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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-319**

Valeriy Yuryevich Kostraba, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed November 21, 2011
Affirmed; motion granted in part and denied in part
Wright, Judge**

Scott County District Court
File Nos. 70-CR-08-14147, 70-CR-07-25118

David W. Merchant, Chief Appellate Public Defender, Sean M. McGuire, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

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

Patrick J. Ciliberto, Scott County Attorney, Todd P. Zettler, Assistant Scott County Attorney, Shakopee, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Klaphake, Judge; and Wright, Judge.

UNPUBLISHED OPINION

WRIGHT, Judge

Appellant challenges the denial of his postconviction petition to withdraw his guilty pleas to domestic assault with intent to inflict bodily harm and interference with a 911 call. He contends that his counsel was unconstitutionally ineffective by failing to accurately

advise him of the immigration consequences of his convictions. Appellant also argues that he should be permitted to withdraw his guilty pleas because they were improperly induced by counsel. In his pro se supplemental brief, appellant also argues that the district court failed to inquire whether appellant understood the immigration consequences of his guilty pleas. In addition to addressing appellant's arguments on the merits, the state contends that this appeal is moot and moves to strike portions of appellant's pro se supplemental brief. We affirm the district court's decision. We also grant in part and deny in part the state's motion to strike.

FACTS

Appellant Valeriy Yuryevich Kostraba, a citizen of Ukraine, was admitted to the United States as a refugee in 1997. His immigration status was subsequently adjusted to that of a lawful permanent resident alien. In 1999, Kostraba was convicted of terroristic threats committed against a family member, a violation of Minn. Stat. § 609.713, subd. 1 (1998), and child endangerment, a violation of Minn. Stat. § 609.378 (1998).

Following a July 18, 2007 altercation with his wife, Kostraba was charged with (1) felony domestic assault by strangulation, a violation of Minn. Stat. § 609.2247, subd. 2 (2006); (2) gross-misdemeanor interference with a 911 call, a violation of Minn. Stat. § 609.78, subd. 2 (2006); (3) gross-misdemeanor domestic assault with intent to inflict bodily harm, a violation of Minn. Stat. §§ 609.2242, subds. 1(2), 2, 609.2243, subd. 1 (2006); and (4) gross-misdemeanor domestic assault with intent to cause fear of immediate bodily harm or death, a violation of Minn. Stat. §§ 609.2242, subds. 1(1), 2, 609.2243, subd. 1 (2006). He pleaded guilty to felony domestic assault and the other charges were dismissed.

The district court subsequently vacated Kostraba's guilty plea on the ground that Kostraba did not have an interpreter and did not sufficiently understand the process.

Kostraba obtained new counsel and, on April 10, 2009, he pleaded guilty to gross-misdemeanor interference with a 911 call and gross-misdemeanor domestic assault with intent to cause bodily harm.¹ During the guilty-plea colloquy, Kostraba stated that he accepts the accusations "but [his] heart says no," and the decision to plead guilty "was difficult because if I get [a] felony I am facing [the] threat of deportation." The district court accepted Kostraba's guilty pleas and dismissed the charges of felony domestic assault by strangulation and gross-misdemeanor domestic assault with intent to cause fear of immediate bodily harm or death. The district court sentenced Kostraba to 364 days' incarceration for the gross-misdemeanor offenses.

The Department of Homeland Security initiated removal proceedings and, on September 9, 2009, an immigration court held that Kostraba was removable from the United States on two grounds: he had been convicted of a crime involving domestic violence, and he had been convicted two or more times for crimes involving moral turpitude, including his 1999 convictions of terroristic threats and child endangerment and his 2009 conviction of domestic assault. The immigration court denied Kostraba relief from removal and ordered Kostraba's removal from the United States to Ukraine.

¹ Kostraba also pleaded guilty to violating a no-contact order, a violation of Minn. Stat. § 518B.01, subd. 22(c) (2006 & Supp. 2007), an offense with which he was separately charged based on his conduct unrelated to the 2007 offenses. This guilty plea is not at issue in this appeal.

On March 18, 2010, Kostraba filed a pro se petition for postconviction relief seeking to withdraw his guilty pleas on the ground that he was improperly induced by counsel to plead guilty. New counsel was appointed to represent Kostraba in postconviction proceedings. On March 31, 2010, the United States Supreme Court held in *Padilla v. Kentucky* that the right to effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution requires counsel to advise a noncitizen defendant whether the client's guilty plea carries a risk of removal. 130 S. Ct. 1473, 1486 (2010). Kostraba subsequently filed a supplemental memorandum in support of his petition for postconviction relief, arguing that, under *Padilla*, his defense counsel's representation was ineffective because she failed to advise him of the immigration consequences of his guilty pleas.

Following a hearing, the district court concluded that *Padilla* does not apply retroactively to Kostraba's guilty pleas because *Padilla* announced a new rule of criminal procedure. But the district court ordered an evidentiary hearing on whether Kostraba was deprived of the right to effective assistance of counsel under the law as it existed at the time of his guilty pleas and whether his guilty pleas were improperly induced. At the evidentiary hearing, Kostraba testified that, in the days preceding his April 2009 guilty pleas, his defense counsel repeatedly advised him to accept the plea agreement offered by the state; and he repeatedly advised his counsel that he did not wish to do so. Kostraba testified that his defense counsel advised him that, if he pleaded guilty to the gross-misdemeanor charges, he would not be removed from the United States.

Kostraba's defense counsel testified that "the whole focus of [her] representation . . . was trying to maximize [Kostraba's] chances of not being deported." She referred Kostraba to an immigration attorney and, after consulting with the immigration attorney, Kostraba's defense counsel negotiated a plea agreement with the state in which Kostraba would plead guilty to one count of gross-misdemeanor domestic assault and one count of gross-misdemeanor interference with a 911 call, for which the state would seek a sentence of 364 days' incarceration. Kostraba's defense counsel testified that she negotiated this sentence in an attempt to avoid Kostraba's certain removal, which would occur if he were convicted of a felony. *See* 8 U.S.C. 1227(a)(2)(A)(i)(II) (2006) (authorizing removal of aliens from United States for conviction of an offense punishable by imprisonment for "one year or longer"). She presented this agreement to Kostraba and advised Kostraba that he could proceed to trial, where he could be convicted of any or all of the charged offenses; but if he were convicted of felony domestic assault, "he for sure was going to be deported." Kostraba's defense counsel advised Kostraba to accept the plea agreement because it offered "a chance at possibly not being deported," whereas "[a] conviction of a felony is a for sure deportation."

The district court denied Kostraba's petition for postconviction relief on February 3, 2011. The district court found the testimony of Kostraba's defense counsel credible. Based on this testimony and Kostraba's statements when pleading guilty, the district court found that the immigration consequences were "the driving force behind [Kostraba's] decisions" to plead guilty. The district court determined that the advice of Kostraba's defense counsel was not misleading because, although Kostraba was removable on two grounds regardless of the

duration of his sentence, the guilty pleas gave him “a chance” at avoiding removal by preserving his eligibility for relief through asylum, withholding of removal, and the Convention Against Torture. The district court also determined that the guilty pleas did not foreclose other possibilities for relief that may have been available regardless of whether Kostraba pleaded guilty. The district court concluded that Kostraba presented no evidence that his defense counsel’s exercise of professional judgment as to an immigration court’s likely interpretation of the relevant statutes fell below an objective standard of reasonableness. Therefore, Kostraba failed to establish that he received ineffective assistance of counsel. The district court also held that Kostraba failed to establish that his guilty pleas were improperly induced. This appeal followed.

D E C I S I O N

I.

As a preliminary matter, the state contends that this appeal should be dismissed as moot because Kostraba has been removed from the United States on grounds that are unrelated to the convictions at issue here. We will dismiss a case as moot if an event occurs that makes a decision on the merits unnecessary or an award of effective relief impossible. *Carney v. State*, 792 N.W.2d 115, 118 (Minn. App. 2010), *review denied* (Minn. Mar. 15, 2011).

Although Kostraba’s 1999 convictions of terroristic threats and child endangerment rendered him removable regardless of his 2009 convictions, his postconviction appeal of the 2009 convictions—which is before us—is not moot. Effective relief remains possible. We may grant effective relief by reversing the denial of Kostraba’s request to withdraw his guilty

pleas and remanding to the district court for additional proceedings on the plea withdrawal and charges should Kostraba re-enter the United States. Moreover, a reversal that allows Kostraba to withdraw his guilty pleas may impact any attempt Kostraba makes to re-enter the United States. *See United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2, 103 S. Ct. 2573, 2575 n.2 (1983) (holding that criminal appeal was not moot because if deported defendants were to attempt to re-enter the United States, upholding their convictions would subject them to collateral legal consequences). Because Kostraba's removal from the United States does not prevent effective relief, Kostraba's appeal is not moot.

II.

Kostraba challenges the district court's refusal to permit him to withdraw his guilty pleas. He maintains that his guilty pleas are invalid because he received ineffective assistance of counsel when his defense counsel failed to advise him of the immigration consequences of convictions of the charged offenses.

We review a district court's decision to deny the withdrawal of a guilty plea for an abuse of discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998). As to issues of fact, we determine whether the evidence is sufficient to sustain the postconviction court's findings. *Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003). As to issues of law, we exercise de novo review. *Id.*

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that defense counsel's performance fell below an objective standard of reasonableness and that the defendant was prejudiced by defense counsel's deficient performance. *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994) (citing *Strickland v.*

Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064 (1984)). The burden of proof rests with the defendant, who must overcome the “strong presumption that counsel’s performance fell within a wide range of reasonable assistance.” *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007); accord *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065 (observing that judicial review should be “highly deferential” to counsel’s performance). When a defendant fails to prove either deficient performance of counsel or resulting prejudice, the claim of ineffective assistance of counsel fails. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *State v. Blanche*, 696 N.W.2d 351, 376 (Minn. 2005).

In *Padilla*, the United States Supreme Court held that, for purposes of the Sixth Amendment right to effective assistance of counsel, “counsel must inform her client whether [the guilty] plea carries a risk of deportation.” 130 S. Ct. at 1486. Here, the district court concluded that *Padilla* announced a new rule of criminal procedure when it was decided on March 31, 2010. Therefore, the district court concluded that *Padilla* is not retroactively applicable to Kostraba’s convictions, which became final on July 9, 2009. See *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.” (quotation omitted)); see also Minn. R. Crim. P. 28.05, subd. 1(1) (stating that a party must file appeal “within 90 days after judgment and sentencing”).

We subsequently held in *Campos v. State* that the rule announced in *Padilla* is not a new rule of criminal procedure because it “merely applied the long-standing principles regarding ineffective assistance of counsel enunciated in *Strickland* to specific facts.” 798 N.W.2d 565, 568-69 (Minn. App. 2011), review granted (Minn. July 19, 2011). Therefore,

Padilla's holding applies retroactively to cases on collateral review. *Id.* Accordingly, the district court erred by holding that *Padilla* does not apply retroactively. We now apply *Padilla* to the facts and circumstances here.²

Our application of *Padilla* focuses on the first prong of the *Strickland* test, whether counsel's performance fell below an objective standard of reasonableness. 130 S. Ct. at 1482-83. Under *Padilla*, "counsel must inform her client whether [the guilty] plea carries a risk of deportation." *Id.* at 1486. When the deportation consequence of a criminal conviction is "truly clear," defense counsel must provide accurate information regarding the adverse immigration consequence. *Id.* at 1483. But in cases "in which the deportation consequences of a particular [guilty] plea are unclear or uncertain" and "the law is not succinct and straightforward[,] . . . 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.* In *Padilla*, defense counsel incorrectly advised the defendant that his guilty plea would not result in his removal from the United States. *Id.* at 1483. The *Padilla* court held that defense counsel "could have easily determined that [the defendant's guilty] plea would make him eligible for deportation simply from reading the text" of a single statutory provision that specifically commands removal for the offense to which the defendant pleaded guilty. *Id.* Because "the terms of the relevant immigration statute are

² Kostraba seeks a remand to the district court to perform the *Padilla* analysis and reopen the record if necessary. But application of the correct legal standard to the undisputed facts of this case presents a question of law, which we review de novo. *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001). Moreover, Kostraba fails to identify any evidence that is lacking or how the outcome of the case would differ if the district court applied the *Padilla* standard. In light of the district court's well-developed record, we conclude that a remand is unnecessary.

succinct, clear, and explicit in defining the removal consequence for [the defendant's] conviction” and defense counsel’s advice was incorrect, defense counsel’s performance in *Padilla* fell below an objective standard of reasonableness. *Id.*

Here, the immigration consequences for Kostraba of a guilty plea to either a gross-misdemeanor domestic-assault offense or a felony domestic-assault offense are readily distinguishable in complexity from the facts of *Padilla*. Determining the effect of a gross-misdemeanor or a felony domestic-assault conviction on Kostraba’s eligibility for removal or relief from removal required consulting multiple provisions of immigration law, considering the likely interpretation of ambiguous terminology, and evaluating an immigration court’s likely application of federal immigration caselaw.³ Because of the numerous relevant

³ The effect of either a felony conviction or a gross-misdemeanor conviction on Kostraba’s eligibility for removal or relief from removal depends on several statutory provisions, the Convention Against Torture, and immigration caselaw. *See, e.g.*, 8 U.S.C. §§ 1158 (asylum), 1159(a) (adjustment of status), 1159(c) (refugee waiver), 1229b(a) (cancellation of removal), 1231 (withholding of removal) (2006); 8 C.F.R. § 208 (2009) (asylum and withholding of removal under Convention Against Torture). Many of the grounds for relief from removal contain ambiguous phrases and depend on discretionary determinations by an immigration court. For example, determining eligibility for cancellation of removal requires analysis of at least six different statutory provisions and immigration caselaw. *See* 18 U.S.C. § 16 (2006) (defining “crime of violence”), 8 U.S.C. §§ 1101(a)(43)(F) (defining “aggravated felony”), 1182(a)(2)(A)(i)(I) (crimes of moral turpitude render noncitizen inadmissible), 1182(a)(2)(A)(ii) (exception to moral turpitude provision), 1229b(a) (eligibility requirements for cancellation of removal), 1229b(d)(1) (stop-time provision) (2006); *Briseno-Flores v. Attorney Gen. of U.S.*, 492 F.3d 226, 230-31 (3d Cir. 2007) (addressing “stop-time events”). And determining eligibility for asylum and withholding of removal requires interpreting multiple statutory provisions and conducting a fact-intensive analysis. *See, e.g.*, 8 U.S.C. §§ 1158 (eligibility for asylum), 1231(b)(3) (eligibility for withholding from removal), 1231(b)(3)(B)(ii) (rendering noncitizen statutorily ineligible for withholding from removal if noncitizen has been convicted of a “particularly serious crime”) (2006); *In re Frentescu*, 18 I. & N. Dec. 244, 247 (1982) (describing factors relevant to determining whether a crime is a “particularly serious crime”), *superseded by statute on other grounds as stated in Mosquera-Perez v. I.N.S.*, 3 F.3d 553, 557 (1st Cir. 1993); *see also Hamama v. I.N.S.*, 78 F.3d 233, 239-40 (6th Cir. 1996) (applying *Frentescu*).

statutes, the complex rules of eligibility for relief, and the discretionary nature of some forms of relief, the deportation consequences and the likelihood of Kostraba obtaining relief from removal could not “easily be determined.” *Padilla*, 130 S. Ct. at 1483. Thus, under *Padilla*, Kostraba’s defense counsel needed to do no more than advise Kostraba that the “pending criminal charges may carry a risk of adverse immigration consequences.” *Id.*

The district court found, and the record reflects, that Kostraba’s defense counsel advised him that the guilty plea offered the possibility of avoiding removal, whereas a felony domestic-assault conviction offered him no chance at avoiding removal. The focus of defense counsel’s representation was to maximize the opportunity for the immigration court to exercise its discretion as to whether removal should be ordered. The district court carefully analyzed the relevant immigration law and determined that neither a conviction of felony domestic assault nor the gross-misdemeanor offenses to which Kostraba pleaded guilty would preclude his eligibility for relief from removal. But by pleading guilty to the gross-misdemeanor offenses, Kostraba had a better chance of obtaining relief from removal than he would with a felony domestic-assault conviction. The district court determined that the legal advice that Kostraba’s defense counsel provided—rejecting the plea agreement and being convicted of a felony offered “no chance” at avoiding removal—reflected her sound professional judgment.

We agree. Determining the immigration consequences of pleading guilty to the gross-misdemeanor offenses required Kostraba’s defense counsel to interpret the relevant statutes and exercise her professional judgment as to the immigration court’s likely interpretation of ambiguous phrases and the probability that the immigration court would elect to grant

discretionary relief. Kostraba's defense counsel's advice as to the probable immigration consequences of a conviction of felony domestic assault versus guilty pleas to the gross-misdemeanor offenses reflected the sound exercise of her professional judgment. She correctly advised Kostraba that both a felony conviction and the gross-misdemeanor guilty pleas carried a risk of adverse immigration consequences. But deportation was virtually certain with a felony conviction. Accordingly, her representation did not fall below an objective standard of reasonableness. Because Kostraba fails to establish that his counsel's representation was deficient, we need not reach the second prong of his ineffective-assistance-of-counsel claim. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064 (requiring that defendant prove both deficiency of counsel's performance and resulting prejudice).⁴

III.

In his pro se supplemental brief, Kostraba contends that the district court failed to inquire, pursuant to Minn. R. Crim. P. 15.01, whether Kostraba understood that “[i]f the defendant is not a citizen of the United States, a guilty plea may result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen.” Minn. R. Crim. P. 15.01, subd. 1(6)(l). The record reflects that neither the district court nor Kostraba's counsel made this inquiry at the guilty-plea hearing. But failure to interrogate a defendant pursuant to Rule 15.01 does not invalidate a guilty plea when the record is adequate to establish that the guilty plea was intelligently and voluntarily given.

⁴ Kostraba also argues that his guilty pleas were involuntary because his defense counsel improperly pressured him to plead guilty by presenting an illusory “chance” at avoiding removal. In light of our decision that the advice of Kostraba's defense counsel reflected her sound professional judgment as to the likelihood of relief from removal, we reject Kostraba's claim that he was improperly induced to plead guilty.

State v. Doughman, 340 N.W.2d 348, 351 (Minn. App. 1983), *review denied* (Minn. Mar. 15, 1984); *cf. State v. Lopez*, 794 N.W.2d 379, 384-85 (Minn. App. 2011) (holding that numerous deficiencies in the guilty-plea colloquy with pro se defendant, including failure to advise through a written rule 15.02 petition that pleading guilty could lead to adverse immigration consequences, was reversible error).

The record contains ample evidence that Kostraba was informed of the immigration consequences before he pleaded guilty. Kostraba signed the rule 15 guilty plea petition that states: “My attorney has told me and I understand that if I am not a citizen of the United States this plea of guilty may result in deportation, exclusion from admission to the United States of America or denial of citizenship.” Before pleading guilty, he affirmed on the record that his counsel had discussed his “rights, [the] consequences and [his] choices” with him, and he testified that the decision to plead guilty was “difficult because if I get [a] felony I am facing [the] threat of deportation.” Moreover, Kostraba testified at the postconviction evidentiary hearing that his counsel reviewed the guilty-plea petition and discussed the ramifications of the guilty pleas with him before he signed the petition and pleaded guilty. Because there is ample evidence that Kostraba’s guilty pleas were voluntary and intelligent, the district court’s failure to inquire whether Kostraba understood the immigration consequences of his guilty pleas as required by rule 15.01 is not reversible error.

IV.

The state moves to strike seven pages of Kostraba’s pro se supplemental brief in which Kostraba asserts facts outside the record and makes arguments based on those facts. The record on appeal consists of only papers filed in the district court, offered exhibits, and

the transcript of the proceedings. Minn. R. Crim. P. 28.02, subd. 8. Pro se litigants generally are held to the same standards as attorneys, and a pro se litigant's allegation that is outside the record must be disregarded. *State v. Meldrum*, 724 N.W.2d 15, 22 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007). Our review establishes that Kostraba refers to facts in his pro se supplemental brief that are not contained in the record and asserts arguments based on those facts. Accordingly, we grant the state's motion in part and decline to consider those portions of Kostraba's pro se supplemental brief that assert facts outside the record and arguments based on those assertions. But we deny the state's motion with respect to those facts that are part of the record and the arguments founded thereon.

Affirmed; motion granted in part and denied in part.