

[Cite as *State v. Yapp*, 2015-Ohio-679.]

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:
REVERSED

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: February 26, 2015

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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 reverse the judgment of the trial court.

{¶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-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 provided him ineffective 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 withdrawal 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 repeatedly held that the 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; *State v. Bains*, 8th Dist. Cuyahoga No. 94330, 2010-Ohio-5143. As in those cases, there is no dispute in the present case that the trial court gave the required statutory advisement. In

Lababidi, we found no prejudice to the defendant where the trial court advised him of possible deportation but he admitted he was not paying attention to the trial judge and instead relied solely on his attorney who allegedly assured him that deportation was unlikely.

{¶15} Pursuant to the above authority, we find that Yapp is unable to demonstrate prejudice in this instance. As such, we conclude that the trial court abused its discretion in granting Yapp's motion to withdraw his pleas.

{¶16} The state's first assignment of error is sustained.

{¶17} We find the state's second assignment of error to be moot.

{¶18} The judgment of the trial court is reversed.

It is ordered that appellant recover from appellee 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., CONCURS;
MARY EILEEN KILBANE, J., DISSENTS (WITH SEPARATE OPINION)

MARY EILEEN KILBANE, J., DISSENTING:

{¶19} I respectfully dissent. I would affirm the trial court's judgment.

{¶20} While the cases cited in the majority hold that the trial court's advisement that a defendant may be deported as a result of the plea is sufficient to overcome any prejudice caused by counsel's failure to properly advise the defendant, I agree with the trial court's reasoning that the instant case is factually distinguishable. The trial court set forth its rationale for granting Yapp's motion to withdraw his guilty pleas in a thoughtfully written two-page opinion.

The basis of [Yapp's motion to withdraw his pleas] is his claim that he was not fully informed that the consequences of his pleas would be deportation from the United States.

[Yapp] is a citizen of Jamaica, having lived in the United States since 1998. He is currently 31 years of age, married, and has 3 children. * * * It should be noted that it is claimed that [Yapp] has limited education and limited language skills concerning reading and writing.

* * *

[T]his court * * * rules that [Yapp] did not receive the level of counsel and advice necessary for him to make an informed decision concerning his plea, even though this court did advise [Yapp], on the record during the plea proceeding, that his plea could result in deportation. The prejudice to the defendant is obvious, he is now awaiting deportation. The end result of all of this could bring the defendant to the same conclusion, however, if he is to get to that same situation, he should be provided the full opportunity to know and understand the clear consequences. This was not a case of what might happen, it was a case of what was certain to happen and he did not receive that advice. The court is aware of the decision of [*Bains*, 8th Dist. Cuyahoga No. 94330, 2010-Ohio-5143,] which affirmed a court's decision to not grant a motion to withdraw a plea on similar grounds. That case is distinguishable from this case. In *Bains*[.] the defendant was clearly advised to consult with an immigration attorney concerning any matters before the immigration and naturalization service. While he was not told to hold off on a plea before consulting an immigration attorney, this was more than the defendant received in this case. If a defendant proceeds after both being warned by the court and having been fully and completely informed by his counsel there would be a different result. Here, a defendant with limited educational background made a decision based upon limited and flawed information.

In keeping with [Crim.R.] 32.1[.] the court rules that it would constitute a manifest injustice to deny Yapp's motion and simply allow him to be deported without having had the opportunity to exercise his full constitutional rights.

{¶21} In the instant case, the trial court determined that Yapp has limited education and

language skills concerning reading and writing. At the hearing, defense counsel testified that he told Yapp he was not familiar with immigration laws, he did not have any specific knowledge of the immigration repercussions, and he did not advise Yapp to consult an immigration attorney prior to entering his pleas. Therefore, the trial court was presented with a defendant with limited educational background who made a decision based upon limited and flawed information. Consequently, I would defer to the trial court's findings that it would be a manifest injustice to deny Yapp's motion and allow him to be deported without having the opportunity to exercise his full constitutional rights. *See State v. Bozhukov*, 8th Dist. Cuyahoga No. 101250, 2015-Ohio-418.

{¶22} Thus, based on the foregoing, I would find that the trial court did not abuse its discretion in vacating the pleas.