

**IN THE COURT OF APPEALS OF IOWA**

No. 0-417 / 09-0585  
Filed June 30, 2010

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**ALEJANDRO ROMOS,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Defendant appeals the denial of his motion in arrest of judgment after his guilty plea to a charge of forgery. **AFFIRMED.**

Rockne O. Cole of Cole & Vondra, L.L.P., Iowa City, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and James Katcher, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ. Tabor, J., takes no part.

**DANILSON, J.****I. Background Facts & Proceedings**

Alejandro Romos was the passenger in a vehicle that was stopped by a Waterloo police officer. When Romos was asked for identification, he gave the officer a permanent resident card that had been forged. Romos was charged with forgery in violation of Iowa Code sections 715A.2(1)(d) and 715A.2(2)(a)(4) (2007). Romos is a native of Guatemala, and he used the services of an interpreter.

A guilty plea hearing was initiated on September 15, 2008. When the district court asked if Romos knew the card was forged, he responded that he did not know. Defense counsel asked that the plea hearing be reset “because I just think that I’m rushing my client, and given the deportation consequences, I’m worried about that.”

A second plea hearing was held on October 16, 2008, and Romos entered an *Alford* plea.<sup>1</sup> The court asked if Romos understood by that pleading guilty he could be deported, and he answered affirmatively. Romos testified he did not have any substantial disagreement with the State’s claim “[t]hat either you or someone else created that card and that you knew this card was fake.” The court found a factual basis for the guilty plea. The court informed Romos that in order to challenge the guilty plea he needed to file a motion in arrest of judgment within forty-five days.

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<sup>1</sup> In an *Alford* plea, a person voluntarily consents to the imposition of a sentence, even if the person is unwilling or unable to admit to committing the crime. See *North Carolina v. Alford*, 400 U.W. 25, 37, 91 S. Ct. 160, 167, 27 L. Ed. 2d 162, 171 (1970).

Romos obtained new counsel and filed a motion in arrest of judgment on January 26, 2009, more than forty-five days after the plea hearing. He claimed he did not properly understand the consequences of his guilty plea regarding immigration consequences, and he did not understand the trial rights he was giving up. At a hearing on the motion Romos's previous defense counsel, David Nadler, testified:

Q. And can you tell us what exactly you advised him of that possibility [of his being deported]? A. My recollection is that I advised him that I was not an immigration attorney and that I could not tell him whether or not he would be deported. But that if he pled guilty, he risked that he would be deported.

Romos did not testify at the hearing.

The court denied the motion in arrest of judgment, finding the motion was untimely and Romos had not asserted legal innocence. The court also found, "Romos was told repeatedly that the card must be fake or fraudulent and that supplies the specific intent necessary." Romos was sentenced to five years in prison, with the sentence suspended, and placed on probation. He appeals the district court order denying his motion in arrest of judgment, claiming he received ineffective assistance of counsel.

## **II. Standard of Review**

We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). A defendant claiming ineffective assistance of counsel concerning a guilty plea must prove

that, but for counsel's breach, there was a reasonable probability he would have insisted on going to trial. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006).

### **III. Ineffective Assistance**

**A.** Romos claims his defense counsel should have filed a motion in arrest of judgment to challenge his guilty plea. A party may be excused from filing a motion in arrest of judgment if the failure is due to ineffective assistance of counsel. *State v. Bearnse*, 748 N.W.2d 211, 218 (Iowa 2008). We determine we may consider Romos's claims of ineffective assistance of counsel, despite his untimely motion in arrest of judgment.

**B.** Romos contends his defense counsel affirmatively misadvised him about the immigration consequences of his guilty plea. He asserts that by telling him, "if he pled guilty, he risked that he would be deported," defense counsel was improperly stating deportation would be the only possible immigration consequence of pleading guilty. Romos alleges forgery is an aggravated felony and also has the following immigration consequences: (1) mandatory detention in immigration removal proceedings; (2) barred eligibility for cancellation of removal for non-permanent residency; (3) barred consideration for naturalized citizenship; (4) barred eligibility for post-hearing voluntary departure; and (5) barred eligibility for asylum.<sup>2</sup> He claims his defense counsel should have alerted him to these other possible consequences of his guilty plea.

An attorney's duty is not merely to refrain from giving affirmative misadvice, but defense counsel must inform a client whether a plea carries a risk

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<sup>2</sup> We make no findings as to whether these immigration consequences would actually be applicable to defendant.

of deportation. *Padilla v. Kentucky*, \_\_\_ U.S. \_\_\_, \_\_\_, 130 S. Ct. 1473, 1486, 176 L. Ed. 2d 284, \_\_\_ (2010). “When 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.” *Id.* at \_\_\_, 130 S. Ct. at 1483, 176 L. Ed. 2d at \_\_\_. When deportation consequences are clear, the duty to give correct advice is equally clear. *Id.*, 130 S. Ct. at 1483, 176 L. Ed. 2d at \_\_\_. In order to prevail on a claim of ineffective assistance, a defendant must show not only that counsel failed to advise of the risk of adverse immigration consequences, the defendant must meet the prejudice requirement by showing “a decision to reject the plea bargain would have been rational under the circumstances.” *Id.* at \_\_\_, 130 S. Ct. at 1485, 176 L. Ed. 2d at \_\_\_.

“Counsel’s duties in connection with a defendant’s guilty plea include advising the defendant of available alternatives and considerations important to counsel or the defendant in reaching a plea decision.” *Saadig v. State*, 387 N.W.2d 315, 325 (Iowa 1986). Counsel, however, is generally not considered ineffective for failing to inform a defendant of collateral or indirect consequences of a plea. *Mott v. State*, 407 N.W.2d 581, 582-83 (Iowa 1987). “Counsel can hardly conceive all possible collateral consequences of a guilty plea and need not be a crystal gazer.” *Saadig*, 387 N.W.2d at 326.

The record shows defense counsel advised Romos of the risk he could be deported if he pled guilty, and this fulfilled his duty under *Padilla*. The record does not show defense counsel affirmatively misadvised Romos this was the only possible immigration consequence of the guilty plea. There is nothing in the

record to show defense counsel stated there would be no other immigration consequences. Furthermore, we do not find ineffective assistance in defense counsel's failure to advise Romos of other possible immigration consequences. "[C]ounsel is not ordinarily required to advise specifically of indirect or collateral consequences." *Id.* We conclude Romos has failed to show he received ineffective assistance on this ground.

**C.** Romos also contends he received ineffective assistance because defense counsel permitted him to plead guilty when there was not a factual basis for his plea. A court may not accept a guilty plea without first determining the plea has a factual basis. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). This is the requirement even with an *Alford* plea. *Id.* It is ineffective assistance for counsel to allow a defendant to plead guilty where there is no factual basis for the charge. *Id.* In determining whether there is a factual basis for a plea, "[w]e consider the entire record before the district court at the guilty plea hearing, including any statements made by the defendant, facts related by the prosecutor, and the minutes of testimony." *State v. Keene*, 630 N.W.2d 579,581 (Iowa 2001).

Romos was charged with violating section 715A.2(1), which provides:

A person is guilty of forgery if, with intent to defraud or injure anyone, or with knowledge that the person is facilitating a fraud or injury to be perpetrated by anyone, the person does any of the following:

....  
 d. Possesses a writing which the person knows to be forged . . . .

The State also alleged the forgery involved “[a] document prescribed by statute, rule, or regulation for entry into or as evidence of authorized stay or employment in the United States.” Iowa Code § 715A.2(2)(a)(4).

The elements of forgery are that the defendant (1) made, completed, executed, or transferred a writing purporting to be the act of another who did not authorize the act and (2) with the specific intent to defraud or injure another person or financial institution or knew the defendant’s act would facilitate a fraud or financial injury. *State v. Calhoun*, 559 N.W.2d 4, 6 (Iowa 1997). Romos contends there was no factual basis in the record to show he had the intent to defraud or injure anyone. Intent may be shown by circumstantial evidence and the reasonable inferences drawn from that evidence. *State v. Walker*, 574 N.W.2d 280, 289 (Iowa 1998). “To deliberately make false statements or give false information in order to gain some advantage is to act with fraudulent intent in the criminal context.” *State v. Acevedo*, 705 N.W.2d 1, 5 (Iowa 2005).

We may examine the minutes of testimony to establish a factual basis for the plea. *Keene*, 630 N.W.2d at 581. The minutes of testimony state that upon questioning by an officer, Romos “produced identification that appeared to be forged.”<sup>3</sup> A copy of a permanent resident card allegedly issued to Alejandro Romos by the Department of Justice was also attached to the minutes of testimony. At the plea proceeding Romos acknowledged that he did not have any substantial disagreement with the statement, “[t]hat either you or someone else created that card and that you knew this card was fake.” The only value of a

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<sup>3</sup> The investigation report of Officer Kye Richter which was attached and made a part of the minutes of testimony reflects that the officer ran the card “through NCIC” and found no file to validate the card.

forged permanent resident card to Romos was to falsely represent his status within the United States. We conclude there was a sufficient factual basis to show Romos knowingly gave false information in order to gain some advantage, and this constituted fraudulent intent. We determine Romos has failed to show he received ineffective assistance based on his claim of a lack of a factual basis for his guilty plea.

**D.** Finally, we find Romos has not shown he was prejudiced by counsel's performance. Romos has not shown that absent the alleged breaches of essential duty by counsel, he would not have pled guilty and would have elected to stand trial. Romos admits the record is inadequate on this point, but asks to have the case remanded to more fully develop the record. We have already found no breach of duty by defense counsel, and therefore deny the request to remand for a further hearing on the issue of prejudice.

We conclude Romos has failed to show he received ineffective assistance of counsel. We affirm his conviction for forgery.

**AFFIRMED.**