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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A13-1565**

Jesus Eduardo Lopez-Silva, petitioner,  
Appellant,

vs.

State of Minnesota,  
Respondent

**Filed April 21, 2014  
Affirmed  
Worke, Judge**

Dakota County District Court  
File No. 19HA-CR-09-4081

Cathryn Middlebrook, Chief Appellate Public Defender, Stephen L. Smith, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

James C. Backstrom, Dakota County Attorney, Nicole E. Nee, Assistant County Attorney, Hastings, Minnesota (for respondent)

Considered and decided by Kirk, Presiding Judge; Worke, Judge; and Larkin, Judge.

## UNPUBLISHED OPINION

**WORKE**, Judge

Appellant challenges the denial of postconviction relief, arguing that his counsel incorrectly advised him to waive his right to withdraw his guilty plea to an offense that called for deportation. We affirm.

### DECISION

Appellant Jesus Eduardo Lopez-Silva argues that the district court should have granted him postconviction relief. A district court may deny a postconviction petition summarily if the petition, files, and record conclusively demonstrate that no relief is warranted. Minn. Stat. § 590.04, subd. 1 (2012). This court reviews the district court's summary denial of a postconviction petition for an abuse of discretion. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). "A [district] court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012) (quotation omitted). We review a district court's factual findings for clear error and its legal conclusions de novo. *Martin v. State*, 825 N.W.2d 734, 740 (Minn. 2013).

Lopez-Silva asserts that the district court should have allowed him to withdraw his guilty plea because he was denied effective assistance of counsel. This court reviews the denial of an ineffective-assistance-of-counsel claim in a postconviction petition de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004). To prevail on a claim of ineffective assistance of counsel, Lopez-Silva must show that (1) his counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability

that, but for counsel's errors, the outcome would have been different. *Staunton v. State*, 784 N.W.2d 289, 300 (Minn. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). "[T]here is a strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007). If Lopez-Silva fails on either prong, his claim of ineffective assistance of counsel fails. *State v. Blanche*, 696 N.W.2d 351, 376 (Minn. 2005).

Lopez-Silva, who is not a United States citizen, claims that his counsel was ineffective because he incorrectly advised him to waive his right to withdraw his guilty plea to an offense that called for deportation. In *Padilla v. Kentucky*, the United States Supreme Court held that to provide effective assistance of counsel, an attorney must inform his client whether pleading guilty carries a risk of deportation. 559 U.S. 356, 373-74, 130 S. Ct. 1473, 1486-87 (2010). Padilla's attorney not only failed to advise of deportation risks, but incorrectly advised that Padilla "did not have to worry about immigration status since he had been in the country so long." *Id.* at 359, 130 S. Ct. at 1478 (quotation omitted).

Lopez-Silva pleaded guilty to possession of a firearm by an ineligible person and sought a downward dispositional sentencing departure. On his petition to enter his guilty plea, Lopez-Silva acknowledged that his attorney advised him that because he is not "a citizen of the United States th[e] plea of guilty may result in deportation, exclusion from admission to the United States of America or denial of citizenship." At sentencing, Lopez-Silva's attorney stated that:

[W]hen this plea was entered, I explained to [Lopez-Silva] there was no agreement with the Court that the Court was going to depart. . . . I believed . . . that the Court was inclined to grant a dispositional departure although the Court never committed itself to doing that. . . . I then explained to [Lopez-Silva] this morning that the Court has now reviewed the [presentence investigation] and has indicated that it is not inclined to grant a dispositional departure.

I would certainly ask the Court to reconsider its position . . . . [Lopez-Silva] currently is in the custody of immigration. . . . As he knows and as I believe we all know, any sentence in excess of a year in jail or prison would result in deportation. . . .

Then he has an opportunity to ask the Court to let him withdraw that plea. I also told him I spoke with his immigration lawyer. She told me that she had received an order from the immigration board last week, and she said this matter before this Court has to be resolved today. If it's not, it will result in a deportation next week, and she said to not move to withdraw the plea because, if you do, he's now facing all three charges, drive-by shooting as well, and she's convinced that it will cause his deportation. So we're between a rock and a hard place.

. . . .  
So I've told [Lopez-Silva] what I'm inclined to do is ask the Court to . . . reconsider the motion for dispositional departure and place him on probation . . . and if the Court is not inclined to do that, then I would ask the Court to consider giving serious consideration to a limited downward durational departure. And the presumptive sentence I believe is 60 months. . . . [Lopez-Silva] would prefer that the Court not put him in prison at all, but if the Court is going to place him in prison . . . I would ask for somewhere between 24 and 30 months. . . .

That may in fact cause his [] deportation. He can [] apply and try to come back to the United States . . . .

He does not want to go to prison. He wants to do whatever he can to stay out of prison.

Lopez-Silva did not move to withdraw his guilty plea; instead, he decided to proceed with sentencing, hoping for probation, after discussing deportation with his criminal

attorney and his immigration attorney. The district court declined to grant a dispositional departure and sentenced Lopez-Silva to 30 months in prison. The record shows that Lopez-Silva's attorney advised him of the risk of deportation, and that Lopez-Silva was well aware of the risk. Because Lopez-Silva received effective assistance of counsel, the district court did not abuse its discretion by denying his petition for postconviction relief.

**Affirmed.**