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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-909**

Ismail Farah Qasim, petitioner,  
Appellant,

vs.

State of Minnesota,  
Respondent.

**Filed June 11, 2012  
Reversed and remanded  
Halbrooks, Judge**

Steele County District Court  
File No. 74-K8-99-000662

David W. Merchant, Chief Appellate Public Defender, Jennifer L. Lauermann, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Daniel A. McIntosh, Steele County Attorney, Scott L. Schreiner, Assistant County Attorney, Owatonna, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Halbrooks, Judge; and Ross, Judge.

**UNPUBLISHED OPINION**

**HALBROOKS**, Judge

Appellant pleaded guilty to fifth-degree possession of a controlled substance. The district court issued a stay of adjudication under Minn. Stat. § 152.18 (1998) and placed

appellant on probation for five years. Appellant successfully completed probation, and the charges were dismissed. Immigration and Customs Enforcement (ICE) brought deportation hearings against appellant based, in part, on his guilty plea, and he was ordered to be removed. Appellant moved to withdraw his guilty plea based on ineffective assistance of counsel for failing to advise him of the immigration consequences under *Padilla*. The district court denied the motion because there was no adjudication of guilt to withdraw. Because stays of adjudication in felony cases are treated as sentencing issues on appeal and the guilty plea can still be withdrawn, we reverse and remand to the district court to consider the merits of appellant's motion.

### **FACTS**

Appellant Ismail Farah Qasim is a refugee from Somalia who was admitted to the United States in July 1993 and gained status as a lawful permanent resident in December 1994. In July 1999, appellant received a package that contained six kilograms of khat, an African plant that is used as a stimulant and is an illegal substance in the United States. The package was delivered by Airborne Express and was sent to appellant by a friend in London, England. The police intercepted the package en route, and an undercover police agent delivered it to appellant. When appellant accepted delivery of the package, he was arrested for possession of a controlled substance.

Appellant was charged with one count of fourth-degree possession with intent to sell and one count of fifth-degree possession of a controlled substance, both of which are felonies that have maximum prison sentences of 15 and 5 years, respectively. Appellant pleaded guilty to fifth-degree possession of a controlled substance. At the sentencing

hearing, the district court followed the plea agreement and issued a stay of adjudication. In August 2006, after appellant completed the terms of his probation, the district court discharged him and dismissed the charges under Minn. Stat. § 152.18 (1998). In its order, the district court stated that “[appellant] shall not be deemed to have been convicted, and he shall not incur any of the disqualifications or disabilities imposed by law for conviction of crime except those imposed by the Federal Gun Control Act.”

One year later, ICE brought deportation proceedings against appellant. ICE alleged that appellant’s true name is “Ismail Abdulle Abukar,” and that on his Form N-400, appellant “admitted that [he] procured [his] admission and adjustment by fraud and by willfully misrepresenting a material fact, to wit: [he] assumed the identity of the son of Hilowie Farah Qasim in a refugee camp in order to be eligible for resettlement in the United States as a refugee.” In June 2009, ICE made additional allegations that appellant was convicted of a controlled-substance offense for his possession of khat. The immigration court ordered that appellant be deported to Somalia once the political violence and unrest in his country ceases.

Appellant moved to withdraw his guilty plea based on ineffective assistance of counsel because his attorney did not advise him of the immigration consequences of his guilty plea. The district court denied the motion, reasoning that “[t]his matter was continued for discharge and dismissal and has in fact been discharged and dismissed. There is simply no plea of guilty to withdraw at this point. There never was an adjudication of guilt. This Court has no control over how the Immigration Court chooses to view the proceedings.” This appeal follows.

## DECISION

Appellant challenges the district court's denial of his motion to withdraw his guilty plea. Whether appellant can appeal from a stay of adjudication is a question of law, which this court reviews de novo. *Smith v. State*, 615 N.W.2d 849, 851 (Minn. App. 2000), *review denied* (Minn. Sept. 26, 2000).

In response to appellant's argument, the state contends that he is not entitled to appeal the denial of his motion because postconviction relief is only available to a person convicted of a crime. And because appellant's charges were dismissed under a stay of adjudication, he was not convicted of a crime. The state cites to *Smith* as support, which has almost identical facts as this case. In both cases, the defendants were charged with fifth-degree controlled-substance crimes in violation of Minn. Stat. § 152.025 (1998), they were guilty,<sup>1</sup> the district courts stayed the adjudication of guilt under Minn. Stat. § 152.18, subd. 1, and the defendants were placed on probation for up to five years. *See id.* When Smith appealed, this court dismissed her appeal under *State v. Verschelde*, 595 N.W.2d 192, 195-96 (Minn. 1999), which held that a stay of adjudication is a pretrial order (as opposed to a final judgment or sentence) and that this court is not required to hear a defendant's appeal from a pretrial order. *Id.* We held that a defendant may not seek postconviction relief from a stay of adjudication because such relief is only available to those convicted of a crime. *Id.* at 851-52 (citing Minn. Stat. § 590.01, subd. 1 (Supp. 1999)). The state argues that appellant's appeal should be dismissed on the same ground.

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<sup>1</sup> Appellant pleaded guilty, while Smith submitted to a stipulated bench trial and was found guilty.

But the law has evolved since *Smith*. This court ruled that “stays of adjudication in felony proceedings are appealable as sentences rather than pre-trial orders.” *State v. Wright*, 699 N.W.2d 782, 784 (Minn. App. 2005). Six months later, the supreme court addressed the issue. While recognizing its ruling in *Verschelde*, the supreme court expressed dissatisfaction with the implementation of the rules. *State v. Lee*, 706 N.W.2d 491, 493 (Minn. 2005). The supreme court noted:

[I]t is fair to say that a stay of adjudication is not precisely a pretrial order, but rather, a unique judicial tool with the need for its own rules of procedure. Our current criminal rules offer only two existing labels for an appeal—either it is an appeal from a sentence or it is an appeal from a pretrial order. In the interest of preserving the integrity of our rules and to avoid any further confusion about choosing between two existing labels to describe a stay of adjudication, we believe that our rules of criminal procedure need to be amended to establish rules of procedure for stays of adjudication.

*Id.* at 494. Although the supreme court referred the matter to the Supreme Court Advisory Committee on the Rules of Criminal Procedure, no rule change has been promulgated to date. *Id.* at 494 n.1. But the supreme court has stated in an order opinion:

We here clarify that our holding in *State v. Lee*, that stays of adjudication are to be treated as pretrial orders for purposes of appeal, applies only to stays of adjudication in misdemeanor cases. Appeals from stays of adjudication in felony cases are to be treated as appeals from sentencings, from which an appeal may be taken as provided in Minn. R. Crim. P. 28.02, subd. 2, and 28.04, subd. 1, as the court of appeals correctly held prior to *Lee* in *State v. Wright*, 699 N.W.2d 782 (Minn. App. 2005).

*State v. Manns*, 810 N.W.2d 303, 303 (Minn. 2006). The rule that provides for an appeal by defendants provides, “A defendant may appeal as of right from any sentence imposed

or stayed in a felony case.” Minn. R. Crim. P. 28.02, subd. 2(3). Because appellant here pleaded guilty to felony fifth-degree possession of a controlled substance, this court has jurisdiction to consider the stay of adjudication as a sentencing appeal under the rules of criminal procedure. But because the district court has not ruled on the merits of appellant’s motion to withdraw his guilty plea, we reverse and remand the matter to the district court.

**Reversed and remanded.**