

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-471

Filed: 3 December 2019

Nash County, No. 15 CRS 52330

STATE OF NORTH CAROLINA

v.

ALI AWNI SAID MARZOUQ, Defendant.

Appeal by defendant from order entered 28 December 2018 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 31 October 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.*

*Tin Fulton Walker & Owen, PLLC, by Jim Melo, Esq., for defendant-appellant.*

*North Carolina Advocates for Justice, by Helen L. Parsonage, and North Carolina Justice Center, by Raul A. Pinto, amici curiae.*

YOUNG, Judge.

Where defendant's guilty plea presumptively subjected him to deportation, trial counsel's advice that defendant "may" be deported constituted ineffective assistance of counsel. However, where the record does not affirmatively show whether the trial court considered defendant's prior convictions to determine prejudice, we must remand for further findings. We affirm in part, but remand in part.

I. Factual and Procedural Background

On 3 August 2015, Ali Awni Said Marzouq (defendant) was indicted by the Nash County Grand Jury for possession with intent to sell and deliver heroin, and possession of a Schedule II controlled substance. At some point he was also charged with maintaining a vehicle or dwelling place for the keeping or selling of controlled substances. Defendant pleaded guilty to the charges of possession of heroin and maintaining a vehicle or dwelling place, and the trial court entered judgment, namely a two-year suspended sentence. On the transcript of plea, next to Question 8, which asks whether the defendant understands that a guilty plea may result in deportation, defendant wrote “Permanent resident.”

On 12 July 2018, defendant filed a motion for appropriate relief (MAR), seeking to withdraw his guilty plea. Defendant, an immigrant, alleged that roughly one year into his two-year suspended sentence, he was seized by Immigration and Customs Enforcement and placed into detention and removal proceedings. He argued that, had he known the plea would impact his immigration status and result in deportation, he would not have taken it. On 10 September 2018, the trial court entered an order, finding that defendant’s indication of “Permanent resident” in response to Question 8 on the transcript of plea indicated an affirmative response. The court therefore denied defendant’s MAR.

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*Opinion of the Court*

On 8 November 2018, this Court granted certiorari. In an order, this Court required the trial court to review “whether petitioner’s Alford plea was induced by misadvice of counsel regarding the immigration consequences of the plea and whether any misadvice resulted in prejudice to petitioner.” The matter was remanded to the trial court for review, and on 28 December 2018, the trial court entered another order. The court found that defendant had been advised that if he pleaded guilty, he might be deported; that defendant had further been advised to speak to an immigration attorney; that defendant asserted to the trial court that he was a citizen, not a permanent resident, of the United States; and that this assertion “precluded any further inquiry into his immigration status and thwarted both the Court and the State’s ability to cure any misadvice the defendant may have received.” The court therefore found that counsel’s advice did not constitute ineffective assistance of counsel, and that defendant failed to show prejudice. The trial court once more denied defendant’s MAR.

On 11 March 2019, this Court granted certiorari to review the trial court’s 28 December 2018 order denying defendant’s MAR.

II. Standard of Review

“When considering rulings on motions for appropriate relief, we review the trial court’s order to determine ‘whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether

the conclusions of law support the order entered by the trial court.’ ” *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). “When a trial court’s findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court’s conclusions are fully reviewable on appeal.” *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998) (citations omitted).

### III. Ineffective Assistance of Counsel

In his first argument, defendant contends that the trial court erred in finding that defense counsel’s conduct was not ineffective assistance of counsel. We agree.

In his MAR, defendant alleged that counsel informed him that his plea “may affect his immigration status or . . . that it would not affect his immigration status in any manner.” Defendant attached to his MAR three affidavits. In one, his own, defendant averred that his attorney “specifically told me not to worry about Immigration.” In another, his fiancée Shannon Pitt averred that defense counsel “said that [defendant] would not have anything to worry about with his immigration status.” Defendant, citing the case of *Padilla v. Kentucky*, 559 U.S. 356, 176 L. Ed. 2d 284 (2010), noted that counsel is “constitutionally ineffective if he fails to advise – or misadvises – his client about the immigration consequences of a guilty plea.”

Defendant therefore argued in his MAR, and argues now on appeal, that he received ineffective assistance of counsel as a result of his attorney's misadvice.

This Court has held that “*Padilla* mandates that when the consequence of deportation is truly clear, it is not sufficient for the attorney to advise the client only that there is a risk of deportation.” *State v. Nkiam*, 243 N.C. App. 777, 786, 778 S.E.2d 863, 869 (2015). In the instant case, defendant's plea concerned possession of heroin and maintaining a dwelling place, two drug-related offenses. Federal law requires an alien or permanent resident to be deported who “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[.]” 8 U.S.C. § 1227(a)(2)(B)(i). This statute provides an explicit mandate – such an alien “shall” be removed if he or she falls within this or other categories.

We hold that where federal statute mandates removal, there is a presumption that deportation will happen. As such, pursuant to *Padilla* and *Nkiam*, it is not sufficient for counsel to suggest that deportation “may” happen or is possible. It is incumbent upon counsel, in a situation like this where deportation is presumed where a defendant pleads or is found guilty, to specify that deportation is probable, or presumptive. Waffling language suggesting a mere possibility of deportation does

not adequately inform the client of the risk before him or her, and does not permit a defendant to make a reasoned and informed decision.

In the instant case, the evidence is somewhat inconsistent. Defendant contends that counsel did not inform him whatsoever of the consequences of his plea, while counsel avers that he informed him there may be consequences. At most, however, the evidence would permit the trial court to find that counsel only offered the possibility of deportation – “may” language, instead of “presumptive” language. As we have held, such language is insufficient when a defendant is facing presumptive deportation. Accordingly, we hold that defendant received ineffective assistance of counsel, and the trial court erred in finding otherwise.

We note, however, that a showing of ineffective assistance of counsel is insufficient to grant defendant the relief he seeks; he must also show prejudice. For this reason, we continue to examine defendant’s arguments.

#### IV. Prejudice

In his second argument, defendant contends that the trial court erred in finding that defendant was not prejudiced by defense counsel’s conduct. We disagree.

Defendant argues that the decision to reject the plea bargain and go to trial would have been a rational one, had he known of the immigration consequences of his decision. As a result, he contends that this guilty plea subjected him to prejudice, namely deportation, where he otherwise might not have been subject.

“Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citations and quotation marks omitted).

The State, in its brief, cites to numerous federal cases which suggest that a defendant who is facing deportation on other grounds cannot show prejudice. *See e.g. United States v. Batamula*, 823 F.3d 237, 242 (5th Cir. 2016) (holding that, where a defendant was “already deportable for having overstayed his visa[,]” he “failed to show prejudice”). We agree with the State, in principle. A showing of prejudice requires a showing that, absent the allegedly erroneous action, a different outcome would have resulted. If a defendant was facing deportation for a separate charge, then regardless of whether he pleaded or went to trial on the instant charge, deportation would still result. As such, we hold that a defendant already facing deportation could not show prejudice, notwithstanding the otherwise ineffective assistance of trial counsel.

The problem that confronts us, however, is the insufficiency of the record. The State notes that “the Department of Homeland Security has taken the position that Defendant is subject to removal on the basis of two convictions: (1) his 30 June 2016 conviction for possession of drug paraphernalia, and (2) his 2 March 2017 conviction for possession of heroin.” Moreover, defendant’s trial counsel acknowledged his prior

conviction for possession of drug paraphernalia. However, it is not clear to this Court that the trial court had the complete factual background, including the position of the Department of Homeland Security, before it.

The State concedes, and we so hold, that a conviction for possession of drug paraphernalia, as opposed to a conviction more directly relating to a controlled substance, does not render a noncitizen presumptively removable. *See e.g. Madrigal-Barcenas v. Lynch*, 797 F.3d 643, 645 (9th Cir. 2015) (holding that a conviction for possession of drug paraphernalia is “not categorically for violation of a law relating to a controlled substance”).

In the instant case, the trial court’s order noted a number of defendant’s pending charges in other cases. It did not, however, contain any findings as to other *convictions*, nor as to whether these convictions made defendant eligible for deportation. Rather, the trial court, upon finding and concluding that defendant did not receive ineffective assistance of counsel, somewhat summarily found and concluded that defendant was not prejudiced by same.

It is true that, in a case such as this, where the trial court’s findings are supported by competent evidence, they are binding upon this Court. And it is true that defendant’s counsel conceded the existence of his prior conviction for possession of drug paraphernalia. However, such a conviction does not render defendant presumptively removable, and it is not clear that the trial court had the position of



Homeland Security before it to support that determination. As such, it is not clear to this Court that there was, in fact, competent evidence to support the trial court's finding that there was no prejudice. We therefore remand this issue to the trial court for the entry of findings consistent with this opinion. On remand, the trial court shall consider whether defendant was prejudiced based on the ineffective assistance of counsel, and shall specifically consider whether defendant is subject to deportation on other charges.

V. Assertion of Citizenship

In his third argument, defendant contends that the trial court erred in finding that defendant's assertion of United States citizenship rendered his MAR moot. While we need not address this issue, as we have remanded this matter for further proceedings, we feel we nonetheless must clarify a matter of trial procedure.

In its order denying defendant's MAR, the trial court found:

23. When questioned by the Court during the plea colloquy on March 2, 2017, defendant told the Court that he was a citizen of the United States.

24. Defendant subsequently admitted that he told the Court he was a citizen of the United States.

25. Defendant's presentation to the Court that he was in fact a citizen of the United States precluded any further inquiry into his immigration status and thwarted both the Court and the State's ability to cure any misadvice the defendant may have received.

As a result, the trial court concluded that “[t]he defendant’s assertion to the Court that he was a citizen renders this MAR moot.” Defendant contends that this conclusion was erroneous.

Simply put, the trial court’s analysis was in error. Pursuant to our General Statutes:

Except in the case of corporations or in misdemeanor cases in which there is a waiver of appearance under G.S. 15A-1011(a)(3), a superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:

- (1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;
- (2) Determining that he understands the nature of the charge;
- (3) Informing him that he has a right to plead not guilty;
- (4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;
- (5) Determining that the defendant, if represented by counsel, is satisfied with his representation;
- (6) Informing him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge; and
- (7) Informing him that if he is not a citizen of the United States of America, a plea of guilty or no contest may result in deportation, the exclusion from admission to this

country, or the denial of naturalization under federal law.

N.C. Gen. Stat. § 15A-1022(a) (2017). No provision is made that permits the trial court to bypass one of these questions. Indeed, all are mandatory. It was therefore error for the trial court to determine that, where defendant asserted his citizenship, it was not necessary for the trial court to inform him of the risk of deportation.

However, the trial court was nonetheless correct, but for a different reason. Our General Statutes also provide that “[n]oncompliance with the procedures of this Article may not be a basis for review of a conviction after the appeal period for the conviction has expired.” N.C. Gen. Stat. § 15A-1027 (2017). In other words, despite the trial court’s failure to engage in proper colloquy with defendant, in violation of N.C. Gen. Stat. § 15A-1022, that failure ceased to be grounds for review when the time for appeal had passed. Defendant’s MAR was filed in 2018, long after the appeal period had passed, and as such, any argument concerning the trial court’s failure to comply with statute was indeed rendered moot.

We nonetheless feel the need to reinforce the importance of following this procedure. The requirements outlined in N.C. Gen. Stat. § 15A-1022 are mandatory, regardless of what a defendant might say, and we advise the courts of this State to comply with them.

AFFIRMED IN PART, REMANDED IN PART.

Judges DILLON and DIETZ concur.