

[Cite as *State v. Bains*, 2010-Ohio-5143.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94330

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HARMEET BAINS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-437308

BEFORE: Sweeney, J., Kilbane, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED:

ATTORNEYS FOR APPELLANT

Margaret W. Wong
Scott Eric Bratton
Margaret W. Wong & Associates Co.
3150 Chester Avenue
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Diane Smilanick
Assistant Prosecuting Attorney
1200 Ontario Street
Cleveland, Ohio 44113

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Harmeet Bains (“defendant”), appeals the trial court’s denial of his motion to withdraw his guilty plea and vacate his conviction. Defendant based his motion on R.C. 2953.21 and Crim.R. 32.1. For the reasons that follow, we affirm.

{¶ 2} Defendant is a not a United States Citizen, being a native and citizen of India. Defendant, however, obtained conditional permanent residency in the United States in 2000. In 2003, defendant was charged with deception to obtain a dangerous drug, which is a felony offense in Ohio pursuant to R.C. 2925.22.

{¶ 3} On August 25, 2003, defendant entered a guilty plea to attempted deception to obtain a dangerous drug, which is a misdemeanor. He was represented by counsel throughout the criminal proceedings. Prior to taking defendant's plea, the trial court judge advised defendant as follows:

{¶ 4} "THE COURT: * * * [U]nder 2943.031, and I quote, if you are not a citizen of the United States, you are hereby advised that conviction of the offense to which you are pleading guilty may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

{¶ 5} "Upon request of the defendant, that's you, the Court shall allow him additional time to consider the appropriateness of the plea in light of the advisement described in this division.

{¶ 6} "* * *

{¶ 7} "All right: Now do you understand that you could be deported because of this?

{¶ 8} "THE DEFENDANT: Yes, sir.

{¶ 9} "THE COURT: All right. Even though this is a misdemeanor? This is an attempted deception to obtain dangerous drugs?

{¶ 10} "THE DEFENDANT: Yes, sir.

{¶ 11} "THE COURT: And this is your decision?

{¶ 12} "THE DEFENDANT: Yes, sir."

{¶ 13} Before accepting defendant's guilty plea, the court raised this issue again and inquired of defendant, "Have you given thoughtful consideration to what is taking place?" To which defendant responded, "Yes." The court then said, "You understand there may be serious consequences to pleading guilty because you are not a citizen of the United States?" And, again defendant assented, "Yes, sir."

{¶ 14} Defendant pled guilty and was convicted of the misdemeanor offense. The court sentenced defendant to pay a \$50 fine.

{¶ 15} The record contains correspondence from defense counsel to defendant dated October 20, 2003. Therein, defendant's counsel, among other things, specifically "urged" defendant to consult an immigration attorney to represent him "in any deportation proceedings initiated by the I.N.S." as a result of his conviction.

{¶ 16} In 2005, deportation proceedings were initiated against defendant due to his 2003 conviction.

{¶ 17} In 2009, defendant filed his motion to withdraw his guilty plea. The trial court issued a journal entry detailing its reasons for denying the motion and defendant has appealed that ruling asserting a sole assignment of error for our review, which states:

{¶ 18} "1. The denial of appellant's motion to withdraw his guilty plea and vacate conviction pursuant to R.C. 2953.21 and Ohio Criminal Rule 32.1 was an abuse of discretion."

{¶ 19} Defendant seeks to vacate his plea under the postconviction relief statute, R.C. 2953.21, as well as Crim.R. 32.1.

{¶ 20} “[A] petition for postconviction relief is subject to dismissal without a hearing when the record, * * * indicates that the petitioner is not entitled to relief and that the petitioner failed to submit evidentiary documents containing sufficient operative facts to demonstrate that the guilty plea was coerced or induced by false promises.” *State v. Kapper* (1983), 5 Ohio St.3d 36, 448 N.E.2d 823.

{¶ 21} The trial court is not required to hold a hearing before denying a motion to withdraw a plea pursuant to Crim.R. 32.1, particularly where the “trial court’s explanation of the reasons underlying the decision to deny the motion will illuminate why a hearing was not necessary. Sometimes, the record will reveal the reasons for denial with sufficient clarity to show that it was not error to fail to hold a hearing * * *.” *State v. Francis*, 104 Ohio St.3d 490, 502, 2004-Ohio-6894, 820 N.E.2d 355.

{¶ 22} We review the trial court’s decision under the abuse of discretion standard. *Id.* at 495. In this case, the trial court issued a comprehensive judgment entry that succinctly detailed the reasons for denying defendant’s motion, which are supported by the record.

{¶ 23} Defendant alleged he was entitled to have his plea vacated on the grounds of ineffective assistance of counsel. Specifically, defendant averred that his attorney misinformed him regarding the deportation consequences of his guilty plea and ensuing conviction.

{¶ 24} “To substantiate a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) the performance of defense counsel was seriously flawed and deficient, and (2) the result of defendant’s trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407. The Ohio Supreme Court truncated this standard, holding that reviewing courts need not examine counsel’s performance if the defendant fails to prove the second prong of prejudicial effect. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶ 25} The United States Supreme Court recently determined that “it is critical for counsel to inform her noncitizen client that he faces a risk of deportation” and that failure to do so can satisfy the first prong of the *Strickland* analysis. *Padilla v. Kentucky* (2010), ____ U.S. ____ 130 S.Ct. 1473, 176 L.Ed.2d 284. Notwithstanding, the defendant must still demonstrate prejudice as a result thereof before being entitled to relief. The court in *Padilla* remanded for a determination of prejudice.

{¶ 26} *Padilla*, however, is not analogous to this case. Most notably, the Kentucky court did not advise Padilla of the possible immigration consequences of his plea and conviction. *Id.* at fn. 15.¹ Also, Padilla’s counsel allegedly

¹Wherein the court found “it significant that the plea form *currently* used in Kentucky courts provides notice of possible immigration consequences.” The court in

misadvised him that he “did not have to worry about immigration status since he had been in the country for so long” and never advised him otherwise. Id. at 1477.

{¶ 27} There is no dispute that defendant’s conviction subjected him to deportation from the United States. There is also no dispute that the trial court properly advised defendant of the consequences of deportation and exclusion from admission to the United States upon his conviction. In fact, the trial court advised defendant verbatim of the warning set forth in R.C. 2943.031. It was during this reading of the “immigration advisement” when defendant allegedly “quietly asked [his] attorney if the plea would cause immigration problems for [him.]” To which his attorney allegedly “quietly replied that it was nothing to worry about and that they have to do this with all non-U.S. citizens.”

{¶ 28} Here, the trial court not only read the immigration advisement to defendant, but also continued to probe even further into defendant’s understanding of it by pointedly asking defendant if he understood the “serious consequences” of pleading guilty as a non-citizen. The trial court also directly advised defendant that he could be deported even though his conviction would be for a misdemeanor. In each instance, defendant assured the trial court that he understood. Defendant denied being promised anything in exchange for his plea. Finally, in the letter dated October 2003, defense counsel urged defendant

Padilla further noted that “many States require trial courts to advise defendants of possible immigration consequences. See * * * Ohio Rev.Code Ann. §2943.031(West

to consult with an immigration attorney to represent him in any deportation proceedings. From that point forward defendant could not have continued to justifiably rely upon any contrary advice or assurances he allegedly had previously received from his attorney.

{¶ 29} Even if we accept the averments of defendant's affidavit as true; namely, that his attorney quietly told him not to worry, the trial court clearly advised defendant on several occasions that his conviction would subject him to deportation — a fact his attorney corroborated at least by October 2003. Defendant did not attempt to withdraw his guilty plea until 2009. For these reasons, defendant cannot establish the requisite prejudice necessary to entitle him to relief. Accord *Flores v. State* ____ So.3d ____, (Fla. 4th DCA 2010) (holding “the court's warning that Flores may be deported based on his plea cured any prejudice that might have flowed from counsel's alleged misadvice”).

{¶ 30} Defendant relies heavily on *State v. Creary*, Cuyahoga App. No. 82767, 2004-Ohio-858. In *Creary*, the majority opinion remanded for a determination of whether Creary was prejudiced by his belief that entering a guilty plea would save him from deportation proceedings.² However, the majority still recognized that a defendant “must show a reasonable probability that he would not have entered the plea absent the lawyer's conduct.” *Id.* at ¶6. In that case, the

2006).” *Id.* at fn. 15.

²Creary alleged that his lawyer's advice that he would be subject to deportation if he went to trial led him to believe that he would not be subject to deportation by entering a guilty plea.

majority concluded that Creary had made a credible allegation because he pled guilty to the sole unamended count of the indictment. The majority further noted that the trial court denied the motion without making any factual findings. On remand, Creary was charged with the task of proving the alleged ineffective assistance of counsel resulted in “manifest injustice,” which “is intended to allow withdrawal only in ‘extraordinary cases.’” *Id.* at ¶12.

{¶ 31} In this case, the trial court did not find defendant’s contentions to be credible, particularly where the trial court had properly advised defendant of the deportation consequences.³ The trial court found disingenuous defendant’s claim that he would have gone to trial “since he had nothing more to lose.” The trial court cited the fact that defendant’s plea reduced the felony charge against him to a misdemeanor. The trial court not only appropriately exercised its discretion by denying defendant’s motion based on the record, but also as being untimely. *Francis*, 104 Ohio St.3d 490, 497. In this case, the trial court was able to conclude from the record that manifest injustice had not occurred and that defendant had not demonstrated the prejudice necessary to obtain relief. The trial court did not abuse its discretion by denying defendant’s motion to withdraw his guilty plea and, therefore, the sole assignment of error is overruled.

Judgment affirmed.

³“In reviewing a petition for postconviction relief filed pursuant to R.C. 2953.21, a trial court should give due deference to affidavits sworn to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge the credibility of the affidavits in determining whether to accept the affidavits as true statements of

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR