STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0050

Adnan Mohamed Ali, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 17, 2018
Reversed and remanded
Kalitowski, Judge[*]

Hennepin County District Court
File No. 27-CR-15-24120

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Johnson, 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

KALITOWSKI, Judge

Appellant Adnan Mohamed Ali challenges the postconviction court's denial of his petition for postconviction relief, arguing that the postconviction court erred in summarily dismissing his petition without an evidentiary hearing. We reverse and remand.

D E C I S I O N

The state charged appellant with one count of first-degree aggravated robbery to which appellant pleaded guilty. Over a year later, the United States Department of Homeland Security issued appellant a notice to appear for removal proceedings. The notice stated that appellant is subject to removal from the United States because he was "convicted of an aggravated felony as defined in" sections 101(a)(43)(F), (G), and (U) of the Immigration and Nationality Act (INA) and that he was "convicted of a crime involving moral turpitude committed within five years" of being admitted to the United States. The notice specified the aggravated felony as "a theft offense . . . or burglary offense" and "a crime of violence."

Appellant petitioned for postconviction relief, arguing that he received ineffective assistance of counsel because his attorney failed to correctly inform him of the immigration consequences that he would face for pleading guilty. The postconviction court denied that petition without an evidentiary hearing after concluding that, because aggravated robbery is not specifically enumerated as an aggravated felony under the INA, appellant's attorney "was not required to provide more than a general warning of immigration consequences."

On appeal, appellant argues that the postconviction court abused its discretion in summarily denying his postconviction petition without an evidentiary hearing. We agree.

A postconviction court must hold an evidentiary hearing on a petition "[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2016).

> To determine whether petitioner is entitled to an evidentiary hearing, the postconviction court must determine whether the competent evidence presented by petitioner considered in the light most favorable to the petition, together with the arguments presented by the parties, conclusively show that the petitioner is not entitled to relief. If so, the court may deny the request for an evidentiary hearing. If the court concludes that material facts are in dispute and that the allegations in the petition, if true, would entitle the petitioner to relief, then the court must schedule an evidentiary hearing.

Martin v. State, 825 N.W.2d 734, 740 (Minn. 2013) (citations omitted). "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).

To receive an evidentiary hearing on an ineffective-assistance-of-counsel claim, the petitioner "is required to allege facts that, if proven by a fair preponderance of the evidence, would satisfy the two-prong test announced in *Strickland v. Washington*." *Bobo v. State*, 820 N.W.2d 511, 516 (Minn. 2012). The *Strickland* test requires the petitioner to show (1) that "counsel's representation 'fell below an objective standard of reasonableness'; and (2) 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Nissalke v. State*, 861 N.W.2d 88, 94

(Minn. 2015) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064 (1984)).

"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." *Nicks*, 831 N.W.2d at 503. We "consider the court's factual findings that are supported in the record, conduct a de novo review of the legal implications of those facts on the ineffective assistance claim, and [will] either affirm the court's decision or conclude that the district court abused its discretion because postconviction relief is warranted." *Id.* at 504.

The United States Supreme Court has held that "[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." *Padilla v. Kentucky*, 559 U.S. 356, 369, 130 S. Ct. 1473, 1483 (2010). "But when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear." *Id.* The Minnesota Supreme Court has recognized that *Padilla* requires criminal defense attorneys to do the following when a noncitizen client is contemplating 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. Second, if conviction of the charged offense clearly subjects the defendant to removal from the United States, the attorney has a constitutional obligation to advise the defendant of this fact before he or she enters a guilty plea. If it does not, then 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). The threshold inquiry is whether the immigration consequences of a conviction are "truly clear." *Padilla*, 559 U.S. at 369, 130 S. Ct. at 1483; *Sanchez*, 890 N.W.2d at 721.

Under federal law, "[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). Aggravated felonies include "a crime of violence . . . for which the term of imprisonment [is] at least one year" and "a theft offense . . . or burglary offense for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F)-(G) (2012). Crimes of violence are offenses that have "as an element, the use, attempted use, or threatened use of physical force against the person or property of another" or a felony offense "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). The relevant federal statutes do not define "theft offense" or "burglary offense."

Appellant was charged with, and pleaded guilty to, first-degree aggravated robbery. In relevant part, first-degree aggravated robbery, as charged here, requires the offender to inflict "bodily harm upon another" during a robbery. Minn. Stat. § 609.245, subd. 1 (2014). A person commits a robbery when that person "takes personal property from the person . . . of another and uses or threatens the imminent use of force against any person to overcome the person's resistance" to assist in taking the property. Minn. Stat. § 609.24 (2014). Robbery, under Minnesota law, requires as an element the use or threatened use of force against a person to facilitate a taking. Minn. Stat. § 609.24. *See also* 10 *Minnesota Practice*, CRIMJIG 14.02 (2015). Simple robbery is a lesser-included offense of

aggravated robbery. *State v. Oksanen*, 149 N.W.2d 27, 29 (Minn. 1967). Accordingly, aggravated robbery also requires as an element the use or threatened use of force against a person to facilitate a taking. *See* 10 *Minnesota Practice*, CRIMJIG 14.04 (2015).

Under federal law, offenses that have, "as an element, the use, attempted use, or threatened use of physical force against the person or property of another" are crimes of violence. 18 U.S.C. § 16. Because Minnesota's aggravated robbery crime requires the use or threatened use of force as an element, it is clear that this offense is considered a crime of violence for federal purposes. Additionally, a felony offense "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" is also considered a crime of violence under federal law. 18 U.S.C. § 16. Minnesota's first-degree aggravated robbery crime, and specifically the provision under which appellant was charged, also requires the infliction of bodily harm on another. Minn. Stat. § 609.245, subd. 1. An offense requiring the infliction of bodily harm necessarily involves "a substantial risk [of] physical force against the person . . . of another." 18 U.S.C. § 16. Therefore, it is "truly clear" that first-degree aggravated robbery is a crime of violence and an aggravated felony rendering the offender deportable under 8 U.S.C. § 1101(a)(43)(F) and 8 U.S.C. § 1227(a)(2)(A)(iii).

The Minnesota Supreme Court has also acknowledged that theft, under Minn. Stat. § 609.52, subd. 2(1), is a lesser included offense of aggravated robbery. *State v. Coleman*, 373 N.W.2d 777, 781 (Minn. 1985) (citing *State v. Nunn*, 351 N.W.2d 16, 19 (Minn. App. 1984)). If a person commits aggravated robbery, he necessarily also commits theft. And because theft is a "theft offense" it is an aggravated felony for federal purposes.

8 U.S.C. § 1101(a)(43)(G). Accordingly, it is truly clear that a person convicted of aggravated robbery in Minnesota is deportable under 8 U.S.C. § 1227(a)(2)(A)(iii).

The Minnesota Supreme Court's decision in *Campos v. State*, 816 N.W.2d 480 (Minn. 2012), supports our conclusion that it is truly clear that aggravated robbery is considered an aggravated felony under the INA. There, the defendant pleaded guilty to simple robbery. *Id.* at 483. He "was not questioned or informed about any immigration consequences of his plea. Nor was he asked whether he understood the immigration consequences of his guilty plea." *Id.* United States Immigration and Customs Enforcement detained and deported the defendant because simple robbery was considered an aggravated felony under the INA. *Id.* at 484. The defendant then moved to withdraw his guilty plea. *Id.* The supreme court ultimately held that *Padilla* is not retroactive and did not cover the *Campos* defendant's claim. *Id.* at 487. But the supreme court also stated that if *Padilla* did apply retroactively, the defendant's attorney was ineffective for failing to advise the defendant of the immigration consequences of pleading guilty. *Id.*

The state argues that *Campos* merely states that the defendant's attorney was ineffective only because he failed to inform the defendant of any immigration consequences. But the supreme court noted that the *Campos* defendant would have "met the first prong of *Strickland*, because the deportation consequences of his guilty plea were likely sufficiently clear under even a cursory reading of the INA to invoke counsel's duty to give correct advice." 816 N.W.2d at 487 n.5 (quotation omitted). Additionally, the supreme court stated without extensive discussion that simple robbery "constitutes an aggravated felony under at least two provisions of the INA"; it is a "crime of violence"

under 8 U.S.C. § 1101(a)(43)(F) and a "theft offense" under 8 U.S.C. § 1101(a)(43)(G). *Id.* at 484 n.3. These are the same INA provisions at issue here. And, because simple robbery is a lesser included offense of aggravated robbery, *Oksanen*, 149 N.W.2d at 29, aggravated robbery is likewise an aggravated felony under the INA.

Because it is "truly clear" from the INA that aggravated robbery constitutes an aggravated felony as both a crime of violence and a theft offense, it is equally clear that a conviction for aggravated robbery would render the offender deportable, triggering the defense attorney's duty to give correct advice concerning the immigration consequences of a guilty plea. *Padilla*, 559 U.S. at 369, 130 S. Ct. at 1483.

Appellant signed and dated a plea petition containing a paragraph stating, "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 to the United States of America or denial of citizenship." At the plea and sentencing hearing, the district court noted for the record that appellant spoke with a public defender that day "to consult with her regarding immigration consequences." Appellant's attorney stated that the day of the hearing "was not the first time [appellant] had consulted with" that public defender about immigration; "[h]e also consulted with her earlier in the proceedings." Appellant's attorney also asked appellant, "[D]o you understand that by your plea here today you will also may (sic) face collateral, other consequences, particularly in the world of immigration.

Do you understand that?" Appellant responded, "Yes." The district court then asked appellant if he had any questions about his rights. Appellant said, "No."

At most, the record shows that appellant was told that he "may" face deportation or other immigration consequences. While the record also reflects that appellant spoke to a second public defender about the immigration consequences of entering a guilty plea at various points throughout the proceedings, there is no indication of whether appellant was given correct information that entering a guilty plea would render him deportable. Appellant's affidavit accompanying his petition for postconviction relief states that he received no such advice. Appellant has sufficiently alleged facts that, if true, would entitle him to relief. We reverse and remand the matter to the postconviction court for an evidentiary hearing on appellant's claim.

Reversed and remanded.