STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1012

Augustus Nickie Phillips, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed March 8, 2011
Affirmed
Connolly, Judge

Dakota County District Court
File No. 19HA-CR-09-2003

Marcus A. Jarvis, Jarvis & Associates, LLC, Burnsville, Minnesota; and

Silas F. Mayberry, Brooklyn Park, Minnesota (for appellant)

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

Daniel J. Fluegel, Hastings City Attorney, Sean R. McCarthy, Assistant City Attorney, Hastings, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Connolly, 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

CONNOLLY, Judge

Appellant challenges the district court's denial of his postconviction motion to withdraw his guilty plea on the basis of ineffective assistance of counsel. Because we conclude that the representation did not fall below an objective standard of reasonableness, we affirm.

FACTS

In 2009, appellant Augustus Nickie Phillips pleaded guilty to third-degree driving while impaired, a gross misdemeanor, in violation of Minn. Stat. § 169A.26, subd. 1 (2008). *See* Minn. Stat. § 169A.26, subd. 2 (2008) ("Third-degree driving while impaired is a gross misdemeanor."). Appellant was represented by counsel (plea counsel) and, as part of his sentence, was placed on probation for two years. In 2010, the United States Department of Homeland Security initiated removal proceedings against appellant.[1] Appellant subsequently filed a petition for postconviction relief, seeking to withdraw his guilty plea on the basis that plea counsel "fail[ed] to advise him that his plea of guilt made him subject to automatic deportation," citing *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483, 1486 (2010) (holding defense counsel's failure to inform noncitizen defendant of the risk of deportation upon entering a guilty plea violated defendant's Sixth Amendment right to effective assistance of counsel because the consequences of defendant's plea

[1] The notice to appear indicated that appellant had overstayed a temporary visa issued in 1983 that was not to exceed six months. Appellant was approximately eight years old at the time he entered on the visa.

could easily be determined from reading the removal statute, which made deportation presumptively mandatory).[2]

At the hearing on appellant's petition, the district court heard testimony from plea counsel and appellant. Plea counsel testified that she has been practicing as a criminal defense attorney for 24 years and worked as a public defender on a part-time basis. When asked if she had "any routine habits or practices [she] developed over that time in terms of pleas," plea counsel responded:

> In felony pleas, . . . the issue of immigration and the consequences thereof from a plea to the charge . . . is listed on

[2] We observe that it is not clear *Padilla* even applies to appellant's case. Appellant's conviction was entered on November 30, 2009. Appellant did not appeal his conviction and, therefore, his conviction became final on February 28, 2010. *See* Minn. R. Crim. P. 28.05, subd. 1 (stating a party appealing a sentence must file an appeal "within 90 days after judgment and sentencing"); *State v. Hughes*, 758 N.W.2d 577, 580 (Minn. 2008) ("[I]f a defendant does not file a direct appeal, his conviction is 'final' for retroactivity purposes when the time to file a direct appeal has expired."). *Padilla* was decided on March 31, 2010. 130 S. Ct. at 1473. Because appellant's conviction was final before *Padilla* was decided, *Padilla* would have to apply retroactively in order for appellant to be eligible for relief under its holding. *See Hughes*, 758 N.W.2d at 583 (stating that because a postconviction petition seeks only collateral review of a conviction, it does not justify retroactivity); *see also Danforth v. State*, 761 N.W.2d 493, 498 (Minn. 2009) (noting that the "'[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system'" (quoting *Teague v. Lane*, 489 U.S. 288, 309, 109 S. Ct. 1060, 1074 (1989))). Currently, it is an open question as to whether *Padilla* applies retroactively. *See, e.g.*, *United States v. Perez*, No. 8:02CR296, 2010 WL 4643033, at *2 (D. Neb. Nov. 9, 2010) (noting that it is unclear whether *Padilla* was meant to apply retroactively, no circuit court of appeals has yet ruled on the matter, and district courts have come to different conclusions). We decline to address the question of retroactivity because it is not necessary to decide this appeal.

Similarly, *Padilla* did not discuss the case of an attorney who does not know that his client is not a citizen. *See State v. Limarco*, No. 101,506, 2010 WL 3211674, at *5 (Kan. App. Aug. 6, 2010) ("If an attorney did not know and had no reason to know his client was an alien, then a failure to advise the client about immigration consequences might not constitute ineffective assistance, even under *Padilla*.").

> the felony plea petition; in other words, there's a question that it asks, "Are you a United States citizen?" And from there I've developed a colloquy, a follow-up with the client, which discusses the consequences of a plea to any charge. . . .
>
> So it's been our office policy to incorporate that question in all of the pleas going through—forward, all of the pleas that we generate just because of the ramifications and certainly because of the stricter immigration consequences . . . .

Plea counsel testified that she inquires of her client's citizenship in every case. Plea counsel explained that she asks: "Are you a United States citizen? And then if they say no, then I advise them: Do you understand that a plea to this charge will, in fact, have deportation consequences upon you."

Plea counsel testified that she asked appellant if he was a United States citizen, appellant said that he was, and, based on appellant's response, she did not engage in any further discussion. Plea counsel acknowledged that there was nothing placed on the record regarding this conversation. Appellant testified that plea counsel did not ask him if he was a United States citizen and that she did not tell him of the potential negative immigration consequences. Ultimately, the district court denied appellant's petition, finding plea counsel more credible than appellant and concluding that appellant's affirmative response to plea counsel's inquiry "precluded [plea counsel] from going into any details about consequences of a guilty plea for a non-U.S. citizen."

The district court followed up its on-the-record findings with a written order. The district court found that (1) appellant discussed his rights with plea counsel prior to pleading guilty; (2) plea counsel followed the same colloquy she does with all of her clients and thus inquired into the status of appellant's citizenship; (3) appellant told plea

counsel that he was a United States citizen; and (4) based on the information that appellant had given her, plea counsel was not required to inform appellant of potential immigration consequences. The district court concluded that plea counsel fulfilled her obligations to advise appellant prior to his plea and that appellant was "responsible for not having been fully advised of all immigration[] consequences of his plea due to his misinforming his attorney about his nationality." This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion in denying appellant's postconviction motion.

In reviewing a district court's denial of postconviction relief, appellate courts determine whether the court's factual findings are supported by sufficient evidence and review issues of law de novo. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). Appellate courts "afford great deference to a district court's findings of fact and will not reverse the findings unless they are clearly erroneous." *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). A postconviction decision will be reversed only upon finding that the district court abused its discretion. *Leake*, 737 N.W.2d at 535.

A defendant may withdraw a guilty plea if "withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice exists when a guilty plea is invalid. *State v. Theis*, 742 N.W.2d 643, 650 (Minn. 2007). For a plea to be valid, it must be accurate, voluntary, and intelligent. *Id.* "If a plea fails to meet any one of these requirements, it is invalid." *Id.* "A defendant bears the burden of showing

his plea was invalid." *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). The validity of a guilty plea is a question of law, which appellate courts review de novo. *Id.*

Appellant argues that "his guilty plea is invalid because [plea counsel] . . . engaged in deficient performance by failing to advi[s]e him that his plea of guilt made him subject to automatic deportation." Appellant appears to be arguing that his guilty plea lacked the intelligence requirement. "The intelligence requirement ensures that a defendant understands the charges against him, the rights he is waiving, and the consequences of his plea." *Id.* at 96 (citing *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983)).[3] Appellant does not claim that he misunderstood the charges against him or the rights that he waived, only that he was not informed of "potential negative immigration consequences" following a guilty plea. *Cf. State v. Lopez*, ___ N.W.2d ____, ____, 2011 WL 382691, at *5 (Minn. App. Feb. 8, 2011) ("Because Lopez did not have an attorney, an attorney's Sixth Amendment duty to advise of immigration consequences is not at issue.").

A two-prong test applies to ineffective-assistance-of-counsel claims arising out of the plea process. *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994). To prevail on an ineffective-assistance-of-counsel claim, "[t]he defendant must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that

[3] Elsewhere in his brief, appellant states that "his guilty plea was not accurate, voluntary, and intelligent" and that "the plea was not accurate." "The accuracy requirement protects a defendant from pleading guilty to a more serious offense than that for which he could be convicted if he insisted on his right to trial" and focuses "on a proper factual basis." *Raleigh*, 778 N.W.2d at 94. However, appellant only argues that his plea was invalid based on plea counsel's failure to inform him of potential negative immigration consequences.

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, 2068 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quotation omitted). Although this is a two-prong test, a reviewing court need not address "both prongs if either one is determinative." *Williams v. State*, 764 N.W.2d 21, 30 (Minn. 2009); *see Gates*, 398 N.W.2d at 563 (declining to address whether counsel's performance was deficient when petitioner had not met his burden of proving prejudice). Because we conclude that plea counsel's representation did not fall below an objective standard of reasonableness, we focus only on the first prong.

As the state points out, "the central finding" challenged by appellant is whether plea counsel asked about appellant's immigration status. Appellant asserts that the plea petition did not contain a clause placing appellant on notice of any potential immigration consequences, plea counsel could not point to any writing indicating that such advice had been given, and the plea colloquy did not address the issue. Appellant also asserts that plea counsel's testimony was inconsistent as to whether she asked appellant about his immigration status or informed appellant of potential immigration consequences following his plea and that the district court improperly considered plea counsel's testimony in determining whether appellant had been advised of any potential immigration consequences.

First, when considering a claim of ineffective assistance of counsel based on a lack of communication between the attorney and the client, "a court needs to hear testimony

from the defendant, his or her trial attorney, and any other witnesses who have knowledge of conversations between the client and the attorney. Only after hearing such testimony could a court determine whether in fact the trial attorney communicated the [requisite information]." *Robinson v. State*, 567 N.W.2d 491, 495 (Minn. 1997). Thus, the district court did not err by considering plea counsel's testimony to determine what advice had been given to appellant.

Second, the district court expressly credited plea counsel over appellant. Based on the testimony, the district court found that plea counsel asked appellant whether he was a citizen and that appellant responded affirmatively. In its on-the-record findings, the district court stated that "it all comes down to credibility." Appellant himself recognizes that this conflicting testimony necessarily involves a credibility determination: "[t]he [district court] took the position that [plea counsel] was more credible (on whether [appellant] was informed of [the] risk of deportation) than [appellant] . . . ." When credibility determinations are crucial, we defer to the district court. *State v. Aviles-Alvarez*, 561 N.W.2d 523, 527 (Minn. App. 1997), *review denied* (Minn. June 11, 1997). Because appellant did not tell plea counsel that he was not a citizen, and the record is void of any facts indicating that plea counsel knew or should have known otherwise, plea counsel had no obligation to advise appellant of possible immigration consequences to pleading guilty, and, therefore, any failure on behalf of plea counsel to provide such advice could not have fallen below an objective standard of reasonableness. *See State v. Lund*, 277 Minn. 90, 93, 151 N.W.2d 769, 772 (1967) ("[I]n the absence of a clear showing that counsel had been so informed [of client's now-claimed intoxication

defense], counsel cannot be found to have been so incompetent so as to render the proceedings . . . and the voluntary plea of guilty a sham or a farce.").

II. Appellant's waived arguments

Appellant raises two additional arguments: (1) the state contributed to plea counsel's alleged ineffectiveness because the plea petition did not have a clause placing him on notice of potential negative immigration consequences as a result of pleading guilty and (2) the state's failure to include an immigration clause in its plea petition denied him due process of law and violated equal protection because "Minn. R. Crim. P. 15.01 requires that a Defendant be placed on notice of risk of deportation upon entry of a guilty plea, and just about every other State District Court has such [a] clause in its plea [petition]." These arguments are waived because they were not raised to the district court. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating an appellate court will generally not consider issues which were not raised before the district court); *In re Welfare of C.L.L.*, 310 N.W.2d 555, 557 (Minn. 1981) (declining to address constitutional issues that were not raised to the district court).

Affirmed.