United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-3018 **September Term, 2019**

FILED ON: July 7, 2020

IN RE: SEALED CASE

Appeal from the United States District Court
for the District of Columbia
(1:16-cr-00211-1)

Before: MILLETT, WILKINS, and KATSAS*, *Circuit Judges.*

JUDGMENT

The Court has considered this appeal on the record compiled by the parties, as well as on their briefs and oral arguments. The Court has accorded the issues full consideration and has determined they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED that Appellant's claim of ineffective assistance of counsel be **REMANDED** to the District Court for an evidentiary hearing and ruling in the first instance.

Appellant, a foreign national and legal permanent resident who understands limited English, cooperated with a Government investigation and pled guilty in the United States District Court for the District of Columbia to one count of conspiracy to commit money laundering. After serving their[1] sentence, Appellant received a notice of removal from immigration authorities and, as of oral argument, was being held in a detention facility. For the first time on direct appeal, Appellant seeks reversal of their conviction due to ineffective assistance of counsel, asserting that their attorney never informed them of the deportation consequences of pleading guilty to conspiracy to commit money laundering, in violation of *Padilla v. Kentucky*, 559 U.S. 356 (2010). Appellant claims that their attorney never raised the near-certainty of deportation during plea negotiations, that the plea agreement itself did not contain a statement warning of the risk of deportation, and that the plea agreement was not translated into their native language before the

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* A separate dissenting statement by Circuit Judge Katsas is attached.

[1] Since this case is presently sealed, to preserve anonymity we refer to Appellant using the singular "they."

plea hearing. Since the record before us fails to conclusively establish either the sufficiency of the attorney's performance or the absence of prejudice from the alleged deficiencies, we remand Appellant's ineffective assistance of counsel claim to the District Court for an evidentiary hearing and ruling in the first instance. *See United States v. Rashad*, 331 F.3d 908, 909-10 (D.C. Cir. 2003).

Under the prevailing *Strickland* test, ineffective assistance of counsel can be established where (1) the attorney's representation fell below "an objective standard of reasonableness" and (2) the deficient performance caused prejudice to the petitioner. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). In evaluating prong one of this test, courts "indulge a strong presumption that [defense] counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. Under *Strickland*'s second prong, a defendant can show an attorney's deficient conduct was prejudicial where there is a reasonable probability that the "outcome of the plea process would have been different with competent advice." *Lafler v. Cooper*, 566 U.S. 156, 163 (2012). Due to the fact-intensive nature of the *Strickland* inquiry, when a defendant asserts their Sixth Amendment claim for the first time on direct appeal, it is likely the relevant facts will not be part of the record. *See Massaro v. United States*, 538 U.S. 500, 502 (2003) ("The evidence introduced at trial . . . will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis."). As a result, this Court generally declines to resolve ineffective assistance of counsel claims in the first instance unless the record conclusively shows that the defendant either is or is not entitled to relief. *See, e.g.*, *United States v. Gray-Burriss*, 920 F.3d 61, 65 (D.C. Cir. 2019); *United States v. Newman*, 805 F.3d 1143, 1147-48 (D.C. 2015); *United States v. Geraldo*, 271 F.3d 1112, 1116 (D.C. Cir. 2001); *United States v. Cyrus*, 890 F.2d 1245, 1247 (D.C. Cir. 1989) ("Where a party fails to create a record on the issue of the ineffectiveness of counsel, this court must remand the case for such proceedings."). Given this Court's clear preference to remand when an ineffective assistance of counsel claim is raised for the first time on direct appeal, a finding for the Government would only be appropriate here if the record *conclusively shows* that Appellant cannot meet one or more prongs of the *Strickland* test—a bar the record before us does not meet.

I.

As to *Strickland*'s first prong, *see* 466 U.S. at 687, we find the present record fails to conclusively establish that counsel's performance was not deficient. In *Padilla*, the Supreme Court held that defense attorneys provide inadequate representation under *Strickland* when they fail to advise their clients about the likely deportation consequences of pleading guilty. 559 U.S. at 356. The present record is inconclusive regarding: (1) what, if anything, Appellant's attorney conveyed to Appellant regarding the deportation consequences of the plea during negotiations; (2) whether Appellant received a translated copy of the entire plea agreement; and (3) whether counsel was even personally aware of the deportation consequences of the plea during negotiations. Curiously, the plea agreement itself does not contain a statement warning of the near-certain deportation

consequences, even though such a notification is typically boilerplate in plea agreements prepared for noncitizens. *See* J.A. 74-87. While attorneys do enjoy a presumption of competence and mere allegations of misconduct are not sufficient under *Strickland*'s prong one, 466 U.S. at 689, the exiguous record before us fails conclusively to establish whether counsel's assistance complied with *Padilla* and leaves Appellant's important assertions about translations and their attorney's personal knowledge unanswered.

II.

As to *Strickland*'s second prong, *see* 466 U.S. at 687, we find the record does not conclusively establish that Appellant did not suffer prejudice as a result of their attorney's allegedly deficient performance. The Government argues that, even assuming trial counsel failed to make Appellant aware of the risk of deportation during plea negotiations, Appellant cannot show prejudice under *Strickland* since subsequent events—including statements by the District Court during the Rule 11 colloquy at the plea hearing, statements in the Probation Office's Pre-Sentence Report ("PSR"), and statements by the District Court at the sentencing hearing—made Appellant sufficiently aware of the plea's deportation consequences. However, although a trial court's subsequent warnings can "weaken" a claim of prejudice, they do not necessarily defeat such a finding outright. *See In re: Sealed Case*, 488 F.3d 1011, 1016-17 (D.C. Cir. 2007). And although Appellant's argument seems weakened by the District Court's various statements, given the limited facts and outstanding questions in this first-instance review, we do not find that Appellant's claim of prejudice is conclusively defeated.

First, the Supreme Court has unequivocally held that "criminal defendants require effective counsel *during* plea negotiations," *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (emphasis added), and stated that "[a]nything less . . . might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'" *Massiah v. United States*, 377 U.S. 201, 204 (1964) (quoting *Spano v. New York*, 360 U.S. 315, 326 (1959) (Douglas, J., concurring)). The failure to receive this constitutionally required advice at the plea stage has the potential to impose myriad burdens on a defendant. For example, plea offers can be rejected or withdrawn during negotiations without formal proceedings or court approval. *See Frye*, 566 U.S. at 143. However, once a guilty plea is accepted by the trial court and entered, in order to withdraw prior to sentencing a defendant must ask permission from the court and "show a fair and just reason for requesting the withdrawal." FED. R. CRIM. P. 11(d)(2)(B); *see also United States v. Curry*, 494 F.3d 1124, 1126, 1128 (D.C. Cir. 2007) (affirming the District Court's rejection of defendant's motion requesting to withdraw his plea).

Second, the present record does not conclusively establish that the Rule 11 colloquy at the plea hearing put Appellant on sufficient notice of the exposure to deportation. *See* FED. R. CRIM. P. 11. At the plea hearing, the court itself seemed unsure about whether Appellant was a noncitizen, and the court's brief comments about the potential for removal, which do not appear to have

included all the requirements of Rule 11[2] or the recommendations of the Benchbook for U.S. District Court Judges,[3] are not sufficient to conclusively defeat Appellant's claim of prejudice. Nor are the post-plea hearing mentions of possible deportation consequences in the PSR and at the sentencing hearing sufficient on the record before us. Although the PSR did discuss the implications of Appellant's immigration status and referred to Appellant as a "deportable alien," Appellant asserts they never received a copy of the PSR in their native language and points to statements they made to a probation officer about their intention to apply for citizenship once the legal case resolved, which they argue show that they still did not appreciate the plea's deportation consequences. Further fact-finding is needed to determine whether Appellant ever received a translated version of the full PSR, whether they were otherwise made aware of its statements regarding deportation implications, and whether the PSR's statements are sufficient to cure any prejudice. The same is true for comments made by the District Court at the sentencing hearing. Although the District Court did reference potential immigration consequences, Appellant's defense attorney oddly demurred, saying he had instructed Appellant to take those inquiries to their immigration attorney. Given remaining questions around what exactly was translated or otherwise communicated to Appellant and when, the apparent deferral by trial counsel to an unknown immigration attorney, and the centrality of *Padilla*'s requirement that defense attorneys provide this advice *during* plea negotiations, we find these various statements are not enough, without more information or context, to conclusively defeat Appellant's claim that they suffered prejudice. *See In re: Sealed Case*, 488 F.3d at 1016-17; *United States v. Hanson*, 339 F.3d 983, 990 (D.C. Cir. 2003) (finding the district court's admonitions at the plea hearing only "weaken[ed]" defendant's claims).

Finally, we do not find the record conclusively refutes Appellant's claim that there is a "reasonable probability that, but for counsel's errors, [they] would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Appellant argues that, like the defendant in *Lee v. United States*, they never would have accepted a guilty plea had they known that they would be deported and would have chosen instead to "gamble[] on trial, risking more jail time for whatever small chance there might be of an acquittal that would let [them] remain in the United States." 137 S. Ct. 1958, 1966 (2017). The Government argues that, given the nature of Appellant's cooperation and statements made during plea negotiations, trial would have been an irrational choice, necessarily defeating a finding of prejudice under *Strickland*. But as the Supreme Court stated in *Lee*, when the consequences of pleading guilty are as dire as certain deportation, "even the smallest chance of success at trial may look attractive." *Id.* And what matters is "what an individual defendant would have done[.]" *Id.* at 1967. Given the gravity of the risk of deportation, the Government cannot conclusively establish on the scant record before

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[2] A court must inform the defendant "that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future." FED. R. CRIM. P. 11(b)(1)(O).

[3] The Federal Judicial Center recommends the court ask whether the defendant has "discussed the possible immigration consequences of a guilty plea with [their] attorney." FED. JUDICIAL CTR, BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 67 (6th ed. 2013).

us that there is no reasonable prospect that this Appellant would have risked a trial, highlighting the need for further factual findings by the District Court.

Thus, since the record does not conclusively establish whether the attorney's performance was deficient or whether Appellant suffered prejudice on account of the alleged deficiency, we follow this Court's general practice and remand Appellant's ineffective assistance of counsel claim to the District Court to develop a factual record and rule in the first instance. *See Newman*, 805 F.3d at 1148. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

KATSAS, *Circuit Judge*, dissenting: After pleading guilty to conspiracy to commit money laundering, the appellant now claims that trial counsel was ineffective in failing to convey the immigration consequences of the plea. An ineffective-assistance claim requires the defendant to prove both deficient performance of counsel and ensuing prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In the context of guilty pleas, prejudice requires a "reasonable probability" that, but for counsel's deficient performance, the defendant "would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). When a defendant raises ineffective assistance on direct appeal, we need not remand if the record conclusively refutes the claim. *United States v. Sitzmann*, 893 F.3d 811, 831–32 (D.C. Cir. 2018) (per curiam).

In my judgment, the record here conclusively shows that the appellant suffered no prejudice. During the plea colloquy, the district court warned the appellant of the immigration consequences of pleading guilty, including removal and ineligibility for future citizenship. Yet the appellant still chose to plead guilty, and the court found that the plea was knowing and voluntary. Moreover, the appellant sought and obtained a substantial downward sentencing variance based on the immigration consequences of the plea. At the sentencing hearing, the appellant expressed no surprise either when the district court reiterated the immigration consequences or when the parties discussed unsealing the record for removal purposes. Finally, the appellant has never asserted innocence or any defense. To the contrary, during the sentencing hearing, the appellant expressed regret for the offense and asked for leniency based in part on acceptance of responsibility. In sum, no evidence suggests that the appellant may have rejected the plea offer had trial counsel conveyed the same immigration information that the district court covered in the plea colloquy.

Because the appellant suffered no prejudice, the ineffective-assistance claim is without merit. Accordingly, I would affirm the conviction and sentence.