

IN THE COURT OF APPEALS OF IOWA

No. 1-389 / 10-1151
Filed June 29, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EDGAR EDUARDO AVILA,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Marsha A. Bergan, Judge.

Appellant contends counsel was ineffective in not advising him of the possible immigration consequences of his drug-related guilty plea. **AFFIRMED.**

Rachel C. B. Antonuccio of Cole & Vondra, L.L.P., Iowa City, for appellant
Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Janet M. Lyness, County Attorney, and Meredith Rich-Chappell, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

SACKETT, C.J.

Edgar Avila appeals from his guilty pleas to possession of cocaine and marijuana. He contends counsel was ineffective in not advising him of the deportation consequences of a drug-related guilty plea. We affirm.

BACKGROUND. In July of 2009 defendant was arrested and charged with several drug-related offenses, including possession of cocaine with intent to deliver and possession of marijuana. He is a legal immigrant. During a bond review, the court became aware that Immigration Customs and Enforcement had placed a detainer on defendant. In April of 2010, pursuant to an agreement, defendant entered a written guilty plea to the marijuana charge and appeared to enter an oral guilty plea to the cocaine charge. During the plea hearing, the court, defense counsel Paul Miller, and defendant discussed the immigration effects of the guilty plea to the cocaine charge.

Court: The court is required to inform all defendants that a criminal conviction will affect that defendant's status under federal immigration status if the defendant is not a United States citizen. Are you a United States citizen? Defendant: No, ma'am.

Court: Have you had sufficient time to discuss that with Mr. Miller? Defendant: Yeah. I've discussed it a few times with him in details.

Miller: Could I add this? He has a separate immigration attorney that he has retained and so they're in the process of dealing with the status and they're aware of these charges.

Court: Okay. Do you know the name of that attorney? Defendant: Dan Vondra.

Court: And I am curious, Mr. Miller, does Mr. Vondra know Mr. Avila is here today to enter a plea? Miller: I don't know if he is here today but he has been updated with the status of the case.

Court: All right. Have you talked to Mr. Vondra about the consequences that might befall you in terms of your immigration status if you plead guilty or if you are convicted? Defendant: Yeah, I've talked to him a few times about it. He has been talking to my parents mainly about it. He has told us some of the consequences.

Court: Do you want any more time to talk with Mr. Vondra before we proceed here with your guilty plea proceeding?
Defendant: No, I don't.

Court: Okay. I want to make sure that you know that as a court here I don't have the knowledge being a state judge to tell you what the consequences might be. My duty is to make sure that you know that there may very well be consequences to a guilty plea and conviction, and my duty is to make sure that you've had enough time to explore what those consequences are before you come forward here to plead guilty. So that's why I'm covering this with you. Are you sure you've had time to talk with Mr. Vondra?
Defendant: Yes, I am.

[Colloquy concerning rights given up by pleading]

Court: And I'm going to ask you once again just to make sure that if it's not true, you can tell me, have you had enough time to talk with Mr. Vondra about the immigration consequences that you may suffer? Defendant: Yes, I have.

In the order accepting the guilty pleas, the court noted:

On the record, the Court was informed by Defendant that he is not a United States citizen. Defendant states that he has consulted with Attorney Dan Vondra and has discussed with Attorney Vondra the consequences of the guilty pleas upon his immigration status in this country, and Defendant wishes to proceed with entry of guilty pleas today.

SCOPE OF REVIEW. Claims of ineffective assistance are reviewed de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). 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. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2009). A defendant claiming ineffective assistance of counsel concerning a guilty plea must prove that, but for counsel's alleged breach, there was a reasonable probability he would have insisted on going to trial. *Id.* We may dispose of an ineffective-assistance-of-counsel claim if the applicant fails to meet either the breach of duty or the prejudice prong. See *State v. Barnes*, 791 N.W.2d 817, 824 (Iowa 2010).

MERITS. On appeal, defendant contends counsel was ineffective in “failing to ensure that Mr. Avila had been informed of the deportation consequences associated with pleading guilty to the crimes at issue.” He asserts his guilty plea was not knowing and intelligent, his conviction should be reversed, and his case remanded to the district court. The State contends the record is not sufficient to address defendant’s claim and asks us to preserve this claim for possible postconviction relief proceedings.

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 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 *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). We believe the record before us is sufficient to resolve defendant’s claim.

Defendant relies on *Padilla v. Kentucky*, 559 U.S. ____, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), in support of his claim defense counsel was ineffective because counsel did not advise him of the deportation consequences of his guilty pleas. Although *Padilla* provides helpful guidance and analysis, the circumstances of the instant appeal differ significantly from *Padilla*. The attorney in *Padilla* affirmatively misadvised his client concerning the consequences of a guilty plea on his immigration status, telling him he “did not have to worry about

his immigration status since he had been in the country so long.” *Padilla*, 559 U.S. at ____, 130 S. Ct. at 1478, 176 L. Ed. 2d at 290. In the instant case, defendant said he had had enough time to discuss with his attorney the effect of a criminal conviction on his immigration status and noted, “I’ve discussed it a few times with him in details.” “[T]here is a strong presumption that trial counsel’s conduct fell within the wide range of reasonable professional assistance.” *DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002). Defendant also had retained an immigration attorney¹ who had spoken with defendant and his parents about the immigration consequences of pleading guilty or being convicted of the drug charges. Defendant indicated he had had enough time to discuss his situation and the immigration consequences with his immigration attorney. It appears from the record before us that defendant had retained the immigration attorney soon after his arrest, nearly a year before the plea proceeding. In addition, defense counsel indicated at the plea proceedings that defendant’s immigration attorney had been “updated with the status” of defendant’s case.

From our review of the record, we conclude defendant was advised by defense counsel, his immigration attorney, and the court that there may be immigration consequences as the result of his pleading guilty or being convicted of the drug charges. See *Padilla*, 559 U.S. at ____, 130 S. Ct. at 1483, 176 L. Ed. 2d at 296 (“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.

¹ Appellate counsel and the immigration attorney are in the same law firm.

But when the deportation consequence is truly clear, . . . the duty to give correct advice is equally clear.”). Defendant has not shown his attorney failed in an essential duty. See *Carroll*, 767 N.W.2d at 641. Having failed to prove the breach-of-duty prong, his ineffective-assistance claim fails. See *Barnes*, 791 N.W.2d at 824.

AFFIRMED.