

State of Wisconsin:

Circuit Court:

Milwaukee County

State of Wisconsin,

Plaintiff,

v.

Case No. 2004CM009116

Pedro Mata,

Defendant.

Motion to Withdraw Guilty Plea

Now comes the above-named defendant, by his attorney, Jeffrey W. Jensen, and hereby moves to withdraw the guilty plea entered in this matter.

As grounds, the undersigned shows to the court that:

1. The court did not warn Mata of the immigration consequences of his guilty plea prior to accepting the plea, and now Mata is the subject of deportation proceedings; and, additionally,

2. Mata received ineffective assistance of counsel in that Mata's attorney misadvised Mata of the immigration consequences of his guilty plea. Had Mata known that this conviction makes him presumptively subject to deportation, he would exercised his right to trial. Mata has a defense on the merits.

This motion is further based upon the attached Memorandum of Law.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2011

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By: _____

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Pedro Mata,

Defendant.

Memorandum of Law in Support of Motion to Withdraw Guilty Plea

Factual Background

The defendant, Pedro Mata (hereinafter “Mata”) was charged with knowingly failing to register as a sex offender. On October 19, 2005, the parties reached an agreement whereby Mata would enter a guilty plea to the crime charged, and the State would recommend a “time served” disposition.

The court conducted a plea colloquy with Mata and, thereafter, accepted his guilty plea. The court’s colloquy, though, did not include the immigration warning required by Sec. 971.08(1)(c), Stats.

After the prosecutor made her sentencing remarks, the court-- apparently realizing the omission-- gave the statutory warning to Mata. The judge then asked Mata whether he wanted to reconsider his guilty plea. (Tran. p 10) Mata did not respond. Then the colloquy went as follows:

THE COURT: Would this change your decision, sir?

MR. DONOHUE: He’s a legal resident, and the other offense would have affected him before this one and it hasn’t yet. We discussed that, the fact that he was a legal resident and it’s not one where he’s going to have to do anything

with immigration any time soon. I told him he should not apply for citizenship because that would raise some problems.

THE COURT: Mr. Donohue, do you want to talk to your client for a minute?

MR. DONOHUE: No, he understands.

THE COURT: Sir, I'm asking do you want to reconsider in light of what I just explained?

THE DEFENDANT: I would like to continue, go ahead.

(Trans. pp. 11-12).

Mata is now in federal custody facing deportation proceedings, in part because of the conviction in this case.

Argument

I. The court's guilty plea colloquy was defective in that the court failed to give Mata the immigration warning prior to the acceptance of his plea. Mata is automatically entitled to withdraw his plea now that he is subject to immigration proceedings.

Sec. 971.08(1)(c), Stats., provides that, before the court may accept a guilty plea, it must:

(c) Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law.

Additionally, Sec. 971.08(2), Stats., provides:

(2) If a court fails to advise a defendant as required by sub. (1) (c) and a defendant later shows that the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization, the court on the defendant's motion shall vacate any applicable judgment against the defendant and permit the defendant to withdraw the plea and enter another plea. This subsection does not limit the ability to withdraw a plea of guilty or no contest on any other grounds.

Here, the transcript of the plea hearing demonstrates that Mata did not receive the immigration warning *prior to the entry and acceptance of his guilty plea* in the exact words of the statute.

In, *State v. Douangmala*, 2002 WI 62, P46 (Wis. 2002) the Wisconsin Supreme Court made clear that where the court does not warn the defendant about the immigration consequences *in the exact words of the statute*, and where the defendant shows that he is subject to deportation proceedings, the statute is mandatory- the court must permit the defendant to withdraw his guilty pleas. That is, there is no harmless error analysis. In *Douangmala*, the Supreme Court wrote:

[W]e conclude that Wis. Stat. § 971.08(1)(c) sets forth the language a circuit court must use to inform a defendant of the deportation consequences of entering a plea of guilty or no contest. In the present case, the circuit court did not advise the defendant in any manner regarding the deportation consequences of entering a plea of no contest. If a circuit court fails to give the statutorily mandated advice and if a defendant moves the court and demonstrates that the plea is likely to result in the defendant's deportation, then § 971.08(2) requires the circuit court to vacate the conviction and to permit the defendant to withdraw the guilty or no-contest plea.

Plainly, since *Douangmala*, there is no harmless error analysis, or “substantial compliance” argument. A bright line rule was created. Here, the court did not give Mata the warning prior to the acceptance of his guilty plea. Moreover, Mata is now the subject of deportation proceedings. Thus, Mata appears to be automatically entitled to withdraw his guilty plea.

However, what effect should the court’s offer, during the sentencing proceedings, to permit Mata to withdraw his plea? As will be set forth in more detail below, it should have no effect because: (1) The statute and the case law create a mandatory procedure, which was not followed (i.e. there is no “substantial compliance” rule); (2) Mata received ineffective assistance of counsel concerning the advisability of withdrawing his guilty plea.

II. The court's offer during the sentencing proceedings to permit Mata to withdraw his guilty plea does not affect the outcome of this motion-- the procedure is mandatory, and Mata received ineffective assistance of counsel on the issue of whether he should withdraw his plea.

Here, during the sentencing hearing the court apparently realized that it had failed to give Mata the immigration warning. The court then read the statutory warning, and asked whether Mata would like to reconsider his guilty plea. The transcript suggests that Mata was stunned by the court's warning, because Mata did not at first answer the court. Instead, Mata's attorney assured the court that Mata did not want to withdraw his plea. Remarkably, defense counsel told the judge, "[t]he other offense would have affected him before this one and it hasn't yet." (Trans. p. 10) Thereafter, Mata told the judge that he wanted to proceed with his guilty plea.

As will be set forth in more detail below, defense counsel was woefully defective in giving such advice to Mata. The advice is contrary to immigration law. Further, Mata had a defense on the merits of the offense, and he would not have entered a guilty plea had he known that the conviction could result in deportation.

In, *Padilla v. Kentucky*, 130 S. Ct. 1473, 1475-1476 (U.S. 2010), the defendant sought to withdraw his guilty plea because, "[h]is counsel not only failed to advise him of this consequence before he entered the plea, but also told him not to worry about deportation since he had lived in this country so long. " The misadvice that defense counsel gave in *Padilla* is practically identical to the misadvice given to Mata by defense counsel in this case.

Regarding such advice, the United States Supreme Court in *Padilla* found that:

In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction. See 8 U.S.C. § 1227(a)(2)(B)(i) "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"). Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which

addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect.

Padilla, 130 S. Ct. at 1483.

Mata's counsel, then, was clearly ineffective when he advised Mata not to withdraw his guilty plea because, "the other offense would have affected him before this one and it hasn't yet."

Ineffective assistance of counsel, of course, is a two-pronged analysis. First, the defendant must show that his counsel was ineffective. Here, ineffectiveness is clear. The second prong, though, requires Mata to show that counsel's ineffectiveness was prejudicial. See *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *State v. Sanchez*, 201 Wis. 2d 219, 232-236, 548 N.W.2d 69, 74-76 (1996). To show prejudice in the context of a guilty plea, Mata must demonstrate that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and he would have insisted on going to trial. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50, 54 (1996). More precisely in this case, Mata will have to show that he would have immediately made a motion to withdraw his guilty plea had he known that the conviction would cause him to be subject to deportation proceedings.

Here, Mata has alleged that he would have moved to withdraw his guilty plea, and gone to trial, had he known that he would be subject to deportation proceedings. Ineffective assistance of counsel claims present mixed questions of law and fact. See *State v. Pitsch*, 124 Wis. 2d 628, 633-634, 369 N.W.2d 711, 714 (1985). Therefore, the court must conduct a hearing into this motion.

Conclusion

For these reasons, it is respectfully requested that the court permit Mata to

withdraw his guilty plea.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2011

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