

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT	ATTORNEYS FOR APPELLEE
H. Samuel Ansell Indianapolis, Indiana	Curtis T. Hill, Jr. Attorney General of Indiana Christina D. Pace Deputy Attorney General Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Umesh Kaushal, <i>Appellant-Defendant</i> , v. State of Indiana, <i>Appellee-Plaintiff</i> .	July 18, 2017 Court of Appeals CaseNo. 49A04-1612-CR-2862 Appeal from the Marion Superior Court The Honorable Sheila Carlisle, Judge The Honorable Stanley E. Kroh, Magistrate Trial Court Cause No. 49G03-1508-F4-28287
--	--

Riley, Judge.

STATEMENT OF THE CASE

Appellant-Defendant, Umesh Kaushal (Kaushal), appeals the trial court's denial of his motion to withdraw his guilty plea to child molesting, a Level 4 felony, Ind. Code § 35-42-4-3(b).

We affirm.

ISSUE

Kaushal raises two issues on appeal, which we consolidate and restate as the following issue: Whether the trial court abused its discretion by denying Kaushal's motion to withdraw his guilty plea.

FACTS AND PROCEDURAL HISTORY

Kaushal, a citizen of India, has lived in the United States for nearly a decade and has a Green Card. On August 11, 2015, the State filed an Information, charging Kaushal with child molesting as a Level 4 felony. The State alleged that Kaushal had fondled his thirteen-year-old stepdaughter's breast. Shortly after his arrest, Kaushal posted bond and retained an attorney. Kaushal, who owns and operates several convenience stores in Indianapolis, Marion County, Indiana, made it clear to his attorney that his priority was to avoid any amount of incarceration so that he could continue to run his businesses and care for his mother. Given Kaushal's insistence against imprisonment, along with his professional opinion that Kaushal was not likely to

succeed at trial, Kaushal's attorney focused on negotiating a deal with the State.

On May 4, 2016, Kaushal entered into a plea agreement with the State, pursuant to which he agreed to plead guilty to the child molesting offense. The agreement provided that Kaushal would receive a four-year sentence, with a one-year cap on executed time and with placement for the executed time to be determined by the trial court. However, after conferring with his attorney and realizing that he could be confined for a portion of his sentence, Kaushal withdrew from the plea agreement.

On June 29, 2016, Kaushal entered into another plea agreement with the State, pursuant to which he again agreed to plead guilty to the offense of child molesting as a Level 4 felony. In exchange, Kaushal would receive a four-year suspended sentence, of which three years would be served on probation with a condition of home detention and one year on non-reporting probation. On June 30, 2016, the trial court conducted a hearing on Kaushal's guilty plea. The trial court advised Kaushal of the implications of pleading guilty, including his obligation to comply with the Sex and Violent Offender Registry; his waiver of his right to appeal his conviction and/or sentence; and his waiver of certain constitutional rights, such as the right to a trial by jury and the right to confront and cross-examine witnesses. These warnings were also included in the written plea agreement, and Kaushal initialed next to each one to affirm his understanding. Also, among the written warnings was an advisement that, as a

non-citizen, Kaushal could face deportation, denial of re-entry, prohibition of citizenship, or loss of immigration benefits as a result of the conviction. After questioning Kaushal, the trial court found that his guilty plea was made knowingly and voluntarily, and Kaushal agreed that there was a factual basis to support his conviction and that he was guilty of committing the charged offense. Accordingly, the trial court accepted the plea agreement and entered a judgment of conviction for child molesting as a Level 4 felony.

According to Kaushal, on July 1, 2016, he met with an attorney who focuses on immigration matters and learned that, as a result of his conviction for child molesting, he was likely to be immediately “picked up” by immigration officials. (Tr. Vol. II, p. 30). Thus, on July 21, 2016, Kaushal filed a Verified Motion to Withdraw Plea of Guilty. Kaushal argued that “[o]utside of a vague advisement that the conviction may have immigration consequences, [he] was not advised of potential immigration consequences and would not have pled guilty to the charged crime had he known it would subject him to automatic detention, revocation of his permanent resident status, and certain deportation.” (Appellant’s App. Vol. II, p. 16). Kaushal further stated that he pled guilty “in order to avoid prison without having knowledge that his ability to legally reside in the United States would end. Kaushal owns several businesses and considers the United States to be his home. Although he has [pled] guilty, Kaushal maintains his innocence and wishes to proceed to trial.” (Appellant’s App. Vol. II, p. 16). Kaushal added that

withdrawing the plea would not prejudice the State because the case could still proceed to trial, and he insisted that withdrawal was necessary to correct a manifest injustice.

On August 5, 2016, and September 9, 2016, the trial court held hearings on Kaushal's motion to withdraw his guilty plea.¹ Kaushal testified that his attorney never discussed the immigration consequences in urging Kaushal to plead guilty. Yet, in response to another question about conversations with his attorney regarding his Green Card, Kaushal also stated, "I think I'm not going to be ever U.S. citizen, or I'm never going to be deported after, like – in that quick until I – I just find immigration stuff." (Tr. Vol. II, p. 28). Kaushal clarified that, while he understood there would be "a hard road after" pleading guilty, he did not realize "that it's going to be that hard – [that he would get] deported that quick." (Tr. Vol. II, p. 29). On the other hand, Kaushal's attorney testified that he went through each paragraph of the plea agreement with Kaushal, including the paragraph regarding possible immigration consequences, and Kaushal did not have any questions as to what he was signing. Moreover, Kaushal's attorney testified that Kaushal had informed him that he was contemporaneously conferring with immigration attorneys. Although Kaushal's attorney stated that he does not practice immigration law, he specifically told Kaushal that his Green Card would

¹ By this time, Kaushal had retained new representation. In this decision, references to Kaushal's attorney denotes his former attorney, who negotiated the plea agreement.

App. 6

not be renewed prior to Kaushal signing the plea agreement.

On November 7, 2016, the trial court issued an Order Denying Verified Motion to Withdraw Guilty Plea. The trial court determined that even though the State had conceded that Kaushal's attorney ineffectively advised Kaushal on the immigration consequences of pleading guilty, Kaushal failed to establish that he was prejudiced by his attorney's advice. On December 2, 2016, Kaushal filed a motion to correct error, which the trial court denied on December 15, 2016.

On December 21, 2016, Kaushal filed his Notice of Appeal. On January 6, 2017, Kaushal filed a motion to stay the proceedings pending appeal. Kaushal argued that "[u]pon the imposition of a sentence, [he] will be subject to mandatory detention and removal by Immigration and Customs Enforcement which, for all practical purposes, will result in the complete denial of his right to pursue the appellate review, afforded to him by statute, of the trial court's denial of his motion to withdraw his guilty plea prior to sentencing." (Appellant's App. Vol. II, p. 33). This, according to Kaushal, "would cause irreparable harm." (Appellant's App. Vol. II, p. 33). On January 10, 2017, the trial court granted Kaushal's motion to stay and vacated the sentencing hearing pending appellate review. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

Indiana Code section 35-35-1-4(b) governs the withdrawal of guilty pleas where such motions are filed after the plea has been entered but prior to sentencing. This statute provides that, upon a written and verified motion to withdraw a guilty plea, the trial court may allow withdrawal “for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant’s plea.” I.C. § 35-35-1-4(b). This decision by the trial court is subject to review only for an abuse of discretion. I.C. § 35-35-1-4(b). “However, the court shall allow the defendant to withdraw his plea of guilty, or guilty but mentally ill at the time of the crime, whenever the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice.” I.C. § 35-35-1-4(b). In other words, the trial court is required to grant a motion to withdraw a guilty plea prior to sentencing

“only if the defendant proves that withdrawal of the plea ‘is necessary to correct a manifest injustice.’ The court must *deny* a motion to withdraw a guilty plea if the withdrawal would result in substantial prejudice to the State. Except under these polar circumstances, disposition of the petition is at the discretion of the trial court.”

Craig v. State, 883 N.E.2d 218, 221 (Ind. Ct. App. 2008) (quoting *Weatherford v. State*, 697 N.E.2d 32, 34 (Ind. 1998)).

“A trial court’s ruling on a motion to withdraw a guilty plea ‘arrives in this [c]ourt with a presumption in favor of the ruling.’” *Brightman v. State*, 758 N.E.2d 41, 44 (Ind. 2001) (quoting *Coomer v. State*, 652 N.E.2d 60, 62 (Ind. 1995)). “We will not disturb the court’s ruling where it was based on conflicting evidence.” *McGraw v. State*, 938 N.E.2d 1218, 1220 (Ind. Ct. App. 2010), *trans. denied*. Rather, unless the trial court has abused its discretion in denying a motion to withdraw a guilty plea, we will uphold its decision. *Centers v. State*, 501 N.E.2d 415, 419 (Ind. 1986). Kaushal bears the burden of establishing the grounds for relief by a preponderance of the evidence. I.C. § 35-35-1-4(e).

II. *Manifest Injustice*

“Manifest injustice” is “necessarily [an] imprecise standard[], and an appellant seeking to overturn a trial court’s decision [faces] a high hurdle under the current statute and its predecessors.” *Craig* 883 N.E.2d at 221 (quoting *Weatherford*, 697 N.E.2d at 34). Pursuant to Indiana Code section 35-35-1-4(c), withdrawal of a plea is required to correct a manifest injustice, in pertinent part, when a convicted person has been denied the effective assistance of counsel or when a plea was not knowingly and voluntarily made “Unless the defendant proves a manifest injustice by a preponderance of the evidence, the trial court has discretion to grant or deny the request.” *Bland v. State*, 708 N.E.2d 880, 882 (Ind. Ct. App. 1999). On appeal, Kaushal argues that his plea must be withdrawn

because his plea was not knowing and voluntary and because he was denied the effective assistance of counsel.

A. *Knowing, Voluntary, and Intelligent Plea*

Kaushal contends that he “presented uncontroverted evidence that he had grossly misapprehended the immigration consequences of his guilty plea. The disparity between what he expected when he pled guilty and what he would receive as an immigration consequence is such that his decision to plead guilty was not made knowingly and intelligently.” (Appellant’s Br. pp. 14-15).² Because “[a] guilty plea constitutes a waiver of constitutional rights,” the trial court must “evaluate the validity of every plea before accepting it.” *Davis v. State*, 675 N.E.2d 1097, 1102 (Ind. 1996). In order for a guilty plea to be valid, “the defendant’s decision to plead guilty must be knowing, voluntary[,] and intelligent.” *Id.* (citing *Boykin v. Alabama*,

² We reject the State’s assertion that Kaushal is precluded from raising the claim that he did not knowingly or intelligently plead guilty because such a claim must be pursued through a petition for post-conviction relief. A motion to withdraw a plea made *after* a sentence has been imposed must be treated as a petition for post-conviction relief. I.C. § 35-35-1-4(c). Here, however, Kaushal filed his motion to withdraw after acceptance of the plea but prior to sentencing. Thus, his direct appeal is the appropriate forum to challenge the voluntariness of his guilty plea. *See Brightman*, 758 N.E.2d at 44. As to the State’s alternative argument, to the extent that Kaushal has not developed a cogent argument with adequate citations to authority as required by Indiana Appellate Rule 46(A)(8)(a), we elect to address the merits of Kaushal’s argument.

395 U.S. 238, 242-44 (1969)). Indiana law provides that a trial court cannot accept a guilty plea “without first determining that the defendant understands the nature of the charges against him and that pleading guilty waives a number of valuable constitutional rights.” *Id.* (citing I.C. § 35-35-1-2(a)). “[C]oncerns about injustice carry greater weight when accompanied by credible evidence of involuntariness, or when the circumstances of the plea reveal that the rights of the accused were violated.” *Coomer*, 652 N.E.2d at 62.

Prior to accepting Kaushal’s guilty plea, the trial court examined Kaushal in accordance with Indiana Code section 35-35-1-2(a). Specifically, in response to questions posed by the trial court, Kaushal testified that he was thirty-four years old and had completed “a little bit of college.” (Tr. Vol. II, p. 5). The trial court asked Kaushal whether he had read the entire plea agreement; whether he had personally initialed the agreement next to certain paragraphs in the agreement; and whether he understood everything in the plea agreement. Kaushal answered “Yes, sir” to each of these questions. (Tr. Vol. II, p. 5). The trial court further questioned Kaushal as to whether he understood that he would be admitting the allegations contained in the charging Information as true and – after reviewing the penalty range for a Level 4 felony, the sentencing terms of the plea agreement, the requirement that he register as a sex offender, and the special conditions for probation – asked Kaushal whether he understood the punishment. Again, Kaushal answered affirmatively. Kaushal also stated that he understood that he would

be waiving his right to a public and speedy trial by jury; his right to confront and cross-examine witnesses; his right to utilize the compulsory process for obtaining witnesses; his right to require the State to prove the allegations beyond a reasonable doubt; his rights to testify or remain silent at trial; and his right to appeal the conviction. Kaushal agreed that he “had enough time to talk with [his] attorney . . . about the facts of the case and the plea agreement itself” and that he had “told [his attorney] everything that [he knew] about the case.” (Tr. Vol. II, p. 10). Kaushal stated that he was satisfied with the legal services that his attorney had provided. Finally, Kaushal stated that he was not pleading guilty because of force, threat, or promise by another; that he was not under the influence of alcohol or drugs; and that he did not suffer from any mental health issues. *See Coomer*, 652 N.E.2d at 62 (discussing the trial court’s duty to examine a defendant prior to accepting the defendant’s guilty plea to confirm that the defendant is acting freely and knowingly).

Although the trial court did not specifically question Kaushal about his understanding of potential immigration consequences, he did ensure that Kaushal read and understood the contents of the plea agreement in their entirety. One paragraph of the plea agreement, which Kaushal initialed, stipulated: “Defendant affirms that if he/she is not a citizen of the United States, he/she wishes to enter a guilty plea even if a conviction in this case results in deportation, denial of re-entry, prohibition of citizenship, or loss of

any future immigration benefit(s).” (Appellant’s Supp. App. Vol. II, p. 15). Accordingly, we agree with the trial court that Kaushal knowingly, voluntarily, and intelligently entered a guilty plea and, therefore, has failed to prove a manifest injustice on this basis.

B. *Ineffective Assistance of Counsel*

Kaushal next contends that withdrawal of his guilty plea is necessary to correct a manifest injustice because his trial counsel rendered ineffective assistance by failing to advise him of the specific immigration consequences that he would incur by pleading guilty to a felony charge of child molestation. To prevail on a claim of ineffective assistance of counsel, a defendant must establish that his counsel’s performance was deficient and that such deficient performance resulted in prejudice to the defendant. *Brightman*, 758 N.E.2d at 46. Deficient performance is defined as that which “falls below an objective standard of reasonableness.” *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). “Prejudice exists when a defendant shows ‘there is a reasonable probability [i.e., probability sufficient to undermine confidence in the outcome] that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Id.* (alteration in original) (quoting *Strickland*, 466 U.S. at 694).

Our court presumes that counsel rendered competent assistance, “and whether a lawyer performed reasonably under the circumstances is determined by examining the whole of the lawyer’s work on a case.”

Id. (citing *Strickland*, 466 U.S. at 690). The defendant is required to “offer strong and convincing evidence to overcome the presumption that counsel prepared and executed an effective defense.” *Id.* (citing *Burris v. State*, 558 N.E.2d 1067, 10720 [sic] (Ind. 1990), *cert. denied*, 516 U.S. 922 (1995)).

Kaushal argues that

[t]he evidence of ineffective assistance of counsel by [his trial attorney] is overwhelming. He failed to correctly advise Kaushal of the immigration consequences of his plea, which by [federal] statute are presumptive detention and deportation. [The attorney’s] immigration advice that Kaushal’s [G]reen [C]ard would not be renewed, as well as the agreed sentence of three years of home detention while on probation, caused Kaushal to grossly mistake the severity and immediacy of the immigration consequences he would face.

(Appellant’s Br. p. 16). Kaushal insists that he “would not have waived [his] trial rights had he not been grossly misinformed and misled by ineffective counsel as to the severe immigration consequences of his guilty plea.” (Appellant’s Br. p. 23). On the other hand, the State argues that Kaushal was aware of the immigration consequences prior to pleading guilty and now simply regrets his decision.

In *Segura v. State*, 749 N.E.2d 496, 500 (Ind. 2001), our supreme court stated that “the failure to advise of the consequence of deportation can, under some circumstances, constitute deficient performance [of

counsel].” Whether such a failure to advise does actually constitute deficient performance “in a given case is fact sensitive and turns on a number of factors. These presumably include the knowledge of the lawyer of the client’s status as an alien, the client’s familiarity with the consequences of conviction, the severity of criminal penal consequences, and the likely subsequent effects of deportation.” *Id.* Recently, our court stated:

Defense attorneys have an obligation to advise their clients regarding the possible penal consequences of standing trial. One of the most important roles a defense attorney plays is to help clients navigate this complex decision-making process. It is incumbent upon the attorney to describe the best and worst case scenarios as to penal consequences the client would face whether the client pleads guilty, with or without a plea agreement, or stands trial.

Black v. State, 54 N.E.3d 414, 427 (Ind. Ct. App. 2016), *trans. denied*. Likewise, our court “caution[ed]” in *Carriello v. State*, 982 N.E.2d 468, 474-75 (Ind. Ct. App. 2013) (citing *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010)), that while “it would be proper for the judiciary to play a part in ensuring that noncitizen defendants are adequately advised of the immigration consequences of guilty pleas,” “it would still be incumbent upon the defendant’s attorney to accurately inform the noncitizen defendant of the deportation consequences of pleading guilty where they can be easily determined from reading the relevant immigration statute.”

However, “[w]hen the 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.” *Id.* at 475 (ellipsis in original) (quoting *Padilla*, 559 U.S. at 369).

In *Segura*, the defendant accused his trial counsel of being ineffective for – as in the present case – failing to advise him of the immigration consequences prior to pleading guilty. *Segura*, 749 N.E.2d at 500. However, the *Segura* court did not address the deficiency of counsel’s performance because it found that, even if counsel’s performance was deficient, the defendant had failed to prove that he had been prejudiced. *Id.* The *Segura* court set the standard for establishing prejudice in cases concerning counsel’s errors in advice as to penal consequences:

[A] petitioner must establish, by objective facts, circumstances that support the conclusion that counsel’s errors in advice as to penal consequences were material to the decision to plead. Merely alleging that the petitioner would not have pleaded is insufficient. Rather, specific facts, in addition to the petitioner’s conclusory allegation, must establish an objective reasonable probability that competent representation would have caused the petitioner not to enter a plea.

Id. at 507.

In *Gulzar v. State*, 971 N.E.2d 1258, 1259-60 (Ind. Ct. App. 2012), *trans. denied*, after pleading guilty and

being sentenced for felony theft, the defendant – an immigrant from Pakistan – filed a petition for post-conviction relief, asserting that he had received ineffective assistance of trial counsel. Similar to the case at hand, the attorney in *Gulzar* did inform the defendant that the guilty plea could affect his immigration status but did not specify that the conviction would subject him to automatic deportation. *Id.* at 1260. The defendant claimed that his counsel’s failure to explain the risk of deportation was prejudicial because he would have otherwise rejected the plea agreement. *Id.* at 1261. Our court noted that “[s]imply alleging that the [defendant] would not have pled [guilty]” was insufficient to establish that the defendant has been prejudiced by any error in counsel’s failure to advise the defendant of penal consequences. *Id.* Rather, “specific facts, in addition to the [defendant’s] conclusory allegation, must establish an objective reasonable probability that competent representation would have caused the [defendant] not to enter a plea.” *Id.* The defendant in *Gulzar* argued that deportation “would be especially difficult for him and [his nuclear family].” *Id.* Notwithstanding these “special circumstances related to his family,” our court found that “the evidence establishing his guilt” supported a finding that, “at the end of the day, the inevitable result is conviction and the same sentence.” *Id.* at 1262. Furthermore, the defendant “secure[d] a significant benefit by reducing his liability” through the guilty plea. *Id.* Thus, we found the defendant failed to establish that he was prejudiced by his counsel’s failure to advise him that a guilty plea would result in automatic deportation. *Id.*

App. 17

In the present case, assuming *arguendo* that his attorney's failure to specifically advise Kaushal of the immediate possibility of deportation was deficient, we find that certain factors do favor a finding that Kaushal was prejudiced.

Although Kaushal's appellate brief is devoid of any argument regarding special circumstances that would support a conclusion that he would not have pled guilty absent the faulty advice of his attorney,³ his motion to withdraw contends that he pled "guilty in order to avoid prison without having knowledge that his ability to legally reside in the United States would end. Kaushal owns several businesses and considers the United States to be his home. Although he has [pled] guilty, Kaushal maintains his innocence and wishes to proceed to trial." (Appellant's App. Vol. II, p. 16). In addition, evidence elicited during the hearing on Kaushal's motion to withdraw indicates that Kaushal takes care of his mother. Kaushal's ties to this country – namely his business and his mother – are "special circumstances" that could support a finding that Kaushal was prejudiced by his attorney's failure to adequately advise him of the penal consequences of his plea. *See Gulzar*, 971 N.E.2d at 1261. Moreover, we note that the factual basis set forth by the State to

³ Rather, Kaushal's argument focuses on accusing his trial counsel of collecting his fee and then "urgent[ly]" advising a reluctant Kaushal to plead guilty in order to avoid having to prepare for a trial. (Appellant's Br. p. 20). We find Kaushal's claims regarding the efforts of his counsel to be irrelevant to the matter of whether Kaushal received ineffective advice as to the penal consequences of pleading guilty.

support Kaushal’s guilty plea simply provided that “on August 8, 2015, . . . Kaushal did perform or submit to fondling or touching with M.S., a child under the age of [fourteen] years, specifically [thirteen] years, with the intent to arouse or satisfy the sexual desires of . . . Kaushal or M.S. All of that occurred in Marion County and is contrary to the laws of the State of Indiana.” (Tr. Vol. II, p. 13). This ‘factual basis’ amounts more to a recitation of the elements necessary to prove the offense rather than a statement of facts to prove those elements. Thus, unlike in *Gulzar*, we can hardly say that there is *overwhelming* evidence of his guilt such that the ultimate result would have likely been the same regardless of whether Kaushal pled guilty or proceeded to trial.

Nevertheless, Kaushal undoubtedly received a substantial benefit by pleading guilty, as he received an entirely suspended sentence for an offense that carries a possible term of incarceration of two to twelve years. *See* I.C. § 35-50-2-5.5. Furthermore, Kaushal’s counsel testified that he informed Kaushal, prior to pleading guilty, that Kaushal’s Green Card would not be renewed, and when he reviewed the contents of the plea agreement with Kaushal, including the paragraph indicating a risk of deportation, Kaushal affirmed his understanding. Moreover, the trial court confirmed that Kaushal had read, understood, and signed the provision of the plea agreement discussing the possibility of deportation. *See Barajas v. State*, 987 N.E.2d 176, 181 (Ind. Ct. App. 2013) (finding that even if trial counsel had performed below prevailing

professional norms by failing to explain the potential immigration consequences of pleading guilty, the defendant was not prejudiced because the trial court explained that his guilty plea could possibly result in deportation). In addition, Kaushal conceded that he was aware that he would face hurdles with respect to his immigration status, despite his mistaken belief that he would have the time and ability to appeal any immigration consequences with immigration officials, but he was apparently willing to accept those risks in order to avoid spending any amount of time incarcerated. Thus, although his attorney did not advise of the specific immigration consequences, it is clear that Kaushal was advised of the possibility that he would be deported if he pled guilty but chose to do so regardless. Accordingly, because he has failed to establish that he was prejudiced by his attorney's performance, he has not proven that the withdrawal of his guilty plea was necessary to correct a manifest injustice. Therefore, the trial court had discretion to deny Kaushal's motion to withdraw his guilty plea.

CONCLUSION

Based on the foregoing, we conclude that the trial court acted within its discretion in denying Kaushal's motion to withdraw his guilty plea.

Affirmed.

Najam, J. and Bradford, J. concur

IN THE
COURT OF APPEALS OF INDIANA

Umesh Kaushal,
Appellant,
v.
State of Indiana,
Appellee.

Court of Appeals Cause No.
49A04-1612-CR-02862

Order

Appellant, Umesh Kaushal, by counsel, filed a Petition for Rehearing. Appellee, State of Indiana, by counsel, filed a Brief in Opposition to Rehearing.

Having reviewed the matter, the Court finds and orders as follows:

Appellant's Petition for Rehearing is denied.

Ordered this 9/26/2017.

Najam, Riley, Bradford, JJ., concur.

For the Court,

/s/ Nancy Harris Vaidik
Chief Judge

App. 21

STATE OF INDIANA) IN THE MARION
) SS: COUNTY SUPERIOR
COUNTY OF MARION) COURT CRIMINAL
 DIVISION, ROOM 3

STATE OF INDIANA)
) CAUSE NO. 49G03-
 v.) 1508-F4-028287
UMESH KAUSHAL)

ORDER ON DEFENDANT'S
MOTION TO CORRECT ERROR

(Filed Dec. 15, 2016)

Comes now the Court, after reviewing the Motion to Correct Error, and the court file, now ORDERS as follows:

1. The court recognizes the Motion to Correct Error in that the court analyzed Defendant's claims under subsection (c) rather than subsection (b) of I.C. 35-35-1-4. As Defendant points out, subsection (b) applies in this case as sentence has not been entered.
2. Subsection (b) provides:
 - (b) After entry of a plea of guilty, or guilty but mentally ill at the time of the crime, but before imposition of sentence, the court may allow the defendant by motion to withdraw his plea of guilty, or guilty but mentally ill at the time of the crime, for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant's plea. The motion to withdraw the

plea of guilty or guilty but mentally ill at the time of the crime made under this subsection shall be in writing and verified. The motion shall state facts in support of the relief demanded, and the state may file counter-affidavits in opposition to the motion. The ruling of the court on the motion shall be reviewable on appeal only for an abuse of discretion. However, the court shall allow the defendant to withdraw his plea of guilty, or guilty but mentally ill at the time of the crime, whenever the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice.

3. The court continues to find the evidence presented in this case do not show a manifest injustice has occurred. Defendant was properly advised of the consequences of his guilty plea in a written plea agreement. The court reviewed the written advisements and advised Defendant at a guilty plea hearing where Defendant indicated he understood the consequences of his plea and that adverse immigration consequences were possible. Sworn testimony from former trial counsel shows counsel advised Defendant his “green card” may not be renewed. The Court was advised Defendant had consulted with a separate attorney regarding the possible immigration consequences. The court does not place weight on Defendant’s current assertions that he never consulted an attorney regarding immigration consequences given the prior sworn testimony presented. The evidence shows Defendant was granted several continuances

App. 23

from trial and ultimately obtained the result he desired by avoiding an executed sentence on a felony Child Molesting charge. Now that he finds adverse immigration consequences may occur, he asks this court to set aside his prior sworn testimony. The facts presented to the court on Defendant's Verified Motion to Set Aside Plea of Guilty do not show a manifest injustice. The court therefore DENIES the Verified Motion to Set Aside Plea of Guilty.

Date: /s/ Stanley E. Kroh
December 15, 2016 Stanley E. Kroh, Magistrate
Marion Superior Court,
Criminal Division Room 3

THE FOREGOING IS ACCEPTED, APPROVED,
AND ENTERED AS THE COURT'S ORDER.

/s/ Sheila A. Carlisle
Sheila A. Carlisle, Judge
Marion Superior Court
Criminal Division, Room 3

H. Samuel Ansell
Rachel Jefferson

App. 24

STATE OF INDIANA) IN THE MARION
) SS: COUNTY SUPERIOR
COUNTY OF MARION) COURT CRIMINAL
 DIVISION, ROOM 3

STATE OF INDIANA)
) CAUSE NO. 49G03-
 v.) 1508-F4-028287
UMESH KAUSHAL)

ORDER DENYING VERIFIED
MOTION TO WITHDRAW GUILTY PLEA

(Filed Nov. 7, 2016)

Comes now the Court, after reviewing the parties proposed findings of fact and conclusions of law, now ORDERS as follows:

1. Defendant seeks to withdraw from the guilty plea and judgment of conviction entered on June 30, 2016, pursuant to a written plea agreement filed June 29, 2016. Defendant asserts the Court should allow Defendant to withdraw his plea of guilty and vacate the judgment of conviction pursuant to I.C. 35-35-1-4. This statute provides that a trial court may grant a motion to withdraw a plea of guilty to correct a manifest injustice. I.C. 35-35-1-4(c) provides:

A motion to vacate judgment and withdraw the plea made under this subsection *shall* be treated by the court as a petition for post-conviction relief under the Indiana Rules of Procedure for Postconviction Remedies. (Emphasis added)

2. Defendant argues the court should evaluate what constitutes a “manifest injustice” without regard to the case law that has developed under the Indiana Rules for Post-Conviction Remedies. The statute specifies one of the situations in which there is a “manifest injustice” includes whenever the convicted person was denied effective assistance of counsel.
3. Absent more specific guidance from the legislature, other than section 4(c), or guidance from appellate courts, this court finds the case law developed under the Indiana Rules for Post-Conviction Remedies to be the appropriate means to review the issues raised here.
4. In the alternative, Petitioner argues that Petitioner has made a showing that he has suffered prejudice.
5. The State has [sic] concedes Petitioner’s prior trial counsel did not to [sic] provide effective assistance. However, the record shows that counsel informed the court that Petitioner had consulted with a separate immigration attorney. Counsel stated he believed he told Defendant his “green card” may be revoked as a result of the conviction. There is no statute or case law which suggests the court must make a more detailed inquiry of what specific advice was provided.
6. In order to prevail on a post-conviction claim that the Sixth Amendment right to effective assistance of counsel was violated, Defendant must establish the two components set forth in *Strickland v. Washington*, 466 U.S. 668

(1984). *Wesley v. State*, 788 N.E.2d 1247, 1252 (Ind. 2003), *reh'g denied*; *Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002), *reh'g denied*. First, a [sic] he must show that defense counsel's performance was deficient. *Wesley*, 788 N.E.2d at 1252 (citing *Strickland*, 466 U.S. at 687). This requires showing that counsel's representation fell below an objective standard of reasonableness and that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed to the defendant by the Sixth Amendment. *Id.* (citing *Strickland*, 466 U.S. at 687-88; *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002)). The objective standard of reasonableness is based on "prevailing professional norms." *Wesley*, 788 N.E.2d at 1252 (citing *Strickland*, 466 U.S. at 687). Second, a petitioner must show that the deficient performance prejudiced the defense. *Id.* "The two prongs of the *Strickland* test are separate and independent inquiries." *Timberlake*, 753 N.E.2d at 603, and the "failure to establish either prong will cause the claim to fail." *Vermillion v. State*, 719 N.E.2d 1201, 1208 (Ind. 1999), *reh'g denied*. The law affords a strong presumption that trial counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment, and the burden falls on the Defendant to overcome that presumption. *Smith*, 765 N.E.2d at 585; *Gibson v. State*, 709 N.E.2d 11, 13 (Ind. Ct. App. 1999), *trans. denied*.

7. Because Defendant asserts ineffective assistance of trial counsel following a guilty plea,

this Court reviews his contention under the standard established in *Segura v. State*, 749 N.E.2d 496 (Ind.2001). See *Reynolds v. State*, 783 N.E.2d 357, 358 (Ind. Ct. App. 2003). A post-conviction claim of ineffective assistance of counsel requires that a petitioner show two things: first, that counsel's performance "fell below an 'objective standard of reasonableness,'" and, second, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Segura*, 749 N.E.2d at 500-01 (citing *Strickland*. 466 U.S. at 687-88, 694). "*Segura* categorizes two main types of ineffective assistance of counsel cases." *Smith v. State*, 770 N.E.2d 290, 295 (Ind. 2002). The first is regarding claims as to errors or omissions of counsel that overlook or impair a defense. *Id*; *Segura*, 749 N.E.2d at 499. The second type is where the defendant's lawyer incorrectly advises the defendant as to penal consequences. *Smith*, 770 N.E.2d at 295. Defendant's allegations fall within the second type.

8. Defendant alleges trial counsel failed to advise him of the adverse immigration consequences prior to pleading guilty in support of his related claim that the guilty plea was not knowing, intelligent, and voluntary. "A guilty plea entered after the trial court has reviewed the various rights that a defendant is waiving and has made the inquiries called for by statute is unlikely to be found wanting in a collateral attack." *Cornelious v. State*, 846 N.E.2d 354, 355 (Ind. Ct. App. 2006) (citing *State v. Moore*, 678 N.E.2d 1258, 1265 (Ind. 1997)),

trans. denied. “However, defendants who can show that they were coerced or misled into pleading guilty by the judge, prosecutor or defense counsel will present colorable claims for relief.” *Id.* Defendant has not made such a showing.

9. The court conducted a thorough guilty plea hearing during which comprehensive advisements and inquiries of Defendant were made. Throughout the hearing, Defendant’s responses were more than sufficient to show that his plea was entered knowingly, intelligently, and voluntarily. *See Johnson*, 734 N.E.2d at 245. The court specifically confirmed with Defendant during the guilty plea hearing that he had read the entire plea agreement, including the written advisements which he initialed thereafter. One of those written advisements was paragraph 15 which expressly stated that if the defendant is not a natural born United States citizen, signing the plea agreement could affect his immigration status, specifically stating that deportation, denial of re-entry, prohibition of citizenship, or loss of future immigration benefits) could result.
10. Defendant has failed to make a showing of prejudice here. In similar cases, the Indiana Supreme Court has set forth the following standard as to the prejudice prong:

[I]n order to state a claim for postconviction relief a petitioner may not simply allege that a plea would not have been entered. Nor is the petitioner’s conclusory testimony to that

effect sufficient to prove prejudice. To state a claim of prejudice from counsel's omission or misdescription of penal consequences that attaches to both a plea and a conviction at trial, the petitioner must allege . . . "special circumstances," or, as others have put it, "objective facts" supporting the conclusion that the decision to plead was driven by the erroneous advice.

We believe a showing of prejudice from incorrect advice as to the penal consequences is to be judged by an objective standard, i.e., there must be a showing of facts that support a reasonable probability that the hypothetical reasonable defendant would have elected to go to trial if properly advised.

Suarez v. State, 967 N.E.2d 553, 555-56 (Ind. Ct. App. 2012) (quoting *Segura*, 749 N.E.2d at 507), *reh'g denied, trans. denied*.

11. Defendant received a substantial benefit from his plea agreement which resulted in a fully suspended sentence on a level 4 felony child molesting charge which carried a potential prison sentence of up to twelve years. See *Kistler v. State*, 936 N.E.2d 1258, 1264 (Ind. 2010) (noting, in finding failure to prove prejudice regarding ineffective assistance claim for incorrect advice as to penal consequences, that the defendant received a substantial benefit from his plea agreement), *trans. denied; see also Suarez*, 967 N.E.2d at 557 (holding that "the extraordinarily large benefit Suarez received in exchange for his guilty plea cannot

be denied, and, in our view, overwhelms all other considerations in this case,” and concluding that the defendant failed to establish that he was prejudiced by his trial counsel’s failure to advise him of the risk of deportation). It is also worth noting trial counsel’s sworn testimony that Defendant’s primary concern was to avoid a prison sentence. A prior plea agreement filed May 4, 2016 and later withdrawn, allowed the possibility of a one year prison sentence, remainder suspended. Defendant testified he believed the plea agreement filed June 29, 2016 which guaranteed a suspended sentence was his best deal and that he risked going to prison if he was found guilty at trial. As the State points out, had Defendant been convicted at trial direct placement at Community Corrections for any executed time would be prohibited by I.C. 35-38-2.6-1.

12. It is difficult to assess Defendant’s probability of prevailing at trial. Given his over-riding concern to avoid prison, he has not presented facts to support a reasonable probability that the hypothetical reasonable defendant would have elected to go to trial, as required by *Segura*.
13. Based upon all of the factors discussed *supra*, Defendant has failed to meet his burden of proving the required prejudice. Petitioner has failed to prove that his guilty plea was anything other than knowing, intelligent, and voluntary.

App. 31

The court denies the Verified Motion to withdraw Plea of Guilty. The court vacates the November 17, 2016 jury trial. This case is scheduled for sentencing on November 22, 2016 at 10:00 a.m.

Date: /s/ Stanley E. Kroh
November 7, 2016 Stanley E. Kroh, Magistrate
 Marion Superior Court,
 Criminal Division Room 3

THE FOREGOING IS ACCEPTED, APPROVED,
AND ENTERED AS THE COURT'S ORDER.

/s/ Sheila A. Carlisle
Sheila A. Carlisle, Judge
Marion Superior Court
Criminal Division, Room 3
[11.7.2016]

H. Samuel Ansell
Rachel Jefferson

App. 32

**In the
Indiana Supreme Court**

Umesh Kaushal,
Appellant(s),
v.
State Of Indiana,
Appellee(s).

Court of Appeals Case No.
49A04-1612-CR-02862
Trial Court Case No.
49G03-1508-F4-28287

Order

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer.

App. 33

Done at Indianapolis, Indiana, on 12/19/2017.

/s/ Loretta H. Rush
Loretta H. Rush
Chief Justice of Indiana

All Justices concur.

STATE OF INDIANA) IN THE MARION
COUNTY OF MARION) SUPERIOR COURT
STATE OF INDIANA) NO. 03
v.) CAUSE NO.
UMESH KAUSHAL,) 49G03-1508-F4-028287
Defendant.) (Filed Jul. 21, 2016)

**VERIFIED MOTION TO
WITHDRAW PLEA OF GUILTY**

Defendant, Umesh Kaushal, by counsel H. Samuel Ansell, pursuant to I.C. 35-35-1-4(b), respectfully moves this Court to withdraw the plea of guilty in this matter and in support states the following:

1. On June 30, 2016, Umesh Kaushal, defendant, pleaded guilty under cause 49G03-1508-F4-028287 to Child Molesting as a level 4 felony;
2. This matter is set for a sentencing hearing on August 5, 2016;
3. The plea agreement calls for the defendant to be sentenced to 4 years suspended with the first three years the defendant serving on probation with home detention as a condition of probation;
4. The offense of conviction, child molesting as a level 4 felony, is a crime involving moral turpitude (CIMT) rendering the defendant inadmissible under 8 USC § 1182(a)(2)(A) and subject to mandatory detention without bond by immigration authorities.

5. The offense of conviction, child molesting as a level 4 felony, is also a deportable offense under 8 USC § 1227(a)(2)(E)(i), as a crime of child abuse, child neglect, or child abandonment.
6. The offense of conviction, child molesting as a level 4 felony is also an aggravated felony under 8 USC § 1101(a)(43), rendering the defendant deportable and inadmissible to the United States and subject to mandatory detention without bond by immigration authorities.
7. Outside of a vague advisement that the conviction may have immigration consequences, the defendant was not advised of potential immigration consequences and would not have pled guilty to the charged crime had he known it would subject him to automatic detention, revocation of his permanent resident status, and certain deportation.
8. Defense counsel Monish Patel did not advise Mr. Kaushal that this conviction would lead to an automatic detention, revocation of his permanent resident status, or deportation (see attached affidavit).
9. The State of Indiana is not substantially prejudiced by any reliance on the plea in this matter as the plea was only filed three weeks ago and the case may still proceed to trial.
10. Withdraw of the guilty plea is necessary to correct a manifest injustice.

11. Mr. Kaushal pleaded guilty in order to avoid prison without having knowledge that his ability to legally reside in the United States would end. Kaushal owns several businesses and considers the United States to be his home. Although he has pleaded guilty, Kaushal maintains his innocence and wishes to proceed to trial.

WHEREFORE, the Defendant, Umesh Kaushal, by counsel respectfully requests that his verified motion to withdraw plea of guilty in this matter be granted and that this matter be set for a pretrial conference in due course

Respectfully submitted,

/s/ H. Samuel Ansell

H. Samuel Ansell

Attorney for Kaushal

VERIFICATION

I affirm, under the penalties for perjury, that the foregoing representations are true.

/s/ Umesh Kaushal

Umesh Kaushal, Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served upon the Marion County Deputy Prosecutor assigned to this case, by leaving a copy in the Prosecutor's box in the City-County Building, 200 East Washington Street, Indianapolis, Indiana, 46204, Courtroom 3, on July 21, 2016.

/s/ H. Samuel Ansell
H. Samuel Ansell, #24163-49
Attorney for Kaushal

156 E. Market Street, Suite 900
Indianapolis, IN 46204
Office 317.381.0371; Fax 317.614.7676

AFFIDAVIT

Rahul Patel, being duly sworn upon his oath, states:

1. On or around August 13th of 2015, I was retained as counsel for the Defendant, Umesh Kaushal under cause 49G03-1508-F4-028287.
2. In my capacity as counsel, I represented Mr. Kaushal at his guilty plea hearing on June 30, 2016.
3. Immigration consequences were mentioned in the written plea agreement under paragraph 15, however I did not specifically discuss such consequences with the defendant when advising him in his decision to plead guilty.

4. At the time of the guilty plea hearing I was not aware of the immigration consequences of pleading guilty to level 4 child molesting.

5. At the time of the guilty plea hearing I was not aware that child molesting would be considered a “crime involving moral turpitude” rendering the defendant inadmissible and ineligible for any relief from deportation under the immigration statute.

6. At the time of the plea agreement I was not aware that child molesting as a level 4 felony would be considered an “aggravated felony” rendering the defendant inadmissible, subject to automatic deportation, and ineligible for relief from deportation under the immigration statute.

7. At the time of the plea agreement I was not aware that child molesting would render the defendant deportable as a crime of child abuse, child neglect, or child abandonment.

FURTHER AFFIANT SAYETH NOT

/s/ Rahul Patel
 Rahul Patel

STATE OF INDIANA)
) SS:
 COUNTY OF MARION)

On this 21st day of July, 2016, before me, a Notary Public within and for said County, personally appeared Rahul Patel, and acknowledged to me the execution of the foregoing instrument as his voluntary

App. 39

act and deed, and who, being first duly sworn upon his oath, swears that the statements and representations made herein are true and accurate to the best of his knowledge and belief.

/s/ Timothy Ziegler

/s/ Timothy Ziegler, Notary Public
~~Marion~~ [Hamilton] County, Indiana

My Commission Expires: 9-16-2021

[SEAL]

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE SUPERIOR COURT OF MARION COUNTY
CRIMINAL DIVISION, ROOM THREE

STATE OF INDIANA) CAUSE NO.
)
Plaintiff,) 49G03-1508-F4-028287
)
vs.)
)
UMESH KAUSHAL)
)
Defendant.)

**TRANSCRIPT OF MOTION TO
WITHDRAW GUILTY PLEA**

BEFORE THE HONORABLE
STANLEY E. KROH, MAGISTRATE
MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM THREE
ON AUGUST 05, 2016

FOR THE STATE	FOR THE DEFENDANT:
OF INDIANA:	H. Samuel Ansell
Rachel Jefferson	ANSELL LAW FIRM, LLC
PROSECUTOR'S OFFICE	156 E. Market Street
251 E. Ohio St., Suite 160	Suite 900
Indianapolis, IN 46204	Indianapolis, IN 46204

***Shelly D. Glore, Official Court Reporter
In the Superior Court of Marion County, Indiana
Criminal Division, Room Seven***

[23] ***DIRECT EXAMINATION OF
UMESH KAUSHAL***

* * *

A. I have like – I have owned three business and there's nobody take care of my businesses if I go to jail and I have a mother to take care of. I'm losing a lot in my life if I go to prison even one day. There's nobody –

* * *

[34] ***REDIRECT EXAMINATION OF
UMESH KAUSHAL***

* * *

A. Mr. Patel wanted me to plead the guilty, he said that's the best deal we've got, and if we go for trial, if we lose. I go for jail. And I don't – I don't look forward to go to prison, sir.

Q. So in order to avoid the risk of going to prison, you admitted to something that wasn't true?

A. Yes, sir.

Q. And you believe that you would be able to get on with your life; is that correct?

A. Yes.

Q. Did You know that you would be subject to mandatory detention by Immigration and Customs Enforcement Removal Operations?

A. No, sir.

Q. Did you know that you would not be eligible for an immigration bond?

A. No, sir.

Q. Did you know that there would be no relief available to you because you would be deportable and inadmissible?

A. No sir.

Q. Do you know that you would [sic] transported back to India in handcuffs and presented to Indian Customs?

A. No, sir.

* * *

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE SUPERIOR COURT OF MARION COUNTY
CRIMINAL DIVISION, ROOM THREE

STATE OF INDIANA,) CAUSE NO.
)
Plaintiff,) 49G03-1508-F4-028287
)
vs.)
)
UMESH KAUSHAL,)
)
Defendant.)

**TRANSCRIPT OF HEARING ON
MOTION TO WITHDRAW GUILTY PLEA**

BEFORE THE HONORABLE
STANLEY E. KROH, MAGISTRATE
MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM THREE
ON SEPTEMBER 9, 2016

FOR THE STATE	FOR THE DEFENDANT:
OF INDIANA:	Harold Samuel Ansell
Rachel A. Jefferson	ANSELL LAW FIRM, LLC
PROSECUTOR'S OFFICE	156 East Market Street
251 East Ohio Street	Suite 900
Suite 160	Indianapolis, Indiana 46204
Indianapolis, Indiana 46204	

***Shelly D. Glore, Official Court Reporter
In the Superior Court of Marion County, Indiana
Criminal Division, Room Three***

[65] ***DIRECT EXAMINATION OF
RAHUL (MONISH) PATEL***

* * *

Q. More specifically talking about the discussion of his immigration issues during the representation, did you discuss any immigration concerns with Mr. Kaushal?

A. I advised him – I mean the paragraph obviously is what we have to do now after the last few years. I think they added that to the plea. But I did say that they would not renew his green card. I think he's here on a [66] green card, and I think they would not renew it. But that was about it.

* * *

[92] ***CROSS-EXAMINATION OF
RAHUL (MONISH) PATEL***

* * *

Q. So \$20,000 and however many months you were on this case, it didn't occur to you to call an immigration attorney and – and look into what might be the consequence of the plea that you were advising that he take?

A. No.

Q. Okay. But you did tell him that his green card probably wouldn't – would be – would not be renewed?

A. Yeah. He said it was up in that – in May or next May, something like that, yes.

Q. Okay. So that was your sole immigration advice. And you didn't have anything else to say about whether he'd be an enforcement priority, whether he'd be subject to mandatory detention, whether he'd ever really even be able to – to execute his sentence?

A. No, I didn't. No.

* * *

[104] Q. Mr. Patel, prior to June of this year, had you done any – had you really considered preparing this case for trial?

A. Before June?

[105] Q. Yeah.

A. Not at the time, no.

* * *
