

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAIME AYALA-GUERRERO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49393

FILED

NOV 05 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a motion to set aside a guilty plea agreement and judgment of conviction. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Appellant Jaime Ayala-Guerrero was convicted, pursuant to a guilty plea, of one count of attempted home invasion. The district court sentenced Ayala-Guerrero to a prison term of 12 to 30 months, suspended the sentence, and placed Ayala-Guerrero on probation for a period not to exceed one year. Ayala-Guerrero did not file a direct appeal.

On March 12, 2007, Ayala-Guerrero filed a post-conviction motion to set aside the guilty plea and judgment of conviction due to his inability to complete his probation as negotiated. Ayala-Guerrero argued that the State breached the plea agreement because the Division of Parole and Probation prematurely reported him to immigration authorities, and his plea agreement was invalid because his California immigration counsel affirmatively misadvised him about the immigration consequences of pleading guilty. The State opposed the motion arguing that it did not breach the plea agreement and Ayala-Guerrero had been informed in the written guilty plea agreement about the possible collateral consequence of

deportation. On April 9, 2007, the district court denied the motion to set aside the guilty plea agreement and judgment of conviction. This appeal followed.

Ayala-Guerrero first argues that the district court erred in denying his motion to set aside his plea because his plea was not voluntarily entered. Ayala-Guerrero argues that his plea is invalid because he relied on misinformation supplied to him by his California immigration counsel regarding the possible immigration consequences of pleading guilty. Second, Ayala-Guerrero argues that immigration counsel's misadvice regarding the immigration consequences of pleading guilty constituted ineffective assistance of counsel.¹

A guilty plea is presumptively valid, and a defendant carries the burden of establishing that the plea was not entered knowingly and intelligently.² Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of

¹We note that Ayala-Guerrero does not argue on appeal that the district court erred in denying his claim that the State breached the plea agreement. Accordingly, we conclude that Ayala-Guerrero has waived this claim, and we do not reach this issue on appeal.

²Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994).

discretion.³ In determining the validity of a guilty plea, this court looks to the totality of the circumstances.⁴

A district court may grant a post-conviction motion to withdraw a guilty plea in order to correct a manifest injustice.⁵ “A guilty plea entered on advice of counsel may be rendered invalid by showing a manifest injustice through ineffective assistance of counsel.”⁶ This court will not overturn a district court’s determination on manifest injustice “absent a clear showing of an abuse of discretion.”⁷

In Barajas v. State, this court held that deportation is a collateral consequence that does not affect the validity of a guilty plea, and the failure to advise a defendant of the possible immigration consequences of pleading guilty did not render a plea involuntary.⁸ This court further held that trial counsel’s failure to provide information regarding the collateral consequence of deportation did not rise to the level of ineffective assistance of counsel.⁹

³Hubbard, 110 Nev. at 675, 877 P.2d at 521.

⁴State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. at 271, 721 P.2d at 367.

⁵NRS 176.165.

⁶Rubio v. State, 124 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. 87, at 9, October 30, 2008).

⁷Barajas v. State, 115 Nev. 440, 442, 991 P.2d 474, 475 (1999).

⁸Id. at 442, 991 P.2d at 475.

⁹Id. at 442, 991 P.2d at 475-76.

In Rubio v. State, this court recently reaffirmed the holding in Barajas.¹⁰ This court also adopted an affirmative misrepresentation exception to the collateral consequence rule and held that “affirmative misadvice [by trial counsel] regarding immigration consequences may constitute ineffective assistance of counsel and support withdrawal of a guilty plea as involuntarily entered.”¹¹

Here, the record indicates that Ayala-Guerrero was aware that he faced possible deportation consequences if he was convicted. Ayala-Guerrero’s criminal defense counsel, Michael Sanft, advised Ayala-Guerrero to seek counsel from an immigration attorney regarding his immigration status in the United States. Ayala-Guerrero hired California immigration counsel, Peter DeBroyn. Based on the affidavits submitted in support of the motion to set aside the guilty plea, it appears that during a conference call between DeBroyn, Sanft, Ayala-Guerrero, and Ayala-Guerrero’s wife, DeBroyn stated that if Ayala-Guerrero was not in jail he would have a better opportunity of not being deported. DeBroyn also indicated that if Ayala-Guerrero was found guilty by a jury and served jail time he would automatically be deported. During the conference call, Sanft indicated that the State had offered a plea deal and Sanft believed that accepting the plea was Ayala-Guerrero’s best opportunity to obtain probation. DeBroyn advised Ayala-Guerrero to accept the plea offer and

¹⁰124 Nev. at ___, ___ P.3d at ___ (Adv. Op. No. 87, at 11-12).

¹¹Id. (Adv. Op. No. 87, at 17).

indicated that he could work on Ayala-Guerrero's immigration status while Ayala-Guerrero was on probation.

We conclude that under the facts presented in this case, Ayala-Guerrero failed to demonstrate that Sanft was ineffective or affirmatively misadvised him about the immigration consequences of entering his guilty plea. As noted above, Sanft did not provide Ayala-Guerrero with any advice about the immigration consequences of pleading guilty. Rather, Sanft properly suggested that Ayala-Guerrero seek advice from immigration counsel about immigration questions that Sanft could not answer.

We further conclude that Ayala-Guerrero failed to demonstrate that he is entitled to relief based on the actions of DeBroyn. Even assuming that DeBroyn acted ineffectively by informing Ayala-Guerrero that he could work on Ayala-Guerrero's immigration status if he received probation,¹² this was not misadvice by criminal defense counsel. Additionally, because Ayala-Guerrero did not have the right to immigration counsel in his criminal trial,¹³ he was not entitled to effective

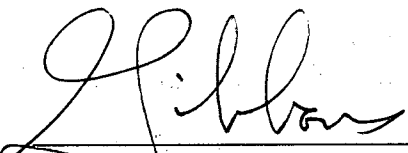
¹²See 8 U.S.C. § 1227(a)(2)(A)(iii) (2000) (making any alien "convicted of an aggravated felony at any time after admission" deportable); 8 U.S.C. § 1101(a)(43)(F) (2000) (defining aggravated felony as a crime of violence as set forth under 18 U.S.C. § 16, for which a sentence of at least one year may be imposed); 18 U.S.C. § 16(a) (2000) (defining crime of violence as including an element of "the use, attempted use, or threatened use of physical force against the person or property of another").

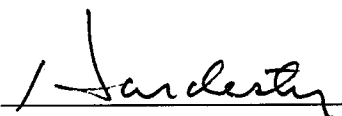
¹³See U.S. Const. amend. VI. (providing that a defendant has the right to have "the Assistance of Counsel for his defence").


assistance from DeBroyn.¹⁴ Thus, the actions by DeBroyn do not support withdrawal of the guilty plea.

Having reviewed Ayala-Guerrero's contentions and determined that they lack merit, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Sally L. Loehrer, District Judge
Benson Lee and Associates
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

¹⁴See McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996) (holding that “[w]here there is no right to counsel there can be no deprivation of effective assistance of counsel”).