

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff-Appellee,)	
)	
vs.)	Supreme Ct. No. 20190116
)	Dist. Ct. No. 09-08-K-04901
George Ludoru Job,)	
)	
Defendant-Appellant.)	

APPELLEE’S BRIEF

Appeal from Order Denying Defendant’s Motion to Withdraw Guilty Plea
Entered April 2, 2019
East Central Judicial District in Cas County, North Dakota
the Honorable Steven E. McCullough, Presiding

Reid A. Brady, NDID #05696
Assistant State’s Attorney
Cass County Courthouse
211 Ninth Street South
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850
sa-defense-notices@casscountynd.gov
Attorney for Plaintiff-Appellee

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[¶2] **TABLE OF AUTHORITIES**

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[¶3] **STATEMENT OF ISSUE**

[¶4] Whether the district court acted within its discretion in denying the Defendant’s motion to withdraw his 2008 guilty plea because the immigration advisory principles established by Padilla in 2010 are not retroactive and his original sentence – not his probation revocation resentence – first caused him to be deportable.

[¶5] **STATEMENT OF CASE**

[¶6] The Defendant appeals from an order denying his motion to withdraw his 2008 guilty plea to aggravated assault. He contends that the district court, when assessing his ineffective assistance of counsel claim, should have applied Padilla’s primary principle – namely, that a defense attorney must advise a criminal defendant of any clear, adverse immigration consequences of a guilty plea. (Appellant’s Brief, “App. Br.”, 19, referencing Padilla v. Kentucky, 559 U.S. 356 (2010).) While acknowledging Padilla has been held not retroactive, the Defendant contends that his 2010 probation revocation resentence should trigger application of Padilla.

[¶7] The State argues that Padilla does not apply retroactively. Because the Defendant entered his guilty plea in 2008, and Padilla was decided in 2010, it is inapplicable. The State also asserts the Defendant’s initial sentence – not the probation revocation resentence – first caused the Defendant to be deportable. Thus, any alleged failure to advise at the revocation phase is irrelevant because it could not be prejudicial. The State asks this Court to affirm the denial of the Defendant’s

motion to withdraw his guilty plea.

[¶8] STATEMENT OF FACTS

A. [¶9] Defendant's Guilty Plea in 2008

[¶10] In late 2008, the Defendant appeared with his attorney in adult court on a transferred charge of aggravated assault, a class C felony. (Appendix, "App.", 5.) The Defendant received an advisory at the beginning of the hearing. The advisory covered the basic rights and immigration-specific admonitions – including that if he was not a U.S. citizen and pled guilty, he could be deported; that he had the right to speak with the consulate of his country of origin; and that he should consult with an attorney that understands immigration law before entering a guilty plea, if he had concerns. (Tr. of First Appearance and Sentencing, Dec. 23, 2008, "Tr. Plea", 6:4-10.) The court confirmed that the Defendant had opportunity to consult with his attorney and knew what was happening. (Tr. Plea 8:14-18.)

[¶11] The Defendant entered a guilty plea to the aggravated assault charge. (Tr. Plea 9:3-6.) The Defendant indicated he understood that by pleading guilty he would be waiving all his rights and that no one had threatened or coerced him. (Tr. Plea 9:7-13.) Based on the parties' agreement, the court imposed a sentence including "imprisonment ... for a period of one (1) year" with all the time suspended and five years of supervised probation. (Tr. Plea 10:2-7; App. 11.)

B. [¶12] Probation Revocation in 2010

[¶13] In the fall of 2010, a petition to revoke the Defendant's probation was

filed. (App. 2.) The Defendant obtained a court-appointed attorney. (App. 2.) Two months later, a probation revocation hearing occurred. (Tr. of Revocation Hearing, Nov. 22, 2010, “Tr. Revo.”, 1.) At the hearing, the Defendant acknowledged that if he admitted to probation violations, he could face adverse immigration consequences, including deportation. (Tr. Revo. 4:12-25.) When asked whether he was satisfied with the discussions he had with his attorney about the potential immigration consequences, the Defendant confirmed that he was. (Tr. Revo. 5:3-6.) The Defendant then admitted to committing ten probation violations. (Tr. Revo. 5:8-7:9.)

[¶14] For resentencing, the State recommended eighteen months imprisonment. (Tr. Revo. 7:20-22.) The Defendant’s attorney alluded to the immigration issue and recommended a sentence of 360 days imprisonment. (Tr. Revo. 8:11-9:2.) The court imposed a sentence of eighteen months imprisonment. (Tr. Revo. 9:10-14.)

C. [¶15] Defendant’s 2018 Motion to Withdraw his 2008 Guilty Plea

[¶16] Nearly eight years after the revocation sentence was imposed, the Defendant filed a motion to withdraw his 2008 guilty plea. (App. 3, 22.) In his motion, the Defendant argued that his attorney “did not advised [sic] Mr. Job of the immigration consequences of the plea if he subsequently was to violate his probation after his plea was entered.” (App. 22.) The Defendant based his motion on Padilla. (App. 22.)

[¶17] A hearing on the Defendant's motion took place earlier this year. (Tr. of Motion to Withdraw Guilty Plea, "Tr. Mot.", 1.) The Defendant testified that he had applied for an adjustment to his immigration status and it was originally granted, but it was later reversed on appeal. (Tr. Mot. 7:21-8:5.) The Defendant tried to distinguish his 2008 guilty plea to aggravated assault from other guilty pleas he had entered. For instance, the Defendant indicated there were "other felonies" on his record, including a 2016 controlled substance offense for which he was told "if you plead today...you can get deported for it." (Tr. Mot. 10:16-19.) But with the aggravated assault offense, he did not "recall" an explanation about deportation. (Tr. Mot. 10:21-22.)

[¶18] The Defendant also testified about the facts underlying his aggravated assault conviction. (Tr. Mot. 13:14-18:1.) The Defendant claimed that he had been attacked while sitting in a vehicle, and in self-defense had stabbed two persons. (Tr. Mot. 14:6-16:20.) The Defendant admitted that he had initially told police officers that nothing had happened. (Tr. Mot. 17:14-24.) The Defendant also admitted that he had later told a detective that he had stabbed a man in the back after the man had turned and tried to run away. (Tr. Mot. 11:14.) The Defendant testified that he did not recall the portion of the advisory indicating that if he was not a citizen, he could be deported. (Tr. Mot. 21:18-22.) The Defendant conceded that he had two convictions for giving false information to law enforcement. (Tr. Mot. 24:11-13.)

[¶19] The court recognized that Padilla did not apply to the Defendant's 2008

guilty plea and concluded it also did not apply to the Defendant's 2010 revocation hearing. (Tr. Mot. 46:2-18.) The court alluded to the probation revocation hearing discussions, including the Defendant being advised of the deportation possibility and acknowledging that he had sufficient information about immigration consequences. (Tr. Mot. 47:1-7.) Finally, the court noted the absence of any other manifest injustice; the record did not show an inability to understand the proceedings or the existence of withheld or newly discovered evidence. (Tr. Mot. 47:21-48:10.) The court issued an order denying the Defendant's motion to withdraw his 2008 guilty plea. The Defendant appealed.

[¶20] **STANDARD OF REVIEW**

[¶21] The abuse of discretion standard applies to review of a district court's denial of a motion to withdraw a guilty plea. State v. Peterson, 2019 ND 140, ¶ 6, 927 N.W.2d 74. A district court abuses its discretion when it acts arbitrarily, unreasonably, or capriciously, or misinterprets or misapplies the law. Id.

[¶22] **LAW AND ARGUMENT**

[¶23] I. **The district court acted within its discretion in denying the Defendant's motion to withdraw his 2008 guilty plea because the immigration advisory principles established by Padilla in 2010 are not retroactive and his original sentence – not his probation revocation resentence – caused him to be deportable.**

[¶24] The Defendant's sole argument is that the district court should have applied Padilla's principles when considering his motion to withdraw his guilty plea.

[¶25] A. **Padilla's immigration advisory principles are not retroactive.**

[¶26] In the spring of 2010, the United States Supreme Court issued its decision in Padilla. The decision related to a criminal defense attorney's duty to advise a noncitizen client about adverse immigration consequences. Padilla v. Kentucky, 559 U.S. 356 (2010). In particular, the Court explained that when the deportation consequence of a criminal charge is clear, the attorney must give equally clear and correct advice, but when the law is not clear, the attorney need only advise that a conviction may carry a risk of adverse immigration consequences. Id. at 369.

[¶27] Padilla's principles have been recognized as not retroactive. Chaidez v. United States, 568 U.S. 342, 358 (2013); Giwa v. State, 2017 ND 250, ¶¶ 9-10, 902 N.W.2d 734. The United States Supreme Court reasoned that defendants whose convictions became final before Padilla "cannot benefit from its holding." Chaidez, at 358. This Court has acknowledged that Padilla is not to be retroactively applied: "The United States Supreme Court has also held that its rule requiring notification to clients about deportation consequences in Padilla does not apply retroactively." Giwa at ¶¶ 9-10 (citing Chaidez v. United States, 568 U.S. 342, 358 (2013) and declining to retroactively apply a criminal procedural rule that was amended to require an immigration consequence colloquy before a guilty plea). The Defendant himself acknowledges that Padilla is not retroactive. (App. Br. 19, 25.)

[¶28] The district court thus correctly concluded that Padilla does not apply retroactively. Further, Padilla does not apply to the Defendant's guilty plea because

his plea occurred in 2008, and Padilla was decided in 2010.

[¶29] B. Padilla's principles cannot apply to the Defendant's 2010 probation revocation resentencing because the Defendant's original sentence of one-year imprisonment in 2008 caused him to be deportable.

[¶30] Attempting to avoid the correct conclusion that Padilla is not retroactive, the Defendant turns to his 2010 probation revocation resentencing. The Defendant asserts, "it is here, in the probation revocation hearing where the mandatory deportation sentence is triggered." (App. Br. 19.) The Defendant's assertion is incorrect.

[¶31] The Defendant fails to recognize that his original sentence in 2008 caused him to be deportable for committing an aggravated felony. The only immigration provision that the Defendant relies upon is 8 U.S.C. § 1101(a)(43)(F). Under that provision, a noncitizen is deportable for committing the following aggravated felony: "a crime of violence ... for which the term of imprisonment [is] at least one year["] 8 U.S.C. § 1101(a)(43)(F) (emphasis added). The Defendant's original sentence included imprisonment of one year. (App. 11.) Thus, the aggravated felony standard was met; "one year" qualifies as at "at least one year." See 8 U.S.C. § 1101(a)(43)(F); see generally I.N.S. v. St. Cyr, 533 U.S. 289, 296 (2001) ("In addition, the term includes any "crime of violence" resulting in a prison sentence of at least one year (as opposed to five years pre-IIRIRA["]); Mondragon v. Holder, 706 F.3d 535, 547 (4th Cir. 2013) (noting that Congress "reduc[ed] the sentence term from five years to one year in the definition of 'aggravated felony'")

(emphasis added).

[¶32] The Defendant misinterprets the minimum imprisonment threshold triggering deportability under the aggravated felony provision. Specifically, he incorrectly replaces the provision “at least one year” in 8 U.S.C. § 1101(a)(43)(F) with “more than one year.” (App. Br. 18.) The Defendant describes the original sentence as including imprisonment of “that magical year or less, [which] made this a non-deportable plea agreement.” (App. Br. 18) (emphasis added.) The Defendant’s requested relief is consistent with his misinterpretation. (App. Br. 28) He asks this Court to “vacate the district court’s probation revocation” and remand with an instruction that the originally suspended imprisonment is the maximum potential revocation resentence.” (App. Br. 28) The originally suspended imprisonment was one year – which qualifies as an aggravated felony.

[¶33] In sum, the Defendant was deportable ever since his original sentence in 2008. Any alleged failure to advise of his deportability at the probation revocation phase is irrelevant; he was already convicted of an aggravated felony and could not have avoided his deportable status.

[¶34] CONCLUSION

[¶35] The district court correctly concluded that Padilla is not applicable and acted within its discretion in denying the Defendant's motion to withdraw his guilty plea. The State requests this Court affirm the district court's decision.

[¶36] Respectfully submitted this 22nd day of August 2019.

Reid A. Brady, NDID #05696
Assistant State's Attorney
Cass County Courthouse
211 Ninth Street South
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850
Attorney for Plaintiff-Appellee
sa-defense-notices@casscountynd.gov

[¶37] CERTIFICATE OF COMPLIANCE

[¶38] This brief complies with the page limit set forth in North Dakota Rules of Appellate Procedure 32(a)(8)(A) and is 12 pages in length.

Reid A. Brady

[¶39] CERTIFICATE OF SERVICE

[¶40] A true and correct copy of the foregoing document was sent by email on the 22nd day of August to Samuel Gereszek at sam@brudviklaw.com.

Reid A. Brady