

NOT DESIGNATED FOR PUBLICATION

No. 119,772

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

FRANCISCO ESCAMILLA-FRANCO,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; STEPHEN J. TERNES, judge. Opinion filed August 16, 2019.
Reversed and remanded with directions.

Caroline M. Zuschek, of Kansas Appellate Defender Office, for appellant.

Boyd K. Isherwood, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before GREEN, P.J., STANDRIDGE, J., and MCANANY, S.J.

PER CURIAM: Francisco Escamilla-Franco, a citizen of Mexico who was legally residing in the United States, appeals the denial of his motion to withdraw his guilty plea to possession of cocaine. His motion was based on the assertion that his attorney incorrectly advised him that he did not need to worry about the immigration consequences of pleading guilty. We conclude that the attorney's advice that led to Escamilla-Franco's plea was inadequate under *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), and that had Escamilla-Franco been properly advised, he would have chosen to take his chances by proceeding to trial. Accordingly, we reverse and remand for further proceedings.

Procedural History

On December 10, 2015, Escamilla-Franco was originally charged with possession of cocaine; possession of drug paraphernalia; driving with a cancelled, suspended, or revoked license; transporting an open container of alcohol; and failing to signal his intention to turn.

Escamilla-Franco's first appearance was held on January 4, 2016.

Escamilla-Franco was age 45, had a sixth grade education, and did not speak English. His court-appointed attorney negotiated a plea agreement with the State under which Escamilla-Franco agreed to plead guilty to possession of cocaine and the State agreed to dismiss the remaining charges, to recommend the low grid box sentence, and to recommend probation so Escamilla-Franco could get drug treatment. The plea agreement was read to Escamilla-Franco by an interpreter before he signed it. Paragraph 9 of the Defendant's Acknowledgment of Rights and Entry of Plea form, which Escamilla-Franco also signed, cautioned: "If I am not a United States citizen, I understand that a conviction of a felony offense most likely will result in my deportation from the United States."

On February 3, 2016, Escamilla-Franco waived a preliminary hearing and entered his plea in accordance with the agreement. The court accepted his plea, found him guilty of possession of cocaine, and set the matter for sentencing.

In March 2016, the court held the sentencing hearing and sentenced Escamilla-Franco to 28 months in prison but granted 12 months of probation and ordered 18 months of drug treatment.

In June 2016, the State moved to revoke Escamilla-Franco's probation when he tested positive for methamphetamine. He also failed to report and failed to make fee payments. The court imposed a 3-day quick dip, changed his probation to supervision by Community Corrections, and extended it for 12 months.

At some point thereafter Escamilla-Franco was arrested by Immigration and Customs Enforcement (ICE) and deportation proceedings were initiated based on Escamilla-Franco's drug conviction in this case.

In January 2017, Escamilla-Franco moved to withdraw his plea, alleging that he did not understand the deportation consequences of his plea and that he was not provided with all the discovery before entering his plea. The court set the matter for a hearing and appointed new counsel for Escamilla-Franco.

In February 2017, at the hearing that followed, Escamilla-Franco was the sole witness. The State did not introduce any evidence. Escamilla-Franco testified through an interpreter that he had been in the United States on a green card for about 15 years. (The records indicated he had been a United States resident at least since 1997.) He met with his original attorney twice, the second time being on the day of his plea hearing. Before he entered his plea his attorney had asked if he had his papers. He told him that he had a green card. Escamilla-Franco testified that his counsel responded that ICE was deporting a lot of people at the time "but if I had my documents, then I would be fine." He testified that his lawyer did not tell him before his plea hearing that if he pled guilty to possession of cocaine he would be subject to removal proceedings. Had he known this he would not have entered his guilty plea. "[H]e was telling me that they wanted to send me to prison, but if I would have known that I would have this problem with immigration, I would not have [pled] guilty." The ICE document received into evidence indicated that Escamilla-Franco was being deported because of his controlled substance violation in this case.

In its ruling from the bench, the district court acknowledged that it was uncontested that the deportation consequences of Escamilla-Franco's plea were not explained to him and stated that the court would "assume for the sake of this hearing that that statement is true." The court focused on paragraph 9 of the acknowledgment of rights and entry of plea, which Escamilla-Franco signed and which cautioned him about the risk of being deported. The court stated that it "has a difficult time concluding that he did not understand the immigration consequences as he has stated." The court did not address or make any findings regarding Escamilla-Franco's testimony that he would not have entered into the plea agreement had he understood the likelihood of being deported. The court found that Escamilla-Franco had failed to demonstrate manifest injustice and denied the motion. This appeal followed.

Analysis

Escamilla-Franco's sole issue on appeal is that the district court erred in not finding manifest injustice that warranted the withdrawal of his guilty plea to the State's drug charge. He contends that he would not have pleaded guilty and instead would have gone to trial if his attorney had properly advised him of the immigration consequences of his guilty plea.

We review the district court's denial of Escamilla-Franco's post-sentencing motion to withdraw his plea for any abuse of discretion. See *State v. Morris*, 298 Kan. 1091, 1100, 319 P.3d 539 (2014). A court abuses its discretion if the decision is based on an error of fact or law or if no reasonable person would have agreed with the court's decision. *State v. Marshall*, 303 Kan. 438, 445, 362 P.3d 587 (2015).

Because Escamilla-Franco seeks relief after his sentence had already been imposed, he was required to show that allowing him to withdraw his plea was necessary to avoid manifest injustice. K.S.A. 2018 Supp. 22-3210(d)(2). To find manifest injustice,

Kansas courts review these nonexclusive factors: "(1) whether the defendant was represented by competent counsel; (2) whether the defendant was misled, coerced, mistreated, or unfairly taken advantage of; and (3) whether the plea was fairly and understandingly made. [Citations omitted.]" *Morris*, 298 Kan. at 1100-01. Escamilla-Franco argues he was not represented by competent counsel because his court appointed attorney did not inform him of probable deportation consequences of a guilty plea.

In considering Escamilla-Franco's claim we apply the constitutional standards set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); and *State v. Bricker*, 292 Kan. 239, 245-46, 252 P.3d 118 (2011); i.e., he must show, by a preponderance of the evidence, that (1) trial counsel's performance fell below the objective standard of reasonableness and (2) there is a reasonable probability that, but for trial counsel's errors, the result of the proceeding would have been different.

To satisfy the first *Strickland* standard, Escamilla-Franco relies on *Padilla* for support. The Court in *Padilla* noted that prevailing norms require counsel to inform clients about the risk of deportation. 559 U.S. at 367. There, Padilla was facing mandatory deportation. Although Padilla's counsel knew Padilla was not a citizen of the United States, he still advised Padilla that he would not need to worry about deportation. Under those circumstances, the Court found that Padilla's counsel was constitutionally ineffective. 559 U.S. at 359-60. The Court explained that "[t]he consequences of Padilla's plea could easily be determined from reading the removal statute" and since "the deportation consequence is truly clear . . . the duty to give correct advice is equally clear." 559 U.S. at 369.

The facts here are similar to those in *Padilla*. Like Padilla, Escamilla-Franco was a lawful resident who had lived in the United States for many years. Both Padilla's attorney and Escamilla-Franco's attorney knew their respective clients were not citizens. Both Padilla and Escamilla-Franco faced mandatory deportation because of their crimes. See

8 U.S.C. § 1227(a)(2)(B)(i) (2012) ("Any alien who at any time after admission has been convicted of a violation of [or a conspiracy or attempt to violate] any law or regulation of a State, the United States or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable."). And like Padilla's attorney, Escamilla-Franco's attorney incorrectly told him that he did not need to worry about deportation.

It was uncontested at Escamilla-Franco's hearing that notwithstanding the cautionary language of paragraph 9 of the acknowledgment of rights and entry of plea, which Escamilla-Franco signed, his counsel essentially told him that he could disregard this warning because he had his green card. He told him that although ICE was deporting a lot of people at the time, because he had his documents, he "would be fine."

This testimony satisfies the first *Strickland* standard by showing that Escamilla-Franco's counsel was constitutionally ineffective in his advice to Escamilla-Franco about his prospects of being deported. See *Padilla*, 559 U.S. at 360.

With regard to the second *Strickland* standard—that there is a reasonable probability that, but for trial counsel's errors, the result of the proceeding would have been different—Escamilla Franco probably would not have pled guilty to a drug crime and would have insisted on going to trial had his attorney provided proper advice about the consequences of his plea. See *Bricker*, 292 Kan. 239, Syl. ¶ 5.

Had Escamilla-Franco rejected the plea deal and gone to trial, he would have faced a maximum prison sentence of 32 months on the original charges. Of course, he could have faced deportation at the end of his prison sentence if convicted. By accepting the plea deal after being advised by his attorney, Escamilla-Franco avoided the prospect of an immediate prison sentence (see K.S.A. 2018 Supp. 21-6805[a]), but faced the strong

probability that he would immediately be deported from the United States where he had lived and worked from at least 1997.

Reading between the lines, it appears from the complaint that Escamilla-Franco's charges arose out of a traffic stop. The record is silent regarding the merits of the State's underlying case or on the likelihood of Escamilla-Franco being convicted of the original charges. The State does not address this second *Strickland* standard on appeal and did not do so before the district court. But we note that Escamilla-Franco entered into the plea agreement and entered his plea only one month after his first appearance on January 4, 2016.

Given the alternatives of almost certain deportation if he pled guilty and the possibility of avoiding deportation by rolling the dice and going to trial, we conclude that Escamilla-Franco satisfied the second *Strickland* standard by convincing us that there was a reasonable probability that, but for trial counsel's errors, he would have rejected the plea deal and taken his chances at trial.

Reversed and remanded for further proceedings.