STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1027

Erasmo Monge Rauda, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed May 15, 2017
Affirmed
Rodenberg, Judge

Dakota County District Court
File No. 19HA-CR-13-3583

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

James C. Backstrom, Dakota County Attorney, Heather D. Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Ross, Judge; and Kalitowski, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

RODENBERG, Judge

Appellant Erasmo Monge Rauda[1] challenges the postconviction court's denial of his motion to withdraw his guilty plea without an evidentiary hearing. Appellant argues that his mental state at the time of the plea hearing rendered his guilty plea not voluntary or intelligent. He also argues that his guilty plea is invalid because of ineffective assistance of counsel. We affirm.

FACTS

Appellant is a citizen of El Salvador and is living in the United States. In 2007, he was charged with being subject to removal proceedings under the Immigration and Nationality Act (INA) as an alien present in the United States who had not been admitted or paroled. *See* 8 U.S.C. § 1182(a)(6)(A)(i) (2012) (stating that an alien present without admission or parole is inadmissible). He thereafter applied for and received Temporary Protected Status (TPS), which provided temporary protection from removal proceedings. *See* 8 U.S.C. § 1254a (2012) (defining the status and providing eligibility requirements).

In 2013, appellant was charged with fourth-degree criminal sexual conduct. Appellant pleaded guilty to that charge pursuant to a plea agreement. The plea petition included the following: "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

[1] Appellant's name has appeared in the district court record in several different ways, including: Erasmo Rauda Monge, Erasmo Raude Monge, and Erasmo Rauda-Monge. We refer to appellant by the name used by the district court and in appellant's brief.

to the United States of America or denial of citizenship." The petition was written in English, but appellant confirmed that, with the aid of an interpreter, he had discussed the petition with his attorney. He testified that he was satisfied with his understanding of the contents of the petition.

Appellant was questioned by the district court and defense counsel about his mental state. Appellant testified that he has depression, that he was taking identified medications, and that he has memory lapses caused by post-traumatic stress disorder (PTSD). When asked if he was thinking with a clear mind, appellant initially answered the district court's question in the affirmative, but when later asked a similar question by defense counsel, he answered, "Not very well." When asked if he would prefer that proceedings be delayed until he was thinking with a clear mind, appellant answered, "I would not change my mind now." When asked if he had forgotten things that had been discussed with defense counsel earlier in the day, appellant answered, "Just some things. But, for whatever has been said here, no, I remember."

Defense counsel asked appellant about their discussions concerning the decision to enter a guilty plea, the trial rights appellant would waive by doing so, and appellant's understanding of the agreement. Immigration consequences were discussed on the record:

> Defense counsel: . . . We also talked about that if you're not a United States citizen that this guilty plea will likely result in immigration consequences. Even though you have legal permission to be here, United States could revoke that permission and deport you from the United States.
> Appellant: Yes.
> Defense counsel: You understand that's a risk you're taking.
> Appellant: Yes.

After a factual basis for the plea was provided, the district court accepted appellant's guilty plea. Before sentencing, the state moved for a competency evaluation to ensure that appellant was competent to understand the proceedings. The evaluator concluded that appellant was competent to proceed with sentencing despite his mental illness and possible mental deficiency. The evaluator noted that appellant understood the charges against him and knew the reasons behind his decision to plead guilty. In March 2015, appellant was sentenced in conformity with the plea agreement.

After sentencing, the Department of Homeland Security (DHS) provided notice of an additional charge of removability under the INA stemming from appellant's guilty plea. Appellant filed a petition for postconviction relief, seeking to withdraw his plea. Appellant filed a supporting affidavit explaining that he suffers from several mental-health issues and was taking multiple prescribed medications at the time of his guilty plea. The affidavit primarily concerned appellant's mental health, but did allege in very summary fashion that appellant was not told that he "would be deported." Appellant also alleged that he felt pressured to plead guilty and that he did not understand his plea at the time it was entered. The postconviction court denied appellant's motion to withdraw his plea without an evidentiary hearing.

This appeal followed.

D E C I S I O N

"[Appellate courts] review the denial of a petition for postconviction relief, as well as a request for an evidentiary hearing, for an abuse of discretion." *Taylor v. State*, 874 N.W.2d 429, 430 (Minn. 2016) (quotation omitted). We review the postconviction court's

factual findings for clear error and review the legal conclusions de novo. *Martin v. State*, 825 N.W.2d 734, 740 (Minn. 2013).

I. Appellant's mental state did not render his guilty plea invalid.

A defendant does not have an "absolute right to withdraw a guilty plea after entering it." *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). After sentencing, a defendant may withdraw a guilty plea only "to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice exists if a guilty plea is not valid. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). "To be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent." *Nelson v. State*, 880 N.W.2d 852, 858 (Minn. 2016) (quotation omitted). The petitioner "bears the burden of showing his plea was invalid." *Raleigh*, 778 N.W.2d at 94. The validity of a plea is reviewed de novo. *Id.*

Appellant argues that his plea was not voluntary because he felt pressured into pleading guilty. "The voluntariness requirement ensures a defendant is not pleading guilty due to improper pressure or coercion." *Id.* at 96. Improper pressure or coercion generally requires a threat or promise made to induce a defendant to plead guilty. *See Brady v. United States*, 397 U.S. 742, 750, 90 S. Ct. 1463, 1470 (1970) ("[A]gents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant."); *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000) ("A guilty plea cannot be induced by unfulfilled or unfulfillable promises . . . ."). We examine "what the parties reasonably understood to be the terms of the plea agreement" and all other relevant circumstances. *Raleigh*, 778 N.W.2d at 96.

Appellant alleged no facts in his affidavit to support a conclusion that the state, defense counsel, the district court, or any other person subjected appellant to improper pressure. Appellant was asked multiple times during the plea colloquy if the terms of the agreement, announced on the record, represented his understanding of the plea agreement. He answered in the affirmative. The report of the competency evaluator supports the conclusion that appellant understood the terms of the agreement at the time of his plea.

Appellant also argues that his plea was not intelligent because of his memory lapses and the medication that he was taking at the time of the hearing. "An intelligent plea is one made 'knowingly and understandingly.'" *Uselman v. State*, 831 N.W.2d 690, 693 (Minn. App. 2013) (quoting *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997)). We examine whether, at the time the plea was entered, the defendant "understood the charges against him, the rights he waived, and the consequences of the plea." *Nelson*, 880 N.W.2d at 861.

At the plea hearing, appellant identified his medical issues, listed his medications, and talked about his memory lapses. Appellant told the court that he had forgotten some things from earlier that day, but that he remembered everything that had been said up to that point in the proceedings. Defense counsel asked appellant about the rights he was waiving, and appellant answered that he understood the rights. At no point did appellant state that he did not understand or did not remember discussing his rights, the charges, or the consequences of the plea, all of which were discussed with appellant on the record and to which he indicated that he understood.

To the extent that appellant argues the postconviction court abused its discretion by considering the information within the competency evaluation for the purpose of considering the validity of the plea, we disagree. The postconviction court could reasonably determine from a review of the plea-hearing transcript that appellant understood the nature of the claims against him, the rights he waived, the consequences of the plea, and the terms of the plea agreement. Moreover, the guilty plea was made before the same district judge who considered the postconviction petition. Appellant's responses to the competency evaluator's questions concerning his understanding of his trial rights and the consequences of his plea only bolstered the plea-hearing record, which demonstrates that appellant's guilty plea was voluntary and intelligent.

II. The postconviction court did not abuse its discretion by denying appellant's request to withdraw his plea based on ineffective assistance of counsel.

Appellant argues that the postconviction court abused its discretion by summarily denying his petition to withdraw his guilty plea on the basis of ineffective assistance of counsel. He maintains that defense counsel had an obligation to warn him that entering a guilty plea to a felony would result in the loss of his TPS, which would then result in his removal from the United States. He argues that there is a reasonable probability that, had he been warned of the true immigration consequences, he would not have pleaded guilty and would instead have proceeded to trial.

We examine an ineffective-assistance-of-counsel claim under the two-prong test articulated in *Strickland*. *Griffin v. State*, 883 N.W.2d 282, 287 (Minn. 2016) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064 (1984)). To

establish ineffective assistance of counsel, appellant must demonstrate that "(1) counsel's representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Swaney v. State*, 882 N.W.2d 207, 217 (Minn. 2016). The denial of postconviction relief based on a claim of ineffective assistance of counsel is a mixed question of law and fact and is reviewed de novo. *Griffin*, 883 N.W.2d at 287.

Entitlement to an evidentiary hearing on an ineffective-assistance-of-counsel claim requires that an appellant "allege facts that, if proven by a fair preponderance of the evidence, would satisfy the two-prong test" established in *Strickland*. *Bobo v. State*, 820 N.W.2d 511, 516 (Minn. 2012). "Any doubts about whether to conduct an evidentiary hearing should be resolved in favor of the defendant seeking relief." *State v. Nicks*, 831 N.W.2d 493, 504 (Minn. 2013). "But the postconviction court need not hold an evidentiary hearing when the petitioner alleges facts that, if true, are legally insufficient to entitle him to the requested relief." *State v. Vang*, 881 N.W.2d 551, 557 (Minn. 2016) (quotation omitted); *see also* Minn. Stat. § 590.04, subd. 1 (2016) (requiring an evidentiary hearing "[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief").

Appellant was informed on the record at the time of his guilty plea that it "will likely result in immigration consequences," and that, even with "legal permission to be here, United States could revoke that permission and deport you." Appellant acknowledged those things and pleaded guilty. In his postconviction affidavit, appellant claimed that he had "no idea that he would be deported" if he pleaded guilty and that defense counsel did

not tell him that he "would be deported." He argues on appeal that defense counsel's warnings at the plea hearing fell below the objective standard of reasonableness because he was only warned that he *could* be deported, not that he *would* be deported.

In *Padilla v. Kentucky*, the United States Supreme Court held that the Sixth Amendment requires defense counsel to inform a noncitizen client "whether his plea carries a risk of deportation." 559 U.S. 356, 374, 130 S. Ct. 1470, 1486 (2010). The Supreme Court further held that it is a violation of the first prong of *Strickland* for defense counsel not to advise a noncitizen defendant of "truly clear" deportation consequences. *Id.* at 369, 130 S. Ct. at 1483. Recently, the Minnesota Supreme Court, applying *Padilla*, stated, "if conviction of the charged offense clearly subjects the defendant to removal . . . the attorney has a constitutional obligation to advise the defendant of this fact," but otherwise "a general advisory warning about the possible immigration consequences of a guilty plea is sufficient." *Sanchez v. State*, 890 N.W.2d 716, 721 (Minn. 2017).

Appellant argues that the removal consequences were clear in his situation. An alien is not eligible for TPS if the alien is found to have been convicted of any felony or of two or more misdemeanors committed in the United States. 8 U.S.C. § 1254a(c)(2)(B)(i). DHS defines a felony for purposes of TPS as "a crime committed in the United States, punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served." 8 C.F.R. § 244.1 (2016). TPS shall be withdrawn if the alien "was not in fact eligible for such status." 8 U.S.C. § 1254a(c)(3)(A). Because appellant was convicted of a felony, he is now ineligible for TPS renewal and the status may be withdrawn. 8 U.S.C. § 1254a(c)(2)(B)(i); 8 C.F.R. § 244.14(a)(1) (2016). Without lawful authority to remain

in the United States, appellant would be subject to removal proceedings. *See* 8 U.S.C. § 1229a(a)(2) (2012) (permitting removal on any ground of inadmissibility); 8 U.S.C. § 1182(a)(6)(A)(i) (providing that aliens present without admission or parole are inadmissible).

But appellant did not claim in his affidavit that defense counsel knew of appellant's TPS. His affidavit contains nothing suggesting that he told his lawyer of his TPS status or that his lawyer knew or should have known of that status from some other source. Whether defense counsel was told of appellant's TPS is significant because the criminal convictions rendering a noncitizen ineligible for TPS are different than the criminal convictions rendering a noncitizen "inadmissible" or "deportable." *Compare* 8 U.S.C. § 1254a(c)(2)(B)(i) (describing crimes which render an alien ineligible for TPS), *with* 8 U.S.C. §§ 1182(a)(2) (2012 & Supp. 2013) (describing crimes which render an alien inadmissible), 1227(a)(2) (2012) (describing crimes which render an alien deportable). In this case, sections 1182 and 1227 do not specifically address deportation or inadmissibility for the crime of fourth-degree criminal sexual conduct. Because deportation or removal is not a clear statutory consequence of a conviction of fourth-degree criminal sexual conduct, constitutionally effective assistance of counsel would typically only involve a general warning. *See Sanchez*, 890 N.W.2d at 722 (providing that a general warning about possible immigration consequences is sufficient if the relevant immigration statutes do not clearly subject the defendant to a risk of removal).

But when a defendant has TPS, a conviction of any felony, regardless of type, would clearly render him ineligible for TPS, and effective assistance of counsel would require

defense counsel to give correct advice as to the risk of removal. *See Padilla*, 559 U.S. at 369, 130 S. Ct. at 1483 ("[W]hen the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.").

It is axiomatic that, in order for an attorney to provide effective assistance of counsel concerning the risks of removal, the defendant must provide the attorney with the information necessary to provide such effective assistance. We are required to "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct" and to consider whether "counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688, 690, 104 S. Ct. at 2065, 2066. Absent a claim that defense counsel was told that appellant had TPS and nevertheless provided incorrect advice, appellant has not carried his burden of demonstrating that defense counsel's performance fell below an objective standard of reasonableness. We do not read *Strickland* or *Padilla* to require that counsel be aware of every possible permutation of immigration law as it might apply to a client's *undisclosed* status. Moreover, appellant was informed on the record of the very risks that attend a TPS-holder's felony conviction: that the United States could revoke legal permission to remain in the United States, and deport appellant. He pleaded guilty having been so advised.

Additionally, and regardless of whether his attorney's advice was sufficient, appellant did not satisfy his burden concerning the second prong of the *Strickland* test. Appellant was required to demonstrate that, but for the ineffective representation, he would not have entered the guilty plea. *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994). Appellant's affidavit states that he was not told by defense counsel that he "would be

deported," but nowhere in the affidavit does appellant claim that he would not have entered a guilty plea if defense counsel had used the word "would" instead of "could." Although appellant argued to the postconviction court and on appeal that there is a reasonable possibility that he would not have entered the guilty plea if he had been informed about the effects on his TPS, his own affidavit makes no such claim.

The postconviction court should hold an evidentiary hearing if there are doubts about whether to do so. *Nicks*, 831 N.W.2d at 504. But here, the postconviction court could conclusively determine from the record, including appellant's affidavit and the plea-hearing transcript, that appellant was entitled to no postconviction relief.

Affirmed.