COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP81 **Cir. Ct. No. 2010CF139**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

OSCAR SANTIAGO-VALDEZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: THOMAS J. WALSH, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Oscar Santiago-Valdez appeals an order denying his postconviction motion for plea withdrawal. He argues the circuit court did not adequately advise him of the immigration consequences of his guilty plea, as

required by WIS. STAT. § 971.08(1)(c),[1] because it did not recite the statutory language verbatim. He also argues his trial attorney was ineffective by failing to inform him deportation was a certain consequence of his plea.

¶2 We conclude the circuit court was not required to read the deportation warning set forth in WIS. STAT. § 971.08(1)(c) verbatim, and the warning the court gave Santiago-Valdez substantially complied with the statute. We also conclude Santiago-Valdez has not met his burden of proving ineffective assistance. We therefore affirm.

BACKGROUND

¶3 Santiago-Valdez's parents brought him into the United States illegally from Mexico when he was a child.[2] On August 4, 2010, Santiago-Valdez pled guilty to one count of delivering cocaine (more than five grams, but not more than fifteen grams), contrary to WIS. STAT. § 961.41(1)(cm)2.[3] The circuit court withheld sentence and ordered three years' probation with 177 days' conditional jail time, which amounted to time served. Santiago-Valdez was subsequently transferred to the custody of United States Immigration and Customs Enforcement and was deported to Mexico.

---

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] Although Santiago-Valdez's statement of facts does not contain any record citations, we rely on some of the background facts outlined in his brief because they are not critical to our analysis and the State does not dispute them. We do, however, remind Santiago-Valdez's attorney that WIS. STAT. RULE 809.19(1)(d) requires an appellant's brief to contain "a statement of facts relevant to the issues presented for review, with appropriate references to the record."

[3] The Honorable Mark Warpinski presided over the combined plea and sentencing hearing.

¶4 On August 10, 2012, Santiago-Valdez filed a postconviction motion seeking plea withdrawal. He contended his trial attorney, Ernesto Chavez, was ineffective by failing to inform him that deportation was a certain consequence of his guilty plea. At the postconviction hearing, Santiago-Valdez raised an additional argument for plea withdrawal, contending the circuit court did not adequately warn him of the immigration consequences of his plea because it failed to recite the deportation warning in WIS. STAT. § 971.08(1)(c) verbatim.[4]

¶5 It is undisputed that Chavez was unavailable to testify at the postconviction hearing. Postconviction counsel informed the court that Chavez's Wisconsin law license had been suspended, and attempts to serve him at his last-known Wisconsin address, as well as an address in Olympia, Washington, had failed. As a result, the only witnesses to testify at the hearing were Santiago-Valdez[5] and his mother. Santiago-Valdez testified Chavez never explained the immigration consequences of pleading guilty. He further testified that, had he known his conviction would lead to deportation, he would have insisted on going to trial.

¶6 The circuit court denied Santiago-Valdez's postconviction motion. The court concluded the deportation warning Santiago-Valdez received during the plea hearing was sufficient, even though it deviated slightly from the language set

[4] Santiago-Valdez also argued his plea was not voluntary because Chavez threatened to withdraw if Santiago-Valdez refused the State's plea offer. However, he does not raise this argument on appeal, and we therefore deem it abandoned. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

[5] After he was deported, Santiago-Valdez apparently reentered the United States illegally. The record reflects that, as of the postconviction hearing, he was in custody facing a federal prosecution for illegal reentry.

forth in WIS. STAT. § 971.08(1)(c). The court also concluded Santiago-Valdez had failed to establish ineffective assistance because he failed to prove Chavez did not advise him deportation was a certain consequence of his plea. Santiago-Valdez now appeals.

DISCUSSION

¶7 To withdraw a guilty or no contest plea after sentencing, a defendant must prove "by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice." ***State v. James***, 176 Wis. 2d 230, 236-37, 500 N.W.2d 345 (Ct. App. 1993). A court's failure to provide the deportation warning required by WIS. STAT. § 971.08(1)(c) may constitute a manifest injustice entitling the defendant to plea withdrawal. *See* WIS. STAT. § 971.08(2); ***State v. Negrete***, 2012 WI 92, ¶31 n.9, 343 Wis. 2d 1, 819 N.W.2d 749. Ineffective assistance of counsel can also satisfy the manifest injustice test. ***State v. Berggren***, 2009 WI App 82, ¶10, 320 Wis. 2d 209, 769 N.W.2d 110.

I. Deportation warning required by WIS. STAT. § 971.08(1)(c)

¶8 Santiago-Valdez first argues the circuit court failed to properly advise him of the immigration consequences of his plea, as required by WIS. STAT. § 971.08(1)(c). A court must vacate a defendant's judgment of conviction and allow the defendant to withdraw his or her plea if the defendant establishes that: (1) the court failed to provide the deportation warning required by § 971.08(1)(c); and (2) the plea is likely to result in the defendant's deportation. WIS. STAT. § 971.08(2). Here, it is undisputed that Santiago-Valdez's plea resulted in his

deportation. The disputed issue is whether the deportation warning the circuit court gave him during the plea hearing complied with § 971.08(1)(c).[6]

¶9 Whether the circuit court complied with WIS. STAT. § 971.08(1)(c) is a question of law that we review independently. ***State v. Vang***, 2010 WI App 118, ¶5, 328 Wis. 2d 251, 789 N.W.2d 115. Our inquiry "'begins with the language of the statute.'" *See* ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (quoted source omitted). We give statutory language "its common, ordinary, and accepted meaning[.]" ***Id.*** Because context is important to meaning, we interpret statutory language "in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *See* ***id.***, ¶46.

¶10 WISCONSIN STAT. § 971.08(1)(c) provides that, before accepting a guilty or no contest plea, a court must:

> Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

At the plea hearing in this case, after ascertaining that Santiago-Valdez wished to plead guilty, the circuit court stated:

---

[6] Santiago-Valdez was warned his plea could result in deportation on two other occasions prior to the plea hearing. The circuit court advised Santiago-Valdez of the immigration consequences of his plea at a final pretrial conference on April 26, 2010, and the plea questionnaire/waiver of rights form Santiago-Valdez completed also advised him his plea could result in deportation. The State concedes these warnings were insufficient to satisfy WIS. STAT. § 971.08(1)(c) because the statute "requires circuit courts to give the deportation advisement at the plea hearing." ***State v. Vang***, 2010 WI App 118, ¶7, 328 Wis. 2d 251, 789 N.W.2d 115.

> You understand that if you are not a citizen and if I accept that plea, that such a plea could result in deportation, the exclusion from admission to this country or the denial of naturalization under federal law?

Santiago-Valdez responded in the affirmative.

¶11 Santiago-Valdez contends this deportation warning was inadequate because the court did not recite the text of WIS. STAT. § 971.08(1)(c) verbatim. However, we recently held that, although the statutory language is "strongly preferred[,]" a court's failure to use the exact language set forth in § 971.08(1)(c) does not entitle a defendant to plea withdrawal, as long as the court "substantially complied" with the statutory mandate. *See* ***State v. Mursal***, No. 2012AP2775, unpublished slip op. ¶¶15-17, 20 (WI App Sept. 24, 2013) (publication decision pending). In ***Mursal***, the substance of the circuit court's deportation warning "fully complied" with § 971.08(1)(c), but the court deviated slightly from the statutory language in four respects.[7] *See* ***Mursal***, unpublished slip op. ¶¶13-15. We concluded the deviations were so slight they did not "alter the meaning of the warning in any way[,]" and we therefore held the defendant was not entitled to withdraw his plea. ***Id.***, ¶¶16, 20. We declined to fashion a rule whereby "*even mistaking one word* in the statute, no matter how inconsequential … would create a defect which would require the court to withdraw the plea." ***Id.***, ¶19.

¶12 Thus, to obtain plea withdrawal, Santiago-Valdez must do more than show that the circuit court failed to recite the deportation warning in WIS. STAT. § 971.08(1)(c) verbatim. He must show that the court's deviations from the statute

[7] The court advised the defendant, "You … need to know if you're not a citizen of the United States, your plea can result in deportation, exclusion from admission to this country or denial of naturalization under federal law." ***State v. Mursal***, No. 2012AP2775, unpublished slip op. ¶13 (WI App Sept. 24, 2013) (publication decision pending).

altered the meaning of the warning, such that the warning the court gave did not substantially comply with the statutory mandate. *See* ***Mursal***, unpublished slip op. ¶20. Santiago-Valdez's brief-in-chief does not specify how any differences between the statutory language and the language the circuit court used altered the meaning of the deportation warning. For the first time in his reply brief, Santiago-Valdez argues the court's warning was deficient because the court omitted the words "of the United States of America" from the phrase "[i]f you are not a citizen of the United States of America." He contends this omission was significant because he "is a citizen of Mexico, but not of the United States." He asserts, "The omission of these operative terms certainly can cause confusion to a [d]efendant with limited understanding of court proceedings … who is being aided by an interpreter."

¶13 We reject Santiago-Valdez's argument for three reasons. First, while Santiago-Valdez argued in the circuit court that the court erred by failing to recite the language of WIS. STAT. § 971.08(1)(c) verbatim, he never argued the court's omission of the words "of the United States of America" altered the meaning of the deportation warning. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (arguments raised for first time on appeal generally deemed forfeited). Second, on appeal, Santiago-Valdez raised this argument for the first time in his reply brief. *See* ***State v. Mata***, 230 Wis. 2d 567, 576 n.4, 602 N.W.2d 158 (Ct. App. 1999) ("We do not address issues raised for the first time in a reply brief."). Third, in context, it is clear that when the circuit court used the term "citizen," it meant a citizen of the United States. The court advised Santiago-Valdez, "[I]f you are not a citizen … such a plea could result in deportation, the exclusion from admission to *this country* or the denial of naturalization under federal law[.]" (Emphasis added.) "[T]his country" clearly refers to the United

States, the country where the plea hearing took place. It would make no sense for the court to inform Santiago-Valdez that his plea could result in exclusion from admission to the United States if he were not a citizen of some other country. Thus, in context, the only reasonable interpretation of the term "citizen" was that it referred to a citizen of the United States.

¶14 The deportation warning the circuit court gave Santiago-Valdez substantially complied with WIS. STAT. § 971.08(1)(c). His first argument for plea withdrawal therefore fails.

II. Ineffective assistance

¶15 Santiago-Valdez next contends he is entitled to withdraw his guilty plea because Chavez was ineffective. To establish ineffective assistance of counsel, a defendant must prove both that counsel performed deficiently and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If the defendant fails to make a sufficient showing on one prong of this analysis, we need not address the other. ***Id.*** When reviewing an ineffective assistance claim, we accept the circuit court's findings of historical fact unless clearly erroneous, but we independently review whether counsel's performance was deficient and prejudicial. ***State v. Johnson***, 153 Wis. 2d 121, 127-28, 449 N.W.2d 845 (1990).

¶16 To prove deficient performance, a defendant must highlight specific acts or omissions that are "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. Santiago-Valdez argues Chavez performed deficiently by failing to inform him that he was certain to be deported if he pled guilty. He asserts this warning was required under ***Padilla v. Kentucky***, 559 U.S. 356 (2010).

¶17 The problem with Santiago-Valdez's argument is that he has not established Chavez failed to advise him deportation was a certain consequence of his guilty plea.[8] Typically, a defendant cannot succeed on an ineffective assistance claim without producing trial counsel to testify at the postconviction hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979); *see also* ***State v. Curtis***, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998). There is an exception to this requirement where, as here, trial counsel is unavailable to testify. *See, e.g.*, ***State v. Lukasik***, 115 Wis. 2d 134, 140, 340 N.W.2d 62 (Ct. App. 1983). However, if counsel is unavailable, "the defendant should not, by uncorroborated allegations, be allowed to make a case for ineffectiveness. The defendant must support his allegations with corroborating evidence." ***Id.***

¶18 Santiago-Valdez has not cited any evidence to corroborate his own testimony that Chavez failed to advise him his plea would result in deportation. Moreover, the circuit court specifically found Santiago-Valdez's testimony was not credible. The court noted that comments Chavez made during the plea hearing belie Santiago-Valdez's claim that he was not informed his plea would lead to

[8] In rejecting Santiago-Valdez's ineffective assistance claim, the circuit court questioned whether ***Padilla v. Kentucky***, 559 U.S. 356 (2010), actually required Chavez to inform Santiago-Valdez "that he absolutely will get deported in the event of his conviction." The court also stated it was not satisfied Santiago-Valdez "would have been absolutely deported by entering his plea." Santiago-Valdez argues both of these findings were erroneous.

However, the circuit court went on to state, "I'm not basing my decision on either of those findings." Instead, the court concluded Santiago-Valdez had not established Chavez failed to warn him deportation was a certain consequence of his plea. We agree with that conclusion. We therefore decline to address whether ***Padilla*** required Chavez to warn Santiago-Valdez that his plea would result in certain deportation and whether deportation was actually a certain consequence of the plea. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (court of appeals need not address every issue raised when one is dispositive).

deportation. After the court accepted Santiago-Valdez's plea, Chavez stated, "I think part of the understanding that underpins this [plea] agreement is that the client wishes to fast track his deportation. He understands he's going to be deported[.]" Soon after Chavez made this remark, the court proceeded to sentencing and gave Santiago-Valdez the opportunity to make a statement. Santiago-Valdez did not dispute Chavez's assertions that he understood he was going to be deported and wanted to fast track his deportation. We defer to the circuit court's credibility determinations. *See* ***State v. Baudhuin***, 141 Wis. 2d 642, 647, 416 N.W.2d 60 (1987).

¶19 Consequently, Santiago-Valdez has not established that Chavez performed deficiently by failing to inform him that his plea would lead to deportation. As a result, Santiago-Valdez has not shown that he received ineffective assistance, and he is not entitled to withdraw his guilty plea.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.