STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1432

Karl Anthony Edwards, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed May 4, 2010
Affirmed
Worke, Judge

Ramsey County District Court
File No. 62-K6-97-1674

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

Susan Gaertner, Ramsey County Attorney, Mark N. Lystig, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Marcus A. Jarvis, Jarvis & Associates, Burnsville, Minnesota (for appellant)

Considered and decided by Lansing, Presiding Judge; Worke, Judge; and Crippen, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

WORKE, Judge

Appellant challenges the district court's denial of his postconviction petition as untimely, arguing that relief is necessary to correct a manifest injustice because his attorney was ineffective by failing to advise him of potential immigration issues that could result from his guilty plea. We affirm.

D E C I S I O N

Appellant Karl Anthony Edwards argues that the district court abused its discretion by denying his petition for postconviction relief. In his petition, appellant sought to withdraw his guilty plea, claiming that plea withdrawal was necessary to correct a manifest injustice because his decision to plead guilty was based "solely on the advice given by [his attorney] that he would not be deported if an agreement that would keep him out of jail was reached."

This court reviews a postconviction court's decision for an abuse of discretion. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). We review findings of fact to determine whether the evidence is sufficient to sustain the findings and review mixed questions of fact and law, including claims of ineffective assistance of counsel, de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004); *Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003). A postconviction petitioner must prove the facts in a petition by a "fair preponderance of the evidence." Minn. Stat. § 590.04, subd. 3 (2008). To meet that burden, the petition "must be supported by more than mere argumentative assertions that lack factual support." *Henderson v. State*, 675 N.W.2d 318, 322 (Minn. 2004).

Timeliness

On August 13, 1997, appellant pleaded guilty to fifth-degree controlled-substance crime, conspiracy to possess more than 42.5 grams of marijuana. He petitioned to withdraw his plea on May 4, 2009. The district court found that appellant's petition was not timely because he failed to file his petition by July 31, 2007. Under Minn. Stat. § 590.01, subd. 4(a) (2008), with certain exceptions, "[n]o petition for postconviction relief may be filed more than two years after . . . the entry of judgment of conviction or sentence if no direct appeal is filed." A 2005 legislative amendment to the postconviction-relief statutes added this two-year time limit, providing that the time limitation would go into effect August 1, 2005, and that "[a]ny person whose conviction became final before August 1, 2005, shall have two years after the effective date to petition for postconviction relief." *See* Act of June 2, 2005, ch. 136, art. 14, § 13, 2005 Minn. Laws 901, 1097-98.

Appellant did not file a direct appeal. His conviction became final before August 1, 2005, and he had two years from that date in which to file a timely petition. Because appellant filed his petition on May 4, 2009, his petition is not timely.

Appellant claims that timeliness should not matter because the state failed to demonstrate that it would be unduly prejudiced if appellant received a trial. But the state was not required to demonstrate prejudice because the statute does not provide an exception when the state is not prejudiced, and the exception it does provide must be established by the petitioner. *See* Minn. Stat. § 590.01, subd. 4(b) (2008). And, in general, it was appellant's burden to prove facts by a fair preponderance of the evidence.

See Minn. Stat. § 590.04, subd. 3; *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007) (stating that "an evidentiary hearing is unnecessary if the petitioner fails to allege facts that are sufficient to entitle him or her to the relief requested").

Appellant also claims that timeliness should not matter because it would have been "too burdensome. . . . [to] require him to monitor changes in the law as it relates to his conviction." But "ignorance of the law is no excuse." *See State v. King*, 257 N.W.2d 693, 697 (Minn. 1977). On January 27, 2009, appellant received notice to appear for removal proceedings under the Immigration and Nationality Act, indicating that appellant was removable from the United States because he is not a citizen or national of the United States, and he was convicted of a controlled-substance crime. But appellant knew well before July 31, 2007, that he was not a citizen or a national of the United States, and that he had a controlled-substance conviction. He was further aware that his conviction could have affected his living status in the United States because his attorney raised this concern. At his December 5, 1997 sentencing, appellant's attorney requested that the district court impose a stayed sentence, arguing that

> [Appellant] is not a citizen of the United States and if he becomes incarcerated, there is a good chance that he will then have an immigration hold put on him and will not get out of custody and may end up being sent back to Jamaica because of the instant offense.

The district court ordered a stay of imposition of the sentence and placed appellant on probation for five years. Appellant's petition was untimely, regardless of the lack of prejudice to the state and appellant's failure to monitor changes in the law.

Exceptions

Appellant claims that an exception to the filing limitation applies to his case. There are legislatively created exceptions to the two-year limitation. One such exception is when "the petition is not frivolous and is in the interests of justice." Minn. Stat. § 590.01, subd. 4(b). Petitions seeking the benefit of an exception must invoke the exception. *Id.*, subd. 4(c) (2008) ("Any *petition invoking* an exception . . . must be filed within two years of the date the claim arises." (emphasis added.)). The phrase "petition invoking" requires petitions to expressly identify the applicable exception. *Nestell v. State*, 758 N.W.2d 610, 614 (Minn. App. 2008). Appellant's petition fails to specifically identify the applicable exception. He claims that plea withdrawal is necessary to correct a manifest injustice; thus, this may fall under the non-frivolous, interests-of-justice exception.

Plea Withdrawal

Appellant requested to withdraw his guilty plea, claiming that he received ineffective assistance of counsel. To be valid, a guilty plea must be "accurate, voluntary, and intelligent." *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). A guilty plea may be rendered invalid by ineffective assistance of counsel. *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994). A plea is not voluntary if it is premised on counsel's failure to give advice and assistance on critical issues that counsel is obligated to give under the standard of ordinary skill and competence. *Id.* It is manifestly unjust for the court to accept an involuntary guilty plea. *Perkins*, 559 N.W.2d at 688. If a guilty plea creates a

manifest injustice, the defendant is entitled to withdraw it. Minn. R. Crim. P. 15.05, subd. 1.

Ineffective Assistance of Counsel

Appellant argues that he received ineffective assistance of counsel because his attorney failed to advise him of the potential negative immigration consequences that could result from his guilty plea and failed to advise him to seek advice from a competent immigration attorney.[1]

A party alleging ineffective assistance of counsel must show that counsel's "representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). Both *Strickland* factors need not be analyzed if a claim fails under either one. *State v. Blom*, 682 N.W.2d 578, 624 (Minn. 2004).

Appellant challenges the reasonableness of his attorney's representation. An objective standard of reasonableness is the exercise of "customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993) (quotation omitted). "There is a strong presumption that a counsel's performance falls within the wide range of reasonable

[1] We are aware of the recent United States Supreme Court decision addressing deportation consequences of a guilty plea. *See Padilla v. Kentucky*, 78 U.S.L.W. 4235 (U.S. Mar. 31, 2010). In our opinion, the holding in *Padilla* does not apply to the record here.

professional assistance." *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007) (quotation omitted).

Appellant's claim falls outside of the interest-of-justice exception for at least two reasons. First, he was on notice that there could be immigration consequences. Second, the supreme court has held that immigration consequences are not a direct consequence of a guilty plea because "deportation is neither definite, immediate, nor automatic." *Alanis v. State*, 583 N.W.2d 573, 578 (Minn. 1998); *see also Kim v. State*, 434 N.W.2d 263, 266-67 (Minn. 1989) (stating that ignorance of a collateral consequence does not entitle a criminal defendant to withdraw a guilty plea). Appellant's case greatly exemplifies the collateral nature of the immigration consequences—he pleaded guilty in 1997 and did not receive notice of removal proceedings until 2009. Under Minnesota law, defense counsel's failure to advise a criminal defendant of collateral consequences of a guilty plea does not constitute a manifest injustice requiring withdrawal of a guilty plea. *Berkow v. State*, 583 N.W.2d 562, 564 (Minn. 1998). Therefore, the district court did not abuse its discretion in denying appellant's postconviction petition.

Affirmed.