

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals No. E-10-070

Appellee

Trial Court No. 2006-CR-042

v.

Anca Andreias

DECISION AND JUDGMENT

Appellant

Decided: September 30, 2011

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Jason T. Lorenzon, Margaret W. Wong and Scott E. Bratton, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Erie County Court of Common Pleas that denied appellant's 2010 motion to vacate the guilty plea she entered in 2006 to

an amended count of attempted theft. For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} Appellant, Anca Andreias, sets forth three assignments of error:

{¶ 3} I. "THE TRIAL COURT ERRED WHEN IT DID NOT PERMIT THE DEFENDANT'S GUILTY PLEA TO BE VACATED PURSUANT TO OHIO CRIMINAL RULE 32.1 AS HER CRIMINAL ATTORNEY'S CONDUCT CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE TWO-PRONG *STRICKLAND* TEST."

{¶ 4} II. "THE TRIAL COURT ERRED BY FAILING TO HOLD AN EVIDENTIARY HEARING ON APPELLANT'S MOTION TO WITHDRAW HER GUILTY PLEA AND VACATE HER CONVICTION PURSUANT TO OHIO CRIMINAL RULE 32.1 DESPITE APPELLANT'S CLEAR AND UNEQUIVOCAL REQUEST."

{¶ 5} III. "THE TRIAL COURT ERRED BY FAILING TO STATE CONCLUSIONS OF FACT AND LAW WHEN IT DENIED APPELLANT'S MOTIONS TO WITHDRAW HER GUILTY PLEA AND VACATE CONVICTION PURSUANT TO OHIO CRIMINAL RULE 32.1"

{¶ 6} The following undisputed facts are relevant to the issues raised upon appeal. On June 5, 2006, in conjunction with a negotiated and amended plea, appellant was found guilty of one count of attempted theft, in violation of R.C. 2913.02 and 2923.02.

{¶ 7} On December 11, 2006, appellant was sentenced to six months in the Erie County Jail. The trial court suspended the six month sentence and placed appellant on community control for a period of eighteen months. The trial court entered the sentencing judgment on December 26, 2006.

{¶ 8} On December 18, 2007, appellant was discharged from community control due to satisfactory compliance with the terms and conditions of her sanctions. On October 21, 2010, four years after the plea was entered and three years after probation was terminated, appellant submitted a motion to withdrawal her guilty plea and vacate her conviction pursuant to Crim.R. 32.1. The trial court denied the motion without a hearing and filed its judgment entry on November 22, 2010.

{¶ 9} In her first assignment of error, appellant contends that the trial court erred in denying her motion to vacate her guilty plea because the injustice suffered by appellant was her trial attorney's ineffective assistance of counsel. Further the appellant argues that her trial attorney failed to properly advise her of the possible immigration-related consequences of her guilty plea.

{¶ 10} Crim.R. 32.1 of Ohio Rules of Criminal Procedure dictates:

{¶ 11} "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea."

{¶ 12} In conjunction with this, the Supreme Court of Ohio has stated: "It has been expressly recognized by the weight of authority that a defendant seeking to withdraw a plea of guilty after sentence has the burden of establishing the existence of manifest injustice." *State v. Smith* (1977), 49 Ohio St.2d 261, 264, quoting *United States v. Mainer* (C.A.3, 1967), 383 F.2d 444.

{¶ 13} In addition, assessing the merits of any such motion lies within the sound discretion of the trial court. The good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court. *State v. Smith* (1977), 49 Ohio St.2d 261, 264, quoting *United States v. Washington* (C.A.3, 1965), 341 F.2d 277.

{¶ 14} Appellant argues that her trial lawyer's ineffective assistance of counsel constituted manifest injustice in this case. It is well established that claims of ineffective assistance of counsel are reviewed under the standard set out in *Strickland v. Washington* (1984), 466 U.S. 668. In order to prove ineffective assistance of counsel, the appellant must show both that the performance of trial counsel was defective and second that but for that defect the trial outcome would have been different. *Id.* at 687.

{¶ 15} The appellant relies on *Padilla v. Kentucky* (2010), 130 S.Ct. 1473 in support of the notion that the disputed motion was wrongfully denied. In *Padilla*, the United States Supreme Court held that trial counsel engaged in deficient performance by failing to advise Padilla that his plea of guilty made him subject to deportation. We find this case to be materially distinguishable from *Padilla*.

{¶ 16} Prior to appellant taking the plea, the record shows that the trial court judge explicitly advised appellant:

{¶ 17} "THE COURT: You're advised that if you're not a citizen of the United States, the conviction to the offense of which you pleaded guilty to may have consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

{¶ 18} "Now on a felony level, more than likely, your chances of being deported or denied naturalization or citizenship would be greatly increased. Misdemeanor level, you already have a misdemeanor. I'm sure that it probably—the chances are made very remote, but I still have to advise you of that, okay? You understand that?

{¶ 19} "MS. ANDREIAS: Yes."

{¶ 20} We find the present case comparable to a recent Eighth District case in which the defendant relied upon *Padilla* under circumstances similar to this case. The court held in *State v. Bains*, 8th Dist. No. 94330, 2010-Ohio-5143: "*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." *Bains* at ¶ 26. Where the court instructed the defendant of the possible consequences of the pled conviction relating to deportation, defendant could not establish the requisite prejudice necessary to entitle him to relief under the second prong of *Strickland*. *Bains* at ¶29. See, also, *Flores v. State* (Fla.App. 2010), 57 So.3d 218, *Hernandez v. State* (Fla.App. 2011), 61 So.3d 1144.

{¶ 21} We adopt the interpretation set out in *Bains* and likewise find this case materially distinct from *Padilla*. The trial court advised appellant of the possible consequences of the plea agreement. Even accepting, without supporting evidence, the defendant's unilateral assertion that her counsel failed to advise her of the effects of a guilty plea, the court cured any prejudice with a thorough and clear explanation to appellant of all potential ramifications. Appellant also affirmed her understanding of same.

{¶ 22} The *Strickland* test for ineffective assistance of counsel is not satisfied. We find no injustice suffered by appellant and accordingly no abuse of discretion by the trial court in denying appellant's motion to vacate. Appellant's first assignment of error is not well-taken.

{¶ 23} The second assignment of error set forth by appellant contends that the trial court erred when it failed to hold an evidentiary hearing on the motion to vacate. The record clearly reflects that the judgment entry denying appellant's motion set forth the findings and comprehensive reasoning for the trial judge's ruling. According to Ohio law:

{¶ 24} "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 pleas was coerced or induced by false promises." *State v. Kapper* (1983), 5 Ohio St.3d 36, 38.

{¶ 25} Consistent with our findings in addressing the first assignment of error, we find that the record indicates appellant is not entitled to relief. We likewise find no evidence to demonstrate the guilty plea was coerced or induced. Therefore, the trial court did not abuse its discretion when it did not hold an evidentiary hearing. Appellant's second assignment of error is not well-taken.

{¶ 26} Appellant's third assignment of error maintains that the trial court erred by failing to state conclusions of fact and law when it denied appellant's motions. Appellant cites to *State v. McNeal*, 8th Dist. No. 82793, 2004-Ohio-50, in her argument, when in actuality the cited case demonstrates law contrary to her position. "Such findings and conclusions assist an appellate court in reviewing the exercise of discretion, but are *not required* when ruling on a motion to withdraw a guilty plea." *Id.* at ¶ 5. (Emphasis added).

{¶ 27} The record shows that the judgment entry extensively discussed the facts and applied the applicable law in the course of rendering the disputed ruling. We find the third assignment of error to be without merit and therefore not well-taken.

{¶ 28} The judgment of the Erie County Court of Common Pleas is affirmed. Pursuant to App.R. 24, costs of this appeal are assessed to appellant.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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