STATE OF RHODE ISLAND
PROVIDENCE, SC. SUPERIOR COURT

MARIO CATALAO

VS. P.M. 2012-2803
(Re: P2-06-3767)

STATE OF RHODE ISLAND

DECISION

HURST, J. The case is before the Court on Mario Catalao's Application for Post Conviction Relief. Jurisdiction is pursuant to chapter 9.1 of title 10 of the Rhode Island General Laws.

On November 7, 2006, Mario Catalao was charged with violating G.L. 1956 § 11-41-11.1—unlawful appropriation in an amount in excess of $1,000.00—and faced the possibility of serving a twenty-year term of imprisonment.[1] The charge stemmed from Mr. Catalao's unauthorized use of purchased materials and money that he had received as partial payment for a construction job that he never performed. Ultimately, Mr. Catalao pleaded guilty and was sentenced to serve a four-year term of imprisonment, which was suspended with probation. He also was ordered to pay restitution and assessments. Although Mr. Catalao contends that he did not intend to permanently

[1] Section 11-41-11.1, entitled Unlawful Appropriation, provides in pertinent part:

> "Any person to whom any money or other property of another shall be entrusted or delivered for a particular purpose, who shall intentionally appropriate to his or her own use that money or property, shall be deemed guilty of unlawful appropriation and shall be fined not more than fifty thousand dollars ($50,000) or three (3) times the value of the money or property thus appropriated, whichever is greater, or imprisoned not more than twenty (20) years, or both."

deprive his victims of their property and intended to repay them when he was able to do so, the federal courts have held that a theft offense involves "the taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." Hernandez-Mancilla v. Immigration and Naturalization Service, 246 F.2d 1002, 1008-09 (7th Cir. 2001). Therefore, according to the United States Immigration and Nationality Act (INA), § 11-41-11.1 is classified as a theft crime, an aggravated felony, and a deportable offense. See 8 USC 1101 (a) (43) (G) (classifying an aggravated felony to include "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year").

On June 1, 2012 Mr. Catalao petitioned this Court for post conviction relief. As grounds, he claimed he had been deprived of his Sixth Amendment Right to Effective Assistance of Counsel under the United States Constitution. More specifically, Mr. Catalao asserted that his Sixth Amendment rights were violated because his criminal defense attorney failed to advise him that his guilty plea would subject him to risk of deportation. See Padilla v. Kentucky, 130 S.Ct. 1473 (2010).

In reviewing this particular claim of ineffective assistance of counsel, the Court adheres to the standard adopted by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). See Padilla, 130 S.Ct. at 1482 (holding as deficient performance counsel's failure to advise client that guilty plea subjected defendant to deportation, thereby necessitating application of the Strickland ineffective assistance of counsel test); Neufville v. State, 13 A.3d 607, 610 (R.I. 2011); State v. Figueroa, 639 a.2d 495, 500 (R.I. 1994).

The Court held an evidentiary hearing in the instant matter on October 11, 2012. A transcript of the plea colloquy was made part of the evidence. During the plea colloquy, the sentencing justice, in accordance with § 12-12-22, informed Mr. Catalao there could be immigration consequences to his plea.[2] The sentencing justice stated, "I would also advise you if you are not a United States citizen, this plea could result in your deportation, your exclusion of admission from [sic] this country and/or denial of naturalization under the laws of this country. Those matters are outside of the control of this Court." Although the trial justice asked Mr. Catalao if he had any questions before his sentence was pronounced, the sentencing justice did not offer, nor did Mr. Catalao request, additional time to consider the appropriateness of his plea in light of this advice. Rather, the sentencing justice almost immediately went on to find that Mr. Catalao had made an intelligent waiver of his rights and accepted his plea.

At the hearing, Mr. Catalao credibly testified on his own behalf. Mr. Catalao testified that he with met his criminal defense attorney only once at his office, and that their conversation was brief. They also met in the hallway of the court house for only a few minutes before Mr. Catalao agreed to accept the plea. Mr. Catalao further testified that the attorney never asked if he was a citizen, or informed him of the immigration consequences of the plea. Mr. Catalao then testified that he had good reason to fight the case because although he had been in the United States for only 8 years, he had close ties

[2] Section 12-12-22 (b) provides:

> "Prior to accepting a plea of guilty or nolo contendere in the district or superior court, the court shall inform the defendant that if he or she is not a citizen of the United States, a plea of guilty or nolo contendere may have immigration consequences, including deportation, exclusion of admission to the United States, or denial of naturalization pursuant to the laws of the United States. Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of this advisement."

here: his brother lived in the United States in 2000 when Mr. Catalao came here at 17 years of age; his parents remained in Portugal and his brother took over guardianship; he met his wife during the year he committed the offense; they became engaged in 2007, and married shortly after he took the plea; and, he started working as a contractor in 2004, and eventually became licensed. This justice accepted Mr. Catalao's description of his discussions with his attorney, the events surrounding the plea, and his reasons for fighting the case.

Strickland contains a two-pronged test. In accordance with Strickland, this Court first must determine whether defense counsel's representation falls below an objective standard of reasonableness. See Strickland, 466 U.S. at 688.

This Court accepted Mr. Catalao's testimony in which he described his interactions with his defense attorney. Based upon that testimony, this Court finds that defense counsel's representation fell below an objective standard of reasonableness and, accordingly, the first prong of a Strickland analysis is satisfied. In Padilla, the United States Supreme Court held that the weight of prevailing norms supports the view that counsel must advise clients regarding the risk of deportation and that when deportation consequences are "truly clear," the duty to give correct advice is equally clear and must be communicated to avoid deprivation of constitutional rights. Padilla, 130 S.Ct. at 1482-83. Given the clear and unambiguous language of the INA, Mr. Catalao's defense attorney unquestionably had an affirmative duty to advise Mr. Catalao that he risked deportation as a consequence of his plea. Thus the attorney's failure to do so rendered his representation deficient.

The second prong of a Strickland analysis has to do with prejudice. In Strickland, the United States Supreme Court held that after a trial court determines defense counsel's performance was deficient, the trial court must then determine whether deficient performance prejudiced the defendant. See Strickland, 466 U.S. at 687. Thus the remaining question is whether Mr. Catalao was prejudiced by his attorney's lapse. If Mr. Catalao can demonstrate he was prejudiced, he is entitled to relief and his sentence must be vacated. See Padilla, 130 S.Ct. at 1487; Strickland, 466 U.S. at 694.

Importantly, in the context of the Sixth Amendment, the concept of prejudice requires a petitioner to demonstrate not only "a *possibility* of prejudice, but that [it] worked to his actual and substantial disadvantage." See United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 1596 (1982) (emphasis in original). The concept of prejudice also ". . . requires a petitioner to demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. In particular, a petitioner asserting a Padilla claim ordinarily must show that he would have insisted on going to trial if he had been informed of the immigration consequences of his plea. See Padilla, 130 S.Ct. at 1485 ("[T]o obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.") Stated differently,

> "[w]hen evaluating a claim for ineffective assistance of counsel in a plea situation, the defendant must demonstrate a reasonable probability that but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial. In addition, a defendant must show that the outcome of his or her case would have been different had he or she been aware of the likely deportation consequences of the guilty plea." Figueroa, 639 A.2d at 500 (citing Hill v. Lockhart, 474

U.S. 52 (1985); United States v. Del Rosario, 902 F.2d 55 (D.C.Cir. 1990)).

It is in the context of this second prong of a Strickland analysis that this Court considers the sentencing justice's advisement given to Mr. Catalao at the time of the plea. Under certain circumstances, a judge or a magistrate's warning concerning the consequences of the plea may cure counsel's failure or erase any consequent prejudice, People v. Garcia, 907 N.Y.S. 2d 398, 406 (2010) (acknowledging as difficult the determination as to "whether defendant suffered prejudice . . . [when] the Court gave defendant deportation warnings during his plea and defendant chose to ignore them and follow contrary advice"). Thus the giving of immigration warnings by a trial court judge or magistrate is relevant to the question of prejudice.

In Garcia, the New York Supreme Court determined that when the judge or magistrate's instruction is sufficiently clear so as to put the defendant on notice that he indeed will be deported if he pleads guilty, notions of "cure" may apply. Id. However, the Court in Garcia also held that the judge or magistrate's general warning did not automatically erase the consequent prejudice when the defendant was misled by a legal professional and did not receive advice from his attorney. See id. at 407 (holding where a "defendant is found in fact to have been misled by bad advice from a so-called retained specialist and by a lack of advice from his defense attorney, the Court's general warning will not automatically cure counsel's failure nor erase the consequent prejudice.").

This Court finds that in Mr. Catalao's case, the sentencing justice's advisement was not sufficient to cure or erase the prejudice caused by defense counsel's deficient representation. True, the offense to which Mr. Catalao pleaded was not automatically deportable and the sentencing justice did advise Mr. Catalao that his plea *could* result in

his being deported, excluded from admission to this country, or denied naturalization. However, the sentencing justice understandably did not attempt to provide further advice or explanation or detail concerning the potential immigration consequences for Mr. Catalao. Nor did he inquire of defense counsel to confirm that defense counsel had advised Mr. Catalo about the potential immigration consequences of the plea. So, although the sentencing justice's advisement met the requirements of § 12-12-22 insofar as he informed Mr. Catalao there could be potential immigration consequences of the plea and described their general nature, this Court cannot agree that the sentencing justice's statement went so far as to cure defense counsel's deficient representation and any resulting possibility of prejudice. Nor can this Court agree that the statutory advisement required by § 12-12-22, standing alone, was intended by the legislature to replace adequate representation by defense counsel in connection with the client's risk of deportation.

Accordingly, this Court considered whether Mr. Catalao also had proved that there was a reasonable probability he would have rejected the plea offer and would have insisted on going to trial and whether there was a reasonable probability the criminal proceedings against him would have finally resulted in a different outcome, such as an acquittal, or a conviction coupled with a non-deportable sentence, (see Figueroa, 639 A.2d 495 at 500**;** Neuville, 13 A.3d at 611**),** or other non-deportable disposition. [3]

During the evidentiary hearing, Mr. Catalao admitted that his victims provided him with two payments. They gave him a deposit of $1200.00 during the last week in May 2006, and, a week later, entrusted him with a payment of $10,000.00 to cover the

[3] It is not inconceivable that there could be circumstances in which a defendant could prove that he or she would have negotiated a disposition that would not be classified by the INA as deportable. See Roberts, Proving Prejudice, Post-Padilla, 54 How.L.J 693 (2011).

cost of materials. Mr. Catalao further admitted that he purchased only approximately $3900.00 in materials and used the remainder to pay his own personal bills and expenses. Mr. Catalao's testified that he fell sick in late June 2006 and had to stop all jobs—including the victims'—and he needed the money. According to Mr. Catalao, he told his victims that he would start the job in August but, when he failed to do that, the victims cancelled the contract. According to Mr. Catalao, he had intended to perform the job or return the money. Mr. Catalao also testified he did not deliver the materials to the victims but, for the sake of convenience, kept the materials at his home. He further admitted that he used the materials on another job; obviously, this would permanently deprive his victims of those materials. When his victims asked for their money back in October 2006, Mr. Catalao failed to give it to them.

After the evidentiary hearing, both counsel provided the Court with case law concerning the element of intent, and whether § 11-41-11.1 is a general intent crime or a specific intent crime. It is Mr. Catalao's contention that § 11-41-11.1 is a specific intent crime an element of which is the intent to permanently deprive the owner of the money or property, an intent which he contends he lacked.

With respect to intent crimes, our Supreme Court has declared that

> "General-intent crimes require only the intention to make the bodily movement which constitutes the act which the crime requires, whereas specific-intent crimes most commonly involve the designation of a special mental element which is required above and beyond any mental state required with respect to the actus reus of the crime. Thus, when a statute defines an offense only by describing the unlawful act, without further referencing an intent to do an additional act or to achieve a further consequence, the proscribed offense is a general-intent crime." State v. Sivo, 925 A.2d 901, 914 (R.I. 2007) (quoting 1 LaFave,

> Substantive Criminal Law § 5.2(e) at 354 (2d ed. 2003))
> (intenal citations and quotations omitted.

Importantly, "[i]t should be noted that the words 'intentionally' and 'knowingly' do not add a specific-intent element to a crime, and instead lend support to the conclusion that only a general-intent is required to commit the offense." Sivo, 925 A.2d at 914 n.4.

Section 11-41-11.1 provides in pertinent part: "Any person to whom any money or other property of another shall be entrusted or delivered for a particular purpose, who shall intentionally appropriate to his or her own use that money or property, shall be deemed guilty of unlawful appropriation . . . ." The Court interprets this language as clearly and unambiguously setting forth the elements of a general intent crime. See Jaiman v. State, 55 A.3d 224, 233 (R.I. 2012) (reiterating that "[w]hen the language of a statute is clear and unambiguous, we must enforce the statute as written by giving the words of the statute their plain and ordinary meaning"). Accordingly, when it comes to the question of intent under § 11-41-11.1, a defendant need only intend to appropriate another person's property or funds to his own purposes in order to commit the crime. This is precisely what Mr. Catalao admitted to having done—using his victims' materials money to pay his own bills and to use their purchased materials in other of his jobs.

Furthermore, § 11-41-11.1 is clear and unambiguous and plainly sets forth the elements of a general intent crime. "[As a] general rule '[w]hen the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional

consequence, the crime is deemed to be one of specific intent.'" People v. Stark, 26 cal. App. 4th 1179, 1182, 31 Cal. Rptr. 2d 887 (1994)

Accordingly, when it comes to the question of intent, a defendant need only intend to appropriate another person's property or funds to his own purposes in order to violate § 11-14-11.1. Unlike, for example, § 11-41-3, which specifically incorporates the elements of fraud and conversion and includes the intent to accomplish the further act of permanently depriving the victim, § 11-41-11.1 requires no more than the act of intentionally appropriating to one's own use.

Even assuming § 11-41-11.1 was not clear and unambiguous, which it is, and therefore requires construction or interpretation, a comparison of the other various theft type crimes laid out in Title 11, Chapter 41, confirms that § 11-41-11.1 is a general intent crime. Many of the other subsections refer to intent to achieve some additional consequence or do some further act. See e.g., § 11-41-2 (requiring a person to "fraudulently receive any stolen money, goods, securities, chattels, or other property . . . ."); § 11-41-11 ("Every [specified individual] who shall embezzle or appropriate to his or her own use any moneys, . . . with intent to cheat or defraud it or any person . . . ."). Section 11-41-11.1, on the other hand, is noticeably lacking in such specific language – language that the legislature very easily could have included had it wanted to do so. See In re Proposed Town of New Shoreham Project, 25 A.3d 482, 505 (R.I. 2011) ("When the language of a statute is unambiguous and expresses a clear and sensible meaning, there is no room for statutory construction or extension, and we must give the words of the statute their plain and obvious meaning. . . . Such meaning is

presumed to be the one intended by the Legislature . . . .") (quoting McGuirl v. Anjou International Co., 713 A.2d 194, 197 (R.I. 1998)).

Furthermore, § 11-41-11 was first enacted in 1995—a relatively new piece of legislation when compared to the pre-existing theft crimes contained in Title 11 Chapter 41. At that time, Black's Law Dictionary (6th ed. 1990) defined "misappropriation" as "[T]he unauthorized, improper, or unlawful use of funds or other property for purposes other than that for which intended." Unauthorized use "include[ed] not only stealing but, also, unauthorized temporary use. . . ." Black's Law Dictionary 998 (6th ed. 1990) Black's also defined "unauthorized" and "unauthorized use." Id at 1523. According to Black's**,** something "unauthorized" is "[t]hat which is done without authority," and in proving unauthorized use, "the government need not prove that the defendant was acting with the intent to deprive permanently . . . ." Id**.** In this respect, too, the plain language of § 11-41-11.1 is consistent with a general intent crime and it cannot be overlooked that if the offense of unlawful appropriation required the specific intent to permanently deprive or to defraud, no one who temporarily, genuinely or purportedly, appropriates property or money to their own use could be successfully prosecuted. See McCain v. Town of North Providence ex rel. Lombardi, 41 A.3d 239, 243 (R.I. 2012)(recognizing "the longstanding principle that statutes should not be construed to achieve meaningless or absurd results").

The evidence in this case was that Mr. Catalao appropriated his victims' materials and materials money to his own use without their knowledge, much less their authority. Had Mr. Catalao proceeded to trial and told the truth about the events, or had the State proved these events, he undoubtedly would have been convicted. Furthermore, there was

insufficient evidence for this fact finder to conclude that that Mr. Catalao would have been able to negotiate a disposition or would have received a sentence that would not trigger a risk of deportation. Therefore, Mr. Catalao has failed to meet the burden imposed upon him by law and to demonstrate that the final outcome of the proceedings would have resulted in something other than his conviction on a deportable offense. See Padilla, 130 S.Ct. at 1487; Strickland, 466 U.S. at 694; Figueroa, 639 A.2d at 500.

Mr. Catalao's petition for post-conviction relief is denied.

Hurst, J.

February 14, 2013