

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001729-MR

JOSCELYN FUARTADO

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE ANN O'MALLEY SHAKE, JUDGE  
ACTION NO. 97-CR-002669

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN PART,  
VACATING IN PART AND REMANDING

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BEFORE: DYCHE, JOHNSON AND PAISLEY, JUDGES.

JOHNSON, JUDGE: Joscelyn Fuartado has appealed from an opinion and order entered by the Jefferson Circuit Court on July 18, 2002, which denied Fuartado's RCr<sup>1</sup> 11.42 motion to vacate, set aside or correct his sentence after finding that his guilty plea had been knowingly, intelligently, and voluntarily entered and that he had not been denied effective assistance of counsel. Having concluded that the trial court did not err in accepting

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

Fuortado's guilty plea, but that Fuortado's ineffective assistance of counsel claim should have been resolved by the trial court determining the reasonableness of counsel's conduct under the circumstances of this case, we affirm in part, vacate in part, and remand.

Fuortado is both a native and citizen of Jamaica, but he has legally resided in the United States since approximately April 1979.<sup>2</sup> On June 4, 1997, Fuortado was arrested in Jefferson County, Kentucky, after he signed for and accepted an unopened United Parcel Service package containing 1,765 grams of marijuana. Fuortado stated that while he was not aware of the exact contents of the package, he assumed that it was of an illegal nature because of the dollar amount he had been paid to pick up and deliver the package.

On October 29, 1997, a Jefferson County grand jury indicted Fuortado on one count of trafficking in marijuana over five pounds.<sup>3</sup> Rather than go to trial, Fuortado elected to plead

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<sup>2</sup> The record shows that Fuortado was legally admitted to the United States as an H-2 nonimmigrant worker. He was granted permanent resident status on February 19, 1981, upon his marriage to a United States citizen. Fuortado has since divorced. Fuortado has five children currently living in the United States.

<sup>3</sup> Kentucky Revised Statutes (KRS) 218A.1421. Results of the initial investigation placed the weight of the marijuana at approximately 2,767 grams, or just over six pounds. However, the record shows that the subsequent lab report listed the weight at 1,765 grams, or slightly under four pounds. The exact weight is important under the statute. For a first-time offender, trafficking in marijuana over five pounds is a Class C felony, punishable by five to ten years in prison; trafficking in over eight ounces, but under five pounds is a Class D felony, punishable by one to five years in prison.

guilty to an amended charge of trafficking in marijuana over eight ounces, but under five pounds. Fuartado entered his guilty plea on December 12, 1997. On January 8, 1998, upon a recommendation by the Commonwealth, Fuartado received a five-year prison sentence. The sentence was probated and Fuartado was required to serve 90 days.

Shortly after Fuartado was sentenced, he engaged in a variety of activities which led to a finding that he had violated the terms of his probation. As a result of this conduct, the Commonwealth moved to revoke the probation Fuartado had received on his trafficking in marijuana conviction. The trial court entered an order to that effect on June 30, 1998, and it ordered Fuartado to serve the remaining five years of his prison sentence.

On April 27, 1999, the Immigration and Naturalization Service (INS) formally informed Fuartado of its intention to begin deportation proceedings against him. As the basis for its intent to deport, the INS cited Fuartado's conviction under KRS 218A.1421 for trafficking in marijuana.<sup>4</sup> On January 10, 2001, Fuartado filed a pro se RCr 11.42 motion to vacate, set aside,

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<sup>4</sup> 8 U.S.C. § 237(a)(2)(A)(iii) provided that an alien who was legally in the United States was deportable for having been convicted of an "aggravated felony." The current provision is found at 8 U.S.C. § 1227(a)(2)(A)(iii). 8 U.S.C. § 237(a)(2)(B)(i) provided that an alien who was legally in the United States was deportable for having been convicted of, inter alia, a violation of a state's controlled substances law. The current provision is found at 8 U.S.C. § 1227(a)(2)(B)(i).

or correct his sentence. Approximately one year later, after counsel had been appointed, Fuartado filed a supplemental RCr 11.42 motion on January 2, 2002. Following an evidentiary hearing, the trial court denied Fuartado's RCr 11.42 motion on July 18, 2002.<sup>5</sup> This appeal followed.

Fuartado claims in this appeal that since he was legally in the United States and that since the trial court failed to inform him of the likely deportation consequences of his guilty plea, his plea was not knowingly, intelligently, and voluntarily entered; and that since his trial counsel had also failed to inform him of the likelihood of his being deported if he pled guilty, he received ineffective assistance of counsel.

In Centers v. Commonwealth,<sup>6</sup> this Court explained the elements of a valid guilty plea:

In determining the validity of guilty pleas in criminal cases, the plea must represent a voluntary and intelligent choice among the alternative course of action open to the defendant. The United States Supreme Court has held that both federal and state courts must satisfy themselves that guilty pleas are voluntarily and intelligently made by competent defendants. Since pleading guilty involves the waiver of several constitutional rights, including the privilege against compulsory self-

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<sup>5</sup> According to the record, Fuartado was being detained pending the decision of the trial court. It is not clear from the record whether Fuartado is still being detained as of the date of this Opinion.

<sup>6</sup> Ky.App., 799 S.W.2d 51, 54 (1990). See also Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

incrimination, the right to trial by jury, and the right to confront one's accusers, a waiver of these rights cannot be presumed from a silent record. The court must question the accused to determine that he has a full understanding of what the plea connotes and of its consequences, and this determination should become part of the record [citations omitted].

In Turner v. Commonwealth,<sup>7</sup> this Court discussed the scope of the consequences of which defendants should be made aware when pleading guilty:

[A] knowing, voluntary and intelligent waiver does not necessarily include a requirement that the defendant be informed of every possible consequence and aspect of the guilty plea. A guilty plea that is brought about by a person's own free will is not less valid because he did not know all possible consequences of the plea and all possible alternative courses of action. To require such would lead to the absurd result that a person pleading guilty would need a course in criminal law and penology.

For example, a defendant could allege if he had known he could have received a change of venue or had the right to call his mother as a character witness, he would not have plead guilty. Likewise, he could assert if he knew prison food would be bad or his cell would be small, he wouldn't have made such a plea.

Hence, while a trial court is under a duty to inform a defendant of the direct consequences of pleading guilty, e.g., that by pleading guilty he waives the right to a trial by jury, there are certain collateral consequences of pleading guilty

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<sup>7</sup> Ky.App., 647 S.W.2d 500, 501 (1982).

that need not be explained to the defendant prior to the acceptance of a guilty plea. In the context of deportation proceedings brought subsequent to alien defendants who are legally in the United States pleading guilty to criminal charges, several state and federal courts have recognized this "direct versus collateral" distinction. These courts have held that because deportation consequences are collateral, trial courts need not inform defendants of the possible negative immigration consequences.

In El-Nobani v. United States,<sup>8</sup> the United States Court of Appeals for the Sixth Circuit stated:

[T]he automatic nature of the deportation proceeding does not necessarily make deportation a direct consequence of the guilty plea. A collateral consequence is one that "remains beyond the control and responsibility of the district court in which that conviction was entered." United States v. Gonzalez, 202 F.3d 20, 27 (1st Cir. 2000). While this Court has not specifically addressed whether deportation consequences are a direct or collateral consequence of a plea, it is clear that deportation is not within the control and responsibility of the district court, and hence, deportation is collateral to a conviction.

Further, in People v. Ford,<sup>9</sup> the Court of Appeals of New York stated:

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<sup>8</sup> 287 F.3d 417, 421 (6th Cir. 2002).

<sup>9</sup> 86 N.Y.2d 397, 657 N.E.2d 265, 272-73 (1995).

[A] criminal court is in no position to advise on all the ramifications of a guilty plea personal to a defendant. Accordingly, the courts have drawn a distinction between consequences of which the defendant must be advised, those which are "direct", and those of which the defendant need not be advised, "collateral consequences[.]" A direct consequence is one which has a definite, immediate and largely automatic effect on defendant's punishment. . . . The failure to warn of [ ] collateral consequences will not warrant vacating a plea because they are peculiar to the individual and generally result from the actions taken by agencies the court does not control [citations omitted].

Deportation is a collateral consequence of conviction because it is a result peculiar to the individual's personal circumstances and one not within the control of the court system. Therefore, our Appellate Division and the Federal courts have consistently held that the trial court need not, before accepting a plea of guilty, advise a defendant of the possibility of deportation [citations omitted].<sup>10</sup>

We agree with the rationale of these cases and hold that the trial court did not err by accepting Fuartado's guilty plea without first advising him of the possible deportation consequences. The possibility that Fuartado would be deported by the INS, a federal agency, was a collateral consequence beyond the control of the trial court. Accordingly, Fuartado's claim that his plea was not knowingly, intelligently, and voluntarily entered is without merit.

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<sup>10</sup> See also United States v. Campbell, 778 F.2d 764 (11th Cir. 1985); United States v. Romero-Vilca, 850 F.2d 177 (3d Cir. 1988); Barajas v. State, 991 P.2d 474 (Nev. 1999); and State v. Abdullahi, 607 N.W.2d 561 (N.D. 2000).

Fuortado also claims that he received ineffective assistance of counsel because his attorney failed to inform him of the likelihood that he would be deported if he pleaded guilty to trafficking in marijuana. Specifically, he argues that under certain circumstances, the possibility that a defendant will be deported upon pleading guilty presents a situation that must be factored into a defense attorney's "general duty to investigate and be prepared." This appears to be an issue of first impression in Kentucky.

We will first review the general test with respect to an ineffective assistance of counsel claim as it relates to a guilty plea. In Taylor v. Commonwealth,<sup>11</sup> this Court stated:

In the context of challenges arising from entry and acceptance of a guilty plea, a defendant who alleges the ineffectiveness of his legal counsel at such proceedings must first prove that his counsel's performance was deficient; and second, that defendant was prejudiced by the deficiency such that there exists "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."<sup>12</sup>

We agree with Fuortado's argument that in certain circumstances defense counsel is under a duty to investigate possible immigration consequences when advising a non-citizen

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<sup>11</sup> Ky.App, 724 S.W.2d 223, 226 (1986).

<sup>12</sup> See also Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); and Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).



defendant to plead guilty; and counsel's failure to investigate and duly inform his client of a significant negative immigration consequence could result in the denial of effective assistance of counsel. However, several federal and state courts have taken the opposite position, holding that a defendant cannot as a matter of law succeed on a claim for ineffective assistance of counsel by showing that his attorney failed to inform him of the possibility of deportation following a guilty plea. For example, in United States v. George,<sup>13</sup> the United States Court of Appeals for the Seventh Circuit stated:

A deportation proceeding is a civil proceeding which may result from a criminal prosecution, but is not a part of or enmeshed in the criminal proceeding. It is collateral to the criminal prosecution. While the Sixth Amendment assures an accused of effective assistance of counsel in "criminal prosecutions," this assurance does not extend to collateral aspects of the prosecution. Various circuits have addressed the issue of failure of counsel to inform an accused of the likely deportation consequences arising out of a guilty plea, and have determined that deportation is a collateral consequence of the criminal proceeding and therefore no ineffective assistance of counsel was found [emphasis original].

The United States Court of Appeals for the Second Circuit has taken a slightly different approach, holding that an

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<sup>13</sup> 869 F.2d 333, 337 (7th Cir. 1989). See also Ford, 657 N.E.2d at 268 (holding that "the failure to advise a defendant of the possibility of deportation does not constitute ineffective assistance of counsel").

ineffective assistance of counsel claim is possible if the defense attorney affirmatively misrepresents the consequences of the guilty plea. In United States v. Santelises,<sup>14</sup> the Second Circuit held that the defendant failed to state a claim for ineffective assistance of counsel because he had not averred that his counsel had made any "affirmative misrepresentations."

We conclude that the proper standard to apply is a case-by-case approach. This approach was explained by the Supreme Court of Colorado in People v. Pozo:<sup>15</sup>

In view of these factors, we conclude that the potential deportation consequences of guilty pleas in criminal proceedings brought against alien defendants are material to critical phases of such proceedings. The determination of whether the failure to investigate those consequences constitutes ineffective assistance of counsel turns to a significant degree upon whether the attorney had sufficient information to form a reasonable belief that the client was in fact an alien. When defense counsel in a criminal case is aware that his client is an alien, he may reasonably be required to investigate relevant immigration law. This duty stems not from a duty to advise specifically of deportation consequences, but rather from the more fundamental principle that attorneys must inform themselves of material legal principles that may significantly impact the particular circumstances of their clients. In cases involving alien criminal defendants, for example, thorough knowledge of fundamental principles of deportation law may have significant impact on a client's

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<sup>14</sup> 509 F.2d 703, 704 (2d Cir. 1975).

<sup>15</sup> 746 P.2d 523, 529 (Colo. 1987).

decisions concerning plea negotiations and defense strategies [citations omitted].

We further conclude that this case-by-case approach comports more soundly with the principles announced in Strickland, supra, than the other approaches previously discussed. In Strickland, the Supreme Court of the United States emphasized that the determination of whether any particular defendant had received ineffective assistance of counsel depended upon the particular facts of each case:

[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance [emphases added].

These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular

investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments [emphasis added].<sup>16</sup>

A blanket rule precluding an ineffective assistance of counsel claim where the attorney has failed to inform a defendant of possible immigration consequences does not allow for the kind of case-by-case analysis that the Strickland test envisions. Similarly, a rule which requires affirmative misrepresentation precludes a claim where defense counsel is reasonably aware that deportation would be likely, but nevertheless intentionally or negligently fails to advise the defendant of this significant consequence. On the other hand, a case-by-case analysis is consistent with Strickland and it allows a trial court to judge each claim of ineffective assistance of counsel upon its particular facts. Therefore, we hold that if, under the particular facts of the case, a trial court finds that an objectively reasonable attorney would have advised the client of possible deportation consequences because of facts known to counsel at the time, or facts that should have been known to counsel through a reasonable investigation, but counsel nonetheless failed to so advise the defendant, a claim for ineffective assistance of counsel is possible.

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<sup>16</sup> Id. at 690-91.

In the case before us, the trial court relied upon those cases which hold as a matter of law that a defense attorney's failure to advise a defendant of possible immigration consequences cannot constitute ineffective assistance of counsel and denied Fuartado's RCr 11.42 claim. Therefore, because the trial court made no factual findings with regard to the reasonableness of Fuartado's counsel's conduct, it is necessary to vacate the trial court's order and to remand this matter for further fact-finding.

Accordingly, the order of the Jefferson Circuit Court is affirmed in part, vacated in part, and this matter is remanded, with instructions to make the required factual findings consistent with the standard announced in this Opinion.

ALL CONCUR.

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