Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **11th day of December, 2020** are as follows:

PER CURIAM:

2020-KK-00300 *STATE OF LOUISIANA VS. RONALD SEWELL (Parish of Orleans Criminal)*

REVERSED. SEE PER CURIAM.

Retired Judge James H. Boddie, Jr., heard this case as Justice pro tempore, sitting in the vacant seat for District 4 of the Supreme Court. He is now appearing as an ad hoc for Justice Jay B. McCallum.

Johnson, C.J., dissents and assigns reasons.
Weimer, J., concurs and assigns reasons.

12/11/20

SUPREME COURT OF LOUISIANA

No. 2020-KK-00300

STATE OF LOUISIANA

versus

RONALD SEWELL

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH CIRCUIT, PARISH OF ORLEANS

PER CURIAM:[*]

Ronald Sewell, a 20-year-old Jamaican national, pleaded guilty to two counts of first degree robbery, La. R.S. 14:64.1, in response to charges of armed robbery, La. R.S. 14:64; and pleaded guilty as charged to possession of a stolen firearm, La. R.S. 14:69.1. The district court sentenced him to serve three years imprisonment at hard labor without parole eligibility for each first degree robbery, and one year imprisonment at hard labor for possession of a stolen firearm, with the sentences to run concurrently. After he served his sentences, the Government commenced removal proceedings based on these felony guilty pleas. Mr. Sewell filed an application for post-conviction relief in which he contended the guilty pleas must be set aside because counsel rendered ineffective assistance by failing to advise him that they would result in his removal from the United States.

Mr. Sewell's former counsel testified at the post-conviction evidentiary hearing. She stated that she was unaware that her former client was not a United States citizen, and that she would have advised him of the possibility of removal if she had known his

[*] Retired Judge James H. Boddie, Jr., heard this case as Justice pro tempore, sitting in the vacant seat for District 4 of the Supreme Court. He is now appearing as an ad hoc for Justice Jay B. McCallum.

status as a noncitizen. Former counsel also testified that Mr. Sewell spoke English fluently and without an accent, and that he never informed her that he was born outside of the United States. The judge who presided over the post-conviction evidentiary hearing also accepted the guilty pleas. The judge indicated that she recalled the case and agreed that nothing about Mr. Sewell would have prompted anyone to question whether he was a United States citizen.

Nonetheless, the district court granted Mr. Sewell's application for post-conviction relief and ordered that his guilty pleas be withdrawn. The court noted that no one had advised defendant of the strong likelihood he would be removed from the United States based on his guilty pleas, the plea form did not contain any place to indicate citizenship, and therefore the court found it incumbent upon it to grant the relief requested. The court of appeal granted writs but denied relief. *State v. Sewell*, 19-1062 (La. App. 4 Cir. 2/5/20), 290 So.3d 1227. The court of appeal reasoned:

> In *Padilla v. Kentucky*, 559 U.S. 356, 368–74, 130 S.Ct. 1473, 1483–86, 176 L.Ed.2d 284 (2010), the Supreme Court applied this test to a complaint about counsel's performance and found that counsel erred by failing to accurately advise a non-citizen of the clear and certain immigration consequences of his conviction, including deportation. The Court observed in pertinent part, "[t]his is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect." *Id*. 559 U.S. at 368-69, 130 S.Ct. at 1483.
>
> It is undisputed that counsel for Mr. Sewell did not inquire as to his citizenship status. Mr. Sewell contended that if he knew pleading guilty would guarantee his deportation, he would have proceeded to trial. "It 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.'" *Padilla*, 559 U.S. at 371, 130 S.Ct. at 1484 (quoting *Hill*, 474 U.S. at 62, 106 S.Ct. at 372) (White, J., concurring in judgment)). Given these factors, we do not find that the trial court erred by granting Mr. Sewell's application for post-conviction relief.

Id., 19-1062, pp. 4–5, 290 So.3d at 1230–31. One member of the appellate panel

dissented on the basis that the present case is distinguishable from *Padilla v. Kentucky*, 559 U.S. 356, 368–74, 130 S.Ct. 1473, 1483–86, 176 L.Ed.2d 284 (2010), because the attorney in *Padilla* was aware of his client's status but misadvised him. *Sewell*, 19-1062, p. 1, 290 So.3d at 1231 (Dysart, J., dissenting).

We granted the State's application to determine whether the courts below erred in their interpretation and application of *Padilla* under the circumstances presented here. The United States Supreme Court held in *Padilla v. Kentucky*, 559 U.S. 356, 374, 130 S.Ct. 1473, 1486, 176 L.Ed.2d 284 (2010), that counsel's failure to advise a client of the risk that his or her conviction might result in removal was a cognizable basis for an ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Padilla*, 559 U.S. at 374, 130 S.Ct. at 1486 ("[W]e now hold that counsel must inform her client whether his plea carries a risk of deportation"). The Court acknowledged that although removal proceedings are civil in nature, they are "nevertheless intimately related to the criminal process[,]" as the American legal system has "enmeshed criminal convictions and the penalty of deportation for nearly a century," and because "recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders." *Id*., 559 U.S. at 365–66, 130 S.Ct. at 1481. On the latter point, the Court elaborated:

> These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

Id., 559 U.S. at 364, 130 S.Ct. at 1480 (footnote omitted). The Supreme Court declined to determine whether removal was a direct or collateral consequence of a conviction

(and, on a larger scale, whether such a distinction is necessary in defining the scope of reasonable assistance required under *Strickland*), finding it "uniquely difficult" to classify. *Id*., 559 U.S. at 366, 130 S.Ct. at 1482. Instead, the Court concluded that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel." *Id*.

A closer look at *Padilla* suggests it imposed a number of duties on defense attorneys, which are subsumed in the obligation to inform a client whether his plea carries a risk of removal. First, while not specifically addressed by *Padilla*, counsel must determine the immigration status of the noncitizen client, which may prove challenging given the several statuses possible under current law. Second, counsel must scrutinize the elements of the state crime in light of federal immigration law to identify the likelihood of removal following a guilty plea.[1] Third, counsel must advise the client accordingly as to the risk of removal.

However, it is not clear that *Padilla* imposed a duty on defense counsel to determine whether his or her client is a noncitizen to begin with, such that failure to make this determination constitutes per se deficient performance. The majority in *Padilla* arguably proceeded on the supposition that a defense attorney is aware that his or her client is a noncitizen. *See Padilla*, 559 U.S. at 370, 130 S.Ct. at 1484 ("When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all."). Concurring in the *Padilla* judgment, Justice Alito, with whom Chief Justice Roberts joined, agreed

[1] The Supreme Court acknowledged the considerable difficulty a criminal defense attorney may experience in this endeavor, given that immigration law is particularly complex and a specialty in its own right. Accordingly, the court provided that in situations in which the possible removal consequences are "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." *Padilla*, 559 U.S. at 369, 130 S.Ct. at 1483. On the other hand, the court held that "when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." *Id*.

with the Court's result, but took issue with the scope of its holding, asserting in pertinent part:

> In concluding that affirmative misadvice regarding the removal consequences of a criminal conviction may constitute ineffective assistance, I do not mean to suggest that the Sixth Amendment does no more than require defense counsel to avoid misinformation. *When a criminal defense attorney is aware that a client is an alien*, the attorney should advise the client that a criminal conviction may have adverse consequences under the immigration laws and that the client should consult an immigration specialist if the client wants advice on that subject. By putting the client on notice of the danger of removal, such advice would significantly reduce the chance that the client would plead guilty under a mistaken premise.

Id., 559 U.S. at 387, 130 S.Ct. at 1494 (emphasis added).

In the present case, it is undisputed that former counsel assumed Mr. Sewell was a United States citizen and did not make any inquiry on the subject. The applicable immigration statute, which is the same as that in *Padilla*, 559 U.S. at 368, 130 S.Ct. at 1483, is "succinct, clear and explicit" in defining the removal consequences for these felony convictions. Former counsel could have easily determined from the statute's text alone that Mr. Sewell's guilty pleas would result in his eligibility for removal, if she had known he was not a citizen. Moreover, the record is clear that former counsel failed to inform Mr. Sewell of the removal consequences of his guilty pleas. Thus, the parties dispute the extent of counsel's obligation to make such an inquiry in the first place. The State contends the court of appeal erred in applying a per se rule in which failure to inquire into citizenship status is always deficient performance. While the court of appeal did not announce that it was adopting a per se rule, it appears to have applied one to the extent that it assumed error and then proceeded straight to the question of prejudice under *Strickland*, without first addressing whether former counsel's performance fell below an objective standard of reasonableness.

We do not believe that the United States Supreme Court in *Padilla* imposed a

duty on every defense attorney to investigate every client's citizenship status in all instances. Instead, the Supreme Court in *Padilla* answered the question of whether advice about removal consequences is within the reach of the Sixth Amendment at all. *See Chaidez v. United States*, 568 U.S. 342, 349, 133 S.Ct. 1103, 1108, 185 L.Ed.2d 149 (2013) ("*Padilla* considered a threshold question: Was advice about deportation 'categorically removed' from the scope of the Sixth Amendment right to counsel"). The Supreme Court in *Padilla* concluded: "*Strickland* applied to Padilla's claim." *Chaidez*, 568 U.S. at 353, 133 S.Ct. at 1110 (quoting *Padilla*, 559 U.S. at 366, 130 S.Ct. at 1482).

Under *Strickland*, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. The nature of the *Strickland* test allows it to be applied to many evidentiary scenarios without "breaking new ground or imposing new obligations." *Williams v. Taylor*, 529 U.S. 362, 391, 120 S.Ct. 1495, 1512, 146 L.Ed.2d 389 (2000); *see also Rompilla v. Beard*, 545 U.S. 374, 381, 125 S.Ct. 2456, 2462, 162 L.Ed.2d 360 (2005) ("A standard of reasonableness applied as if one stood in counsel's shoes spawns few hard-edged rules."). Under the *Strickland* reasonableness standard, there may be no obligation to inquire into immigration status where counsel did not know, and did not have reason to know, that defendant was a noncitizen. Likewise, there may also be circumstances under which counsel's failure to inquire is unreasonable and amounts to error under *Strickland*. Nevertheless, the heart of the question under *Strickland* will always be reasonableness. To the extent the court of appeal here applied a per se rule rather than consider whether counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, the court of appeal erred.[2]

[2] *Cf. Bodabilla v. State*, 117 N.E.3d 1272, 1282–83 (Ind. 2019) (finding that failure to ask a client's

Similarly, the district court erred in granting relief without first finding that former counsel's performance fell below an objective standard of reasonableness.

Nonetheless, Mr. Sewell contends that former counsel's preparation and investigation was deficient—i.e. fell below an objective standard of reasonableness—and argues that if counsel had conducted an adequate investigation she would have discovered her client was not a United States citizen. The record and the district court's factual determinations, however, stand as a considerable obstacle for respondent to overcome here. Former counsel testified, and the district court agreed, that there was simply nothing to cause counsel (or the court) to question respondent's citizenship. While counsel argues that former counsel should have done more in the course of this representation, which might then have led former counsel to question her client's citizenship, those arguments are speculative, constructed post hoc, and not well grounded in the testimony presented at the evidentiary hearing and or in the district court's findings. The applicant for post-conviction relief has the burden of proving relief should be granted, La.C.Cr.P. art. 930.2, and respondent here failed to carry that burden.[3] Because we can find nothing in the record to show that the district court erred in concluding that former counsel did not know, and did not have any reason to know, that her client was not a United States citizen, we cannot conclude that former counsel

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citizenship status may not be per se deficient and questioning under what circumstances counsel's failure to inform a client of removal consequences could be deficient performance); *Vogel v. Director*, 95 Va. Cir. 335 (Va. Cir. Ct. 2017) (unpub'd), available at 2017 WL 10966801 (finding that the imposition of a hard line rule flies in the face of the reasonableness standard set forth in *Strickland*, and that the proper inquiry is whether counsel rendered ineffective assistance given that they did not know, or have reason to know, that the defendant was a noncitizen); *State v. Limarco*, 235 P.3d 1267 (Kan. App. 2010) (unpub'd), available at 2010 WL 3211674 ("If an attorney did not know and had no reason to know his client was an alien, then a failure to advise the client about immigration consequences might not constitute ineffective assistance, even under *Padilla*").

[3] Although respondent cites decisions in which courts found deficient performance in failures to advise about the removal consequences of a guilty plea, in none were the essential facts as undisputed as they are here—where all agree that the client did not reveal his citizenship, the attorney did not know the client's citizenship, and there was no reason to question the client's citizenship.

erred under *Strickland*.

Under the circumstances here, Mr. Sewell failed to carry his burden post-conviction of showing that his attorney's failure to inquire into his citizenship fell below an objective standard of reasonableness under *Strickland*. Therefore, the district court erred in granting Mr. Sewell's application for post-conviction relief and in ordering that Mr. Sewell's guilty pleas be withdrawn. Accordingly, we grant the State's application. We reverse the rulings of the courts below. We reinstate Mr. Sewell's guilty pleas.[4]

REVERSED

[4] Respondent in this court, the applicant for post-conviction relief in the district court, has now fully litigated his application for post-conviction relief in state court. Similar to federal habeas relief, *see* 28 U.S.C. § 2244, Louisiana post-conviction procedure envisions the filing of a second or successive application only under the narrow circumstances provided in La.C.Cr.P. art. 930.4 and within the limitations period as set out in La.C.Cr.P. art. 930.8. Notably, the legislature in 2013 La. Acts 251 amended that article to make the procedural bars against successive filings mandatory. Respondent's claims have now been fully litigated in accord with La.C.Cr.P. art. 930.6, and this denial is final. Hereafter, unless he can show that one of the narrow exceptions authorizing the filing of a successive application applies, respondent has exhausted his right to state collateral review. The district court is ordered to record a minute entry consistent with this per curiam.

12/11/20

SUPREME COURT OF LOUISIANA

No. 2020-KK-00300

STATE OF LOUISIANA

VS.

RONALD SEWELL

On Writ of Certiorari to the Court of Appeal, Fourth Circuit, Parish of Orleans

Johnson, C.J., dissenting:

Mr. Sewell was brought to the United States from Jamaica when he was one year old. He was 17 years old when he was arrested in the instant matter. His counsel did not ask him whether he was a United States' citizen before Mr. Sewell entered a guilty plea. Nor did counsel ask his parents whether Mr. Sewell was a United States' citizen. Therefore when Mr. Sewell pled guilty, he was unaware of the immigration consequences of his conviction. Deportation proceedings were subsequently commenced against him and he remains at the Pine Prairie ICE Processing Center, pending his deportation to Jamaica.

"When a defendant enters a counseled plea of guilty, this court will review the quality of counsel's representation in deciding whether the plea should be set aside." *State v. Beatty*, 391 So.2d 828, 831 (La. 1980); *see also State v. Scott*, 93-0401 (La. 3/17/95), 651 So.2d 1344. The two-part test of *Strickland v. Washington*,

466 U.S. 668 (1984) applies to challenges of guilty pleas based on claims of ineffective assistance of counsel. *See Hill v. Lockhart*, 474 U.S. 52, 58 (1985); *State v. Washington*, 491 So.2d 1337, 1339 (La. 1986). Under that standard, a reviewing court must reverse a conviction if a defendant establishes: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's inadequate performance prejudiced defendant to the extent that the proceedings were rendered unfair and the conviction suspect. *Strickland*, 466 U.S. at 687–694.

In my view, defense counsel's failure to enquire as to her teenaged client's immigration status was deficient. An objectively reasonable standard requires a simple enquiry into a client's citizenship in order to properly advise the client of the consequences of a conviction. The American Bar Association's guidelines for the performance of defense counsel in criminal cases address this very point directly:

> **Standard 4-5.5 Special Attention to Immigration Status and Consequences**
>
> (a) Defense counsel should determine a client's citizenship and immigration status, assuring the client that such information is important for effective legal representation and that it should be protected by the attorney-client privilege.
>
> (c) After determining the client's immigration status and potential adverse consequences from the criminal proceedings, including removal, exclusion, bars to relief from removal, immigration detention, denial of citizenship, and adverse consequences to the client's immediate family, counsel should advise the client of all such potential

> consequences and determine with the client the best course of action for the client's interests and how to pursue it.

ABA Standards for Criminal Justice 4–5.5 (4th ed. 2017). The Supreme Court "long ha[s] referred [to these ABA Standards] as 'guides to determining what is reasonable.'" *Wiggins v. Smith,* 539 U.S. 510, 524 (2003) (quoting *Strickland v. Washington,* 466 U.S. 668, 688 (1984)). And the State provides "no reason to think the quoted standard impertinent here." *Rompilla v. Beard*, 545 U.S. 374, 387 (2005).

Believing that the United States Supreme Court in *Padilla v. Kentucky*, 559 U.S. 356 (2010) did not impose a duty on every defense attorney to investigate every client's citizenship status in all instances, the majority opinion reverses the relief granted to Mr. Sewell in this case. However, the American Bar Association standards for the defense function were revised five years after *Padilla* and added the standard that counsel ascertain a client's immigration status. These guidelines were adopted by the American Bar Association House of Delegates in February 2015; three-and-a-half years before Mr. Sewell pled guilty while represented by counsel who was unaware that he was not a citizen.

Furthermore, it is not burdensome to require counsel to explain to a client that they might be deported if they are convicted of certain offenses and then ask the client if they are a citizen of the United States. It would only take a few minutes. And it is of no moment that counsel was not on notice that her client was not a citizen. To be effective, defense counsel is often required to investigate into a client's

circumstances that a client may not immediately volunteer or that may not immediately be apparent. For example, effective defense counsel in a capital case must investigate their client's educational and developmental history to ascertain whether they are intellectually disabled and therefore ineligible to be sentenced to death under *Atkins v. Virginia*, 536 U.S. 304 (2002).

Of course, a finding of deficient performance does not warrant vacating a conviction without a showing of prejudice. In this instance, the record before us is insufficient to determine whether, even if counsel had made the relevant enquiry, determined Mr. Sewell's immigration status and advised him of the consequences of the conviction accordingly, there is a reasonable likelihood that the result of the proceeding would have been different. Therefore I would remand to the trial court for a hearing on the question of whether counsel's deficient performance prejudiced Mr. Sewell.

It is notable that many judicial districts in Louisiana now include a question about citizenship and immigration consequences into a judge's standard plea colloquy with a defendant. There is no good reason why every jurisdiction should not include such a question as an insurance policy against the type of deficient performance exhibited by counsel in this defendant's case.

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SUPREME COURT OF LOUISIANA

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STATE OF LOUISIANA

versus

RONALD SEWELL

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
FOURTH CIRCUIT, PARISH OF ORLEANS

WEIMER, J., concurring.

I respectfully concur in the result to point out that the defendant previously pled guilty to misdemeanors of simple battery and illegal possession of stolen things less than $500. At that time, during booking, the defendant was recorded as informing jail personnel that he was born in Pennsylvania. Consequently, it is reasonable to believe that the defendant would not necessarily have been forthcoming about his immigration status, even if he had been asked.