[Cite as *State v. Gallegos-Martinez*, 2010-Ohio-6463.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. Julie A. Edwards, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 10-CAA-06-0043
ROLANDO GALLEGOS-MARTINEZ	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Delaware County Court of Common Pleas, Case No. 99CRI050127
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 28, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
WILLIAM OWEN 140 N. Sandusky St., 3d Fl. Delaware, OH 43015	LOUIS EDWARD VALENCIA II 10979 Reed Hartman Highway, Ste. 110 Cincinnati, OH 45242

Gwin, J.

{¶1} Defendant, Rolando Gallegos-Martinez, appeals from the judgment of the Delaware County Court of Common Pleas denying his post-sentence motion to withdraw his guilty plea.

STATEMENT OF THE FACTS AND CASE

{¶2} On August 27, 1999, appellant, indicted on charges of Attempted Rape and Assault, entered a plea of guilty to a charge of Corruption of a Minor, a violation of R.C. Section 2907.04(A), a felony of the fourth degree.[1] He was sentenced on October 11, 1999 to a Community Control Sanction from which he was granted early release on October 11, 2001. Appellant was not a U.S. citizen at the time he entered his plea.

{¶3} On February 20, 2009, appellant received a notice of an immigration hearing for possible deportation as a consequence of his felony conviction in 1999. Appellant thereafter initiated attempts to vacate his guilty plea.

{¶4} Appellant filed his first motion to vacate his guilty plea on May 5, 2009. The motion was amended on June 15, 2009. In the motions appellant argued that the "mandatory warning required by R.C. 2943.031 was not issued by [the] presiding judge…Based on the fact that the Defendant was not read the warning required by R.C. 2943.031 verbatim and the trial court did not substantially comply with the lesser standard allowed by the Ohio Supreme Court [in *State v. Francis,* 104 Ohio St. 3d 490, 494, 820 N.E. 2d 355, 2004-Ohio-6894] this motion should be granted." [Amended

[1] This court is aware from oral argument of the circumstances surrounding the reduction of charges and the subsequent plea however, insofar as the explanation is absent from the record, we cannot utilize it here in order to analyze whether the court abused its discretion in denying the motion. See, *North v. Beightler,* 112 Ohio St.3d 122, 2006-Ohio-6515, 858 N.E.2d 386, ¶ 7, quoting *Dzina v. Celebrezze,* 108 Ohio St.3d 385, 2006-Ohio-1195, 843 N.E.2d 1202, ¶ 16.

Motion to Vacate Guilty Plea, filed June 15, 2009 at 2-3]. On June 18, 2009 appellant filed a written request for a hearing on his motions with the trial court.

{¶5} By Judgment Entry filed June 29, 2009, the trial court overruled all of appellant's motions. The trial court found, "The transcript of the guilty plea hearing shows on page 20, lines 9-17 that the Court advised the Defendant that his conviction 'would impact your status here in this country and you might be subject to extradition or deportation proceedings.' The Defendant acknowledged that he understood." The court found substantial compliance with the mandate of R.C. 2943.031 based upon *State v. Francis* 104 Ohio St. 3d 490, 820 N.E. 2d 355, 2004-Ohio-6894.

{¶6} Appellant attempted to appeal the trial court's June 29, 2009 Judgment Entry to this Court in Delaware App. No. 09CAA070070; however, by Judgment Entry filed August 17, 2009 this Court dismissed appellant's appeal as having been untimely filed. Appellant's Motion to Reconsider was denied by this Court on September 10, 2009.

{¶7} Thereafter, appellant filed a second motion to vacate his guilty plea on April 27, 2010 following the United State's Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). This second motion was denied by the trial court on May 5, 2010 on the basis that appellant failed to demonstrate actual prejudice as a result of trial counsel's failure to inform him of the potential deportation consequences of his guilty plea.

{¶8} Appellant has timely appealed the trial court's May 5, 2010 Judgment Entry denying his second motion to withdraw his plea of guilty raising the following two assignments of error,

{¶9} "I. THE LOWER COURT ERRED IN DENYING MR. GALLEGOS' SECOND MOTION TO VACATE HIS GUILTY PLEA BECAUSE HE SUFFERED PREJUDICE. THERE IS A REASONABLE PROBABILITY THAT BUT FOR COUNSEL'S UNPROFESSIONAL ERRORS; THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT.

{¶10} "II. THE LOWER COURT ERRED IN DENYING MR. GALLEGOS' SECOND MOTION TO VACATE HIS GUILTY PLEA BECAUSE THE DUTY IMPOSED BY O.R.C. §2943.031 (A) IS NOT TANTAMOUNT TO COUNSEL'S ADVICE. THE LOWER COURT WARNING UNDER O.R.C. §2943.031 (A) DOES NOT CURE MR. GALLEGOS' PREJUDICE."

I & II

{¶11} In his first assignment of error appellant maintains that he was entitled to have his plea vacated on the grounds of ineffective assistance of counsel. Specifically, appellant argues that his attorney did not inform him regarding the deportation consequences of his guilty plea and ensuing conviction. In his second assignment of error, appellant argues that the trial court's admonishing that his guilty plea may have deportation consequences cannot cure counsel's failure to advise him regarding the deportation consequences of his plea. We disagree.

{¶12} Appellant, as noted above, unsuccessfully sought to withdraw his guilty plea before the trial court by motion filed May 5, 2009 and amended June 15, 2009. We find that at least some of the issues in his present appeal of the denial of his second motion to withdraw his guilty plea are prohibited by the doctrine of res judicata. As stated in *State v. Sneed,* Eighth District No. 84964, 2005-Ohio-1865, "Where a

defendant files a post conviction motion to withdraw and fails to raise an issue that could have been raised, the defendant is precluded from raising the issue in a subsequent motion to withdraw. See *State v. Jackson* (Mar. 31, 2000), Trumbull App. No. 98-T-0182. Indeed, numerous courts have applied the doctrine of res judicata to successive motions to withdraw a guilty plea. See *State v. Brown*, Cuyahoga App. No. 84322, 2004-Ohio-6421 (determining that a Crim.R. 32.1 motion will be denied when it asserts grounds for relief that were or should have been asserted in a previous Crim.R. 32.1 motion); *State v. McLeod*, Tuscarawas App. No.2004 AP 03 0017, 2004-Ohio-6199 (holding res judicata barred current challenge to a denial of a motion to withdraw because the issues could have been raised in a defendant's initial motion to withdraw); *State v. Vincent*, Ross App. No. 03CA2713, 2003-Ohio-3998 (finding res judicata barred defendant from raising issues that could have been raised in a prior motion for new trial or Crim.R. 32.1 motion); *State v. Reynolds*, Putnam App. No. 12-01-11, 2002-Ohio-2823 (finding that the doctrine of res judicata applies to successive motions filed under Crim.R. 32 .1); *State v. Unger*, Adams App. No. 00CA705, 2001-Ohio-2397 (concluding that the defendant's Crim.R. 32.1 motion was barred by res judicata because she had previously filed a motion to withdraw her guilty plea that she did not appeal prior to filing the second motion to withdraw guilty plea); *State v. Jackson* (Mar. 31, 2000), Trumbull App. No. 98-T-0182 (res judicata applies to successive motions to withdraw a guilty plea filed pursuant to Crim.R. 32.1). As succinctly stated in *State v. Kent*, Jackson App. No. 02CA21, 2003-Ohio-6156: ‘Res judicata applies to bar raising piecemeal claims in successive post-conviction relief petitions or motions to withdraw a guilty plea that could

have been raised, but were not, in the first post conviction relief petition or motion to withdraw a guilty plea.'" *Sneed* at ¶ 17.

{¶13} In the case at bar, to the extent appellant argues that the trial court failed to advise him of the deportation consequences of his guilty plea or that he failed to understand the trial court's advice concerning the deportation consequences of his guilty plea, we find appellant attempted to raise those issues in his initial appeal from the trial court's Judgment Entry filed June 29, 2009. Therefore, the doctrine of res judicata bars those issues in the appeal presently under consideration.

{¶14} However, appellant claims that his trial counsel was ineffective by failing to advise him of the deportation consequences of his guilty plea. Appellant further asserts he suffered prejudice as a result of counsel's "unprofessional error" that could not be cured by the trial court's advice.

{¶15} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶16} In order to warrant a finding that trial counsel was ineffective, the petitioner must meet both the deficient performance and prejudice prongs of *Strickland* and *Bradley*. *Knowles v. Mirzayance* (2009), --- U.S. ----, 129 S.Ct. 1411, 1419, 173 L.Ed.2d 251.

{¶17} To show deficient performance, appellant must establish that "counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. at 688, 104 S.Ct. at 2064. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct. at 2064. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *Strickland v. Washington* 466 U.S. at 688, 104 S.Ct. 2052 at 2065.

{¶18} "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668 at 689,104 S.Ct. at 2064

{¶19} In light of "the variety of circumstances faced by defense counsel [and] the range of legitimate decisions regarding how best to represent a criminal defendant," the

performance inquiry necessarily turns on "whether counsel's assistance was reasonable considering all the circumstances." *Strickland v. Washington*, 466 U.S. 668 at 689,104 S.Ct. at 2064. At all points, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland v. Washington*, 466 U.S. 668 at 689,104 S.Ct. at 2064.

{¶20} Appellant must further demonstrate that he suffered prejudice from his counsel's performance. See *Strickland,* 466 U. S., at 691 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment"). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. To prevail on his ineffective-assistance claim, appellant must show, therefore, that there is a "reasonable probability" that the trier of fact would not have found him guilty.

{¶21} The United States Supreme Court recently determined that "it is critical for counsel to inform her noncitizen client that he faces a risk of deportation" and that failure to do so can satisfy the first prong of the *Strickland* analysis. *Padilla v. Kentucky* (2010), --- U.S. ---- 130 S.Ct. 1473, 176 L.Ed.2d 284. Notwithstanding, the defendant must still demonstrate prejudice as a result thereof before being entitled to relief. The court in *Padilla* remanded the case for a determination of prejudice.

{¶22} *Padilla,* however, is not analogous to this case. Most notably, the Kentucky court did not advise Padilla of the possible immigration consequences of his

plea and conviction. Id. at fn. 15[2]. In addition, Padilla's counsel allegedly misadvised him that he "'did not have to worry about immigration status since he had been in the country for so long' and never advised him otherwise." Id. at 1477.

{¶23} In Ohio, the duty to inform a non-citizen defendant of the possible deportation consequences of his or her plea is entrusted to the trial court. R.C. 2943.031(A) states that, when a trial court accepts a guilty plea from a defendant, like appellant, who is not a United States citizen:

{¶24} "* * * [T]he court shall address the defendant personally, provide the following advisement to the defendant that shall be entered in the record of the court, and determine that the defendant understands the advisement:

{¶25} 'If you are not a citizen of the United States, you are hereby advised that conviction of the offense to which you are pleading guilty (or no contest, when applicable) may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.'"

{¶26} In addition, R.C. 2943.031(D) states:

{¶27} "Upon motion of the defendant, the court shall set aside the judgment and permit the defendant to withdraw a plea of guilty or no contest and enter a plea of not guilty or not guilty by reason of insanity, if, after the effective date of this section, the

[2] As the Court in *Padilla* noted, "Further, many States require trial courts to advise defendants of possible immigration consequences. See, *e.g.,* Alaska Rule Crim. Proc. 11(c)(3)(C) (2009-2010); Cal.Penal Code Ann. § 1016.5 (West 2008); Conn. Gen.Stat. § 54-1j (2009); D. C.Code § 16-713 (2001); Fla. Rule Crim. Proc. 3.172(c)(8) (Supp.2010); Ga.Code Ann. § 17-7-93(c) (1997); Haw.Rev.Stat. Ann. § 802E-2 (2007); Iowa Rule Crim. Proc. 2.8(2)*(b)* (3) (Supp.2009); Md. Rule 4-242 (Lexis 2009); Mass. Gen. Laws, ch. 278, § 29D (2009); Minn. Rule Crim. Proc. 15.01 (2009); Mont.Code Ann. § 46-12-210 (2009); N. M. Rule Crim. Form 9-406 (2009); N. Y.Crim. Proc. Law Ann. § 220.50(7) (West Supp.2009); N. C. Gen.Stat. Ann. § 15A-1022 (Lexis 2007); Ohio Rev.Code Ann. § 2943.031 (West 2006); Ore.Rev.Stat. § 135.385 (2007); R. I. Gen. Laws § 12-12-22 (Lexis Supp.2008); Tex.Code. Ann.Crim. Proc., Art. 26.13(a)(4) (Vernon Supp.2009); Vt. Stat. Ann., Tit. 13, § 6565(c)(1) (Supp.2009); Wash. Rev.Code § 10.40.200 (2008); Wis. Stat. § 971.08 (2005-2006)."

court fails to provide the defendant the advisement described in division (A) of this section, the advisement is required by that division, and the defendant shows that he is not a citizen of the United States and that the conviction of the offense to which he pleaded guilty or no contest may result in his being subject to deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

{¶28} In *State v. Francis,* 104 Ohio St. 3d 490, 494, 820 N.E. 2d 355, 2004-Ohio-6894, the Ohio Supreme Court set forth the standard for plea withdrawal motions pursuant to R.C. 2943.031 claims: "[I]f some warning of immigration-related consequences was given at the time a noncitizen defendant's plea was accepted, but the warning was not a verbatim recital of the language in R.C. 2943.031(A), a trial court considering the defendant's motion to withdraw the plea under R.C. 2943.031(D) must exercise its discretion in determining whether the trial court that accepted the plea substantially complied with R.C. 2943.031(A)." *Francis* at ¶ 48. "'Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving. * * * The test is whether the plea would have otherwise been made.' "Id., quoting *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

{¶29} In the case at bar, the following exchange occurred during appellant's change of plea hearing:

{¶30} "[The Court]: One thing I forgot, however, I think I indicated at the time of your arraignment, is that this conviction would impact your status here in this country

and you might be subject to extradition or deportation proceedings. Do you understand that?

{¶31} "[Appellant]: Yes, sir.

{¶32} "[The Court]: And understanding that, do you still wish to enter this guilty plea?

{¶33} "[Appellant]: Yes, sir."

{¶34} [T. August 27, 1999 at 20). In addition, appellant executed a written "Withdrawal of Former Plea of Not Guilty to the Indictment, Written Plea of Guilty to the Indictment and Judgment Entry on Guilty Plea" filed August 30, 1999. Both appellant and his attorney signed this document. This form states, in relevant part, "I understand the consequences of a conviction upon me if I am not a U.S. citizen." Id. at 4.

{¶35} In the case at bar, an interpreter was present during appellant's change of plea hearing. The appellant was at all times represented by a competent attorney. In response to the trial judge, appellant indicated he understood the fact that his guilty plea might affect his status here in this country and that he might be subject to extradition or deportation. Upon being informed by the trial court that he was subject to possible extradition or deportation proceedings, appellant did not indicate his disapproval or confusion to the trial court. After being so advised, appellant further stated that he still wished to enter a guilty plea. At no time during either the plea or sentencing phase of the hearing, did appellant ask any questions regarding the penalties involved for the charges to which he was pleading guilty, nor did appellant inquire as to any possibilities concerning possible extradition or deportation. In support of his second motion to withdraw his guilty plea, appellant did not submit any evidence that he would have

rejected the plea agreement and insisted upon a trial on the charges of Rape and Assault had his attorney provided this information in addition to the trial court. If, in fact, appellant subjectively held some belief, either that he would not be subject to possible extradition or deportation, there is no evidence of it in the record or that such belief was essential to his decision to plead guilty.

{¶36} Given the record, we find that appellant has failed to demonstrate that he was prejudiced by trial counsel's representation of him.

{¶37} As previously noted, *Padilla,* is not analogous to this case. Most notably, the Kentucky court did not advise Padilla of the possible immigration consequences of his plea and conviction. Id. at fn. 15. The Court concluded, "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." Further, this is not a case of counsel allegedly misadvised appellant that he would not be deported if he pleads guilty, as was the case in *Padilla*.

{¶38} The trial court advised appellant of the possible immigration consequences of his plea and conviction[3]. As the Ohio Supreme Court noted in *Francis*, "Along with Ohio, at least 17 states and the District of Columbia require through statute or court rule that trial judges advise criminal defendants entering into plea agreements of the immigration-related consequences of the plea. See *Immigration & Naturalization Serv. v. St. Cyr* (2001), 533 U.S. 289, 322, 121 S.Ct. 2271, 150 L.Ed.2d

[3] As previously noted to the extent appellant argues that the trial court failed to advise him of the deportation consequences of his guilty plea or that he failed to understand the trial court's advice concerning the deportation consequences of his guilty plea appellant's claims are barred by res judicata because appellant attempted to raise the issues herein in his initial appeal from the trial court's Judgment Entry filed June 29, 2009 overruling appellant first motion and amended motion to withdraw his guilty pleas.

347, fn. 48. Federal judges have no comparable statute or rule to follow in accepting pleas from noncitizen defendants." 104 Ohio St.3d 490, 497, 820 N.E.2d 355, 2004-Ohio-6894 at ¶25. Failure to advise the defendant of the possible deportation risks did not result in an automatic reversal in *Padilla*; rather the United States Supreme Court remanded the case for a hearing to determine whether Padilla was prejudiced by the failure of his attorney to advise him of the possible deportation consequences of his guilty plea.

{¶39} While we agree with the appellant that, based on *Padilla*, if defense counsel fails to advise a Defendant of possible deportation risks, this would fail the first prong of the *Strickland* test; however, we find in the case at bar that appellant has failed to establish prejudice as required under the second-prong of the *Strickland* test, i.e. that he would not have pleaded guilty had his attorney rather than the trial court given the advice.

{¶40} The trial court did not abuse its discretion by denying appellant's second motion to withdraw his guilty plea. We find appellant has not demonstrated that he was prejudiced by trial counsel's performance.

{¶41} Accordingly, appellant's first and second assignments of error are overruled.

{¶42} The judgment of the Delaware County Court of Common Pleas is affirmed.

By Gwin, J.,

Edwards, P.J., and

Delaney, J., concur

_____
HON. W. SCOTT GWIN

_____
HON. JULIE A. EDWARDS

_____
HON. PATRICIA A. DELANEY

WSG:clw 1201

[Cite as *State v. Gallegos-Martinez*, 2010-Ohio-6463.]

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
ROLANDO GALLEGOS-MARTINEZ	:	
Defendant-Appellant	:	CASE NO. 10-CAA-06-0043

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Delaware County Court of Common Pleas is affirmed. Costs to appellant.

_____
HON. W. SCOTT GWIN

_____
HON. JULIE A. EDWARDS

_____
HON. PATRICIA A. DELANEY