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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-002035-MR

JOSEPH EBU

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 15-CR-01061

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** **

BEFORE: MAZE, NICKELL AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Joseph Ebu appeals from an order of the Fayette Circuit Court summarily denying his motion for relief under Kentucky Rules of Criminal Procedure (RCr) 11.42. Ebu argues that he was entitled to an evidentiary hearing to determine whether his guilty pleas to facilitation to theft by deception and fraudulent use of a credit card must be set aside because counsel affirmatively

misadvised him about the immigration consequences of his plea and sentence. We agree with Ebu that he is entitled to a hearing and reverse and remand.

Ebu was indicted by the Fayette County Grand jury of theft by deception including cold checks under \$10,000 and theft of identity of another without consent, both Class D felonies. The charges arose from Ebu's alleged involvement with the fraudulent purchases of mobile phones using stolen identities.

On June 9, 2017, on advice of counsel, Ebu entered guilty pleas to amended charges of facilitation to theft by deception and fraudulent use of a credit card, both misdemeanors. He was sentenced to twelve months on each of the two misdemeanors, to run concurrently, with the imposition of the sentence of imprisonment probated for two years.

On October 4, 2017, Ebu filed an RCr 11.42 motion along with a verified affidavit requesting that he be permitted to set aside his guilty pleas on the basis he received ineffective assistance of counsel in the form of affirmative misadvice from his former counsel about the immigration consequences of his plea and sentence. Specifically, Ebu stated his former counsel advised him he would not be deported if he pled guilty to the misdemeanors. At this point, Ebu had been seized by immigration and deportation procedures had started.

On October 26, 2017, the Fayette Circuit Court summarily denied Ebu's motion to set aside indicating that it reviewed the video record of Ebu's guilty plea and sentencing. Ebu's motion to reconsider was denied and this appeal followed.

The right to counsel in a criminal case is guaranteed by the Sixth Amendment to the United States Constitution and Section Eleven of the Kentucky Constitution. As the United States Supreme Court observed in *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n.14, 90 S.Ct. 1441, 1449, n.14, 25 L.Ed.2d 763 (1970)), "the right to counsel is the right to the effective assistance of counsel." The two-prong test of *Strickland* for determining ineffective assistance of counsel claims "has now become hornbook law. 'First, the defendant must show that counsel's performance was deficient Second, the defendant must show the deficient performance prejudiced the defense.'" *Commonwealth v. Leinenbach*, 351 S.W.3d 645, 647 (Ky. 2011) (quoting *Strickland*, 466 U.S. at 686, 104 S.Ct. 2052)). In *Missouri v. Frye*, 566 U.S. 134, 143-44, 132 S.Ct. 1399, 1407, 182 L.Ed.2d 379 (2012) (internal quotations, citations and brackets omitted), the Supreme Court emphasized defense counsel's responsibilities during the guilty plea process:

The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours is for the most part a system of pleas, not a system of trials . . . it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. To a large extent . . . horse trading between prosecutor and defense counsel determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system. Defendants who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial. In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.

In *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S.Ct. 1473, 1482, 176

L.Ed.2d 284 (2010), the United States Supreme Court rejected the notion that there is a distinction between consequences of a guilty plea that are “direct” and those that are “collateral” in the context of immigration. The Court reasoned that because deportation is nearly an automatic result for a broad class of noncitizen offenders, “accurate legal advice for noncitizens accused of crimes” is crucial and the failure of counsel to do so constitutes ineffective assistance of counsel. *Id.*, 559

U.S. at 364, 130 S.Ct. at 1480. The Court held it was not enough that Kentucky's plea form provides notice of possible immigration consequences. The Court concluded "[i]t is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so clearly satisfies the first prong of the *Strickland* analysis." *Id.*, 559 U.S. at 371, 130 S.Ct. at 1484 (internal quotation marks omitted). Although the Court refrained from determining whether Padilla met the *Strickland* prejudice prong and remitted that issue to the Kentucky courts for an evidentiary hearing, the Court stressed that meeting *Strickland's* "high bar is never an easy task." *Id.*, 559 U.S. at 371, 130 S.Ct. at 1485.

The trial court in Ebu's case refused to conduct an evidentiary hearing on Ebu's claim that his former counsel misadvised him of the immigration consequences of his guilty pleas to misdemeanors. Although the trial court cited to the video record of Ebu's guilty plea and sentencing, nothing in that record or elsewhere in the record refutes Ebu's claim that counsel erroneously advised him of the deportation consequences or that Ebu was otherwise aware of those consequences. To the contrary, it is unclear whether Ebu's former counsel was aware of Ebu's immigration status as it was Ebu who informed the trial court that he is a permanent resident with a green card.

Ebu has presented material factual allegations of ineffective assistance of counsel that are not refuted by the record. The trial court was not free to “simply disbelieve [his] factual allegations” without conducting an evidentiary hearing. *Fraser v. Commonwealth*, 59 S.W.3d 448, 453 (Ky. 2001). The Commonwealth concedes remand to the trial court for an evidentiary hearing is required unless this Court rules that Ebu cannot prove the prejudice prong of the *Strickland* test. The Commonwealth asserts that no evidentiary hearing is required because the evidence against Ebu was strong and he would have been convicted of a crime resulting in the same immigration consequences as did his guilty plea.

Under *Strickland*’s prejudice prong, Ebu is required to prove “that he rationally would have insisted on a trial, not that an acquittal at trial was likely.” *Padilla v. Commonwealth*, 381 S.W.3d 322, 328 (Ky.App. 2012). As this Court noted after remand in *Padilla* and in Padilla’s second appeal of the trial court’s denial of his RCr 11.42 motion, the inquiry into the prejudice prong in the case of a noncitizen’s guilty plea is far different than in the case of a citizen. This Court explained:

The evidence of guilt and the potential sentence if convicted at trial compared to the consequences of a guilty plea are factors to be considered and, for a citizen defendant, may be the determinative factors in deciding to accept a plea offer. However, for a noncitizen defendant and, particularly a legal permanent resident facing deportation, “the stakes are . . . high and momentous.” *Delgado v. Carmichael*, 332 U.S. 388,

391, 68 S.Ct. 10, 12, 92 L.Ed. 17 (1947). It is the “equivalent of banishment or exile.” *Id.* In *Padilla*, the Court stressed that preserving the noncitizen defendant’s right to remain in the United States “may be more important to the [defendant] than any jail sentence.” *Padilla*, 130 S.Ct. at 1483 (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 322–323, 121 S.Ct. 2271, 2291, 150 L.Ed.2d 347 (2001)).

Id. at 329. Whether Ebu has satisfied the *Strickland* prejudice prong cannot be determined without an evidentiary hearing.

For the reasons stated, the trial court’s order is reversed, and the case is remanded for an evidentiary hearing.

NICKELL, JUDGE, CONCURS.

MAZE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MAZE, JUDGE, DISSENTING: Respectfully, I must dissent from the majority opinion because Ebu has failed to allege facts which, if true, satisfy the prejudice prong of *Strickland*. The majority opinion’s analysis of this issue is confined to its assertion that “Whether Ebu has satisfied the *Strickland* prejudice prong cannot be determined without an evidentiary hearing.” However, the majority does not explain what facts Ebu has alleged which, if true, demonstrate prejudice and necessitate an evidentiary hearing. Ebu’s mere claim he would not have pled guilty is not sufficient to warrant an evidentiary hearing. In the guilty plea context, a movant establishes prejudice by demonstrating “a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on

going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). This determination “should be made objectively, without regard for the idiosyncrasies of the particular decisionmaker.” *Id.*, 474 U.S. at 60, 106 S.Ct. at 371 (internal quotation marks and citation omitted). The movant “must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.” *Padilla v. Kentucky*, 559 U.S. 356, 372, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010).

In my opinion, a rational defendant wishing to avoid deportation would not have insisted on going to trial given the strength of the Commonwealth’s evidence that Ebu was guilty of at least two Class D felonies: theft by deception and theft of identity of another. After receiving a tip that a package would be delivered to the victim’s former house, Ebu was surveilled driving up to the residence and taking the package. He was then seized by police and described in detail a scheme in which a contact in Ghana would use stolen identities to purchase cell phones on the internet and have them delivered to vacant properties in the United States. Ebu would then pick up the cell phones and ship them to Ghana. Several packages from other fraudulently obtained cellphones were discovered in Ebu’s residence.

Ebu does not dispute this evidence. He merely asserts that no one can know what would have happened at trial and avoiding deportation was of

“paramount” importance to him. However, a theft offense for which the term of imprisonment is at least one year is an “aggravated felony.” 8 U.S.C.A. § 1101(a)(43)(G). Federal law provides that any alien who commits an aggravated felony shall be deported. 8 U.S.C.A. § 1227(a)(2)(A)(iii). A misdemeanor conviction would make Ebu eligible for deportation only if it were found to involve “moral turpitude.” 8 U.S.C.A. § 1227(a)(2)(A)(i). Ebu would have an opportunity to argue that his convictions did not qualify as moral turpitude crimes. Thus, Ebu’s options were 1.) insist on going to trial and hope for acquittal despite overwhelming evidence of guilt and the consequences being 1-5 years in prison on each count and automatic deportation; or 2.) accept the plea offer, avoid any jail time, and have a legitimate legal argument to raise in immigration court that his misdemeanor convictions do not require deportation. Based on the facts alleged by Ebu, accepting the Commonwealth’s plea offer was the *only* action that gave him a realistic hope of avoiding deportation. Accordingly, Ebu has failed to assert facts that, assumed true, show he was prejudiced by trial counsel’s allegedly deficient performance. The order of the trial court should be affirmed.

BRIEFS FOR APPELLANT:

J. Ryan Chailland
Ches Clark
Assistant Public Advocates
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Ken W. Riggs
Assistant Attorney General
Frankfort, Kentucky