STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0938

State of Minnesota,
Respondent,

vs.

Soboun Nol,
Appellant.

Filed September 24, 2012
Affirmed
Wright, Judge

Ramsey County District Court
File No. 62-CR-15130

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

John J. Choi, Ramsey County Attorney, Kaarin Long, Assistant Ramsey County Attorney, St. Paul, Minnesota (for respondent)

Andrew G. Birkeland, Andrew G. Birkeland, P.C., Minneapolis, Minnesota; and

Dan Rasmus, Rasmus Law Office, LLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Wright, Judge; and Larkin, Judge.

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

WRIGHT, Judge

Appellant, a noncitizen asylee, challenges the district court's denial of his motion to withdraw his guilty plea, arguing that his defense attorneys provided ineffective

assistance of counsel when they failed to advise him correctly about the immigration consequences of his guilty plea. Because appellant has not established a violation of the constitutional right to effective assistance of counsel, we affirm.

FACTS

Appellant Soboun Nol, who was born in Cambodia, migrated to the United States in 2001. In 2002, he was granted asylum.

On September 5, 2009, Nol and S.A.K., who were good friends from Cambodia, went to a motel located in St. Paul. According to S.A.K., she accompanied Nol to this location to "coin" his back. This refers to a Cambodian tradition in which a person's back is scraped with a large coin to remove body pain. Once inside the motel room, however, Nol asked S.A.K. for sex. When S.A.K. refused, a struggle ensued. Nol eventually apologized to S.A.K. and took her home. When S.A.K. reported Nol's actions to her family, they called the police.

Nol was charged with attempted first-degree criminal sexual conduct, attempted second-degree criminal sexual conduct, and second-degree criminal sexual conduct. On April 12, 2011, Nol pleaded guilty to second-degree criminal sexual conduct. He signed a written guilty-plea petition, which set out the terms of the plea agreement. The written plea petition specifically warned Nol that as a noncitizen, his "plea of guilty to this crime may result in deportation, exclusion from admission to the United States or denial of naturalization as a United States citizen." *See* Minn. R. Crim. P. 15.01, subd. 1(6)(l) (2010). During the guilty-plea hearing, Nol was sworn and questioned by his attorney, with the assistance of an interpreter, about the contents of the guilty-plea petition. At

several points during the colloquy, the district court judge interjected and personally questioned Nol. With respect to the immigration consequences of the guilty plea, the record reflects the following exchange between Nol, through the interpreter, and his attorney:

> Q: And, sir, you understand that as a refugee in the United States you are subject to possible deportation because of a conviction of this offense?
>
> THE INTERPRETER: Yeah.
>
> Q: And you understand that neither I nor [my co-counsel] are immigration attorneys but that we have consulted with an immigration attorney and given you information about immigration -- your immigration status?
>
> THE INTERPRETER: Yeah.
>
> Q: And that you will need to seek the services of an immigration attorney to handle those issues that cannot be handled here in criminal court?
>
> THE INTERPRETER: No response.
>
> Q: And that you understand –
>
> THE COURT: Wait. Was there an answer to that?
>
> THE INTERPRETER: Yes.
>
> THE COURT: Thank you.
>
> Q: And that you understand that you would most likely have relief under the convention against torture?
>
> THE INTERPRETER: Yes.

Nol's attorney then questioned Nol about the factual basis for the guilty plea. At the end of the hearing, the district court ordered a presentence investigation report and scheduled the matter for sentencing. On June 24, 2011, the district court adjudged Nol guilty of second-degree criminal sexual conduct, imposed a sentence of 90 months' imprisonment, stayed the execution of the sentence, placed Nol on probation for 25 years, and ordered him to serve one year in jail. The district court dismissed the remaining charges.

On November 9, 2011, U.S. Citizenship and Immigration Services sent Nol a Notice of Intent to Terminate Asylum Status and Hearing before an Immigration Judge. Nol was detained in February 2012 and placed in the custody of the Department of Homeland Security (DHS).

Nol moved to withdraw his guilty plea in March 2012. In support of his motion, he submitted an affidavit stating that he did not fully understand the consequences of his guilty plea, that he relied on his attorney's statement that it was unlikely that he would be deported, and that other factors contributed to his lack of understanding. These factors included the quality of the interpreter used for the guilty-plea hearing and his fatigue resulting from his HIV medications.

At the evidentiary hearing that followed, Nol rested on his written submissions and affidavit. The state opposed the motion and called Nol's criminal defense attorneys to testify.

Nol's lead attorney testified that she was appointed to represent Nol from September 2009 through his sentencing in June 2011. She has 16 to 17 years of criminal defense experience. At her first meeting with Nol, she knew that he was not a citizen,

and she actively took steps to obtain information about his immigration concerns. Nol's attorney testified that, during her representation of Nol, she and her co-counsel had many discussions with Nol about the immigration consequences of his case. She also consulted with two immigration attorneys about possible defenses to the charges and the immigration consequences for Nol if he were convicted or decided to plead guilty. Nol's attorney testified that she met with Nol five or six times in summer 2010 to discuss immigration consequences and to advise him about hiring an immigration attorney.

On cross-examination, Nol's attorney acknowledged that second-degree criminal sexual conduct is an aggravated felony and a crime of violence that carries a term of imprisonment greater than one year. His attorney also acknowledged that in her discussions with one of Nol's immigration attorneys, she came to the conclusion that if Nol pleaded guilty to second-degree criminal sexual conduct, he would be "deportable." But she also advised Nol that he could seek relief under the Convention Against Torture (CAT).

Nol's second attorney (co-counsel) testified that he began representing Nol in spring 2010 as co-counsel. He met with Nol many times to review evidence and to prepare for Nol's criminal hearings and trial. Nol's co-counsel testified that, based on his prior experience with Nol, he believed that Nol clearly understood their discussions during the meetings and at the guilty-plea hearing.

In its April 4, 2012 order, the district court denied Nol's motion to withdraw his guilty plea. The district court concluded that Nol knew the meaning and consequences of his guilty plea, that neither the court interpreter nor Nol's medications interfered with his

understanding of the guilty plea and its consequences, and that Nol was sufficiently advised of the consequences of his guilty plea.

Nol filed this appeal on May 29, 2012. Nol's appellate counsel also received a notice dated May 29 setting Nol's removal hearing for August 1, 2012. In its June 27, 2012 order, this court granted Nol's request to expedite the appeal.[1]

D E C I S I O N

Relying on *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), Nol argues that his Sixth Amendment right to effective assistance of counsel was violated when he was given inaccurate advice and "false assurance" that his guilty plea would not result in his removal. A claim of ineffective assistance of counsel presents a mixed question of law and fact, which we review de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004). To prevail on his claim of ineffective assistance of counsel, Nol must prove that (1) his counsels' performance fell below an objective standard of reasonableness and (2) a reasonable probability exists that, but for his counsels' 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, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). We need not analyze both prongs of *Strickland* if either prong is determinative. *Id*. The burden of proof rests with the defendant, who must overcome the "strong presumption" that

[1] This court has not been advised by Nol's appellate counsel whether the removal hearing took place as scheduled or whether it was stayed pending this appeal. The outcome of the removal hearing, however, does not render the appeal moot because "all criminal convictions carry continuing collateral consequences." *United States v. Quezada-Enriquez*, 567 F.3d 1228, 1232 & n.2 (10th Cir. 2009).

counsel's performance was within a wide range of reasonable assistance. *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007).

In *Padilla*, the United States Supreme Court held that, in the context of plea negotiations, "when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear." 130 S. Ct. at 1483. The *Padilla* Court acknowledged, however, that the duty is "more limited" in the "numerous situations in which the deportation consequences of a particular plea are unclear or uncertain." *Id.* The *Padilla* Court concluded that, "[w]hen the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice ALITO), 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). The concurring opinion of Justice Alito, to which the majority refers, describes several scenarios in which the task of advising a client about the immigration consequences of a criminal conviction becomes complicated. Relevant to this analysis is the added complication of the task of advising a defendant when "the relationship between the length and type of sentence and the determination whether [an alien] is subject to removal, *eligible for relief from removal*, or qualified to become a naturalized citizen[]" raises questions. 130 S. Ct. at 1490 (quotations omitted) (emphasis added).

In *Padilla*, the defendant was a native of Honduras and had been a lawful permanent resident of the United States for 40 years. 130 S. Ct. at 1477. Based on his attorney's advice that he "did not have to worry about immigration status since he had been in the country so long," Padilla pleaded guilty to transportation of a large amount of

marijuana in his tractor-trailer. *Id.* at 1477-78 (quotations omitted). Observing that "virtually every drug offense . . . is a deportable offense" and that the defendant's guilty plea "made his deportation virtually mandatory," the *Padilla* Court concluded that "constitutionally competent counsel would have advised [Padilla] that his conviction for drug distribution made him subject to automatic deportation." *Id.* at 1477-78 & n.1. The *Padilla* Court concluded that counsel in *Padilla* could have easily 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.

Unlike the facts presented in *Padilla*, the facts of this case present unclear or uncertain immigration consequences; and the advice given by Nol's attorneys was neither deficient nor objectively unreasonable. Both of Nol's attorneys consulted with two immigration attorneys before Nol entered his guilty plea and had many discussions with Nol about the immigration consequences. Nol agreed to plead guilty to second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(e)(i) (2008), which makes it a crime to engage in sexual contact and cause personal injury to another person by use of force or coercion to accomplish the sexual contact. This offense clearly qualifies as an "aggravated felony" under federal law[2] and, therefore, is a deportable

[2] Under federal immigration law, any alien who is convicted of "an aggravated felony" at any time after admission "is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii) (2006). The term "aggravated felony" includes "a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year[.]" 8 U.S.C. § 1101(a)(43)(F) (2006). A "crime of violence," in turn, is defined as including "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]" 18 U.S.C. § 16(a) (2006).

offense. Nol acknowledged this during the guilty-plea colloquy when he indicated that he was "subject to possible deportation because of a conviction of this offense."

At the guilty-plea hearing, before Nol entered his guilty plea, Nol's attorney advised Nol that a conviction of the offense would subject him to "possible" deportation and that he "most likely" would have relief under the CAT. This statement acknowledges that Nol's status as an asylee may offer him additional protection and provide a plausible basis for relief from removal or deferral of removal under the CAT. It did not guarantee asylum or protection under the CAT. Issues of asylum, withholding of removal, and protection under the CAT are often raised by noncitizens seeking to contest removal and remain in the United States. *E.g.*, *Ali v. Holder*, 686 F.3d 534, 536 (8th Cir. 2012); *Gaitan v. Holder*, 671 F.3d 678, 679 (8th Cir. 2012). Even the November 2011 DHS notice of intent to remove that Nol received demonstrates the uncertainty of his deportation. The notice states that his "crimes and subsequent convictions dictate that [his] status as an asylee must be terminated" but that he will be given an opportunity to "present information and evidence to show that [he is] still eligible for asylum." The advice that Nol received from his attorneys after their consultation on his behalf with immigration attorneys is not inconsistent with the subsequent DHS notice.

Because the immigration consequences to an asylee are complex and uncertain in light of the discretion exercised by federal immigration officials, Nol's attorneys met their obligation by advising Nol of the risk of adverse immigration consequences and the possibility that he could obtain the discretionary relief available to him under the CAT.

Nol did not present any evidence from the immigration attorneys that were consulted to refute the advice he was given by his defense attorneys after their consultation. Nol's health condition and other personal circumstances *may* be the factors on which the immigration counsel relied to assess the likelihood of success. Nol has not established otherwise.

On the record before us, we cannot conclude that the numerous consultations with immigration lawyers and the advice of his defense counsel that resulted from these consultations establish that the performance of Nol's attorneys fell below an objective standard of reasonableness under *Padilla* and *Strickland*.[3]

Affirmed.

[3] Because we conclude that Nol has not established that the performance of Nol's attorneys was objectively unreasonable, we need not reach the prejudice prong of *Strickland*.