

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
JOSE OSCAR MARQUEZ-TARANGO,
Respondent.

No. 50730

FILED

JUN 03 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order granting respondent Jose Oscar Marquez-Tarango's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

On May 30, 2006, Marquez-Tarango was charged by criminal complaint with one count of robbery of a victim 60 years of age or older. Pursuant to negotiations, the State agreed to reduce the charge and recommend probation. On October 18, 2006, Marquez-Tarango was convicted, pursuant to a guilty plea, of one count of larceny from a person. The district court sentenced Marquez-Tarango to a prison term of 12-48 months, suspended execution of the sentence, and placed him on probation for an indeterminate period not to exceed three years. Marquez-Tarango did not pursue a direct appeal from the judgment of conviction and sentence.

After completing approximately nine months of his probationary term, Marquez-Tarango was arrested by federal authorities and, pursuant to § 237(a)(2)(A)(iii) of the Immigration and Nationality Act, removal proceedings were initiated based on his conviction for larceny

from a person, which qualified as an aggravated felony under § 101(a)(43)(G) of the Act. Ultimately, an immigration judge ordered Marquez-Tarango deported. While his appeal in the immigration case was pending, Marquez-Tarango filed a post-conviction petition for a writ of habeas corpus in the district court. Marquez-Tarango raised several allegations of ineffective assistance of counsel. The State opposed the petition. At the evidentiary hearing on the petition, the district court found that Marquez-Tarango's counsel failed to provide competent advice pertaining to the entry of his plea and, "to cure a manifest injustice pursuant to NRS 176.165," granted the petition, thus allowing him to withdraw his guilty plea. In its order, the district court specifically found that Marquez-Tarango (1) "was induced to plead guilty based upon the reasonable expectation that probation would be available to him;" (2) was never informed and "the State, and the Court [were] unaware that a conviction for Larceny from a Person is an Aggravated Felony . . . subjecting the Defendant to mandatory deportation;" (3) expected to "be afforded an opportunity to complete the terms and conditions of his probation;" and (4) "did not receive the benefit of his Plea Bargain Agreement." The State has now filed this timely appeal.

The State contends that the district court abused its discretion by granting Marquez-Tarango's petition and allowing him to withdraw his guilty plea. Specifically, the State argues that (1) deportation remains a collateral consequence to a guilty plea; (2) Marquez-Tarango did not receive ineffective assistance of counsel; (3) Marquez-Tarango received the benefit of his bargain; and (4) an alleged mutual mistake of fact regarding immigration consequences does not amount to a manifest injustice under NRS 176.165. We agree with the State and conclude that the district

court did not have a sound legal basis to grant Marquez-Tarango's petition.

NRS 176.165 provides, in part, that a defendant may be permitted to withdraw his guilty plea after sentencing "[t]o correct manifest injustice." In determining the validity of a guilty plea, this court looks to the totality of the circumstances. State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); Bryant v. State, 102 Nev. 268, 271, 721 P.2d 364, 367 (1986). This court presumes "that the lower court correctly assessed the validity of the plea, and we will not reverse the lower court's determination absent a clear showing of an abuse of discretion." Bryant, 102 Nev. at 272, 721 P.2d at 368. Additionally, "a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference upon appellate review. See Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004).

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 does not render a plea involuntary. 115 Nev. 440, 442, 991 P.2d 474, 475-76 (1999). Further, trial counsel's failure to provide information regarding the collateral consequence of deportation is not objectively unreasonable and does not amount to ineffective assistance of counsel. Id.; Strickland v. Washington, 466 U.S. 668, 688 (1984). Moreover, this court recently reaffirmed the holding of Barajas in Rubio v. State. 124 Nev. ___, 194 P.3d 1224 (2008). In Rubio, 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.” *Id.* at ___, 194 P.3d at 1232.

In this case, counsel’s failure to provide Marquez-Tarango with information regarding the collateral consequence of deportation prior to the entry of his plea was not objectively unreasonable pursuant to Barajas. And despite Marquez-Tarango’s insistence, we refuse to once again revisit Barajas. Our review of the record reveals that counsel did not affirmatively misrepresent the immigration consequences of Marquez-Tarango’s plea and run afoul of our holding in Rubio. Therefore, we conclude that counsel’s performance in this regard did not provide a basis for the district court to allow Marquez-Tarango to withdraw his plea.


We further conclude that the district court erred by finding that Marquez-Tarango did not receive the benefit of his bargain with the State. In exchange for Marquez-Tarango’s guilty plea, the State agreed to a reduced charge of larceny from a person, rather than robbery with the elderly victim enhancement, and to recommend probation at the sentencing hearing. The State complied with the terms of the negotiations. The terms of the plea deal did not guarantee probation, let alone the opportunity to complete a probationary term, and were not conditional so that Marquez-Tarango would be allowed to withdraw his guilty plea in the event the district court imposed a term of incarceration. Moreover, there is no indication in the record that the goal of the plea negotiations was to avoid immigration consequences. As noted above, Marquez-Tarango was in fact released from custody and began his


probationary term, completing approximately nine months before his arrest by federal authorities.

Therefore, because Marquez-Tarango received the benefit of his bargain and did not receive ineffective assistance of counsel, we conclude that he did not suffer a manifest injustice allowing for the withdrawal of his guilty plea. Accordingly, we conclude that the district court abused its discretion by granting Marquez-Tarango's petition, and we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. James M. Bixler, District Judge
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Xavier Gonzales
Eighth District Court Clerk