

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2010-09-231
 :
 - vs - : OPINION
 : 12/19/2011
 :
 EDUARDO GUERRERO, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2009-03-0477

Michael T. Gmoser, Butler County Prosecuting Attorney, Donald R. Caster, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Gary A. McGee, 332 South Front Street, Hamilton, Ohio 45011, for defendant-appellant

POWELL, P.J.

{¶1} A defendant appeals the denial of his motion to vacate his plea after he alleged his trial counsel misinformed him about the deportation consequences of his plea. Finding the argument not well taken, we affirm the trial court's decision.

{¶2} Eduardo Guerrero pled guilty in Butler County Common Pleas Court in 2009 to the third-degree felony charge of possession of cocaine. After his release from prison in 2010, Guerrero moved to vacate his plea. The trial court denied his motion, and Guerrero

appealed, arguing in his single assignment of error that the trial court erred in denying his motion under *Padilla v. Kentucky*.

{¶3} While not specifically delineated as such, we will address Guerrero's motion as a Crim.R. 32.1 motion to withdraw his plea. See *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993; see Crim.R. 32.1 ("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.").

{¶4} A post-sentence motion to withdraw a guilty plea is allowable only in extraordinary cases, and therefore, the decision to deny a post-sentence motion to withdraw a guilty plea is within the sound discretion of the trial court. *State v. Williams*, Warren App. No. CA2009-03-032, 2009-Ohio-6240, ¶11, 14 (defendant must establish a reasonable likelihood that a withdrawal of his plea is necessary to correct a manifest injustice before a trial court must hold an evidentiary hearing on his motion).

{¶5} Ineffective assistance of counsel is a proper basis for seeking a post-sentence withdrawal of a guilty plea. *State v. Mays*, 174 Ohio App.3d 681, 2008-Ohio-128, ¶8. When an alleged error underlying a motion to withdraw a guilty plea is the ineffective assistance of counsel, the defendant must show (1) that his counsel's performance was deficient and (2) that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty. *State v. Xie* (1992), 62 Ohio St.3d 521, 524, citing *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052.

{¶6} Guerrero argues that his trial counsel told him he would not be deported if he pled guilty because he was a permanent resident of the United States. Guerrero asserts that he would not have pled guilty otherwise.

{¶7} Defendant relies on the United States Supreme Court case of *Padilla v.*

Kentucky (2010), ___ U.S. ___, 130 S.Ct. 1473, 176 L.Ed.2d 284, to support his argument below and now on appeal. In *Padilla*, the defendant claimed his counsel told him that he did not have to worry about immigration issues since he had been in the country so long. The United States Supreme Court found that competent counsel must inform her client whether his plea carries a risk of deportation. The court found Padilla had "sufficiently alleged that his counsel was constitutionally deficient. Whether Padilla is entitled to relief will depend on whether he can demonstrate prejudice as a result thereof, a question we do not reach because it was not passed on below." *Id.* at 1486-1487.

{¶18} According to the transcript of the motion hearing in the case at bar, there was reference to Guerrero's counsel filing an affidavit at the plea hearing indicating Guerrero was informed of the deportation issues; Guerrero refuted the statements in his own affidavit.

{¶19} Guerrero did not provide this court with a transcript of the plea proceedings, even though that is the first proceeding wherein he alleges the claimed error occurred. See App. R. 9. However, at the hearing on Guerrero's motion to vacate, the trial court read portions of the plea hearing transcript into the record.

{¶10} The trial court read the following: "Now, I am required to read you the following statement. If you are not a citizen, * * * conviction of the offense to which you are pleading guilty, * * * may have the consequences of deportation, exclusion... * * *. Do you understand that? And your client said, Yes, sir. Then [current attorney], I went further. I said, In fact, it is my understanding, based upon the representations of your attorney and the prosecutor, that the fact that the immigration people are going to seek your deportation. [sic] And your client says – and I said, Do you understand that? And your client says, Yes, sir. And I said, Now, knowing that, do you still wish to enter a plea of guilty? Yes, Sir."

{¶11} The trial court said: "So by implication I mean, based upon the conversation I had with your client in open court, he was clearly advised, not only by me, but by [his plea

attorney] that he was going to be deported. That he was – in exchange, that he would receive the minimal sentence by this Court of one year and that that was the consideration, that he was going to be deported and he was going to get a one-year sentence * * *." [sic]

{¶12} Guerrero's attorney argued that he was not challenging the trial court's deportation warnings at the plea hearing, but the trial court's advisement was irrelevant because an attorney can nullify the trial court's statement by telling his client not to worry about what the court says. Guerrero's attorney argued that under *Padilla* he should have an evidentiary hearing to bring in "all the other attorneys and his family and everybody * * *" to testify.

{¶13} The trial court said, "I'm going to deny the emergency motion to vacate the case. The court believes that the defendant was fully advised at the time of the plea that there was discussion of the very issue which you are attacking [plea attorney] for. * * * Obviously, I had a very clear discussion with Mr. Guerrero on the record that he was going to be deported, that [plea attorney] represented to me that he was going to be deported. * * * And now for [defendant] to say after the fact that everybody lied to him or there was a misrepresentation made by [plea attorney], I mean, it's just so overwhelmingly against the facts of the case that I find that it has no credibility."

{¶14} We note the *Padilla* case, released by the United States Supreme Court in March 2010, remanded the case to determine whether the defendant was prejudiced by trial counsel's misinformation because prejudice was not considered by the court below.

{¶15} After *Padilla*, the Sixth Appellate District, in *State v. Andreias*, Erie App. No. E-10-070, 2011-Ohio-5030, found that a defendant should not be permitted to withdraw his plea for ineffective assistance of counsel because he didn't show he was prejudiced (under *Strickland*) when the trial court informed him of the immigration consequences by complying with R.C. 2943.031; see also, *State v. Ikharo*, Franklin App. No. 10AP-967, 2011-Ohio-2746.

{¶16} However, in *State v. Yahya*, Franklin App. No. 10AP-1190, 2011-Ohio-6090, the Tenth Appellate District distinguished *Ikharo* and others by noting those cases dealt with trial counsel's failure to advise or to fully advise of the consequences, whereas the *Yahya* case involved trial counsel giving incorrect advice [on immigration consequences] when counsel allegedly showed defendant a document indicating she "was not deportable."

{¶17} The *Yahya* court stated there was no evidence in the record contradicting defendant's claim that her attorney didn't tell her she would be subject to deportation. *Id.* at ¶15. It further found that the trial court in *Yahya* only gave the statutory warning under R.C. 2943.031, "without any further 'pointed' discussion of the consequences of pleading guilty." *Id.* at ¶16. The matter was reversed and remanded to the trial court for a hearing.

{¶18} Similar to the facts in *Yahya*, Guerrero alleges his trial counsel gave misinformation about deportation consequences. However, the case at bar includes R.C. 2943.031 warnings given by the trial court, an affidavit from plea counsel, and additional evidence contradicting Guerrero's claim. The trial court in the instant case detailed the specific discussion it had, telling Guerrero before he pled that trial counsel and the prosecutor said "immigration people" were going to seek his deportation.

{¶19} Guerrero argues the trial court was erroneously informed at the plea hearing that immigration officials had a holder on him before his plea was taken. Regardless of whether the parties were wrong about the existence of the holder, the discussion with the trial court resulted in Guerrero receiving strong warnings that deportation would be sought against him.

{¶20} Even if we were to assume trial counsel's representation was deficient, Guerrero failed to prove that he was prejudiced, in order to meet the second prong of the *Strickland* two-part test. See *State v. Haynes*, Butler App. No. CA2010-10-273, 2011-Ohio-5743, ¶16 (failure to make an adequate showing on either prong is fatal to ineffective

assistance of counsel claim). Guerrero has not shown he was entitled to have his plea vacated or withdrawn. Guerrero's single assignment of error is overruled.

{¶21} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.