear warning of deportation as a consequence of a guilty plea. It is beyond legal fiction to believe that a plea could be knowingly, voluntarily, and intelligently made absent this critical information. It is an absurdity that eviscerates elemental due process.

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