STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2148

Jose C. Xique, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed January 14, 2013
Affirmed
Halbrooks, Judge

Scott County District Court
File Nos. 70-2000-16551, 70-2001-22621

Ignatius Udeani, Udeani Law Office, Bloomington, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Patrick J. Ciliberto, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Halbrooks, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

This matter is before us on remand from the Minnesota Supreme Court for reconsideration in light of *Campos v. State*, 816 N.W.2d 480 (Minn. 2012), *petition for cert. filed* (U.S. Sept. 17, 2012), which held that the Supreme Court's decision in *Padilla*

v. Kentucky, 130 S. Ct. 1473 (2010), is not retroactive. On remand, appellant argues that *Campos* was incorrectly decided and that he is entitled to relief under *Padilla*, because his attorneys failed to correctly advise him about the deportation consequences of his guilty pleas. We reject appellant's arguments and affirm the district court's denial of appellant's postconviction petitions to withdraw his 2000 and 2002 guilty pleas.

FACTS

Appellant Jose C. Xique was born in Mexico in November 1961 and is married to a United States citizen. The couple have four children, all of whom were born in the United States. Appellant works as a farmer and is the sole provider for his family.

2000 Guilty plea

In August 2000, police went to appellant's residence in response to a complaint of domestic assault. Appellant's wife reported that, during an argument about money, appellant threw a paper bag at her that contained a curling iron, striking her above the right eye and causing swelling in the area. When appellant's wife indicated that she was going to call police and started to dial the number, appellant interfered with her attempt to call. He left when his wife ordered him out of the house. Appellant was charged with one count of gross misdemeanor interference with a 911 call, in violation of Minn. Stat. § 609.78, subd. 2 (2000); one count of misdemeanor domestic assault, in violation of Minn. Stat. § 609.2242, subd. 1(1), (2) (2000); and one count of misdemeanor fifth-degree assault, in violation of Minn. Stat. § 609.224, subd. 1(1), (2) (2000).

On September 25, 2000, appellant pleaded guilty to misdemeanor fifth-degree assault, and the other two counts were dismissed.[1] At his plea hearing, appellant orally waived trial rights that included the right to a jury of six people; the right to have the state prove him guilty beyond a reasonable doubt; the right to a unanimous verdict; and the rights to cross-examine witnesses, to have witnesses testify on his behalf, and to testify or remain silent. A factual basis was established for the plea that included appellant's agreement that he got into an argument with his wife on August 21, 2000, threw a bag at her, and hit her in the head.

Appellant was warned that "if you should get another assault against your wife or other people within five years of today, that . . . could be considered a Gross Misdemeanor, . . . punishable by up to a $3,000 fine or a year in jail." He acknowledged that he understood "that the consequences of another [offense would be] more serious than this." The district court also questioned appellant about whether he understood what was "happening here today," whether he understood English, and whether he needed an interpreter. Appellant indicated that he understood the proceedings and that he understood English "a little bit," but he did not need an interpreter. Appellant received a

[1] The record does not include a written plea petition from this 2000 guilty plea, although such a petition was not required at that time. *See* Minn. R. Crim. P. 15.02 (2000) (allowing for questioning of defendant on record in open court in misdemeanor case). And because appellant's 2000 plea was to a misdemeanor, rule 15.02 did not require the immigration advisory that was required for gross misdemeanor and felony offenses. *See* Minn. R. Crim. P. 15.01 (10)(c) (2000) (requiring defense counsel to advise defendant "[t]hat if [he] is not a citizen of the United States, a plea of guilty to the crime charged may result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen").

stay of imposition, was placed on probation for one year, and ordered to follow the recommendations of court services that included an anger-management evaluation.

2002 Guilty plea

On July 31, 2001, police were again called to appellant's residence. While conducting an interview of appellant's wife and children, the officers noticed a welt on appellant's 12-year-old son. Appellant's wife told the officers that approximately three hours earlier, the son had grabbed a knife and told appellant that he was not afraid of him. Appellant became angry and hit the son across the back, first with a belt and then with a plastic hanger. Appellant followed his son across the room, trying to punch him, and the son pushed him away. When appellant's wife tried to intervene, she was hit in the face with the belt. Appellant was charged with gross misdemeanor malicious punishment of a child, in violation of Minn. Stat. § 609.377 (2000); misdemeanor fifth-degree assault, for hitting his son with a belt, in violation of Minn. Stat. § 609.224, subd. 1(1) (2000); and misdemeanor fifth-degree assault, in violation of Minn. Stat. § 609.224, subd. 1(1) (2000), for hitting his wife with a belt.

On June 11, 2002, appellant pleaded guilty to one count of gross misdemeanor malicious punishment of a child. Appellant signed a written plea petition, which was in Spanish, agreed that he had gone over the document with his attorney and with the interpreter who was at the plea hearing, and that he understood the plea agreement and the rights he was waiving. The district court received the plea petition[2] and found that

[2] The written plea petition does not include the advisory that pleading guilty "may result in deportation" that was required by the rule in effect for gross misdemeanor and felony

appellant understood his rights and that he knowingly and voluntarily waived those rights. A factual basis was established for the guilty plea, with appellant acknowledging that he hit his son with a belt, resulting in a mark on his back, and that his actions constituted malicious punishment of a child. The district court agreed to sentence him to a misdemeanor, with no jail time, assuming that the presentence-investigation report indicated that appellant had dealt with county human services in good faith to resolve some of the family's issues.

At sentencing on July 26, 2002, appellant's attorney requested that the district court sentence the matter as a misdemeanor, noting that he "talked to [appellant's] immigration lawyer yesterday and that [misdemeanor sentencing for this offense] would certainly go a long way for him maintaining his status in the United States." The district court stayed imposition of sentence and placed appellant on probation for one year, with conditions. In August 2003, appellant was discharged from probation based on his satisfactory completion of all conditions.

Current charges, deportation proceedings, and postconviction proceedings

In January 2010, appellant was again charged with malicious punishment of a child and domestic assault. On February 4, 2010, the Department of Homeland Security initiated removal proceedings against appellant.

In June 2010, appellant brought substantially identical postconviction petitions, seeking to withdraw his 2000 and 2002 guilty pleas. Appellant asserted that the petitions

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cases at that time. *See* Minn. R. Crim. P. 15.01 (10)(c); Appendix A to Rule 15 19.e (2002).

were timely filed because they were not frivolous and because it was in the interests of justice to consider the petitions on the merits. Appellant also argued that he was entitled to plea withdrawal because his pleas were not knowing, intelligent, and voluntary, because he was not advised, as required under *Padilla*, about the adverse immigration consequences of his guilty pleas.

The district court denied appellant's motions to withdraw his guilty pleas, concluding that *Padilla* does not apply retroactively. The district court's order is now before us "for reconsideration in light of" the Minnesota Supreme Court's decision in *Campos*, which held that *Padilla* is a new rule of criminal procedure that is not retroactively applied.

D E C I S I O N

A defendant seeking to withdraw a guilty plea after sentencing does so by petitioning for postconviction relief. *James v. State*, 699 N.W.2d 723, 727 (Minn. 2005). We review a district court's decision to deny a petition to withdraw a guilty plea for an abuse of discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998).

Appellant argues that his petitions were timely and should be considered in the interests of justice. While he did not cite the two-year statute of limitations, or its exceptions, set out in Minn. Stat. § 590.01, subd. 4 (2012), the courts are required to liberally construe postconviction petitions to determine if the interests-of-justice

exception to the limitations period is invoked.[3] *See Rickert v. State*, 795 N.W.2d 236, 241 (Minn. 2011) (citing *Roby v. State*, 787 N.W.2d 186, 191 (Minn. 2010)).

The state asserts that appellant's petitions were untimely and do not meet any exception to the two-year statute of limitations. Specifically, the state argues that, because *Padilla* does not have retroactive effect, appellant cannot meet the exception for retroactive application of a new interpretation of constitutional law under Minn. Stat. § 590.01, subd. 4(b)(3).

Appellant argues that *Campos* was incorrectly decided and that he is entitled to relief under *Padilla*. But *Campos* is established precedent that we must follow. *See State v. Ward*, 580 N.W.2d 67, 74 (Minn. App. 1998) ("[W]e are not in position to overturn established supreme court precedent."). Appellant further argues that even without relying on *Padilla*, he should be allowed to withdraw his guilty plea under Minn. R. Crim. P. 15.01, because he was not warned about the adverse consequences that his plea could have on his immigration status.

Prior to *Padilla*, Minnesota law held that a defense attorney was not required to warn a defendant about the deportation or immigration consequences of a guilty plea and that a defendant's ignorance of those collateral consequences did not necessarily constitute manifest injustice so as to allow the defendant to withdraw the plea. *See Alanis*

[3] The interests-of-justice exception to the two-year statute of limitations provides that a court may hear a postconviction petition if "the petitioner establishes to the satisfaction of the court that the petition is not frivolous and is in the interests of justice." Minn. Stat. § 590.01, subd. 4(b)(5). The interests of justice are implicated only in "exceptional and extraordinary circumstances." *Carlton v. State*, 816 N.W.2d 590, 607 (Minn. 2012) (quotation omitted). Appellant does not meet those circumstances here.

v. State, 583 N.W.2d 573, 578-79 (Minn. 1998) (relying on direct-versus-collateral-consequences distinction to reject an ineffective-assistance-of-counsel claim), *abrogated in part by Padilla*, 130 S. Ct. 1473; *see Berkow v. State*, 583 N.W.2d 562, 563 (Minn. 1998) (relying on *Alanis*).

In *Padilla*, the United States Supreme Court held that "when the deportation consequence [of a guilty plea] is truly clear . . . the duty to give correct advice is equally clear." 130 S. Ct. at 1483. The petitioner in *Padilla* was a native of Honduras and had been a lawful permanent resident of the United States for 40 years. 130 S. Ct. at 1477. Padilla's attorney advised him that he "did not have to worry about immigration status since he had been in the country so long," and he pleaded guilty to transportation of a large amount of marijuana in his tractor-trailer. *Id*. at 1477-78 (quotation omitted). Because "virtually every drug offense . . . is a deportable offense" and Padilla's guilty plea "made his deportation virtually mandatory," the Supreme Court concluded that "constitutionally competent counsel would have advised [Padilla] that his conviction for drug distribution made him subject to automatic deportation." *Id*. at 1477 n.1, 1478. The Court noted that Padilla's attorney easily could have determined from reading the text of a single statutory provision that pleading guilty would result in his client being deportable, making his removal "presumptively mandatory." *Id.* at 1483.

But the *Padilla* Court also acknowledged that the duty to give advice is "more limited" in the "numerous situations in which the deportation consequences of a particular plea are unclear or uncertain." *Id*. The Court concluded that, "[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*. (footnote omitted). Thus, even under *Padilla*, when the immigration consequences are uncertain or unclear, an attorney may only be required to advise a criminal defendant that pleading guilty may result in deportation or other adverse immigration consequences.

In *Campos*, the Minnesota Supreme Court held that *Padilla* announced a new rule of federal constitutional criminal procedure, but not a watershed rule, and thus did not apply retroactively to the defendant's ineffective-assistance-of-counsel claim raised on collateral review. 816 N.W.2d at 490, 499. As such, defense counsel's failure to inform the defendant of the immigration consequences of pleading guilty was not ineffective assistance under governing law at the time the defendant's conviction became final. 816 N.W.2d at 499. Because *Padilla* was decided on March 31, 2010, it does not apply retroactively to appellant's 2000 and 2002 guilty pleas. Because *Padilla* does not apply, appellant's attorneys did not provide ineffective assistance if they failed to provide accurate advice or to speculate about immigration consequences that might befall appellant in the future.

Nevertheless, appellant's arguments could be construed as raising a claim that, even if *Padilla* is not retroactively applicable to his guilty pleas, he is entitled to relief on the basis that he was not warned about the adverse consequences that pleading guilty could have on his immigration status as required by Minn. R. Crim. P. 15.01. In *Campos*, the supreme court recognized that a criminal defendant may be entitled to withdraw a guilty plea if he did not receive the immigration advisory or warning from the district

court at his plea hearing, as required by Minn. R. Crim. P. 15.01, subd. 1(6)(l). 816 N.W.2d at 499-500 (remanding to the district court to consider whether appellant is entitled to withdraw his plea due to lack of compliance with rule 15.01). The immigration advisory required by rule 15.01 did not become effective until January 1, 1999, a year after the supreme court's ruling in *Alanis*. *Id.* at 499; *see also State v. Lopez*, 794 N.W.2d 379, 383-84 (Minn. App. 2011) (discussing district court's obligation to conduct rule 15 inquiry prior to accepting guilty plea and noting that omission of particular rule 15 advisory justifies plea withdrawal only when omission denies defendant a constitutional right).

In this case, appellant pleaded guilty in 2000 to a misdemeanor; at the time, no immigration advisory was required by the rules. *See* Minn. R. Crim. P. 15.02 (2000) (allowing for questioning of defendant on record in open court in misdemeanor case). When appellant pleaded guilty to a gross misdemeanor in 2002, rule 15.01 did include an immigration advisory, but appellant's written plea petition appears to omit that particular advisory. *See* Minn. R. Crim. P. 15.01 (10)(c); Appendix A to Rule 15 19.e (2002). Nevertheless, the transcripts of the plea and sentencing hearings indicate that appellant had consulted with an immigration attorney and suggest that some discussion took place regarding the possible consequences that appellant's plea might have on his immigration status. Because the record shows that appellant was aware that his guilty plea might affect his immigration status, he is not entitled to withdraw his plea under rule 15.

We therefore conclude that the district court acted within its discretion by denying appellant's petitions for postconviction relief.

Affirmed.