

[Cite as *State v. Yapp*, 2015-Ohio-1654.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 101247 and 101248

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

MAURICE O. YAPP

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-12-565949-A and CR-12-567342-A

BEFORE: E.A. Gallagher, P.J., Kilbane, J., and Blackmon, J.

RELEASED AND JOURNALIZED: April 30, 2015

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ON RECONSIDERATION¹

EILEEN A. GALLAGHER, P.J.:

{¶1} In this consolidated appeal, the state appeals the trial court's decision granting appellee Maurice Yapp's motions to withdraw his guilty pleas and vacate his convictions. For the reasons that follow, we affirm.

{¶2} The record reflects that Yapp is a Jamaican citizen and has lived in the United States since 1998. In 2012, Yapp was indicted for drug trafficking and possession of criminal tools in Cuyahoga C.P. No. CR-12-565949 and two counts of felonious assault in Cuyahoga C.P. No. CR-12-567342. On March 27, 2013, Yapp entered into a plea agreement whereby he plead guilty to drug trafficking in CR-12-565949 and one count of attempted aggravated assault in CR-12-567342.

{¶3} Prior to accepting Yapp's pleas, the trial court addressed Yapp's immigration status and explained:

[I]f you are not a U.S. citizen I need to advise you that a conviction of these offenses or a plea may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States.

{¶4} Yapp acknowledged the trial court's warning regarding the potential negative consequences to his immigration status prior to entering his pleas. At sentencing, the trial court ordered Yapp to forfeit \$5,080.08 in CR-12-565949 and imposed one and one-

¹ The original announcement of decision *State v. Yapp*, 2015-Ohio-679, released February 26, 2015, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized decision in this appeal. *See App.R.22(C) see also S.Ct.Prac.R.701.*

half years of community control sanctions. In CR-12-567342, the trial court also imposed one and one-half years of community control sanctions.

{¶5} On September 10, 2013, Yapp filed a motion to withdraw his guilty pleas in both cases on the grounds that his attorney failed to provide him with effective assistance of counsel by failing to properly advise him of the immigration consequences of his guilty pleas. Yapp averred that his trial counsel told him that he did not know what the immigration consequences of his guilty pleas would be because the immigration laws change “all the time.” In July 2013, Yapp was taken into immigration custody for deportation due to his trafficking offense conviction.

{¶6} The trial court held a hearing on Yapp’s motion and his trial counsel testified that during his representation of Yapp he was aware that Yapp was not a U.S. citizen. He testified that Yapp had questions regarding the implication of his pleas for the purposes of his immigration status and that he told him that he was not familiar with the relevant immigration laws because they “change all the time” and he didn’t have any specific knowledge of the immigration repercussions of Yapp’s pleas. Counsel did not advise Yapp to consult an immigration attorney prior to entering his pleas.

{¶7} On March 18, 2014, the trial court granted Yapp’s motion to withdraw his pleas in both cases. This court granted the state’s motion to leave to appeal on May 5, 2014. The state’s first assignment of error provides:

A trial court abuses its discretion by granting a defendant’s motion to withdraw a guilty plea where, prior to accepting defendant’s plea, the trial

court informs the defendant that “a conviction of these offenses or a plea may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States” and the defendant states on the record that he understands the potential consequences of his guilty plea.

{¶8} A defendant moving for a postsentence withdrawal of a guilty plea has the burden of establishing the existence of manifest injustice. *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus. A manifest injustice is a clear or openly unjust act; an extraordinary and fundamental flaw in the plea proceeding. *State v. Sneed*, 8th Dist. Cuyahoga No. 80902, 2002-Ohio-6502, ¶ 13. Manifest injustice comprehends a fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through another form of application reasonably available to him or her. *Id.* However, “a post-sentence motion to withdraw a guilty plea is allowable only in extraordinary cases.” *State v. Conner*, 8th Dist. Cuyahoga No. 98084, 2012-Ohio-3579, ¶ 5, citing *Smith*.

{¶9} A motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court, and the good faith, credibility, and weight of the movant’s assertions in support of the motion are matters to be resolved by that court. *Smith*, paragraph two of the syllabus. Consequently, an appellate court’s review of a trial court’s denial of a postsentence motion to withdraw a guilty plea is limited to a determination of whether the trial court abused its discretion. *State v. Blatnik*, 17 Ohio App.3d 201, 202, 478 N.E.2d

1016 (6th Dist.1984); *State v. Xie*, 62 Ohio St. 3d 521, 584 N.E.2d 715 (1992). The term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶10} Yapp has argued that his trial counsel failed to provide effective assistance of counsel by failing to advise him that his pleas would result in his deportation. In order to establish a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) the performance of defense counsel was seriously flawed and deficient, and (2) the result of defendant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶11} In *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), the United States Supreme Court noted that immigration laws can be complex and at times the deportation consequences of a particular plea may be unclear or uncertain. *Id.* at 369. However, the court held that when the deportation consequence for a defendant is truly clear, trial counsel's duty to give correct advice is equally clear. *Id.* at 369.

{¶12} In this instance, the deportation and permanent exclusion consequences of Yapp's plea agreement were clear. *Id.* at 368; 8 U.S.C. 1227(a)(2)(B)(i) ("[a]ny alien who at any time after admission has been convicted of a violation of * * * any law or regulation of a State, the United States, or a foreign country relating to a controlled

substance * * * other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable."); 8 U.S.C. 1227(a)(2)(A)(iii) "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable."; 8 U.S.C. 1101(a)(43)(b) (illicit trafficking in a controlled substance including a drug trafficking crime constitutes an aggravated felony.)

{¶13} Where, as here, the deportation consequences of a plea are clear and trial counsel fails to properly advise, the first prong of *Strickland* is satisfied. *Padilla v. Kentucky*, 559 U.S. 356, 374, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). However, a defendant must still demonstrate prejudice as a result thereof before being entitled to relief. *Id.*

{¶14} "This court has previously adhered to the concept that "[a] trial court's R.C. 2943.031(A) advisement that the defendant may be deported as a result of his plea, is sufficient to overcome any prejudice caused by counsel's failure to properly advise the defendant." *State v. McCubbin*, 8th Dist. Cuyahoga No. 100944, 2014-Ohio-4216, ¶ 16, citing *State v. Lababidi*, 2012-Ohio-267, 969 N.E.2d 335 (8th Dist.); *State v. Velazquez*, 8th Dist. Cuyahoga No. 95978, 2011-Ohio-4818. This proposition of law was born from our decision in *State v. Bains*, 8th Dist. Cuyahoga No. 94330, 2010-Ohio-5143, where we upheld a trial court's decision denying a motion to withdraw because, among other things, the trial court properly advised the defendant under R.C. 2943.031(A) that he may be subject to deportation and other immigration consequences.

{¶15} A careful reading of *Bains* reveals that that case does not stand for the broad

proposition that a trial court's proper advisement under R.C. 2943.031(A) "cures" any potential prejudice and *always* precludes a finding of prejudice under *Padilla*. Instead, *Bains* merely stands for the proposition that, depending on the circumstances of the particular case, the R.C. 2943.031(A) advisement *may* preclude a finding of prejudice. *Bains*, at ¶ 29 (concluding that no prejudice existed based on several "reasons" rather than *solely* the R.C. 2943.031(A) advisement.)

{¶16} Therefore, we clarify that a trial court's R.C. 2943.031(A) advisement does not necessarily foreclose the possibility of finding prejudice under *Padilla* and move away from the progeny of *Bains* that seemed to expansively interpret *Bains* as a bright line rule that the advisement cures all prejudice.

{¶17} In this case, although the trial court complied with its duty to advise the defendant pursuant to R.C. 2943.031 that his plea might result in deportation, the record supports the trial court's conclusion that, based upon the totality of the information provided to Yapp, he did not appreciate his actual risk of deportation. The trial court issued a detailed opinion explaining the decision to grant Yapp's motion to withdraw his pleas. The court found that Yapp's deportation was a certainty as a result of his plea and he was not provided adequate advice that would allow him to make an intelligent decision. In finding prejudice, the court noted that Yapp possessed limited education and language skills, had lived in United States since 1998 and had three children.

{¶18} On these facts we cannot say the trial court abused its discretion in granting Yapp's motion to withdraw his pleas.

{¶19} The state's first assignment of error is overruled.

{¶20} The state's second assignment of error provides:

A trial court abuses its discretion by admitting affidavits into evidence over the state's objection where the affiants are not present in court for cross-examination.

{¶21} The state argues that the trial court improperly admitted affidavits from Yapp and his spouse without requiring the affiants to be available for cross-examination.

{¶22} "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987), paragraph two of the syllabus. An appellate court, therefore, generally reviews a trial court's decision pertaining to the admission of evidence for an abuse of discretion. *State v. Gale*, 8th Dist. Cuyahoga No. 94872, 2011-Ohio-1236, ¶ 12, citing *State v. Finnerty*, 45 Ohio St.3d 104, 107, 543 N.E.2d 1233 (1989). An abuse of discretion means more than a mere error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶23} The record reflects that the trial court's inquiry into the absence of Yapp revealed that he was unavailable due to his being in federal custody awaiting deportation.

Although the state objected to the admission of Yapp's affidavit on the basis of his unavailability for cross-examination we note that Yapp filed his motion to withdraw his pleas on September 10, 2013 and attached his affidavit to the motion. The hearing on

Yapp's motion was not held until March 14, 2014. Despite the state's knowledge of the allegations in Yapp's affidavit and its professed desire to cross-examine him, the record is silent regarding any efforts by the state to procure Yapp's appearance despite the fact that he was in federal custody.

{¶24} More importantly, we find any error in the admission of the affidavits to be harmless. The state argues on appeal that the admission of the affidavits allowed the trial court to improperly determine "whether [Yapp] entered his pleas in the knowledge that his pleas could lead to deportation." However, we find no merit to this argument as the circumstances of Yapp's plea and the deficient legal advice he received regarding potential deportation consequences were provided through the testimony of Yapp's trial counsel and explored during cross-examination of that witness by the state. We note that the trial court acknowledged the state's objection to the affidavits as "well placed" and stated that it would "consider them for whatever they are worth." We find no abuse of discretion in this instance.

{¶25} The state's second assignment of error is overruled.

{¶26} The judgment of the trial court is affirmed.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of

the Rules of Appellate Procedure.

EILEEN A. GALLAGHER, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
MARY EILEEN KILBANE, J., CONCUR