IN THE COURT OF APPEALS OF IOWA

No. 1-373 / 10-0850
Filed June 29, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ERNESTO ARELLANO DIAZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bradley J. Harris, Judge.

Defendant contends trial counsel was ineffective in failing to advise him of the immigration consequences of his pleading guilty. **AFFIRMED.**

Rachel C. B. Antonuccio of Cole & Vondra, L.L.P., Iowa City, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber and Thomas W. Andrews, Assistant Attorneys General, Thomas J. Ferguson, County Attorney, and Michelle Wagner, Assistant County Attorney, for appellee State.

Heard by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J., takes no part.

DANILSON, J.

Ernesto Arellano-Diaz[1] appeals from judgment and sentence imposed upon his plea of guilty to the charge of possession of cocaine with intent to deliver, in violation of Iowa Code section 124.401(1)(c) (2009). He contends his trial counsel was ineffective in failing to advise him of the immigration consequences of his plea. He also argues the district court violated the mandates of Iowa Rule of Criminal Procedure 2.8(2)(*b*) in accepting a guilty plea without confirming he was aware deportation was a consequence of pleading guilty. Because this record is inadequate to evaluate the ineffective-assistance-of-counsel claim, we preserve it for possible postconviction relief proceedings. We reject the defendant's contention that the district court must go beyond the inquiries required by the rules of criminal procedure.

I. Background Facts and Proceedings.

On February 22, 2010, a trial information was filed charging Ernesto Arellano Arellano-Diaz with possession of cocaine with intent to deliver.

On April 30, 2010, the parties informed the district court they had reached a plea agreement: Arellano-Diaz would plead guilty, and the State would recommend

> a $1000 fine, to be suspended; a 10-year prison term also to be suspended; to be placed on two to five years of supervised probation; the 180-day driver's license revocation; the $125 law enforcement initiative fine and $10 DARE fee.

Before accepting Arellano-Diaz's plea, the court asked:

[1] Appellant's counsel refers to the defendant as Ernesto Arellano-Diaz, as will we.

> THE COURT: Are you a U.S. citizen? THE DEFENDANT: No.
>
> THE COURT: Okay. Do you understand that a conviction of this may affect your immigration status and this court has no control over that? THE DEFENDANT: Yeah.

The court did accept the plea and, in accordance with the parties' agreement, moved immediately to sentencing.

Arellano-Diaz appeals.

II. Ineffective-assistance-of-counsel claim.

On appeal, Arellano-Diaz contends trial counsel was ineffective in failing to inform him of the potential immigration consequences associated with pleading guilty to possession of cocaine with intent to deliver. He asserts that as a result of his guilty plea, he has been placed in deportation proceedings.

About one month before Arellano-Diaz entered his guilty plea, the United States Supreme Court decided *Padilla v. Kentucky*, __ U.S.__, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). Padilla pleaded guilty to the transportation of a large amount of marijuana, which made "his deportation virtually mandatory." *Padilla*, ___ U.S. at ___, 130 S. Ct. at 1478, 176 L. Ed. 2d at ___. The case involved an application for postconviction relief asserting ineffective assistance of counsel: the defendant claimed he was erroneously advised by trial counsel that he "did not have to worry about immigration status since he had been in the country so long." *Id.* at ___, 130 S. Ct. at 1478, 176 L. Ed. 2d at ___.

The Supreme Court noted that "[t]he drastic measure of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes." *Id.* at ___, 130 S. Ct. at 1476, 176 L. Ed. 2d at ___. The court stated, "as a matter of federal law, deportation is an integral part–indeed, sometimes the

most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Id*. at ___, 130 S. Ct. at 1480, 176 L. Ed. 2d at ___ (footnote omitted). The *Padilla* court majority opined the "collateral consequences" analysis[2] was inappropriate in defining the scope of constitutionally effective assistance of counsel "because of the unique nature of deportation." *Id.* at ___, 130 S. Ct. at 1481-82, 176 L. Ed. 2d at ___. Thus, the *Padilla* Court held the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), analysis applies to ineffective-assistance-of-counsel claims based on deportation advice. *Id.* at ___, 130 S. Ct. at 1482, 176 L. Ed. 2d at ___.

Under *Strickland*, the court stated that to prove ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. This is the same analysis we employ in ruling on claims of ineffective assistance of counsel. *See State v. Fountain*, 786 N.W.2d 260, 266-67 (Iowa 2010).

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[2] Effectively abrogating *State v. Ramirez*, 636 N.W.2d 740, 743 (Iowa 2001), in which our supreme court adhered to its prior position that an attorney has no duty to advise a defendant of deportation consequences as they were collateral consequences of guilty plea.

We review claims of ineffective assistance of counsel de novo. *State v. Ondayog*, 722 N.W.2d 778, 783 (Iowa 2006).

The *Padilla* Court found Padilla's counsel could have "easily determined that his plea would make him eligible for deportation" and thus the erroneous advice satisfied the first prong of the *Strickland* analysis. ___ U.S. at ___, 130 S. Ct. at 1483, 176 L. Ed. 2d at ___.[3] "Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy *Strickland's* second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance." *Id*. at ___, 130 S. Ct. at 1483-84, 176 L. Ed. 2d at ___. Arellano-Diaz contends *Padilla* is "exactly analogous" and his counsel was required to advise him of the deportation consequences prior to entry of his guilty plea.

A defendant may raise an ineffective assistance claim on direct appeal if there are reasonable grounds to believe the record is adequate to address the

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[3] The *Padilla* Court observed:

> In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction. *See* 8 U.S.C. § 1227(a)(2)(B)(i) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable"). Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. . . .
>
> Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. . . . But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Id. at ___, 130 S. Ct. at 1483-84, 176 L. Ed. 2d at ___.

claim on direct appeal. Iowa Code § 814.7(2). When an ineffective-assistance-of-counsel claim is raised on direct appeal, we may decide the record is adequate to decide the claim or may choose to preserve the claim for postconviction relief proceedings. *Id.* § 814.7(3). Only in rare cases will the district court record alone be sufficient to resolve the claim on direct appeal. *Straw*, 709 N.W.2d at 133; *see also State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997).

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 from that failure. *State v. Fountain*, 786 N.W.2d 260, 265-66 (Iowa 2010). Both elements must be proved by a preponderance of the evidence. *Straw*, 709 N.W.2d at 133. Failure to prove either element by a preponderance of the evidence is fatal to Mason's claim of ineffective assistance. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003).

Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings. *Id*. Those proceedings allow an adequate record of the claim to be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims and explain his or her conduct, strategies, and tactical decisions. *Id*.; *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002).

Arellano-Diaz acknowledges the record before us "does not make explicitly clear whether trial counsel researched and informed" him of the

deportation consequences, but "the fact that Arellano-Diaz pled guilty to the crime as [sic] issue is strong evidence in support of the fact that he did not." He then further alleges that "any reasonable Defendant who knew his guilty plea would automatically result in him being placed in deportation proceedings would have insisted on" going to trial or continuing plea negotiations. These bald assertions do not constitute proof of either deficient performance or prejudice. This record is not adequate to resolve the ineffectiveness claim, and we preserve the matter for possible postconviction proceedings.

III. Iowa Rule of Criminal Procedure 2.8(2)(*b*).

Arellano-Diaz also contends the district court violated the mandates of Iowa Rule of Criminal Procedure 2.8(2)(*b*) because it did not "confirm whether Arellano-Diaz was aware deportation was a consequence of pleading guilty."

Rule 2.8(2)(*b*) implements the constitutional due process standards for acceptance of a guilty plea. *State v. Ramirez,* 636 N.W.2d 740, 741-42 (Iowa 2001). Rule 2.8(2)(*b*) provides that the court "shall not accept a plea of guilty without first determining that the plea is made voluntarily and intelligently and has a factual basis." The rule provides further:

> Before accepting a plea of guilty, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, . . . (3) [t]hat a criminal conviction, deferred judgment, or deferred sentence *may affect a defendant's status under federal immigration laws.*

Iowa R. Crim. Proc. 2.8(2)(*b*)(3) (emphasis added). Thus, under the rule, the court is to inform the defendant his conviction may affect his status under federal immigration laws.

Here, the district court asked: "Do you understand that a conviction of this may affect your immigration status and this court has no control over that?" Arellano-Diaz responded in the affirmative. This is sufficient under the rule. *See Ramirez,* 636 N.W.2d at 741-43 (rejecting defendant's claim that the district court committed constitutional error when it accepted his guilty plea without sua sponte satisfying itself the defendant understood the deportation consequences); *see also State v. Myers*, 653 N.W.2d 574, 577-78 (Iowa 2002) (stating where "the issue is whether there is adequate compliance with the requirement that *the defendant be informed of certain rights* before the guilty plea is accepted by the court . . . , we have consistently held that substantial compliance is all that is required, even in felony cases." (emphasis in original)).

Arellano-Diaz also argues that the court should minimally inquire whether the defendant has been informed of the possibility of deportation. In support of this contention, Arellano-Diaz notes the last unnumbered paragraph of rule 2.8(2)(*b*) requires written guilty pleas to serious and aggravated misdemeanors to include a statement "that conviction of a crime may result in the defendant's deportation or other adverse immigration consequences if the defendant is not a United States citizen." And according to Arellano-Diaz, the court's colloquy should minimally ask if the defendant was informed deportation may be a consequence. Although the better practice may encompass an explanation that deportation may be a consequence, we decline to impose this duty on the trial court absent an amendment to our rules. *Padilla* specifically places the burden of informing the defendant of the consequences of the plea upon the defendant's attorney. *See Padilla*, ___ U.S. at ___, 130 S. Ct. at 1486,

176 L. Ed. 2d at ___ ("[W]e now hold that counsel must inform her client whether his plea carries a risk of deportation.").

Contrary to the defendant's claim, the court is not required to "confirm" the precise immigration consequences or inform the defendant that one of the possible consequences is deportation.

IV. Conclusion.

We preserve the defendant's ineffective assistance claim for possible postconviction proceedings and affirm his conviction.

AFFIRMED.