RENDERED: OCTOBER 10, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001038-MR

CLERVENS PIERRE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NOS. 07-CR-002676 AND 08-CR-002569

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, NICKELL, AND STUMBO, JUDGES.

NICKELL, JUDGE: Clervens Pierre, a native of Haiti, came to the United States in 1992 when he was four years old; he was granted asylee status. In 1997, he was granted lawful permanent U.S. residency. He alleges he received ineffective assistance of counsel in 2008, because prior to entering two guilty pleas in Jefferson Circuit Court in August and September 2008, his appointed attorney did

not advise him he would face certain deportation[1] as a result of pleading guilty to felony charges of complicity[2] to commit robbery[3] and burglary,[4] both in the second degree—crimes for which he received concurrent sentences of five years. According to Pierre, he was unaware he faced any risk of deportation until December of 2008 when he learned from ICE,[5] "after you serve your time, you'll have to attend a (sic) immigration hearing and it's a possibility that you can be subject for removal from the United States."[6]

This appeal challenges two orders entered by the Jefferson Circuit Court in 2012. The first, entered after an evidentiary hearing by then-Circuit Judge

[1] Since adoption of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009-546, the proper terminology is an order of "removal" rather than an order of "deportation" or "exclusion." See *Calcano-Martinez v. INS,* 533 U.S. 348, 350, n.1, 121 S.Ct. 2268, 2269, 150 L.Ed.2d 391 (2001). We use the terms interchangeably in this Opinion.

[2] Kentucky Revised Statutes (KRS) 502.020.

[3] KRS 515.030, a Class C felony.

[4] KRS 511.030, a Class C felony.

[5] United States Immigration and Customs Enforcement.

[6] Pierre so testified at an evidentiary hearing on April 23, 2012. The record contains an Immigration Detainer for Pierre dated December 12, 2008. According to the Acknowledgement/Release generated by Roederer Correctional Complex on December 18, 2008, Pierre's parole eligibility date at that time was "6/2009" and his minimum expiration date was "3/2012."

Irv Maze,[7] overruled a *pro se* RCr[8] 11.42 motion because counsel testified he advises all clients of the specter of deportation, and, even if counsel's performance was deficient, it would have been irrational for Pierre to decline an offer of only five years when a jury could have fixed his punishment at twenty-five years. The second order, entered by Judge Martin McDonald sitting as a Senior Judge, denied a motion to reconsider denial of the RCr 11.42 motion. Upon review of the record, the briefs and the law, we affirm.

FACTS

On August 16, 2007, Indictment No. 07-CR-2676 charged Pierre and Howell Roscoe Porter IV[9] with complicity to commit both burglary in the second degree and criminal mischief in the first degree.[10] Hon. Deandra Baltimore, a public defender, represented Pierre on the charges from 2007 until May of 2008, when she was preparing to change jobs. Baltimore had represented Pierre on prior

[7] Judge Maze was elected to this Court on November 6, 2012.

[8] Kentucky Rules of Criminal Procedure.

[9] Porter was the victim's son. The day before the burglary, he had been removed from his mother's home. Like Pierre, Porter was also convicted of burglary and criminal mischief for which he received two five-year terms. The discovery packet provided by the Commonwealth was detailed. Pierre's uniform citation states, he "admitted to be (sic) on the scene at vics (sic) resident (sic) at time of burglary and helping codefendants burglarize vics (sic) house and committing criminal mischief, O/1000.00. [Pierre] also stated he pawned several pieces of jewelry at pawn shop on Central Avenue in his own name." The criminal mischief charge resulted from much of the home's interior being sprayed with black paint, traces of which were still visible on Porter's hands at the time of arrest. Pierre turned himself in to police upon learning he was wanted in connection with the burglary.

[10] KRS 515.020, a Class D felony.

misdemeanors for which he had never evinced concern about deportation. Baltimore had no independent recollection of discussing immigration with Pierre in relation to the 2007 charges, but testified at a 2012 hearing on the RCr 11.42 motion that her customary practice was to discuss deportation consequences with *all* clients. She further testified Pierre could read and speak English and she believed he fully understood the charges against him. Her motion to suppress incriminating statements Pierre had made to police after signing a waiver of rights was denied. Despite the Commonwealth's having made an offer on a guilty plea, Pierre told Baltimore he wanted either an acquittal or a dismissal. When Baltimore left the public defender's office in July of 2008, the 2007 indictment was pending trial.

Another public defender, Hon. Ramon McGee, assumed Pierre's representation in August 2008. He knew Pierre was a Haitian citizen, and by this time, Pierre was named in not one, but two sets of charges—the burglary and criminal mischief charges from 2007, and a new charge of robbery in the second degree resulting from a purse snatching—the basis of Information No. 08-CR-2569—in which Pierre stole a woman's purse from her shoulder as a co-defendant hit the woman's arm and back with a beer bottle. The Commonwealth offered to recommend a sentence of five years on the new charge, to run concurrently with the maximum five years offered on the 2007 indictment. According to the uniform citation, Pierre was identified as the purse snatcher by both the victim and two eyewitnesses—one of whom had followed Pierre on foot.

McGee represented Pierre on both cases. On August 6, 2008, the Hon. Stephen Mershon, sitting as a Senior Judge, accepted Pierre's guilty plea to complicity to second-degree burglary and complicity to first-degree criminal mischief. As recited in the Order on Plea of Guilty, the Commonwealth's recommendation was:

> [a]ll counts to run concurrently for a total of Five (5) years. Commonwealth will object to probation. The Defendant agrees to pay restitution to be determined at sentencing. The Defendant request (sic) to be release (sic) on his own recognizance pending sentencing. If the Defendant is released and violates the law or fails to cooperate the court orders he aggress (sic) to serve ten (10) years with no request for shock probation. The Defendant must enroll in GED classes and bring proof of attendance at sentencing.

On September 23, 2008, two concurrent five-year sentences were formally imposed on the 2007 indictment by Judge Maze. That same day, Pierre pled guilty to second-degree robbery as charged in the 2008 information. In October 2008, Pierre received a five-year sentence on the 2008 case, with all three terms being run concurrently for a total of five years. A request for probation was denied during the sentencing hearing. Motions for shock probation were also denied.

Prior to pleading guilty, Pierre (and McGee) executed two[11] standard AOC-491 forms—Motion to Enter Guilty Plea. Paragraph 10 of the form reads:

[11] While both forms carry a revision date of "2-03," only the form filed in Indictment No. 08-CR-2569 includes paragraph 10.

> I understand that because of my conviction here today, **I may be subject to greater/enhanced penalties if found guilty and/or convicted of any future criminal offenses.** I understand that if I am not a United States citizen, I may be subject to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service. I understand the complete terms of this plea and all the obligations imposed upon me by its terms.

[Emphasis in original].

Like Baltimore, McGee had no independent recollection of the specific advice he had given Pierre about deportation. At a hearing on March 22, 2012, McGee could testify only about his common practice in advising criminal clients. He said he and Pierre must have discussed deportation because it appears on the AOC-491, and he goes over that form "top to bottom" with all clients considering entering a guilty plea. McGee testified he does not usually discuss details beyond those mentioned in the form unless a client asks a specific question. He typically tells clients facing deportation the decision will be made by a federal court; not the state court. McGee testified Pierre understood the legal process and the facts of the case so well he was able to correct misstatements made by the trial court. McGee also stated he counseled Pierre about the Commonwealth's objection to probation. McGee testified he did not personally believe removal was consistent with the gravity of Pierre's actions and did not know removal was mandatory. Finally, McGee said Pierre's status and nationality were discussed at the subsequent sentencing hearing, when McGee recalled advising Pierre a conviction might make him subject to removal.

McGee was very familiar with the application process for challenging removal from the United States. In 2005 or 2006, he had helped a German national[12] successfully avoid removal by arranging a § 212(c) hearing in the Immigration Court.[13] Another person had also asked him about removal—fearing he might be charged in a burglary. McGee told that person he would almost certainly be deported, but no indictment resulted; McGee was unaware of any further action on the matter.

Defense counsel tested McGee's understanding of immigration law. McGee said mandatory removal often depends on the date of conviction and the

---

[12] The client had been convicted of driving under the influence and learned he was subject to removal upon applying for a passport.

[13] Prior to 1997, § 212(c) of the Immigration and Nationality Act of 1952 (INA) provided a process by which some aliens could request a waiver from deportation from the U.S. Attorney General. As explained in *INS v. St. Cyr*, 533 U.S. 289, 297, 121 S.Ct. 2271, 2277, 150 L.Ed.2d 347 (2001),

> [t]hree statutes enacted in recent years have reduced the size of the class of aliens eligible for such discretionary relief. **In 1990, Congress amended § 212(c) to preclude from discretionary relief anyone convicted of an aggravated felony who had served a term of imprisonment of at least five years.** § 511, 104 Stat. 5052 (amending 8 U.S.C. § 1182(c)). **In 1996**, in § 440(d) of AEDPA, Congress identified a broad set of offenses for which convictions would preclude such relief. *See* 110 Stat. 1277 (amending 8 U.S.C. § 1182(c)). And finally, that same year, **Congress passed IIRIRA. That statute, *inter alia*, repealed § 212(c), see § 304(b), 110 Stat. 3009–597, and replaced it with a new section that gives the Attorney General the authority to cancel removal for a narrow class of inadmissible or deportable aliens,** see *id*., at 3009–594 (creating 8 U.S.C. § 1229b (1994 ed., Supp. V)). **So narrowed, that class does not include anyone previously "convicted of any aggravated felony." § 1229b(a)(3) (1994 ed., Supp. V).**

(Emphasis added).

In 2008, when Pierre entered his guilty pleas, the term "aggravated felony" included "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year[.]" 8 U.S.C. 1101(a)(43)(G).

length of time the client has lived in the United States. He said he would discuss removal with any client charged with a violent crime, or an offense involving drugs or alcohol, since those charges often make a client subject to removal.

McGee was of the opinion one could request a waiver for any crime other than an "aggravated felony"—but acknowledged he had not researched the issue lately. Since 1990, a waiver is unavailable for anyone who pleads guilty to an aggravated felony. *St. Cyr*, 533 U.S. at 297, 121 S.Ct. at 2277. McGee also testified he would have discussed removal with Pierre early during his representation—while determining how to resolve the charges.

On June 24, 2011, Pierre filed a *pro se* motion to vacate, set aside or correct sentence—supported by a memorandum. He alleged counsel was ineffective on multiple grounds—he did not have conflict-free counsel; his attorney did not hire a forensic expert; his attorney neither had him "evaluated" nor considered his alien status, making his plea invalid; his attorney never told him he would face a removal hearing; and, his attorney did not request a suppression hearing.[14]

On December 5, 2011, post-conviction counsel filed a supplemental memorandum on Pierre's behalf arguing *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), was controlling. Appended to the memorandum was an affidavit signed by Pierre stating, "[h]ad I known of the

[14] Pierre does not specify the basis for the desired hearing. A suppression hearing was held on Baltimore's motion to exclude statements Pierre had made to police after waiving his constitutional rights in writing. The motion to suppress was denied.

immigration consequences of my guilty plea, I would not have agreed to the plea, but would have insisted that my case go to trial."

On January 25, 2012, defense counsel moved for an evidentiary hearing and supplemental briefing. He sought a swift resolution because Pierre "will go before the parole board in March, and if he is released, will likely go into ICE custody. It may be difficult to secure [Pierre's] personal appearance for a hearing if this occurs."

Testimony on the ineffective assistance of counsel claim was heard on two separate days. Baltimore and McGee testified, in Pierre's absence,[15] on March 22, 2012. A month later, on April 23, 2012, Pierre testified. According to Pierre, when he agreed to the Commonwealth's offer, there had been no talk of removal and he understood the Commonwealth would take no stand on probation. He also claimed he did not understand the meaning of the word "objection"[16] at the time of the plea, and McGee had told him he stood a good chance of being placed on felony probation. Pierre stated he would not have pled guilty had he known he would be deported.

On cross-examination, Pierre acknowledged McGee had told him the maximum sentence he faced and the Commonwealth's offer of a maximum of five years was a "big break." Pierre testified he agreed with McGee's assessment of the

[15] By error, Pierre was not transported to the hearing.

[16] McGee had previously testified he had explained the Commonwealth's objection to probation to Pierre and the objection was reflected in the Commonwealth's written offer which Pierre signed.

case since he had been told he stood a good chance of receiving felony probation. Pierre admitted he had previously pled guilty to misdemeanor theft charges in district court. While testifying, Pierre demonstrated he understood the impact of the "hammer clause" contained in the Commonwealth's offer and even referenced Jefferson County's unique "rocket docket."[17]

At the close of Pierre's testimony, counsel for both Pierre and the Commonwealth orally argued the motion to vacate. Defense counsel emphasized *Padilla* distinguishes advising a client he *might* be deported, from advising a client he *will* be deported, and while paragraph 10 on the standard AOC-491 states deportation may be a consequence of entering a guilty plea, the form does not constitute advice of counsel. In contrast, the Commonwealth argued Pierre had not alleged in writing that counsel had failed to advise him of automatic deportation; McGee had described his usual practice in advising all criminal clients about all aspects of the AOC-491 form; two separate judges had accepted Pierre's guilty pleas; Pierre remembered points that could help his case, but conveniently forgot points that were detrimental to his position; and, under *Padilla* and *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Pierre would be entitled to relief only upon showing he would have gone to trial—something the Commonwealth argued no rational defendant in Pierre's predicament would have done.

[17] A team of prosecutors in Jefferson County assigned to the Progressive Criminal Justice Plan with a goal of speedy resolution of certain criminal matters to reduce crowded criminal dockets. Pierre's 2008 case originated on the rocket docket and proceeded by way of information.

On April 27, 2012, the trial court issued an opinion and order overruling the motion to vacate with the following pertinent language:

> "We should . . . presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty." *Padilla, supra* at 1485. Here, the testimony of Mr. Ramon [McGee] confirms his general practice for years prior to his representation of Pierre included discussion of deportation consequences for plea agreements. While Pierre testified that Mr. McGee did not advise him of deportation consequences, the Court finds Mr. McGee's testimony more persuasive. In light of this and the strong presumption of competent advice mandated by *Padilla,* the Court finds that Pierre was advised of the deportation risk of taking his pleas. Because of this, his motion must fail.
>
> Even if Pierre had proven that Mr. McGee did not advise him of the deportation consequences of his pleas, the Court is not convinced he could satisfy the second prong of the test in *Strickland v. Washington,* 466 U.S. 668, 687[, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674] (1984). That is, even if Mr. McGee did not advise Pierre of the deportation risk of his pleas, the Court does not believe Pierre would rationally have chosen to go to trial. Had Pierre chosen to go to trial on 07-CR-2676, he could have been sentenced to fifteen (15) years upon conviction. He could have faced an additional ten (10) years on 08-CR-2569.[18] This brings the maximum sentence he was facing to twenty-five (25) years.
>
> Pierre's plea agreements ultimately secured Pierre a five (5) year sentence for all charges. His pleas eliminated 80% of the possible penalty for the charged offenses. If the Commonwealth had chosen to seek higher charges,

[18] The Commonwealth stated during hearings that the maximum sentence could actually have been thirty-five (35) years had the Commonwealth amended the charges in 08-CR-2569 to Robbery I. The Information filed in that case charges Pierre with Robbery II, and so the Court relies solely upon the maximum sentence under that Information rather than what the Commonwealth may have ultimately charged had the case proceeded to trial.

> then the math changes to make the plea agreement far more favorable to Pierre. The Court does not believe Pierre would rationally have chosen to face such harsh prison sentences – which would also have subjected him to a risk of deportation – given the generous offer made by the Commonwealth. Pierre's motion thus also fails the second prong of *Strickland.* For these reasons, the Court cannot grant Pierre the relief he seeks pursuant to RCr 11.42.

(Footnote in original).

On May 3, 2012, defense counsel moved the court to reconsider and alter, amend or vacate the denial of RCr 11.42 relief. The motion was called on May 21, 2012, at 2:26 p.m. Defense counsel asked that he be allowed to either argue or brief the CR[19] 59.05 motion for reconsideration. Judge McDonald initially stated the matter was remanded, but upon further questioning by defense counsel about whether the request was being denied or remanded, counsel was told to take a seat in the courtroom and the matter would be discussed at the end of the docket.

The case was called again at 3:02 p.m. At that point, Judge McDonald noted no order had been tendered. Defense counsel asked the trial court to reconsider Judge Maze's denial of the RCr 11.42 motion. The Commonwealth objected to the motion and asked that it be overruled because an evidentiary hearing lasting more than an hour had occurred and nothing had happened in the interim to change the result. Thereafter, the court denied the CR 59.05 motion. This appeal follows.

[19] Kentucky Rules of Civil Procedure.

ANALYSIS

We begin our review with a few words about compiling the Appendix to an appellate brief. Documents associated with Immigration Court in Chicago, Illinois, have been appended to Pierre's brief even though they are not part of the certified appellate record. Pierre argues in his reply brief these items were moved into evidence over the Commonwealth's objection during the hearing on the RCr 11.42 motion, and attached as exhibits to the supplemental memorandum filed by counsel. However, review of the hearing at which Pierre testified, and the supplemental memorandum filed by counsel, shows the only item marked and introduced at the hearing on April 23, 2012, was an ICE detainer dated December 12, 2008; the only exhibit attached to the supplemental memorandum was an affidavit executed by Pierre on November 21, 2011. Thus, the Commonwealth correctly notes the items contained in Exhibit 3 to Pierre's brief are not part of the certified appellate record.

CR 76.12(4)(c)(vii) forbids inclusion of items that are not part of the record, "[e]xcept for matters of which the appellate court may take judicial notice[.]" We may take judicial notice of "public records and government documents[.]" *Polley v. Allen,* 32 S.W.3d 223, 226 (Ky. App. 2004). Thus, we may take judicial notice of the documents pertaining to Immigration Court even though they were neither made available to—nor considered by—the trial court, especially since two of the documents did not exist when the RCr 11.42 and CR

59.05 motions were denied. While we are willing to take judicial notice of the challenged documents, our resolution does not flow from them.

It is a rudimentary principle of criminal law that a defendant choosing to enter a guilty plea is entitled to effective assistance of counsel. *Commonwealth v. Pridham,* 394 S.W.3d 867, 870 (Ky. 2012) (citing *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)). To prove he received deficient legal counsel, Pierre must first demonstrate counsel's representation was "below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688, 104 S.Ct. at 2052. Then, he must also demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* 466 U.S. at 694, 104 S.Ct. at 2052. Since he entered a guilty plea, Pierre must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill,* 474 U.S. at 59, 106 S.Ct. at 370.

Under *Padilla,* 559 U.S. at 374, 130 S.Ct. at 1486, to be constitutionally sufficient, counsel must advise a client whether the plea being contemplated "carries a risk of deportation." However, before *Padilla* was rendered, courts were split on whether *Strickland's* two-prong test for ineffectiveness applied to allegations of bad legal advice about deportation. Thus, when *Padilla* confirmed *Strickland* does apply to such claims, it announced a new rule. When a new rule is announced, defendants whose convictions are already final cannot benefit from the change. *Teague v. Lane,* 489 U.S. 288, 310, 109

S.Ct. 1060, 1075, 103 L.Ed.2d 334 (1989). Because Pierre's convictions became final in 2008, and *Padilla* announced a new rule in 2010, *Padilla* does not govern Pierre's appeal. *Chaidez v. U.S.*, --- U.S. ----, 133 S.Ct. 1103, 1113, 185 L.Ed.2d 149 (2013).

By the time of this appeal, Pierre's *pro se* RCr 11.42 motion alleging five grounds of ineffectiveness had been reduced to just one—that counsel did not inform him he would automatically be deported upon pleading guilty to felony burglary and robbery. A circuit court's findings on a claim of ineffective assistance of counsel present mixed questions of law and fact which we review *de novo*. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008) (citing *Groseclose v. Bell*, 130 F.3d 1161, 1164 (6th Cir. 1997)). We may set aside the trial court's findings of fact only if they are clearly erroneous. CR 52.01. We must indulge a strong presumption that counsel's conduct was within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Finally, because an evidentiary hearing was held, we must defer to the determinations of fact and witness credibility made by the trial judge. *See McQueen v. Commonwealth*, 721 S.W.2d 694, 698 (Ky. 1986); *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996). It is against this backdrop that we apply the *Strickland* analysis.

First, we must determine whether counsel provided less than objectively reasonable legal representation. There was conflicting testimony about whether Pierre knew he faced a risk of removal if he pled guilty. Pierre testified he

did not. Neither Baltimore nor McGee had independent recollection of discussing deportation with Pierre, but both testified their ordinary course of practice was to discuss the risk of deportation with *all* clients. McGee specifically testified he goes over the possibility of deportation with all clients because he explains the AOC-491 in detail to every client contemplating entering a guilty plea. The trial court found the testimony from Pierre's two attorneys to be more persuasive than that provided by Pierre. The trial court's findings being supported by the evidence, we give great deference to them and conclude counsel advised Pierre pleading guilty carried a risk of removal.

While immigration law is fluid and ever-changing, counsel should have been more explicit in advising Pierre his conviction of a felony—whether via guilty plea or jury verdict—would subject him to deportation. After wading through the immigration law ourselves, we are loath to say McGee provided bad advice, especially since he was so well-versed on the topic during the evidentiary hearing. However, since 1990, anyone convicted of an aggravated felony—specifically a crime involving a theft or burglary for which the person will serve at least one year—has been ineligible for a waiver from the Attorney General—formerly known as a § 212(c) exception. Pierre did not plead guilty until 2008. McGee testified he did not know removal for the crimes to which Pierre was pleading guilty would have been certain, but under 8 U.S.C. §1229b(a)(3),[20] it was.

[20] This provision reads in pertinent part:

> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

Accepting that McGee's advice should have been more precise, and therefore, was deficient, Pierre is not entitled to relief unless we believe he would have insisted on standing trial had he known removal would be certain. In light of the overwhelming evidence of guilt and the Commonwealth's generous offer, we are not convinced the outcome would have been any different if Pierre had known deportation was guaranteed. In our view, standing trial would not have been a rational choice. *Roe v. Flores-Ortega,* 528 U.S. 470, 486, 120 S.Ct. 1029, 1039-40, 145 L.Ed.2d 985 (2000); *see also Commonwealth v. Pridham,* 394 S.W.3d 867, 880 (Ky. 2014) (internal citations omitted).

Once indicted, Pierre had two choices—neither of which was good, and both of which would likely result in conviction in light of the evidence. The Commonwealth had inculpatory statements Pierre had personally made to police about the burglary and for which the trial court had denied a motion to suppress. On the charge of second-degree robbery, the victim of the purse snatching and two witnesses had positively identified Pierre as the man who stole the purse while his co-defendant hit the victim. Such evidence would have been exceptionally difficult to overcome at trial. Furthermore, the burglary and criminal mischief charges had been poised for trial until Pierre chose to accept the Commonwealth's

---

. . . .

(3) has not been convicted of any aggravated felony.

offer. Thus, he clearly knew standing trial was an option—and something made him change his mind.

Speaking of the Commonwealth's offer, while Pierre was charged with second-degree robbery, the Commonwealth argued Pierre could have been charged with first-degree robbery due to his co-defendant hitting the victim with a beer bottle as Pierre snatched the purse from her shoulder. In light of the facts and the Commonwealth's evidence, it is highly unlikely standing trial would have resulted in an acquittal and carried the added detriment of exposing Pierre to a far greater sentence.

Because a theft and a burglary were involved, so long as he was convicted of a felony—and there is no indication the Commonwealth was willing to reduce either charge to a misdemeanor—removal was inevitable. It appears McGee secured a good deal for Pierre in which his potential exposure for twenty-five years, if not thirty-five years, was reduced to three concurrent five-year sentences. Despite Pierre's protests to the contrary, we simply do not believe he would have rationally insisted on going to trial had he known deportation was certain, rather than just a risk.

As the trial court found, standing trial would not have been a rational decision for Pierre. Thus, even though counsel was deficient in not telling Pierre he would be deported if convicted of felony theft and/or burglary, there has been no showing of prejudice to trigger relief under RCr 11.42. We affirm the orders entered by the Jefferson Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Daniel J. Canon
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

James Havey
Assistant Attorney General
Frankfort, Kentucky