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JANUARY 17, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

The State of North Dakota,	)	
	)	Supreme Court No. 20190273
	)	
Plaintiff and Appellee,	)	
	)	District Court No. 18-2019-CR-00405
	)	
vs.	)	
	)	
Mohamed Jama Awad,	)	
	)	
Defendant and Appellant.	)	

APPEAL FROM ORDER DENYING DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA DATED AUGUST 12, 2019, FROM THE DISTRICT COURT FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT GRAND FORKS COUNTY, NORTH DAKOTA THE HONORABLE JASON MCCARTHY PRESIDING

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

[¶1] Whether the district court erred in denying Defendant's motion to withdraw plea under North Dakota Rules of Criminal Procedure 11(d).

STATEMENT OF THE CASE

[¶2] The Defendant appeals from an order denying his motion to withdraw his guilty plea to the charge of Election Offense – Not Qualified. N.D.C.C. § 16.1-01-12(1)(g). The Defendant was charged with Election Offense – Not Qualified and made an initial appearance with the assistance of counsel. The Defendant waived his preliminary hearing and entered into a plea agreement with the assistance of counsel. One month later, the Defendant filed a motion to withdraw guilty plea arguing that the Defendant's plea did not comply with North Dakota Rules of Criminal Procedure Rule 11(d). Further, the Defendant argues that there is a probability that but for the lack of advice on immigration consequences, the Defendant would have gone to trial.

[¶3] The State asserts that Rule 11(d) of the North Dakota Criminal Rules of Procedure was complied with when the Defendant was advised of potential immigration consequences by the district court at the Defendant's initial appearance and again reminded of his rights at the preliminary hearing when plead guilty pursuant to a plea agreement. Furthermore, whether there is a reasonable probability that absent advice on potential immigration consequences the Defendant would have gone to trial is not the full analysis required to be conducted when a defendant moves the trial court to withdraw a guilty plea. The district court properly analyzed the Bahtiraj factors and denied the Defendant's motion to withdraw a guilty plea.

STATEMENT OF THE FACTS

[¶4] On February 27, 2019, the Defendant was charged with the crime of Election Offense – Not Qualified, a class C Felony, in Grand Forks County District Court. (App. p. 3). On March 11, 2019, the Defendant made an initial appearance and was represented by counsel. (App. pp. 3, 13). At the initial appearance, the Defendant was advised of his rights and, specifically, that "[i]f you are not a U.S. citizen and you plead guilty, or are convicted of a crime, it may have immigration consequences, including but not limited to: deportation, exclusion from admission to the United States, or denial of citizenship." (App. pp. 14-16). A preliminary hearing was scheduled for April 15, 2019. (App. p. 17).

[¶5] At the preliminary hearing on April 15, 2019, the Defendant voluntarily waived the preliminary hearing and entered a guilty plea pursuant to a plea agreement while represented by counsel. (App. p. 24). The district court advised the Defendant that by pleading guilty he was giving up his rights. (App. pp. 24-25). The Defendant indicated he understood he was giving up his rights by pleading guilty. (App. p. 25). The Defendant was sentenced pursuant to the plea agreement to a one year deferred imposition of sentence, twenty hours of community service, and the mandatory court fees in the amount of $550.00. (App. p. 3).

[¶6] On May 16, 2019, the Defendant filed a motion to withdraw guilty plea under North Dakota Rules of Criminal Procedure 11(d) arguing the Defendant was not advised of immigration consequences prior to pleading guilty. (App. p. 4). On May 30, 2019, the State filed a response brief opposing Defendant's motion as the district court complied with Rule 11(d) when the Defendant had his initial appearance and when he pled guilty and was sentenced. (App. p. 4). On July 31, 2019, a hearing was held on

Defendant's motion. (App. p. 5). The district court took the matter under advisement and issued its order denying defendant's motion on August 12, 2019. (App. pp. 5, 9). On September 6, 2019, the Defendant filed a notice of appeal. (App. p. 5).

STANDARD OF REVIEW

[¶7] "[R]eview of a district court's denial of a motion to withdraw a plea of guilty is under the abuse of discretion standard of review." State v. Job, 2019 ND 278, ¶ 5, (citing State v. Peterson, 2019 ND 140, ¶ 20, 927 N.W.2d 74). "An abuse of discretion under N.D.R.Crim.P. 11(d) occurs when the court's legal discretion is not exercised in the interests of justice." Id. "The trial court must exercise its sound discretion in determining whether a 'manifest injustice' or a 'fair and just reason' to withdraw a guilty plea exists." Id. (citing State v. Bates, 2007 ND 15, ¶ 6, 726 N.W.2d 595).

ARGUMENT

I. The district court complied with Rule 11 of the North Dakota Rules of Criminal Procedure.

[¶8] Rule 11(d)(2) of the North Dakota Rules of Criminal Procedure governs withdrawal of guilty pleas and provides that "[u]nless the defendant proves that withdrawal is necessary to correct a manifest injustice, the defendant may not withdraw a plea of guilty after the court has imposed sentence." "'Manifest injustice' means a specific finding by the court that the imposition of sentence is unreasonably harsh or shocking to the conscience of a reasonable person, with due consideration of the totality of the circumstances." N.D.C.C. § 39-01-01(40). "The defendant has the burden of proving a manifest injustice." State v. Pixler, 2010 ND 105, ¶ 6, 783 N.W.2d 9. "[W]ithdrawal is not a matter of right." State v. Lium, 2008 ND 232, ¶ 13, 758 N.W.2d

711. "The determination of a manifest injustice is ordinarily within the trial court's discretion." State v. Hobus, 535 N.W.2d 728 (N.D. 1995).

[¶9] In the instant case, the parties appeared at the Preliminary Hearing on April 15, 2019, and submitted a plea agreement which was accepted by the Court. The Defendant moved to withdraw his guilty plea approximately one month after the district court imposed sentence. Therefore, the Defendant must show that withdrawal is necessary to correct a manifest injustice.

[¶10] The Defendant claims that he was not advised of the immigration consequences of his plea by the Court which is a manifest injustice necessitating withdrawal of his guilty plea. Defendant's claims are completely contradictory to the requirements of the Court when accepting a plea. Under North Dakota Rule of Criminal Procedure 11(b)(1)(J) "[t]he Court may not accept a plea of guilty without first [. . .] informing the defendant of and determining that the defendant understands: (J) that, if convicted a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future." "The advice requirement to be given by Rule 11 is mandatory and binding on the court." State v. Farrell, 2000 ND 26, ¶ 9, 606 N.W.2d 524. Rule 11 does not require a "ritualistic, predetermined formality, a trial court must substantially comply with the procedural requirements of the rule to ensure a defendant's guilty plea is voluntary." Id.

[¶11] Under North Dakota Rules of Criminal Procedure 11, "a trial court must inform a defendant of all 'direct consequences' of a plea, but need not advise the defendant of 'collateral consequences.'" State v. Dalman, 520 N.W.2d 860, 863 (N.D. 1994). The North Dakota Supreme Court has held that ". . . the advice requirements in

N.D.R.Crim.P. 11, provide the framework for assessing the direct or collateral consequences of a guilty plea, and we decline to extend a court's obligation to inform a defendant about the immigration consequences of a guilty plea beyond those direct consequences identified in N.D.R.Crim.P. 11." State v. Abdullahi, 2000 ND 39, ¶ 18, 607 N.W.2d 561. The United States Supreme Court has held that "'counsel must advise her client regarding the risk of deportation' resulting from a guilty plea and failure to advise is ineffective assistance of counsel." Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473, 1482 (2010).

[¶12] On March 11, 2019, at the Defendant's initial appearance, Judge McCarthy read all rights to Defendant and specifically read about potential immigration consequences for noncitizens.

> Court: If you are not a U.S. citizen and you plead guilty, or are convicted of a crime, it may have immigration consequences, including but not limited to: deportation, exclusion from admission to the United States, or denial of citizenship.
>
> (Proceedings unrelated to the defendant were held.)
>
> Court: Mr. Awad? Do you have a copy of the Information?
>
> Defendant: Yes, Your Honor.
>
> Court: Do you want me to read that to you? Or are you okay with me summarizing it?
>
> Mr. Escarraman: No, you're good. I'm okay with that Your Honor.
>
> Court: With the summary?
>
> Defendant: Yeah.

Court: It alleges that on November 6 of last year you elec - - or you knowingly voted when you were not qualified to do so. Specifically, that you voted in the November election when you were not a U.S. citizen and thus disqualified to do so. It

charges as a Class C Felony. That carries a maximum of five years in jail, a $10,000 or both. Do you understand what you're charged with, sir?

Defendant: Yes, Your Honor.

(Appellant's Appendix pp. 16-17). The Court then went into addressing the Defendant's bond. The State inquired into the Defendant's ties to the community and the following exchange took place:

Court: I'll turn to you, Mr. Escarraman.

Mr. Escarraman: Yes, Your Honor. We're requesting a PR-bond, Your Honor. He has had no criminal history other than maybe - - I think a speeding ticket. His father's a U.S. citizen. He followed his friend, who had a Texas ID, was denied application for - - or at least the ability to vote. He slipped through the cracks and, unfortunately, was not asked whether he was a U.S. citizen on his way in. And he has a job with Windpower? I believe it is.

(Appellant's Appendix pp. 17-18).

[¶13] The Court advised the Defendant of his rights at the initial appearance and that by pleading guilty to or being convicted of a crime it may have immigration consequences. The Court's advisory is almost identical to the requirements of North Dakota Rules of Criminal Procedure 11(b)(1)(J). Therefore, the Court substantially complied with Rule 11 at the Defendant's initial appearance.

[¶14] At the Defendant's sentencing on April 15, 2019, the Defendant waived the preliminary hearing and a plea agreement was submitted to the Court. The following exchange took place:

Court: Based on your waiver, then, I will bind you over for the arraignment. Do you have any questions about the rights that we went over earlier, sir?

Defendant: No, Your Honor.

Court: Okay. And do you have any questions about what you're charged with?

Defendant: No, Your Honor.

> Court: Okay. Mr. Awad, how, then, do you plead to Election Offense – Not Qualified to Vote, a Class C Felony?
>
> Defendant: Guilty.
>
> Court: And have any threats or promises been made to get you to plead guilty?
>
> Defendant: No.
>
> Court: You're doing so voluntarily?
>
> Defendant: Yeah.
>
> Court: Yes? And you understand that by pleading guilty, you're giving up your rights? That would include your right to trial, and your right to confront and cross-examine any adverse witnesses.
>
> Defendant: Yes, Your Honor.
>
> Court: And do you admit that back on November 6 of last year in Grand Forks County, you voted in an election when you were not a United States citizen and thus not qualified to do so?
>
> Defendant: Yes, Your Honor.

(Appellant's Appendix pp. 23-24).

[¶15] "At a change of plea hearing, a district court is not required to readvise a defendant of each of his rights under North Dakota Rule of Criminal Procedure 11(b), if the court finds the defendant previously was properly advised of those rights and recalls the advice." Peltier v. State, 2015 ND 35, ¶ 17, 859 N.W.2d 381. The district court advised the Defendant that by pleading guilty he was giving up his rights and confirmed that the Defendant understood. (Appellant's Appendix pp. 24-25). The district court substantially complied with Rule 11.

II. Defendant has failed to satisfy both prongs of the Strickland test.

[¶16] Defendant argues that he was never advised of potential immigration consequences by his attorney prior to entering a guilty plea and, therefore, his plea was

not knowingly, intelligently, and voluntarily made. Defendant's argument is essentially one of ineffective assistance of counsel at the time of the preliminary hearing and change of plea.

[¶17] "Ordinarily, a claim of ineffective assistance of counsel should be resolved in a post-conviction proceeding under N.D.C.C. ch. 29-32.1, so the parties can fully develop a record on the issue of counsel's performance and its impact on the defendant's claim." State v. Yost, 914 N.W.2d 508, 519 (N.D. 2018)(citing State v. Bertram, 2006 ND 10, ¶ 39, 708 N.W.2d 913). "When a claim for ineffective assistance of counsel is argued on direct appeal, we review the record to decide if the assistance of counsel was plainly defective." Id. "Representations and assertions of appellate counsel are not enough to establish a claim of ineffective assistance. To successfully claim ineffective assistance of counsel, a defendant must establish counsel's representation fell below an objective standard of reasonableness and the defendant was prejudiced by counsel's deficient performance." Id.

[¶18] Defendant states many allegations in his argument about what advice he received prior to entering a guilty plea, the actions he took after he was sentenced, interactions with Immigration and Customs Enforcement ("ICE"), and conversations with his attorney post-sentence. None of this evidence is in the record as no testimony was ever presented to the district court for consideration. The Defendant requested a hearing on his motion to withdraw guilty plea and was afforded the opportunity to provide the district court with evidence to support his motion. (Appellant's Appendix p. 5). The Defendant did not present any evidence to the district court in support of his motion, to establish his counsel's ineffective assistance, or any subsequent impact the conviction

had on the Defendant. The district court only had defense counsel's representations and assertions that he committed ineffective assistance. It is wholly improper for the Defendant to appeal to this Court and provide new information that was not available for analysis by the district court.

[¶19] Defendant argues that his conviction makes him deportable from the United States under the Immigration and Nationality Act as it is a crime of moral turpitude and could have been determined by a plain reading of the statute. (App. Br. ¶ 7). In cases where a plain reading of the statute indicates a conviction will result in deportation that is presumptively mandatory, the United States Supreme Court found that was a sufficiently alleged constitutional deficiency to satisfy the first prong of Strickland. See Strickland v. Washington, 466 U.S. 668 (1984). The State disagrees that a plain reading of the statutes provided by the Defendant show a conviction for Election offense – Not qualified is a crime of moral turpitude or that deportation is presumptively mandatory. In situations where deportation consequences of a plea are unclear, "a criminal defense attorney need do no more than advice a noncitizen client that pending criminal charge may carry adverse immigration consequences." Padilla v. Kentucky, 559 U.S. 356, 357 (2010). As previously stated, there is no evidence in the record as to defense counsel's actions or advice to the Defendant prior to or after the Defendant plead guilty. Therefore, the Defendant has failed to establish prong one of the Strickland test for ineffective assistance of counsel.

[¶20] The second prong under Strickland is that there "must be a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Strickland, 466 U.S. 668 at 694. "[A] defendant must

demonstrate both deficient representation by counsel *and* prejudice caused by the deficient representation." Woehlhoff v. State, 487 N.W.2d 16, 17 (N.D. 1992).

[¶21] "All courts 'require something more than defendant's 'subjective, self-serving' statement that, with competent advice, he would' not have pled guilty and would have insisted on going to trial." Bahtiraj v. State, 2013 ND at ¶ 16 (quoting 3 Wayne LaFave et al., *Criminal Procedure* § 11.10(d)(3rd ed.2007)). "The petitioner 'must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.'" Id. (quoting Padilla, 559 U.S. at 372). "The movant must allege facts that, if proven, would support a conclusion that the decision to reject the plea bargain and go to trial would have been rational, e.g., valid defenses, a pending suppression motion that could undermine the prosecution's case, or the realistic potential for a lower sentence." Id. (quoting Stiger v. Commonwealth, 381 S.W.2d 230, 237 (Ky. 2012)). Factors to be considered in whether a defendant would have insisted on going to trial include:

> (a) whether the defendant pleaded guilty in spite of knowing that the advice on which he claims to have relied might be incorrect, (b) whether pleading guilty gained him a benefit in the form of more lenient sentencing, (c) whether the defendant advanced any basis for doubting the strength of the government's case against him, and (d) whether the government would have been free to prosecute the defendant on counts in addition to those on which he pleaded guilty.

Chhabra v. United States, 720 F.3d 395, 408 (2nd Cir. 2013).

[¶22] The plea agreement called for a one year deferred imposition of sentence, twenty hours of community service, and one year of unsupervised probation on a Class C Felony charge. The Defendant never asserted any valid defenses at any stage of the proceedings. No motion to suppress or dismiss was filed by the Defendant. No argument

has been made that there is a realistic potential for a lower sentence. The district court properly analyzed that the sentence was not unreasonably harsh or shocking to the conscious but in fact, the Defendant received a very generous sentence considering the maximum possible penalty that could be imposed on a C Felony charge. (App. p. 11). Neither the Defendant nor defense counsel raised any doubt as to the strength of the State's case. At sentencing, the Defendant admitted to the factual basis for the charge and pled guilty. (App. p. 25).

[¶23] The Defendant has failed to satisfy the second prong of the Strickland test as he cannot show prejudice. Pleading guilty pursuant to the plea agreement gained him a benefit of a one year deferred imposition of sentence on a Class C Felony. The Defendant did not advance any basis to doubt the strength of the State's case. The Defendant has failed to establish that but for counsel's ineffective advice he would have taken this case to trial and obtained a different or more favorable outcome than the plea agreement he voluntarily entered into with the State. This case is very similar to Bahtiraj where this Court held the defendant's testimony that he would have gone to trial if his attorney had correctly advised him that pleading guilty with a sentence of one year or more would result in mandatory deportation. Bahtiraj, 2013 ND at ¶ 19. This Court went on to state that "[t]his statement is not enough to establish prejudice." Id. "Bahtiraj's rejection of the guilty plea under these circumstances would not have been rational." Id. Similarly, the Defendant's rejection of a one year deferred imposition of sentence on a C Felony charge when no argument disputing the strength of the State's case was put forth would not have been rational.

CONCLUSION

[¶24] Based on the foregoing law and conclusion, the State respectfully requests that this Court deny the Defendant's appeal as the district court complied with Rule 11 of the North Dakota Rules of Criminal Procedure, the Defendant failed to establish both prongs of the Strickland test, and the district court did not err in denying Defendant's Motion to Withdraw Guilty Plea.

[¶25] Respectfully submitted this 17th day of January, 2020.

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Mohamed Jama Awad,	)	
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CERTIFICATE OF COMPLIANCE

[¶1] The State of North Dakota, by and through Assistant State's Attorney Sarah Gereszek hereby certifies that the attached brief complies with the page limitation as set forth in Rule 32 of the North Dakota Rules of Appellate Procedure. The electronically filed brief contains 16 number of pages.

Dated this 17th day of January, 2020.

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COUNTY OF GRAND FORKS)

The undersigned, being of legal age, being first duly sworn deposes and says that on the 17 day of January, 2020, she served true copies of the following documents:

Brief of Appellee
Certificate of Compliance

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Subscribed and sworn to before me this 17 day of January, 2020.

MICHELLE L JENSON
Notary Public
State of North Dakota
My Commission Expires Jan. 31, 2023

Notary Public

bjd

MICHELLE L JENSON
Notary Public
State of North Dakota
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