[Cite as *State v. Bieksza*, 2012-Ohio-5976.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 12AP-176 (C.P.C. No. 06CR-02-1274) No. 12AP-177
v.	:	(C.P.C. No. 07CR-01-0580)
Mark Bieksza,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 18, 2012

Ron O'Brien, Prosecuting Attorney, and *Michael P. Walton*, for appellee.

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

APPEALS from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} In these consolidated appeals, defendant-appellant, Mark Bieksza, appeals from a judgment of the Franklin County Court of Common Pleas, denying his motions to withdraw guilty pleas to one count of importuning and five counts of pandering obscenity.

{¶ 2} On February 17, 2006, appellant was indicted in case No. 06CR-1274 on one count of importuning, in violation of R.C. 2907.07, and one count of attempted unlawful sexual conduct with a minor, in violation of R.C. 2907.04. On January 22, 2007, appellant was indicted in case No. 07CR-0580 on five counts of pandering obscenity involving a minor, in violation of R.C. 2907.321.

{¶ 3} On January 30, 2007, appellant entered a guilty plea in case No. 06CR-1274 to one count of importuning. Also on that date, appellant entered a guilty plea to five counts of pandering obscenity in case No. 07CR-0580. By entries filed on May 31, 2007, the trial court sentenced appellant to five years of community control in case No. 06CR-1274 and five years of community control in case No. 07CR-0580.

{¶ 4} The Department of Homeland Security ("DHS") subsequently initiated removal proceedings in immigration court against appellant, a non-citizen, alleging three charges. On April 4, 2008, an immigration judge issued an order dismissing two of the removal charges on the merits, and dismissing the final charge for failure to comply with 8 C.F.R. 1003.15(b)(4) (requiring that a notice to appear include charges against the alien and the statutory provisions alleged to have been violated).

{¶ 5} The DHS later filed a removal charge based upon attempted sexual abuse of a minor, alleging that appellant had committed an aggravated felony under Immigration and Nationality Act ("INA") § 237(a)(2)(A)(iii), as defined under INA § 101(a)(43)(A) and § 101(a)(43)(U). By order dated June 11, 2008, the immigration court sustained the aggravated felony charge, thus finding appellant was removable from the United States.

{¶ 6} On September 28, 2011, appellant filed, pursuant to Crim.R. 32.1, motions to withdraw his guilty pleas and to vacate his convictions in the two common pleas cases. The state filed responses in opposition to the motions. By entry filed February 1, 2012, the trial court denied appellant's motions in both cases.

{¶ 7} On appeal, appellant sets forth the following two assignments of error for this court's review:

> I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DID NOT PERMIT THE DEFENDANT'S GUILTY PLEA TO BE VACATED PURSUANT TO OHIO CRIMINAL RULE 32.1 AS HIS CRIMINAL ATTORNEY'S CONDUCT CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE TWO-PRONG STRICKLAND TEST.
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> II. THE TRIAL COURT ERRED BY FAILING TO HOLD AN EVIDENTIARY HEARING ON APPELLANT'S MOTION TO WITHDRAW HIS GUITY PLEA AND VACATE HIS CONVICTION PURSUANT TO OHIO CRIMINAL RULE 32.1.

{¶ 8} Appellant's assignments of error are interrelated and will be considered together. Under these assignments of error, appellant argues that the trial court abused its discretion in not permitting him to withdraw his guilty pleas pursuant to Crim.R. 32.1, and in failing to hold an evidentiary hearing on the motions to withdraw.

{¶ 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." A criminal defendant "bears the burden of establishing a manifest injustice based on specific facts in the record or facts supplied through affidavits attached to the motion." *State v. Sansone,* 10th Dist. No. 11AP-799, 2012-Ohio-2736, ¶ 7, citing *State v. Hagler*, 10th Dist. No. 10AP-291, 2010-Ohio-6123, ¶ 7.

{¶ 10} Under Ohio law, " '[a] hearing on a post-sentence Crim.R. 32.1 motion is not required if the facts alleged by the defendant and accepted as true by the trial court would not require the court to permit a guilty plea to be withdrawn.' " *State v. Bowman,* 7th Dist. No. 03-BE-40, 2004-Ohio-6372, ¶ 15, quoting *State v. Blatnik,* 17 Ohio App.3d 201, (6th Dist.1984), paragraph three of the syllabus. A trial court's decision denying a post-sentence motion to withdraw a plea of guilty and the court's decision whether to hold a hearing on the motion are subject to review for abuse of discretion. *State v. Ikharo,* 10th Dist. No. 10AP-967, 2011-Ohio-2746, ¶ 9, citing *State v. Smith*, 49 Ohio St.2d 261 (1977).

{¶ 11} In his motions to withdraw, appellant argued that, but for the ineffective assistance of his trial counsel, he would not have entered guilty pleas in the two cases. In order to prevail on his claim, appellant must satisfy the two-part test for ineffective assistance of counsel set forth in *Strickland v. Washington,* 466 U.S. 668 (1984) requiring a defendant to show that (1) his counsel's performance was deficient, and (2) that the deficient performance prejudiced his defense. As applied to guilty pleas, in order to establish prejudice, a defendant must show that, but for counsel's errors, he or she would not have entered a guilty plea. *State v. Xie,* 62 Ohio St.3d 521, 524 (1992).

{¶ 12} In support of his motions to withdraw, appellant submitted his own affidavit and the affidavit of his sister, Donna Gemperline. According to his affidavit, appellant met with his attorney on approximately seven occasions prior to entering his guilty pleas on January 30, 20o7. During these meetings, counsel explained to him that

there might be advantages to pleading guilty; that a guilty plea "could get me just probation and avoid jail time." Prior to a scheduled court hearing, appellant met with his attorney to discuss information required for a form. One of the questions on the form dealt with citizenship, and appellant informed counsel he had been a lawful, permanent resident for over 40 years, but that he was not a citizen. Appellant's counsel expressed surprise and left the room. When counsel returned, appellant was informed that the hearing would be postponed.

{¶ 13} Later, counsel told appellant that he would "contact an immigration attorney friend of his to find out about what would happen with my immigration status if I pleaded guilty." At a subsequent meeting, counsel told appellant and his sister "there was only a very small possibility that my immigration status would be affected if I pled guilty and was convicted." Counsel indicated: "I should not worry about it especially since I had been a permanent resident so long. Most likely it would be at least five years before immigration would find out anything. Most likely, nothing would come of it."

{¶ 14} At his next court date, appellant entered a guilty plea. According to appellant, his counsel "never told me that if I pled guilty there was a strong chance that I would be deported. To the contrary, he told me that it was only a remote possibility and that immigration would not even learn about it for many years." Appellant was also told by counsel that he would probably avoid jail time and only be subject to probation as a result of entering a guilty plea.

{¶ 15} At the January 30, 2007 hearing, appellant recalled the trial judge informing him "there could be immigration problems with my conviction. He said that it was up to immigration officials." However, because his lawyer told him that deportation "was only a very small possibility," appellant "went ahead with the guilty plea." According to appellant, had he known deportation "was a strong possibility for the lesser offense," he would have "asked just to plead to the more serious crimes, but not the one that meant I had to be deported. Otherwise, I would go to trial. I would have nothing to lose."

{¶ 16} Appellant's sister, Gemperline, averred in her affidavit that she attended all of appellant's meetings with his counsel, and she also attended all court hearings. During one of the meetings, counsel indicated he would consult with a "lawyer friend" regarding "what would happen if Mark pleaded guilty to the charges." At the last meeting in the

attorney's office, counsel "said his attorney friend told him that since [appellant] had been in the country for forty years, it was not as big a deal." Counsel told appellant "not to worry about it because there was only a small chance that anything would happen. He said that it would take like 5 to 6 years if ever for [Immigration and Customs Enforcement] to even get word of his guilty plea."

{¶ 17} Appellant's claim of ineffective assistance of counsel is predicated primarily upon the United States Supreme Court's recent decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), holding that, under certain circumstances, the failure of a criminal defense attorney to accurately inform a non-citizen client of the immigration consequences of a guilty plea can constitute deficient performance (under the first prong of *Strickland*). Under the facts of that case, the defendant, Padilla, entered a guilty plea to felony drug distribution after his attorney gave him "false assurance that his conviction would not result in his removal from this country." *Id.* at 1483. The advice was erroneous, and the Supreme Court noted that Padilla's counsel could have "easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses." *Id.* Thus, under the facts of that case, because "[t]he consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect." *Id.*

{¶ 18} The Supreme Court in *Padilla* also recognized, however, that immigration law "can be complex," and that there will "undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain." *Id.* In those instances in which the law "is not succinct and straightforward," the duty of counsel "is more limited," and "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.* While the Supreme Court in *Padilla* found that counsel's performance was deficient under *Strickland's* first prong, the court did not grant a new trial, but rather remanded the matter for a determination as to whether the defendant was prejudiced by counsel's action.

{¶ 19} In the instant case, the trial court found that when appellant entered his pleas "it was not at all clear that a conviction for importuning under Ohio law mandated deportation." The trial court noted that the immigration court, after determining that appellant's five convictions for pandering obscenity involving a minor (second-degree felonies under Ohio law) carried no immigration consequences, further found that his conviction for importuning (a fifth-degree felony under Ohio law) constituted an "aggravated felony" under immigration law. The trial court observed that the immigration court "only reached its determination after issuing a five-page * * * memorandum setting forth the basis for its conclusion." The trial court concluded that, unlike *Padilla*, "this is not a case where 'the deportation consequence is clear.' "

{¶ 20} In the immigration court's memorandum and order, finding that appellant was removable, the focus of the court's analysis was whether Ohio's reckless mens rea requirement with respect to the offender's belief as to the victim's age was sufficient to sustain an aggravated felony conviction under INA § 101(a)(43)(A). Appellant had argued before the immigration court that "recklessness is too low of a mental state to make importuning an aggravated felony" under immigration law. *In re: Bieksza, Respondent: In Removal Proceedings,* case No. A14-458-867 (Immigration Ct., June 11, 2008). In addressing this issue, the immigration court considered whether analysis from a federal court decision, *Rebilas v. Mukasey*, 527 F.3d 783 (9th Cir.2008), finding that Arizona's public-sexual-indecency-to-a-minor offense was not an aggravated felony under federal immigration law, was distinguishable from Ohio's statute. The immigration court found *Rebilas* "sufficiently" distinguishable on the basis that, under Ohio's statute, "the solicitation for sexual activity must be directed toward a victim the respondent believes to be a minor (or is reckless in that regard)," while under the Arizona statute "sexual activity in the presence of a minor suffices, even where the minor is unaware of the indecent activity." *In re: Bieksza*. The immigration court further found that "Arizona's reckless mens rea is arguably less stringent than Ohio's." *Id*.

{¶ 21} The immigration court also reviewed an immigration board decision interpreting Texas law, *In re*: *Rodriguez-Rodriguez,* 22 I&N Dec. 991 (Sept. 16, 1999), and noted that dictum in *Rodriguez* "suggests" that a conviction under a Texas misdemeanor statute "cannot categorically involve sexual abuse of a minor because no

minor need be involved; the statute simply requires that an offender be reckless regarding whether *any* person is present." (Emphasis sic.) The immigration court found that, by contrast, "Ohio case law demonstrates that in convictions for importuning under the reckless statute, the subject reveals that he or she is a minor." *In re: Bieksza*. While the immigration court noted that cases dispensing with a mens rea requirement concerning age "usually involve physical contact or the victim's presence," the court further noted case law holding that "psychological harm can constitute abuse." *Id*. In analyzing the relevant case law and statutes, the immigration court concluded that "given the 'inherent risk of exploitation, if not coercion, when an adult solicits a minor to engage in sexual activity,' the court finds that Ohio's reckless mens-rea requirement regarding the offender's belief as to the age of the victim [is] sufficient to sustain an aggravated felony conviction under INA § 101(a)(43)(A)." *Id*.

{¶ 22} Upon review, we agree with the trial court that this was not a case in which the deportation consequence was clear at the time of the plea. Unlike the facts of *Padilla,* in which defense counsel could have "easily" determined from a reading of the removal statute that the defendant's deportation was "presumptively mandatory," the question of whether a conviction for importuning constituted an aggravated felony for purposes of immigration law, as reflected by the immigration court's analysis of the mens rea issue, was not "truly clear." *Padilla* at 1483. Accordingly, appellant's counsel was not ineffective in advising his client that the "pending criminal charges may carry a risk of adverse immigration consequences." *Id*.

{¶ 23} In addition to the holding in *Padilla,* appellant also places reliance upon this court's decision in *State v. Yahya,* 10th Dist. No. 10AP-1190, 2011-Ohio-6090. Under the facts of *Yahya,* however, trial counsel gave incorrect advice when counsel allegedly showed the defendant an electronic document indicating she "was not deportable" if she entered a guilty plea. *Id.* at ¶ 14. In the present case, by contrast, counsel never advised appellant that no deportation proceeding would result from a guilty plea; rather, counsel made appellant aware that deportation was a possibility, but expressed the view it was unlikely immigration officials would learn of his convictions (i.e., it might be five or six years before immigration officials became aware of appellant's status). As noted by the trial court, the fact immigration officials learned of appellant's convictions shortly after

his plea does not mean he received objectively incorrect advice; rather, it means that an event appellant was "told had a 'very small possibility' of happening did in fact happen to him." Based upon this court's review, we find no error with the trial court's determination that counsel's representation did not fall below an objective standard of reasonableness.

{¶ 24} While the trial court found that appellant failed to satisfy the first prong of *Strickland,* the court further considered the issue of whether, under the second prong of *Strickland*, appellant had demonstrated prejudice. Because we find that counsel's performance was not deficient, we need not reach *Strickland's* prejudice prong.

{¶ 25} Upon review, we find that the trial court did not abuse its discretion in denying appellant's motions to withdraw his pleas to correct a manifest injustice based upon alleged deficient performance of counsel. In light of the record, we also conclude that the court did not abuse its discretion in deciding the motions without first conducting a hearing.

{¶ 26} Based upon the foregoing, appellant's first and second assignments of error are without merit and are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BRYANT and DORRIAN, JJ., concur.

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