IN THE COURT OF APPEALS OF IOWA

No. 1-568 / 10-1315
Filed September 8, 2011

SERGIO PEREZ,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Marshall County, Michael J. Moon, Judge.

Sergio Perez appeals the district court's dismissal of his application for postconviction relief. **AFFIRMED.**

Michael H. Said of Law Offices of Michael H. Said, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Jennifer Miller, County Attorney, and James S. Scheetz, Assistant County Attorney, for appellee State.

Considered by Eisenhauer, P.J., and Doyle and Mullins, JJ.

DOYLE, J.

Sergio Perez appeals the district court's dismissal of his application for postconviction relief, which challenged his trial counsel's failure to advise him about the deportation consequences of his guilty plea to possession of methamphetamine. The court concluded Perez's claims were untimely under Iowa Code section 822.3 (2009). We affirm the judgment of the district court.

I. Background Facts and Proceedings.

In October 2000, following a fight at a bar in Marshalltown, Sergio Perez was charged with possession of methamphetamine with intent to deliver and failure to affix a drug tax stamp. Pursuant to a plea bargain with the State, he filed a written guilty plea to the reduced charge of possession of methamphetamine, and the State dismissed the tax stamp violation. Perez was not a citizen of the United States at the time he pleaded guilty. The written guilty plea contained no notice or acknowledgment that Perez's conviction could affect his status under federal immigration laws.[1] The district court accepted Perez's plea and entered a judgment in December 2000 convicting him of possession of methamphetamine. Perez did not appeal his conviction.

Close to ten years later, Perez filed an application for postconviction relief alleging among other things that (1) his trial counsel "did not notify the Applicant of the immigration implications of his guilty plea," (2) no interpreter was provided to him in violation of Iowa Code section 622A.2, and (3) no "record of the

[1] The rule in effect at the time, Iowa Rule of Criminal Procedure 8.2(*b*) (2000), did not require that any such notice be given to a defendant making a plea of guilty.

translation of the plea colloquy was made or maintained" in violation of section 622A.8.

In support of the first allegation, Perez asserted his trial counsel had a duty to "explain the consequences of his plea on his immigration status" and to "review all applicable national and foreign law." Because that was not done, Perez alleged he unknowingly pleaded guilty to a crime "rendering [him] deportable and unable to legally re-enter the United States." He stated he was "now facing removal proceedings in the Federal Executive Office for Immigration Review court."

The State filed a motion to dismiss, alleging Perez's application was untimely under Iowa Code section 822.3, which generally requires that challenges to criminal convictions be brought within three years from the date the conviction or decision is final. Perez resisted, arguing his challenge could not have been raised earlier due to a change in the law brought about by the United States Supreme Court's recent decision in *Padilla v. Kentucky*, ____ U.S. ____, ____, 130 S. Ct. 1473, 1486, 176 L. Ed. 2d 284, 299 (2010), which, contrary to previous Iowa cases on the issue, requires that counsel must now inform defendants whether their pleas carry a risk of deportation.

Following a hearing, the district court entered a ruling dismissing Perez's application in its entirety. Perez appeals, claiming the court erred in "dismissing the proceedings based on the statute of limitations" and, in doing so, failing to consider the violations of Iowa Code sections 622A.2 and .8.

II. Scope and Standards of Review.

Our review of the district court's ruling on the State's statute-of-limitations defense is for correction of errors of law. *Harrington v. State*, 659 N.W.2d 509, 519 (Iowa 2003).

III. Discussion.

Iowa Code section 822.3 contains a statute of limitations for postconviction relief actions, which requires that all applications "must be filed within three years from the date the conviction or decision is final or, in the event of an appeal, from the date the writ of procedendo is issued." The statute goes on to provide an exception to this limitation where the applicant alleges "a ground of fact or law that could not have been raised within the applicable time period." *See State v. Edman*, 444 N.W.2d 103, 106 (Iowa Ct. App. 1989) (stating the exception only applies where "there would be no opportunity to test the validity of the conviction" within the three-year time period).

The district court found the exception in section 822.3 did not apply to any of Perez's claimed grounds for relief, stating: "The errors, if indeed they were, were known to applicant. He simply did not raise them until they became problematic due to immigration issues." We agree as to the claims involving sections 622A.2 and .8, but reach a somewhat different conclusion with respect to Perez's *Padilla* claim, though we ultimately arrive at the same result as the district court.

A. Lack of Interpreter and Recording.

Together, Iowa Code sections 622A.2 and .8 require the assistance of an interpreter for persons involved in legal proceedings "who cannot speak or

understand the English language" and the recording of proceedings where "non-English testimony is given." Perez argues the district court erred in failing to consider whether these code provisions were violated during his guilty plea proceedings. The State responds that Perez could have raised these issues within the time limitation of section 822.3 "because, logically, he had to be aware when he entered his guilty plea that he required an interpreter." We agree.

Notably, Perez does not argue on appeal that either of these statutes were grounds of fact or law he could not have raised within the applicable time period.[2] Indeed, he cannot make that argument, as sections 622A.2 and .8 are not new code sections. Nor does he claim he was unaware of these statutes until recently, though such a claim is without merit in any event. *See Edman*, 444 N.W.2d at 106 (observing a "claimed lack of knowledge" is not a ground for exception from the effects of the statute of limitations in section 822.3). We accordingly affirm the district court's dismissal of these two grounds for relief.

B. Counsel's Failure to Advise of Deportation Consequences.

At the time of Perez's guilty plea, Iowa cases, as well as the law of most other states and federal courts, held the failure to advise a defendant of collateral consequences of a guilty plea, even serious ones such as possible deportation, "cannot provide a basis for a claim of ineffective assistance" under the federal constitution. *Mott v. State*, 407 N.W.2d 581, 583 (Iowa 1987); *accord State v. Ramirez*, 636 N.W.2d 740, 746 (Iowa 2001) (declining the opportunity to overrule

[2] Perez instead argues we should address sections 622A.2 and .8 because "the matters at bar are 'capable of repetition yet evading review.'" This is an exception to the mootness doctrine, not the statute of limitations. *See Rhiner v. State*, 703 N.W.2d 174, 177 (Iowa 2005).

Mott and continuing to adhere to the collateral-consequences rule).[3] Shortly after the *Ramirez* case was decided, Iowa's Rules of Criminal Procedure concerning guilty pleas were amended to require courts to inform defendants "[t]hat a criminal conviction, deferred judgment, or deferred sentence may affect a defendant's status under federal immigration laws." Iowa R. Crim. P. 2.8(2)(*b*)(3).

In *Padilla*, the United States Supreme Court considered "whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country." ____ U.S. at ____, 130 S. Ct. at 1478, 176 L. Ed. 2d at 290. The Court sidestepped the question of whether the distinction employed by the majority of state and federal courts between "direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*" is appropriate. *Id.* at ____, 130 S. Ct. at 1481, 176 L. Ed. 2d at 293. It instead found the distinction was "ill-suited" to evaluating a *Strickland* claim concerning the risk of deportation because of the "unique nature of deportation" with its intimate relationship to the criminal process. *Id.* at ____, 130 S. Ct. at 1481-82, 176 L. Ed. 2d at 293-94.

Having reached that conclusion, the Court then considered the first prong of the *Strickland* test—whether the failure to advise a defendant regarding the risk of deportation constitutes deficient performance. *Id.* at ___, 130 S. Ct. at

[3] The *Ramirez* court agreed with the then-majority rule among states that a court is not required by due process to ascertain the defendant's understanding of possible deportation consequences, but noted "[i]t would, however, be proper, and probably desirable, for the court to advise a defendant of such matters." 636 N.W.2d at 743.

1482, 176 L. Ed. 2d at 294. It found the "weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." *Id.* In so finding, the Court rejected the government's argument that *Strickland* should apply to such claims "only to the extent that [the defendant] has alleged affirmative misadvice." *Id.* at ___, 130 S. Ct. at 1484, 176 L.Ed. at 296-97; *cf. Mott*, 407 N.W.2d at 583 (noting if a defendant "has been affirmatively *mis*led by an attorney concerning the consequences of a plea, the plea may be held to be invalid, even though the consequences are characterized as collateral"). The Court held it "is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so 'clearly satisfies the first prong of the *Strickland* analysis.'" *Id.* at ____, 130 S. Ct. at 1484, 176 L. Ed. 2d at 297.

Perez argues the Court's holding in *Padilla* was a change in the law that could not have been raised within the three-year limitations period of section 822.3. We need not answer this question, as Perez has failed to establish *Padilla* should be applied retroactively to his application for postconviction relief. *See Goosman v. State*, 764 N.W.2d 539, 545 n.1 (Iowa 2009) (declining to reach statute-of-limitations argument under section 822.3 due to conclusion that applicant's federal due process claim based on the limitation of retroactivity announced in a state court decision was without merit).

The starting point for any retroactivity analysis is *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). *Teague* provides that for cases on collateral review such as this, new constitutional rules of criminal procedure will generally "not be applicable to those cases which have become

final before the new rules are announced." 489 U.S. at 310, 109 S. Ct. at 1075, 103 L. Ed. 2d at 356. "Under the *Teague* framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review." *Whorton v. Bockting*, 549 U.S. 406, 416, 127 S. Ct. 1173, 1180, 167 L. Ed. 2d 1, 10 (2007).

The State asserts Perez must concede *Padilla* "is a new rule, otherwise, his argument that *Padilla* is a new ground of law . . . under the exception to section 822.3, would be contradictory." *See United States v. Dass*, No. 05-140 (D. Minn. July 14, 2011) (finding "it would be illogical to determine *Padilla* is not a new constitutional rule of criminal procedure, but is a right newly recognized by the Supreme Court"). We agree and, in doing so, observe that Perez has not provided us with any argument in favor of applying *Padilla* retroactively to his case.[4] *See State v. Hicks*, 791 N.W.2d 89, 98 (Iowa 2010) (noting we do not, on appeal, "'assume a partisan role and undertake [a party's] research and advocacy'" (citation omitted)).

Nor has Perez asserted that any exception to the bar against the retroactive application of new rules to collateral proceedings applies here. *See Whorton*, 549 U.S. at 416, 127 S. Ct. at 1180, 167 L. Ed. 2d at 10-11 ("A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a 'watershed rule of criminal procedure implicating

[4] We note that the two federal circuit courts of appeals that have ruled on the retroactivity of *Padilla* to date are split. *Compare Chaidez v. United States*, ___ F.3d ____, ____ (7th Cir. 2011) (finding Padilla does not apply retroactively) *with United States v. Orocio*, 645 F.3d 630, 641 (3d Cir. 2011) (finding *Padilla* applies retroactively). The federal district courts are split as well, with a slight majority favoring retroactive application. *See Commonwealth v. Clarke*, 949 N.E.2d 892, 897 n.6 (Mass. 2011) (listing some of those cases).

the fundamental fairness and accuracy of the criminal proceeding.'" (citations omitted)). And the analysis provided by the State in its appellate brief establishes that neither of these exceptions is applicable to the holding of *Padilla*. *See Schriro v. Summerlin*, 542 U.S. 348, 352-53, 124 S. Ct. 2519, 2522-23, 159 L. Ed. 2d 442, 449 (2004) (stating a rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes and observing the class of "watershed" rules of criminal procedure is "extremely narrow," as the rule must be one "'without which the likelihood of an accurate conviction is *seriously* diminished'" (citation omitted)).

We accordingly conclude Perez failed to establish *Padilla* should apply retroactively to his postconviction relief application. As a result, the district court properly dismissed that claim.

IV. Conclusion.

The district court's dismissal of Perez's application for postconviction relief is affirmed.

AFFIRMED.