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COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
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71802-9

NO. 71802-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

SACIID NADIF,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE ELIZABETH BERNS

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

Appellant Nadif pled guilty to second-degree assault after being repeatedly advised by his attorney that it was a “deportable offense.” He pled guilty to take advantage of the State’s agreement to recommend a two-year exceptional sentence, instead of the ten-year exceptional sentence it planned to request after trial, and to take advantage of the State’s agreement not to display photographs of the victim’s severe injuries at sentencing. Nadif later moved to withdraw his plea, claiming that his attorney did not tell him that deportation was “certain.” He presented no evidence that certain deportation was a “truly clear” consequence to his guilty plea. Furthermore, he presented no evidence that had he been so advised, he would *not* have pled guilty and instead proceeded to trial. Did the trial court properly exercise its discretion to deny Nadif’s motion to withdraw his guilty plea?

**B. STATEMENT OF THE CASE**

Saciid Nadif pled guilty in the King County Superior Court to Assault in the Second Degree – Domestic Violence, based on the brutal beating of his wife, Ashar Farah. CP 1-5, 12-25. Nadif also pled guilty to the aggravating factor that the offense occurred within the sight or sound of the couple’s minor child. CP 1-2, 12-13, 23.

Prior to sentencing, Nadif moved to withdraw his guilty plea, alleging that his prior counsel, Timothy Leary, had performed deficiently for not advising him, “unequivocally . . . *that he will be deported without fail* as a result of entering into this plea.” 03/07/14 RP 46 (emphasis added); see also CP 56 (“Mr. Leary failed to advise Mr. Nadif about the clear immigration consequence of Mr. Nadif’s conviction – certain deportation.”). Nadif alternatively argued that his plea was involuntary because he had not been informed of the “clear and irrevocable immigration consequence, deportation.” 03/07/14 RP 46; CP 57-59.

After considering the briefing of the parties, testimony from both Nadif and Leary, and the arguments of counsel, the trial court denied Nadif’s motion to withdraw his plea. CP 34-36; 03/24/14 RP 3-6.

On April 4, 2014, the trial court imposed an exceptional sentence of 24 months of incarceration, as well as 18 months of community custody. CP 38, 40-41, 43-44; 04/02/2014 RP 6-7. Nadif now appeals the denial of his motion to withdraw his guilty plea. CP 47-49.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO DENY NADIF’S MOTION TO WITHDRAW HIS GUILTY PLEA.**

Nadif alleges that the trial court abused its discretion when it denied his motion to withdraw his guilty plea based on ineffective

assistance of counsel.<sup>1</sup> Specifically, he contends that his attorney never informed him “he would be deported,” and instead told him that he “might not be deported due to the unstable political climate in his home country.” Brf. of App. at 1 (emphasis in original). However, the only “truly clear” immigration consequence to Nadif’s plea was that the crime he pled guilty to is a “deportable” offense. Because Nadif’s counsel properly advised him that his plea may subject him to deportation, the trial court properly denied Nadif’s motion to withdraw his plea.

A motion to withdraw a plea of guilty prior to judgment is governed by CrR 4.2(f). That rule states, in pertinent part, that “[t]he court shall allow a defendant to withdraw the defendant’s plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.” A defendant “has the burden of establishing a manifest injustice in light of all the surrounding facts of his case.” State v. Dixon, 38 Wn. App. 74, 76, 683 P.2d 1144 (1984). Proving a manifest injustice is a demanding standard, made so because of the many safeguards taken when a defendant enters a guilty plea. State v. Zhao, 157 Wn.2d 188, 197, 137 P.3d 835 (2006); State v. Hystad, 36 Wn. App. 42, 45, 671 P.2d 793 (1983).

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<sup>1</sup> On appeal, Nadif abandons his claim of involuntary plea. Brf. of App. at 8 (“On appeal, [Nadif] asserts exclusively that trial counsel’s ineffectiveness created a manifest injustice, requiring relief.”).

A manifest injustice is one which is obvious, directly observable, overt, and not obscure. State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). Four indicia of manifest injustice have been recognized by the Washington State Supreme Court: 1) the defendant was denied effective assistance of counsel; 2) the plea was not ratified by the defendant; 3) the plea was involuntary; 4) the plea agreement was not kept by the prosecution. Taylor, 83 Wn.2d at 597.

A trial court's denial of a defendant's motion to withdraw his plea will be overturned only in the case of an abuse of discretion. State v. Marshall, 144 Wn.2d 266, 280-81, 27 P.3d 192 (2001), abrogated on other grounds by State v. Sisouvanh, 175 Wn.2d 607, 290 P.3d 942 (2012).

A trial court abuses its discretion when it bases its decision on untenable grounds or reasons, or when its decision is manifestly unreasonable.

State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

a. Additional Facts From The Hearing Below.

After Nadif set his case for trial, he retained attorney Leary. Id. Leary discussed immigration issues with Nadif on multiple occasions. 03/07/14 RP 24-25. Nadif informed Leary that he was a citizen of Somalia, and that his green card had expired two years earlier. 03/07/14 RP 12. Leary told Nadif that second-degree assault (especially with a

domestic violence allegation) was a crime subject to deportation.

03/07/14 RP 14, 24-25. Leary also informed Nadif that although the United States had elected not to deport Somali citizens for a period of time, that could change. Id. Leary made clear to Nadif that the crime was a deportable offense, and that although there was a question as to whether he would actually be deported due to instability in Somalia, deportation was certainly a possibility. 03/07/14 RP 25. In fact, Nadif even asked Leary about the option of simply leaving the country voluntarily and returning to Somalia, should he face deportation as a result of a plea. Id.

Nadif did not want to plead guilty to a felony, regardless of the immigration consequences. 03/07/14 RP 21. However, the State refused Leary's attempt to negotiate a reduced charge. 03/07/14 RP 19-20. Then, shortly before the matter was to begin trial, the State sent Leary a letter outlining its intent to seek an exceptional sentence of ten years following trial. 03/07/14 RP 20-21; Pretrial Ex. 4. The sentence recommendation would be based on the significant injuries that Nadif inflicted on his wife, as well as the fact that the assault occurred in front of the couple's young daughter. 03/07/14 RP 18-19; Pretrial Ex. 4. The State offered to make an agreed-upon exceptional sentencing recommendation of 24 months in exchange for Nadif's guilty plea prior to the start of trial. Id. At Leary's request, the State included in its plea offer an agreement not to display

photographs of the victim's injuries at the sentencing hearing. 03/07/14 RP 21-22. The photographs depicted in graphic detail the substantial injuries Nadif's wife suffered at his hands. 03/07/14 RP 19; Pretrial Ex. 3. Nadif was provided a written copy of the State's offer. 03/07/14 RP 20, 42-43; Pretrial Ex. 4.

Leary interviewed the victim, and based on that interview and all of the other evidence, he informed Nadif that he would face the immigration consequences they had discussed, be it 24 months from the date of a plea, or in 10 years if the sentencing court followed the State's recommendation after trial. 03/07/14 RP 16-17, 22-23.

On the morning of trial, Nadif agreed to accept the State's offer. 03/07/14 RP 22. Leary reviewed the guilty plea statement with Nadif, and specifically reminded him that the crime he was pleading to was a deportable offense. CP 12-24; 03/07/14 RP 22-25. Prior to that time, Leary had discussed the immigration issues with Nadif "at length." 03/07/14 RP 23. They had "frequent" and "multiple" conversations about the immigration consequences to the plea, including the impact to Nadif's green card and his possible deportation. 03/07/14 RP 24-25. Thus, according to Leary, the language on the plea statement about possible deportation and other immigration consequences "wasn't a surprise to [Nadif]." 03/07/14 RP 23.

Nadif testified at the hearing to withdraw his plea. He claimed to have had only one discussion with Leary about immigration,<sup>2</sup> and that during the discussion, Leary told him he would contact an immigration lawyer, but Nadif never heard anything else about it. 03/07/14 RP 32-33. Nadif claimed that at the time he entered the plea, he had never reviewed the discovery or evidence with Leary, that he “was confused and misinformed,” and that he was “just signing papers” that he had not read or had read to him. 03/07/14 RP 34. Nadif claimed that he had no memory of the prosecutor asking him questions about the guilty plea statement in court, and specifically, the portion of the form that advised him he could be deported as a result of the plea. 03/07/14 RP 39-40. Nadif testified that he “probably wasn’t paying attention about anything.” Id. He alleged that Leary never told him that he would “*certainly* be deported” as a result of the plea. Id. (emphasis added).

b. The Trial Court Properly Concluded That Nadif Failed To Establish Ineffective Assistance Of Counsel.

A criminal defendant has the right to effective assistance of counsel in the plea process. U.S. Const. amend. VI; In re Pers. Restraint of Riley, 122 Wn.2d 772, 780, 863 P.2d 554 (1993). Claims of ineffective

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<sup>2</sup> Nadif admitted that he had told Leary during that discussion that he knew the felony charge resulted in “immigration consequence[s].” 03/07/14 RP 32.

assistance of counsel in the plea bargaining context are governed by Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The burden of establishing ineffective assistance of counsel falls on the defendant. Id. at 687. To prevail, a defendant must show that (1) his attorney's conduct fell below an objective standard of reasonableness and (2) this deficiency resulted in prejudice. Id. at 687-88; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). In this context, prejudice exists only if the defendant can demonstrate that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); Riley, 122 Wn.2d at 780-81.

If the defendant fails to establish either prong of the Strickland test, the inquiry ends. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Courts presume that counsel has provided effective representation and are "highly deferential" when scrutinizing counsel's performance. Strickland, 466 U.S. at 689.

- i. Nadif failed to establish deficient performance.

In Padilla v. Kentucky, the Supreme Court held that in order to provide effective assistance of counsel, defense counsel must advise a

noncitizen client regarding the risk of deportation. \_\_\_ U.S. \_\_\_, 130 S. Ct. 1473, 1482, 176 L. Ed. 2d 284 (2010). Recognizing that immigration law is complex, the Court acknowledged that in most situations the deportation consequences are uncertain. Id. at 1483. The Court concluded that, “When 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. When the “deportation consequence is truly clear,” the duty is to give correct advice. Id.

Thus, deficient performance can be established by showing that:

1) the deportation consequences are truly clear and counsel gave the defendant incorrect advice; *or* 2) the deportation consequences are uncertain and counsel failed to advise the client that the conviction could carry a risk of adverse immigration consequences. Id. See also State v. Sandoval, 171 Wn.2d 163, 172, 249 P.3d 1015 (2011).

The record establishes that the only “truly clear” immigration consequence of Nadif’s plea is that a conviction for second-degree assault with a domestic violence allegation may subject a defendant to deportation

proceedings.<sup>3</sup> 03/07/14 RP 14. The court properly exercised its discretion when it concluded that Leary properly advised Nadif.

Nadif completed the 12<sup>th</sup> grade. CP 12; 10/17/13 RP 4. He signed the Statement of Defendant on Plea of Guilty, indicating that “My lawyer has explained to me, and we have fully discussed all of the above paragraphs. I understand them all. I have been given a copy of this ‘Statement of Defendant on Plea of Guilty.’” CP 24. At the plea hearing, Nadif affirmed that he had gone through the entire document with his lawyer, and that he understood all of it. 10/17/13 RP 3. Leary also signed the plea statement, attesting that “I have read and discussed this statement with the defendant and believe that the defendant is competent and fully understands the statement.” Id. Included in the plea statement was the following provision:

If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

CP 20. This statement was read aloud to Nadif in open court, who unequivocally stated that he understood it. 10/17/13 RP 8-9. Moreover, Nadif’s attorney affirmed to the court that he had “consulted with

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<sup>3</sup> Although no evidence of this fact was presented beyond Leary’s testimony, the parties do not appear to have disagreed that second-degree assault is a “deportable offense,” and the State has no basis to contest such fact on appeal.

Mr. Nadif about any adverse immigration consequences that may follow conviction.” 10/17/13 RP 12. Thus, it is clear that Nadif was informed that his plea of guilty was grounds for his deportation.

Moreover, at the motion to withdraw the plea, Leary testified that he informed Nadif that the crime was a deportable offense on multiple occasions prior to the plea:

I let him know that, you know, an assault 2 is something that, especially when there’s a domestic violence allegation with it, is subject to deportation.

03/07/14 RP 14. See also 03/07/14 RP 24 (“[T]here were frequent conversations about the impact on his green card, his ability to stay in the country, and whether or not he would be sent back to Somalia, and whether he could return voluntarily”). The prosecutor asked Leary:

Q: [W]ere you basically telling him that he would in fact – that this is a deportable offense?

A: Yeah, I did. And when I say ten years, I wasn’t like, you know, you’re going to get ten years, I said, you know, there’s a significant risk that you could get ten years based on what happens. And so, yes, I mean, he was aware that this was a deportable offense, and that there were questions as to whether he would be, in fact, deported based on the lack of – the instability in Somalia, but that was a possibility.

Q: And that’s a discussion you had with him?

A: Yes, on multiple occasions.

03/07/14 RP 24-25. The trial court found Leary's testimony credible, concluding that Leary "specifically advised Mr. Nadif [the charge he pled to] was a deportable offense." CP 35; 03/24/14 RP 4. Based on the evidence, this Court cannot say that the lower court abused its discretion when concluding that Nadif was properly advised that he was pleading guilty to a deportable offense.

Moreover, the trial court found that Nadif was *not* credible, and rejected his testimony as "completely contradict[ing] everything that he himself said in court [at the time of his plea]." CP 35; 03/24/14 RP 5. Credibility determinations are strictly within the province of the trial court and are not reviewable on appeal. State v. Teshome, 122 Wn. App. 706, 715, 94 P.3d 1004 (2004) (citing State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850) (1990)). Because Nadif produced nothing to support his motion other than his own self-serving statements that the trial court found not credible, Nadif failed to meet his burden to prove deficient performance. See State v. Cervantes, 169 Wn. App. 428, 434, 282 P.3d 98 (2012) (self-serving assertions lacking corroboration are insufficient to establish deficient performance).

Although Nadif argued below that Leary was ineffective for failing to unequivocally advise him that he would be deported *without fail* as a result of entering the plea, 03/07/14 RP 46, he presented no evidence to

support his claim that *certain* deportation was a “truly clear” immigration consequence. Moreover, Nadif’s argument on appeal is not clear about what specific immigration consequences he believes Leary was required to have provided advice about and either neglected to provide, or misadvised him of.<sup>4</sup> See Brf. of App. at 3 (arguing only that the advice was “misleading and confusing”); Brf. of App. at 5 (arguing only that counsel’s advice was “ambiguous”). Nadif’s generalizations are inadequate to establish a basis for relief.

Nadif argues that the court’s factual finding that he “was clearly advised that it was a matter of 24 months or 10 years when deportation would occur” lacks sufficient support in the record. While Nadif is technically correct that Leary never told him that deportation *would* occur, it is of no importance. Leary was under no obligation to tell Nadif when or if deportation *would definitely* occur, because such a consequence to his plea was not “truly clear.” All that was required of Leary was to advise Nadif that a plea to second-degree assault *could* result in his deportation. Thus, the finding Nadif complains of has no relevance. The pertinent

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<sup>4</sup> Nadif repeatedly alleges that Leary testified he never used the word “deportation” during his discussions with his client, and that he only used the phrase “immigration consequences” when advising Nadif. Brf. of App. at 6-7. However, Leary specifically testified that he told Nadif that a plea to second-degree assault “is subject to *deportation*.” 03/07/14 RP 14 (emphasis added). He also testified that he told Nadif “on multiple occasions,” that the crime was a “*deportable* offense.” 03/07/14 RP 24-25. Thus, Nadif’s assertions that Leary never used the word “deportation” in his discussions with Nadif are inaccurate.

finding by the trial court is that Leary informed Nadif that the offense was a deportable one. CP 35 (line 9); 03/24/14 RP 4 (lines 23-24). The record provides ample support for that finding.

The trial court's determination that Nadif failed to establish deficient performance was a proper exercise of discretion. Nadif's claim that he was not properly advised as to the "truly clear" immigration consequences of his plea is meritless.

ii. Nadif failed to establish prejudice.

As noted above, in order to establish the prejudice prong under Strickland, a defendant must demonstrate a reasonable probability that had he been given appropriate advice, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. at 59; Riley, 122 Wn.2d at 780-81. A defendant must "convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla, 130 S. Ct. at 1485. Although Nadif alleges on appeal that he "would not have taken a guilty plea and risked deportation, had he understood the risks to his immigration status," Brf. of App. at 4, his claim is unsupported by the record and implausible.

First, as noted above, it is unclear exactly what "risks to his immigration status" Nadif believes that Leary *should have* advised him of,

but either failed to or provided misadvice about. Additionally, Nadif presented no evidence that he would *not* have pled guilty had he been so advised. Nadif's attorney alleged below that "Nadif will testify at the evidentiary hearing that – had he been informed and fully understood that he would be deported as a result of his this [sic] conviction, he would have decided to proceed to trial." CP 56. However, despite his attorney's assertions, Nadif never testified to anything of the sort, nor did he sign any affidavit stating as much. 03/07/14 RP 29-45. The record is utterly devoid of any evidence of prejudice to Nadif.

Moreover, it is clear that Nadif pled guilty solely to minimize his incarceration time, because absent an unlikely acquittal, he had no ability to alter the immigration consequences he faced. See 03/07/14 RP 23 (Leary testified that "there wasn't an option on the table that would have mitigated the immigration consequences."). Up until the day of trial, Nadif did not want to plead guilty "regardless of immigration consequences." 03/07/14 RP 21. What appears to have finally convinced Nadif to change his mind was the threat of the prosecutor to seek a ten-year exceptional sentence. See 03/07/14 RP 43 (Nadif testified that "I was thinking about the ten years more than I was thinking about the immigration status.").

Leary informed Nadif that he would be facing the same immigration consequences – possible deportation – in either two years (pursuant to the plea) or potentially in ten years (following a trial). 03/07/14 RP 16, 22-23, 24-25. Based on his investigation of the case, including an interview with the victim, Leary appropriately advised Nadif that it was in his best interest to avoid having the sentencing judge see damaging photographs that depicted the horrific injuries that Nadif inflicted upon his wife in the presence of their young child. 03/07/14 RP 16-22; Pretrial Ex. 3. Under the plea, the State agreed it would not display the photographs at sentencing, and it would recommend only a two-year sentence. 03/07/14 RP 21; Pretrial Ex. 4. From this, it is clear that Nadif's decision to plead had nothing to do with Leary's advice regarding immigration consequences, and had everything to do with his desire to avoid a harsher sentence.

Nadif failed to establish that a decision to reject the plea bargain would have been rational under the circumstances. Because there was no evidence of prejudice under Strickland, the trial court properly denied Nadif's motion to withdraw his plea for ineffective assistance of counsel.

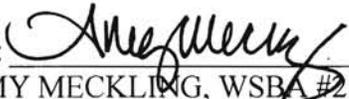
**D. CONCLUSION**

Based on the above arguments, this Court should conclude that the trial court properly exercised its discretion when it determined that Nadif had not met his burden to establish a manifest injustice warranting withdrawal of his plea.

DATED this 10<sup>th</sup> day of February, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jan Trasen, the attorney for the appellant, at Jan@washapp.org, containing a copy of the BRIEF OF RESPONDENT, in STATE V. SACHIID NADIF, Cause No. 71802-9 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 10 day of February, 2015

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington