STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0724

Wilson Nduri Tindi, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed December 11, 2017
Affirmed
Cleary, Chief Judge

Hennepin County District Court
File No. 27-CR-14-35561

Cathryn Middlebrook, Chief Appellate Public Defender, Kathryn J. Lockwood, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

Considered and decided by Peterson, Presiding Judge; Cleary, Chief Judge; and Reyes, Judge.

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

CLEARY, Chief Judge

In this appeal from an order denying postconviction relief, appellant Wilson Nduri Tindi challenges the district court's denial of his postconviction petition, arguing that he received ineffective assistance of counsel because his trial attorney failed to warn him of the immigration consequences of his guilty plea, and that the district court violated Minn. R. Crim. P. 15.01 by failing to warn him of any immigration consequences during the plea hearing. Because we conclude that the immigration consequences of appellant's guilty plea were not truly clear and because the plea petition warned appellant of the potential immigration consequences, we affirm.

FACTS

On November 16, 2015, appellant, a native of Kenya and a permanent resident of the United States, pleaded guilty to one count of criminal sexual conduct in the fourth degree in violation of Minn. Stat. § 609.345, subd. 1(d) (2014).

On the way to the plea hearing, appellant asked his attorney about the immigration consequences of his plea. Appellant's attorney replied that he was unsure of the consequences because he was not an immigration attorney.

During the plea hearing, appellant's attorney reviewed with him a four-page plea petition outlining his rights and waivers. Appellant testified that he reviewed the petition line-by-line with his attorney who answered his questions, and that he understood everything his attorney explained to him. Appellant's signed plea petition specifically

provided: "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 . . . ."

The district court accepted appellant's guilty plea and sentenced him according to the plea agreement. The Department of Homeland Security then commenced the deportation process and an immigration judge sustained appellant's removal. Appellant filed a postconviction motion in the district court seeking withdrawal of his guilty plea based on the ineffective assistance of counsel and the district court's violation of rule 15.01.

At the hearing, the district court denied appellant's postconviction motion, finding that appellant's attorney was not required to provide him with heightened immigration warnings because the immigration consequences of appellant's guilty plea were not truly clear. The district court did not address appellant's rule 15.01 violation allegation. This appeal follows.

D E C I S I O N

I. Ineffective Assistance of Counsel

"We review a denial of a petition for postconviction relief . . . for an abuse of discretion. 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." *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012) (citations and quotations omitted). In reviewing a postconviction court's denial of relief, we will consider the court's factual findings that are supported in the record, conduct a de novo review of the legal implication of those facts on the ineffective assistance claim, and either affirm the court's decision or conclude that the

court abused its discretion because postconviction relief is warranted. *State v. Nicks*, 831 N.W.2d 493, 503-04 (Minn. 2013).

Appellant contends that his trial counsel was ineffective because he failed to do any research or provide any advice regarding the immigration consequences of his plea. The state contends that appellant's trial counsel was not required to provide him with heightened immigration warnings because the immigration consequences of appellant's guilty plea were not truly clear. The district court determined that the immigration consequences of appellant's guilty plea were not truly clear because fourth-degree criminal sexual conduct does not contain a "use of force" element. We agree that the immigration consequences were not truly clear.

When an ineffective-assistance-of-counsel claim is properly raised in a direct appeal, we examine the claim under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017). The defendant must prove: (1) "that his counsel's representation 'fell below an objective standard of reasonableness;'" and (2) "'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland*, 466 U.S. at 688, 694, 104 S. Ct. at 2064, 2068). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. A reviewing court need not analyze both elements of the test if either one is determinative. *Staunton v. State*, 784 N.W.2d 289, 300 (Minn.

2010). Here, we need only consider the first prong as appellant received reasonable representation.

A. Deportation Consequences

When the immigration consequences of a defendant's guilty plea are clear, trial counsel has a duty to inform her client as to those consequences and the failure to do so renders counsel's assistance ineffective. *Padilla v. Kentucky*, 559 U.S. 356, 368-69, 130 S. Ct. 1473, 1483 (2010). But, "[w]hen 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.* at 369, 130 S. Ct. at 1483.

"It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation." *Id.* at 371, 130 S. Ct. at 1484. Under *Padilla*, "criminal-defense attorneys must take some affirmative steps before allowing a noncitizen client to accept a plea deal. First, at a minimum, an attorney must review the relevant immigration statutes to determine whether a conviction will subject the defendant to a risk of removal from the United States." *Sanchez v. State*, 890 N.W.2d 716, 721 (Minn. 2017).

Padilla and *Sanchez* proclaim a criminal-defense attorney's threshold duty to review the applicable immigration statutes to determine whether the law is truly clear at the time a defendant pleads guilty. The record here is devoid of evidence showing whether appellant's trial counsel did so. It is unreasonable for a criminal-defense attorney to fail to conduct research to determine if her client will be deported upon pleading guilty, especially

after her client specifically inquires about it. However, the first *Strickland* prong is not satisfied here because the immigration consequences of appellant's guilty plea were not truly clear.

While trial counsel has a duty to review the applicable immigration statutes, *Padilla* failed to resolve whether she is obligated to review only the statutes (the strict interpretation), or whether she must also review relevant administrative interpretations and caselaw (the expansive interpretation). *Sanchez*, 890 N.W.2d at 721. *Sanchez* did not determine which interpretation is binding in Minnesota, but the court suggested that the issue need not be answered when the immigration consequences of a guilty plea are not truly clear under either view. *Id.* at 722. As in *Sanchez*, the immigration consequences here were not truly clear under either view.

"Under the strict interpretation of *Padilla*, an attorney representing a noncitizen defendant must only review the relevant immigration statutes and then advise his or her client about the immigration consequences of a plea." *Id.* (citing *Padilla*, 559 U.S. at 368-69, 130 S. Ct. at 1473).

The district court identified 8 U.S.C. § 1227 (2012), which outlines a variety of crimes that subject aliens to deportation, as applicable to appellant, In particular, the statute provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii) (2012). The statute clearly subjects aliens convicted of aggravated felonies to deportation. But the definition of "aggravated felony" is less clear. "Aggravated felony" is broadly defined in 8 U.S.C. § 1101(a)(43)

(2012) and includes many qualifying acts. Most applicable to appellant's case is "a crime of violence" which is further defined as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16 (2012); 8 U.S.C. § 1101(a)(43)(F) (2012). "Physical force" is not defined.

At the time of appellant's crime, Minnesota law provided that "[a] person who engages in sexual contact with another person is guilty of criminal sexual conduct in the fourth degree if any of the following circumstances exists: . . . the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless." Minn. Stat. § 609.345, subd. 1(d). "Sexual contact" for purposes of appellant's crime includes five different variations of touching intimate parts via direct touch or through clothing or seminal fluids. Minn. Stat. § 609.341, subd. 11(a) (2014). Such acts must be "committed without the complainant's consent, except in those cases where consent is not a defense, and committed with sexual or aggressive intent." *Id.*

Based on a review of the statutory language only, it was not truly clear whether appellant's crime had the use of physical force as an element or otherwise involved a substantial risk that physical force would be used. Under the strict interpretation of *Padilla*, appellant's attorney did not have a duty to provide him with heightened immigration warnings because the applicable law was not truly clear.

An expansive interpretation of *Padilla* "would require criminal-defense attorneys to review not only the relevant federal immigration statutes, but also case law and administrative interpretations, when evaluating whether the law is truly clear." *Sanchez*, 890 N.W.2d at 723. Determining whether it was truly clear that fourth-degree criminal sexual conduct had the use of physical force as an element or otherwise involved a substantial risk that physical force would be used requires examining additional sources.

Appellant first contends that fourth-degree criminal sexual conduct is a qualifying crime of violence because it is so defined by Minn. Stat. § 624.712, subd. 5 (2014) (listing fourth-degree criminal sexual conduct as a "crime of violence"). However, this statute does not indicate that its definitions are based in any way on the degree of any use or substantial threat of physical force, as is found in the federal definition. *Compare* Minn. Stat. § 624.712, subd. 5, *with* 18 U.S.C. § 16(b). Moreover, the state statute itself limits the scope of the definitions to a portion of a subchapter of the firearms and other crimes chapter, unrelated to the immigration and criminal sexual conduct statutes at issue in this case. Section 624.712 is inapposite.

Appellant next contends that caselaw clearly interprets fourth-degree criminal sexual conduct as a crime of violence. Here, the question is not whether the state fourth-degree criminal sexual conduct crime may be considered a crime of violence under the federal statute, but whether the answer was truly clear at the time of appellant's plea hearing. Appellant relies on two cases that interpret the federal sentencing guidelines manual, which previously defined a crime of violence as "any offense under federal or state

law, punishable by imprisonment for a term exceeding one year, that . . . otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S. Sentencing Guidelines Manual (USSG) § 4B1.2(a)(2) (U.S. Sentencing Comm'n 2011).

In *United States v. Craig*, the Eighth Circuit determined that a conviction under Tennessee's sexual-battery statute constituted a crime of violence as defined in the federal sentencing guidelines because the crime "creates a substantial risk of a violent confrontation and involves purposeful, violent, and aggressive behavior." 630 F.3d 717, 724 (8th Cir. 2011) (quotation omitted). One year later, that court held that a conviction under Arkansas's second-degree sexual-assault statute was "categorically a crime of violence" because it occurs "without the victim's consent" and thus creates a "substantial risk of a violent face-to-face confrontation should the victim, or another person who would protect the victim, become aware of what is happening." *United States v. Dawn*, 685 F.3d 790, 797-98 (8th Cir. 2012) (quotation omitted).

Because the former definition in USSG § 4B1.2(a)(2) is similar to the current definition in 18 U.S.C. § 16(b), *Craig*'s and *Dawn*'s interpretations are instructive. But because they do not directly interpret 18 U.S.C. § 16(b), they are not controlling and do not clearly establish whether appellant's crime was a crime of violence. Indeed, the United States Supreme Court has previously distinguished the language in USSG § 4B1.2(a)(2) from the language in 18 U.S.C. § 16(b). *See Leocal v. Ashcroft*, 543 U.S. 1, 10 n.7, 125 S. Ct. 377, 383 (2004).

Further, appellant's argument in favor of the "crime of violence" definition in 18 U.S.C. § 16(b) may be moot. Currently before the United States Supreme Court is a Ninth Circuit case holding that 18 U.S.C. § 16(b) is unconstitutionally vague in light of the holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, 35 S. Ct. 31 (U.S. Sept. 29, 2016) (No. 15-1498). In *Johnson*, the Supreme Court struck down 18 U.S.C. § 924(e)(2)(B)(ii) (2012) defining a violent felony as "any crime punishable by imprisonment for a term exceeding one year . . . that . . . involves conduct that presents a serious potential risk of physical injury to another." 135 S. Ct. 2551. The Court held that the provision "produce[d] more unpredictability and arbitrariness than the Due Process Clause tolerates" by "combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony." *Id.* at 2558.

In *Dimaya*, the Ninth Circuit concluded that *Johnson*'s ruling applied to the similar clause contained in 18 U.S.C. § 16(b) because that provision "requires courts to 1) measure the risk by an indeterminate statute of a judicially imagined ordinary case, not by real world-facts or statute elements and 2) determine by vague and uncertain standards when a risk is sufficiently substantial." 803 F.3d at 1120 (quotation marks omitted). Accordingly, the court held that 18 U.S.C. § 16(b) was unconstitutionally vague. *Id.*

The Supreme Court could decide that 18 U.S.C. § 16(b) is not unconstitutionally vague.[1] But its consideration by the Court persuasively indicates that its interpretation is not truly clear. If appellant's trial counsel had researched the caselaw, he would have found that whether appellant's fourth-degree criminal-sexual-conduct conviction constitutes a crime of violence was not truly clear. Even if appellant's counsel had unreasonably failed to satisfy his threshold duty of conducting research, the first *Strickland* prong is not satisfied because under either the strict or expansive view of *Padilla*, the immigration consequences of appellant's guilty plea were not truly clear. Appellant's plea agreement adequately warned him of the possible immigration consequences of his plea. Because this prong is determinative, we need not address the second *Strickland* prong.

B. Inadmissibility Consequences

Appellant contends in his pro se brief that his crime clearly rendered him inadmissible because it constituted a crime of moral turpitude. Federal law provides that "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime" is inadmissible. 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2012).

[1] In his supplemental pro se brief, appellant cites authority from seven different circuits holding that "non-consent of the victim is the criterion for determining whether the offense involves a substantial risk of physical force." But appellant fails to cite any such authority from the Eighth Circuit, and with one exception all of the authority cited relies on 18 U.S.C. § 16(b), currently before the Supreme Court. That exception, *United States v. Mack*, 53 F.3d 126, 128 (6th Cir. 1995), relies on 18 U.S.C. § 924(e)(2)(B)(ii), struck down by *Johnson*.

"Congress has not defined the phrase 'crime involving moral turpitude,' and the meaning of that phrase was left 'to future administrative and judicial interpretation.'" *Chanmouny v. Ashcroft*, 376 F.3d 810, 811 (8th Cir. 2004) (quoting *Franklin v. INS*, 72 F.3d 571, 572 (8th Cir. 1995)) (other quotation omitted).

> Moral turpitude refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong or malum in se. . . . Among the tests to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or corrupt mind.

Bobadilla v. Holder, 679 F.3d 1052, 1054 (8th Cir. 2012) (quoting *Chanmouny*, 376 F.3d at 811-12) (other quotation omitted). "Without question, the term is ambiguous." *Bobadilla*, 679 F.3d at 1054.

While appellant's crime may have been considered a crime of moral turpitude based on Minnesota's requirement that sexual contact be "committed with sexual or aggressive intent," Minn. Stat. § 609.341, subd. 11(a), he fails to cite any binding authority clearly determining whether criminal sexual conduct in fact did constitute a crime of moral turpitude. As with the deportation consequences, the inadmissibility consequences of appellant's plea were not truly clear. The immigration warning provided in the plea petition, as discussed with trial counsel, satisfied counsel's duties. Appellant's trial counsel's assistance was not ineffective.

II. Rule 15.01

Appellant contends that the district court failed to give him the immigration advisory required by rule 15.01, rendering his guilty plea unintelligent and involuntary. The state contends that the criminal procedural requirements were met because appellant signed a plea petition that alerted him to the immigration consequences of his guilty plea.

"Assessing the validity of a plea presents a question of law that we review de novo." *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). Before accepting a guilty plea, the district court must "ensure defense counsel has told the defendant and the defendant understands: . . . [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)(1).

Generally, "a defendant will not be permitted to plead anew simply because the trial court did not personally question the defendant." *State v. Milton*, 295 N.W.2d 94, 95 (Minn. 1980). A district court's "failure to follow the suggested question in Minn. R. Crim. P. 15.01 verbatim is not fatal. . . . [F]ailure to interrogate a defendant as set forth in rule 15.01 . . . does not invalidate a guilty plea." *State v. Doughman*, 340 N.W.2d 348, 351 (Minn. App. 1983), *review denied* (Minn. Mar. 15, 1984). This court has held that a district court's failure to follow rule 15.01 procedures does not invalidate a guilty plea when defendant's counsel testified that he discussed the rights contained in the petition with the defendant. *State v. Wiley*, 420 N.W.2d 234, 237 (Minn. App. 1988), *review denied* (Minn. Apr. 26, 1988). The supreme court has held the same. *State v. Greenfield*, 291 Minn. 534,

535, 191 N.W.2d 398, 400 (1971) (holding a defendant "will not be afforded an opportunity to plead anew even if [an attorney] elicited some of the information rather than the trial court.").

Here, appellant signed a plea petition that explicitly contained the immigration advisory required by rule 15.01, and he testified at the plea hearing that he had discussed those rights with his attorney to his understanding and satisfaction. Under current law, appellant's plea agreement satisfied the rule 15.01 requirement and the district court did not violate the rule by failing to personally question him.

We affirm appellant's guilty plea because his trial counsel was not obligated to provide him with heightened immigration warnings, and because we find no binding authority imposing an independent obligation on a district court to independently question a defendant. But we note that current authority pre-dates the holdings of *Padilla* and *Sanchez*. Accordingly, we take this opportunity to note the need to review a district court's rule 15.01 obligations in light of *Padilla* and *Sanchez*.

In *Campos v. State*, 816 N.W.2d 480, 483 n.2, 500 (Minn. 2012), the supreme court remanded the question of whether the defendant properly received the rule 15.01 advisory because the plea petition containing the standard immigration advisory was not in the record and because neither defense counsel nor the district court questioned the defendant on immigration consequences at the plea hearing. The dissent agreed that "the ineffectiveness of [the defendant]'s counsel was compounded by the district court's failure

to provide the immigration advisories required under the rule." *Id.* at 508 (Page, J., dissenting).

As noted in *Padilla*,

> The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. . . . These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

559 U.S. at 360, 364, 130 S. Ct. at 1478, 1480. In light of criminal-defense lawyers' heightened duties under *Padilla* and *Sanchez*, it is unclear whether these holdings impact any rule 15.01 district court duties. The best practice for the district court is to specifically inquire as to that portion of the plea petition governing potential immigration consequences, including the possibility of deportation, under Minn. R. Crim. P. 15.01, subd. 1(6)(1). While current caselaw has not made this an obligation on the part of the district court, it seems prudent for a district court to so proceed in light of *Padilla* and *Sanchez*.

Affirmed.