

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellant, :
 :
 v. : No. 11AP-1106
 : (C.P.C. No. 98CR-04-002187)
 Abel Tovar, : (REGULAR CALENDAR)
 :
 Defendant-Appellee. :

D E C I S I O N

Rendered on December 27, 2012

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellant.

Ross & Midian LLC, and *George S. Breitmayer, III*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Plaintiff-appellant, the State of Ohio, appeals from a judgment of the Franklin County Court of Common Pleas that granted a motion to withdraw guilty plea filed by defendant-appellee Abel Tovar. For the following reasons, we reverse that judgment.

I. Factual and Procedural Background

{¶ 2} In 1998, Tovar was indicted with one count of possession of cocaine in violation of R.C. 2925.11, a fifth-degree felony. Tovar initially entered a not guilty plea to the charge but later withdrew that plea and entered a guilty plea to a stipulated lesser-included offense of attempted possession of cocaine. At his plea hearing, the prosecutor's recitation of facts indicated that Tovar was a passenger of a car stopped by police. As Tovar stepped out of the car, the officers saw a brown compact on the glove box that contained cocaine. The trial court accepted Tovar's guilty plea, found him guilty, and

sentenced him to a one-year term of probation. The trial court terminated Tovar's probation in 1999 after he complied with the terms of his probation.

{¶ 3} In 2007, Tovar filed a motion to withdraw his guilty plea pursuant to R.C. 2943.031. Specifically, Tovar alleged that he was not a citizen of the United States when he entered his guilty plea but that the trial court did not advise him of the possible adverse immigration consequences of his conviction as required by that statute. The trial court denied Tovar's motion and Tovar did not timely appeal that judgment.

{¶ 4} Tovar filed another motion to withdraw his guilty plea in 2011. This motion again asserted that the trial court did not comply with R.C. 2943.031 but also alleged that Tovar received ineffective assistance of counsel at his plea hearing. *See Padilla v. Kentucky*, ___U.S.___, 130 S.Ct. 1473 (2010). Without explanation, the trial court summarily granted Tovar's motion.

II. The Appeal

{¶ 5} The state appeals and assigns the following error:

The trial court abused its discretion in withdrawing defendant's guilty plea.

A. Standard of Review

{¶ 6} We first address the claim in Tovar's motion that he received ineffective assistance of counsel.¹ Crim.R. 32.1 permits a motion to withdraw a guilty plea "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." Manifest injustice relates to some fundamental flaw in the proceedings which results 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. Manifest injustice " 'is an extremely high standard, which permits a defendant to withdraw his guilty plea only in extraordinary cases.' " *State v. Tabor*, 10th Dist. No. 08AP-1066, 2009-Ohio-2657, ¶ 6, quoting *State v. Price*, 4th Dist. No. 07CA47, 2008-Ohio-3583, ¶ 11. A defendant seeking to withdraw a guilty plea following imposition of sentence bears the burden of establishing manifest injustice with specific facts either contained in the record or

¹ We do so because the procedure for the withdrawal of a guilty plea due to ineffective assistance of counsel is distinct from the procedure for seeking withdrawal of a guilty plea due to a trial court's noncompliance with R.C. 2943.031. *State v. Yuen*, 10th Dist. No. 01AP-1410, 2002-Ohio-5083, ¶ 34; *State v. Yanez*, 150 Ohio App.3d 510, 2002-Ohio-7076, ¶ 12-14 (1st Dist.).

supplied through affidavits submitted with the motion. *State v. Garcia*, 10th Dist. No. 08AP-224, 2008-Ohio-6421, ¶ 11, citing *State v. Gegia*, 157 Ohio App.3d 112, 2004-Ohio-2124 (9th Dist.).

{¶ 7} A motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court. *State v. Smith*, 49 Ohio St.2d 261 (1977), paragraph two of the syllabus. Therefore, this court's review of a trial court's denial of a post-sentence motion to withdraw a guilty plea is limited to a determination of whether the trial court abused its discretion. *State v. Conteh*, 10th Dist. No. 09AP-490, 2009-Ohio-6780, ¶ 16. Absent an abuse of discretion on the part of the trial court, its decision concerning a post-sentence motion to withdraw guilty plea must be affirmed. *State v. Xie*, 62 Ohio St.3d 521, 527 (1992). Although an abuse of discretion is typically defined as an unreasonable, arbitrary, or unconscionable decision, *State v. Beavers*, 10th Dist. No. 11AP-1064, 2012-Ohio-3654, ¶ 8, we note that no court has the authority, within its discretion, to commit an error of law. *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶ 70.

B. *Padilla v. United States and Ineffective Assistance of Counsel*

{¶ 8} The state first contends that the trial court abused its discretion when it granted Tovar's motion because he failed to demonstrate ineffective assistance of counsel. We agree.

{¶ 9} Ineffective assistance of counsel may constitute manifest injustice requiring post-sentence withdrawal of a guilty plea. *State v. Yahya*, 10th Dist. No. 10AP-1190, 2011-Ohio-6090, ¶ 9. To establish a claim of ineffective assistance of counsel, Tovar must show that counsel's performance was deficient and that counsel's deficient performance prejudiced him. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶ 133, citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The failure to make either showing defeats a claim of ineffective assistance of counsel. *State v. Bradley*, 42 Ohio St.3d 136, 143 (1989), quoting *Strickland* at 697. ("[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.").

{¶ 10} In order to show counsel's performance was deficient, Tovar must prove that counsel's performance fell below an objective standard of reasonable representation. *Jackson* at ¶ 133. Tovar must overcome the strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Strickland* at 689.

To show prejudice, Tovar must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶ 204. 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.' " *Xie* at 524, quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Yahya* at ¶ 10.

{¶ 11} The genesis of Tovar's claim of ineffective assistance of counsel is the United States Supreme Court's recent decision in *Padilla*. In that case, the Court held that that when advising a criminal defendant about the consequences of pleading guilty, "counsel must inform her client whether his plea carries a risk of deportation," and that failure to do so is subject to ineffective assistance analysis. *Id.* at 1486-87. The Court decided *Padilla* in 2010, many years after Tovar's conviction became final. Therefore, the state argues that the rule in *Padilla* does not apply to Tovar's conviction.

{¶ 12} New constitutional rules of criminal procedure, subject to limited exceptions that would not apply here, do not apply retroactively to final convictions. *State v. Bruggeman*, 3d Dist. No. 2-04-26, 2005-Ohio-956, ¶ 8, citing *Teague v. Lane*, 489 U.S. 288, 310 (1989). We have found no appellate court in Ohio that has determined whether *Padilla* applies retroactively, *State v. Tran*, 10th Dist. No. 11AP-146, 2012-Ohio-1072, ¶ 19, and there is a conflict amongst the federal courts. See *Abraham v. United States*, 699 F.3d 1050, 1052-53 (8th Cir.2012). The United States Supreme Court granted certiorari to resolve this conflict. *Chaidez v. United States*, ___U.S.___, 132 S.Ct. 2101.

{¶ 13} We need not resolve the issue regarding the retroactive application of the *Padilla* rule because even if we applied the rule, Tovar cannot demonstrate prejudice under *Strickland*. In order to demonstrate prejudice in this context, Tovar would have to " 'convince the court that a decision to reject the plea bargain would have been rational under the circumstances.' " *Yahya* at ¶ 12, quoting *Padilla*. This determination is an objective one which is dependent on the likely outcome of a trial had the defendant not pleaded guilty. *Meyer v. Branker*, 506 F.3d 358, 369 (4th Cir.2007); *Dando v. Yukins*, 461 F.3d 791, 798 (6th Cir.2006).

{¶ 14} Tovar did not file an affidavit in support of his motion. The only "evidence" he presents to demonstrate prejudice are counsel's written words that Tovar would not have pled guilty to any charge if he had known of the even "remote chance" of deportation. Tovar cannot establish prejudice, however, merely by stating now that he would have gone to trial had he been properly informed of the consequences of his conviction. *Pilla v. United States*, 668 F.3d 368, 373 (6th Cir.2012). Rather, Tovar must objectively demonstrate that a decision to reject the plea bargain and go to trial would have been rational under the circumstances. *Id.*, citing *Padilla*. Tovar does not attempt to make this showing.

{¶ 15} As indicted, Tovar faced 6 to 12 months in prison if convicted of a fifth-degree felony of possession of cocaine. Former R.C. 2929.14(A)(5). The prosecutor's recitation of facts at Tovar's plea hearing indicates that Tovar was a passenger in a car in which cocaine was found in the glove box, i.e., right in front of Tovar. Tovar makes no attempt to explain what defense he would have asserted if the matter had proceeded to trial. Without explaining what possible defense he could have raised, Tovar has not met his burden of demonstrating that it would have been rational to proceed with a trial on a fifth-degree felony without a defense rather than plead guilty to a first-degree misdemeanor. A conviction under either scenario would have put his status in this country in jeopardy. *See Haddad v. United States*, 6th Cir. No. 10-2079, 2012 WL 2478355 (June 28, 2012) (rejecting claim of prejudice under similar circumstances); *Pilla* (same); *Tran* at ¶ 23 (defendant failed to demonstrate rational reason to reject plea deal and go to trial).

{¶ 16} Therefore, even if the requirements of *Padilla* applied, Tovar has not demonstrated that he suffered prejudice from his trial counsel's failure to fulfill those requirements. Accordingly, we conclude that the trial court abused its discretion when it granted Tovar's motion to withdraw his guilty plea based on ineffective assistance of counsel.

C. R.C. 2943.031 and Res Judicata

{¶ 17} The state also argues that the trial court erred by granting Tovar's motion, to the extent it was again based on the trial court's failure to comply with R.C. 2943.031, because that argument was barred by law of the case and/or res judicata. We agree.

{¶ 18} In 2007, Tovar filed a motion to withdraw his guilty plea. In that motion, he claimed that the trial court failed to comply with R.C. 2943.031 because it did not provide him the warnings required by the statute. The trial court denied Tovar's motion, based on Tovar's delay in filing the motion (almost nine years after the plea). Tovar did not timely appeal from that decision. His current motion to withdraw, in addition to raising the *Padilla* issue, again raised the trial court's noncompliance with R.C. 2943.031. Res judicata bars his second attempt to litigate this same issue. *State v. Zhao*, 8th Dist. No. 86392, 2005-Ohio-5549, ¶ 12; *State v. Icke*, 6th Dist. No. L-10-1134, 2011-Ohio-364, ¶ 15; *State v. McDonald*, 11th Dist. No. 2003-L-155, 2004-Ohio-6332, ¶ 22.

D. The Timeliness of Tovar's 2011 Motion to Withdraw

{¶ 19} Given our resolution of the state's first two arguments, we need not address the state's argument that Tovar's motion was also untimely.

III. Conclusion

{¶ 20} Tovar failed to demonstrate that he received ineffective assistance of counsel at his plea hearing and res judicata barred his attempt to relitigate the trial court's noncompliance with R.C. 2943.031. Accordingly, we conclude that the trial court erred when it granted Tovar's motion to withdraw his guilty plea. Therefore, we sustain the state's assignment of error and reverse the judgment of the Franklin County Court of Common Pleas.

Judgment reversed; cause remanded.

BRYANT and FRENCH, JJ., concur.
