

IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

MOHAMMAD A. BASHAR,
Defendant-Appellant.

Supreme Court No. 2013-SCC-0040-CRM

Superior Court No. 09-0036A

OPINION

Cite as: 2015 MP 4

Decided August 10, 2015

Janet H. King, King Law Office, Saipan, MP, for Defendant-Appellant.

James B. McAllister, Assistant Attorney General, Office of the Attorney General,
Saipan, MP, for Plaintiff-Appellee.¹

¹ McAllister was the Assistant Attorney General during the briefing and oral argument stages.

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; PERRY B. INOS, Associate Justice.

CASTRO, C.J.:

¶ 1 Defendant Mohammad A. Bashar (“Bashar”) appeals the trial court’s order denying his motion to set aside his post-conviction plea of *nolo contendere*. Bashar asserts the trial court erred by: (1) finding his motion untimely, (2) denying his motion without an evidentiary hearing, and (3) ruling that he failed to establish ineffective assistance of counsel. For the following reasons, we AFFIRM the trial court’s order.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 The Commonwealth charged Bashar, a citizen of Bangladesh and a resident of the Commonwealth for over thirteen years at the time, with marriage fraud and conspiracy to commit marriage fraud. Before the trial concluded, Bashar entered a plea of *nolo contendere* to marriage fraud pursuant to 3 CMC § 4366(a). The trial court accepted the plea agreement on February 10, 2011.² The plea stated that Bashar “knowingly enter[ed] a marriage with . . . Taitano for the sole purpose of obtaining a labor or immigration benefit, and/or for the purpose of evading Commonwealth and/or United States immigration law.” *Commonwealth v. Bashar*, No. 09-036A (NMI Super. Ct. Feb. 10, 2011) (Plea Agreement at 3) [hereinafter Plea Agreement]. The plea indicated Bashar and then-counsel, Edward C. Arriola (“Arriola”), understood “the nature, contents, and legal consequences of the [a]greement, including any potential immigration consequences that may or may not occur . . .” *Id.* The plea also reiterated that Arriola advised Bashar of the nature, content, and legal consequences of the agreement, including “any potential immigration consequences that may or may not occur as a result of entering into [the] agreement.” *Id.* at 3–4.

¶ 3 On January 12, 2012, the United States Immigration Court found Bashar removable based on his conviction for marriage fraud. Bashar appealed over a week after the decision, but the Board of Immigration Appeals ultimately dismissed the appeal.

¶ 4 On July 10, 2013, Bashar, through new counsel, moved to set aside his plea and vacate the conviction and sentence, alleging Arriola provided ineffective assistance as counsel by failing to inform him of the deportation consequence of the plea. Without holding an evidentiary hearing, the trial court denied Bashar’s motion because Bashar failed to establish Arriola was ineffective as counsel and did not timely file the motion.

² Two years prior to Bashar’s plea, Jayna Lynn Taitano (“Taitano”) also pled guilty to marriage fraud and agreed to cooperate during the prosecution of Bashar. In November 2009, Taitano filed for divorce, alleging she and Bashar married and separated on the same day.

¶ 5 Bashar challenges the trial court's order denying the motion to set aside the plea and vacate the conviction and sentence.

II. JURISDICTION

¶ 6 The Supreme Court has appellate jurisdiction over judgments and orders of the Superior Court of the Commonwealth. 1 CMC § 3102(a). Bashar timely appealed the Superior Court's final order. We therefore have jurisdiction. 1 CMC § 3105; NMI SUP. CT. R. 4(b)(1)(A)(i).

III. STANDARDS OF REVIEW

¶ 7 We review three issues. First, we consider whether the trial court abused its discretion in considering timeliness as a basis for denying the motion. *See Commonwealth v. Shimabukuro*, 2008 MP 10 ¶ 23 (applying the abuse of discretion standard when the trial court's ruling is grounded "on an erroneous view of the law"). Second, we determine whether the trial court abused its discretion when it did not conduct an evidentiary hearing on the motion. *United States v. Reed*, 719 F.3d 369, 373 (5th Cir. 2013). Third, we examine whether the trial court erred in denying the motion premised on Bashar's ineffective assistance claim. We review the ineffective assistance claim de novo, *Commonwealth v. Taivero*, 2009 MP 10 ¶ 7, and the denial of a post-conviction motion to withdraw a plea for abuse of discretion. *Id.* ¶ 25 (citing *Commonwealth v. Chen*, 2006 MP 14 ¶ 6).

IV. DISCUSSION

¶ 8 Bashar appeals the trial court's denial of his motion to withdraw the plea to marriage fraud based on an ineffective assistance claim. Before scrutinizing the trial court's denial of the motion without an evidentiary hearing, we consider whether the trial court abused its discretion in finding Bashar's motion untimely.

A. Timeliness of Post-Conviction Motion

¶ 9 We first assess whether there is a time limit to withdraw a plea under Commonwealth Rule of Criminal Procedure 32(d). Rule 32(d) provides: "to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his/her plea." NMI R. CRIM. P. 32(d).³ While the timeliness of a motion to withdraw a plea is a factor in

³ The federal standard for plea withdrawals after sentencing is now found in Federal Rules of Criminal Procedure 11(e). Under Federal Rule of Criminal Procedure 11(e), a defendant may only set aside a plea on direct appeal or collateral attack. However, Commonwealth Rule of Criminal Procedure 32(d) maintains the plea withdrawal standard prior to the amendment, allowing a defendant to withdraw a plea by demonstrating manifest injustice. The manifest injustice standard is higher than the fair and just standard under Federal Rule of Criminal Procedure 11(d), which applies to a defendant withdrawing a plea before sentencing. *State v. Taylor*, 829 N.W.2d 482, 497 (Wis. 2013). *See generally Commonwealth v. Santos*, 2013 MP 18 ¶ 12 (offering a presumption that substantive amendments to federal rules, such as the fair and just standard in Federal Rule of Criminal Procedure 11(d), must be approved by statute, court rules, or case law).

determining whether to grant the motion, timeliness is not itself dispositive of a motion to withdraw. *State v. Francis*, 820 N.E.2d 355, 362 (Ohio 2004) (concluding timeliness is “just one of many factors” the trial court should consider in assessing a motion to withdraw a plea under the manifest injustice standard); see *James v. State*, 699 N.W.2d 723, 728 (Minn. 2005) (indicating that a “deliberate and inexcusable” delay constitutes “sufficient grounds to justify denial of relief solely on the basis that the petition is untimely”).

¶ 10 Here, Bashar filed a motion to withdraw his plea over two years after entering the plea. In the order denying Bashar’s motion, the trial court noted Bashar’s multiple opportunities to withdraw his plea: following the notice to appear for removal proceedings twelve days after the plea, after the removal hearing in March 2011, and after the removal order in January 2012. Instead, Bashar moved to withdraw his plea in July 2013. While the trial court considered timeliness a basis for denial, it was not the sole basis. The trial court also took into account whether Arriola actually provided ineffective assistance. Thus, we cannot conclude that the trial court abused its discretion in deciding that Bashar’s motion was untimely.

B. Necessity of Evidentiary Hearing

¶ 11 Next, we address whether the trial court was required to conduct an evidentiary hearing to determine whether Bashar is entitled to a post-conviction withdrawal of his plea. In the context of an ineffective assistance claim, an evidentiary hearing must be conducted “if the records and files . . . cannot conclusively resolve substantial issues of material fact” and whether the allegations, if proven, would warrant relief for the defendant. *United States v. Butt*, 731 F.2d 75, 78 (1st Cir. 1984); see also *Reed*, 719 F.3d at 373 (“A defendant is entitled to an evidentiary hearing . . . only if he presents ‘independent indicia of the likely merit of [his] allegations.’” (quoting *United States v. Cavitt*, 550 F.3d 430, 442 (5th Cir. 2008))). Conclusory claims are insufficient to require an evidentiary hearing. *United States v. Fournier*, 594 F.2d 276, 279 (1st Cir. 1979). Our determination on the evidentiary hearing issue therefore turns on whether Bashar demonstrated manifest injustice, as required for a post-conviction motion to withdraw a plea under Commonwealth Rule of Criminal Procedure 32(d). Manifest injustice may be demonstrated by proving ineffective assistance of counsel. *Holtan v. Parratt*, 683 F.2d 1163, 1168 (8th Cir. 1982) (noting ineffective assistance of counsel as an example of manifest injustice); *State v. Taylor*, 829 N.W.2d 482, 497 (Wis. 2013) (same); *Commonwealth v. Starr*, 301 A.2d 592, 595 n.6 (Penn. 1973) (same).

¶ 12 To prevail on an ineffective assistance claim, Bashar must establish two prongs: (1) deficient representation by counsel, and (2) prejudice resulting from counsel’s deficient performance. *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)). In examining the first prong, the Court considers whether counsel acted reasonably “under prevailing professional norms.” *Strickland*, 466 U.S. at 688. The second prong, prejudice, is satisfied by demonstrating “a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

¶ 13 While we have previously reviewed ineffective assistance claims raised after immigration proceedings, we have not examined the issue since the United States Supreme Court's decision in *Padilla v. Kentucky*. There, the defendant filed a post-conviction claim for relief based on ineffective assistance because his counsel did not advise him about the deportation consequence of a guilty plea and instead "told him that 'he did not have to worry about immigration status since he had been in the country so long.'" 559 U.S. at 359. *Padilla* considered an attorney's obligation to advise a defendant about the removal consequence of a guilty plea. *Id.* at 360.

¶ 14 *Padilla* held that counsel must advise a client about the risk of deportation as a consequence of entering a criminal plea. *Id.* at 374. It acknowledged:

There will . . . be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, . . . the duty to give correct advice is equally clear.

Id. at 363 (footnote omitted).

¶ 15 In light of the new standard, *Padilla* examined the first prong in establishing ineffective assistance—deficient performance. The Court reviewed the applicable immigration statute, which provided:

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

Id. at 368 (quoting 8 U.S.C. § 1227(a)(2)(B)(i)). *Padilla* determined the statute was "succinct, clear, and explicit" in outlining the immigration consequence of a conviction for transporting marijuana. 559 U.S. at 368. Thus, counsel should have known that pleading guilty to transporting a large amount of marijuana would lead to deportation. *Id.* at 368–69. The United States Supreme Court held the defendant adequately raised claims that, if true, would constitute deficient performance by counsel.⁴ *Id.* at 369.

⁴ The Court remanded to the lower court whether prejudice resulted from the deficient performance by defense counsel. 559 U.S. at 369.

¶ 16 Before *Padilla*, we have consistently held that an attorney is not obligated to inform a client of potential immigration consequences—a collateral consequence⁵ of a guilty plea—based on federal precedent. *Taivero*, 2009 MP 10 ¶¶ 16–18; *Shimabukuro*, 2008 MP 10 ¶ 16; *Chen*, 2006 MP 14 ¶ 9 (citing numerous federal circuit court cases). Indeed, until *Padilla*, “the longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the *direct* consequences of a criminal conviction.” *Padilla*, 559 U.S. at 375–76 (Alito, J., concurring). We now take this time to review the applicability of *Padilla* to the ineffective assistance claim before us.

¶ 17 *Padilla*’s holding—that the Sixth Amendment right to effective assistance of counsel includes the right of a criminal defendant to be informed of whether entry of a criminal plea carries the risk of deportation—applies in the Commonwealth. See NMI CONST. art. I, § 4 (delineating a criminal defendant’s fundamental right to assistance of counsel). Likewise, we too require counsel to comport with *Padilla*’s requirements.⁶

¶ 18 In determining whether the trial court should have conducted an evidentiary hearing in this matter, we consider whether the record cannot resolve substantial issues of material fact; and whether Bashar’s allegations, if true, constitute ineffective assistance. Here, the trial court relied on Arriola’s and his employees’ declarations in concluding Bashar failed to establish an ineffective assistance claim. Arriola and his employees contend Bashar was aware of the deportation consequences. Arriola specifically advised Bashar that “it might be in his best interest to cut his loss in order to avoid a jail sentence and consider a plea deal whereby he would pay a fine of \$2,000.00, . . . and be placed on one year probation but would eventually be subject to deportation” Arriola Decl. 5. Arriola notified Bashar that while he could not determine the length of time before the deportation process triggers, he would speak with the Commonwealth about not actively pursuing deportation against Bashar. Based on this understanding, Bashar agreed to the plea. Arriola also noted to Bashar “the inevitability of his conviction if [trial proceeded] and also the inevitability of deportation” at the trial court courtroom at or around the time of the change of plea hearing, at Arriola’s office in the presence of two employees, and at Arriola’s office when Bashar signed the plea agreement. *Id.* at 6.

⁵ The United States Supreme Court declined to consider the distinction between direct and collateral consequences “because of the unique nature of deportation,” which is “intimately related to the criminal process.” *Id.* at 365–66. It determined that categorizing deportation as a direct or collateral consequence is “ill suited to evaluating a *Strickland* claim.” *Id.* at 366.

⁶ Bashar’s proceedings began in February 2011—after the *Padilla* decision. *Padilla* applies prospectively. See *Chaidez v. United States*, ___ U.S. ___, 133 S. Ct. 1103, 1107–11 (2013) (specifying that the new rule in *Padilla* does not benefit a defendant with a final conviction prior to *Padilla*).

¶ 19 On the other hand, Bashar asserts he alleged facts that present a “colorable claim” of ineffective assistance, which would warrant relief if proven. Bashar claims Arriola did not advise him about the deportation consequence of pleading guilty to marriage fraud and merely discussed the “potential immigration consequences that may or may not occur as a result of entering” the plea. Plea Agreement 3. He argues the trial court erred in relying on declarations by Arriola and his employees without an evidentiary hearing and maintains these declarations contradict the plea agreement. The plea states Arriola advised Bashar about “potential immigration consequences that may or may not occur as a result of entering” the plea. *Id.* at 3. Bashar further argues his ineffective assistance claim was bolstered by the declarations of seven witnesses, who were prepared to testify at the hearing or at trial regarding the bona fide nature of the marriage.

¶ 20 While Bashar asserts the evidentiary hearing would have adduced facts concerning the nature of his marriage, the evidentiary hearing, if conducted, would solely address the issue of ineffective assistance of counsel. Bashar merely argues an evidentiary hearing would have afforded the trial court an opportunity to make credibility determinations. However, Bashar fails to demonstrate whether the hearing would have elicited facts that would bolster his ineffective assistance claim. Furthermore, in determining the motion, the trial court considered all declarations, including Bashar’s; the trial court’s warning concerning the potential immigration consequences of the plea; and the timing of the motion. Thus, Bashar does not sufficiently establish how the existing record was inadequate to resolve substantial issues of material fact regarding his ineffective assistance claim. Accordingly, we conclude the trial court did not abuse its discretion by refusing to hold an evidentiary hearing on the ineffective assistance claim.

C. Ineffective Assistance of Counsel

¶ 21 We now turn to the merits of Bashar’s ineffective assistance claim. Bashar claims he entered a plea after Arriola advised him that he would not experience immigration issues, including deportation, if he paid the \$2,000 fine. Bashar contends he would not have pled nolo contendere if he received accurate advice with respect to the immigration consequence of the plea.

¶ 22 In its order denying Bashar’s motion to withdraw his plea, the trial court determined Arriola’s actions did not constitute deficient performance. The trial court’s analysis of the first *Strickland* prong focused on the declarations of Arriola and his employees and the lack of direct and circumstantial evidence provided by Bashar to demonstrate deficient performance. Unlike *Padilla*, where counsel assured the defendant that he did not have to be concerned about his immigration status, 559 U.S. at 359, Arriola alleges he notified Bashar several times about the deportation consequence of the plea. During his plea discussions with Bashar, Arriola noted that it was best for Bashar to plea because he would avoid a jail sentence, serve a one-year probation, and pay a fine, although he would “eventually be subject to deportation by the U.S.

Immigration.” Arriola Decl. 5. In response, Bashar expressed his desire “to avoid going back to jail at all cost,” and inquired as to the amount of time before deportation and whether deportation could be stalled. *Id.* Upon Arriola’s request, the Commonwealth agreed to not actively pursue Bashar’s deportation proceedings. With an understanding that Bashar would be deported eventually, Bashar agreed to a change of plea and signed the plea agreement. Based on these facts, the trial court determined Arriola did not perform deficiently; that is, he did not act unreasonably under prevailing professional norms.

¶ 23 Because Bashar did not adequately support his claim that Arriola failed to inform him of the adverse immigration consequences of his plea, we conclude Bashar failed to establish a claim for ineffective assistance of counsel. Consequently, we decline to reach the merits of the prejudice prong.⁷ We therefore hold the trial court did not err in determining Bashar failed to establish ineffective assistance and did not abuse its discretion by denying Bashar’s motion.

V. CONCLUSION

¶ 24 Based on the foregoing, the trial court did not abuse its discretion in considering timeliness as a basis for denying Bashar’s post-conviction motion to withdraw his plea, not conducting an evidentiary hearing on the ineffective assistance claim, and denying the motion. Furthermore, the trial court did not err in finding Bashar failed to demonstrate ineffective assistance by Arriola. Accordingly, we AFFIRM the trial court decision.

SO ORDERED this 10th day of August, 2015.

⁷ On remand, the lower court focused on whether the rejection of the plea bargain would have been “rational under the circumstances”; in other words, whether the defendant “rationally would have insisted on a trial.” *Padilla v. Kentucky*, 381 S.W.3d 322, 328 (Ken. 2012) [hereinafter *Padilla II*] (quoting *Padilla*, 559 U.S. at 372) (internal quotation marks omitted). In determining the issue, the lower court weighed “the evidence of guilt and the potential sentence if convicted at trial compared to the consequences of the guilty plea,” but noted that the immigration consequences of a guilty plea may be a dominating factor for a noncitizen defendant. *Padilla II*, 381 S.W.3d at 329.

/s/ _____
ALEXANDRO C. CASTRO
Chief Justice

/s/ _____
JOHN A. MANGLONA
Associate Justice

/s/ _____
PERRY B. INOS
Associate Justice