

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 10AP-1190
v.	:	(C.P.C. No. 09CR10-6451)
	:	
Saiqa Yahya,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 22, 2011

Michael DeWine, Attorney General, and *Shawn P. Napier*, for appellee.

Margaret W. Wong & Associates Co., LPA, *Jason T. Lorenzon*, *Scott E. Bratton*, and *Margaret W. Wong*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Defendant-appellant, Saiqa Yahya ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas denying her motion to withdraw a guilty plea and vacate her conviction. For the reasons that follow, we reverse and remand this matter with instructions.

{¶2} Appellant is a citizen of Pakistan but has been a legal permanent resident of the United States since 1996. On October 27, 2009, appellant was indicted on one count of theft by deception, a third-degree felony in violation of R.C. 2913.02(A)(3). The charge

was based on an allegation that appellant improperly billed wheelchair transportation for Medicaid recipients. On May 25, 2010, appellant pled guilty to the lesser-included offense of theft, a fourth-degree felony in violation of R.C. 2913.02.¹ Appellant was sentenced to four years of community control and required to complete 90 hours of community service, to maintain employment, and to pay restitution.

{¶3} On October 12, 2010, appellant filed a motion to withdraw her guilty plea and vacate her conviction. In her motion, appellant asserted that, shortly after her conviction, she was apprehended by United States Immigration and Customs Enforcement and remained in custody pending deportation proceedings. In the motion, appellant claimed that, prior to entering the guilty plea, her trial counsel advised her that the plea would not adversely affect her immigration status. The motion also claimed that, if appellant had received the correct legal advice, she would not have entered the guilty plea. Without holding a hearing, the trial court denied appellant's motion to withdraw the guilty plea.

{¶4} Appellant appeals from the trial court's order denying her motion, assigning three errors for this court's review:

I. THE TRIAL COURT ERRED WHEN IT DID NOT PERMIT THE APPELLANT'S GUILTY PLEA TO BE VACATED PURSUANT TO OHIO CRIMINAL RULE 32.1 AS HIS [sic] CRIMINAL ATTORNEY'S CONDUCT CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE TWO-PRONG STRICKLAND TEST.

II. THE TRIAL COURT ERRED BY FAILING TO HOLD AN EVIDENTIARY HEARING ON APPELLANT'S MOTION TO WITHDRAW HER GUILTY PLEA AND VACATE HER

¹ The guilty plea form contains a reference to R.C. 2913.02(A)(3), but the words "by deception" appear to have been scratched out. The judgment entry only states that appellant was convicted of theft, in violation of R.C. 2913.02.

CONVICTION PURSUANT TO OHIO CRIMINAL RULE 32.1
DESPITE APPELLANT'S CLEAR AND UNEQUIVOCAL
REQUEST.

III. THE TRIAL COURT ERRED BY FAILING TO STATE
CONCLUSIONS OF FACT AND LAW WHEN IT DENIED
APPELLANT'S MOTIONS TO WITHDRAW HIS [sic] GUILTY
PLEA AND VACATE CONVICTION PURSUANT TO OHIO
CRIMINAL RULE 32.1.

{¶5} In her second assignment of error, appellant asserts that the trial court erred by denying the motion to withdraw her guilty plea without conducting a hearing on the motion. Because we find the question of whether the trial court should have held a hearing to be a threshold matter, we begin our analysis with this assignment of error.

{¶6} Crim.R. 32.1 provides that "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." A defendant seeking to withdraw a guilty plea after a sentence has been imposed bears the burden of establishing that manifest injustice exists. *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus. "Manifest injustice relates to some fundamental flaw in the proceedings which result[s] in a miscarriage of justice or is inconsistent with the demands of due process." *State v. Williams*, 10th Dist. No. 03AP-1214, 2004-Ohio-6123, ¶5. A trial court is not always required to hold a hearing on a post-sentence motion to withdraw a guilty plea, but "[a] hearing is required if the facts alleged by the defendant and accepted as true would require the court to permit that plea to be withdrawn." *Id.* at ¶6, citing *State v. Kent*, 10th Dist. No. 03AP-722, 2004-Ohio-2129, ¶8. We review a trial court's decision not to hold an evidentiary hearing on a post-sentence motion to withdraw a guilty plea for abuse of discretion. *Id.*

{¶7} First, we will determine whether the trial court accepted the facts as alleged by appellant as true. Appellant asserts that she should be permitted to withdraw her guilty plea because her trial counsel provided ineffective assistance by advising her that a guilty plea would not adversely affect her immigration status or subject her to deportation. The two-prong test for ineffective assistance of counsel requires a defendant to prove (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defendant. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064. As applied to guilty pleas, the second prong of the ineffective assistance test requires the defendant to " 'show that there is a reasonable probability that but for counsel's errors, he would not have pleaded guilty.' " *State v. Xie* (1992), 62 Ohio St.3d 521, 524, quoting *Hill v. Lockhart* (1985), 474 U.S. 52, 59, 106 S.Ct. 366, 370. In this case, the trial court concluded that appellant did not establish a reasonable probability that, if had she been properly advised by her trial counsel, she would not have pleaded guilty because she "indicate[d] several times throughout her brief that if her counsel had told her she could be deported, she would have merely requested more time to contemplate her plea, not that she would have changed her plea." (Dec. 3, 2010 Decision and Entry at 6.)

{¶8} In her affidavit in support of the motion to withdraw her plea, appellant stated several times that she wished she had more time to consider the effect of her plea or to further investigate the consequences of her plea. The trial court was correct that these assertions were insufficient to prove that, if she had been properly advised, she would not have pled guilty. However, in the penultimate paragraph of the affidavit, appellant stated that "[i]f I had known that my plea would subject me to mandatory

detention, I would not have pled to the original charge." (Yahya affidavit ¶12.)² Accordingly, accepting as true appellant's allegation that she would not have pled to the charge, we must next consider whether such fact would require the trial court to permit withdrawal of the plea and, thus, whether the trial court was required to hold a hearing on the motion.

{¶9} We have previously concluded that ineffective assistance of counsel may constitute manifest injustice requiring post-sentence withdrawal of a guilty plea. *Conteh*

² Generally, it is the trial court's domain to weigh the credibility and good faith of statements made in support of a motion to withdraw a guilty plea. *State v. Conteh*, 10th Dist. No. 09AP-490, 2009-Ohio-6780, ¶15. Yet, a trial court is required to accept as true the facts alleged by the movant in determining whether a hearing is necessary. It appears here that, while the trial court accepted as true the appellant's assertion that if she had known she would be subject to detention she would have asked for more time to contemplate her plea, it did not accept as true appellant's assertion that she would not have pled guilty to the original charge. Furthermore, this court has said that a self-serving affidavit from a movant is insufficient to establish manifest injustice. *Conteh* at ¶15, citing *State v. Smith*, 10th Dist. No. 07AP-985, 2008-Ohio-2802; *State v. Moncrief*, 10th Dist. No. 08AP-153, 2008-Ohio-4594. However, in *Conteh* there were also other factors tending to discredit the movant's claims. In particular, we noted that there were affidavits from the movant's family members that contradicted the movant's claims as to the advice given by his attorney. *Conteh* at ¶17. Thus, rejection of the motion to withdraw the guilty plea in this case did not turn solely on the issue of a self-serving affidavit.

Moreover, the Supreme Court of Ohio has stated that "[a]n affidavit, being by definition a statement that the affiant has sworn to be truthful, and made under penalty of perjury, should not lightly be deemed false." *State v. Calhoun*, 86 Ohio St.3d 279, 284, 1999-Ohio-102. In *Calhoun*, a case involving a petition for postconviction relief under R.C. 2953.21, the Supreme Court adopted a multifactor test for assessing the credibility of affidavit testimony. *Id.* at 284-85. After noting that the trial court has discretion to determine whether one or more of these factors justify a conclusion that an affidavit is not credible, the court stated that "[a] trial court that discounts the credibility of sworn affidavits should include an explanation of its basis for doing so in its findings of fact and conclusions of law, in order that meaningful appellate review may occur." *Id.* at 285. Although *Calhoun* involved a petition for postconviction relief, other appellate courts have applied it in the context of motions to withdraw pleas under Crim.R. 32.1. See *State v. Mynatt*, 1st Dist. No. C-100298, 2011-Ohio-1358, ¶18-20; *State v. Spencer*, 8th Dist. No. 92992, 2010-Ohio-1667, ¶21; *State v. Hoffman*, 2d Dist. No. 2006 CA 19, 2006-Ohio-6119, ¶36. In *State v. Christley* (May 19, 2000), 11th Dist. No. 99-P-0022, the Eleventh District Court of Appeals applied *Calhoun* in reversing a trial court's denial without a hearing of a motion to withdraw a guilty plea. The motion was supported by affidavits from the movant and his wife. After finding that the trial court denied the motion without stating its reasons, the appellate court reversed and remanded to the trial court to either make findings of fact explaining why it discounted the credibility of the affidavits or to conduct an evidentiary hearing.

We find that the same reasoning applies in this case to the trial court's review of appellant's affidavit in support of her motion to withdraw her guilty plea. It is unclear from the decision below whether the trial court found appellant's statement that, if properly advised, she would not have pled guilty was not credible or whether the court overlooked that statement. Absent an explanation of why the trial court chose not to credit this portion of appellant's sworn statement, we are unable to conduct a meaningful review of whether the trial court acted arbitrarily in discrediting appellant's affidavit.

at ¶14, citing *State v. Dalton*, 153 Ohio App.3d 286, 2003-Ohio-3813, ¶18. Therefore, we engage in a two-part analysis to determine whether appellant was entitled to a hearing on her motion to withdraw her guilty plea. First, we must determine whether, taking her allegations as true, her trial counsel provided ineffective assistance. Second, once again taking her allegations as true, we must determine whether the ineffective assistance would constitute manifest injustice requiring the trial court to permit withdrawal of the guilty plea.

{¶10} As noted above, in the context of a guilty plea, the test for ineffective assistance of counsel requires establishing that trial counsel's performance was deficient and that there is a reasonable probability that, but for that deficient performance, the defendant would not have pled guilty. As to the first prong of this analysis, we are guided by the United States Supreme Court's decision in *Padilla v. Kentucky* (2010), — U.S. —, 130 S.Ct. 1473. In that case, the Supreme Court held that, when the deportation consequences of pending criminal charges are "truly clear," a criminal defense attorney has an equally clear duty to give correct advice regarding those consequences. *Id.*, 130 S.Ct. at 1483. Even when the law is not "succinct and straightforward," an attorney should advise the client that the pending criminal charges may result in adverse immigration consequences. *Id.* In *Padilla*, the relevant federal statute provided that any alien convicted of violating any law relating to a controlled substance, other than a single offense involving possession of 30 grams or less of marijuana for personal use, was deportable. *Id.* Padilla pled guilty to transporting a large amount of marijuana and was thus subject to deportation. *Id.*, 130 S.Ct. at 1477. Accepting as true for purposes of analysis Padilla's allegation that his trial counsel told him he did not have to worry about

his immigration status because he had been in the country so long, the Supreme Court held that his trial counsel's performance was constitutionally deficient. *Id.*, 130 S.Ct. at 1483.

{¶11} Appellant was indicted on a charge of theft by deception in violation of R.C. 2913.02(A)(3), a third-degree felony involving theft of property or services worth \$100,000 or more, but less than \$500,000. Appellant pled guilty to the stipulated lesser-included offense of theft in violation of R.C. 2913.02, a felony of the fourth degree, and the trial court sentenced appellant to pay restitution of \$131,549.27. Federal law provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. 1227(a)(2)(A)(iii). The category of "aggravated felony" includes "an offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000." 8 U.S.C. 1101(a)(43)(M)(i). In this case, determining the deportation consequences of appellant's guilty plea required appellant's counsel to review and understand the federal law defining "aggravated felony." However, in reviewing that law it appears sufficiently clear that appellant's theft conviction would constitute an aggravated felony and that she would be subject to deportation.³ Thus, appellant's trial counsel had a duty to give her correct advice about the immigration consequences of her guilty plea and, assuming appellant's claims are true, her attorney's failure to give correct advice constitutes a deficiency sufficient to satisfy the first prong of the ineffective assistance of counsel test.

³ Further, we note that, even if this was a case where the law was not "succinct and straightforward," appellant's trial counsel was still required to advise her that pleading guilty "may carry a risk of adverse immigration consequences." *Padilla*, 130 S.Ct. at 1483. However, in this case, appellant asserts that her trial counsel told her she would not be subject to deportation.

{¶12} Next, we turn to the prejudice prong of the ineffective assistance of counsel test and consider whether appellant established a reasonable probability that but for her trial counsel's incorrect advice she would not have pled guilty. "A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Dalton* at ¶30, citing *State v. Bradley* (1989), 42 Ohio St.3d 136, 142. As the *Padilla* court noted, a defendant "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 130 S.Ct. at 1485. The Supreme Court remanded *Padilla* on the prejudice question because the lower court decisions had not addressed the issue. *Padilla*, 130 S.Ct. at 1487.

{¶13} The state argues that appellant cannot demonstrate prejudice, citing to this court's recent decision in *State v. Ikharo*, 10th Dist. No. 10AP-967, 2011-Ohio-2746, and to the Fifth District Court of Appeals' decision in *State v. Yazici*, 5th Dist. No. 2010CA00138, 2011-Ohio-583, which we cited in *Ikharo*. However, we find the present case to be factually distinguishable from those decisions. In *Ikharo*, the defendant claimed that trial counsel failed to advise him of the immigration consequences of a guilty plea. *Ikharo* at ¶6. In *Yazici*, trial counsel advised the defendant that deportation was a possibility, but not that it would be a mandatory result of her guilty plea. *Yazici* at ¶35. In both cases, the trial court gave the statutory warning required under R.C. 2943.031 that the conviction could adversely affect the defendant's immigration status. *Ikharo* at ¶3; *Yazici* at ¶16. The Fifth District Court of Appeals held in *Yazici* that the defendant could not establish that she was prejudiced by her attorney's advice because she was advised that deportation was a possible consequence of her guilty plea. *Id.* at ¶43. In *Ikharo*, we cited to that ruling and held that the defendant could not establish prejudice because the

trial court's warning put him on notice that his guilty plea might have adverse immigration consequences. *Ikharo* at ¶19. We also noted in *Ikharo* that nothing in the record indicated that the defendant would not have entered the guilty plea if he had been advised that he would be, rather than might be, subject to deportation. *Id.* at ¶20.

{¶14} Unlike *Ikharo* and *Yazici*, which were based on a lack of advice or a lack of complete advice from trial counsel, this case involves an allegation that trial counsel gave incorrect legal advice to appellant. Assuming appellant's claims are true, when she asked about immigration consequences before entering the guilty plea, her trial counsel showed her an electronic document "showing that someone from the court or the prosecution contacted someone from immigration [sic] who stated that I was not deportable if I pled guilty to the charges." (Yahya affidavit ¶9.) Thus, appellant's trial counsel led her to believe she would be safe from deportation. Because appellant alleges that her counsel gave her incorrect advice, rather than failed to give advice or gave incomplete advice, this case is distinguishable from *Ikharo* and *Yazici*. For that reason, this case also differs from the decisions in *State v. Gallegos-Martinez*, 5th Dist. No. 10-CAA-06-0043, 2010-Ohio-6463, and *State v. Velazquez*, 8th Dist. No. 95978, 2011-Ohio-4818, which both rejected motions to withdraw or vacate pleas based on alleged failure to advise the defendants of the immigration consequences of their pleas.

{¶15} We also find that other recent cases are distinguishable from the present matter. In *Conteh*, this court affirmed a trial court's denial of a motion to withdraw a guilty plea based on a claim that the movant's attorney incorrectly advised him regarding the immigration consequences of a guilty plea. *Conteh* at ¶12, 19. However, *Conteh* differs in several key respects from the present case. In *Conteh*, we found that nearly a year

passed between the sentencing and the filing of the motion to withdraw the guilty plea. *Id.* at ¶2-3. In the present case, by contrast, less than six months passed between the entry of the guilty plea and the motion to withdraw that plea. Further, in *Conteh*, we noted that statements in the affidavits from the movant's brother and sister contradicted his claims about incorrect advice from his attorney. *Id.* at ¶17. Here, there is no evidence contradicting appellant's claim that her attorney told her she would not be subject to deportation.

{¶16} In a decision similar to *Conteh*, the Eighth District Court of Appeals affirmed a trial court's denial of a motion to withdraw a guilty plea based on a claim of incorrect advice in *State v. Bains*, 8th Dist. No. 94330, 2010-Ohio-5143. The movant claimed that while the trial court was reading the statutory warning required under R.C. 2943.031, he turned to his attorney and asked whether the plea would result in immigration problems. The movant claimed that his attorney responded that it was nothing to worry about and that the warning was required to be given to all non-citizens. *Id.* at ¶27. The appellate court found that, even if the movant's claim about his attorney's statement was true, his motion to withdraw was insufficient. The court found that the trial court not only gave the statutory warning, "but also continued to probe even further into [the movant's] understanding of it by pointedly asking [the movant] if he understood the 'serious consequences' of pleading guilty." *Id.* at ¶28. In the present appeal, it appears that the trial court only gave the statutory warning, without any further "pointed" discussion of the consequences of pleading guilty. Further, in *Bains*, the appellate court noted that the movant entered his guilty plea in August 2003 and in October 2003 received correspondence from his attorney urging him to consult an immigration attorney to

represent him in any deportation proceedings arising due to his conviction. *Id.* at ¶3, 15. Despite this warning, the movant did not attempt to withdraw his guilty plea until 2009. *Id.* at ¶29. By contrast, in this case, the appellant moved to withdraw her guilty plea less than six months after the entry of her plea. Thus, we find that the present case differs significantly from *Bains*.

{¶17} "The right to assistance of counsel [for a criminal defendant] has been long recognized as a fundamental right basic to our system of jurisprudence." *State v. Hook* (1986), 33 Ohio App.3d 101, 103. This right is based on recognition that "even the intelligent and educated layman has minimal or sometimes no skill in the science of the law" and that the right to a fair trial may necessarily require the right to counsel. *Id.*, citing *Powell v. Alabama* (1932), 287 U.S. 45, 53 S.Ct. 55. Accordingly, our system provides criminal defendants access to an attorney, and that attorney has a professional obligation to provide competent representation to the defendant. Prof.Con.R. 1.1. Within the context of this system, a defendant is entitled to rely on advice from counsel and to trust that the advice is competent and accurate. See, e.g., *Abdalla v. Olexia* (1996), 113 Ohio App.3d 756, 759 ("A layman untrained in the law is entitled to and, in fact, to some extent required to rely upon advice of his legal counsel."); *State v. Benson* (July 18, 1997), 2d Dist. No. 09-CA-29 ("A criminal defendant facing serious potential sanctions can be expected to rely upon the advice of his counsel."). This is particularly true for an immigrant, who faces not only potential criminal sanctions but also deportation. In this case, appellant alleges that she relied on specific advice from her attorney, received prior to entering the guilty plea, that she would not be deported as a result of that plea. When the trial court subsequently delivered the statutory warning that pleading guilty *might*

result in deportation, exclusion, or denial of naturalization, it might have been reasonable for appellant to rely on her attorney's specific assurance that she would not be deported. Under these circumstances, the trial court's delivery of the warning required under R.C. 2943.031 would not necessarily cure her attorney's specific error regarding the consequences of a guilty plea. Those issues could be more fully explored during a hearing.

{¶18} Even prior to *Padilla*, Ohio courts recognized that "[r]egardless of whether a lawyer is required to inform a defendant of collateral consequences, the lawyer who gives such advice must ensure that the information is correct." *State v. Creary*, 8th Dist. No. 82767, 2004-Ohio-858, ¶9. Creary claimed that his lawyer advised him to plead guilty because he would be subject to deportation if found guilty at trial. As a result of this advice, Creary believed that pleading guilty would eliminate the possibility of deportation. *Id.* at ¶5. Creary pled guilty and was sentenced to one year in prison. *Id.* at ¶2. When federal immigration authorities commenced deportation proceedings against him, Creary filed a Crim.R. 32.1 motion to withdraw his guilty plea. *Id.* at ¶3. Creary supported his motion with an affidavit and a copy of the notice of deportation proceedings. The trial court denied the motion without a hearing. *Id.* On appeal, the court noted that "[e]ven after the judge informed him that deportation remained a possibility, Creary could have relied on his lawyer's advice in believing that the possibility was lessened by his plea." *Id.* at ¶9. The court of appeals found that, based on his affidavit and surrounding circumstances, Creary was entitled to a hearing on his motion to withdraw the guilty plea. *Id.* at ¶16. Assuming appellant's claims to be true, the case before us presents a stronger case for withdrawal of the guilty plea than *Creary* because this case is based on incorrect

advice from appellant's attorney rather than a mistaken inference drawn from the advice of counsel.

{¶19} In applying *Padilla*, other jurisdictions have found that incorrect advice from trial counsel may prejudice a defendant who enters a guilty plea. The Supreme Court of Washington found that a defendant suffered prejudice due to his trial attorney's incorrect advice about the immigration consequences of his guilty plea in *State v. Sandoval* (2011), 171 Wash.2d 163. Sandoval was charged with rape in the second degree. He was offered a plea deal for a reduced charge of rape in the third degree. *Id.* at 167. Sandoval was "very concerned" that he would be subject to deportation proceedings after pleading guilty, but his attorney advised him that he would not be immediately deported and would have an opportunity to retain an immigration attorney to address any potential consequences of the guilty plea. *Id.* Based on this advice, Sandoval pled guilty. The plea form contained a warning that a guilty plea to an offense punishable as a crime under state law was grounds for deportation. *Id.* On appeal, the Supreme Court of Washington concluded that Sandoval demonstrated a reasonable probability that, but for his attorney's error, he would not have pled guilty. *Id.* at 175. In addition to his own post-conviction attestation that he would have rejected the plea offer if he had known the deportation consequences, his trial counsel stated that Sandoval was very concerned about the risk of deportation. *Id.* The state argued that it would not have been rational for Sandoval to go to trial because he faced significantly greater penalties if convicted of second-degree rape than he did by pleading guilty to third-degree rape. *Id.* However, the court rejected this argument, reasoning that, because Sandoval had earned permanent residency and because deportation would have been a particularly severe penalty, it

would have been rational for him to take his chances at trial. *Id.* at 176. Accordingly, the court found that Sandoval was prejudiced by his attorney's incorrect advice. *Id.* See also *People v. Williams* (N.Y.App.Div. 2010), 72 A.D.3d 1347, 1348.

{¶20} Similarly, in *United States v. Reid* (Aug. 4, 2011), S.D.Ohio No. 1:97-CR-94, the United States District Court for the Southern District of Ohio held that a criminal defendant who had been misinformed by his trial counsel about the immigration consequences of his guilty plea demonstrated that he was directly prejudiced by his counsel's incorrect advice. Reid was indicted on eight counts of embezzlement, in violation of federal law. Reid pled guilty and was convicted of one count of embezzlement; prior to entering the guilty plea, Reid's attorney advised him that he would be subject to deportation if convicted at trial, but not if he pled guilty. His attorney also advised him that, if he was convicted at trial, his family would face deportation. The court found that Reid's "primary concern" was the effect of the criminal charges on his immigration status and that, until his attorney misadvised him of the deportation consequences, he was ready to go to trial. The Supreme Court further found that, if Reid had been properly advised that a guilty plea would still subject him to deportation, he likely would have weighed his options differently and decided to go to trial. Thus, the Supreme Court concluded that Reid had demonstrated a reasonable probability that he would not have entered the guilty plea if he had been properly advised and, therefore, he demonstrated prejudice sufficient to establish ineffective assistance of counsel. See also *United States v. Dass* (July 14, 2011), D. Minn. Crim. No. 05-140.

{¶21} In addition to her affidavit, the timing of appellant's motion to withdraw her guilty plea might support her claim that she would not have pled guilty if she had been

properly advised of the immigration consequences of that plea. Appellant entered her guilty plea on May 25, 2010. It is unclear from the record before us when the deportation proceeding against her began, but she filed her motion to withdraw the guilty plea on October 12, 2010, less than six months after entering the plea. In *State v. Conteh*, 10th Dist. No. 09AP-490, 2009-Ohio-6780, the defendant sought to withdraw a guilty plea, arguing, in part, that his trial counsel erroneously advised him that he would not be subject to deportation. Id. at ¶12. We noted that " '[a]n undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim.R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion.' " Id. at ¶15, quoting *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph three of the syllabus. The deportation proceedings against the defendant in *Conteh* began in April 2008, but he did not move to withdraw his guilty plea until February 2009. *Conteh* at ¶3. In affirming the trial court's denial of the motion to withdraw the guilty plea, we noted that the delay between the commencement of deportation proceedings and the filing of his motion weighed against the defendant. Id. at ¶17. Here, appellant filed her motion to withdraw her guilty plea approximately six months after she entered her plea.

{¶22} Additionally, assuming appellant's statements are true, it might be rational for her to insist on going to trial if a guilty plea automatically subjects her to deportation. Appellant was born in Pakistan in 1972 but has been a legal permanent resident of the United States since 1996. Thus, for the past 15 years, more than one-third of her life, appellant has been a resident of the United States. Further, her husband, to whom she has been married since 1999, is also a legal permanent resident of the United States.

Under these circumstances, appellant might decide to take her chances at trial, rather than subject herself to automatic deportation.

{¶23} Thus, if the trial court found the statements in appellant's affidavit to be true, she would have demonstrated that her counsel's performance was deficient and that, but for this deficient performance, she would not have entered a guilty plea. Under these circumstances, trial counsel's ineffective assistance might constitute manifest injustice sufficient to permit withdrawal of appellant's guilty plea. See, e.g., *Dalton* at ¶34. It is necessary, however, for the trial court to determine, at a hearing, whether the allegations of deficient performance and prejudice are credible and thus ultimately decide if a manifest injustice occurred. Because the facts alleged by appellant, if accepted as true, might support the grant of appellant's motion, we find that the trial court abused its discretion by denying appellant's motion without holding a hearing. Accordingly, we sustain appellant's second assignment of error. Based on our resolution of the second assignment of error, appellant's first and third assignments of error are moot, and we need not consider them.

{¶24} For the foregoing reasons, appellant's second assignment of error is sustained, and his first and third assignments of error are moot. We reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to that court with instructions to conduct a hearing on appellant's motion to withdraw her guilty plea.

Judgment reversed; cause remanded with instructions.

KLATT and CONNOR, JJ., concur.
