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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-134

Miguel Angel Carmona Sanchez,
a/k/a Manuel Andres Silva, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed August 22, 2011
Affirmed
Schellhas, Judge

Ramsey County District Court
File No. 62-KX-99-676

William H. McKibbin, Attorney at Law, Minneapolis, Minnesota (for appellant)

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

John J. Choi, Ramsey County Attorney, Mark N. Lystig, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Peterson, Judge; and Minge, Judge.

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

SCHELLHAS, Judge

Appellant challenges the district court's denial of his postconviction petition, arguing that he should be allowed to withdraw his guilty plea due to ineffective assistance of counsel. We affirm.

FACTS

Appellant Miguel Angel Carmona Sanchez was born in Mexico in 1970. Sanchez illegally entered the United States in 1985. In 1988, Sanchez applied for legalization as a seasonal agricultural worker, but his application was denied. Sanchez continued to live and work in the United States until his arrest on March 5, 1999, for possessing 245.9 grams of cocaine.

Sanchez was subject to a U.S. Immigration and Naturalization Service (INS) hold, when, on May 17, 1999, he signed a petition to enter a plea of guilty in this case. His petition contained the following language: "My attorney has told me and I understand that if I am not a citizen of the United States, conviction of a crime may result in deportation, exclusion from admission to the U.S.A., or denial of naturalization." The district court accepted the petition, Sanchez pleaded guilty to attempted first-degree controlled-substance crime in violation of Minn. Stat. §§ 152.021, subd. 1 (1998) and 609.17, subd. 1 (1998), and the district court imposed a 43-month sentence. Sanchez did not appeal.

After Sanchez served his sentence, the Minnesota Department of Corrections transferred him to the custody of the INS. The INS deported Sanchez under 8 U.S.C. § 1227(a)(2)(A)(iii) (Supp. V 1999) because he was convicted of an aggravated felony.

In March 2010, the Supreme Court decided *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010), holding that to provide constitutionally effective representation, an attorney must advise a client that his or her guilty plea carries a risk of deportation. On August 5, 2010, Sanchez filed a postconviction petition to withdraw his guilty plea and argued that, under *Padilla*, his guilty plea was unintelligent due to ineffective assistance of counsel.

The district court denied appellant's postconviction petition, concluding that "*Padilla* only requires an attorney to inform the client whether a plea carries a risk of deportation," and "the plea petition, which [Sanchez] had read to him in his native language by the interpreter, contained a clause that he may be subject to deportation based on the guilty plea." This appeal follows.

D E C I S I O N

Sanchez challenges the postconviction court's dismissal of his postconviction petition without a hearing. Postconviction courts must set an evidentiary hearing on a petition unless "the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2010). A hearing "is not required unless facts are alleged which, if proved, would entitle a petitioner to the requested relief." *Fratzke v. State*, 450 N.W.2d 101, 102 (Minn. 1990) (quotation omitted). This court reviews the district court's denial of a postconviction

petition without a hearing for an abuse of discretion. *Chambers v. State*, 769 N.W.2d 762, 764 (Minn. 2009).

Untimeliness of Postconviction Petition

Because the district court sentenced Sanchez on June 15, 1999, and Sanchez did not appeal, his conviction became final on September 13, 1999. *See* Minn. R. Crim. P. 28.02, subds. 2(1), 4(3)(a) (stating that an appeal of a final judgment in felony cases "must be filed within 90 days after final judgment," which occurs "when the district court enters a judgment of conviction and imposes . . . a sentence"); Minn. R. Crim. P. 28.05, subd. 1(1) (stating that party appealing 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.").

Because Sanchez's conviction was final before August 1, 2005, his deadline for filing a postconviction petition was July 31, 2007. *Moua v. State*, 778 N.W.2d 286, 288 (Minn. 2010). Sanchez did not file his postconviction petition until August 5, 2010. Sanchez's petition therefore must be dismissed as untimely unless an exception applies under Minn. Stat. § 590.01, subd. 4 (2010). *See Roby v. State*, 787 N.W.2d 186, 191 (Minn. 2010) (holding that "[t]he Legislature specifically provided the postconviction court with the discretion to hear a petition filed more than two years after the disposition of the direct appeal" if any of the exceptions in Minn. Stat. § 590.01, subd. 4(b), is met).

Time-Bar Exceptions

Sanchez argued to the district court that two exceptions apply. First, he argued, under Minn. Stat. § 590.01, subd. 4(b)(3), that *Padilla* announced "a new interpretation of constitutional law" and that this interpretation is retroactively applicable to his case. Second, he argued, under Minn. Stat. § 590.01, subd. 4(b)(5), that he established that his postconviction petition is not frivolous and is in the interests of justice. On appeal, Sanchez repeats his argument under section 590.01, subdivision 4(b)(3), but does not cite section 590.01, subdivision 4(b)(5), regarding the interests-of-justice exception. Instead, Sanchez argues that the district court's denial of his postconviction petition to withdraw his guilty plea constitutes a manifest injustice.

Minn. Stat. § 590.01, subd. 4(b)(3)—Padilla v. Kentucky

Padilla was a Honduras native and "a lawful permanent resident of the United States for more than 40 years." *Padilla*, 130 S. Ct. at 1477. Padilla pleaded guilty to a controlled-substance crime that is a deportable offense under 8 U.S.C. § 1227(a)(2)(B)(i) (2006). *Id.* He subsequently filed a postconviction petition, claiming that "his counsel not only failed to advise him of [the deportation] consequence prior to his entering the plea," but also told him not to worry about his immigration status because "'he had been in the country so long.'" *Id.* at 1478. Padilla alleged that "he would have insisted on going to trial if he had not received incorrect advice from his attorney." *Id.*

Citing the two-prong ineffective-assistance-of-counsel test enumerated in *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S. Ct. 2052, 2064, 2068

(1984), the Supreme Court held that to be constitutionally effective, defense counsel "must inform her client whether his plea carries a risk of deportation." *Id.* at 1482, 1486.

Because the immigration statute in *Padilla* was "succinct, clear, and explicit in defining the removal consequence," the Supreme Court stated that "counsel could have easily determined that [the petitioner's] plea would make him eligible for deportation." *Id.* at 1483. "Instead, Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country." *Id.* The Supreme Court therefore held that Padilla "sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*," i.e. that the representation fell below an objective standard of reasonableness, and reversed and remanded for a determination of whether Padilla could show prejudice. *Id.* at 1483–84, 1487.

This court recently determined that *Padilla* did not announce a new rule of criminal procedure and applies retroactively to postconviction petitioners because *Padilla* "merely applied the long-standing principles regarding ineffective assistance of counsel enunciated in *Strickland* to specific facts." *Campos v. State*, 798 N.W.2d 565, 568–69 (Minn. App. 2011), *review granted* (Minn. July 19, 2011). At the time that the district court denied Sanchez's petition, *Campos* had not yet been decided. The district court concluded that Sanchez's claim fails on the merits and therefore did not decide whether *Padilla* announced a new interpretation of law that applies retroactively. Based on this court's ruling in *Campos* that *Padilla* did not announce a new rule, the time-bar exception in section 590.01, subdivision 4(b)(3), does not apply.

Minn. Stat. § 590.01, subd. 4(b)(5)

Although Sanchez argues on appeal that the district court's denial of his postconviction petition to withdraw his guilty plea constitutes a manifest injustice, we consider this argument as an interests-of-justice argument under subdivision 4(b)(5).

A defendant is entitled to withdraw his or her guilty plea after sentencing if he or she can prove "that withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice has occurred if a plea was not accurate, voluntary, and intelligent. *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). A plea is unintelligent if the defendant does not understand the consequences of pleading guilty. *Id.* Sanchez argues that under *Padilla* his plea was not intelligent[1] because his attorney provided ineffective assistance by failing to advise him of the deportation consequences of his plea.[2]

To withdraw a guilty-plea on the basis of ineffective assistance of counsel, the petitioner must show (1) the representation fell below an objective standard of reasonableness and (2) there is a "reasonable probability" that, but for the inadequate representation, he or she would not have pleaded guilty. *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994) (citing *Strickland*, 466 U.S. at 687–88, 694, 104 S. Ct. at 2064, 2068).

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[1] Sanchez argues that the plea was inaccurate, involuntary, and not intelligent. But Sanchez only asserts that counsel failed to inform him of the deportation consequences of his plea. Therefore, Sanchez's argument is limited to whether the plea was intelligent.

[2] Sanchez also argues for the first time on appeal that he received ineffective assistance of counsel because counsel "allow[ed] the probable cause portion of the complaint to go unchallenged and did not request a Contested Omnibus Hearing or constitutional challenge to the evidence." Generally, an appellate court will not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Sanchez's argument is waived.

Here, although the district court made no finding as to whether *Padilla* announced a new rule of criminal procedure, for the purposes of Sanchez's motion, the court presumed that *Padilla* announced a new rule that "is retroactively applicable," analyzed Sanchez's ineffective-assistance-of-counsel argument based on *Padilla*, and dismissed the petition on the merits. The court noted the significant distinction between the facts in *Padilla* and this case. Unlike Padilla, who was a lawful, permanent resident of the United States, Sanchez was in the United States illegally. And the court noted that the language in the plea petition, which an interpreter read to Sanchez in his native language, included a clause that Sanchez may be subject to deportation based on his guilty plea. The court concluded that "[t]here is no dispute that [Sanchez] was informed that his plea carrie[d] a risk of deportation."

We conclude that Sanchez's claim fails the second *Strickland* prong because he cannot show that there is a reasonable probability that, but for the alleged inadequate representation, he would not have pleaded guilty. We therefore do not reach the first prong under *Strickland* of whether Sanchez's legal representation fell below an objective standard of reasonableness under *Padilla*. We reach our conclusion that Sanchez's claim of ineffective assistance of counsel fails because, unlike Padilla, who was a legal permanent resident of this country for over 40 years, Sanchez resided in the United States illegally. He illegally entered the United States in 1985 and lived and worked in the United States for 14 years until his arrest in 1999. At the time of his guilty plea, Sanchez was subject to an INS hold. His guilty plea did not change his deportation status—he

was subject to deportation both before and after his guilty plea. Moreover, he was advised through the plea petition that his guilty plea may subject him to deportation.

The district court did not abuse its discretion by denying Sanchez's postconviction petition without a hearing, and we therefore affirm.

Affirmed.