

[Cite as *State v. Ayesta*, 2015-Ohio-600.]

[Please see vacated opinion at 2015-Ohio-1695.]

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:
AFFIRMED

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: February 19, 2015

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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 affirm the judgment of the trial court.

{¶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 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 mandatory deportation consequences that arise from a conviction of domestic violence.

{¶6} 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.

{¶7} 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 postconviction 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). 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, 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

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

{¶9} 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

{¶10} Ayesta further contends that the court did not address whether his counsel was ineffective under *Padilla*, 559 U.S. 356, 364, 130 S.Ct. 1473, 176 L.Ed.2d 284, for allegedly failing to advise him of the deportation consequences associated with his plea. We disagree with this contention and find that the court did address the *Padilla* challenge and did so correctly.

{¶11} 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, citing *Strickland*, 474 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.

{¶12} Trial counsel has a duty to advise his client of the advantages and disadvantages of a plea agreement. *Padilla* at 370. This includes advising non-citizen defendants of potential 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 non-citizen 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.

{¶13} Here, Ayesta argues that his counsel never advised him of the deportation consequences associated with his plea, therefore his counsel was constitutionally deficient. The only evidence Ayesta presents in support of this argument is his own affidavit averring that he was never so advised. The Ohio Supreme Court has made clear that when a defendant’s own affidavit is the only evidence of the failure to advise, the court does not have to hold an evidentiary hearing on the issue. *State v. Kapper*, 5 Ohio St.3d 36, 38, 448 N.E.2d 823 (1982). Rather the court is allowed to discount a self-serving affidavit as it sees fit, and weigh it alongside other evidence of advisement, or non-advisement, accordingly. *State v. Sedman*, 8th Dist. Cuyahoga No. 83531, 2004-Ohio-3298, ¶ 29.

{¶14} At the plea hearing, the court asked Ayesta whether he understood that pleading guilty may subject him to immigration consequences, including deportation, exclusion from admission to the United States, and denial of naturalization. In response to this question, Ayesta stated that he was aware of the consequences. Thus, Ayesta's own statements during the plea colloquy served as evidence that his attorney did properly advise him of the deportation consequences — because he stated that he was indeed aware of the consequences of his plea. Because Ayesta's statements at the plea hearing belie his affidavit in support of the motion, we cannot conclude that the trial court abused its discretion when it denied Ayesta's motion to withdraw.

{¶15} However, even if the trial court accepted the averments in Ayesta's affidavit as true — despite Ayesta's own contrary admission during the plea colloquy — a *Padilla* violation only satisfies the first prong of the *Strickland* test. Ayesta still had to prove that his counsel's failure to advise him prejudiced Ayesta in the proceedings.

{¶16} Prejudice in this context requires a showing that there was a reasonable probability that but for counsel's deficient performance, Ayesta would have entered a plea of not guilty and chosen to go to trial. *Hill*, 474 U.S. at 59. At first glance, this prejudice inquiry may seem to mirror that of a claim of an ineffective assistance of counsel during trial, where the defendant must show that there is a reasonable probability that but for counsel's deficient performance he would have prevailed at trial. However, in ineffective assistance of counsel challenges based on guilty plea convictions, the proper analysis is not whether the defendant would have likely prevailed at trial, but whether he would have chosen to go to trial at all. Accordingly, the prejudice inquiry in the context of the plea stage requires a much more nuanced analysis of all of the factors surrounding the plea decision. *See id.* These factors may include the benefits

associated with a plea, *see State v. Strong*, 11th Dist. Ashtabula No. 2013-A-0003, 2013-Ohio-5189, ¶ 19, the possible punishments involved, *id.*; the weight of the evidence against the defendant, *Hodges v. Colon*, 727 F.3d 517, 539 (6th Cir. 2013), and any other special circumstances that might support or rebut the defendant’s claim that he would have taken his chances at trial, *see, e.g., id.* at 538 (stating that trial counsel’s testimony that the defendant “pled guilty only reluctantly,” tends to corroborate the defendant’s testimony that he would have pleaded not guilty); *see also Hill* at 59.¹

{¶17} Here, the factors weigh against a finding of prejudice. First, it is clear that Ayesta received the benefit of the bargain when he chose to enter a guilty plea. Ayesta’s original indictment included two felonious assault charges and the domestic violence charge. Each felonious assault charge is a second-degree felony carrying a mandatory, definite, two to eight-year prison term. Therefore, prior to the plea deal, Ayesta faced a potential 16 years in prison on the felony charges alone. The plea deal nolleed one of the felonious assault counts, and amended the other to simple assault. By accepting this plea, Ayesta received no prison time and was only ordered to serve a year of probation. Additionally, the limited evidence we have before us shows that Ayesta’s sister, the victim in this case, sought medical treatment and received sutures as a result of her brother’s attack. This evidence, on its face, is strong enough to potentially support a conviction in and of itself. Lastly, Ayesta failed to present any special circumstances, aside from the fact that his family lives in the United States, that would convince us that he would not have accepted a plea and chosen to take his chances at trial if his attorney

¹ 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 clarify today 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.

had made him aware of the deportation consequences. Therefore, we cannot conclude that even if counsel was deficient as alleged, that Ayesta suffered any prejudice.

{¶18} Furthermore, our court has repeatedly held that a court’s advisement under R.C. 2943.031(A), which notifies a defendant that he may be deported as a result of his plea, can preclude a finding of prejudice. *State v. Bains*, 8th Dist. Cuyahoga No. 94330, 2010-Ohio-5143, ¶ 31 (upholding the denial of a motion to withdraw on grounds that the trial court did not find the defendant’s contentions to be credible where the trial court had properly advised defendant of deportation consequences); *State v. Velazquez*, 8th Dist. Cuyahoga No. 95978, 2011-Ohio-4818, ¶ 29; *State v. Lababidi*, 8th Dist. Cuyahoga No. 96755, 2012-Ohio-267, ¶ 12; *State v. McCubbin*, 8th Dist. Cuyahoga No. 100944, 2014-Ohio-4216, ¶ 16.² It is undisputed that the trial court properly advised Ayesta under R.C. 2943.031(A) of the deportation consequences of his guilty plea. Further, the trial court explicitly cited *Bains* and *Lababidi* in its order denying the motion to withdraw, thus evidencing its finding that Ayesta’s prejudice contentions were not credible in light of the court’s advisement. Accordingly, we conclude that the trial court did resolve the *Padilla* issue, and did so correctly.³

{¶19} Lastly, it is important to bear in mind that this case is an appeal from a Crim.R. 32.1 motion to withdraw a guilty plea, not an appeal under R.C. 2953.21, the postconviction

² We overrule the *Bains* progeny of cases to the extent that they seem to suggest that a trial court’s proper advisement under R.C. 2943.031(A) “cures” any prejudice. Rather, today we clarify and uphold the original holding of *Bains*, that a trial court’s proper advisement under R.C. 2943.031(A) *may preclude* a finding of prejudice altogether.

³ Ayesta attempts to counter the court’s decision to deny the motion by citing to *State v. Kostyuchenko*, 1st Dist. Hamilton No. C-120257, 2014-Ohio-324. In *Kostyuchenko* the court held that a trial court’s advisement under R.C. 2943.031(A) does not preclude a finding of prejudice when neither the court nor the attorney advised the defendant that he would be subject to *mandatory* deportation, but rather advised the defendant that he *may* be subject to deportation. Although not relevant to our decision here, this court does not make a distinction. See *State v. Huang*, 8th Dist. Cuyahoga No. 99945, 2014-Ohio-1511, ¶ 11.

relief statute. The manifest injustice standard under Crim.R. 32.1 is a more demanding standard for granting relief than that under the statute. Under the statute, a finding of constitutionally ineffective assistance of counsel would mandate relief. However, the manifest injustice standard under the criminal rule is intended to allow withdrawal only in extraordinary cases. *See Lababidi* at ¶ 5. Therefore, even if we were to assume that Ayesta had successfully made out a claim for ineffective assistance of counsel, we would not grant the motion to withdraw, because we find that the facts in this case preclude a finding of manifest injustice.

{¶20} Here the facts show that Ayesta faced the possibility of a formidable prison sentence if he were to proceed to trial. Additionally, the facts establish that Ayesta was advised by the court of all of the possible immigration consequences associated with his plea, including the possibility of deportation. Therefore, we find that this was not one of those exceptional circumstances where a motion to withdraw must be granted to correct a manifest injustice.

{¶21} Accordingly, the trial court did not abuse its discretion in denying the motion.

{¶22} Judgment affirmed.

It is ordered that appellee recover of appellant its 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 Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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