Rel: April 23, 2021

Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-19-0273

Grace Okeowa

v.

State of Alabama

Appeal from Russell Circuit Court
(CC-16-1015.60)

COLE, Judge.

Grace Okeowa, a Nigerian national who was a lawful permanent resident of the United States (known colloquially as a "green-card

holder"), pleaded guilty to third-degree theft of property on December 17, 2018. She was sentenced to 22 months' imprisonment. Shortly after she pleaded guilty, the United States Immigration and Customs Enforcement agency took Okeowa into custody and began removal proceedings against her.[1]

In response, Okeowa filed a Rule 32, Ala. R. Crim. P., petition for postconviction relief, alleging that her trial counsel was ineffective because, she said, her counsel -- who she also alleged "was not aware that [she] was subject to U.S. Immigration Law at the time the plea was entered" -- did not tell her that "her plea would render her categorically deportable from the United States as an aggravated felon." (C. 8.) Okeowa claimed that if her counsel had told her that she would be removed from the United States by pleading guilty to third-degree theft of property, then she would not have entered a guilty plea.

After an evidentiary hearing, the circuit court denied Okeowa's petition. The circuit court found that, based on the testimony of Okeowa's

[1]The federal immigration statutes use the term "removal" instead of "deportation."

trial counsel, Okeowa was advised through the "Explanation of Rights and Plea of Guilty" form that "a guilty plea may subject [her] to adverse immigration consequences, including deportation," but she did not tell her counsel "of her immigration status." (C. 58.) The circuit court concluded that counsel "cannot be deemed to be ineffective if counsel presented and discussed the Explanation of Rights Form with [her] and [she] neglected to inquire about a plea agreement's effects on her immigration status, or even tell counsel that [she] is an immigrant." (C. 58.) Okeowa appeals the circuit court's decision, and she reasserts on appeal the claim that she raised in her Rule 32 petition.

To resolve Okeowa's appeal we must answer the following question: Does counsel have a duty to investigate and inquire about a client's citizenship status when that status is unknown to counsel so counsel may properly advise that client about the immigration consequences of pleading guilty?

Okeowa argues that her trial counsel had such a duty. According to her, to be constitutionally effective under Padilla v. Kentucky, 559 U.S. 356 (2010), counsel must not only research immigration law and correctly

advise noncitizen clients about the immigration consequences of pleading guilty to a crime, but they must also "investigate or inquire" about the immigration status of every client.

The State, on the other hand, argues that, when counsel is unaware of a client's immigration status, as was the case here, counsel has no duty to inquire about a client's citizenship status. Instead, the State says, counsel is providing constitutionally effective assistance when they tell their client that there might be immigration consequences to pleading guilty if the client is a noncitizen. According to the State, after counsel gives that general warning, the noncitizen client bears the burden of telling counsel about his or her immigration status and of raising any questions or concerns he or she might have about pleading guilty. For the reasons set out below, we agree with the State.

"Immigration law can be complex, and it is a legal specialty of its own." Padilla, 559 U.S. at 369. But, when counsel represents a criminal offender counsel knows is a noncitizen, the complexity of immigration law does not excuse counsel from trying to determine what consequences, if any, a noncitizen client might face by pleading guilty to a criminal offense.

Under Padilla, counsel's duty to a client counsel knows is a noncitizen who wants to plead guilty is as follows:

> (1) When immigration law is clear that a guilty plea will result in a noncitizen client's removal from the United States, counsel has an affirmative duty to give that noncitizen client "correct advice" about the immigration consequence of their guilty plea. Padilla, 559 U.S. at 369.
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> (2) When immigration "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." Padilla, 559 U.S. at 369 (footnote omitted).

In Padilla, the Supreme Court made clear that counsel's advice to a client, known to be a noncitizen, concerning the possibility of removal from the United States as a consequence of a guilty plea is subject to the Strickland v. Washington, 466 U.S. 668 (1984), ineffective-assistance-of-counsel test. It also made clear that, when counsel fails to properly advise such a client about the immigration consequences of a guilty plea, counsel has performed deficiently under the first prong of the test set out in Strickland. Padilla does not hold that counsel is per se ineffective if counsel fails to properly advise a noncitizen client about the immigration consequences of a guilty plea. All Padilla holds is that, when a noncitizen

alleges in a postconviction petition that counsel was aware that their client was a noncitizen and misinformed the client, or failed to advise the client, about the immigration consequences of pleading guilty to a crime, the petitioner "has sufficiently alleged that his counsel was constitutionally deficient." Whether the petitioner "is entitled to relief will depend on whether he can demonstrate prejudice as a result thereof." Padilla, 559 U.S. at 374. So, even after Padilla, a petitioner must both plead and prove (1) that his or her counsel's performance was deficient and (2) that his or her counsel's deficient performance prejudiced the client.

But the duty articulated in Padilla to properly advise a noncitizen client of the immigration consequences of a guilty plea assumes that counsel actually knows that his or her client is, in fact, a noncitizen. And, as we read it, we see nothing in Padilla that expressly requires counsel to investigate the citizenship status of every client. We are not alone in our reading. In fact, the Supreme Court of Louisiana reads Padilla the same way, explaining that, in Padilla,

"[t]he Supreme Court declined to determine whether removal was a direct or collateral consequence of a conviction (and, on a larger scale, whether such a distinction is necessary in defining the scope of reasonable assistance required under Strickland [v. Washington, 466 U.S. 668 (1984)]), finding it 'uniquely difficult' to classify. Id., 559 U.S. at 366, 130 S. Ct. at 1482. Instead, the Court concluded that 'advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.' Id.

"A closer look at Padilla suggests it imposed a number of duties on defense attorneys, which are subsumed in the obligation to inform a client whether his plea carries a risk of removal. First, while not specifically addressed by Padilla, counsel must determine the immigration status of the noncitizen client, which may prove challenging given the several statuses possible under current law. Second, counsel must scrutinize the elements of the state crime in light of federal immigration law to identify the likelihood of removal following a guilty plea. Third, counsel must advise the client accordingly as to the risk of removal.

"However, it is not clear that Padilla imposed a duty on defense counsel to determine whether his or her client is a noncitizen to begin with, such that failure to make this determination constitutes per se deficient performance. The majority in Padilla arguably proceeded on the supposition that a defense attorney is aware that his or her client is a noncitizen. See Padilla, 559 U.S. at 370, 130 S. Ct. at 1484 ('When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all.'). Concurring in the Padilla judgment, Justice Alito, with whom Chief Justice Roberts joined, agreed with the Court's result, but took issue with the scope of its holding, asserting in pertinent part:

> " 'In concluding that affirmative misadvice regarding the removal consequences of a criminal conviction may constitute ineffective assistance, I do not mean to suggest that the Sixth Amendment does no more than require defense counsel to avoid misinformation. When a criminal defense attorney is aware that a client is an alien, the attorney should advise the client that a criminal conviction may have adverse consequences under the immigration laws and that the client should consult an immigration specialist if the client wants advice on that subject. By putting the client on notice of the danger of removal, such advice would significantly reduce the chance that the client would plead guilty under a mistaken premise.'

"Id., 559 U.S. at 387, 130 S. Ct. at 1494 (emphasis added).

"....

"We do not believe that the United States Supreme Court in Padilla imposed a duty on every defense attorney to investigate every client's citizenship status in all instances. Instead, the Supreme Court in Padilla answered the question of whether advice about removal consequences is within the reach of the Sixth Amendment at all. See Chaidez v. United States, 568 U.S. 342, 349, 133 S. Ct. 1103, 1108, 185 L. Ed. 2d 149 (2013) ('Padilla considered a threshold question: Was advice about deportation "categorically removed" from the scope of the Sixth Amendment right to counsel'). The Supreme Court in Padilla concluded: 'Strickland applied to Padilla's claim.' Chaidez, 568 U.S. at 353, 133 S. Ct. at 1110 (quoting Padilla, 559 U.S. at 366, 130 S. Ct. at 1482)."

State v. Sewell, [2020-KK-00300, Dec. 11, 2020] ___ So. 3d ___, ___ (La. 2020) (footnote omitted). In short, the Louisiana Supreme Court recognized that, although Padilla might suggest that counsel has a duty to ask a client about his or her citizenship status, Padilla does not expressly require counsel to inquire about a client's citizenship status.

So, although Padilla creates a duty for counsel who knows of his or her client's citizenship status to properly advise that client about the immigration consequences of a guilty plea, it does not create a separate duty for counsel to ask every client about his or her citizenship status. This does not mean, however, that counsel cannot be ineffective in failing to ask a client about their citizenship status. Whether counsel is ineffective in failing to ask a client about their citizenship status is evaluated under the two-pronged test articulated in Strickland. There "may ... be circumstances under which counsel's failure to inquire [about a client's citizenship status] is unreasonable and amounts to error under Strickland." Sewell, ___ So. 3d at ___. Conversely, there may be circumstances under which counsel's failure to ask a client about the

client's citizenship status is reasonable under Strickland. Thus, we evaluate Okeowa's counsel's actions under Strickland.

To establish that counsel was ineffective under Strickland, Okeowa had to prove (1) that her counsel's performance was deficient and (2) that she was actually prejudiced by her counsel's deficient performance.

> "To prove deficient performance, [Okeowa] had the burden to prove that [her] counsel's performance 'fell below an objective standard of reasonableness ... considering all the circumstances' at the time. Ex parte Lawley, 512 So. 2d 1370, 1372 (Ala. 1987). In order to eliminate the distorting effects of hindsight, there is 'a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance,' Strickland, 466 U.S. at 689, and [Okeowa] had the burden to prove 'that [her] attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy.' Chandler v. United States, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000) (quoting Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)). In other words, [Okeowa] had the burden to prove that no reasonable attorney would have chosen the course of action that [her] attorney[] chose. See, e.g., Harvey v. Warden Union Corr. Inst., 629 F.3d 1228, 1239 (11th Cir. 2011) ('To put it another way, trial counsel's error must be so egregious that no reasonably competent attorney would have acted similarly.'). Moreover, '[c]ourts are "required not simply to give the attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons ... counsel may have had for proceeding as they did." ' Stallworth v. State, 171 So. 3d 53, 92 (Ala. Crim. App. 2013) (opinion on

> return to remand) (quoting Cullen v. Pinholster, 563 U.S. 170, 196, 131 S. Ct. 1388, 1407, 179 L. Ed. 2d 557 (2011)).
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> > "To prove prejudice, [Okeowa] had the burden to prove 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' Strickland, 466 U.S. at 694. 'A reasonable probability is a probability sufficient to undermine confidence in the outcome,' id., and '[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.' Id. at 693."

Bryant v. State, 181 So. 3d 1087, 1142-43 (Ala. Crim. App. 2011). When, as is the case here, an ineffective-assistance-of-counsel claim is based on alleged errors in the guilty-plea process, " 'the prejudice prong of the Strickland analysis is satisfied by ... establishing "that there is a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial." ' " Frost v. State, 76 So. 3d 862, 864 (Ala. Crim. App. 2011) (quoting Culver v. State, 549 So. 2d 568, 572 (Ala. Crim. App. 1989), quoting in turn Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)).

Of course, when this Court evaluates an ineffective-assistance-of-counsel claim, it is not required to "consider both prongs of the Strickland test." Bryant, 181 So. 3d at 1143. This is because it is the Rule 32

petitioner's duty to satisfy "both prongs of the Strickland test" and the petitioner's "failure to establish one of the prongs is a valid basis, in and of itself, to deny the claim." Id. As the circuit court correctly found, Okeowa's ineffective-assistance-of-counsel claim does not satisfy the first prong of Strickland because the evidence presented at the evidentiary hearing shows that Okeowa's "counsel's conduct [fell] within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689.

Indeed, the evidence presented at the evidentiary hearing showed that nothing about Okeowa's counsel's interaction with Okeowa caused her to question Okeowa's citizenship status or gave her any reason to believe that Okeowa was a noncitizen. Thus, counsel had no reason to believe that she should inquire about Okeowa's citizenship status.

At the Rule 32 hearing, Okeowa's counsel testified that Okeowa never told her that she was a noncitizen and that she was given no reason to believe that Okeowa was a noncitizen. Okeowa's counsel said that she spoke with some of Okeowa's family members and none of them mentioned that Okeowa was not a citizen. Okeowa's counsel explained that Okeowa spoke English, albeit with an accent, and was "very easy to

communicate with." (R. 11.) Okeowa's counsel said that "in the back of [her] mind [she] thought [Okeowa] was from Hawaii." (R. 11, 18.) Likewise, her counsel testified that Okeowa's family members spoke English well but did note that Okeowa's father had an accent.

Okeowa argues that her's and her father's accents should have been an "immediate alarm" that "Okeowa was not, as they say, 'from around here' " and, thus, should have "triggered a duty on the part of [her counsel to] inquire regarding her immigration status." (Okeowa's brief, p. 19.) In other words, Okeowa argues that, when a client has an accent that shows that he or she is "not from around here" (as she phrases it), then counsel has a duty to ask that client about his or her citizenship status.

Although there could be circumstances under which a client's accent, when coupled with other factors, might require counsel to ask that client about his or her citizenship status, we are reluctant to hold that counsel acts unreasonably when they fail to ask a client about the client's citizenship status in circumstances where certain immutable characteristics -- for example, race, ethnicity, physical appearance, or accent -- are present without any other nonimmutable characteristic

calling into question the client's citizenship status. Indeed, it would be odd to hold counsel ineffective for failing to profile someone based solely on an immutable characteristic or trait when that same behavior would, at minimum, be criticized in other contexts. In short, we are not persuaded that a client's accent, by itself, triggers any obligation on the part of counsel to ask that client about his or her citizenship status.

Additionally, not only did Okeowa's counsel not have sufficient reason to ask Okeowa about her citizenship status based on her interaction with her, Okeowa's counsel also had no reason to believe that she should ask Okeowa about her citizenship status for another reason: Okeowa's counsel warned her that, if she is a noncitizen, pleading guilty could result in her removal from the United States. At the evidentiary hearing, Okeowa's counsel explained that, before Okeowa pleaded guilty, she went over the Explanation-of-Rights-Plea-of-Guilty form with Okeowa. That form includes the following warning:

> "If you are not a United States citizen, a guilty plea may subject you to adverse immigration consequences including deportation (See 8 U.S.C. § 1227), exclusion from reentry into the United States and amnesty, and that the appropriate consulate may be informed of the plea and conviction."

(C. 58; R. 14.) See also State of Alabama Unified Judicial System Form CR-51. According to Okeowa's counsel, after she went over the form with Okeowa, she asked Okeowa to read the form. After Okeowa finished reading the form, she asked Okeowa if she had any questions about her rights and Okeowa told her that she did not. Okeowa acknowledged that she understood that warning, and, despite that warning and her understanding of it, Okeowa failed to tell her counsel that she was a not a citizen of the United States.

Counsel cannot be ineffective for failing to ask a client about the client's citizenship status when that client remains silent after being warned that, if he or she is a noncitizen, the client may be subject to removal from the United States by pleading guilty. See generally, George v. State, [Ms. CR-15-0257, Jan. 11, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019) (holding that, in the context of a counsel's failure to investigate evidence, counsel "cannot be found to be ineffective for failing to introduce information uniquely within the knowledge of the defendant and his family which is not provided to counsel"). As the circuit court correctly found:

> "Based on the language within the explanation of rights form that [Okeowa] may be subject to deportation upon conviction or plea in this matter, I feel that [Okeowa] was put on notice of the potential consequences that may result directly or collaterally from her plea. The obligation would have been on her to seek further clarification if it was needed. You know, it would not be justice to allow individuals, plaintiffs, defendants, the State, to cherry pick a document in a situation like this. It's very clear, black and white, in the explanation of rights form, and if this was a matter of concern for [Okeowa], she could have and should have discussed it with her attorney, and she did not do so."

(R. 33-34.)

In our view, under the facts of this case, Okeowa's counsel's failure to ask Okeowa about her citizenship status was reasonable, and we certainly cannot say that the failure to ask her about her citizenship status was "so egregious that no reasonably competent attorney would have acted similarly." Harvey v. Warden Union Corr. Inst., 629 F.3d 1228, 1239 (11th Cir. 2011).

Moreover, although Okeowa's brief on appeal cites an American Bar Association ("ABA") guideline, which provides that criminal defense lawyers should " 'determine a client's citizenship status and immigration status, assuring the client that such information is important for effective

legal representation,' " (Okeowa's brief, p. 18 (quoting ABA Criminal Justice Standards for the Defense Function, § 4-5.5(a) (4th ed. 2017)), and argues that the ABA guideline shows that competent counsel would have asked his or her client about citizenship status, we are not persuaded that the cited ABA guideline creates a "prevailing professional norm" for criminal defense attorneys to ask their client about citizenship status. It is difficult to conclude that there is a prevailing professional norm requiring counsel to ask every client about the client's citizenship status when even courts cannot agree on the question whether counsel has such a duty, compare State v. Sewell, ___ So. 3d ___ (holding that counsel does not have a duty to investigate or inquire about a client's citizenship status), with Commonwealth v. Lavrinenko, 38 N.E.3d 278 (Mass. 2015) (holding that the "failure of a criminal defense attorney to make a reasonable inquiry of the client regarding his or her citizenship and immigration status is sufficient to satisfy the deficient performance prong of the ineffective assistance analysis"). Additionally, as we have explained, ABA guidelines are merely "guides for determining what is reasonable" and, as we have consistently held:

> "Although the ABA guidelines may, in some instances, provide guidance as to what is reasonable in terms of counsel's representation, they are not determinative. Rather, the two-pronged analysis set forth in Strickland remains the standard for deciding ineffective-assistance-of-counsel claims. Such a standard is sufficient to protect a defendant's rights to both counsel and due process."

Jones v. State, 43 So. 3d 1258, 1278 (Ala. Crim. App. 2007).

In other words, although asking every client about their citizenship status might be a "best practice" for criminal defense attorneys under the ABA guidelines, we cannot conclude that failing to do so always amounts to deficient performance under Strickland. As we explain above, the actions of Okeowa's counsel in this case do not amount to deficient performance under Strickland. Therefore, she is not entitled to relief on her ineffective-assistance-of-counsel claim.

Accordingly, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and Kellum, McCool, and Minor, JJ., concur.