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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SERGIO ALFONSO BRITO-CUSTODIO,

Defendant-Appellant.

UNPUBLISHED
November 18, 2021

No. 354542
Kent Circuit Court
LC No. 19-02559-FH

Before: RONAYNE KRAUSE, P.J., and CAMERON and RICK, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted[1] the trial court's denial of his motion to withdraw his guilty plea. We vacate the trial court's order and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

Defendant is originally from Mexico, but he has lived in Michigan for more than fifteen years. In 2019, defendant was involved in an incident in which he and another person entered a neighbor's home and removed some items that defendant contends actually belonged to him. Defendant was charged with felony third-degree home invasion, MCL 750.110a(4). Defendant ultimately accepted a plea agreement. Defendant entered a plea of guilty to misdemeanor larceny of more than $200 but less than $1,000, MCL 750.356(4)(a), and the third-degree home invasion charge was dismissed. On December 9, 2019, the trial court sentenced defendant to one day in jail, with credit for one day served, and twelve months of probation. Defendant never served his probation, because he was immediately taken into custody by the United States Immigration and Customs Enforcement Agency (ICE) and held pending deportation proceedings.

[1] *People v Brito-Custodio*, unpublished opinion of the Court of Appeals, entered October 19, 2020 (Docket No. 354542).

In March of 2020, several Supreme Court Administrative Orders were entered affecting various deadlines and court operations in response to the COVID-19 crisis. On June 4, 2020,[2] defendant moved to withdraw his plea. Defendant argued that he had believed he had a valid defense to the charges against him, but he accepted the plea on the basis of incorrect legal advice that his plea would not affect his immigration status. Specifically, defendant's trial counsel had consulted with an immigration attorney, Joshua Mikrut, regarding the immigration consequences of defendant's then-contemplated plea to larceny. Mikrut allegedly[3] failed to warn defendant that defendant's immigration status would turn on whether the potential sentence for a charge was greater or less than a year, and/or whether the charge was "a crime involving moral turpitude." Defendant asserts that he accepted the plea because he believed doing so would avoid potential immigration problems. However, the charge to which defendant pled guilty in fact mandated defendant's detention and deportation. Defendant contended that because he received incorrect advice and entered his plea on the basis of that advice, he was entitled to withdraw his plea.

The prosecution objected that defendant had not provided adequate record evidence in support of his motion. We note that the lower court record submitted to us on appeal was incomplete, but it appears that defendant had in fact attached an affidavit from himself, and he referenced affidavits from his trial counsel and from an expert immigration law attorney. The trial court denied defendant's motion, reasoning, in part, (1) that defendant had failed to provide an adequate record, seemingly meaning a transcript of the plea hearing; (2) that the trial court had informed defendant at the plea hearing that his immigration status might be affected; (3) that trial counsel's consultation of an immigration attorney had been competent even if the immigration attorney rendered bad advice; and (4) that defendant's motion must fail because defendant's "current attorney" had not attached the affidavits from his trial counsel and his expert. Regarding the latter point, the trial court clarified that defendant had actually attached the affidavits to a reply brief, but the trial court struck the reply brief[4] as impermissible under MCR 2.119(A)(2)(b). The trial court subsequently denied defendant's motion for reconsideration. The trial court rejected defendant's arguments that the COVID-19 crisis excused the untimeliness of the affidavits, and it criticized defendant for serving his motion for reconsideration on the prosecutor by email[5] and for filing it one day late.

Meanwhile, because of defendant's detention and eventual deportation, he was never taken into the custody of the probation department. According to defendant's probation officer, on

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[2] This was therefore within 6 months of defendant's sentencing, notwithstanding the COVID-19 crisis. Pursuant to MCR 6.310(C)(1), a defendant "may file a motion to withdraw the plea within the time for filing an application for leave to appeal under," in relevant part, MCR 7.205(A)(2)(a), which provides six months in criminal matters.

[3] Mikrut purportedly drafted a memo, but we have not found any copy of that memo in the record.

[4] A copy of the reply brief, with attached affidavits, is found in the lower court record, but we find the record ambiguous as to when the brief was filed.

[5] The proof of service stamp on the prosecutor's brief in response to defendant's motion indicates that the prosecutor also served his brief on defendant by email.

August 31, 2020, defendant's appeal in his deportation proceedings was denied, and on September 15, 2020, defendant was deported to Mexico. Defendant's probation officer therefore moved for defendant's discharge from probation, which the trial court granted. On October 19, 2020, this Court granted defendant's application for leave to appeal.

II. STANDARDS OF REVIEW AND PRINCIPLES OF LAW

When a criminal defendant seeks to withdraw a guilty plea on the basis that it was offered after receiving incorrect or insufficient legal advice, the defendant must show that the lawyer was not "reasonably competent" and the advice substandard in comparison to what one would reasonably expect from competent criminal-defense lawyers. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). In other words, where, as here, "a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id*. The defendant must also prove that counsel's deficient representation led to "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. While deportation is technically a civil, and not criminal, proceeding, it is a "particularly severe" sanction that has been "enmeshed" with criminal convictions, and, in many cases, those convicted are essentially automatically deported as a result. *Padilla v Kentucky*, 559 US 356, 365-366; 130 S Ct 1473; 176 L Ed 2d 284 (2010). Therefore, the competent advice required by *Strickland* includes advising clients whether a plea carries (or may carry) a risk of deportation; and, at least where "the deportation consequence is truly clear," that advice must be correct. *Id*. at 366, 369, 374.

This Court reviews a trial court's decision regarding a defendant's motion to withdraw a guilty plea for an abuse of discretion. *People v Seadorf*, 322 Mich App 105, 109; 910 NW2d 703 (2017). An abuse of discretion occurs when a trial court's ruling "falls outside the range of reasonable and principled outcomes." *People v Waterstone*, 296 Mich App 121, 131-132; 818 NW2d 432 (2012). "A trial court necessarily abuses its discretion when it makes an error of law." *Id*. at 132. Effectiveness of counsel is a mixed question of law and fact. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). The trial court must first make findings of fact, which this Court reviews for a clear error. *Id.* This Court will find a clear error in factual findings when its review of the record leaves it "with a definite and firm conviction that the trial court made a mistake." *Id*. The trial court then must determine whether those facts show that the defendant received constitutionally deficient representation and that he should be permitted to withdraw his plea, a question of law that this Court reviews de novo. *Id*.

III. CONSIDERATION OF AFFIDAVITS

As an initial matter, Supreme Court Administrative Order No. 2020-4 suspended all filing deadlines in the Court of Appeals from March 24, 2020, to June 3, 2020. It is not clear to us, and we need not decide, whether AO 2020-4 specifically tolled the time within which to file a motion to withdraw a plea.[6] However, we take judicial notice that the disruptions caused by the COVID-19 crisis were widely recognized at that time as demanding more lenity by the courts in excusing

[6] See footnote 2.

difficulties faced by parties that might ordinarily not be tolerated. Courts and attorneys were still adapting to handling matters via teleconferencing software or otherwise remotely, and indeed, it was often not even possible to handle some matters—including filings—in person. Under ordinary circumstances, the trial court's concern with defendant's timing might be warranted, but the trial court clearly abused its discretion by not considering defendant's affidavits. We also note that the trial court criticized defendant's use of email, while, curiously, not criticizing the prosecutor's use of email. That unequal treatment also constituted an abuse of discretion, especially at a time when email was the safest and most reliable medium for service.

Furthermore, in striking defendant's reply brief, to which was attached his trial attorney's affidavit and his expert's affidavit, the trial court relied on MCR 2.119(A)(2)(b), which states:

> *Except as permitted by the court* or as otherwise provided in these rules, no reply briefs, additional briefs, or supplemental briefs may be filed. [(Emphasis added).]

The trial court's commentary suggests that, contrary to the plain language of the court rule, it did not realize that it had the discretion to permit reply briefs. To the extent the trial court failed to recognize its discretion, the trial court necessarily abused that discretion as a matter of law. *People v Stafford*, 434 Mich 125, 134 n 4; 450 NW2d 559 (1990).

Conversely, to the extent the trial court recognized its discretion and chose to strike defendant's reply brief, the trial court abused that discretion as a matter of fact, at least as to the attached affidavits. The affidavits were referenced in defendant's motion to withdraw his plea, they support what was already stated in defendant's own affidavit, and the prosecution has identified no prejudice from the affidavits. Under the circumstances, it was neither reasonable nor principled for the trial court to withhold a trivial amount of lenity that it was specifically empowered to grant.

In any event, defendant's own affidavit was attached to his motion to withdraw his plea, and it appears that the trial court did not even consider that affidavit. Furthermore, even if the reply brief and attorneys' affidavits had not been properly included in the lower court record, we may and must consider materials outside the record for the limited purpose of whether to remand the matter for an evidentiary hearing. *People v Moore*, 493 Mich 933, 933; 82 NW2d 580 (2013). We would therefore be obligated to consider those affidavits even if the trial court had not been under any such obligation. We consider them below.

IV. SUPPOSED PERJURY

However, we must first address a troubling argument raised by the prosecution, both in the trial court and on appeal. The prosecution argues that, because defendant entered a plea of guilty and now seeks to withdraw that plea, defendant necessarily either committed perjury at his plea hearing or in his motion. This is simply an unjust and unfair argument.

It is an unfortunate fact that people sometimes enter pleas to charges that they do not believe they truly committed for tactical reasons, such as fear of being unable to prevail at trial. So long as plea agreements are permissible, entering into a plea agreement should not itself be held against a defendant, at least so long as the defendant did not present any factual untruths in the

process.[7] It does not appear that defendant has recanted any facts here. Rather, in his affidavit, defendant tacitly continues to admit that he did take the items, but he took those items because he believed he had a right to do so.

When the trial court elicited a factual basis for defendant's plea, the trial court asked defendant to confirm that he had committed larceny by taking those items. That was, however, not an entirely appropriate question. The trial court is required to elicit *facts* from a defendant that support a finding of guilt. MCR 6.302(D)(1). Whether those facts could support a conviction is a conclusion for the trial court, not the defendant, to make. See *People v Haack*, 396 Mich 367, 378; 240 NW2d 704 (1976). In effect, it is a question of law whether defendant committed larceny on the basis of the facts he provided. See *People v Moss*, 333 Mich App 515, 392 n 1; 963 NW2d 390 (2020). It has long been established that questions of law are for the courts, and parties' stipulations of law are not binding. *People v Metamora Water Service, Inc*, 276 Mich App 376, 385; 741 NW2d 61 (2007).

The fact that defendant seeks to withdraw his plea does not establish that he either committed perjury at the plea hearing or is committing perjury now. The prosecutor's contention to that effect is both wholly unsupported by the record and an improper and unjust argument. We remind the prosecutor that their role is to seek justice, not just to seek convictions. *People v Evans*, ___ Mich App ___, ___; ___ NW2d ___ (2020), Docket No 343544, slip op at p 7.

V. PREJUDICE TO DEFENDANT

As discussed, to establish ineffective assistance of counsel, a defendant must show that counsel's performance was objectively deficient and that the defendant was prejudiced by that deficient performance. In *Lee v United States*, 582 US ___; 137 S Ct 1958; 198 L Ed 2d 476 (2017), the United States Supreme Court addressed prejudice in the context of a defendant receiving erroneous advice regarding immigration consequences. *Id.*, 137 S Ct at 1964.

We note that, in *Lee*, the government had agreed that the attorney's representation was objectively unreasonable, so the reasonableness of the attorney's representation was not analyzed. *Id.*, 137 S Ct at 1962, 1964. We wholeheartedly agree with the trial court that it was appropriate for defendant's trial counsel to seek the advice of a specialist when presented with a question to which trial counsel did not know the answer. However, it is clear from *Lee* that prejudice is analyzed from the standpoint of what a defendant knew based on what he had been told. *Id.* 137 S Ct at 1967-1968. This is, of course, only fair, because only defendant can make the decision whether to enter the plea, and the inquiry is into whether defendant understood the plea rather than whether defendant's attorney understood the plea. See *People v Williams*, 153 Mich App 346, 350; 395 NW2d 316 (1986). Therefore, the issue is not so much whether trial counsel appropriately consulted a specialist, but rather what advice was actually given to defendant from *any* lawyer acting on his behalf. A trial court's warning at a plea hearing that the defendant's plea

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[7] We express no views as to the consequences, if any, should a defendant take a later position that factually irreconcilably conflicts with statements made during a plea, because no such situation is before us.

may have immigration consequences does not automatically cure the prejudice from a defendant's incorrect knowledge of those consequences. *Lee*, 137 S Ct at 1968 n 4.

Although we can unambiguously determine that the trial court erred by failing to consider defendant's affidavits, it is not possible to say on this record whether defendant received the kind of prejudicial ineffective assistance of counsel proscribed by *Padilla* and *Lee*. For example, we have not been provided with the memo allegedly drafted by Mikrut, nor do we have any affidavit or testimony from Mikrut. We conclude that the effectiveness of trial counsel cannot be determined without holding an evidentiary hearing. At a minimum, defendant's trial counsel must testify; if possible, Mikrut should also testify, and Mikrut's supposed memo should be introduced into evidence if it can be found. Such a hearing must include, but is not limited to, making a properly complete record of what communications were held by any combination of Mikrut, trial counsel, and defendant. There may even be other questions that the limited record precludes us from knowing we should ask.

However, although we vacate the trial court's denial of defendant's motion to withdraw his plea and we remand for further proceedings, we do not necessarily order an evidentiary hearing to be held. The trial court may alternatively reconsider its denial of defendant's motion to withdraw his plea, which would render the issue of ineffective assistance of counsel moot. Similarly, the parties may stipulate to permitting defendant to withdraw his plea and agreeing to a substitute plea agreement without immigration consequences, and if the trial court accepts that alternative plea, the issue of ineffective assistance of counsel would likewise be rendered moot. Therefore, an evidentiary hearing must be held on remand only if the trial court declines to grant defendant's motion or if the parties are unable to reach an alternative plea agreement. If an evidentiary hearing proves necessary, the trial court shall afford the parties a reasonable opportunity to present argument and shall make a ruling whether it would grant defendant's motion to withdraw his plea.

VI. CONCLUSION

The trial court's order denying defendant's motion to withdraw his plea is vacated, and the matter is remanded for further proceedings consistent with this opinion. Within 60 days of this opinion, the trial court shall do one of the following: (1) enter an amended judgment of sentence pursuant to an alternative plea agreement entered into by the parties; (2) enter an order granting defendant's motion to withdraw his plea and setting the matter for trial; or (3) enter an order denying defendant's motion to withdraw his plea after holding an evidentiary hearing and provide this Court with a record of the evidentiary hearing proceedings. We retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Thomas C. Cameron
/s/ Michelle M. Rick

Court of Appeals, State of Michigan

ORDER

People of MI v Sergio Alfonso Brito-Custodio

Docket No. 354542

LC No. 19-002559-FH

Amy Ronayne Krause
Presiding Judge

Thomas C. Cameron

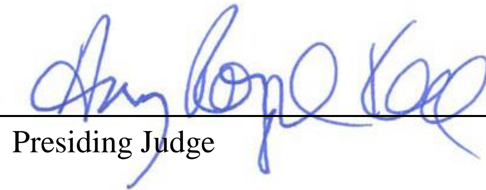
Michelle M. Rick
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall be given priority until they are concluded. As stated in the accompanying opinion, the trial court shall do one of the following within 60 days after the date of this order and accompanying opinion: (1) enter an amended judgment of sentence pursuant to an alternative plea agreement entered into by the parties; (2) enter an order granting defendant's motion to withdraw his plea and setting the matter for trial; or (3) enter an order denying defendant's motion to withdraw his plea after holding an evidentiary hearing and provide this Court with a record of the evidentiary hearing proceedings. The proceedings on remand are limited to these issues.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.



Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

November 18, 2021
Date

Chief Clerk