IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1088

Filed: 21 July 2020

Cumberland County, Nos. 15CRS051647, 15CRS055455-6, 15CRS058657, 15CRS062952

STATE OF NORTH CAROLINA

v.

MICHAELANGELO RE

Appeal by Defendant from order entered 25 July 2019 by Judge James F. Ammons, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 9 June 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas R. Sanders, for the State-Appellee.

Tin Fulton Walker & Owen PLLC, by Jim Melo, for Defendant-Appellant.

COLLINS, Judge.

I. Background

Between 15 June and 9 November 2015, Defendant Michaelangelo Re was indicted for felony breaking or entering, felony larceny pursuant to breaking and

entering, felony possession of stolen goods, felonious conspiracy, and two counts of felony obtaining property by false pretenses.

On 5 May 2016, Defendant waived indictment and signed a Bill of Information for felony obtaining controlled substances by misrepresentation and two counts of trafficking in heroin, and a separate Bill of Information for felony obtaining property by false pretenses.

On 5 May 2016, Defendant pled guilty, pursuant to an *Alford* plea, to felony breaking or entering, two counts of larceny after breaking or entering, one count of obtaining a controlled substance by misrepresentation, and three counts of obtaining property by false pretenses. At the plea hearing, the State presented the following evidence as a factual basis for Defendant's guilty plea: Defendant and his wife broke into a residence and were discovered when the home owner returned to the residence; the residence had been ransacked and approximately $7750 worth of jewelry had been stolen; Defendant's wife's fingerprints were found on the jewelry box that had contained the stolen jewelry; Defendant pawned one of the stolen necklaces a few days after the burglary; Defendant stole and then pawned a lawnmower, a palm sander, a drill and its battery charger, 21 collectible knives, a military watch, and two fishing poles; Defendant impermissibly obtained 40 units of oxycodone from a physician a few days after he had been prescribed 110 units of oxycodone by another

physician; and Defendant misrepresented his medical history in order to obtain multiple prescriptions for oxycodone.

In exchange for his plea, the State dismissed the remaining charges. In accordance with the plea agreement, the trial court sentenced Defendant to three consecutive sentences of 6-17 months' imprisonment, suspended the sentences, and placed Defendant on 48 months' supervised probation. Defendant did not appeal.

On 16 October 2017, Defendant was detained by Immigration and Customs Enforcement officers, who served him with a Notice to Appear before a United States immigration judge. On 22 December 2017, Defendant filed a motion for appropriate relief ("MAR") with the trial court. Defendant asserted that he received ineffective assistance of counsel because his trial counsel erroneously advised Defendant of the immigration consequences of his convictions.

On 7 February 2018, the trial court ordered the State and Defendant's trial counsel to respond to the motion. Defendant's trial counsel responded on 6 March 2018 and the State responded on 9 March 2018.

On 9 January 2019, Defendant filed an amended MAR. Defendant alleged that each of the convictions resulting from his guilty pleas subjected him to "presumptively-mandatory deportation under clearly-established federal statutory law," and that his pleas were obtained in violation of his right to a knowing and intelligent waiver of his right to counsel.

On 17 May 2019, the trial court heard and orally denied Defendant's MAR. On 25 July 2019, the trial court entered a written order, memorializing its oral ruling. On 21 August 2019, Defendant filed a petition for writ of certiorari with this Court, seeking review of the trial court's order denying the MAR. On 30 August 2019, this Court allowed Defendant's petition for certiorari.

II. Discussion

Defendant argues that he (1) received ineffective assistance of counsel when his trial counsel informed him that deportation was a possibility, when in fact deportation was a certainty, and (2) was prejudiced by his trial counsel's advice regarding the immigration consequences of his guilty plea.

This Court reviews a trial court's order denying a MAR to determine "whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Hyman*, 371 N.C. 363, 382, 817 S.E.2d 157, 169 (2018) (internal quotation marks and citation omitted). Findings of fact that are supported by competent evidence are binding on appeal, even if there is conflicting evidence. *Id.* Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal. *Id.* We review conclusions of law de novo; under de novo review, this Court "considers the matter anew and freely substitutes its own

judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (internal quotation marks and citations omitted).

To prevail on a claim for ineffective assistance of counsel ("IAC"), a defendant must satisfy a two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Banks, 367 N.C. 652, 655, 766 S.E.2d 334, 337 (2014) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the United States Supreme Court held that legal advice regarding the risk of deportation is within the scope of the Sixth Amendment right to counsel, *id.* at 374, and concluded that trial counsel's assistance was ineffective where counsel provided defendant "false assurance that his conviction would not result in his removal[.]" *Id.* at 368.[1] Because "[t]he consequences of [defendant's] plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect." *Id.* at 368-69. The Court explained that

[1] The case was remanded to the trial court for a determination of prejudice as the trial court did not reach that prong in the first instance.

> [w]hen the law is 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. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Id. at 369.

This Court first applied *Padilla* in *State v. Nkiam*, 243 N.C. App. 777, 778 S.E.2d 863 (2015). Defendant in *Nkiam* was a lawful permanent resident who faced deportation after pleading guilty to felony aggravated armed robbery. He filed an MAR with the trial court asserting ineffective assistance of counsel. At an evidentiary hearing on the motion, the trial court denied the MAR because "[d]efendant was informed by his attorney prior to accepting the plea that there was at least a possibility it could result in his deportation from the United States." *Id.* at 779, 778 S.E.2d at 865. This Court reversed the denial,[2] explaining that "*Padilla* mandates that when the consequence of deportation is truly clear, it is not sufficient for the attorney to advise the client only that there is a risk of deportation." *Id.* at 786, 778 S.E.2d at 869.

"The second, or 'prejudice,' requirement . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). To successfully demonstrate prejudice, "the

[2] This Court "remand[ed] so that the trial court may address, in the first instance, whether defendant was prejudiced by his trial counsel's inadequate advice regarding the immigration consequences of his guilty plea." *Nkiam*, 243 N.C. App. at 795-96, 778 S.E.2d at 875.

defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* "The Supreme Court in *Padilla* emphasized, that in applying *Hill*, 'to obtain relief on this type of claim, a [defendant] must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.'" *Nkiam*, 243 N.C. App. at 792, 778 S.E.2d at 873 (quoting *Padilla*, 559 U.S. at 372). Because the consequence of deportation may weigh more heavily on a defendant than any other factor, "a defendant makes an adequate showing of prejudice by showing that rejection of the plea offer would have been a rational choice, even if not the best choice, when taking into account the importance the defendant places upon preserving his right to remain in this country." *Nkiam*, 243 N.C. App. at 795, 778 S.E.2d at 874.

When reviewing a defendant's claim of IAC, this Court "need not address both components of the inquiry . . . . If it is [possible] to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Banks*, 367 N.C. at 655, 766 S.E.2d at 337 (internal quotation marks and citation omitted). Here, we need not address whether trial counsel's performance was deficient because the trial court properly concluded that Defendant failed to demonstrate prejudice.

The trial court made the following findings of fact relevant to prejudice:

7. [Trial counsel] had several meetings with the defendant per his affidavit. In fact, at one point the defendant sought the services of a private attorney, Andrew Dempster.

8. After consulting with Andrew Dempster, the defendant indicated to [trial counsel] that he wanted to accept the plea that the State was offering.

9. The defendant entered pleas of guilty pursuant to a plea agreement on May 5, 2016 in the Superior Court of Cumberland County before the Honorable Judge James F. Ammons Jr., Judge Presiding. The defendant was represented by [trial counsel]. The plea agreement allowed the defendant to plead guilty to Breaking or Entering and Larceny after Breaking or Entering in 15CRS051647; four counts of Obtaining Property by False Pretenses in 15CRS055456-7 and 15CRS058657; and Obtaining a Controlled Substance by Fraud or Forgery in 15CRS062952. In exchange for the defendant's plea of guilty to the aforementioned charges, the State agreed to dismiss the charges of Possession of Stolen Goods, Conspiracy and two counts of Trafficking in Heroin. The plea agreement provided that the defendant would receive three consecutive suspended sentences of 6 to 17 months and would be placed on supervised probation; the defendant would pay restitution to the victims pursuant to the worksheet prepared by the State; and the defendant agreed to any other terms and conditions the Court would deem appropriate.

10. The State tendered a sentencing worksheet to the Court showing that the defendant was a prior record level I for felony sentencing purposes. The defendant was sentenced in accordance with the plea agreement. The defendant was sentenced in the presumptive range to three consecutive suspended sentences of 6 months minimum to 17 months maximum in the North Carolina Department of Adult Corrections in 15CRS051647, 15CRS055456 and 15CRS058657. The defendant was placed on supervised

> probation for 48 months. The defendant did not enter notice of appeal.
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> 11. The Court has examined the actual transcript and the court reporter's transcript of plea where the defendant was asked, "are you a United States Citizen?" His answer was "no." And the defendant was further asked, "do you understand that, if you are not a citizen of the United States, your plea of guilty or no contest may result in your deportation from this country, your exclusion from admission to this country, or the denial of you naturalization under federal law." His answer was, "yes."
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> . . . .
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> 14. The Court has also examined the entire file including the original Motion for Appropriate relief filed by Attorney Chris Peebles and the amended Motion for Appropriate relief filed by Jim Melo.
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> 15. The Court finds [trial counsel's] testimony to be credible, finds that it is almost in direct contradiction to some of the statements the defendant has made through both of his affidavits.
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> 16. . . . [Defendant] attempt[s] to undermine the negotiated plea that he entered into in order to avoid a certain active prison sentence if convicted of the trafficking charges.
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> 17. The Court finds that [Defendant] did not express any concerns to [trial counsel] or the Court about deportation when he entered the plea[.]
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> 18. The Court finds that the defendant has ties to Italy and has two brothers who currently reside there and at least one maternal aunt that resides there.

The trial court also made the following conclusions of law, which are more accurately categorized as findings of fact, *see State v. Allen*, 222 N.C. App. 707, 719,

731 S.E.2d 510, 519 (2012) ("A trial court's mislabeling a determination [as either a finding of fact or conclusion of law] . . . is inconsequential as the appellate court may simply re-classify the determination and apply the appropriate standard of review." (quotation marks and citation omitted)):

> 5. That the risk of prejudice to the defendant in light of the evidence against him and the certainty of conviction for trafficking offenses overrode any concern the defendant had at the time about deportation or exclusion from admission to this country or any other deportation consequences.
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> 6. The defendant clearly understood what he was doing. And it's the opinion of the Court, based on all of the evidence before the Court, that the defendant decided it was better not to risk the certain prison term and to worry about any immigration consequences down the road. He did this knowingly, understandingly, and intelligently, after consulting with multiple attorneys.

Based on these findings, the trial court concluded, in relevant part:

> 3. That the defendant was not prejudiced.
>
> 4. That there is no reasonable probability that the defendant would not have plead guilty if he had received different advice.

Defendant does not argue that the findings are not supported by the evidence. They are thus presumed to be supported by competent evidence and binding on appeal. *Hyman*, 371 N.C. at 382, 817 S.E.2d at 169. Instead, he argues that the trial court's finding that "the risk of prejudice to the defendant in light of the evidence against him and the certainty of conviction" "misses the point and focuses only on the

alleged weight of the evidence against [Defendant.]" Defendant argues that the trial court "failed to properly understand the significance of the immigration consequences that directed [Defendant's] decision making." We disagree.

The trial court "examined the entire file[,]" including an affidavit wherein Defendant averred, *inter alia*, "Had I known that my plea would have resulted in deportation from this country I would never have accepted the plea deal[,]" and "I would rather have risked years in jail rather than knowing I would certainly be deported for these offenses." The trial court's findings make it clear that it did not consider Defendant's averments to be credible. The trial court specifically found that trial counsel's testimony, which was "almost in direct contradiction to some of the statements the defendant has made through both of his affidavits" was credible; Defendant "did not express any concerns to [trial counsel] or the Court about deportation when he entered the plea"; the certainty of conviction "overrode any concern the defendant had at the time about deportation or exclusion from admission to this country or any other deportation consequences"; and "defendant decided it was better not to risk the certain prison term and to worry about any immigration consequences down the road." Thus, the trial court thoroughly analyzed "the significance of the immigration consequences that directed [Defendant's] decision making[.]" While the consequence of deportation may weigh more heavily on a defendant than any other factor, the trial court's findings show that in this case, the

consequence of deportation did not weigh more heavily on Defendant than any other factor. *Nkiam*, 243 N.C. App. at 795, 778 S.E.2d at 874.

The trial court also found that the evidence against Defendant created a "certainty of conviction[.]" *See Hill*, 474 U.S. at 59 ("In many guilty plea cases . . . the determination whether the error 'prejudiced' the defendant . . . will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial."). *See e.g.*, *Clarke v. United States*, 703 F.3d 1098, 1101 (7th Cir. 2013) (no possible prejudice where defendant faced almost certain conviction of aggravated felony at trial); *Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012) (finding no possible prejudice in light of overwhelming evidence of defendant's guilt for aggravated felony and noting that defendant cannot show prejudice on appeal "merely by telling [the Court] now that she would have gone to trial then if she had gotten different advice"). Additionally, Defendant faced up to 219 months–18.25 years–in prison if convicted of breaking or entering; larceny after breaking and entering; three counts of obtaining property by false pretenses; and obtaining controlled substance by misrepresentation, and faced additional prison time if convicted of possession of stolen goods, conspiracy, and trafficking charges. However, pursuant to Defendant's plea, the charges of possession of stolen goods, conspiracy, and trafficking were dropped and the trial court suspended the sentences for all remaining charges such that Defendant spent no time in prison. *See Padilla*, 381

S.W.3d at 329 ("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 . . . .").

Finally, the trial court found that Defendant has ties to Italy in that he has two brothers and one maternal aunt who currently reside in the country. Although Defendant's wife and three children live in the United States, unlike in *Padilla*, where the defendant had lived in the United States for more than 40 years and testified that facing deportation to Honduras was essentially "putting a gun to his head," *Padilla*, 318 S.W.3d at 330, Defendant here had lived in Italy for the first thirteen years of his life, had been in the United States for approximately sixteen years at the time of the MAR hearing, and has multiple family members still residing in Italy. *See Padilla*, 381 S.W.3d at 329 (explaining that a defendant's ties to the United States and to his country of citizenship are relevant factors in the prejudice analysis).

The trial court's findings of fact, which are supported by the evidence, illustrate that the trial court made all the relevant inquiries in determining whether Defendant was prejudiced by his counsel's performance. Moreover, the findings of fact support the trial court's conclusions that "there is no reasonable probability that the defendant would not have plead guilty if he had received different advice" and that Defendant was not prejudiced by his counsel's performance. Accordingly, we affirm the order denying Defendant's MAR. *Hyman*, 371 N.C. at 382, 817 S.E.2d at 169.

III. Conclusion

The trial court's order denying Defendant's MAR is affirmed.

AFFIRMED.

Judges STROUD and TYSON concur.

Report per Rule 30(e).