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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1279,
A17-1281**

State of Minnesota,
Respondent,

vs.

Tanka Nath Upreti,
Appellant.

**Filed June 25, 2018
Affirmed in part, reversed in part, and remanded
Cleary, Chief Judge**

Ramsey County District Court
File Nos. 62-CR-15-7889 and 62-CR-15-10026

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John Choi, Ramsey County Attorney, Adam E. Petras, Assistant County Attorney, St. Paul,
Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Lauermann, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Cleary, Chief Judge;
and Connolly, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

In this direct appeal from a final judgment of conviction and sentence for fifth-degree controlled-substance crime and theft of a motor vehicle, appellant Tanka Nath

Upreti argues that the district court erred in denying his presentence motion to withdraw his guilty pleas because it would have been fair and just to permit withdrawal based on his lack of understanding of the immigration consequences of his convictions. We affirm in part, reverse in part, and remand.

FACTS

On October 6, 2015 and December 23, 2015, appellant was charged with one count of fifth-degree controlled-substance crime and one count of theft of a motor vehicle, respectively. On September 15, 2016, appellant pleaded guilty to both offenses in exchange for the dismissal of an unrelated case. At the plea hearing, the following exchange occurred:

COUNSEL: You understand that this may have immigration consequences. Correct?

APPELLANT: Correct.

COUNSEL: Those consequences could include deportation, denial of naturalization, or exclusion. Do you understand that?

APPELLANT: Correct.

COUNSEL: And knowing that, you still wish to go forward with this plea. Is that correct?

APPELLANT: Yes.

On October 10, 2016, an immigration attorney sent a letter to appellant's probation officer stating that appellant's controlled-substance-crime conviction rendered him deportable from the United States and that motor vehicle theft was a crime involving moral turpitude which led to the same result.

In February 2017, prior to sentencing, appellant moved to withdraw his guilty pleas, arguing that he misunderstood the immigration consequences of his convictions. The district court denied the motion, noting that appellant's cases were over a year and a half

old and that during that time, U.S. Immigration and Customs Enforcement (ICE) had held and released appellant¹ due to the charges. The district court stated:

I do not think there was a lack of understanding that [appellant's] plea would result in deportation given that he had already been held by ICE. There were appearances over the course of 10 months to discuss this matter and it was mentioned repeatedly and certainly discussed at the time of the plea. Again, he had already been picked up, so how can he not know?

So, I think I'm bound by that fact in determining whether or not it's fair and just, it's sort of vague. Did he know and understand the consequences of his plea? I don't think there's any question. I'm going to deny the motion.

The district court sentenced appellant to one year and one day for each offense and stayed execution of the sentences. This appeal follows.

D E C I S I O N

A district court has discretion to allow a defendant to withdraw a guilty plea before sentencing and its decision will only be reversed if an appellate court can “fairly conclude that the [district] court abused its discretion.” *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989). On appeal, the reviewing court “[c]onsider[s] the entire context in which [a defendant]’s plea of guilty occurred, as demonstrated by the record” to determine whether sufficient reasons exist to support the motion. *State v. Abdisalan*, 661 N.W.2d 691, 695 (Minn. App. 2003), *review denied* (Minn. Aug. 19, 2003).

¹ That ICE detained appellant is not dispositive. The motion hearing transcript indicates that ICE released appellant prior to the plea hearing, but further details on appellant’s detention including when it took place and why he was released are not contained in the record.

Appellant argues that the district court erred in denying his motion because he received ineffective assistance of counsel regarding the immigration consequences of his plea. We agree as to appellant's controlled-substance-crime plea.

"A defendant has no absolute right to withdraw a guilty plea after entering it." *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). A guilty plea "may be withdrawn only if one of two standards is met. First a plea may be withdrawn if 'withdrawal is necessary to correct a manifest injustice.'" *State v. Lopez*, 794 N.W.2d 379, 382 (Minn. App. 2011) (quoting Minn. R. Crim. P. 15.05, subd. 1). "Second, before a defendant is sentenced, a plea can be withdrawn 'if it is fair and just to do so.'" *Id.* (quoting Minn. R. Crim. P. 15.05, subd. 2). "The fair-and-just standard is less demanding than the manifest-injustice standard." *Id.*

"The 'fair and just' standard requires district courts to give 'due consideration' to two factors: (1) the reasons a defendant advances to support withdrawal and (2) prejudice granting the motion would cause the State given reliance on the plea." *Raleigh*, 778 N.W.2d at 97 (quoting Minn. R. Crim. P. 15.05, subd. 2). "The defendant has the burden to prove that a fair-and-just reason exists to withdraw his plea, and it is the state's burden to show any prejudice that allowing withdrawal would cause." *Lopez*, 794 N.W.2d at 382.

The ineffective assistance of counsel can render a guilty plea constitutionally invalid, resulting in a manifest injustice. *Sames v. State*, 805 N.W.2d 565, 567 (Minn. App. 2011). And because "the fair-and-just standard is less demanding than the manifest-injustice standard," a showing of ineffective assistance of counsel necessarily satisfies the

fair-and-just standard for plea withdrawal. *State v. Ellis-Strong*, 899 N.W.2d 531, 541 (Minn. App. 2017).

The assistance of counsel was ineffective if 1) “counsel’s representation ‘fell below an objective standard of reasonableness,’” and 2) “‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). In the context of a guilty plea, a defendant must demonstrate that “but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Campos v. State*, 816 N.W.2d 480, 486 (Minn. 2012) (quotation omitted).

“It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so clearly satisfies the first prong of the *Strickland* analysis.” *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S. Ct. 1473, 1484 (2010) (quotation omitted). Under *Padilla*, “criminal-defense attorneys must take some affirmative steps before allowing a noncitizen client to accept a plea deal. . . . [A]t a minimum, an attorney must review the relevant immigration statutes to determine whether a conviction will subject the defendant to a risk of removal from the United States.” *Sanchez v. State*, 890 N.W.2d 716, 721 (Minn. 2017).

“When the immigration consequences of a guilty plea are ‘truly clear,’ defense counsel must affirmatively advise a defendant that the plea will ‘subject [the defendant] to automatic deportation.’” *Id.* at 720 (quoting *Padilla*, 559 U.S. at 368-69, 130 S. Ct. at 1483). But “[w]hen the law is not succinct and straightforward . . . , a criminal defense

attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” *Padilla*, 559 U.S. at 369, 130 S. Ct. at 1483.

The first prong of *Strickland* is satisfied as to appellant’s controlled-substance-crime plea. Federal immigration law clearly provides that appellant’s conviction for possession of methamphetamine rendered him deportable. *See* 8 U.S.C. § 1227(a)(2)(B)(i) (2012); 21 U.S.C. §§ 802(6), 812, schedule II(c) (2012). Because appellant was only advised that his plea *might* result in immigration consequences, the assistance of his counsel was ineffective.

The record here is insufficient as to appellant’s controlled-substance-crime plea to satisfy the second *Strickland* prong. Appellant argues that the “nature of the circumstances” shows that he would not have pleaded guilty. But appellant did not provide an affidavit or testimony that he would have gone to trial had he known of the clear immigration consequences of his plea.

In *Ellis-Strong*, the court concluded that the record was insufficient to determine prejudice in the absence of an affidavit or testimony that the appellant would not have pleaded guilty but for counsel’s ineffective assistance and where the facts explaining the reasons for appellant’s decision to plead guilty “were not fully developed.” 899 N.W.2d at 540. The court remanded “for a postconviction evidentiary hearing so that the district court [could] determine” whether the appellant could show a reasonable probability that he would not have pleaded guilty but for counsel’s errors. *Id.* at 541. Other courts have taken the same approach. *See, e.g., Padilla*, 559 U.S. at 374, 130 S. Ct. at 1487 (remanding to

determine prejudice where appellant “sufficiently alleged that his counsel was constitutionally deficient”); *contra Campos*, 816 N.W.2d at 506 (appellant established prejudice with affidavit before district court). Remanding to determine prejudice under *Strickland* is similarly appropriate here.

Neither prong of *Strickland* is satisfied as to appellant’s motor-vehicle-theft plea. Federal law provides that admission into the United States will be denied to “any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime.” 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2012).

“Congress has not defined the phrase crime involving moral turpitude, and the meaning of that phrase was left to future administrative and judicial interpretation.” *Chanmouny v. Ashcroft*, 376 F.3d 810, 811 (8th Cir. 2004) (quotations omitted). “Without question, the term is ambiguous.” *Bobadilla v. Holder*, 679 F.3d 1052, 1054 (8th Cir. 2012). Because the immigration consequences of appellant’s motor-vehicle-theft conviction were not truly clear, the advisory he received was proper.

We affirm appellant’s motor-vehicle-theft conviction because he did not receive ineffective assistance of counsel and the district court did not abuse its discretion in denying his motion to withdraw his guilty plea. But appellant has sufficiently alleged that his counsel was constitutionally deficient as to his controlled-substance-crime plea. We therefore reverse his conviction and remand for a determination of prejudice under the second *Strickland* prong.

Additionally, the parties did not brief what effect, if any, reversal of only one conviction and withdrawal of the plea would have on the plea agreement as a whole. If appellant establishes prejudice to warrant withdrawal of his controlled-substance-crime plea, the district court will need to address that issue. We remand to the district court for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.