CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

STATE OF NEBRASKA, APPELLEE, V.
ALMA RAMIREZ GONZALEZ, APPELLANT.
807 N.W.2d 759

Filed January 13, 2012. No. S-10-1097.

1. **Pleas: Appeal and Error.** The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal.
2. **Pleas: Sentences: Proof.** With respect to withdrawal of a plea of guilty or no contest made after sentencing, withdrawal is proper only where the defendant makes a timely motion and establishes, by clear and convincing evidence, that withdrawal is necessary to correct a manifest injustice.
3. **Pleas: Sentences: Judgments.** A motion for withdrawal of a plea of guilty or no contest is timely if made with due diligence, considering the nature of the allegations therein, and is not necessarily barred because it was made subsequent to judgment or sentence.
4. **Pleas: Proof.** Manifest injustice justifying withdrawal of a plea may be proved if the defendant proves, by clear and convincing evidence, that (1) he or she was denied the effective assistance of counsel guaranteed by constitution, statute, or rule; (2) the plea was not entered or ratified by the defendant or a person authorized to so act on his or her behalf; (3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed; or (4) he or she did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose those concessions as promised in the plea agreement.
5. ____: ____. A defendant seeking to withdraw a plea must plead and prove that omissions constituting manifest injustice have resulted in prejudice.
6. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
7. **Pleas: Effectiveness of Counsel: Proof.** In the context of a plea of guilty or no contest, to prevail on a claim of ineffective assistance of counsel, a defendant

must allege facts showing a reasonable probability that he or she would have insisted on going to trial but for counsel's errors.

8. **Constitutional Law: Right to Counsel: Effectiveness of Counsel: Case Overruled.** Advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel, and *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), applies to such a claim, abrogating *State v. Zarate*, 264 Neb. 690, 651 N.W.2d 215 (2002).
9. **Pleas: Attorney and Client.** Counsel must inform his or her client whether a plea carries a risk of deportation.
10. **Plea Bargains: Effectiveness of Counsel.** To obtain relief on a claim of ineffective assistance of counsel based on failure to advise a client whether a plea carries a risk of deportation, the defendant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.
11. **Effectiveness of Counsel: Appeal and Error.** A claim of ineffective assistance of counsel presents a mixed question of law and fact. Whether counsel was deficient and whether the defendant was prejudiced are questions of law that an appellate court reviews independently of the lower court's decision, but the appellate court reviews factual findings for clear error.

Appeal from the District Court for Hall County: JAMES D. LIVINGSTON, Judge. Affirmed.

Joshua W. Weir, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Alma Ramirez Gonzalez was convicted of fraudulently obtaining public assistance benefits, based upon a no contest plea that she entered pursuant to a plea agreement. Over 2 years after her sentencing, she filed a motion to withdraw her plea, alleging that she had received ineffective assistance of counsel because her attorney had not explained that her plea would result in automatic deportation. We conclude that procedurally, Gonzalez was permitted to move for withdrawal of her plea. But we also conclude that she failed to prove by clear and convincing evidence that withdrawal of her plea was necessary to prevent a manifest injustice. Therefore, we affirm the district court's decision to overrule her motion.

BACKGROUND

Gonzalez was, at the time of this action, living in Grand Island, Nebraska, with two of her three children. In December 2006, before criminal proceedings were brought against her, Gonzalez was detained by the federal government for living in the United States illegally. As a result, deportation proceedings were brought against her. As of August 31, 2010, the deportation proceedings were ongoing.

In 2007, Gonzalez was arrested for fraudulently obtaining public assistance benefits in an amount greater than $500, which is a Class IV felony, punishable by up to 5 years' imprisonment or a $10,000 fine.[1] Gonzalez was charged by information on January 2, 2008. She was arraigned and pled not guilty. Before she entered her plea, she was advised of her rights by the court, including the warning that conviction for the offense charged against her could have the consequence of deportation or denial of a naturalization request. Gonzalez said she understood those rights.

On March 20, 2008, Gonzalez withdrew her initial plea of not guilty and, pursuant to a plea agreement, pled no contest to the charge. In exchange for Gonzalez' plea of no contest, the State agreed to recommend a term of probation at sentencing. Gonzalez also agreed to pay restitution to the State for the benefits illegally obtained, in the amount of $18,522. The factual basis for the plea established that Gonzalez had applied for and received public assistance, but had not reported the fact that she was employed under an assumed name. Her failure to report her employment resulted in an overpayment of benefits.

Before accepting Gonzalez' plea, the court again advised her that conviction for the offense could result in her deportation or a denial of her naturalization requests, and she said she understood. The court convicted Gonzalez pursuant to her plea and, on May 8, 2008, sentenced her to a term of 5 years' probation.

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[1] See, Neb. Rev. Stat. § 68-1017(2) (Cum. Supp. 2010); Neb. Rev. Stat. § 28-105 (Reissue 2008).

Because Gonzalez pled no contest to fraudulently obtaining public assistance benefits, she became ineligible to stay in the United States. Specifically, Gonzalez was ineligible for a "cancellation of removal," for which she had been eligible because she had U.S. relatives and she had been living in the United States for 10 years.[2] Her ineligibility for a cancellation of removal was a direct result of her conviction for fraudulently obtaining public assistance benefits.[3]

Gonzalez filed a "Motion to Withdraw Plea and Vacate Judgment" in the district court on July 14, 2010, on the ground that she had received ineffective assistance of counsel. An evidentiary hearing was held. At the hearing, Gonzalez testified that she had not discussed the immigration consequences of her plea with her criminal trial counsel. Gonzalez testified that her criminal trial counsel had known Gonzalez was not a U.S. citizen, but Gonzalez had not informed her criminal trial counsel of her ongoing immigration case.

Gonzalez said that if she had known beforehand that there could be consequences with immigration that could result in deportation, she "would have looked for another solution." She admitted, however, that although the immigration consequences were very important to her before she entered her plea, she never asked her attorney whether there might be a problem. She also admitted that the court had informed her there could be immigration consequences to her plea, but that the advisement was said "very rapidly through the interpreter" and she "didn't understand much." She said that the first time she learned about the effect of the plea on her immigration status was about 5 months before the hearing on her motion to withdraw, when she was told by a different attorney who represented her in the immigration proceedings.

The district court denied Gonzalez' motion. While the district court accepted Gonzalez' claim that her criminal trial counsel's performance was deficient, the court determined that Gonzalez had failed to demonstrate prejudice resulting from that deficient performance. The court explained that Gonzalez'

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[2] See 8 U.S.C. § 1229b(b) (2006).

[3] See, *id.*; 8 U.S.C. § 1227(a)(2) (2006).

assertion that she would have found a "'different solution'" did not satisfy Gonzalez' burden of showing prejudice, because whether a "different solution" was possible was not within Gonzalez' control. The court also noted that Gonzalez had two different attorneys at the time of the plea—her criminal trial counsel and her immigration attorney—and apparently did not inquire of either one of them about the specific immigration consequences of her plea, despite her awareness that such consequences were possible. So, the court found that Gonzalez had failed to prove prejudice and denied her motion to withdraw her plea. Gonzalez appeals.

ASSIGNMENT OF ERROR

Gonzalez assigns, as consolidated, that the district court erred in denying her motion to withdraw her plea, because she was denied effective assistance of counsel.

STANDARD OF REVIEW

[1] The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal.[4]

ANALYSIS

Jurisdiction Over Motion to Withdraw Plea

The State argues that we have no appellate jurisdiction. The State claims that there is no procedure in Nebraska law for withdrawal of a guilty plea after judgment based on ineffective assistance of counsel. So, the State argues, the trial court lacked jurisdiction over Gonzalez' motion and we likewise lack jurisdiction over her appeal.[5]

The premise of the State's argument is incorrect; we do have jurisdiction over this appeal. But in order to explain the legal principles that govern our disposition of the merits of this particular appeal, it will be helpful to review some of our more recent case law regarding the procedural avenues

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[4] *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010).

[5] See *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009).

available to a defendant who claims that he or she was not properly advised of the immigration consequences of a plea. Specifically, there are three such avenues generally available: (1) a motion for postconviction relief under the Nebraska Postconviction Act,[6] (2) withdrawal of the plea pursuant to Neb. Rev. Stat. §§ 29-1819.02 and 29-1819.03 (Reissue 2008), and (3) a common-law motion to withdraw the plea. We agree with the State that only the third avenue is at issue here.

To begin with, this is not a postconviction action. For reasons that will become apparent below, it is at least possible that due to the U.S. Supreme Court's decision in *Padilla v. Kentucky*,[7] a defendant in Gonzalez' position could bring a postconviction action based on allegations of ineffective assistance of counsel. But Gonzalez has not brought such a claim—her motion neither cites nor relies upon the Nebraska Postconviction Act, and perhaps most clearly, her motion was not verified, as a postconviction motion is required to be.[8]

It is equally clear that §§ 29-1819.02 and 29-1819.03 provide no relief here, and Gonzalez does not contend otherwise. Section 29-1819.02 requires a trial court, before accepting a plea, to advise defendants that a conviction may have immigration consequences. And that section also establishes a statutory procedure whereby a convicted person may file a motion to have a criminal judgment vacated and a plea withdrawn when the court did not give the required advisement and the defendant faces an immigration consequence not included in the advisement given.[9]

In this case, however, the statutory advisement was given. So, §§ 29-1819.02 and 29-1819.03 are inapplicable. But that does not foreclose a common-law remedy for withdrawal of a plea. We held in *State v. Rodriguez-Torres*[10] that § 29-1819.02

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[6] See Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Supp. 2011).

[7] *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

[8] See, § 29-3001; *State v. Robinson*, 215 Neb. 449, 339 N.W.2d 76 (1983).

[9] See, *Mena-Rivera, supra* note 4; *Yos-Chiguil, supra* note 5.

[10] See *State v. Rodriguez-Torres*, 275 Neb. 363, 746 N.W.2d 686 (2008).

did not create a statutory procedure pursuant to which a plea entered before the statute was enacted could be withdrawn after the person convicted of the crime had already served his sentence. But we later clarified that *Rodriguez-Torres* did not foreclose a common-law remedy for withdrawal of a plea.[11]

[2,3] Gonzalez has pursued such a remedy here. And contrary to the State's suggestion, it is well established that a defendant may move to withdraw a plea, even after final judgment. However, the grounds for such a withdrawal are quite difficult for a defendant to prove—the bar is set high. If a motion to withdraw a plea of guilty or no contest is made *before* sentencing, a court, in its discretion, may allow a defendant to withdraw his or her plea for any fair and just reason, provided the prosecution would not be substantially prejudiced by its reliance on the plea.[12] But with respect to withdrawal of a plea of guilty or no contest made *after* sentencing, withdrawal is proper only where the defendant makes a timely motion and establishes, by clear and convincing evidence, that withdrawal is necessary to correct a manifest injustice.[13] That standard applies even where a motion to withdraw a plea has been made after the sentencing court's judgment has become final.[14] A motion for withdrawal is timely if made with due diligence, considering the nature of the allegations therein, and is not necessarily barred because it was made subsequent to judgment or sentence.[15]

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[11] See *Yos-Chiguil, supra* note 5.

[12] See, *State v. Minshall*, 227 Neb. 210, 416 N.W.2d 585 (1987); *State v. Molina-Navarrete*, 15 Neb. App. 966, 739 N.W.2d 771 (2007).

[13] See, *Minshall, supra* note 12; *State v. Dixon*, 223 Neb. 316, 389 N.W.2d 307 (1986), *disapproved on other grounds, Minshall, supra* note 12; *State v. Holtan*, 216 Neb. 594, 344 N.W.2d 661 (1984); *State v. Jipp*, 214 Neb. 577, 334 N.W.2d 805 (1983); *State v. Rouse*, 206 Neb. 371, 293 N.W.2d 83 (1980); *State v. Kluge*, 198 Neb. 115, 251 N.W.2d 737 (1977), *disapproved on other grounds, Minshall, supra* note 12; *State v. Evans*, 194 Neb. 559, 234 N.W.2d 199 (1975), *disapproved on other grounds, Minshall, supra* note 12; *State v. Lewis*, 192 Neb. 518, 222 N.W.2d 815 (1974); *Molina-Navarrete, supra* note 12.

[14] See, *Holtan, supra* note 13; *Kluge, supra* note 13.

[15] *Evans, supra* note 13.

In short, while it is possible that Gonzalez could have brought a motion for postconviction relief based on her allegations, she is also permitted to move to withdraw her plea. The trial court had jurisdiction to consider her motion, and we have jurisdiction over her appeal. Whether Gonzalez has adduced the clear and convincing evidence of manifest injustice necessary to justify withdrawal, however, is another matter, and requires us to consider the merits of her assignment of error.

Manifest Injustice and Ineffective Assistance of Counsel

As noted above, withdrawal of a plea is proper only where the defendant makes a timely motion and establishes, by clear and convincing evidence, that withdrawal is necessary to correct a manifest injustice.[16] Gonzalez made her motion with due diligence: it was filed shortly after the U.S. Supreme Court's decision in *Padilla*[17] held that a claim for ineffective assistance of counsel was available based upon the immigration consequences of a plea.[18]

[4,5] We have explained that "manifest injustice" may be proved if the defendant proves, by clear and convincing evidence, that (1) he or she was denied the effective assistance of counsel guaranteed by constitution, statute, or rule; (2) the plea was not entered or ratified by the defendant or a person authorized to so act on his or her behalf; (3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed; or (4) he or she did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose those concessions as promised in the plea agreement.[19] And the defendant must plead and prove that such omissions have resulted in prejudice.[20]

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[16] See cases cited *supra* note 13.

[17] *Padilla, supra* note 7.

[18] See *Evans, supra* note 13.

[19] *Holtan, supra* note 13; *Evans, supra* note 13.

[20] See *Jipp, supra* note 13.

[6,7] Obviously, what is at issue here is whether Gonzalez proved, by clear and convincing evidence, that ineffective assistance of counsel has resulted in a manifest injustice. It is well understood that to prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[21] the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.[22] And we recently reaffirmed that in the context of a plea of guilty or no contest, a defendant must allege facts showing a reasonable probability that he or she would have insisted on going to trial but for counsel's errors.[23]

[8] In 2002, we held in *State v. Zarate*[24] that counsel's failure to inform the defendant of the immigration consequences of a plea did not support a claim of ineffective assistance of counsel. Obviously, the U.S. Supreme Court's decision in *Padilla* abrogated our decision in *Zarate*.[25] In *Padilla*, the Court held that advice regarding deportation was not categorically removed from the ambit of the Sixth Amendment right to counsel and that *Strickland* applied to such a claim.

[9,10] Specifically, the Court explained that when the law regarding the possible deportation consequences of a plea 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. But when the deportation consequence is truly clear, the duty to give correct advice is equally clear. In sum, the Court concluded that counsel must inform his or her client whether a plea carries a risk of deportation and that to obtain relief on such a claim, the defendant must convince the court

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[21] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[22] *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010), *cert. denied* 563 U.S. 1012, 131 S. Ct. 2912, 179 L. Ed. 2d 1254 (2011).

[23] See *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011). See, also, *Premo v. Moore*, 562 U.S. 115, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011); *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

[24] *State v. Zarate*, 264 Neb. 690, 651 N.W.2d 215 (2002).

[25] See *Padilla, supra* note 7.

that a decision to reject the plea bargain would have been rational under the circumstances.[26]

We recognize that there is some significant dispute regarding whether the Court's holding in *Padilla* is applicable on collateral review of pleas that were entered before *Padilla* was decided.[27] We need not resolve that issue in this case, however, because we conclude that even under *Padilla*, Gonzalez failed to establish the clear and convincing evidence of manifest injustice necessary to justify withdrawal of her plea.

[11] Although this case arises in the context of a motion to withdraw a plea, in the context of postconviction relief, we have stated that a claim of ineffective assistance of counsel presents a mixed question of law and fact.[28] Whether counsel was deficient and whether the defendant was prejudiced are questions of law that we review independently of the lower court's decision.[29] But we review factual findings for clear error.[30] We see no reason to depart from that standard of review in evaluating whether a defendant proved ineffective assistance of counsel, although the court's ultimate determination of whether the defendant is permitted to withdraw his or her plea is still reviewed for an abuse of discretion.

We agree with the district court's conclusion that Gonzalez did not prove prejudice here. The district court had well-founded skepticism regarding Gonzalez' testimony that the immigration consequences of her plea were important to her, yet she apparently never inquired about them to either of her attorneys. She purportedly never did so despite having been cautioned of possible deportation consequences by the court more than once, and her acknowledgment even at the hearing on her motion to withdraw her plea that she had been at least aware of those advisements. She was aware of the general

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[26] See *id.*

[27] See, e.g., *Chaidez v. U.S.*, 655 F.3d 684 (7th Cir. 2011) (and cases cited therein).

[28] See *Yos-Chiguil, supra* note 23.

[29] *Id.*

[30] *Id.*

possibility of immigration consequences, and her criminal trial counsel could not have informed her of the specific effect of her plea on her "cancellation of removal," because Gonzalez had not informed her counsel of the separate immigration proceeding.

And most important, Gonzalez did not testify that the possibility of deportation would have led her to insist on going to trial instead of pleading guilty.[31] She simply said that she would have "looked for another solution," but presented no evidence of what such a solution might have been or whether such a solution would have been available to her. Under the Immigration and Nationality Act,[32] cancellation of removal is unavailable to any alien who has committed an "aggravated felony,"[33] which includes an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000."[34] There appears to be no dispute that Gonzalez did what she was accused of, or any question that her conduct fit that description, which means that there is nothing in *this* record to suggest that her case could have been resolved in a way that would avoid the Immigration and Nationality Act. The argument in Gonzalez' appellate brief that the State might have been willing to "craft a creative plea bargain"[35] is nothing more than speculation. And Gonzalez faced up to 5 years' imprisonment, so a recommendation of probation was not an unfavorable plea agreement in the underlying proceeding.

Simply put, Gonzalez presented no evidence that she would have insisted on going to trial absent her counsel's allegedly deficient performance,[36] and nothing in the record persuades us that "a decision to reject the plea bargain would have been rational under the circumstances."[37] We agree with the district

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[31] See *id.*

[32] 8 U.S.C. § 1101 et seq. (2006).

[33] See §§ 1227(a)(2)(A)(iii) and 1229b(b)(1)(C).

[34] See § 1101(a)(43)(M)(i).

[35] Brief for appellant at 24.

[36] See, *Premo, supra* note 23; *Hill, supra* note 23.

[37] See *Padilla, supra* note 7, 130 S. Ct. at 1485.

court that Gonzalez did not prove the prejudice prong of *Strickland*.[38] As a result, even if *Padilla* applies retroactively to her plea, she did not prove ineffective assistance of counsel and therefore did not prove the manifest injustice necessary to justify withdrawing her plea. The district court did not abuse its discretion in overruling Gonzalez' motion, and we find no merit to her assignment of error.

CONCLUSION

Although we conclude that the district court had jurisdiction to consider Gonzalez' motion to withdraw her plea, despite the fact that her conviction had become final, we find that she did not prove ineffective assistance of counsel. The district court did not abuse its discretion in overruling her motion. The district court's order is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

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[38] See *Strickland, supra* note 21.

JULIE LOVELACE, APPELLEE, V.
CITY OF LINCOLN, APPELLANT.
809 N.W.2d 505

Filed January 13, 2012. No. S-10-1241.

1. **Workers' Compensation.** Under the odd-lot doctrine, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. The essence of the test is the probable dependability with which a claimant can sell his or her services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his or her crippling handicaps.
2. **Workers' Compensation: Appeal and Error.** In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong.
3. ____: ____. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.