

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JUAN OMAR TAVARA,	:	
	:	
Appellant	:	No. 1944 MDA 2013

Appeal from the PCRA Order entered on September 30, 2013
in the Court of Common Pleas of Lebanon County,
Criminal Division, No. CP-38-CR-0000344-2011

BEFORE: LAZARUS, WECHT and MUSMANNNO, JJ.

MEMORANDUM BY MUSMANNNO, J.:

FILED JULY 25, 2014

Juan Omar Tavara (“Tavara”) appeals from the Order denying his Petition filed pursuant to the Post Conviction Relief Act (“PCRA”). **See** 42 Pa.C.S.A. §§ 9541-9546. We affirm.

Tavara, a noncitizen, and his co-conspirators stole over \$100,000 in merchandise from their employer. Tavara was arrested, charged with various theft offenses and appointed counsel. Tavara’s counsel advised him that a guilty plea could have an effect on his immigration status, and referred him to an immigration attorney. Tavara did not contact an immigration attorney. On September 9, 2011, Tavara pled guilty to one count each of theft by unlawful taking, receiving stolen property and criminal conspiracy (to commit theft by unlawful taking),¹ and was thereafter

¹ **See** 18 Pa.C.S.A. §§ 3921(b), 3925(a), 903(a)(1).

sentenced to serve an aggregate sentence of six to twenty-three months in prison. Prior to accepting Tavera's plea, the trial court asked Tavera "Do you realize if you are not a U.S. citizen, this plea of guilty could cause you to be deported?" N.T, 9/2/11, at 24-25. In response, Tavera indicated that "he understood." *Id.* at 25. Tavera did not file any post-sentence motions or appeal his judgment of sentence.

On May 3, 2012, while Tavera was still in prison, United States Immigration and Customs Enforcement ("ICE") officials took him into their custody and initiated deportation proceedings against him. On May 23, 2012, an immigration judge ordered Tavera's deportation. On October 2, 2012, Tavera, through separate PCRA counsel, filed the instant PCRA Petition. Following a hearing, the PCRA court denied Tavera's Petition on September 30, 2013. Tavera filed a timely Notice of Appeal.

On appeal, Tavera raises the following question for our review: "Should [Tavera] be permitted to withdraw his guilty plea (pursuant to his timely [PCRA P]etition []) because his court-appointed attorney failed to advise him that [his] plea would likely result in his deportation?" Brief for Appellant at 2.

Tavera contends that he would not have entered his guilty plea if he had known that it would likely result in his deportation. *Id.* at 13. Tavera asserts that his counsel was ineffective because he failed to advise him that, by pleading guilty to an aggravated felony (receiving stolen property) with a

sentence that reached one year or more in prison, he risked deportation under 8 U.S.C.A. § 1101(a)(43)(G). Brief for Appellant at 13, 15. Instead, Tavera claims, his counsel merely advised him that his guilty plea could have an effect on his immigration status, and referred him to an immigration attorney. **Id.** at 18. Tavera asserts that his counsel had a non-delegable duty to advise him of his risk of deportation, and that he did not satisfy this duty by referring Tavera to an immigration attorney. **Id.** at 21-22. Tavera contends that the trial court's inquiry during his oral guilty plea colloquy, wherein the trial court asked Tavera if he realized that that his guilty plea could cause him to be deported, did not cure the deficiencies in Tavera's legal representation. **Id.** at 23.²

In reviewing the denial of a PCRA petition, we examine whether the PCRA court's determination "is supported by the record and free of legal error." **Commonwealth v. Rainey**, 928 A.2d 215, 223 (Pa. 2007) (citations omitted).

To succeed on an ineffectiveness claim, Tavera must demonstrate by the preponderance of the evidence that

² Tavera also contends that his counsel was ineffective by failing to negotiate a guilty plea that was structured in a manner that prevented deportation under 8 U.S.C.A. § 1101(a)(43)(G) (*i.e.*, such that no sentence imposed for any one of his theft crimes exceeded 364 days). Reply Brief for Appellant at 2. However, Tavera did not raise this claim before the PCRA court. Accordingly, it is waived on appeal. **See** Pa.R.A.P. 302(a) (providing that a claim is waived if it is raised for the first time on appeal); **see also Commonwealth v. Wharton**, 811 A.2d 978, 987 (Pa. 2002).

(1) [the] underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different.

Commonwealth v. Ali, 10 A.3d 282, 291 (Pa. 2010). A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim.

Commonwealth v. Martin, 5 A.3d 177, 183 (Pa. 2010). Counsel is presumed to be effective and the burden is on the appellant to prove otherwise. **Commonwealth v. Hanible**, 30 A.3d 426, 439 (Pa. 2011).

We note also that allegations of ineffectiveness in connection with a guilty plea cannot warrant relief unless counsel's ineffectiveness caused an involuntary, unknowing or unintelligent plea. **Commonwealth v. Anderson**, 995 A.2d 1184, 1192 (Pa. Super. 2010). Where the defendant enters a plea on counsel's advice, the voluntary and knowing nature of that plea turns on whether counsel's advice fell within the range of competence demanded of attorneys in criminal cases. **Id.**

When the defendant is a noncitizen, the United States Supreme Court has held that counsel must inform him as to whether a plea carries a risk of deportation. **Padilla v. Kentucky**, 559 U.S. 356, 374 (2010). The **Padilla** Court observed that some potential deportation situations are unclear and uncertain, while other deportation situations are truly clear. **Id.** at 369. In this vein, the **Padilla** Court commented that, when the relevant deportation law is not succinct and straightforward, counsel need do no more than

advise the client that the charges/conviction *may* carry a risk of deportation. **Id.** However, when the deportation consequence is truly clear, “the duty to give correct advice is equally clear.” **Id.**

This Court has held that **Padilla** requires counsel to inform a defendant as to a risk of deportation, but not as to its certainty. **See Commonwealth v. Escobar**, 70 A.3d 838, 841 (Pa. Super. 2013) (holding that, although defendant’s drug-related conviction made him deportable, his counsel was not required to advise him that he would be deported because actual deportation was not an absolute certainty when he pled); **see also Commonwealth v. McDermitt**, 66 A.3d 810, 814 (Pa. Super. 2013) (holding that plea counsel’s advice that defendant’s guilty plea would render him deportable was not ineffective).

Here, the PCRA court determined that it was “not truly clear that [Tavara] would be deported.” PCRA Court Opinion, 9/30/13, at 6. Accordingly, it found that, under **Padilla**, plea counsel “only needed to advise [Tavara] of potential adverse immigration consequences.” **Id.**

We agree with the PCRA court’s application of the law. Pursuant to 8 U.S.C.A. § 1101(a)(43)(G), Tavara’s conviction for receiving stolen property, coupled with his sentence for that conviction for a period greater than one year, rendered him deportable. However, whether ICE personnel would initiate and pursue Tavara’s actual deportation was not an absolute certainty when he entered his plea. **See Escobar**, 70 A.3d at 841 (holding that,

although the defendant's plea rendered him deportable, his deportation was not a certainty because "whether the U.S. Attorney General and/or other personnel would necessarily take all the steps needed to institute and carry out [the defendant's] actual deportation was not an absolute certainty when he pled.").

Moreover, Tavera knew that his deportation was possible. Tavera's counsel advised him that his guilty plea could have an effect on his immigration status and referred him to an immigration attorney. Tamara failed to contact an immigration attorney. Plea counsel's advice to Tamara was within the range of competence demanded of attorneys in criminal cases.

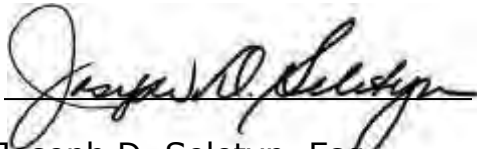
Even if ***Padilla*** required Tavera's plea counsel to specifically inform Tavera that he could be deported, it was not necessary in this case because, prior to accepting Tavera's plea, the trial court asked Tavera "Do you realize if you are not a U.S. citizen, this plea of guilty could cause you to be deported?" N.T, 9/2/11, at 24-25; ***see also McDermitt***, 66 A.3d at 814 (stating that it was unnecessary for plea counsel to specifically advise the defendant of his risk of deportation because he was made aware of this risk through other means prior to entering his plea). In response, Tavera indicated that "he understood." ***Id.*** at 25; ***see also Commonwealth v. Yeomans***, 24 A.3d 1044, 1047 (Pa. Super. 2011) (stating that a defendant

is bound by statements made during his guilty plea colloquy). Thus, by the time of his plea, Tavera was aware that he could be deported.

Because counsel's advice was not deficient, there is no merit to Tavera's claim that counsel should have advised him differently. Thus, Tavera has not established that counsel was ineffective. Similarly, Tavera has not established counsel's conduct induced an unknowing, involuntary or unintelligent plea. Therefore, the PCRA court did not err in denying Tavera's Petition.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/25/2014