STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

KEVIN JAIME-LUNA,

Defendant.

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Case No. 16-04884-FH

Hon. Paul J. Sullivan

OPINION & ORDER GRANTING DEFENDANT'S MOTION TO WITHDRAW PLEA AND VACATE CONVICTIONS

Appearances:

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OPINION & ORDER GRANTING DEFENDANT'S MOTION TO WITHDRAW PLEA AND VACATE CONVICTIONS

Defendant Kevin Jaime-Luna moves to withdraw his guilty plea to one count of felony malicious destruction of personal property (at least $1,000 and less than $20,000), one count of unlawful posting of a message, and one count of misdemeanor stalking. After his sentencing on these counts, he discovered he was facing deportation. He now argues he was not properly advised of the immigration consequences of his plea and he is entitled to withdrawal of the plea based on *Padilla v Kentucky*, 559 US 356 (2010). For the reasons explained below, defendant's motion is respectfully GRANTED.

I. FACTS AND BACKGROUND

A. BASIC FACTS AND PROCEEDINGS LEADING TO THIS MOTION

Defendant was born in Mexico, but was brought to the United States when he was 2 months old and he has been here ever since. His mother obtained lawful status while he was still a minor, and he was granted lawful permanent resident status on December 30, 2014. He just turned 20 years old on November 16, 2016, and did not have a criminal history prior to this case.

The incidents leading to the underlying charges occurred in April 2016. Attorney Robert Suarez represented defendant in the initial proceedings. Defendant pled guilty to the charges on June 2016 as part of a plea bargain under which two other charges were dropped. The prosecution also expressed an objection to sentencing under the Holmes Youthful Trainee Act (HYTA), but the understanding was that HYTA sentencing would still be left to the discretion of the Court.

During the plea hearing, the Court, Mr. Suarez, and defendant discussed potential immigration consequences. It was first confirmed that defendant was a lawful resident and the following exchange occurred:

> THE COURT: Any potential immigration consequences you're aware of, Mr. Suarez?
>
> MR. SUAREZ: Yes, your Honor, that's why the prosecutor and I left it to your discretion for a diversionary sentencing --
>
> THE COURT: Okay.
>
> MR. SUAREZ: -- because of his young age, the immigration problems that may potentially cause, as well as his record of no priors besides this.
>
> THE COURT: Okay. So do you understand -- I'm sorry. The prosecutor is objecting to Holmes?
>
> MR. SUAREZ: Yes.
>
> THE COURT: Okay. And you say there are some potential consequences here?
>
> MR. SUAREZ: Correct.
>
> THE COURT: All right. And do you understand that, Mr. Jaime-Luna?
>
> THE DEFENDANT: Yes.
>
> THE COURT: I don't have any control over the immigration authorities. Potentially your pleas could have some impact in your ability to remain here lawfully.
>
> Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And you've had the ability to consult with your attorney here about that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay, thank you. And you still wish to plead guilty, right?

THE DEFENDANT: Correct.

THE COURT: All right. Thank you very much.

Now, the prosecuting attorney -- let me ask you this. How do you plead on these three charges?

THE DEFENDANT: Guilty.

THE COURT: The prosecuting attorney has indicated that in return for your pleas of guilty to those three charges, that she will dismiss the charges contained in Count 1, that's a charge of aggravated stalking. She will also dismiss the charges contained in Count 4, which is a separate count of unlawful posting of a message. And it should be understood that when I sentence you on these offenses here, the prosecuting attorney is opposing any sentence under Holmes Youthful Trainee Act, so you likely will not be sentenced under that act.

Do you understand that?

THE DEFENDANT: Yes, sir.

The plea was accepted and defendant was sentenced under HYTA on August 16, 2016. He was sentenced to 3 years of probation and 90 days jail, with credit for 3 days served, plus costs and restitution.

As a result of his plea in this case, an immigration detainer was placed on defendant. Because of this, as soon as defendant completed his jail sentence, he was transferred to the custody of Immigration and Customs Enforcement (ICE) agents. His green card has been confiscated and he has been denied bond. He is currently incarcerated and awaiting deportation proceedings. ICE is taking the position that defendant is deportable under 8 USC § 1227(a)(2)(A)(i), which provides:

> Any alien who--
>
> (I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and
>
> (II) is convicted of a crime for which a sentence of one year or longer may be imposed,
>
> is deportable.

The notice of the immigration proceedings specifically cites defendant's conviction for felony malicious destruction of property (at least $1,000 and less than $20,000), which is claimed to be a crime involving moral turpitude (CIMT) and for which a sentence of one year or more may be imposed. According to defendant, he is now left without a defense to deportation under this section.

Defendant moved to withdraw his plea and vacate his convictions, alleging that he was not properly made aware of the immigration consequences. An affidavit from defendant is attached to his motion, stating that he was told by Mr. Suarez that this case would not affect his current immigration status and that Mr. Suarez said any future effect on immigration status when applying for citizenship would be in the Court's hands. According to defendant, Mr. Suarez told him to call when he was applying for citizenship because of Mr. Suarez's knowledge of defendant's case. Defendant claims that he was not properly advised of the immigration consequences of his plea by Mr. Suarez and he did not receive effective assistance of counsel in light of *Padilla*. He claims that had he known he would be immediately deportable, he would have proceeded to trial or attempted to work out a different type of plea agreement.

An evidentiary hearing was scheduled and held to address the allegations made in defendant's motion.

B. THE EVIDENTIARY HEARING

The evidentiary hearing was held on December 12, 2016. At the hearing, Mr. Suarez was called as the first witness. Mr. Suarez has been licensed to practice law since 2010 and works primarily in the fields of criminal defense and immigration law. He was retained by defendant and his family to address the criminal case and immigration concerns related to the case.

Mr. Suarez testified that he discussed the concept of CIMTs with defendant and advised defendant that he could be deported if he was convicted of such a crime. However, defendant made statements to police regarding the offenses, so Mr. Suarez believed it may be a difficult case to defend, and he arranged for a plea bargain reducing a charge of aggravated stalking to misdemeanor stalking. He believed that the reduction of this charge could help to possibly avoid negative immigration consequences. Mr. Suarez claims that he mentioned HYTA during the sentencing hearing in relation to immigration consequences because he believed such a sentence would work to his advantage for immigration purposes, although he did not explain exactly how this would work to his benefit.

Mr. Suarez was asked about and acknowledged various statements he made in the past related to this case. On August 19, 2016, shortly after defendant's sentencing, Mr. Suarez wrote a letter to defendant's mother. The letter was written in Spanish, but a translated copy in English has been provided, indicating that Mr. Suarez stated:

> I gave [defendant] his foreign number (Alien # - "A" number) and explained to him that his charges were "[deferred]"[1] under HYTA. Being "[deferred]" means that his record does not reflect the charges that he was convicted of. This would be forever, only needing to comply with the ordered conditional liberty norms by the judge August 16.

Mr. Suarez also told defendant's mother about the possibility of defendant being allowed work release from jail and explained his continuing attempts to try to arrange for work release. In

[1] The translated copy of the letter uses the word "differed", but from the context and review of the original letter it appears this is a clerical error and "deferred" is the accurate translation.

addition to the letter to defendant's mother, Mr. Suarez also admitted to posting a statement on his website on September 1, 2016, claiming defendant's case as a success. In that statement, Mr. Suarez indicated that the plea that was negotiated allowing for "diversionary sentencing", which meant that "Kevin does not have to worry about having his career or future ruined because of one bad choice or an error in judgment."

The record also includes reference to several emails sent by Mr. Suarez after he was notified that ICE detained defendant. Mr. Suarez expressed surprise and confusion regarding defendant being detained. He wrote to a Calhoun County deputy sheriff who was overseeing defendant after being detained by ICE, and stated, "Kevin HAS A GREEN CARD. [S]o this is why I do not know why he was picked up. Is it because Kevin has ONLY a copy of his green card?" Mr. Suarez wrote to defendant's mother stating, "They cannot deport a permanent resident without a trial. This has to be a mistake (error)." Then, after getting more information, he wrote again to her stating that "Kevin MUST ask for Release on Bond" and that "Kevin just needs to provide judge with address where he will stay and tell judge that NONE of his crimes deal with hurting someone. He can do this on his own[] and save some $$". As it turned out, defendant was actually placed under mandatory detention and had no chance of bond because of his immigration circumstances.

During his testimony, Mr. Suarez acknowledged being surprised that defendant was detained and being subjected to deportation proceedings. He also acknowledged that he did not think defendant would have a problem with immigration due to his plea, and he communicated this belief to defendant and his family. He claimed that if he believed there would be a problem with immigration, he likely would have sought a different plea bargain or taken the matter to trial.

When Mr. Suarez was asked whether, knowing what he knows now, he believes that defendant has a valid defense to deportation, he was somewhat hesitant and equivocal, but stated that he did believe so. He thought the malicious destruction of property charge could be argued to not be a CIMT and the stalking charge, while generally a CIMT, could be argued to fall under a "petty offense exception" under which an immigration judge might have discretion to not deport defendant based on that crime.

An affidavit from an immigration attorney, Richard G. Kessler, was submitted by the defense during the hearing and reviewed by Mr. Suarez. Mr. Kessler has practiced immigration law for over 34 years and provided expert opinions regarding immigration consequences of criminal convictions. Mr. Kessler stated that his review of this case showed Mr. Suarez was not well versed in immigration law and the potential effects of HYTA status. According to Mr. Kessler, defendant pled guilty to two CIMTs and his convictions had the effect of making him automatically deportable and subject to mandatory detention. Defendant's deportation was "almost certain" when he made his plea, and HYTA made absolutely no difference to the immigration consequences.

During Mr. Suarez's testimony, he first stated he agreed with all of the statements in Mr. Kessler's affidavit. It was only when he was pressed regarding specific paragraphs that he expressed disagreement. Mr. Suarez claimed, contrary to the affidavit, that he was adequately versed in immigration law and gave adequate advice. However, he acknowledged that defendant faced "almost certain" deportation.

Defendant testified after Mr. Suarez. Consistent with his prior affidavit, defendant testified that Mr. Suarez advised him that this would not affect his current immigration status at all, but could have an impact on naturalization when he sought to become a citizen. According to defendant, he was told that once he complied with the terms of his sentence under HYTA, that would not impact his immigration status. Defendant states that immigration law concepts such as CIMTs and aggravated felonies were never discussed with him. He claims he was never told it was possible he could be deported based on this plea and, had he known of this possibility, he would have either sought a different plea deal or taken the matter to trial.

II. LAW, ANALYSIS, AND FINDINGS

This motion is brought after sentencing, but within six months after the sentence. Accordingly, it is timely and may be considered under MCR 6.310(C). Defendant alleges that his plea was not made knowingly, voluntarily, or intelligently, and he is entitled to relief based on *Padilla v Kentucky*, 559 US 356, 364 (2010). In *Padilla*, the United States Supreme Court recognized that "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Id.* at 364. Accordingly, the Sixth Amendment right to effective assistance of counsel extends to advice regarding deportation. *Id.* at 366. Furthermore, this can apply not only to affirmative misadvice, but also a failure to give advice, because "there is no relevant difference between an act of commission and an act of omission in this context." *Id.* at 370.

In order to demonstrate entitlement to relief based on *Padilla*, a defendant must show deficient performance of counsel and prejudice from that deficiency. *Id.* at 369. With respect to showing deficient performance, the duty of an ordinary criminal defense attorney varies depending upon the complexity of the immigration issue. "When the deportation consequence is truly clear . . . the duty to give correct advice is equally clear." *Id.* at 369. 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.* This is because of the complexity of immigration law and its status as a specialty of its own. *Id.* If a noncitizen is advised of the possibility of immigration consequences, he or she then has the option of consulting with an immigration attorney regarding the issue. *See id.* at 375 (ALITO, J., concurring).

In this case, defendant claims he was not advised of the possibility of deportation as a result of this plea, while Mr. Suarez claims he did discuss the issue with defendant. After considering the conflicting testimony and evidence, the Court finds that, at the very least, defendant was not aware of the possibility of deportation if the Court sentenced him under HYTA, and this was due to the affirmative misadvice of his attorney. Furthermore, with respect to the potential of deportation in the event of a non-HYTA sentence, defendant was given affirmative misadvice leading him to mistakenly believe that deportation was either extremely unlikely or not possible.

These conclusions are based on a view of the whole record. Mr. Suarez's statements during and after sentencing strongly suggest that he thought the HYTA sentence meant defendant was not subject to deportation, when, in reality, HYTA did not and could not impact his deportability. Furthermore, Mr. Suarez now acknowledges that the plea bargain included at least one crime generally found to be a CIMT—misdemeanor stalking—which is punishable by up to a year of

incarceration, and he believes that only a "petty offense exception" involving judicial discretion could save defendant from deportation related to that charge. As for the charge of felony malicious destruction of property, Mr. Suarez suggested arguments could be made regarding this not being a CIMT in defendant's case, but he acknowledged the crime includes an element of malice and he did not cite any authority suggesting it is not a CIMT. There is also no indication that he researched these crimes in relation to immigration law prior to advising defendant and his family that there was little to no chance of deportation from defendant's plea. In reality, as Mr. Suarez himself acknowledged at the time of the hearing when discussing Mr. Kessler's affidavit, defendant's plea made him subject to mandatory detention without bond and "almost certain" deportation.

It should also be remembered that Mr. Suarez was representing defendant as a criminal defense attorney and expert in immigration law. Unlike an ordinary criminal defense attorney who is expected to simply raise the possibility of deportation in uncertain cases and advise that more information would need to be obtained from an expert in the field, Mr. Suarez was retained as an expert in the field. Defendant was entirely reliant upon on him for advice regarding the immigration consequences.

While the area of CIMTs can be complex and not always predictable, there was affirmative misadvice in this case. Defendant was incorrectly advised that an HYTA sentence would not affect his immigration status. It was also wrongly conveyed to him that his chances of his deportation in the event of a non-HYTA sentence were extremely low to nonexistent. Defendant's plea actually made him subject to almost certain deportation. Even setting aside the benefit of hindsight, there was clearly improper advice and deficient representation. Under these circumstances, defendant's plea was not made knowingly and intelligently.

That leaves the issue of whether there is prejudice. To demonstrate prejudice, a defendant must show that, but for the errors, he would not have accepted the plea and "a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 559 US at 372. In this case, defendant has been in the United States since he was two months old, and immigration consequences were clearly and understandably important in this case. He testified that he would not have pled to these charges had he been advised of the risks of deportation in this case. Instead, he would have sought another plea bargain or taken it to trial if necessary. Mr. Suarez acknowledged that if he believed there would be a problem with immigration, he likely would have sought a different plea bargain or taken the matter to trial. Mr. Kessler also stated that seeking a different plea deal or bringing the matter to trial would have been the reasonable way to proceed. Under these circumstances, the Court has little difficulty finding prejudice. Defendant's testimony regarding what he would have done is credible and rational, as is further confirmed by the statements of Mr. Suarez and Mr. Kessler.

Based on the foregoing, defendant received ineffective assistance of counsel, leading to entry of a plea that was not made knowingly and intelligently. The record shows that he would not have accepted the plea with proper advice of counsel, and that decision would be rational. Defendant is entitled to withdrawal of his plea and vacation of his convictions. This case will be reopened for further proceedings.

Order

For the reasons set forth above, defendant's motion to withdraw his plea and vacate his convictions is respectfully GRANTED. Based on the request of defendant, his plea is hereby deemed WITHDRAWN, and his convictions are VACATED. This case is REOPENED and a status conference will be scheduled in the near future to discuss further proceedings.

Dated: January 17, 2017

Paul J. Sullivan, Circuit Judge (P24139)