COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP2136-CR **Cir. Ct. No. 2015CF5293**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

IRVIN PEREZ-BASURTO,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed*.

¶1 KESSLER, J.[1] The State of Wisconsin appeals an order of the circuit court allowing Irvin Perez-Basurto, a Mexican foreign national, to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

withdraw his guilty pleas on the grounds of ineffective assistance of counsel. We affirm.

BACKGROUND

¶2 On December 20, 2015, Perez-Basurto was charged with one count of criminal damage to property, one count of criminal trespass, one count of misdemeanor battery, and one count of felony intimidation of a witness. The domestic abuse penalty enhancer was added to all of the charges. According to the criminal complaint, the charges stemmed from an incident that occurred on December 19, 2015, in which Perez-Basurto went to the home of his former girlfriend, J.B., and demanded that J.B. allow him to enter. J.B. called the police. West Allis police arrived and told Perez-Basurto to leave. Approximately ten minutes after the police left, Perez-Basurto began knocking on J.B.'s second-story kitchen window and started yelling. J.B. took the child she and Basurto shared, ran to the bathroom, locked the door, and called 911. Perez-Basurto broke into the home, broke down the bathroom door, and caused injuries to J.B. Perez-Basurto was subsequently arrested and charged.

¶3 On the final pretrial date, February 3, 2016, the defense indicated that it would proceed to trial. On the date of trial, February 10, 2016, the State offered to amend the felony witness intimidation charge to a misdemeanor offense. Perez-Basurto pled guilty to four misdemeanors. Perez-Basturto was sentenced to six months jail time for criminal damage to property and twenty-four months probation as to the remaining counts.

¶4 Perez-Basurto filed a postconviction motion seeking to withdraw his guilty plea alleging ineffective assistance of counsel. The motion alleged that Perez-Basurto's defense counsel failed to advise him of the immigration

consequences of his pleas, pursuant to ***Padilla v. Kentucky***, 559 U.S. 356 (2010). The motion stated:

> Mr. Perez Basurto is a native and citizen of Mexico. He entered the United States in 2003 without inspection with his mother when he was 14 years old. The U.S. Department of Homeland Security has approved his application for Deferred Action for Childhood Arrivals, more commonly known as DACA….
>
> On February 10, 2016, Mr. Perez was convicted of Criminal Damage to Property, Criminal Trespass to Dwelling, Battery, and Intimidation of a Witness, all domestic violence ("DV") related. Prior to pleading guilty, Mr. Perez's attorney did not advise him and/or failed to advise him that DV related convictions to Battery and/or Intimidation of a Witness would result in Mr. Perez's deportation. Given his reliance on his attorney's lack of immigration advisals, Mr. Perez pleaded guilty to the instant charges. However, in so doing, he became immediately removable from the U.S. because DV-related convictions to Battery and Intimidation of Witness are separate removable offenses for immigration purposes…. Furthermore, such convictions immediately disqualif[y] a person from obtaining or maintaining his/her DACA status, and further bars Mr. Perez for relief from removal, i.e., Cancellation of Removal for Certain Non-Permanent Residents…. Thus, Mr. Perez has no available relief to stop his removal from the U.S.
>
> As a result of these convictions, the U.S. Department of Homeland Security has placed a detainer against Mr. Perez at the local jail…. At the completion of his sentence, DHS will take him into custody and commence removal proceedings against him.

¶5 At a hearing on the motion, the circuit court heard testimony from both Perez-Basurto and his defense counsel. Perez-Basurto testified that when he first met defense counsel at the pretrial hearing, he explained his DACA status. Counsel told Perez-Basurto that he was not familiar with the DACA status and would have to look into it. Perez-Basurto stated that he told counsel about his DACA status multiple times, but each time counsel was unsure of what the status

was. Perez-Basurto was unsure of the exact dates during which he spoke with counsel, but said that his conversations with counsel consisted of two meetings at the courthouse (prior to the pretrial hearing and prior to the scheduled trial) and one phone conversation.

¶6 Defense counsel testified that when he first met Perez-Basurto, Perez-Basurto indicated that he entered the United States in 2003, had a two-year work permit, and was not a United States citizen. Counsel told the court that his plan to take Perez-Basurto's case to trial was dependent on whether J.B. would testify. On the day of trial, J.B. appeared for trial to testify. Because counsel believed that J.B. would make a convincing witness, he did not think Perez-Basurto would be successful at trial. Counsel stated that he discussed the option of pleading to four misdemeanors with Perez-Basurto and reviewed the plea questionnaire "a few times," including the section explaining the deportation risk to a non-citizen. Counsel could not recall whether Perez-Basurto had questions. Counsel also could not recall discussing Perez-Basurto's specific immigration status. Counsel stated that he was unsure of what the DACA status meant. Counsel could not recall whether he discussed Perez-Basurto's immigration status prior to the trial, nor could counsel recall whether he discussed the potential immigration consequences of Perez-Basurto's particular plea. Counsel testified that he never researched Perez-Basurto's status, nor did he research whether a misdemeanor conviction would affect Perez-Basurto's status.

¶7 The circuit court granted Perez-Basurto's motion to withdraw his guilty plea, finding that under ***Padilla***, defense counsel failed to adequately advise Perez-Basurto of his deportation risk. This appeal by the State follows.

DISCUSSION

¶8 A defendant who moves to withdraw the plea after sentencing carries the heavy burden of establishing by clear and convincing evidence that the circuit court should permit plea withdrawal to correct a "manifest injustice." ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836 (citation and one set of quotation marks omitted). The "'manifest injustice'" test requires a defendant to show a serious flaw in the fundamental integrity of the plea. ***State v. Nawrocke***, 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995) (citation omitted). Ineffective assistance of counsel is an example of a factual situation that establishes manifest injustice. ***State v. Krieger***, 163 Wis. 2d 241, 251 & n.6, 471 N.W.2d 599 (Ct. App. 1991). Plea withdrawal under the manifest injustice standard rests in the circuit court's discretion. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). A circuit court erroneously exercises its discretion, however, if it bases its decision on an error of law. ***State v. Woods***, 173 Wis. 2d 129, 137, 496 N.W.2d 144 (Ct. App. 1992).

¶9 In order to establish manifest injustice based on ineffective assistance of counsel, the defendant must satisfy a two-part test: the defendant must prove both that counsel's performance was deficient and that the deficient performance was prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Performance is deficient if it falls outside the range of professionally competent representation. ***State v. Pitsch***, 124 Wis. 2d 628, 637, 369 N.W.2d 711 (1985). We measure performance by the objective standard of what a reasonably prudent attorney would do in similar circumstances. *See* ***Strickland***, 466 U.S. at 688; ***Pitsch***, 124 Wis. 2d at 636-37. We will affirm the circuit court's findings of historical fact concerning counsel's performance unless those findings are clearly erroneous. *See* ***State v. O'Brien***, 223 Wis. 2d 303, 324-25, 588 N.W.2d 8 (1999).

However, the ultimate question of ineffective assistance is one of law, subject to independent review. ***Id.*** at 325.

¶10 We agree with the circuit court that Perez-Basurto's counsel provided ineffective assistance. Relying on our supreme court's recent decision in ***State v. Shata***, 2015 WI 74, 364 Wis. 2d 63, 868 N.W.2d 93, the State argues that counsel adequately advised Perez-Basurto of his deportation risk because counsel discussed the risk at the time of the plea hearing, and also reviewed the plea questionnaire with Perez-Basurto. The State points out that the section of the plea questionnaire addressing the deportation risk is underlined and circled, suggesting that counsel did discuss the risk with Perez-Basurto. We conclude that this case is distinguishable from ***Shata***.

¶11 In ***Shata***, Hatem Shata, an Egyptian foreign national, pled guilty to possession of marijuana with intent to deliver, an offense that made him deportable under immigration law. ***Id.***, ¶¶6, 17. Shata moved to withdraw his guilty plea on the grounds that his counsel failed to advise him that his offense required mandatory deportation. ***Id.***, ¶21. The supreme court held that Shata's attorney was not ineffective because counsel did inform Shata that pleading guilty would likely result in a "'strong chance'" of deportation. ***Id.***, ¶69. The court concluded that Shata was properly advised because the ultimate deportation decision rested with the federal government. ***Id.***, ¶71.

¶12 Here, defense counsel could not recall the extent of his conversations with Perez-Basurto regarding Perez-Basurto's immigration concerns. Indeed, counsel was not even aware of what Perez-Basurto's DACA status meant. Counsel also admitted to doing no research about Perez-Basurto's status. From the record before us, it is clear that counsel did not provide advice even up to the

level Shata received. We agree with the circuit court that defense attorneys should not be required to become immigration law experts; however, defense counsel's "advice" in this case fell woefully short of that required by ***Padilla***. ***Padilla*** requires that an attorney provide correct advice about the potential deportation consequences of a conviction when the potential consequences are clear. ***Id.***, 559 U.S. at 369. Here, counsel never did testify that he even understood his client's DACA status, much less the consequences of the proposed pleas to that status. Where counsel was not even aware of Perez-Basurto's immigration status, we cannot conclude that counsel provided Perez-Basurto with adequate advice regarding his deportation risk. The record establishing Perez-Basurto's immigration consequences upon the completion of his sentence shows prejudice.

¶13 For the foregoing reasons, we affirm the circuit court and remand with directions to enter an order setting aside Perez-Basurto's guilty pleas and vacating the judgment of conviction.

By the Court—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.