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1. [Se Phay v. State, 1996 Minn. App. LEXIS 1408](#)

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Se Phay v. State

Court of Appeals of Minnesota

December 17, 1996, Filed

C5-96-106

Reporter

1996 Minn. App. LEXIS 1408 *; 1996 WL 722110

Se Phay, petitioner, Appellant, vs. State of Minnesota, Respondent.

Notice: [*1] THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

Prior History: Ramsey County District Court. File No. K9-92-1861. Hon. Robert H. Lynn.

Disposition: Affirmed.

Core Terms

guilty plea, immigration consequences, withdraw, manifest injustice, immigration, attorney's, assistance of counsel, fail to inform, motion to withdraw, postconviction, ineffective, misdemeanor, argues

Case Summary

Procedural Posture

Defendant appealed an order of the Ramsey County District Court (Minnesota), which denied his motion to withdraw his guilty plea after his conviction for possession of a pistol without a permit.

Overview

Defendant was charged with possession of a pistol without a permit. He pleaded guilty and was convicted of the crime. After two later guilty pleas, a deportation proceeding was instituted against defendant. Defendant filed a motion to withdraw his guilty plea to the charge of possession of a pistol without a permit, claiming that the plea constituted a manifest injustice because his attorney failed to inform him of the immigration consequences of the plea. The trial court denied the motion. On appeal, the court affirmed the trial court's order. The court held that defendant's motion was not

timely within the meaning of [Minn. R. Crim. P. 15.01, subd. 1](#) because it was filed 35 months after sentencing. The court determined that defendant was not denied his right to effective assistance of counsel because his attorney was not required to inform him of the immigration consequences of his plea and defendant failed to show that he would not have pleaded guilty but for the omission. The court ruled that the withdrawal of defendant's guilty plea was not necessary to correct a manifest injustice.

Outcome

The court affirmed the trial court's order denying defendant's motion to withdraw his guilty plea.

LexisNexis® Headnotes

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Changes & Withdrawals

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Changes & Withdrawals

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > General Overview

[HN1](#) [↓] **Entry of Pleas, Changes & Withdrawals**

In order to withdraw a guilty plea, the moving party must bring a "timely motion" and prove that the withdrawal is necessary to "correct a manifest injustice." [Minn. R. Crim. P. 15.05, subd. 1](#). In a postconviction proceeding, the burden is on the petitioner to prove by a preponderance of the evidence that withdrawal of the

guilty plea is warranted. [Minn. Stat. § 590.04, subd. 3](#) (1994). An appellate court's scope of review is limited to determining whether there is sufficient evidence in the record to support the findings of the postconviction court.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Changes & Withdrawals

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Changes & Withdrawals

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

[HN2](#) **Guilty Pleas, Changes & Withdrawals**

While a motion to withdraw a guilty plea is not barred solely because it is made after sentencing, it must be timely. [Minn. R. Crim. P. 15.01, subd. 1.](#)

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

[HN3](#) **Entry of Pleas, Guilty Pleas**

There are two necessary elements of an ineffective assistance claim: (1) that counsel's representation falls below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's errors, the result of the case would have been different. The appellant must affirmatively prove both of these elements.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Changes & Withdrawals

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Changes &

Withdrawals

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

[HN4](#) **Guilty Pleas, Changes & Withdrawals**

While it may be desirable for lawyers to inform their clients of immigration consequences of a guilty plea, there is no affirmative duty that they do so. An attorney's failure to inform a client of immigration consequences is one factor in the decision whether to allow a defendant to withdraw a guilty plea. Other factors to be considered are the innocence of the defendant and the possible prejudice to the state because of the defendant's untimely request to stand trial.

Counsel: Herbert A. Igbanugo, Hassan & Reed, Ltd., 2311 Wayzata Boulevard, Minneapolis, MN 55405 (for Appellant).

Timothy E. Marx, St. Paul City Attorney, Matthew J. Pfohl, Assistant City Attorney, 500 City Hall, 15 West Kellogg Boulevard, St. Paul, MN 55102 (for Respondent).

Judges: Considered and decided by Schumacher, Presiding Judge, Klaphake, Judge, and Amundson, Judge.

Opinion by: AMUNDSON

Opinion

UNPUBLISHED OPINION

AMUNDSON, Judge

Appellant Se Phay challenges the district court's denial of his petition for postconviction relief. He moved to withdraw a guilty plea, claiming that because his attorney failed to inform him of the immigration consequences of his plea, the plea constituted a manifest injustice. We affirm.

FACTS

Appellant Se Phay is a 24-year-old Cambodian man. On June 26, 1992, in response to a shooting the same

day, appellant was arrested for possession of a firearm found in his car. Appellant wrote a statement for the police that indicated that he and his [*2] friends had gone to the Mount Airy housing project to fight a gang, that the other gang had shot at them, and that appellant had shot his gun, which he had bought two weeks before, once into the air before running back to his car. Statements by other witnesses seem to corroborate this account.

A criminal complaint issued four days later charging appellant with possession of a pistol without a permit (a gross misdemeanor offense) and discharge of a firearm in the city (a misdemeanor offense). On July 15, 1992, appellant, who had no criminal record, pleaded guilty to the possession charge and the misdemeanor charge was dismissed.

In 1995, while facing deportation proceedings based on two later guilty pleas, appellant moved for postconviction relief to vacate his 1992 gross misdemeanor conviction. The district court found that appellant had not met his duty of proving a manifest injustice. This appeal followed.

DECISION

Appellant challenges the district court's denial of his postconviction motion to vacate his 1992 gross misdemeanor conviction, or in the alternative, to withdraw his guilty plea. The basis of his motion was that his attorney's failure to inform him of the possible [*3] immigration consequences of his plea was ineffective assistance of counsel and constituted a manifest injustice.

[HN1](#) [↑] In order to withdraw a guilty plea, the moving party must bring a "timely motion" and prove that the withdrawal is necessary to "correct a manifest injustice." [Minn. R. Crim. P. 15.05, subd. 1](#). In a postconviction proceeding, the burden is on the petitioner to prove by a preponderance of the evidence that withdrawal of the guilty plea is warranted. [Minn. Stat. § 590.04, subd. 3](#) (1994). Our scope of review is limited to determining whether there is sufficient evidence in the record to support the findings of the postconviction court. **See** [Kochevar v. State, 281 N.W.2d 680, 687 \(Minn. 1979\)](#).

I. Timeliness of the Motion

[HN2](#) [↑] While a motion to withdraw a guilty plea is not barred solely because it is made after sentencing, it must be timely. [Minn. R. Crim. P. 15.01 subd. 1](#). In this case, appellant entered a guilty plea on July 15, 1992,

and filed his motion to withdraw the plea on August 29, 1995--37 months later, or 35 months after sentencing. Appellant's motion is not timely.¹ Although we are under no obligation to address the merits of the case, we have [*4] elected to do so.

II. Ineffective Assistance of Counsel

The first substantive issue before the court is whether appellant was denied effective assistance of counsel, thus invalidating his guilty plea. [HN3](#) [↑] There are two necessary elements of an ineffective assistance claim: (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's errors, the result of the case would have been different. [Gates v. State, 398 N.W.2d 558, 561 \(Minn. 1987\)](#). Appellant must affirmatively prove both of these [*5] elements. *Id.*

Appellant claims that counsel failed to inform him of the immigration consequences of his guilty plea, and therefore his representation fell below an objective standard of reasonableness. Appellant argues that his attorney was aware of his status as an immigrant from Cambodia and therefore he had a duty to apprise him of possible deportation consequences of his plea.

[HN4](#) [↑] While it may be desirable for lawyers to inform their clients of immigration consequences of a guilty plea, there is no affirmative duty that they do so. In [Lopez](#), this court considered a claim that a defendant should be entitled to withdraw a guilty plea on the grounds that he was not adequately advised of the immigration consequences of his plea. [379 N.W.2d at 636](#). Although this court concluded that the case presented more of a fact question than a legal question (defendant's attorney testified that he discussed possible immigration consequences "several times")--it also noted that other courts have considered an attorney's failure to inform a client of immigration consequences as one factor in the decision whether to allow a defendant to withdraw a guilty plea. [Id. at 633](#). [*6] Other factors to be considered are the innocence of the defendant and the possible prejudice to the state because of the defendant's untimely request

¹ Motions to withdraw have been found untimely when as little as three months have elapsed between sentencing and serving a motion to withdraw. **See** [State v. Andren, 358 N.W.2d 428, 431 \(Minn. App. 1984\)](#); **see also** [State v. Lopez, 379 N.W.2d 633, 636 \(Minn. App. 1986\)](#) (motion to withdraw guilty plea filed eleven months after sentencing was untimely), **review denied** (Minn. Feb. 14, 1986).

to stand trial. *Id.* In this case, appellant's untimely motion may prejudice the state in prosecuting his case, and perhaps more importantly, appellant makes no claim of innocence.

Appellant argues that his attorney should have discussed with him possible immigration consequences of his plea with him and that an attorney more familiar with immigration law would have been able to craft a better agreement. Appellant's use of familiarity with immigration law as the basis for his standard of effective assistance of counsel is somewhat misplaced, since this was a public defender who would likely not have, nor be expected to have, extensive knowledge of immigration law.

Thus, there is no reason to conclude that appellant's attorney's representation fell below an objective standard of reasonableness.

The second prong of an ineffective assistance of counsel claim is that there is a reasonable probability that, but for the attorney's unprofessional errors, the result of the proceeding would have been different. Here, appellant argues [*7] that "a competent attorney familiar with immigration law would have been able to engineer a plea agreement which would not have negatively impacted his immigration status in the United States under the facts and circumstances of this case." There is, however, no further evidence presented on what this plea agreement would have been or on the likelihood of such a plea agreement being accepted.

In addition, appellant states that he had no idea that deportation could result from his guilty plea. Appellant's argument implies that appellant would not have pleaded guilty had he known of such possible consequences. Perhaps appellant would have been more likely to decide to go to trial on the charged offenses had he known of the immigration consequences of his guilty plea. However, there is no dispute of appellant's guilt of the offense to which he pleaded guilty and there is no argument that an acquittal was likely. Appellant does not imply that a guilty plea was not the best outcome for him, except for his contention that a better lawyer would have crafted a plea agreement with less impact on his immigration status.

Therefore, we conclude that there is no reason to believe that but for [*8] appellant's attorney's failure to inform him of immigration consequences, appellant would not have pleaded guilty.

III. Manifest Injustice

Appellant argues that because of his attorney's failure to inform him of immigration consequences of his plea, his plea was unintelligent. Therefore, he argues, the plea constitutes a manifest injustice and should be withdrawn. We disagree. Because we conclude that his attorney's failure to inform him of immigration consequences did not constitute ineffective assistance of counsel, and because there are no additional factors, such as an assertion of innocence by appellant, we conclude that withdrawal of appellant's guilty plea was not necessary to correct a manifest injustice.

Affirmed.

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