STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1958

Daniel Onguenyi Nyagoko, petitioner,
Respondent,

vs.

State of Minnesota,
Appellant.

Filed July 24, 2017
Affirmed
Smith, Tracy M., Judge
Concurring specially, Connolly, Judge

Hennepin County District Court
File No. 27-CR-13-25344

Cathryn Middlebrook, Chief Appellate Public Defender, Erik I. Withall, Assistant Public Defender, St. Paul, Minnesota (for respondent)

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

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Peterson, Judge; and Smith, Tracy M., Judge.

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

SMITH, TRACY M., Judge

Appellant Daniel Onguenyi Nyagoko is a former lawful permanent resident who was removed from the United States following his conviction of gross-misdemeanor

criminal abuse. Following his removal, Nyagoko filed a postconviction petition requesting to withdraw his guilty plea. Nyagoko argued that he had received ineffective assistance of counsel because his attorneys affirmatively misadvised him that his conviction would not render him inadmissible to the United States under immigration law and, therefore, would not prevent him from returning to the United States in the future. The district court granted Nyagoko's petition. The state argues on appeal that the district court erred because (1) Nyagoko's attorneys had no affirmative duty to advise him about the inadmissibility consequences of his plea and (2) misadvice regarding a collateral consequence cannot be ineffective assistance of counsel. Because misadvice regarding a collateral consequence can be ineffective assistance of counsel and the district court did not abuse its discretion in concluding that Nyagoko was misadvised in violation of his right to effective assistance of counsel, we affirm.

FACTS

Nyagoko is a citizen of Kenya who entered the United States as a lawful permanent resident in August 2011. In August 2013, Nyagoko was charged with three counts of criminal sexual conduct. A public defender ("trial counsel") was appointed to represent Nyagoko. The prosecutor e-mailed trial counsel a plea agreement, proposing that Nyagoko plead guilty to gross-misdemeanor criminal abuse and serve "120" days. Trial counsel understood the plea agreement as requiring Nyagoko to be sentenced to 364 days and to serve 180 days in custody, with the possibility of being released after 120 days.

Trial counsel forwarded this e-mail to an attorney who advises the public defender's office and its clients on the immigration consequences of criminal matters ("*Padilla*

counsel"). *Padilla* counsel misinterpreted the plea agreement as requiring Nyagoko to be sentenced only to a term of imprisonment of 120 days. Believing that Nyagoko would receive a 120-day sentence, *Padilla* counsel advised Nyagoko about two particular immigration consequences: deportability and inadmissibility. Deportability is the determination that a noncitizen who was lawfully admitted is subject to removal from the United States. 8 U.S.C. §§ 1227 (2012). *Padilla* counsel advised Nyagoko that he would likely be deported if convicted because an immigration judge would find that gross-misdemeanor criminal abuse is a crime involving moral turpitude. Inadmissibility is the determination that a noncitizen is "ineligible to receive visas and ineligible to be admitted to the United States." 8 U.S.C. § 1182(a) (2012). A noncitizen who commits a crime involving moral turpitude is generally inadmissible for an indefinite period of time. *Id.*, (a)(2)(A). But *Padilla* counsel advised Nyagoko that he would be eligible for the petty-offense exception to inadmissibility because the term of imprisonment did not exceed 180 days. Under this exception, Nyagoko would be eligible to return to the United States in the future.

Nyagoko pleaded guilty to gross-misdemeanor criminal abuse and was sentenced to 364 days, 180 days of which he was required to serve and the remainder of which would be stayed for two years. Nyagoko signed a plea petition, stating, "I understand . . . this guilty plea may result in my removal from the United States and/or stop me from being able to legally enter or reenter the United States."

Several months later, Nyagoko was placed in removal proceedings. The immigration judge concluded that gross-misdemeanor criminal abuse was a crime

involving moral turpitude and ordered that Nyagoko be removed to Kenya. Nyagoko now resides in Kenya. Because Nyagoko received a sentence of 364 days—and not 120 days as *Padilla* counsel believed—he does not qualify for the petty-offense exception and is inadmissible.

Nyagoko filed a petition for postconviction relief on December 18, 2015, asserting that he was not properly advised of the immigration consequences of his plea and would not have pleaded guilty had he been properly advised.

The district court conducted an evidentiary hearing at which Nyagoko, trial counsel, *Padilla* counsel, and an immigration-law expert testified. Trial counsel testified that she relied on *Padilla* counsel to provide Nyagoko with advice about the immigration consequences of the plea. *Padilla* counsel testified that Nyagoko received proper advice about the deportability consequences of the plea but that he received incorrect advice about inadmissibility because his sentence exceeded 180 days and he therefore did not qualify for the petty-offense exception. The expert testified that the inadmissibility advice fell below the professional standards for advice on immigration consequences.

The district court concluded that a "communication breakdown" between *Padilla* counsel and trial counsel led to a misunderstanding about the inadmissibility consequences of the plea and that, "[u]nder *Padilla*, [the] affirmative misadvice regarding immigration consequences of the guilty plea, amounts to deficient performance."[1] The district court found Nyagoko credible with respect to his testimony that he would not have pleaded guilty

[1] The district court rejected Nyagoko's claim that he was misadvised regarding deportation consequences, but Nyagoko does not challenge that decision on appeal.

had he known he would be inadmissible. The district court concluded that Nyagoko received ineffective assistance of counsel and, therefore, that his guilty plea was not intelligent and voluntary. The district court granted Nyagoko's postconviction petition, vacated his guilty plea and conviction, and reinstated the initial charges against Nyagoko.

The state appeals.[2]

D E C I S I O N

The state argues that the postconviction court erred in granting Nyagoko's postconviction petition because defense counsel has no affirmative duty to advise a criminal defendant of the collateral consequences of a plea. Nyagoko argues that—regardless of whether his attorneys had an affirmative duty to advise him about the inadmissibility consequences of his plea—he was affirmatively misadvised about a collateral consequence and the misadvice constituted ineffective assistance of counsel.[3]

Appellate courts review a postconviction court's decision on a postconviction petition for an abuse of discretion. *Sanchez v. State*, 890 N.W.2d 716, 719-20 (Minn.

[2] Nyagoko filed a cross-appeal related to a warrant of apprehension filed after the district court granted Nyagoko's postconviction petition. We dismissed Nyagoko's cross-appeal. *Nyagoko v. State*, Nos. A16-1958, A17-0226 (Minn. App. Feb. 14, 2017) (order).

[3] Both parties also address whether the U.S. Supreme Court's holding in *Padilla v. Kentucky* requires an attorney to affirmatively advise a noncitizen defendant about the inadmissibility consequences of a plea. 559 U.S. 356, 130 S. Ct. 1473 (2010). *Padilla* holds that defense attorneys must affirmatively advise a noncitizen defendant about the deportation consequences of a plea. *Id.* at 368, 130 S. Ct. at 1483. Because we conclude that Nyagoko received ineffective assistance of counsel as a result of his attorneys' affirmative misadvice about a collateral consequence of his plea, we do not address whether Nyagoko's attorneys had an affirmative duty to advise him of the inadmissibility consequences of his plea.

2017). "A postconviction court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Id.* at 720 (quotation omitted). A postconviction court must allow a defendant to withdraw a plea if the plea is constitutionally invalid. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). To be valid, a guilty plea must be accurate, voluntary, and intelligent. *Id.*

Ineffective assistance of counsel renders a guilty plea involuntary and unintelligent. *Sanchez v. State*, 868 N.W.2d 282, 286 (Minn. App. 2015), *aff'd*, 890 N.W.2d 716 (Minn. 2017). "[C]ounsel plays a key role in ensuring that any plea is intelligent by explaining the charges, the rights to be waived, and the consequences of the plea." *Taylor v. State*, 887 N.W.2d 821, 823 (Minn. 2016). Counsel, however, is generally not required to affirmatively advise a defendant concerning the collateral consequences of the plea. *Kaiser v. State*, 641 N.W.2d 900, 901 (Minn. 2002). Collateral consequences "are not punishment" but "are civil and regulatory in nature and are imposed in the interest of public safety." *Id.* at 905. But affirmative *misadvice* about a collateral consequence renders a guilty plea constitutionally invalid when such misadvice amounts to ineffective assistance of counsel. *State v. Ellis-Strong*, ___ N.W.2d ___, ___, No. A16-1260, slip op. at 1 (Minn. App. June 19, 2017).

A defendant is deprived of the constitutional right to effective assistance of counsel when counsel fails to render adequate legal assistance. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063-64 (1984) (quotation omitted); *State v. Hokanson*, 821 N.W.2d 340, 357 (Minn. 2012). To prevail on an argument of ineffective assistance of counsel, the defendant must show that (1) the trial counsel's "representation fell below an

objective standard of reasonableness" and (2) "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Hokanson*, 821 N.W.2d at 357 (quotation omitted). "Because claims of ineffective assistance of counsel are mixed questions of law and fact, we review the postconviction court's legal conclusions on such questions de novo." *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013). "[W]hen we review a postconviction court's denial of relief on a claim of ineffective assistance of counsel, we will consider the court's factual findings that are supported in the record" and "conduct a de novo review of the legal implication of those facts on the ineffective assistance claim." *Id.* at 503-04.

Both parties agree that inadmissibility is civil and regulatory in nature and is therefore a collateral consequence. *See Kaiser*, 641 N.W.2d at 905. Misadvice regarding inadmissibility consequences thus may constitute ineffective assistance of counsel. *Ellis-Strong*, slip op. at 14-17.

In reviewing Nyagoko's ineffective-assistance-of-counsel argument, the first question is whether the affirmative misadvice Nyagoko received about the inadmissibility consequences of his plea fell below an "objective standard of reasonableness." *Hokanson*, 821 N.W.2d at 357 (quotation omitted). The state does not dispute that Nyagoko's attorneys misadvised him about the inadmissibility consequences of his guilty plea. We review de novo the legal implications of the district court's factual findings with respect to the objective standard of reasonableness. *Nicks*, 831 N.W.2d at 503-04. The district court found that *Padilla* counsel believed that Nyagoko would receive a 120-day sentence and therefore advised him that he would be eligible for the petty-offense exception to

inadmissibility. In order to qualify for the petty-offense exception, Nyagoko had to receive a sentence not "in excess of 6 months (regardless of the extent to which the sentence was ultimately executed)." *See* 8 U.S.C. § 1182(a)(2)(A)(ii). The district court found that Nyagoko received a sentence of 364 days and, as a result, did not qualify for the petty-offense exception. The district court thus found, and *Padilla* counsel acknowledged, that Nyagoko was misadvised about the inadmissibility consequences of his plea. Because Nyagoko was misadvised about a collateral consequence of his guilty plea, the advice Nyagoko received fell below an objective standard of reasonableness. *See Ellis-Strong*, slip. op. at 14.

But the state argues that our decision in *State v. Brown*, which holds that misinformation about a collateral consequence does not render a guilty plea unintelligent, bars Nyagoko's argument that affirmative misadvice about a collateral consequence falls below an objective standard of reasonableness. ___ N.W.2d ___, No. A16-1619, slip op. at 1 (Minn. App. May 8, 2017). In *Ellis-Strong*, however, we concluded that *Brown* does not extend to claims of ineffective assistance of counsel. Slip op. at 8. The district court thus did not err in concluding that the advice Nyagoko received about the inadmissibility consequences of his plea fell below an objective standard of reasonableness. *Id.*

The state also argues that Nyagoko acknowledged in his plea petition that "this guilty plea may result in my removal from the United States and/or stop me from being able to legally enter or re-enter the United States." Accordingly, the state argues that any misadvice is irrelevant because he had notice that he *may* be found inadmissible as a result of his conviction. Direct testimony at the hearing, which the district court found credible,

contradicts the plea petition. *Padilla* counsel testified that she incorrectly advised Nyagoko that he qualified for the petty-offense exception, and Nyagoko testified that he relied on that misadvice. The district court did not err in determining, notwithstanding the plea petition, that Nyagoko was misadvised about the inadmissibility consequences of his plea.

The second question is whether there is a reasonable probability that the result of the proceeding would have been different but for the incorrect advice Nyagoko received. *Hokanson*, 821 N.W.2d at 357. "In order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985). Based on Nyagoko's testimony, the district court found that Nyagoko "would not have entered the plea if he received correct advice regarding immigration." The state argues that Nyagoko was not credible. But we defer to the credibility determinations of the district court. *State v. Kramer*, 668 N.W.2d 32, 38 (Minn. App. 2003), *review denied* (Minn. Nov. 18, 2003). The district court thus did not err in concluding that Nyagoko established that he would have gone to trial rather than plead guilty if he had not received inaccurate advice about the inadmissibility consequences of his plea. *Hokanson*, 821 N.2d at 357.

Because the district court did not err in concluding that Nyagoko received ineffective assistance of counsel, the district court did not abuse its discretion in granting Nyagoko's postconviction petition. *Sanchez*, 890 N.W.2d at 719-20.

Affirmed.

CONNOLLY, Judge (concurring specially)

I agree with the majority and with the district court's thoughtful opinion that appellant should be allowed to withdraw his plea. I write separately to comment on the current Hennepin County Public Defender policy mentioned in this case. According to testimony at appellant's post-conviction hearing, the Hennepin County Public Defender's Office, as a rule, does not "put anything regarding the client's immigration advice, immigration status, the fact that the client's an immigrant, on the record." As a former district court judge in the Fourth Judicial District, I have the highest regard for the attorneys in this office. Nevertheless, my concern is that the current policy, as applied, will result in a continued pattern of incomplete records and uninformed decisions made by individuals who have grave concerns about the immigration consequences of their criminal cases.

The Minnesota Rules of Criminal Procedure require a defendant pleading guilty to a gross misdemeanor to "understand[] 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." Minn. R. Crim. P. 15.02, subd. 1(3). Accordingly, appellant's plea petition included similar language requiring his acknowledgment. This goal would be better served by including some discussion of those consequences on the record.

Here, because of off-the-record miscommunication between *Padilla* counsel and trial counsel as to the petty-offense exception, appellant pleaded guilty but still lost the main factor driving his plea: the ability to reenter the United States. The district court described the miscommunication between counsel and its result as follows:

> [*Padilla* counsel] understood the agreement to be 120 days total, including any stayed time. This is not consistent with [trial counsel's] understanding of the agreement which was a 364-day stayed sentence with 120 actual days in, which would mean the interim jail sanction was 180 days with good time. [*Padilla* counsel] conceded that there was confusion over the sentence and that she was not aware of the 364-day stayed sentence. [She] testified that 364-days would have been a "red flag" and that such a sentence would not fit within the petty offense exception.
>
> . . . The misunderstanding of the sentence between the two attorneys led to counsel affirmatively misadvising [appellant] that he would qualify for the petty offense exception and could be permitted to return to the country in the future.

Had some discussion been put on the record at his plea hearing, either the district court or counsel may have been alerted to the fact that appellant's sentence would not have permitted him to reenter the United States. At the very least, a complete record would have been made.

Padilla counsel testified at appellant's post-conviction hearing as to the purpose behind the office policy:

> Well, there's a couple of different reasons. I mean, first of all, *Padilla* is a Sixth Amendment right, so it goes to our work with our client. We're very protective of our attorney-client privilege. So, that's part of the reason. We don't talk about the advice or the work that we do with a client on the record. The second reason is . . . that a client's admission in court can actually have detrimental effects for them. They can be charged with a crime, sometimes illegal reentry or illegal entry. They're not given right[s advisories] against self-incrimination. So, there's a lot of different reasons why we don't, but all of the reasons are geared towards our work defending a particular client.

I certainly am not suggesting that any attorney-client privilege or the right against self-incrimination be violated. But to avoid circumstances such as those arising in this case, further discussion on the record is necessary so defendants can make an informed decision. Moreover, if the record is intentionally silent, appellate courts will look to the plea petition and assume that defendants were correctly advised. *See Anderson v. State*, 746 N.W.2d 901, 905-06 (Minn. App. 2008) (rejecting appellant's argument that the district court promised a shorter sentence where the record was silent on the issue and the plea petition did not include evidence of other agreed-upon terms or promises), *review denied* (Minn. Nov. 24, 2009). Because no one wanted to discuss the key details of appellant's circumstances and how the sentence would have impacted them on the record, appellant was left with the impression that he could be readmitted to the United States. Unfortunately for appellant, this was not the case.