

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 13, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2229

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HUNG NAM TRAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County:
EMMANUEL VUVUNAS, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Hung Nam Tran appeals from an order denying his motion under WIS. STAT. § 974.06 (1997-98)¹ to withdraw his 1992 no contest

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

plea to first-degree sexual assault. The dispositive issue is whether Tran understood the possible deportation consequences of his plea. We affirm the order denying Tran's motion for plea withdrawal.

¶2 During the plea colloquy the trial court did not, as required by WIS. STAT. § 971.08(1)(c), advise Tran² that “[i]f you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law.” Tran argues that his trial counsel was ineffective for not advising him of potential deportation consequences and that the trial court's failure to comply with § 971.08(1)(c) permits Tran to withdraw his plea. The trial court concluded that the totality of the record, including the plea questionnaire Tran executed and trial counsel's testimony, demonstrates that Tran understood the deportation consequences.

¶3 When a defendant claims that notice of possible deportation was not given as required by WIS. STAT. § 971.08(1)(c), the defendant is entitled to withdraw the plea if the State does not prove that the omission was harmless and if the requirements of § 971.08(2) are met. *See State v. Rodriguez*, 221 Wis. 2d 487, 494, 585 N.W.2d 701 (Ct. App. 1998). The trial court's failure to comply with § 971.08(1)(c) can be harmless if the defendant in fact had an understanding of the potential for deportation when entering the plea. *See State v. Chavez*, 175 Wis. 2d 366, 371, 498 N.W.2d 887 (Ct. App. 1993). The State must show by clear and convincing evidence that the defendant knew and understood the necessary

² Tran was admitted to the United States as a Vietnam refugee.

information to render his or her plea voluntary and knowing. *See id.* at 369; *State v. Issa*, 186 Wis. 2d 199, 211, 519 N.W.2d 741 (Ct. App. 1994). The determination that the defendant understood the potential deportation consequences may be based on the entire record, including trial counsel's testimony and the plea questionnaire.³ *See State v. Lopez*, 196 Wis. 2d 725, 726-27, 732, 539 N.W.2d 700 (Ct. App. 1995). The trial court's findings of evidentiary or historical facts will not be overturned unless they are clearly erroneous. *See State v. Van Camp*, 213 Wis. 2d 131, 140, 569 N.W.2d 577 (1997).

¶4 The plea questionnaire included the advisement required by WIS. STAT. § 971.08(1)(c). Tran's initials appear next to the paragraph. Tran's trial counsel testified that he read each paragraph of the plea questionnaire form to Tran and that Tran indicated his understanding by initialing each paragraph. Counsel indicated that he and Tran discussed the possibility of deportation. The trial court found counsel's testimony credible. "Due regard is given to the opportunity of the trial court to judge the credibility of witnesses." *State v. Long*, 190 Wis. 2d 386, 393, 526 N.W.2d 826 (Ct. App. 1994). Even Tran admitted that he "must have" read the paragraph regarding possible deportation. At the time of his plea, Tran was a senior in college and fully aware of his refugee status. He was capable of understanding the possibility that he would be deported. The

³ Tran misapplies the holding in *State v. Issa*, 186 Wis. 2d 199, 202, 519 N.W.2d 741 (Ct. App. 1994). *Issa* held that the mere reference to a guilty plea questionnaire does not satisfy the trial court's obligation to personally advise a defendant regarding deportation under WIS. STAT. § 971.08(1)(c). *See Issa*, 186 Wis. 2d at 202. *Issa* did not address whether the guilty plea questionnaire can demonstrate whether the plea was nevertheless knowingly entered. *State v. Lopez*, 196 Wis. 2d 725, 726-27, 732, 539 N.W.2d 700 (Ct. App. 1995), and *State v. Chavez*, 175 Wis. 2d 366, 371, 498 N.W.2d 887 (Ct. App. 1993), conclude that evidence outside the plea hearing record may be utilized to demonstrate the defendant's understanding of deportation consequences.

conclusion that the trial court's failure to make the deportation advisement was harmless is affirmed.

¶5 We need not address Tran's claim that trial counsel was ineffective for not advising him about possible deportation. The finding that Tran understood the possibility of deportation means that Tran was not prejudiced by counsel's allegedly deficient performance. See *State v. Kuhn*, 178 Wis. 2d 428, 438, 504 N.W.2d 405 (Ct. App. 1993) (if we conclude on a threshold basis that the defendant could not have been prejudiced by trial counsel's performance, we need not address whether such performance was deficient). Moreover, deportation is still a collateral consequence of a plea and counsel's failure to advise about possible deportation or seek a judicial recommendation against deportation is not ineffective assistance of counsel. See *Rodriguez*, 221 Wis. 2d at 497; *State v. Santos*, 136 Wis. 2d 528, 533, 401 N.W.2d 856 (Ct. App. 1987).

¶6 Tran is estopped from asserting that trial counsel gave him inaccurate legal advice that as a political refugee he could not be deported. Tran's suggestion that counsel discussed immigration law with him is contrary to his claim that he never discussed deportation consequences with counsel. Tran cannot be heard to make the contradictory claim. See *State v. Michels*, 141 Wis. 2d 81, 97-98, 414 N.W.2d 311 (Ct. App. 1987) (a position on appeal which is inconsistent with that taken at trial is subject to judicial estoppel). Additionally, the claim is undeveloped and waived. At the initial hearing on his postconviction motion, Tran specifically advised the trial court that he was not bringing an ineffective assistance of counsel claim. At the evidentiary hearing, Tran did not examine counsel with specificity about misinformation he may have relayed to

Tran.⁴ The trial court was not asked to make a finding about whether counsel had given inaccurate information. We properly decline to review an issue on appeal when the appellant has failed to give the trial court fair notice that he or she is raising a particular issue and seeks a particular ruling. *See State v. Salter*, 118 Wis. 2d 67, 79, 346 N.W.2d 318 (Ct. App. 1984).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

⁴ During his testimony, counsel stated his belief that if Tran were a political refugee, he could not be deported. Counsel never suggested that he and Tran talked in detail about Tran's refugee status. Trial counsel expressed doubt that Tran ever brought his political asylum status to the counsel's attention.

