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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-507

Orlando Manuel Bobadilla, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 26, 2011
Affirmed
Minge, Judge

Kandiyohi County District Court
File Nos. 34-T0-02-5480, 34-T4-01-5990

John E. Mack, Mack & Daby, P.A., New London, Minnesota (for appellant)

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

Richard L. Ronning, Willmar City Attorney, Willmar, Minnesota (for respondent)

Considered and decided by Hudson, Presiding Judge; Minge, Judge; and Ross, Judge.

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

MINGE, Judge

Appellant challenges the district court's denial of his petition for postconviction relief, arguing that he should be allowed to withdraw his guilty pleas to two misdemeanor convictions from 2002 because he was not informed at the time of the pleas of the

immigration consequences. Because appellant failed to present any admissible evidence in support of his claims, we affirm.

FACTS

Appellant Orlando Bobadilla is a Canadian citizen who faces deportation for convictions of two misdemeanor crimes of moral turpitude. Both convictions were based on guilty pleas; on April 23, 2002, Bobadilla pleaded guilty to providing a false name to a police officer under Minn. Stat. § 609.506, subd. 1 (2000), and on December 10, 2002, Bobadilla pleaded guilty to theft under Minn. Stat. § 609.52, subd. 2(1) (2002). Bobadilla did not file a direct appeal for either conviction.[1]

On August 13, 2010, Bobadilla filed a petition for postconviction relief seeking to withdraw his 2002 guilty pleas. The district court conducted a hearing on the issue. Bobadilla argued that he did not have a lawyer at the time of either guilty plea, that the district court did not inform Bobadilla of the immigration consequences of pleading guilty, and that this failure to inform prevented Bobadilla's guilty plea from being intelligent. However, Bobadilla did not submit transcripts of either plea hearing,

[1] In a series of proceedings unrelated to this current matter, Bobadilla appealed 2003 convictions of first- and second-degree criminal sexual conduct. *State v. Bobadilla*, 690 N.W.2d 345 (Minn. App. 2004). This court reversed his convictions and remanded for a new trial because of a Confrontation Clause violation. *Id.* at 351. The Minnesota Supreme Court reversed this court's decision and reinstated the convictions. *State v. Bobadilla*, 709 N.W.2d 243, 257 (Minn. 2006). Bobadilla then filed a writ of habeas corpus in federal district court, which vacated Bobadilla's convictions. *Bobadilla v. Carlson*, 570 F. Supp. 2d 1098, 1113 (D. Minn. 2008). The Eighth Circuit affirmed the federal district court's decision. *Bobadilla v. Carlson*, 575 F.3d 785, 794 (8th Cir. 2009), *cert. denied*, 130 S. Ct. 1081 (Jan. 11, 2010). Bobadilla alleges that, when he was released from prison after his sexual-conduct convictions were vacated, the government "noticed" his immigration status, identified the misdemeanor convictions now being appealed, and began deportation proceedings.

introduce witness testimony that Bobadilla was not advised of the immigration consequences at the time of the guilty pleas, or submit an affidavit from Bobadilla alleging the district court had not advised him of such consequences. Instead, Bobadilla's current attorney, who was not his attorney at the time of the guilty pleas, submitted an affidavit stating that Bobadilla had not been advised of the immigration consequences.

On February 14, 2011, the district court denied Bobadilla's petition for postconviction relief. The district court reasoned that Bobadilla had offered no evidence of "what, if any, advice he was given . . . in regards to the immigration consequences of a guilty plea." This appeal follows.

D E C I S I O N

In reviewing a postconviction court's denial of relief, issues of law are reviewed de novo and issues of fact are reviewed for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). We review the postconviction court's final determination for an abuse of discretion. *Id.* A petitioner seeking postconviction relief must prove the alleged facts by a "fair preponderance of the evidence." Minn. Stat. § 590.04, subd. 3 (2010). To meet that burden, the petition "must be supported by more than mere argumentative assertions that lack factual support." *Henderson v. State*, 675 N.W.2d 318, 322 (Minn. 2004).

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.*

"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. To ensure an intelligent guilty plea, Minnesota requires that either the district court or defendant's counsel explain the plea agreement and the immigration consequences of such a plea to the defendant. Minn. R. Crim. P. 15.02, subd. 1; *see also State v. Lopez*, 794 N.W.2d 379, 384–85 (Minn. App. 2011) (holding that the failure to advise a defendant of the immigration consequences of a guilty plea establishes a fair-and-just reason to withdraw the plea).

Bobadilla argues that his guilty pleas were not intelligent because he was unrepresented at the plea hearings and the district court failed to inform him of the immigration consequences of pleading guilty to misdemeanor crimes of moral turpitude. To prove this allegation, Bobadilla cited to the sentencing orders from both convictions and submitted an affidavit from his current attorney stating that Bobadilla was not informed of the immigration consequences of pleading guilty. The sentencing orders do not indicate whether Bobadilla was represented by counsel or what information was given to Bobadilla prior to accepting his guilty pleas; indeed, there is no designated space for such information on the form used for the sentencing orders. And Bobadilla's current attorney was not the attorney of record at the time of the pleas and does not have personal

knowledge of the plea hearings. Although Bobadilla's attorney likely has personal knowledge of Bobadilla's out-of-court assertions, those assertions are still inadmissible hearsay unless an exception applies. *See* Minn. R. Evid. 801(d) (admitting a party's own hearsay statements only if the party testifies at the hearing or if the statement is against that party's interests).

More importantly, Bobadilla's argument is compromised by presentencing portions of the record. The record for each conviction contains a request for a public defender and an order appointing such a public defender. And during the proceedings regarding the theft charge, Bobadilla's public defender filed a demand for disclosure with the district court approximately two weeks prior to Bobadilla's guilty plea, indicating that defense counsel was then engaged on his behalf. Neither file contains any indication that Bobadilla dismissed or otherwise waived his right to an attorney before the plea hearing. We conclude that the clear implication from the record is that Bobadilla was represented by counsel when he pleaded guilty to both charges.

Without a transcript of the plea hearings, we are unable to determine whether the district court or defense counsel advised Bobadilla of the immigration consequences of a guilty plea. *See Custom Farm Servs., Inc. v. Collins*, 306 Minn. 571, 572, 238 N.W.2d 608, 609 (1976) (declining to consider an allegation of error in the absence of a transcript). It is the appellant's burden to prove his allegations and to supply an adequate record. *See* Minn. R. Crim. P. 28.02, subds. 8, 9 (providing for appellant ordering transcript and supplying record). An appellant may not obtain a new trial without presenting an adequate record. *State v. Anderson*, 351 N.W.2d 1, 2 (Minn. 1984). To

prove Bobadilla's allegations, we require either a transcript of the plea hearings or a statement of the case pursuant to Minn. R. Crim. P. 28.02, subds. 8, 9; or the counterpart in Minn. R. Civ. App. P. 110.02, .03; or an affidavit signed by Bobadilla or the judge or prosecuting attorney at the time stating that nobody advised Bobadilla of the immigration consequences of a guilty plea. Without such an effort to supply a record or a showing that such an effort is not possible, we cannot consider Bobadilla's guilty-plea-withdrawal requests and they fail.

Bobadilla argues that he did not have to prove that he was not advised of the immigration consequences of pleading guilty because, in 2002, "nobody" advised criminal defendants of such information. However, in 1998, four years before Bobadilla's guilty pleas, Minnesota amended its rules of criminal procedure, requiring the district court or defendant's attorney to advise defendants, including misdemeanor defendants, of the immigration consequences of a guilty plea. *Lopez*, 794 N.W.2d at 383 (citing Minn. R. Crim. P. 15.02). The approved form for a petition to enter a misdemeanor guilty plea includes that advisory. Minn. R. Crim. P. 15, App. B. It is difficult for this court to presume that, four years after the adoption of that rule and form, district court judges and criminal-defense attorneys were ignoring this requirement and not using the established form. *See White v. Minn. Dep't of Natural Resources*, 567 N.W.2d 724, 734 (Minn. App. 1997) (stating that error is never presumed on appeal), *review denied* (Minn. Oct. 31, 1997).

Because Bobadilla failed to provide a record that would enable this court to determine whether he was advised of the immigration consequences of pleading guilty,

we conclude that the district court did not abuse its discretion in denying Bobadilla's petition for postconviction relief.

Affirmed.

Dated: