

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001981-MR

JOSE R. PADILLA

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY M. EASTON, JUDGE
ACTION NO. 01-CR-00517

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** *

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND HENRY, JUDGES.

COMBS, CHIEF JUDGE: Jose Padilla appeals from an order of the Hardin Circuit Court of September 14, 2004, denying his motion for post-conviction relief pursuant to RCr¹ 11.42. Padilla argues that he was entitled to an evidentiary hearing on his motion claiming ineffective assistance of counsel. After a review of the record and the applicable authorities, we remand this matter to the trial court for further consideration.

On October 31, 2001, Padilla was indicted on charges of possession of marijuana, possession of drug paraphernalia,

¹ Kentucky Rules of Criminal Procedure.

trafficking in marijuana (including an amount greater than five pounds) and operating a truck without a weight and distance tax number. Pursuant to a plea agreement, Padilla pled guilty to all three drug-related charges on August 22, 2002; the Commonwealth dismissed the vehicular violation. It also recommended that Padilla be sentenced to concurrent terms of twelve months each for the two possession charges and to ten years for trafficking. The agreement provided that Padilla would serve the first five years of the ten-year sentence in prison; the second five years of the sentence were to be probated. Padilla was sentenced according to the agreement on October 4, 2002.

On August 18, 2004, Padilla, *pro se*, filed a timely motion pursuant to RCr 11.42 and requested that his sentence be vacated. He alleged that he is a native of Honduras who has lived in the United States for many years. He stated that he served in the United States military during the Vietnam War and that he was honorably discharged at the conclusion of his service.

Padilla's claim of ineffective assistance of counsel focused on his attorney's representation concerning his alien status. He contended that his trial attorney failed to "investigate the possible immigration consequences" involved in his plea of guilty; that his attorney **affirmatively advised** him

that he "did not have to worry about immigration status since he had been in the country so long"; and that his attorney's advice was inaccurate. He alleged that he had suffered "unreasonable prejudice and consequences by the mistaken advice of counsel" and that he would have elected to go to trial if he had been properly advised. He asked for an evidentiary hearing and for appointment of counsel to assist him with the motion.

The Commonwealth did not file a response to Padilla's motion. The trial court did not appoint counsel to represent Padilla; nor did it grant an evidentiary hearing. It summarily denied Padilla's motion, holding as follows:

Padilla's counsel does not make a deportation decision, and neither does this Court. This record indicates that Padilla was aware of the possibility that he could be deported. Padilla cannot show ineffective assistance of counsel merely because of a statement of opinion on whether the Immigration and Naturalization Service would choose to deport Padilla given his length of time in the United States.

Findings of Fact, Conclusions of Law and Order Denying RCr 11.42 Motion, at pp. 3-4.

Padilla appealed from this order, but his appeal was placed in abeyance pending the Kentucky Supreme Court's decision in Commonwealth v. Fuartado, 170 S.W.3d 384 (Ky. 2005). In Fuartado, the Court held that a defendant was not entitled to post-conviction relief based on failure of trial counsel to

investigate or advise him of possible deportation consequences of a plea:

[A] defendant's Sixth Amendment right to counsel encompasses *criminal* prosecutions only, and does not extend to requiring counsel on collateral consequences that may result from such proceedings. *Cf. Turner v. Commonwealth*, 647 S.W.2d 500, 500-501 (Ky.App. 1982) ("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."). "[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The constitutional requirement of effective assistance of counsel, therefore, extends to and encompasses only those activities which tend to protect a criminal defendant's right to a fair and intelligent determination of guilt or innocence. *See id.* at 686, 104 S.Ct. 2052 ("In giving meaning to the requirement [of effective assistance of counsel], . . . we must take its purpose - to ensure a fair trial - as the guide."); *McMann v. Richardson*, 397 U.S. 759, 766, 90 S.Ct. 1441, 1446, 25 L.Ed.2d 763 (1970) (since a guilty plea is also a waiver of trial it is endowed with certain constitutional protections.) In cases where defendants are agreeing to plead guilty in accordance with a plea bargain, this principle of protecting a criminal defendant's right to be fairly tried and justly convicted is extended to include investigating and advising the criminal defendant on all aspects of the plea and the direct consequences thereof - such as the sufficiency of the evidence supporting the plea, the availability of substantial defenses, the loss of several fundamental constitutional rights, and the punishment

that may be imposed by the trial court. See *Brady v. United States*, 397 U.S. 742, 755, 90 S.Ct. 1463, 1472, 25 L.Ed.2d 747 (1970) (defendant must be "fully aware of the *direct* consequences" of a guilty plea)(emphasis added); *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974)(setting forth standards for effective assistance of counsel). The existence of collateral consequences is irrelevant to the determination of a defendant's guilt or innocence and completely outside the authority or control of the trial court. Accordingly, we find, along with the majority of other courts determining the issue, that the Sixth Amendment requires representation encompassing only the criminal prosecution itself and the direct consequences thereof. Because the consideration of collateral consequences is outside the scope of representation required under the Sixth Amendment, failure of defense counsel to advise Appellee of potential deportation consequences was not cognizable as a claim for ineffective assistance of counsel.

Id. at p. 386 (emphasis in original).

If Padilla's claim were predicated solely on counsel's failure to investigate or to advise him of the potential for deportation, Fuortado would clearly require a resolution of his appeal in favor of the Commonwealth. Fuortado held that the validity of a defendant's guilty plea is not compromised by trial counsel's failure to render advice relating to the collateral consequences of the plea. However, it did not address Padilla's claim that his lawyer gave erroneous information concerning his risk of deportation after Padilla had

made a direct inquiry. In contrast to an omission in advising a client of the collateral consequences of a plea, an affirmative act of "gross misadvice" relating to collateral matters can justify post-conviction relief. Sparks v. Sowders, 852 F.2d 882, 885 (6th Cir. 1988).

Sparks, supra, involved counsel's direct misinformation about parole eligibility. In In re Resendiz, 25 Cal.4th 230, 19 P.3d 1171, 105 Cal.Rpt.2d 431 (2001), a case cited by the Commonwealth, the court addressed erroneous advice in the context of deportation issues:

The Attorney General, relying primarily on out-of-state and federal court decisions, urges us to announce a categorical bar to immigration-based ineffective assistance claims. For the following reasons we decline to impose such a categorical bar. Rather, we hold that affirmative misadvice regarding immigration consequences can in certain circumstances constitute ineffective assistance of counsel.

. . . .

As discussed, petitioner testified that counsel told him that, if he pled guilty, he would have "no problems with immigration" except that he would not be able to become a United States citizen. Even among the federal and other courts cited by the Attorney General, "the clear consensus is that an affirmative misstatement regarding deportation may constitute ineffective assistance."

Id., at p. 240 and 251, citing United States v. Mora-Gomez, 875 F. Supp. 1208, 1212 (E.D. Va. 1995); see also, Downs-Morgan v. United States, 765 F.2d 1534, 1540-41 (11th Cir. 1985).

After examining the record, the court in Resendiz ultimately determined that the defendant was not entitled to relief because he failed to demonstrate that he was prejudiced by counsel's misinformation. The Commonwealth argues that we should also conclude as a matter of law that Padilla cannot prove that he was prejudiced as required by the second-prong of the Strickland analysis. However, the Court in Resendiz conducted an evidentiary hearing on the merits of the claim of ineffective assistance of counsel prior to issuing its ruling.

Padilla did not receive a hearing on his claim. The record does not refute his allegation that counsel affirmatively assured him he would not be deported as a result of pleading guilty; nor does it refute his claim that but for counsel's mistaken advice, he would not have pled guilty. We are persuaded that counsel's wrong advice regarding deportation could constitute ineffective assistance of counsel pursuant to Sparks, supra. Thus, as there are relevant and substantial issues of fact that cannot be resolved by an examination of the record, we conclude that Padilla is entitled to an evidentiary hearing on his motion. See, Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001).

The order of the Hardin Circuit Court is vacated, and this matter is remanded for further proceedings consistent with this opinion.

DYCHE, JUDGE, CONCURS.

HENRY, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

HENRY, JUDGE, DISSENTING. I respectfully dissent. I would affirm the trial court for two reasons. First, in my view the very recently decided case of Commonwealth v. Fuartado, 170 S.W.3d 384 (Ky. 2005) is controlling here. As our Supreme Court has plainly said, "[b]ecause the consideration of collateral consequences is outside the scope of representation required under the Sixth Amendment, failure of defense counsel to advise [the defendant] of potential deportation consequences was not cognizable as a claim for ineffective assistance of counsel." Id. at 386. Second, the assertion by Padilla that a statement by his defense counsel concerning his immigration status affected the voluntariness of his guilty plea is simply not credible. Long before he entered his plea, within days after his arrest, Padilla was informed that his bond was changed from \$25,000 cash to "no bond" for the stated reason that he was "believed to be an illegal alien and is awaiting deportation by the Federal authorities." Padilla knows he is not a U.S. citizen. He cannot make a credible claim that he did not know that his immigration status could be affected by his criminal

charges. The "misadvice" by his lawyer that he complains of is an alleged statement that Padilla "did not have to worry about immigration status since he had been in the country so long." Padilla does not allege that he was told that he would avoid being deported if he pleaded guilty. He has not made a showing that his deportation is imminent, or even that deportation proceedings against him have commenced. Conversely, he cannot show that he might not be deported even if he is ultimately acquitted at trial. I must agree with the Commonwealth that the possible outcomes regarding Padilla's immigration status are "speculative". Misadvice about speculative deportation consequences is not ineffective assistance of counsel under Fuortado, and cannot render Padilla's plea involuntary within the meaning of Boykin v. Alabama.

Sparks v. Sowders, 852 F.2d 882 (6th Cir. 1988), cited by the majority in support of the proposition that "gross misadvice" about collateral matters "can justify post-conviction relief," is not persuasive authority here. In Sparks the defendant was told that he could be sentenced to life without parole if he did not accept a plea offer, when in fact Kentucky law did not provide for such a sentence at the time. Relying on the misadvice, Sparks pleaded guilty and received a thirty-five year sentence. As a result he was not eligible for parole until he served seven years. Since he was charged with non-capital

murder, if he had gone to trial and received the maximum sentence of life in prison, he would have been eligible for parole after only eight years under the law in effect at the time. As Judge Kennedy stated in his concurring opinion, "[e]ligibility for parole is ordinarily only a collateral consequence of a possible sentence. In the case of a life sentence without parole, however, it is more than collateral. It is an essential and critical portion of the penalty." Id. at 886.

In the California case relied on by the majority, the California Supreme Court ultimately rejected the defendant's claim that his lawyer's misadvice about his possible deportation constituted ineffective assistance of counsel. In re Resendiz, 25 Cal.4th 230, 254, 19 P.3d 1171, 1187, 105 Cal.Rpt.2d 431, 448 (2001). In that case the defendant's lawyer told him that if he pleaded guilty "he would have 'no problems with immigration' except that he would not be able to become a United States citizen." Id. at 25 Cal.4th 236, 19 P.3d 1175, 105 Cal.Rpt.2d 434. Although Resendiz was afforded a hearing on the question, the court rejected his contention that he would have insisted on going to trial if not for his lawyer's erroneous advice about deportation consequences. Among other things the court considered "the probable outcome of any trial, to the extent that may be discerned." Id. at 25 Cal.4th 254, 19 P.3d 1187,

105 Cal.Rpt.2d 448. It is worth noting that California law on this issue diverges substantially from Kentucky's law; for example a California statute² requires courts, as part of the guilty-plea colloquy, to advise defendants that if they are not citizens, a plea of guilty "may have the consequences of deportation." Yet even the Resendiz majority noted that Resendiz's choice:

whether to plead, even had he been properly advised, would *not* have been between, on the one hand, pleading guilty and being deported and, on the other, going to trial and avoiding deportation. While it is true that by insisting on trial petitioner would for a period have retained a theoretical possibility of evading the conviction that rendered him deportable and excludable, it is equally true that a conviction following trial would have subjected him to the same immigration consequences.

Id. (emphasis in original). The same reasoning applies with equal force to Padilla.

It is a foregone conclusion that Padilla will testify at the evidentiary hearing that he would not have pleaded guilty except for his lawyer's misadvice. Given the clear holding of Fuortado, other controlling law, and the probable outcome of any trial in this case, there surely cannot be much doubt about the result. I would not remand this case for such a proceeding.

² California Penal Code Section 1016.5.

BRIEF FOR APPELLANT:

Richard Edwin Neal
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Brian T. Judy
David A. Smith
Assistant Attorneys General
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE:

David A. Smith
Frankfort, Kentucky