IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)	
)	
V.)	ID. No. 1201010137
)	
FITZHUAH AIKEN.)	

ORDER

On this 22nd Day of October and upon Defendant Fitzhuah Aiken's ("Defendant") motion for post-conviction relief and to withdraw his guilty plea, it appears to the Court that:

Background

On January 13, 2012, a Sears Loss Prevention manager informed Officer Mauchin that Defendant, a Sears employee, and another employee were observed on video surveillance stealing recycled car batteries. When the loss prevention manager interviewed Defendant, he admitted to stealing the batteries and provided a written statement. On January 17, 2012, an arrest warrant was obtained for the Defendant and he spoke to Officer Mauchin on the phone. On January 19, 2012, Defendant agreed to turn himself in and he obtained a public defender, Raymond M. Radulski ("Attorney Radulski").

On February 1, 2012, Defendant and Attorney Radulski signed a Truth-in-Sentencing Form. The form contained the following question: "NON-CITIZENS: Are you aware that conviction of a criminal offense may result in deportation/removal, exclusion from the United States, or denial of naturalization?" Attorney Radulski marked "NA" in response to the question. The answer "Yes" was marked in response to the question "Have you read and understood all the information in this form?"

On February 16, 2012, Defendant entered a plea of guilty to Theft of more than \$1500, a felony. During the plea colloquy, Defendant replied in the affirmative when the Court asked whether he reviewed the form with his attorney and whether the form was complete and accurate. Defendant was then sentenced to 2 years at Level 5 suspended for 1 year at Level 3 probation and restitution, fees and costs.

Defendant did not appeal his plea and, on May 20, 2013, he moved for the first time and through different counsel for post-conviction relief and the withdrawal of his plea based on the ineffective assistance of counsel. Based on *Padilla v. Kentucky*, 559 U.S. 365 (2010), Defendant argues that, because he is in

¹ State Mot., at ¶ 7

² Truth-in-Sentencing Form (bold in original).

the United States on a green card,³ his attorney was required, but failed to, advise him that his guilty plea carried a risk of deportation.

The State has attached the Attorney Radulski's affidavit to support its assertion that Attorney Radulski was not under a duty to advise Defendant of the consequences related to his immigration status because he was not made aware of Defendant's status. The State also argues that Defendant cannot show that, but for counsel's failure to inform him of the risk of deportation, he would not have pled guilty.

In Attorney Radulski's affidavit, he stated that he "reviewed the Truth-in-Sentencing Guilty Plea form line-by-line with the defendant, including the caveat directed to 'non-citizens' which advises non-citizens of possibility of deportation/removal, exclusion from the United States or denial of naturalization which may result from a criminal conviction." He also stated that he had "no recollection of the defendant having advised [him] of his 'green card' status at the time [they] discussed the plea, at the time [they] reviewed the Guilty Plea Form, or at any time prior to sentencing."5

 $^{^3}$ Defendant's green card expires in November 2013. Def. Mot., at \P 6. 4 Radulski Affidavit, at \P 2.

Standard of Review

To determine whether to consider the merits of a motion for post-conviction relief, the Court must first determine whether a defendant has met the procedural requirements under Del. Super. Ct. Rule 61.⁶ While "[a] defendant who fails to raise an issue on direct appeal is generally barred from raising it in a postconviction motion," "colorable ineffective assistance of counsel claims are not subject to the procedural bars contained in Rule 61(i)(1), (2), or (3)."

Granting a motion to withdraw a guilty plea is within the "sound discretion of the trial court." "After sentencing, a motion to withdraw a guilty plea constitutes a collateral attack against the conviction and is subject to the requirements of Rule 61, including its bars of procedural default." ¹⁰

Discussion¹¹

Under the *Strickland* two-prong test, a defendant asserting a claim for ineffective assistance of counsel must show 1) "that counsel's representation fell below an objective standard of reasonableness, with reasonableness being judged

⁶ Ayers v. State, 802 A.2d 278, 281 (Del. 2002).

⁷ *Id.* (citing Super. Ct.Crim. R. 61(i)(3)).

⁸ State v. Washington, 2007 WL 2297092, at *1 (Del. Super. Aug. 13, 2007) aff'd, 945 A.2d 1168 (Del. 2008)(citing State v. MacDonald, 2007 WL 1378332, at *4, n. 17 (Del . Super.Ct. May 9, 2007)).

⁹ Blackwell v. State, 736 A.2d 971, 972 (Del. 1999).

¹⁰ *Id.* at 972-73.

¹¹ Because Defendant did not file a direct appeal, judgment became final in March 2012, 30 days after Defendant was sentenced. Rule 61(i)(1). Defendant did not file this motion until May 20, 2013. Nevertheless, the Court will consider Defendant's ineffective assistance argument. *Washington*, 2007 WL 2297092 at *1.

under professional norms prevailing at the time counsel rendered assistance" and 2) "a reasonable probability that the deficiencies in counsel's representation caused the defendant actual prejudice." When considering the reasonableness prong, the Court affords counsel a "strong presumption of reasonableness" and "evaluate[s] the conduct from counsel's perspective at the time." ¹⁵

In *Padilla*, a defendant, a Honduran native and lawful permanent resident of the United States, moved for post-conviction relief based on the ineffective assistance of counsel. The defendant argued that his counsel not only failed to advise him of the risk of deportation associated with the plea, but also supplied erroneous advice. Finding that the defendant satisfied *Strickland*'s reasonableness prong, the Supreme Court held that "counsel must inform her client whether his plea carries a risk of deportation." ¹⁶

Defendant has not shown that Attorney Radulski's representation fell below an objective standard of reasonableness or that Attorney Radulski failed to inform Defendant of the risk of deportation, as required by *Padilla*. First, nowhere in Defendant's motion does he indicate any circumstances under which Attorney

¹² Smith v. State, 991 A.2d 1169, 1174 (Del. Supr. 2010)(quoting Strickland v. Washington, 466 U.S. 668, 668 (1984)) (internal quotations omitted).

¹³ *Id.* at 1174 (citing *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996)).

¹⁴ Id. (quoting Strickland, 466 U.S. at 689).

¹⁵ *Id*.

¹⁶*Padilla*, 559 U.S. at 374.

Radulski was made aware of his immigration status. In his affidavit, Attorney Radulski stated that he did not recall that Defendant informed him of his status. Second, Defendant signed the Truth-in-Sentencing form, indicating that he read and understood all of the questions and that the citizenship question was "NA" or "not applicable." Third, Defendant stated to the Court that his attorney went over the questions on the form and that the form was accurate. Attorney Radulski also stated that he reviewed the form "line by line," including the question regarding citizenship. 17 Therefore, the Court finds that Defendant has failed to show that Attorney Radulski's representation was unreasonable. Because Defendant has not shown the reasonableness prong, the Court does not reach the second *Strickland* prong. Consequently, Defendant's request for post-conviction relief and the withdrawal of his guilty plea based on the ineffective assistance of counsel must be denied.

Conclusion

For the foregoing reasons, Defendant's motion for post-conviction relief and withdrawal of his guilty plea is **DENIED.**

IT IS SO ORDERED.

/s/Calvin I. Scott
Judge Calvin L. Scott, Jr.

¹⁷ Cf. State v. Davis, 2011 WL 2085900, at *2 (Del. Super. May 20, 2011) (discussing the risk of deportation language contained in Truth-in-Sentencing forms).