

STATEMENT OF THE CASE

Appellant-Defendant, Mauricio Carvajal (Carvajal), appeals his conviction for forgery, a Class C felony, Ind. Code § 35-43-5-2, following a guilty plea.

We affirm.

ISSUE

Carvajal raises six issues for our review, which we restate as the following single issue: Whether the trial court erred in denying his motion to withdraw his guilty plea.

FACTS AND PROCEDURAL HISTORY

On May 7, 2009, Carvajal and Mercedes Solorzano (Solorzano) completed an application for township assistance. On May 12, 2009, Sheila Bruner (Bruner) of the Wayne Township Trustees Office interviewed Carvajal and Solorzano with regard to their request for help in paying their NIPSCO utility bill. During the interview, Carvajal informed Bruner that he was not a legal citizen and that he was using another person's social security number on the application.

On July 27, 2009, the State filed an Information charging Carvajal with forgery, a Class C felony, I.C. § 35-43-5-2. The charging information stated, in relevant part that:

[S]ometime during May of 2009 . . . [Carvajal], with intent to defraud, did utter a written instrument, namely application for township assistance, in such a manner that it purported to have been made by authority of one, to wit: Social Security Administration who did not give authority, all of which is contrary to the form of IC [§] 35-43-5-2 in such cases made and provided....

(Appellant's App. p. 6). On January 26, 2010, the State amended the charge, which stated:

[O]n or between February 8, 2007 and May, 2009. . . [Carvajal], with intent to defraud, did make or utter a written instrument, namely document(s) with his

social security number, in such a manner that purported to have been made by authority of one who did not have authority, namely, Social Security Administration, all of which is contrary to the form of statutes in such cases made and provided by IC [§] 35-43-5-2....

(Appellant's App. p. 10). Public Defender Scott J. Lennox (Lennox) was appointed to Carvajal's case. During the course of Lennox's representation, the State offered Carvajal a plea agreement limiting the executed portion of his sentence to two years. Additionally, the plea agreement stated that "[d]eportation [would be] a possible consequence by pleading guilty []." (Appellant's App. p. 11).

On March 2, 2010, Carvajal accepted the State's plea agreement which left the sentencing open to the trial court's discretion. During the plea agreement hearing, the trial court asked Carvajal whether he understood that by entering into a plea agreement, it could result in his deportation. Through a translator, Carvajal stated that he understood. The trial court then scheduled sentencing for March 31, 2010. On March 25, 2010, defense attorney Bart Arnold filed an appearance on behalf of Carvajal and filed a motion for continuance. On June 8, 2010, Carvajal filed a verified motion to withdraw guilty plea prior to sentencing and amended that motion on July 12, 2010. The next day, on July 13, the trial court held an evidentiary hearing on the motion.

During the hearing, Carvajal testified without the aid of a translator and stated that he had been living in the United States for fifteen years, that he was not a citizen, that he had been employed in the past, and that he and Lennox did not discuss deportation. However, Carvajal admitted that he had previously received and reviewed his plea agreement and that

he signed it, and also acknowledged that the trial court informed him of the possibility of deportation.

Lennox also testified during the hearing that after discussing the plea agreement with Carvajal and the potential consequences of proceeding to trial, “specifically the high risk that if [Carvajal] were to be convicted, that he would be facing a substantial term of incarceration,” Lennox advised Carvajal to plead guilty based on Lennox’s belief that Carvajal would be placed on probation as a sentence and not receive an executed term of incarceration. (Transcript p. 29). Lennox also informed Carvajal on at least three occasions that “a felony conviction and any term of incarceration would or could lead to deportation.” (Tr. p. 29). Finally, Lennox advised Carvajal that “it was [Lennox’s] understanding that...Carvajal would be placed on probation and that during his term of probation [] an INS hold would be placed upon him. That he would be taken into custody during a probation meeting and deportation at that point would be most likely.” (Tr. p. 30).

Finally, Kelly Krugman (Krugman), Probation Officer with the Kosciusko County Probation Department, testified that when she met with Carvajal to prepare the pre-sentence investigation report, Carvajal gave her a letter addressed to the trial court asking for leniency. Krugman also discussed the possibility of deportation with Carvajal. At the end of evidence, the trial court denied Carvajal’s motion to withdraw guilty plea and immediately sentenced him to two years in the Indiana Department of Correction.

Carvajal now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

Carvajal contends that the trial court erred in denying his pre-sentencing motion to withdraw his guilty plea. The statute governing motions to withdraw guilty pleas provides, in relevant part:

After entry of a plea of guilty...the court may allow the defendant by motion to withdraw his plea of guilty...for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant's plea.... The ruling of the court on the motion shall be reviewable on appeal only for an abuse of discretion. However, the court shall allow the defendant to withdraw his plea of guilty...whenever the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice.

I.C. § 35-35-1-4(b). We have interpreted this statute to require a trial court to grant such a request where the defendant “proves that withdrawal of the plea is necessary to correct a manifest injustice.” *Weatherford v. State*, 697 N.E.2d 32, 34 (Ind. 1998). “Manifest injustice” and “substantial prejudice” are necessarily imprecise standards, and an appellant seeking to overturn a trial court’s decision has faced a high hurdle under the current statute and its predecessors. *Coomer v. State*, 652 N.E.2d 60, 62 (Ind. 1995). The court must deny a motion to withdraw a guilty plea if the withdrawal would result in substantial prejudice to the State. *Id.* “Except under these polar circumstances, disposition of the petition is at the discretion of the trial court.” *Id.*

The trial court’s ruling on a motion to withdraw a guilty plea comes to us with the presumption in favor of the ruling. *Johnson v. State*, 734 N.E.2d 242, 245 (Ind. 2000). “An appellant of an adverse decision on a motion to withdraw must prove the court abused its

discretion by a preponderance of the evidence. In evaluating a defendant’s arguments on this point, we will not disturb the trial court’s ruling where it was based on conflicting evidence.”

Id.

II. *Motion to Withdraw Guilty Plea*¹

Carvajal argues that his guilty plea was manifestly unjust because he was denied effective assistance of counsel and his plea was unknowingly and involuntarily made. We find that the trial court did not abuse its discretion when it denied Carvajal’s motion to withdraw guilty plea.

A. *Ineffective Assistance of Counsel*²

Carvajal claims that his counsel provided ineffective assistance which violated his Sixth Amendment right to counsel and Article I, Sections 12 and 13 of the Indiana Constitution. Specifically, Carvajal argues that Lennox failed to inform him that pleading

¹ As part of his argument, Carvajal claims that his conviction is void because he did not commit forgery. This argument is not supported by analysis, cogent reasoning or citations. Additionally, this argument is more properly raised under a “sufficiency of the evidence” argument. As such, this argument is waived under Ind. Appellate Rule 46(A)(8)(a).

² We note that post-conviction relief proceedings are the preferred method of presenting claims of ineffective assistance of counsel. *McIntire v. State*, 717 N.E.2d 96, 101 (Ind. 1999). In *Johnson v. State*, 734 N.E.2d 242, 247 (Ind. 2000), our supreme court discussed whether it was appropriate for the defendant to raise a claim of ineffective assistance of counsel on direct appeal. The court stated that generally, raising such claim on direct appeal “would be a particularly bad idea for most defendants.” *Id.* “A claimant would thus not have ‘the type and extent of evidentiary hearing afforded at a post-conviction proceeding ... designed to allow [an] appellant an opportunity to establish the factual assertions he makes concerning his guilty plea.’” *Id.* at 247-48 (citing *Crain v. State*, 301 N.E.2d 751, 751-52 (Ind. 1973)). Thus, when a defendant litigates this claim under direct appeal, *res judicata* bars him from raising it more comprehensively in a collateral proceeding. *Id.* at 248.

guilty to forgery, a crime of moral turpitude, would lead to automatic deportation.³ Additionally, he argues that Lennox failed to file a motion to dismiss the amended information, which he argues was defective.

Claims of ineffective assistance of counsel are reviewed under a two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 674 (1984). A defendant must demonstrate both that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006). Prejudice occurs when the defendant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068). "Isolated poor strategy, bad tactics, a mistake, carelessness or inexperience do not necessarily amount to ineffective assistance of counsel unless, taken as a whole, the defense was inadequate." *Woods v. State*, 701 N.E.2d 1208, 1211 (Ind. 1998). There is a strong presumption that counsel's representation was adequate. *State v. McManus*, 868 N.E.2d 778, 790 (Ind. 2007).

Carvajal contends that he was unaware that a guilty plea would lead to his automatic deportation. Specifically, he argues that when Lennox told him that "a felony conviction and any term of incarceration would or could lead to deportation," he understood that to mean

³ 8 U.S.C.A. § 1227(a)(2)(A)(i) provides: Any alien. . . in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(i) crimes of moral turpitude

that pleading guilty and receiving a suspended sentence would not adversely affect his immigration status. (Tr. p. 29).

Carvajal points to *Padilla v. Kentucky*, 599 U.S. --, 130 S.Ct. 1473, 1477-78 (2010), where the defendant, who was a lawful permanent resident of the United States, was informed by his counsel that “he did not have to worry about his immigration status” if he pled guilty to transporting a large quantity of marijuana “since he had been in the country” for approximately 40 years. *Id.* at 1475. This advice was incorrect and Padilla was subjected to removal proceedings. *Id.* at 1477.

In pertinent part, the Supreme Court agreed that counsel’s representation fell below an objective standard of reasonableness, citing the first prong of the *Strickland* test. *Id.* at 1483. However, the Supreme Court remanded the case for a review of whether or not his counsel’s failure to notify him of the immigration consequences of his plea prejudiced him, the second prong of *Strickland*. *Id.* at 1483-84.

Similarly, in *Sial v. State*, 862 N.E.2d 702, 704 (Ind. Ct. App. 2007), Sial pled guilty to felony theft. Neither Sial’s attorney nor the trial court inquired regarding his immigration status or informed him that deportation is a possible consequence of a felony conviction. *Id.* After sentencing, the Department of Justice sent Sial a notice that he was deportable for his felony conviction and ordered him to appear before an immigration judge. *Id.* Sial filed a petition for post-conviction relief, claiming he had received ineffective assistance of counsel because his attorney did not inform him that deportation was a possible consequence of a felony conviction. *Id.* His petition was denied by the trial court. He then appealed, and this

court reversed and remanded for trial. *Id.* In our decision, we examined *Segura v. State*, 749 N.E.2d 496 (Ind. 2001) where our supreme court considered the burden of proof carried by a post-conviction petitioner seeking to establish ineffective assistance of counsel based on a failure to advise the client of deportation as a possible penal consequence. *Id.* at 704-05. The court concluded that, under certain circumstances, failure to advise may constitute ineffective assistance of counsel:

[T]he failure to advise of the consequence of deportation can, under some circumstances, constitute deficient performance. Otherwise stated, we cannot say that this failure as a matter of law never constitutes deficient performance. Whether it is deficient in a given case is fact sensitive and turns on a number of factors. These presumably include the knowledge of the lawyer of the client's status as an alien, the client's familiarity with the consequences of conviction, the severity of criminal penal consequences, and the likely subsequent effects of deportation. Other factors undoubtedly will be relevant in given circumstances.

Id. at 705 (citing *Segura*, 749 N.E.2d at 500). Applying those same principals to Sial's case, we concluded that Sial's special circumstances, namely the presence of his wife and child in the United States and the fact that he had lived here for over twenty years, were sufficient special circumstances to make the requisite showing of prejudice. *Id.* at 707-08.

Nevertheless, we find both *Padilla* and *Sial* to be inconsistent with the present case based on one important factor—in those cases, neither defendant had been informed by counsel that deportation was a consequence of pleading guilty to a felony. If anything, this case is only vaguely similar to *Sial*, where his counsel told him not to worry about deportation. Here, after reviewing the plea agreement and assessing the risk of trial, Lennox advised Carvajal to plead guilty based on his belief that Carvajal would receive probation.

We note that this was likely bad advice, as pleading guilty to forgery carries with it automatic deportation pursuant to 8 U.S.C.A. § 1227(a)(2)(A)(i).

Taken as a whole, however, Carvajal has not demonstrated that the deficient performance resulted in prejudice. Lennox informed Carvajal on at least three occasions before he accepted the guilty plea that “a felony conviction and any term of incarceration would or could lead to deportation.” (Tr. p. 29). Then, during the guilty plea hearing, the trial court asked him if he understood the consequence of pleading guilty, to which he responded that he did. Finally, during the pre-sentence investigation, Krugman testified that she and Carvajal discussed deportation. Carvajal’s knowledge of deportation is demonstrated by the letter he wrote to the trial court asking for leniency: “[m]ost of all I implore you not to incarcerate me since this could easily lead to deportation.” (State’s Exhibit 2). As such, we find that Carvajal was indeed aware that deportation was possible.

Carvajal also briefly argues that the amended Information was defective and Lennox failed to file a motion to dismiss prior to the omnibus date. Specifically, he argues that he did not create or present a document that came from the Social Security Administration. To establish that counsel was deficient in failing to file a motion to dismiss, the defendant must show that the motion would have been granted. *Sauerheber v. State*, 698 N.E.2d 796, 807 (Ind. 1998). We cannot say that his motion would have been granted. Based on the amended Information, the elements of the crime are present: Carvajal intended to present a social security number as if it was his own and as if he had the authority to do so of the Social Security Administration.

B. *Unknowingly*

Carvajal also argues that his plea was unknowingly and involuntarily made. Specifically, he argues that he followed Lennox's advice to plead guilty because Lennox told him he would likely be placed on probation and not incarcerated and was only made aware that deportation was possible during the guilty plea hearing. He also argues that he did not understand the charges, as the amended complaint was not translated to him in Spanish.

The longstanding test for the validity of a guilty plea is “whether the plea represents a voluntary and intelligent choice among the alternative course of action open to the defendant.” *Diaz v. State*, 934 N.E.2d 1089, 1094 (Ind. 2010) (quoting *North Carolina v. Alford*, 400 U.S. 25, 31 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)). In furtherance of this objective, Indiana Code section 35-35-1-3 provides that the court accepting the guilty plea determine that the defendant: (1) understands the nature of the charges; (2) has been informed that a guilty plea effectively waives several constitutional rights, including trial by jury, confrontation and cross-examining of witnesses, compulsory process, and proof of guilt beyond a reasonable doubt without self-incrimination; and (3) has been informed of the maximum and minimum sentences for the crime charged.

It is clear that Carvajal was informed, both in Spanish and English, that deportation was a possibility. During the guilty plea hearing, the trial court asked if he understood that “entering a plea of guilty in [his] case could result in deportation if you are not a naturalized citizen. Do you understand that, Mr. Carvajal?” (Tr. p. 8). Carvajal stated that he understood. Additionally, Carvajal stated that he understood that a Class C felony carries

with it the possibility of imprisonment of two to eight years with a possible fine of up to \$10,000. During that same hearing, the following colloquy between the trial court and Carvajal took place:

TRIAL COURT: Then how do you plead, Mr. Carvajal?

CARVAJAL: I am plead-okay-I plea my sentence—I agree with everything that-

TRIAL COURT: Do you plead guilty or not guilty?

CARVAJAL: Yes, I am guilty, sir.

TRIAL COURT: And that's guilty to [f]orgery a Class C felony all pursuant to the [p]lea [a]greement?

CARVAJAL: Yes, sir.

(Tr. pp. 9-10). Additionally, after the guilty plea hearing, he met with Krugman, who discussed with him the possible consequence of pleading guilty. Despite his argument now that he was advised by his attorney that he would likely not be incarcerated, it is abundantly clear that he understood the charges and penalty as stated by the trial court.

With respect to Carvajal's argument that he did not understand the factual basis because it was not translated into Spanish, we find that his response to the trial court was sufficient to show that he understood the charges against him. During the guilty plea hearing, while the advisements of his rights were translated into Spanish, the following was not:

TRIAL COURT: Mr. Carvajal, do you understand before you could be convicted of the crime of [f]orgery a Class C felony, the State, at trial, would have to prove each of the following elements beyond a reasonable doubt, that between February 8, 2007 and May 2009, in Kosciusko County, State of

Indiana, you Mauricio Carvajal with intent to defraud did make or utter a written instrument namely documents with your social security number in such a manner that purported to have been made by the authority of one who did not give authority, namely the Social Security Administration?

CARVAJAL: Yes, sir.

(Tr. p. 7). The record further establishes Carvajal is familiar enough with the English language that no translator was required during the motion to withdraw guilty plea hearing. In fact, Carvajal testified in English on his own behalf. As such, taken as a whole, we cannot say that Carvajal entered into the plea agreement unknowingly.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion when it denied Carvajal's motion to withdraw guilty plea, Carvajal did not receive ineffective assistance of counsel and his guilty plea was not entered into unknowingly.

Affirmed.

ROBB, C.J., concurs.

BROWN, J., concurs in result without opinion.