IN THE COURT OF APPEALS OF IOWA

No. 3-1097 / 13-0040
Filed January 9, 2014

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JULIO CESAR GARCIA-CARONA,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mark D. Cleve, Judge.

Defendant appeals from his felony conviction following a guilty plea to delivery of powder cocaine. **AFFIRMED.**

Jack Dusthimer, Davenport, for appellant.

Thomas J. Miller, Attorney General, Heather Quick, Assistant Attorney General, Michael J. Walton, County Attorney, and Amy Devine, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., and Tabor and Bower, JJ.

TABOR, J.

Julio Cesar Garcia-Carona appeals his felony conviction for delivery of powder cocaine. He claims his attorney was ineffective for allowing him to enter a guilty plea without sufficient information about the deportation ramifications. Because Garcia cannot show he was prejudiced by counsel's performance, we affirm.

I. Background Facts and Proceedings

Garcia is a native of Acapulco, Mexico and was in the United States illegally at the time of his offense. Immigration and Customs Enforcement (ICE) deported Garcia in June 2010 after he was released from the Illinois Department of Corrections, but Garcia returned to the United States without authorization in October 2010.

Davenport police arrested Garcia in June 2012 in connection with an investigation of cocaine trafficking. The State filed a trial information on July 10, 2012, charging Garcia with delivery of a schedule II substance (powder cocaine) in violation of Iowa Code sections 124.401(1)(c)(2), 124.406(2)(d) and 703.1 (2011), and conspiracy to commit a non-forcible felony.

Garcia reached a plea bargain with the State, agreeing to plead guilty to the delivery count in exchange for the State dismissing the conspiracy count. The district court held a plea hearing on October 24, 2012. Garcia, through an interpreter, admitted "sharing" three grams of powder cocaine with friends at a motel in Davenport. Garcia also confirmed in open court that he had discussed his immigration status with his attorney.

The district court held a sentencing hearing on December 5, 2012. Garcia's attorney acknowledged at the hearing that ICE had a detainer on his client, and Garcia would likely be deported "immediately" if the court granted him a suspended sentence. The court sentenced Garcia to an indeterminate ten years in prison with a one-third mandatory minimum. Garcia now appeals.

II. Standard of Review

We review Garcia's claims of ineffective assistance of counsel de novo. *See State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). Although we often preserve such claims for postconviction relief actions, we will address them on direct appeal when the record is sufficient to allow a ruling. *State v. Finney,* 834 N.W.2d 46, 49 (Iowa 2013). The record here permits us to address Garcia's ineffective-assistance claims on direct appeal.

III. Analysis

On appeal, Garcia alleges he did not receive adequate advice about the impact of his guilty plea on his immigration status. But Garcia did not move in arrest of judgment to allow the district court to address any alleged defect in his plea, despite being informed of that procedural requirement at the plea hearing. *See* Iowa R. Crim. P. 2.8(2)(d). Accordingly, he cannot directly attack his guilty plea on appeal. *See* Iowa R. Crim. P. 2.24(3)(a). Instead, he must claim ineffective assistance of counsel. *See State v. Hallock*, 765 N.W.2d 598, 602 (Iowa Ct. App. 2009) (explaining failure to file motion in arrest of judgment will not preclude challenge if failure resulted from ineffective assistance of counsel).

Garcia must show (1) his plea counsel failed to perform an essential duty and (2) prejudice resulted. *See State v. Brothern*, 832 N.W.2d 187, 192 (Iowa 2013); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish a breach of duty, Garcia must show counsel's performance fell below the standard of a reasonably competent attorney. *See Strickland*, 466 U.S. at 687. The prejudice prong requires Garcia to prove a reasonable probability existed that but for counsel's errors, Garcia would not have pleaded guilty and instead would have insisted on going to trial. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Garcia alleges his plea counsel was remiss in two ways: (1) by failing to file a motion in arrest of judgment to challenge the district court's compliance with Iowa Rule of Criminal Procedure 2.8(2)(b)(3) and (2) by failing to provide independent advice regarding deportation consequences as required by *Padilla v. Kentucky*, 559 U.S. 356 (2010). Garcia alleges his counsel's performance was a violation of the right to effective representation guaranteed by both the Sixth Amendment of the Federal Constitution[1] and Article I, Section 10 of the state constitution.[2]

We turn to the first alleged error of counsel. Before accepting a plea of guilty, the district court must personally address the defendant in open court and inform him and determine he understands—among other things—"[t]hat a criminal conviction, deferred judgment, or deferred sentence may affect a

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[1] "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

[2] "In all criminal prosecutions, . . . the accused shall have a right . . . to have the assistance of counsel." Iowa Const. art. 1, § 10.

defendant's status under federal immigration laws." Iowa R. Crim. P. 2.8(2)(b)(3).

The plea-taking court engaged in the following exchange with Garcia:

> THE COURT: Do you understand if you are not an American citizen, a criminal conviction, deferred judgment, or deferred sentence may affect your status under federal immigration laws? THE DEFENDANT: Yes.

Garcia's appellate attorney recognizes the district court "mimicked rule 2.8 language" but argues the court did not "independently meet the *Padilla* requirements." In *Padilla*, the United States Supreme Court held that criminal defense attorneys must inform their clients whether their guilty plea carries a risk of deportation. 559 U.S. at 374. *Padilla* does not speak to the colloquy required of the district court. *See* Danielle Lang, Padilla v. Kentucky: *The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful* Padilla *Claims*, 121 Yale L.J. 944, 954 (2012) (explaining "the Sixth Amendment right to counsel and the Fifth Amendment plea colloquy serve analytically distinct purposes. The Fifth Amendment plea colloquy is by its nature a far more limited enterprise").

We find the district court satisfied rule 2.8(2)(b)(3), leaving no ground for Garcia's attorney to object to the plea colloquy. Counsel cannot be deemed incompetent for declining to raise an issue lacking in merit. *Brothern*, 832 N.W.2d at 192.

In his second claim against counsel, Garcia alleges his attorney failed to provide him independent advice regarding immigration consequences as required by *Padilla*. The record does not support Garcia's allegation. In open court, Garcia and his attorney engaged in the following exchange:

> COUNSEL: I would like to ask a couple of questions of Mr. Garcia. Have you and I spoken about potential consequences as a result of your immigration or citizenship status? DEFENDANT: Yes.
>
> COUNSEL: And we have discussed potential consequences as a result of your guilty plea today? DEFENDANT: Yes.
>
> COUNSEL: Thank you.

We have no reason to doubt the veracity of Garcia's responses. He provides no specifics on appeal as to what additional information he should have received from his attorney. In assessing claims of ineffective assistance of counsel, a defendant's conduct is examined as well as that of his attorney. *State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996) (internal citations omitted). Garcia cannot call foul now. Garcia had an opportunity to inform the court if he did not understand the consequences of his plea or if counsel truly did not inform him of the potential for deportation.

Even if the on-the-record exchange between Garcia and his trial attorney did not satisfy *Padilla*, Garcia cannot establish the requisite prejudice. In the context of a guilty plea, a defendant must show there is a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial, but for counsel's omissions. *Hill*, 474 U.S. at 59. Nothing in this record supports Garcia's claim he "may have opted to go to trial" if he had been fully informed about possible deportation. Garcia was subject to deportation even if he did not plead guilty. He was under an ICE hold at his initial appearance. Even if his attorney had not discussed the immigration consequences with him, Garcia had experienced those consequences is a similar situation two years earlier when he

was deported following a drug conviction in Illinois. We find no reasonable probability of a different outcome.

Finally, Garcia urges that Article I, Section 10 of the Iowa Constitution should be read as requiring a more probing colloquy between non-citizen defendants and the plea-taking court to guarantee their thorough knowledge of the immigration consequences of their guilty pleas. Garcia's counsel argues on appeal: "During the plea colloquy the Defendant should be asked if he is a U.S. citizen." If the defendant is not a citizen, Garcia suggests possible inquiries adapted from a website developed by an advocacy group called the Immigrant Defense Project.[3] But that same website has published a paper that recommends judges do not question a defendant about his immigration status. *See Ensuring Compliance with* Padilla v. Kentucky *Without Compromising Judicial Obligations: Why Judges Should Not Ask Criminal Defendants About Their Citizenship/Immigration Status* Immigrant Defense Project (January 2011) (explaining that asking a defendant about immigration status is not necessary to comply with *Padilla* and may trigger unintended harms).

While it is "fundamental that state courts be left free and unfettered" to interpret their state constitutions, *State of Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940), we are skeptical whether the Iowa Constitution imposed a duty on Garcia's trial counsel to advocate for a new colloquy not outlined in our rules of criminal procedure. But we do not have to answer that question. As noted above, Garcia cannot show he was prejudiced by counsel's performance in

[3] Garcia also contends the Benchbook for U.S. District Court Judges (March 2013) is "closer to fulfilling the *Padilla* requirements."

connection with the guilty plea given Garcia's prior deportation and the pretrial ICE hold.

AFFIRMED.