

[Cite as *State v. Spivakov*, 2013-Ohio-3343.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	No. 13AP-32
	:	(C.P.C. No. 05CR-05-2845)
v.	:	No. 13AP-33
	:	(C.P.C. No. 06CR-05-3904)
Gennadiy A. Spivakov,	:	
	:	
Defendant-Appellant.	:	(ACCELERATED CALENDAR)

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D E C I S I O N

Rendered on July 30, 2013

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*Ron O'Brien*, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

*DiFranco Law Office, LLC*, and *Brian C. DiFranco*, for appellant.

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APPEALS from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, Gennadiy A. Spivakov, appeals from the judgment of the Franklin County Court of Common Pleas denying his motion to withdraw his guilty pleas. For the following reasons, we affirm.

**I. BACKGROUND**

{¶ 2} Appellant's appeal pertains to case Nos. 13AP-32 and 13AP-33, which were consolidated by this court. In case No. 13AP-32, appellant was indicted in May 2005 on three counts of forgery, in violation of R.C. 2913.31, and three counts of receiving stolen property, in violation of R.C. 2913.51. Two forgery counts were fourth-degree felonies and one forgery count was a fifth-degree felony. The receiving stolen property counts were fifth-degree felonies. In June 2005, appellant pleaded guilty to two fourth-degree counts of forgery. The plea form, signed by appellant and his attorney, states:

I [am not] a citizen of the United States of America. I understand that, if I am not a citizen of the United States, my conviction of the offense(s) to which I am pleading guilty 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.

(Case No. 13AP-32, R. 28-29.)

{¶ 3} The trial court accepted appellant's guilty plea and, on August 12, 2005, sentenced him to community control. The trial court issued a judgment entry of conviction and sentence on August 16, 2005, and appellant filed no appeal of that judgment.

{¶ 4} In May 2006, appellant was indicted in case No. 13AP-33 on one count of receiving stolen property, a fourth-degree felony. That same month, appellant pleaded guilty to the charge, and he and his attorney signed a plea form acknowledging that he is not a United States citizen and mentioning the previously noted consequences of his guilty plea. The trial court accepted appellant's guilty plea and sentenced him to community control. The trial court issued a judgment entry of conviction and sentence on May 25, 2006, and appellant filed no appeal of that judgment.

{¶ 5} In November 2006, the trial court revoked appellant's community control in both cases, due to appellant violating the conditions of those sentences and ordered him to serve 17 months imprisonment. The federal government subsequently initiated deportation proceedings.

{¶ 6} Pursuant to Crim.R. 32.1, appellant moved to withdraw his guilty pleas in August 2010, and he requested a hearing on the motion. Appellant argued that, pursuant to *Padilla v. Kentucky*, 559 U.S. 356 (2010), his defense counsel was ineffective for not advising him about the risk of deportation arising from his guilty pleas. He also argued that his pleas were not knowing, voluntary, and intelligent due to his counsel's ineffectiveness. The trial court noted it provided the deportation information to appellant and that appellant's "plea forms contain language which alerted [him] to deportation consequences." (Jan. 7, 2013 Decision.) Consequently, the court denied appellant's motion without a hearing on January 7, 2013.

## II. ASSIGNMENTS OF ERROR

{¶ 7} Appellant filed a timely notice of appeal and assigns the following as error:

[I.] The Trial Court abused [its] discretion and denied appellant due process under the U.S. and Ohio Constitutions by failing to address or otherwise adjudicate a Federal claim presented in Appellant's Motion to Withdraw Guilty Plea specifically pursuant to *Padilla v. Kentucky*, 599 U.S. \_\_\_\_\_ (2010) 130 S.Ct. 1382 (March 31, 2010)[.] Appellant was denied effective assistance of counsel. Prior to conviction former Counsel failed to provide Appellant affirmative advice or to assist him upon request whether his guilty plea rendered him Removable from the United States.

[II.] The Appellant/Defendant's guilty plea was not made knowingly, intelligently and voluntarily.

[III.] Appellant was denied due process where he presented his ineffective assistance arguments to the trial court in 2010 and the trial court failed to conduct a hearing on the ineffective assistance of counsel arguments and merely ruled on the motions almost three years later.

## III. DISCUSSION

{¶ 8} In his first assignment of error, appellant asserts he was denied due process and effective assistance of trial counsel because he was not informed of the possibility of deportation as required by *Padilla*. In his second assignment of error, appellant asserts that, because of the trial court's non-compliance with *Padilla*, his guilty plea was not knowingly, voluntarily, and intelligently entered. In his final assignment of error, appellant asserts the trial court erred in failing to hold a hearing on his motion to withdraw guilty plea. Because they are interrelated and dependent on the application of *Padilla*, we will address appellant's three assignments of error as one.

{¶ 9} Motions to withdraw guilty pleas are governed by Crim.R. 32.1, which provides that the motion "may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." Here, the motion to withdraw was made after sentence, and, therefore, the issue is whether granting the motion is necessary to correct a manifest injustice.

{¶ 10} Manifest injustice relates to some fundamental flaw in the proceedings which results in a miscarriage of justice or is inconsistent with the demands of due process. *State v. Williams*, 10th Dist. No. 03AP-1214, 2004-Ohio-6123, ¶ 5. " '[I]t is clear that under such standard, a postsentence withdrawal motion is allowable only in extraordinary cases.' " *State v. Gripper*, 10th Dist. No. 10AP-1186, 2011-Ohio-3656, ¶ 7, quoting *State v. Smith*, 49 Ohio St.2d 261, 264 (1977). A defendant seeking to withdraw a post-sentence guilty plea bears the burden of establishing a manifest injustice based on specific facts either contained in the record or supplied through affidavits attached to the motion. *State v. Barrett*, 10th Dist. No. 11AP-375, 2011-Ohio-4986, ¶ 8.

{¶ 11} A trial court is not automatically required to hold a hearing on a post-sentence motion to withdraw a guilty plea. *Id.* at ¶ 9. A hearing must only be held if the facts alleged by the defendant, accepted as true, would require that the defendant be allowed to withdraw the plea. *Id.*

{¶ 12} A trial court's decision to deny a post-sentence motion to withdraw a guilty plea and the decision whether to hold a hearing on the motion are subject to review for abuse of discretion. *Id.* at ¶ 10. An 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 (1983). With that standard in mind, we address the merits of appellant's appeal.

{¶ 13} Appellant argues that the trial court abused its discretion by denying his motion without a hearing because, pursuant to *Padilla*, his defense counsel rendered ineffective assistance by not advising him about the risk of deportation arising out of his guilty pleas. Ineffective assistance of counsel may constitute manifest injustice requiring post-sentence withdrawal of a guilty plea. *State v. Tovar*, 10th Dist. No. 11AP-1106, 2012-Ohio-6156, ¶ 9. To establish a claim of ineffective assistance of counsel, a defendant must show that his counsel was deficient and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The failure to make either showing defeats a claim of ineffective assistance of counsel. *Id.* at 697.

{¶ 14} Appellant also argues that his pleas were not knowing, voluntary, and intelligent due to counsel's ineffectiveness. A manifest injustice occurs when a plea is not knowing, voluntary, and intelligent. *Williams* at ¶ 9.

{¶ 15} In *Chaidez v. United States*, 133 S.Ct. 1103, 1105 (2013), the court held that *Padilla* does not apply retroactively to final convictions. A defendant's conviction becomes final if he files no appeal from it. *State v. Frash*, 10th Dist. No. 08AP-870, 2009-Ohio-642, ¶ 14. Because appellant filed no appeal of his convictions occurring in 2005 and 2006, his convictions became final long before *Padilla* was decided. Therefore, pursuant to *Chaidez*, *Padilla* is not applicable to this matter, and we find no merit to appellant's claim that his counsel was ineffective for failing to comply with *Padilla* or that his guilty pleas were not knowing, voluntary, and intelligent based on the trial court's and counsel's alleged non-compliance with *Padilla*. Consequently, we conclude that appellant suffered no manifest injustice when he entered his guilty pleas, and the trial court did not abuse its discretion by denying his motion to withdraw guilty pleas without a hearing.

{¶ 16} Lastly, appellant argues that the trial court infringed on his right to due process by taking almost three years to rule on his motion. We find no prejudice to appellant given that he has failed to demonstrate that the trial court's ruling on his motion is erroneous and because he could have, but did not, seek a writ of procedendo to compel the trial court to rule on the motion sooner. *Travis v. Travis*, 2d Dist. No. 2006 CA 39, 2007-Ohio-4077, ¶ 57-58.

{¶ 17} For all of these reasons, we overrule appellant's first, second, and third assignments of error.

#### **IV. CONCLUSION**

{¶ 18} Having overruled appellant's three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

CONNOR and McCORMAC, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).

