

[Cite as *State v. Ayesta*, 2015-Ohio-1695.]

[Vacated opinion. Please see 2015-Ohio-600.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101383

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

NESTOR AYESTA

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-10-533381-A

BEFORE: Stewart, J., S. Gallagher, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: May 1, 2015

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ON RECONSIDERATION¹

MELODY J. STEWART, J.:

{¶1} Defendant-appellant Nestor Ayesta appeals from the denial of his motion to withdraw his guilty plea to domestic violence, a first-degree misdemeanor. For the following reasons, we reverse the judgment and remand to the trial court for a hearing on the motion.

{¶2} On February 10, 2010, the Cuyahoga County Grand Jury issued a three-count indictment against Ayesta on charges that arose from a physical altercation between him and his sister. Counts 1 and 2 alleged that Ayesta committed a felonious assault, in violation of R.C. 2903.11(A)(1) and 2903.11(A)(2), respectively. Count 3 alleged that he committed domestic violence in violation of R.C. 2919.25(A).

{¶3} As a result of plea negotiations, on April 7, 2010, Ayesta pleaded guilty to Count 1, amended to assault, and Count 3, domestic violence, in exchange for the dismissal of Count 2. At the time of his guilty plea, Ayesta was living as a legal resident of the United States, but lacked citizenship status. Prior to his plea, the trial court advised Ayesta that there may be immigration consequences as a result of his plea. After accepting his plea, the court sentenced Ayesta to concurrent and suspended, six-month prison terms on both the assault and domestic violence charges. Ayesta was ordered to

¹ The original announcement of decision, *State v. Ayesta*, 8th Dist. Cuyahoga No. 101383, 2015-Ohio-600, released February 19, 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. 7.01.

serve a one-year term of community control probation.

{¶4} In November 2013, the federal government initiated immigration removal proceedings against Ayesta because of his domestic violence conviction. On March 3, 2014, Ayesta filed a motion to withdraw his guilty plea to the domestic violence charge only. The trial court denied the motion without a hearing.

{¶5} In his sole assignment of error, Ayesta asserts that the trial court incorrectly denied his motion to withdraw his guilty plea and failed to address whether his trial counsel was constitutionally ineffective under *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), for allegedly failing to advise him of what he describes as “the mandatory” deportation consequences that arise from a conviction of domestic violence. *See* 8 U.S.C. 1227(a)(2)(E)(i)(stating, “[a]ny alien who at any time after admission is convicted of a crime of domestic violence * * * is deportable.” We agree. We therefore sustain the assignment of error and remand the matter to the trial court for a hearing.

{¶6} The linchpin of Ayesta’s argument is that a conviction of domestic violence results in mandatory deportation and that had he known of the mandatory consequences, he would not have pled guilty to the charge but would have asked his attorney to attempt to negotiate a plea arrangement that did not involve his pleading guilty to a mandatory deportable offense, or that he would have taken his chances at trial.

{¶7} However, before getting to the substance of Ayesta’s argument, we think it prudent to briefly discuss the federal deportation statute, 8 U.S.C. 1227(a)(2)(E)(i). We

note that after careful review of this statute, we have been unable to find any language that says that a conviction of domestic violence results in mandatory deportation. While the word “deportable,” in its most literal interpretation, means “able to be deported,” as the United States Supreme Court has recognized, the practical result of such a conviction is that the alien almost always *will be deported*. See *Padilla* at 360–364 (explaining how federal law has changed since the 1990s and stating that “[u]nder contemporary law, if a noncitizen has committed a removable offense * * * his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses. See 8 U.S.C. 1229b.” Courts have been describing the level of certainty of deportation for deportable offenses as “virtually automatic” and “unavoidable,” *United State v. Couto*, 311 F.3d 179, 184 (2d Cir.2002), “certain,” *INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347, 325 (2001), and “presumptively mandatory,” *Hernandez v. State*, 124 So.3d 757, 763 (Fla. 2012). It is therefore understandable why Ayesta calls the deportation consequences of his conviction “mandatory.”

{¶8} Crim.R. 32.1 authorizes postconviction withdrawal of a guilty plea in limited circumstances where it is required to correct a “manifest injustice.” A manifest injustice is a “clear or openly unjust act,” *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 1998-Ohio-271, 699 N.E.2d 83, that is evidenced as “an extraordinary and fundamental flaw in the plea proceeding.” *State v. Hamilton*, 8th Dist. Cuyahoga No. 90141, 2008-Ohio-455. Ineffective assistance of counsel can constitute a manifest

injustice worthy of withdrawal of a guilty plea. *State v. Dalton*, 153 Ohio App.3d 286, 2003-Ohio-3813, 793 N.E.2d 509, ¶ 18 (10th Dist.).

{¶9} In a Crim.R. 32.1 motion to withdraw a guilty plea, the defendant bears the burden of proving that a manifest injustice occurred. *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus. A determination of whether the defendant has met his burden of proof is within the sound discretion of the trial court. *Id.* at paragraph two of the syllabus. Accordingly, an appellate court will not reverse a trial court's ruling on a postsentence motion to withdraw a guilty plea, unless the court abused its discretion. *Id.* An abuse of discretion requires a showing that the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Longo*, 4 Ohio App.3d 136, 141, 446 N.E.2d 1145 (8th Dist.1982).

{¶10} A hearing on Crim.R. 32.1 motion to withdraw a guilty plea is not always required. “[A] hearing is not required where the record, on its face, conclusively and irrefutably contradicts the allegations in support of withdrawal,” *State v. Legree*, 61 Ohio App.3d 568, 573 N.E.2d 687 (6th Dist.1988), or when the record otherwise indicates that the movant is not entitled to relief. *See State v. Russ*, 8th Dist. Cuyahoga No. 81580, 2003-Ohio-1001, ¶ 12. However, in the absence of a contradictory record, an evidentiary hearing is required if the facts, as alleged by the defendant, and taken as true by the court, would require that the guilty plea be withdrawn. *State v. Miley*, 8th Dist. Cuyahoga No. 83152, 2004-Ohio-641, ¶ 14; *State v. Hamed*, 63 Ohio App.3d 5, 7, 577 N.E.2d 1111 (8th Dist.1989), citing *State v. Blatnik*, 17 Ohio App.3d 201, 478 N.E.2d 1016 (1984). A court

has discretion to judge the credibility of affidavits in determining whether to accept the affidavits as true statements of fact. *State v. Knowles*, 8th Dist. Cuyahoga No. 95239, 2011-Ohio-1685, ¶ 22, citing *State v. Mays*, 174 Ohio App.3d 681, 2008-Ohio-128, 884 N.E.2d 607, ¶14.

{¶11} In denying Ayesta’s motion to withdraw, the court stated:

Defendant’s motion to withdraw guilty plea to count 3 * * * is denied for the following reasons: (1) defendant’s motion is untimely as it was filed nearly 4 years after defendant was sentenced, (2) defendant was properly advised of all of his rights prior to entering his guilty plea,² and (3) pursuant to R.C. 2943.031, the court specifically advised defendant verbatim that his guilty plea may have immigration consequences. *See State v. Bains*, 8th Dist No. 94330, 2010-Ohio-5143, and *State v. Lababidi*, 8th Dist. No. 96755, 2012-Ohio-267.

I. Timeliness

{¶12} The timeliness of a motion to withdraw is a factor courts consider when exercising their discretion under Crim.R. 32.1. *See Smith*, 49 Ohio St.2d 261 at paragraph three of the syllabus (stating “[a]n undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim.R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion.”). Courts weigh the timeliness factor more or less heavily depending on the circumstances surrounding the appeal. *See State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355 (explaining that in some cases even a considerable delay in filing a motion to withdraw a guilty plea will not be a factor supporting denial of the motion, such as when the immigration-related consequences of the

² We interpret this to mean that the defendant was advised, in accordance with Crim.R. 11, of his rights before entering his guilty plea. However, we do not take this as an adequate reason for denying the motion in the context of the issues presented in this appeal.

plea and resulting conviction did not become evident for some time after the plea was entered).

{¶13} Regarding the timeliness of Ayesta's motion, one of the reasons the trial court stated for denying the motion was that it was filed almost four years after Ayesta was sentenced. However, Ayesta states that he was first made aware of the deportation consequences of his plea in November 2013 when he received notification of deportation proceedings. He filed his motion to withdraw six months later. We find that the six-month period of time is the more appropriate measure in this case, and conclude that timeliness is not a factor weighing against Ayesta.

II. *Padilla* Violation

{¶14} Defendants have a Sixth Amendment right to the effective assistance of counsel when deciding whether to enter a guilty plea. *Id.* at 364, citing *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on a challenge to a guilty plea based on ineffective assistance of counsel, the defendant must satisfy the two-part test set forth in *Strickland v. Washington*. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Under *Strickland*, the defendant must first show constitutional ineffectiveness — that is, that his counsel's performance fell below an objective standard of reasonableness. *Padilla*, 559 U.S. at 367, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), citing *Strickland*, 466 U.S. at 694. Second, the defendant must show that he was prejudiced by his counsel's deficient performance. *Id.* Proving prejudice requires a showing that there is a reasonable probability that were it not for counsel's errors, the result of the proceeding would have been different. *Hill v. Lockhart*, 474 U.S. at 57; *Strickland*, 466 U.S. at 694. In the context of constitutional

challenges to guilty pleas, the prejudice prong of the test requires that the defendant show that there is a reasonable probability that were it not for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 59. This involves “convinc[ing] the court that a decision to reject the plea bargain would have been rational under the circumstances.” *Padilla* at 372.³

{¶15} Trial counsel has a duty to accurately advise his client of the advantages and disadvantages of a plea agreement. *Padilla* at 370. This includes advising noncitizen defendants of the deportation consequences associated with a plea. *Id.* Counsel breaches this duty by either providing affirmative misadvice about immigration consequences, or by not providing any advice at all when advice is warranted. *Id.* at 370–371 (stating, “there is no relevant difference between an act of commission and an act of omission in this context” (internal quotations omitted)). Thus, failing to advise a noncitizen defendant of potential deportation consequences associated with a plea satisfies the first prong of the *Strickland* test by establishing that counsel's performance fell below an objective standard of reasonableness. *See id.* at 373–374.

{¶16} Here, Ayesta alleged in his brief in support of his motion to withdraw and in his accompanying affidavit that his counsel failed to advise him of the deportation

³ Two recent cases from our district, *State v. Huang*, 8th Dist. Cuyahoga No. 99945, 2014-Ohio-1511, and *State v. Preciado*, 8th Dist. Cuyahoga No. 101257, 2015-Ohio-19, may seem to suggest that prejudice at the plea stage requires a showing that the defendant would have prevailed at trial. While the court in *Huang* and *Preciado* did primarily look to trial outcome, we now clarify that the weight of the evidence against the defendant and thus the likelihood of prevailing at trial, while an important factor, is just one factor a court may consider when conducting its prejudice evaluation.

consequences. He also stated that had he known of the mandatory deportation consequences, he would not have pled guilty. The court, nonetheless, declined to hold a hearing on the motion before denying it.

{¶17} As evidence in support of his motion, Ayesta presented his own affidavit averring that he was never advised by counsel of the mandatory immigration consequences.⁴ Additionally, Ayesta's brief in support of his motion explains that his family lives in the United States and that he would not have agreed to plead guilty to a charge of domestic violence if he knew that he would be deported as a result. Ayesta's affidavit, together with the brief in support of the motion was sufficient to warrant a hearing on the motion. The affidavit asserted facts, that if taken as true, would require that the guilty plea be withdrawn, as it made out a prima facie case for ineffective assistance of counsel. Additionally, the fact that his immediate family lives in the United States supports his contention that he would not have pleaded guilty to the charge if he knew that he would be deported.

{¶18} While we recognize that the trial court has discretion to determine the credibility of the affidavit, we note that the court did not voice any concerns regarding the truth of Ayesta's contentions when it denied the motion without a hearing. Therefore, we conclude that the court denied the motion for other reasons: namely that Ayesta was advised by the trial court, in accordance with R.C. 2943.031, that he may be deported as a

⁴ Ayesta's affidavit states, "[m]y lawyer never told me that the Domestic Violence conviction would result in a mandatory deportation proceeding and did not discuss deportation until after the sentencing hearing; then, my lawyer told me that if I keep doing things like this I could be deported."

result of taking the plea.

{¶19} Although the record shows that at the plea hearing Ayesta was properly advised that pleading guilty may subject him to deportation, and that Ayesta stated that he understood those consequences, it cannot be said that the record, on its face, conclusively and irrefutably contradicts the allegations in support of withdrawal. In our original opinion, we stated that the record did belie Ayesta's affidavit because during the plea colloquy, Ayesta told the court that he was aware of the consequences of pleading guilty — thus reasoning that the admission served as evidence that his trial counsel had discussed immigration consequences with him. Upon further examination of the transcript, our interpretation of the exchange between the court and Ayesta does not clearly indicate that Ayesta had been made aware of the immigration consequences *prior* to the court's advisement. A more accurate reading of the exchange demonstrates that Ayesta manifested an understanding of the court's advisement of immigration consequences. Thus, we cannot say that the record truly belies Ayesta's affidavit in such a way that a hearing on the motion was unnecessary. Moreover, it has always been Ayesta's contention that if he had known of the "mandatory" deportation consequences, he would not have accepted the plea bargain.

{¶20} Further, the record does not otherwise indicate that Ayesta is not entitled to relief. We are aware of case law from this district that states that proper advisement under R.C. 2943.031(A) "cures" any prejudice from counsel's failure to properly advise of immigration consequences. *State v. Lababidi*, 8th Dist. Cuyahoga No. 96755,

2012-Ohio-267. A version of this legal doctrine can be traced back to this court's decision in *State v. Bains*, 8th Dist. Cuyahoga No. 94330, 2010-Ohio-5143. In *Bains*, we upheld the trial court's decision denying a motion to withdraw because, among other things, the trial court had properly advised the defendant under R.C. 2943.031(A) that he may be subject to deportation and other immigration consequences. Over the years, some of our decisions seem to interpreted *Bains* as standing for the proposition that a trial court's advisement under R.C. 2943.031 will *always* preclude a finding of prejudice. Thus, to the extent that the *Bains* progeny of cases suggest that a trial court's advisement under R.C. 2943.031(A) "cures" any prejudice or that it precludes a finding of prejudice, we correct and clarify those cases and uphold the proposition of law manifested in *Bains*, which is that a trial court's proper advisement under R.C. 2943.031(A) *may* preclude a finding of prejudice. Thus, as the trial court's advisement did not necessarily foreclose the possibility of finding prejudice, we cannot conclude that the court's properly giving the advisement, alone, is a valid reason for denying a hearing on the motion when Ayesta presented prima facie evidence of ineffective assistance of counsel.

{¶21} We reverse and remand to the trial court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee 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.

MELODY J. STEWART, JUDGE

SEAN C. GALLAGHER, P.J., and
EILEEN T. GALLAGHER, J., CONCUR