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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.

NO. 32,252

5 **GUILLERMO CONTRERAS,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF CIBOLA COUNTY**

8 **Camille M. Olguin, District Judge**

9 Hector H. Balderas, Attorney General

10 Margaret McLean, Assistant Attorney General

11 Olga Serafimova, Assistant Attorney General

12 Santa Fe, NM

13 for Appellee

14 Honce Law Office, LLC

15 Elizabeth A. Honce

16 Albuquerque, NM

17 for Appellant

1 **MEMORANDUM OPINION**

2 **HANISEE, Judge.**

3 {1} Defendant appeals from the district court’s denial of his motion for relief from
4 judgment, wherein Defendant sought to set aside the guilty plea on grounds that Rule
5 5-303(F)(5) NMRA, requiring that the district court both notify a defendant of, and
6 determine his or her understanding regarding, possible immigration consequences
7 associated with a plea of guilty. The rule as well requires that district courts ensure
8 that defense counsel advises defendants regarding the immigration consequences they
9 will face upon a plea of guilty. In this regard, Defendant also sought relief based upon
10 his attorney’s ineffectiveness. On appeal, Defendant argues that: (1) he did not receive
11 adequate translation services during his plea hearing; (2) the district court erred in
12 ruling that Defendant failed to establish ineffective assistance of counsel; and (3) the
13 district court erred in ruling that Defendant failed to establish a Rule 5-303(F)(5)
14 violation. As to his final point of appeal, we reverse the district court and remand for
15 proceedings consistent with this Opinion.

16 **BACKGROUND**

17 {2} Defendant, a citizen of Mexico, was arrested for intentional possession of
18 cocaine, contrary to NMSA 1978, Section 30-31-23 (1990, amended 2011), and use
19 or possession with intent to use drug paraphernalia, contrary to NMSA 1978, Section

1 30-31-25.1 (1997, amended 2001). In 2002, Defendant entered into a plea agreement
2 with the State, pursuant to which he pled guilty to one count of cocaine possession,
3 a fourth degree felony. After the district court accepted Defendant's guilty plea, it
4 inquired as to whether Defendant was a United States citizen. On the audio tape of the
5 proceeding, an unidentified individual can be heard to reply in the negative. The court
6 stated that at the upcoming sentencing hearing, it would like to know how sentencing
7 would affect Defendant's "ability to stay in the United States." Defense counsel stated
8 that he did not "think a deferred sentence would have [an effect] because there is no
9 entry of guilt." The court requested that this information be verified and instructed
10 both the defense and the State to conduct research on the matter. Defense counsel
11 again reiterated that he did not "believe [a deferred sentence] would have an effect
12 because as a deferral there is no adjudication."

13 {3} At the sentencing hearing, an Adult Probation and Parole officer (APPO)
14 recommended, as set forth within a presentence report that had been prepared
15 regarding Defendant, that the court impose only a deferred sentence. Defense counsel
16 requested that the court additionally "consider a conditional discharge" due to what
17 his perception that the APPO thought there might in fact be "a possible problem with
18 the [Immigration and Naturalization Service]." The court asked if there would be a
19 problem with deferring the sentence, and defense counsel responded:

1 I think with the deferral, according to the presentence report, there is. I
2 think with the conditional discharge, there probably won't be because a
3 judgment is never entered; a finding of guilt is never entered, and
4 obviously [Defendant] would be under the same terms and conditions
5 that the probation office is recommending on a deferred sentence.

6 After conferring with the APPO, the court noted that deportation would be triggered
7 "either with a conditional discharge, with a deferral, with a suspended [sentence], or
8 imposition of sentence. All four of those would cause the trigger because of the plea."

9 Ultimately, the district court followed the recommendation of the APPO and deferred
10 Defendant's sentence for a period of eighteen months. Defendant completed his
11 probationary period without revocation and the district court entered an order of
12 dismissal.

13 {4} Although not a part of the record on appeal, Defendant explains that
14 approximately six years after the district court entered the dismissal, he was taken into
15 the custody of Immigration and Customs Enforcement following a traffic stop. At that
16 time, Defendant obtained new counsel and filed a motion to withdraw his initial plea
17 or to set aside the judgment and sentence. Defendant claimed that the requisite inquiry
18 was not made regarding whether he understood that his plea may bare upon his
19 immigration status, and he was "never advised by his attorney of the specific
20 immigration consequences of his plea."¹ Defendant alleged that had he "known the

18 ¹ While the motion actually states that "inquiry was made as to whether Defendant
19 understood that his plea may have had an effect on his immigration status[,]" due to

1 specific collateral immigration consequences to his plea, [he] would have exercised
2 his [c]onstitutional [r]ight . . . to a trial by jury and would not have agreed to plead[.]”

3 {5} The district court held a hearing on Defendant’s motion, and Defendant
4 subsequently filed a motion for relief from judgment pursuant to Rule 1-060(B)(6)
5 NMRA of the Rules of Civil Procedure, where Defendant again asserted that during
6 the plea and sentencing hearings, he was never asked if he understood the immigration
7 consequences of his plea nor was he informed as to what the immigration
8 consequences would be. Defendant additionally claimed that his counsel’s failure to
9 properly advise him of the immigration consequences constituted ineffective
10 assistance of counsel that resulted in prejudice to Defendant as he had been detained
11 and placed into removal proceedings before an immigration court. Defendant again
12 argued that had he known of the specific immigration consequences of his plea, he
13 would have exercised his constitutional right to trial by jury. Ultimately, Defendant
14 asserted that his judgment was void because he received ineffective assistance of
15 counsel and because his plea was not “willfully, knowingly, or intelligently made.”

16 {6} Alternatively, Defendant filed a petition for a writ of habeas corpus, seeking to
17 have his sentence vacated and his conviction set aside on the same bases that he was
18 denied effective assistance of counsel and that his plea was not willful, knowing, or

18 the nature of Defendant’s argument to the contrary and the absence of the inquiry in
19 the record, we assume this was a typographical error by counsel.

1 voluntary. Defendant alleged a violation of his Sixth and Fourteenth Amendments
2 under the United States Constitution and his Article II, Section 14 rights under the
3 New Mexico Constitution. After a hearing on the matters, the district court issued a
4 ruling, noting that Defendant sought to withdraw his plea and have the judgment set
5 aside on the bases of a violations of Rule 1-060 and Rule 5-303(F)(5).

6 {7} In ruling against Defendant, the district court held that: (1) Defendant’s claim
7 regarding his lack of knowledge as to the effect of his plea on his immigration status
8 was not credible based upon the transcript of the sentencing hearing; (2) Defendant
9 failed to demonstrate the unconstitutionality of his plea and sentence as “Defendant
10 was present at two recorded hearings where discussion of his guilty plea, and [its]
11 [e]ffect on immigration, was discussed” and “Defendant was notified in court
12 hearings[] . . . heard extensive argument in court hearings that the guilty plea would
13 affect his ability to remain the country”; (3) the record was silent as to a violation of
14 Rule 3-303(F)(5), as portions of the sentencing hearing discussing Defendant’s
15 constitutional rights were absent and after the plea was accepted, the district court
16 asked the attorneys to research the immigration consequences, thereby putting
17 Defendant “on notice that his guilty plea could affect his immigration status.”
18 Accordingly, the district court denied Defendant’s motion for relief from judgment or,
19 in the alternative, his petition for writ of habeas corpus.

1 {8} In his brief in chief, Defendant explains that ultimately he voluntarily departed
2 the United States and is currently permanently disallowed entry into the United States.
3 Defendant appeals the district court's denial of his Rule 1-060(B) motion for relief
4 from judgment or sentence, arguing that the district court erred in ruling that
5 Defendant: (1) received adequate translation during the plea hearing, (2) failed to
6 show ineffective assistance of counsel and prejudice under Rule 1-060(B); and (3)
7 failed to establish a Rule 5-303(F)(5) violation.

8 **DISCUSSION**

9 **I. Rule 5-303**

10 {9} Defendant contends that the district court abused its discretion when it ruled
11 that Defendant failed to establish a Rule 5-303 violation. He asserts in this regard that
12 the district court failed to inform him that his plea may have an effect on his
13 immigration status and failed to inquire as to whether defense counsel advised him of
14 the immigration consequences of a plea. In support, Defendant cites to the transcripts
15 of the plea and sentencing hearings and claims that the only inquiry made by the
16 district court during the proceedings was whether he had anything to say during the
17 sentencing hearing. As a result of the claimed error, Defendant maintains that his plea
18 was not willfully, knowingly, and intelligently made, and the plea should be
19 withdrawn and the conviction voided.

1 {10} The State concedes that the district court failed to comply with the requirements
2 of Rule 5-303(F)(5), but argues that this was not the version of the rule in place at the
3 time Defendant entered his plea. The State asserts that Defendant cannot rely on a
4 later version of the rule to void his conviction. It additionally argues that “[a]
5 judgment is void only if the court rendering it lacked jurisdiction of the subject matter,
6 or of the parties, or acted in a manner inconsistent with due process of law.” *Classen*
7 *v. Classen*, 1995-NMCA-022, ¶ 10, 119 N.M. 582, 893 P.2d 478 (emphasis, internal
8 quotation marks, and citation omitted). The State maintains that because federal due
9 process does not require a district court to inform defendants that their pleas may have
10 immigration consequences and because Defendant failed to argue that the New
11 Mexico Constitution should be subject to a varied interpretation, the district court’s
12 ruling should be affirmed.

13 {11} “A motion to withdraw a guilty plea is addressed to the sound discretion of the
14 [district] court, and we review the [district] court’s denial of such a motion only for
15 abuse of discretion.” *State v. Garcia*, 1996-NMSC-013, ¶ 7, 121 N.M. 544, 915 P.2d
16 300; *State v. Favela*, 2013-NMCA-102, ¶ 16, 311 P.3d 1213. “The district court
17 abuses its discretion in denying a motion to withdraw a guilty plea when the
18 undisputed facts establish that the plea was not knowingly and voluntarily given.”
19 *State v. Paredes*, 2004-NMSC-036, ¶ 5, 136 N.M. 533, 101 P.3d 799 (internal

1 quotation marks and citation omitted). The relevant inquiry is whether Defendant’s
2 plea was knowing and voluntary, which requires this Court to examine whether the
3 district court complied with the requirements of Rule 5-303(F)(5). *See Paredez*, 2004-
4 NMSC-036, ¶ 8 (“The procedures established in Rule 5-303 are designed to ensure
5 a guilty plea is made knowingly and voluntarily.” (internal quotation marks and
6 citation omitted)). “A denial of a motion to withdraw a guilty plea constitutes manifest
7 error when the undisputed facts establish that the plea was not knowingly and
8 voluntarily given.” *Garcia*, 1996-NMSC-013, ¶ 7.

9 {12} The version of Rule 5-303(F)(5) in place at the time Defendant challenged the
10 proceedings in this case states that the district court shall not accept a guilty plea
11 without first, in open court, informing the defendant that the guilty plea may have an
12 effect upon the defendant’s immigration status and determining if “the defendant has
13 been advised by counsel of the immigration consequences of a plea[.]” *Id.* The
14 previous version of Rule 5-303, in effect at the time Defendant entered his plea, stated
15 that the district court “shall not accept a plea of guilty . . . without first, by addressing
16 the defendant personally in open court, informing the defendant of and determining
17 that the defendant understands . . . that, if the defendant is convicted of a crime, it may
18 have an effect upon the defendant’s immigration or naturalization status.” Rule 5-
19 303(E)(5) NMRA (2001). An examination of the record reveals that at the plea

1 hearing, the district court accepted Defendant’s guilty plea, and only *after* accepting
2 the plea inquired as to Defendant’s citizenship. Upon discovering that Defendant was
3 not a citizen of the United States, the court asked both defense counsel and the State
4 to research the effects the sentence would have on Defendant’s ability to remain in the
5 country.

6 {13} Therefore, even under the former version of the rule, the district court failed to
7 comply with the requirement of informing Defendant of and determining if Defendant
8 understood potential effects the plea may have on his immigration status. Failure to
9 advise Defendant of the potential impact of the guilty plea on his immigration status,
10 before the plea is completed, renders Defendant’s previously stated guilty plea
11 unknowing and involuntary. *See Garcia*, 1996-NMSC-013, ¶ 23 (“Failure to advise
12 a defendant of the potential penalties presumptively affects defendant’s substantial
13 rights and renders the plea unknowing and involuntary.”). “An involuntary plea is
14 inconsistent with the constitutional guarantee of due process.” *State v. Robbins*, 1967-
15 NMSC-091, ¶ 19, 77 N.M. 644, 427 P.2d 10. Accordingly, we reverse the district
16 court’s determination that Defendant failed to establish a violation of Rule 5-303. We
17 remand with instructions to the district court to allow Defendant to withdraw his plea.
18 *See Garcia*, 1996-NMSC-013, ¶ 24 (reversing and remanding to the district court with
19 instructions to allow the defendant to withdraw the guilty plea where the district court

1 failed to comply with Rule 5-303). Allowing Defendant to withdraw his plea
2 effectively disposes of the other errors claimed on appeal; therefore, we do not reach
3 them herein.

4 **CONCLUSION**

5 {14} For the foregoing reasons, we reverse the decision of the district court and
6 remand for proceedings consistent with this Opinion.

7 {15} **IT IS SO ORDERED.**

8
9

J. MILES HANISEE, Judge

10 **WE CONCUR:**

11

12 **RODERICK T. KENNEDY, Judge**

13

14 **TIMOTHY L. GARCIA, Judge**