STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1539

Otis Blackie Tengben, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 8, 2013
Affirmed
Cleary, Judge

Hennepin County District Court
File No. 27-CR-06-012974

David W. Merchant, Chief Appellate Public Defender, Julie Loftus Nelson, Special Assistant Appellate Public Defender, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney; Minneapolis, Minnesota; and

John J. Thames, Brooklyn Center City Attorney, Carson, Clelland & Schreder, Minneapolis, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Cleary, Judge; and Smith, Judge.

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

CLEARY, Judge

Appellant challenges the denial of his petition for postconviction relief seeking to withdraw his guilty plea to misdemeanor domestic assault, arguing that his plea was not intelligent because he was not advised of the immigration consequences of his plea. Appellant asserts that the state waived the statute of limitations in Minn. Stat. § 590.01, subd. 4 (2012), and alternately, that an exception to the two-year statute of limitations applies. We affirm.

FACTS

Hennepin County charged appellant, a Liberian citizen, with fifth-degree domestic assault, in violation of Minn. Stat. § 609.2242, subd. 1 (2004), for an offense that occurred on February 23, 2006. On June 28, 2006, the date set for trial, appellant's privately-retained counsel did not appear. Appellant asked for a public defender, but the district court told him he would have to proceed without counsel because his case was on the calendar for that day. The district court also advised appellant to talk to the prosecutor about resolving the matter because the victim's injuries—a perforated eardrum—corroborated her description of what happened, so "if you went before a jury it's going to be hard for you to disprove something like that, you know."

After the jury had been called, appellant and the prosecuting attorney discussed plea negotiations. Appellant decided to plead guilty with the agreement that he would be sentenced according to the probation report's recommendation. Appellant signed a plea petition and he waived his rights to representation by counsel and to have a trial on the

record. Appellant also acknowledged that the assault charge was subject to enhancement. Appellant responded affirmatively to the prosecuting attorney's questions concerning a factual basis for the plea. The district court accepted the plea.

Sentencing was held on July 10, 2006. Based on the probation officer's recommendation, the court stayed imposition of the sentence for two years under Minn. Stat. § 609.135 (2004) and placed appellant on probation. Appellant appeared for a probation violation hearing on February 23, 2007. The district court found that he violated designated conditions of probation and revoked the stay of imposition. The district court sentenced appellant to 90 days in jail, stayed 75 of the 90 days for two years with credit for 15 days, suspended the fine, and continued the previously-ordered probation conditions.

In February 2012, after appellant learned that the federal government had initiated removal proceedings against him, he filed a postconviction petition seeking to withdraw his guilty plea to the domestic assault charge. The state opposed the petition, arguing that it was untimely under the two-year time bar in Minn. Stat. § 590.01, subd. 4(a)(1), and that appellant had not established that his petition met an exception to the time bar. Appellant responded that the state waived the statute of limitations argument because the state filed its answer over a month late. Alternately, appellant argued that two exceptions to the two-year time bar apply. First, his petition meets the exception set out in subdivision 4(b)(3) because *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), reversed state law that had previously held that the immigration consequences of a guilty plea were

collateral.[1] Second, his claim that he was not advised of the immigration consequences of his plea meets the interests-of-justice exception under subdivision 4(b)(5).

The district court denied appellant's petition for postconviction relief because it was untimely. This appeal followed.

D E C I S I O N

When reviewing a postconviction court's decision, "we examine only whether the postconviction court's findings are supported by sufficient evidence." *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). We "will reverse a decision of a postconviction court only if that court abused its discretion." *Id.* Issues of law, however, are reviewed de novo. *Id.*

A.

A defendant may withdraw a guilty plea at any time, including after sentencing, if withdrawal is necessary to correct a manifest injustice. Minn. R. Crim. P. 15.05, subd. 1. A guilty plea that is not constitutionally valid, i.e., a plea that is not accurate, voluntary, and intelligent, automatically meets the manifest-injustice standard in rule 15.05, subdivision 1. *Perkins v. State*, 559 N.W.2d. 678, 688 (Minn. 1997). A defendant

[1] Prior to *Padilla*, the Minnesota Supreme Court had held that the intelligence requirement of a plea meant that a defendant had to be aware of the direct consequences, which "flow definitely, immediately, and automatically from the guilty plea," such as the sentence. *Alanis v. State*, 583 N.W.2d 573, 578 (Minn. 1998), *abrogated in part by Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). The *Alanis* court had held that deportation is not a direct consequence of a guilty plea because there are administrative procedures that must occur prior to deportation proceedings. *Alanis*, 583 N.W.2d at 578–79. *Padilla* did not apply the direct/collateral distinction to deportation consequences. 130 S. Ct. at 1481–82. Nonetheless, the Supreme Court held that counsel's failure to advise a defendant of the immigration consequences of a guilty plea is constitutionally deficient representation under the Sixth Amendment. *Id.* at 1482, 1487.

seeking to withdraw a guilty plea after sentencing must do so in a petition for postconviction relief. *See James v. State*, 699 N.W.2d 723, 727 (Minn. 2005). But a postconviction petition must be filed within two years of the "entry of judgment of conviction or sentence if no direct appeal is filed," or within two years of the date the claim arises if brought under an exception to the two-year time bar. Minn. Stat. § 590.01, subd. 4(a)(1), (b), (c). There is no dispute that appellant filed his postconviction petition more than two years after sentencing.

Appellant argues that he should be allowed to withdraw his guilty plea under the manifest-injustice standard because his plea was not intelligent where he was not advised of the deportation consequences of his guilty plea. *See Padilla*, 130 S. Ct. at 1483. But *Padilla* dealt with the Sixth Amendment right to the effective assistance of counsel, and appellant was not represented by counsel. Instead, appellant's claim that his plea was not intelligent is really grounded in the immigration-advisory requirement in Minn. R. Crim. P. 15.02, subd. 1 (2012).[2] According to rule 15.02, subdivision 1, before the district court accepts a guilty plea, either the court or counsel must question the defendant as to whether the defendant understands that "if 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." *Id.* This requirement became effective on January 1, 1999, and was in effect at the time appellant pleaded

[2] The 2004 version of the rule is substantively similar to the current version of the rule. The changes reflect renumbering of the paragraphs.

guilty to this offense. *See Campos v. State*, 816 N.W.2d 480, 499 (Minn. 2012), *cert. denied*, 133 S. Ct. 938.

According to rule 15, the district court had the duty to advise appellant of the immigration consequences of his plea because appellant was unrepresented by counsel. *State v. Lopez*, 794 N.W.2d 379, 383 (Minn. App. 2011). But the rule 15 plea petition that appellant signed did not include the advisory, and the district court failed to advise appellant of the immigration consequences of his plea on the record. This court has held that the district court's failure to comply with the immigration inquiry in rule 15 warrants plea withdrawal under the fair-and-just standard for guilty-plea withdrawal before sentencing. *Id.* at 384; Minn. R. Crim. P. 15.05, subd. 2. This court also noted that plea withdrawal would be necessary under the manifest-injustice standard when the district court fails to comply with rule 15 requirements and the failure "denies a defendant a constitutional right." *Lopez*, 794 N.W.2d at 384 (citations omitted). Here, the district court's failure to comply with rule 15.02, subdivision 1(3), and advise appellant of the immigration consequences of his plea implicates the constitutional requirement that a plea be intelligent. *See Campos*, 816 N.W.2d at 499–500 (reversing and remanding to consider whether Campos was entitled to withdraw his plea due to the district court's failure to follow the immigration advisory in rule 15). "When reviewing challenges to guilty pleas entered without the benefit of counsel, appellate courts 'have been strict.'" *Lopez*, 794 N.W.2d at 384 (quoting *State v. Motl*, 337 N.W.2d 664, 666 (Minn. 1983)). Applying these principles, we are satisfied that appellant has demonstrated that his plea was not intelligent under the manifest-injustice standard for guilty-plea withdrawal.

B.

Although appellant can establish a manifest injustice warranting guilty-plea withdrawal, his next hurdle is the two-year time bar for postconviction claims. Minn. Stat. § 590.01, subd. 4. Appellant relies on *Carlton v. State*, 816 N.W.2d 590 (Minn. 2012), as authority for his argument that the state waived the statute of limitations by filing its answer to his petition over a month after the deadline. The statute gives the state 20 days, "or within such time as the [assigned judge] may fix" to answer a postconviction petition. Minn. Stat. § 590.03 (2010). The *Carlton* court held that the two-year time limit in subdivision 4(c) is not a jurisdictional bar to a claim but may be waived by the state's failure to assert it. *Carlton*, 816 N.W.2d at 601. The court reached this conclusion, in part, because equity is an important part of postconviction relief, so the statute of limitations in a postconviction claim is subject to equitable principles. *Id.* at 606. *Carlton* merely recognized that a district court may grant postconviction relief beyond the two-year statute of limitations if the state fails to assert it. *Id.* at 600–01. But in this case the state did not fail to assert the two-year statute of limitations; the state was late in filing its answer asserting the time bar. Because appellant had the burden to establish that he was entitled to postconviction relief, the district court could have denied the petition with or without any response from the state. *See* Minn. Stat. § 590.04, subd. 3 (2010). This is also consistent with the statute's plain language that the district court may "fix" a different date to answer a postconviction petition. *See Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536, 539 (Minn. 2007) (noting that statutory construction is not necessary when the legislature's intent is clear from the plain

meaning of the statute). Accordingly, we are satisfied that the state did not waive the statute of limitations by filing an untimely answer.

C.

Alternately, appellant argues that the court can consider the merits of his postconviction petition because an exception to subdivision 4(b) applies. First, appellant relies on the exception for new interpretations of federal or state constitutional or statutory law that is retroactively applicable to his case. *See* Minn. Stat. § 590.01, subd. 4(b)(3). Relying on this exception, appellant argues that the Supreme Court's decision in *Padilla* is a new interpretation of law that is retroactively applicable. However, both the United States Supreme Court and the Minnesota Supreme Court have held that *Padilla* does not apply retroactively. *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013); *Campos*, 816 N.W.2d at 499.

Alternately, appellant argues that the court can consider his petition under the interests-of-justice exception in subdivision 4(b)(5). The district court implicitly rejected appellant's interests-of-justice argument when it held that the only argument that fit an exception to the statute of limitations was the *Padilla* argument. According to the interests-of-justice exception, appellant must meet two requirements: (1) that the petition is not frivolous and (2) that reviewing the petition is in the interests of justice. *State v. Berkovitz*, 826 N.W.2d 203, 209 (Minn. 2013). A petition is frivolous when it is perfectly apparent that the petition is without merit. *Gassler v. State*, 787 N.W.2d 575, 586 (Minn. 2010). For example, a claim is frivolous if it is procedurally barred by *Knaffla*. *Berkovitz*, 826 N.W.2d at 209. Here, appellant's claim is not frivolous because

this is his first review of his conviction by postconviction, and appellant can establish that his petition has merit because his plea was not intelligent.

A postconviction petition under the interests-of-justice exception must be filed within two years of the date the interests-of-justice claim arises. *See* Minn. Stat. § 590.01, subd. 4(c), *see also Sanchez v. State*, 816 N.W.2d 550, 558 (Minn. 2012) (holding that the two-year time limit in section 590.01, subdivision 4(c), applies to all of the subdivision 4(b) exceptions, including the interests-of-justice exception). Appellant filed his petition on February 27, 2012. In order to be timely, his claim must have arisen no earlier than February 27, 2010. "Claim refers to the event that supports a right to relief under the asserted exception." *Yang v. State*, 805 N.W.2d 921, 925 (Minn. App. 2011) (quotation marks omitted), *review denied* (Minn. Aug. 7, 2012). The date the claim arises is a question of fact. *Sanchez*, 816 N.W.2d at 560.

In *Sanchez*, the supreme court used the objective "knew or should have known" standard, as applied "in the context of other time-limitations provisions." 816 N.W.2d at 558. "[T]he interests-of-justice exception is triggered by an injustice that *caused* the petitioner to miss the primary deadline in subdivision 4(a), not the *substance* of the petition." *Id.* at 557 (emphasis in original). When the injustice is the same as the substance of the petition, and the substance of the petition is based on something that happened at the time the conviction became final, "the injustice simply cannot have caused the petitioner to miss the 2-year time limit in subdivision 4(a), and therefore is not the type of injustice contemplated by the interests-of-justice exception in subdivision 4(b)(5)." *Id.* Applying these principles, the substance of appellant's petition under the

interests-of-justice exception was the date his invalid guilty plea was entered on June 28, 2006. This is also the date appellant's claim arose under the objective knew-or-should-have-known standard articulated in *Sanchez*.[3]

Although appellant's claim that his guilty plea was not intelligent has substantive merit, appellant cannot meet an exception to the two-year time bar. Because his petition for postconviction relief is untimely, we hold that the district did not abuse its discretion in denying appellant's postconviction petition.

Affirmed.

[3] We note that this seems a harsh result considering that appellant was unrepresented by counsel. But we are "bound by supreme court precedent." *State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010), *review denied* (Minn. Sept. 21, 2010). Indeed, the only scenario in which appellant's postconviction petition is timely under the interests-of-justice exception is if his claim arose on the date he learned that his plea to domestic assault would have immigration consequences. This occurred in October 2011 when he first learned of the Immigration and Customs Enforcement (ICE) detainer. But *Sanchez* soundly rejected a subjective, actual-knowledge standard in favor of the knew-or-should-have-known standard, and we must follow that precedent.