

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-146 (C.P.C. No. 86CR-3772)
Quang Ly Tran,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 15, 2012

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Quang Ly Tran, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} This is an appeal by defendant-appellant, Quang Ly Tran, from a judgment of the Franklin County Court of Common Pleas denying his motions to withdraw his guilty plea and for post-conviction relief.

{¶ 2} On December 22, 1986, appellant was indicted on one count of aggravated murder with a death penalty specification, and one count of aggravated robbery. The case came for trial before a jury beginning March 21, 1988. Following the presentation of evidence, the jury returned verdicts finding appellant guilty of both counts, including the death penalty specification. Prior to sentencing, appellant entered a guilty plea to one count of aggravated murder and one count of aggravated robbery. In exchange for appellant's guilty plea, a three-judge panel vacated the jury's verdict and the state agreed

not to seek the death penalty or life imprisonment for 30 years before the possibility of parole on the charge of aggravated murder. *See State v. Tran*, 10th Dist. No. 96APA07-882 (Feb. 13, 1997) ("*Tran I*"). On May 18, 1988, the trial court filed an entry sentencing appellant to life imprisonment with parole eligibility after 20 years on the aggravated murder conviction, and a term of ten to 25 years on the aggravated robbery conviction, with the sentences to run concurrently. *Id.*

{¶ 3} On May 3, 1995, appellant filed a motion for post-conviction relief, which included a request, as alternative relief, to withdraw his guilty plea pursuant to Crim.R. 32.1. On June 25, 1996, the trial court filed a decision denying appellant's motions for post-conviction relief and to withdraw his guilty plea. In its decision, the trial court found that appellant's guilty plea, which was entered with the aid of an interpreter and with counsel present, was made knowingly, voluntarily, and intelligently.

{¶ 4} Appellant filed a pro se notice of appeal from the trial court's decision, raising 11 assignments of error, including three assignments of error asserting that his guilty plea was not knowingly, voluntarily, and intelligently made. More specifically, under those three assignments of error, appellant argued: (1) he was coerced into entering the guilty plea; (2) his attorney informed him that the maximum sentence would be ten years; (3) he had little or no understanding of the English language; and (4) he did not understand his rights and his guilty plea constituted double jeopardy. In *Tran I*, this court overruled all of appellant's assignments of error, thus affirming the trial court's denial of appellant's motion to withdraw his guilty plea, as well as the trial court's dismissal of his petition for post-conviction relief.

{¶ 5} On May 22, 2008, appellant filed a second motion to withdraw his guilty plea, which the state opposed. By decision and entry filed June 12, 2008, the trial court denied appellant's motion to withdraw his guilty plea, relying in part upon application of the doctrine of res judicata. Appellant filed an appeal from the trial court's decision denying his motion to withdraw the guilty plea, and in *State v. Tran*, 10th Dist. No. 08AP-532, 2008-Ohio-5897 ("*Tran II*"), this court affirmed the judgment of the trial court. Specifically, this court held that appellant's claim was barred on res judicata grounds, noting that "[w]e have previously found that Tran entered his pleas with a full understanding of their consequence." *Id.* at ¶ 11.

{¶ 6} On August 2, 2010, appellant filed a third motion to withdraw his guilty plea or, alternatively, for a re-sentencing hearing. On August 13, 2010, appellant filed a second petition for post-conviction relief. On August 25, 2010, the state filed a response to appellant's petition for post-conviction relief. By decision and entry filed February 2, 2011, the trial court denied appellant's motion to withdraw his guilty plea. The court also denied appellant's petition for post-conviction relief, finding it to be untimely and barred by the doctrine of res judicata.

{¶ 7} On appeal, appellant raises the following eight assignments of error in his pro se brief:

Assignment of Error No. 1:

The Trial Court erred when it denied the Appellant's motion to withdraw his guilty plea because his pleas was not knowing, intelligent, or voluntary where:

- 1) Appellant was born in South Vietnam and lacked sufficient knowledge of the English language to participate in the trial court proceedings;**
- 2) The Trial Court permitted the Defendant's cousin, Mr. Chou, (a fellow immigrant from South Vietnam to serve as translator without being sworn in a court of law;**
- 3) The Trial Court failed to provide a qualified sworn interpreter;**
- 4) The Trial Court failed to administer an oath to the interpreter in accordance with O.R.C. 2311.14, Evidence Rules 603, 604, and 702, Crim.R. 11(C), Article 1, Section 10 of the Ohio Constitution, and the 14th Amendment of the United States Constitution.**
- 5) Mr. Chou gave his own conclusion with respect to the Appellant's responses to the court's inquiry in violation of O.R.C. 2301.12(A); and**
- 6) Appellant was denied equal protection of the law, due process, and effective assistance of counsel as provided by Ohio and United States Constitutions.**

Assignment of Error No. 2:

The Trial Court erred when it denied the Appellant's motion to withdraw his guilty plea because his plea was not knowing, intelligent, or voluntary:

- 1) Appellant was given affirmative mis advice with misleading and false information concerning deportation consequences by defense counsel, the State, and the Court;
- 2) Appellant was instruction that the United States would not deport an immigrant from South Vietnam;
- 3) The resulting plea violated Appellant's rights to due process, equal protection of the law, and effective assistance of counsel as provided in the United States and Ohio Constitution.

Assignment of Error No. 3:

The Trial Court erred when it denied the Appellant's motion to withdraw his guilty plea because his plea was not knowing, intelligent, or voluntary where:

- 1) The Trial Court failed to strictly comply with Crim.R. 11(C)(2)(c) as it pertained to the Appellant's right to compulsory process;
- 2) Mr. Chou, acting as an interpreter, lacked sufficient understanding and knowledge to translate the right to compulsory process to the defendant; and
- 3) The resulting plea denied the defendant his right to due process and equal protection of the law as guaranteed by Ohio and United States Constitutions.

Assignment of Error No. 4:

The Trial Court erred when it denied the Appellant's motion to withdraw his guilty plea because his plea was not knowing, intelligent, or voluntary where:

- 1) The plea was based on the false promise of parole eligibility after 20 years of incarceration;

2) The defendant understood through translation that after 20 years he "would go home";

3) The Defendant was unaware the prosecution lacked authority to make such promise until completing 20 years of incarceration; and

4) The resulting plea violated defendant's constitutional rights of due process, equal protection of the law, and fundamental fairness.

Assignment of Error No. 5:

The trial court erred when it denied Appellant's motion to withdraw his guilty plea without a hearing where he was denied the effective assistance of counsel during the original plea and sentencing hearing in violation of the Appellant's constitutional right to effective assistance of counsel, due process, equal protection of the law, and fundamental fairness.

Assignment of Error No. 6:

The Trial Court erred when it denied Appellant's petition for post-conviction relief on the basis that his claims were untimely and barred by the doctrine of res judicata.

Assignment of Error No. 7:

The Trial Court erred when it denied the Appellant's post-conviction petition for relief without a hearing.

Assignment of Error No. 8:

The Trial Court erred when it denied Appellant's motion for summary judgment on his petition for post-conviction relief.

(Sic passim.)

{¶ 8} Appellant's first, second, third, fourth, and fifth assignments of error are interrelated and will be considered together. Under each of these assignments of error, appellant raises challenges to the trial court's denial of his motion to withdraw his guilty plea. Specifically, appellant argues that his plea was not knowingly, intelligently, and voluntarily made because: (1) he did not understand English or have a qualified

interpreter; (2) he was given misleading advice with respect to deportation consequences; (3) the trial court failed to strictly comply with Crim.R. 11 in advising him of compulsory process; and (4) his plea was based on a false promise of parole eligibility after 20 years of incarceration. Appellant also contends that the trial court erred in denying his motion to withdraw his guilty plea because he received ineffective assistance of counsel during the plea proceedings.

{¶ 9} Crim.R. 32.1 provides: "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." Under Ohio law, "[a] trial court may allow the post-sentence withdrawal of a plea of guilty only to correct a manifest injustice." *State v. Aleshire*, 5th Dist. No. 2011-CA-73, 2012-Ohio-16, ¶ 23, citing Crim.R. 32.1; *State v. Smith*, 49 Ohio St.2d 261 (1977), paragraph one of the syllabus. Furthermore, "a reviewing court will not disturb a trial court's decision whether to grant a motion to withdraw a plea absent an abuse of discretion." *Aleshire* at ¶ 23, citing *State v. Caraballo*, 17 Ohio St.3d 66 (1985).

{¶ 10} The state argues that the trial court properly denied appellant's motion to withdraw his guilty plea because the doctrine of res judicata barred the issues raised in his third motion to withdraw, and because the record indicates appellant was not entitled to relief. We agree.

{¶ 11} This court has "consistently concluded that res judicata bars a party from raising issues in a post-sentencing Crim.R. 32.1 motion that were or could have been raised in a direct appeal." *State v. Ikharo*, 10th Dist. No. 10AP-967, 2011-Ohio-2746, ¶ 11, citing *State v. Hagler*, 10th Dist. No. 10AP-291, 2010-Ohio-6123; *State v. Hazel*, 10th Dist. No. 08AP-1002, 2009-Ohio-2144; *State v. Conteh*, 10th Dist. No. 09AP-490, 2009-Ohio-6780. Further, "[r]es judicata further acts to bar raising issues in a successive Crim.R. 32.1 motion to withdraw a plea of guilty where those issues could have been raised in the prior Crim.R. 32.1 motion." *Ikharo* at ¶ 11, citing *State v. Gallegos-Martinez*, 5th Dist. No. 10-CAA-06-0043, 2010-Ohio-6463, ¶ 12.

{¶ 12} The issue raised by appellant under his first assignment of error, i.e., that his plea was deficient because he did not understand English or have a qualified interpreter was previously addressed and rejected by this court. *See Tran I* (noting that

appellant was provided with an interpreter at the time of the guilty plea "who was from his own community in Viet Nam [and] who spoke appellant's particular dialect," that the trial court "scrupulously complied with Crim.R. 11," and "[a]t no time did appellant indicate he did not understand what was taking place"). Similarly, appellant previously raised challenges to the length of his sentence, and this court rejected those arguments in *Tran I* as well as in *Tran II*. The remaining challenges he brings with respect to his plea could have been raised either on direct appeal or in his first motion to withdraw. See *State v. Zhao*, 9th Dist. No. 03CA008386, 2004-Ohio-3245, ¶ 8 ("The doctrine of res judicata bars appellant's current challenge of the court's denial of his motion to withdraw his guilty plea because the issues he raises now could have been fully litigated on direct appeal * * * or raised in his initial motion to withdraw his guilty plea pursuant to Crim.R. 32.1"); *Hazel* (Bryant, J., concurring) ("res judicata applies because appellant previously filed a motion to withdraw in which he could have raised the issues presented in his current motion").

{¶ 13} Further, with respect to appellant's challenge to the trial court's explanation of compulsory process, we agree with the state that a review of the transcript of the colloquy, as well as the entry of guilty plea signed by appellant, fails to support appellant's claim that the trial court did not comply with Crim.R. 11(C)(2)(c). See *State v. Barker*, 129 Ohio St.3d 472, 2011-Ohio-4130, ¶ 26 (employing "totality-of-the-circumstances test" in finding defendant knowingly, intelligently, and voluntarily waived his right to compulsory process; transcript indicates appellant "was adequately informed of his right to compulsory process via the language employed" and, additionally, defendant "signed a written change-of-plea form stating that he understood that he was giving up the right to use the power of the court to call witnesses to testify for him").

{¶ 14} Finding that the trial court did not abuse its discretion in denying appellant's motion to withdraw his guilty plea, appellant's first, second, third, fourth, and fifth assignments of error are overruled.

{¶ 15} Appellant's sixth, seventh, and eighth assignments of error all raise challenges to the trial court's denial of his petition for post-conviction relief, and will be considered together. Under these assignments of error, appellant contends that the trial court erred in (1) denying his motion to vacate or set aside judgment on the basis that the

motion was untimely and barred by the doctrine of res judicata, (2) denying his post-conviction petition without a hearing, and (3) denying his motion for summary judgment on his petition for post-conviction relief.

{¶ 16} Pursuant to R.C. 2953.21(A)(2), a petition for post-conviction relief "shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction * * *. If no appeal is taken * * * the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal." For defendants sentenced prior to the effective date of amended R.C. 2953.21 (September 21, 1995), "the legislature, in the uncodified law set forth in 1995 S.B. No. 4, Section 3, specified that 'a person who seeks post-conviction relief' under R.C. 2953.21 through 2953.23 'with respect to a case in which sentence was imposed prior to the effective date of this act * * * shall file a petition within the time required' in R.C. 2953.21(A)(2), 'as amended by this act, or within one year from the effective date of this act, whichever is later.' " *State v. Jones*, 10th Dist. No. 08AP-551, 2008-Ohio-6515, ¶ 7.

{¶ 17} In the instant case, appellant was convicted prior to 1995 and, as determined by the trial court, his petition (filed in August of 2010) was untimely. A court, however, may still entertain an untimely petition if the conditions of R.C. 2953.23(A) are met. *State v. Wolfel*, 10th Dist. No. 08AP-388, 2008-Ohio-4596, ¶ 10. Specifically, R.C. 2953.23(A)(1)(a) allows a trial court to entertain an untimely petition if: "(1) the petitioner was unavoidably prevented from discovering the facts on which the petition is predicated, or (2) the United States Supreme Court has recognized a new federal or state right that applies retroactively to the petitioner and the petition asserts a claim based on that new right." *State v. Williams*, 8th Dist. No. 85180, 2005-Ohio-3023, ¶ 13. Further, "R.C. 2953.23(A)(1)(b) also requires that 'the petitioner show by clear and convincing evidence that, but for constitutional error at trial, no reasonable fact finder would have found the petitioner guilty of the offense of which the petitioner was convicted.' " *Id.* at ¶ 14.

{¶ 18} Appellant contends that his untimely filing should be excused under R.C. 2953.23(A)(1)(a) because the United States Supreme Court in *Padilla v. Kentucky*, ___ U.S. ___, 130 S.Ct. 1473 (2010) recognized a new federal right that applies retroactively to him. In *Padilla*, the Supreme Court held that the failure to inform a client whether his or

her plea carries a risk of deportation constitutes deficient performance under the first prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). *Id.* at 1486.

{¶ 19} Our research indicates no Ohio cases addressing the issue of whether the United States Supreme Court, in *Padilla*, recognized a new federal right that applies retroactively to a petition for post-conviction relief for purposes of R.C. 2953.23(A)(1)(a). One federal court has observed that, "[i]n the year since *Padilla* was decided, state courts and federal district courts considering *Padilla's* retroactivity have reached differing conclusions." *United States v. Orocio*, 645 F.3d 630, 641 (3d Cir.2011), fn. 10 citing *Doan v. United States*, 760 F.Supp.2d 602 (E.D.Va.2011) (*Padilla* not retroactive); *United States v. Chaidez*, 730 F.Supp.2d 896 (N.D.Ill.2010) (*Padilla* retroactive); *Miller v. State*, 196 Md.App. 658, 11 A.3d 340 (2010) (*Padilla* not retroactive); *People v. Garcia*, 29 Misc.3d 756, 907 N.Y.S.2d 398 (2010) (*Padilla* retroactive).

{¶ 20} We need not decide the issue of whether the Supreme Court's decision in *Padilla* recognizes a new federal or state right that applies retroactively to appellant. Rather, even were we to accept appellant's argument that his counsel's performance was deficient under *Padilla*, appellant cannot demonstrate prejudice under the second prong of *Strickland*. Under this prong, the court is required to determine "whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Padilla* at 1482, quoting *Strickland* at 694. In order for a defendant to obtain relief on this type of claim, "a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Id.* at 1485.

{¶ 21} In *Tran I*, this court noted that appellant was permitted to enter a guilty plea "after having been found guilty by a jury of aggravated murder with a specification, as well as aggravated robbery, in exchange for the *minimum sentence* of twenty years before parole eligibility and, thereby, avoided a possible sentence of thirty years before parole eligibility or death." (Emphasis added.) *Id.* This court further determined that, "[g]iven the overwhelming evidence of appellant's guilt, trial counsel achieved the best possible result for his client," and that this clearly represented "an intelligent choice among alternative courses of action." *Id.*

{¶ 22} As noted by the state, the transcript of the plea proceeding belies appellant's contention that he would not have entered a guilty plea had he been advised of possible deportation proceedings. Specifically, appellant stated during the hearing: "[T]he reason I plead guilty is because I don't want to be charged with 30 years or the death penalty." (Tr. 12.) *See State v. Graham*, Super.Ct.N.J. No. A-3546-09T3 (Feb. 4, 2011) (where petitioner indicated that only thing she was focusing on was the prospect of going to jail, petitioner failed to show she would have opted to go to trial if she knew she was going to be deported; "It simply would not have been rational to reject such a favorable plea agreement and risk up to twenty years in prison when she faced such strong evidence of guilt").

{¶ 23} As previously noted, given the somewhat unusual posture of the case, appellant was permitted to enter a guilty plea after having already been found guilty by a jury of aggravated murder (with death specification) and aggravated robbery. Under the circumstances, appellant has not shown that it would have been rational for him to reject the plea agreement and risk 30 years in prison or the death penalty, especially in light of the "overwhelming evidence" of guilt. *Tran I. See United States v. Astorga*, 9th Cir. No. 10-15267 (Nov. 4, 2011) (Appellant cannot show he was prejudiced by trial counsel's advice with respect to immigration consequences of his guilty plea "because he cannot show that it would have been rational for him to reject the plea; he faced a sentence of at least 120 months in prison by going to trial with an overwhelming amount of evidence against him, but pled guilty so as to receive a sentence of only 70 months"); *Wassouf v. United States*, E.D.N.H. No. 11-cv-51-SM (Feb. 7, 2011) (even if *Padilla* is deemed retroactively applied to his petition, petitioner cannot meet the prejudice test under *Strickland*; the evidence against petitioner was overwhelming and the plea agreement represented a "rational and beneficial disposition of the case in petitioner's interest, given the risks he faced if he proceeded to trial"); *Rosales v. Artus*, E.D.N.Y. No. 10-CV-2742 (Aug. 30, 2011) (despite petitioner's claim he was given false advice by his attorney that he would not be deported if he pled guilty, it was not objectively unreasonable for petitioner's counsel to advise him to plead guilty where petitioner received an advantageous plea agreement, avoiding a more severe potential maximum prison term); *Herrera v. Hynes*, E.D.N.Y. No. CV-08-1651 (Nov. 21, 2008) (in the absence of evidence showing why

petitioner "would have risked a trial when the likely outcome was both exposure to deportation *and* a substantial, preceding custody term [petitioner] cannot raise a claim of prejudice under the second prong of *Strickland*"). (Emphasis sic.)

{¶ 24} Based upon our determination that appellant cannot demonstrate prejudice under the second prong of *Strickland*, appellant's contentions under his seventh and eighth assignments of error, that the trial court erred in failing to grant a hearing on his petition and that the trial court erred in denying his motion for summary judgment on his petition for post-conviction relief, are without merit. Upon review, the trial court did not err in denying appellant's petition for post-conviction relief, and appellant's sixth, seventh, and eighth assignments of error are not well-taken and are overruled.

{¶ 25} Based upon the foregoing, appellant's eight assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

FRENCH and DORRIAN, JJ., concur.
