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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1560**

Fortunato Alarcon Gatica, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 19, 2019
Affirmed
Ross, Judge**

Hennepin County District Court
File No. 27-CR-17-4257

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

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, John Patrick Monnens, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Ross, Judge; and Bratvold, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Fortunato Gatica, who is not a United States citizen and who immigrated into the country illegally, pleaded guilty to second-degree assault with a dangerous weapon after

he pummeled a man with a thick broomstick. United States immigration officials placed him in detention. Gatica moved to withdraw his guilty plea, arguing that he was denied effective assistance of counsel because his attorney never told him he would be automatically deported by pleading guilty. The district court denied the motion. Because federal law did not clearly indicate that Gatica would be automatically deportable for pleading guilty to second-degree assault, we hold that his attorney did not provide him ineffective counsel, and we affirm.

FACTS

In February 2017, Fortunato Gatica attacked a man near his home because he believed the man was in love with his wife. Gatica struck the man in the head, arm, and body with a broomstick two inches thick before the man fled into a nearby house and called police. The state charged Gatica with second-degree assault with a dangerous weapon. The Hennepin County Department of Community Corrections and Rehabilitation reported that Gatica was an illegal immigrant who might be deported if he pleaded guilty.

Gatica offered to plead guilty in July 2017, but after the district court expressed concerns about whether he understood the immigration implications of his plea, the district court ended the hearing to allow Gatica to consult with his immigration attorney. Gatica withdrew his plea eight days later.

On the day his trial was set to begin, Gatica again offered to enter another plea agreement. The agreement in part stated, “My attorney has told me and I understand that if I am not a citizen of the United States my plea of guilty may result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen.”

At the plea hearing, the district court confirmed that Gatica had read and understood the statement before accepting his guilty plea. The district court sentenced Gatica to 364 days in the workhouse, stayed, 120 days in custody, 90 days on electronic home monitoring, and 20 days of “sentence to service.”

United States Immigration and Customs Enforcement detained Gatica and began deportation proceedings. Gatica then filed a postconviction petition seeking to withdraw his guilty plea, arguing that he had not been properly advised of the immigration consequences. The district court denied the motion. Gatica appeals.

D E C I S I O N

Gatica argues that the district court erred by not allowing him to withdraw his guilty plea. A defendant has no absolute right to withdraw his guilty plea, but withdrawal is mandated if it is necessary to avoid a manifest injustice, such as when a defendant does not understand the charges against him or the consequences of his plea. *State v. Raleigh*, 778 N.W.2d 90, 93–94 (Minn. 2010). We review the validity of a plea de novo. *Id.*

Gatica argues that he should be permitted to withdraw his guilty plea because he received ineffective assistance of counsel. To prove he received ineffective assistance of counsel causing him to plead guilty, Gatica must show that his attorney’s representation did not meet an objective standard of reasonableness and that there is a reasonable probability that, had he been reasonably represented, he would not have pleaded guilty. *See Sanchez v. State*, 890 N.W.2d 716, 720 (Minn. 2017). If a defendant is charged with a crime and he is not a United States citizen, his attorney must accurately inform him of the immigration consequences of pleading guilty. *Id.* (citing *Padilla v. Kentucky*, 559 U.S. 356,

374, 130 S. Ct. 1473, 1486 (2010)). When the immigration consequences of pleading guilty are “truly clear,” the attorney must tell the defendant that a guilty plea will subject him to automatic deportation. *Id.* To determine whether a guilty plea will subject a defendant to automatic deportation, the defendant’s attorney must discern from federal immigration statutes whether the defendant’s crime falls into one of the categories calling for automatic deportation. *Id.* at 721.

Gatica pleaded guilty to second-degree assault, which occurs when one person assaults another with a dangerous weapon. Minn. Stat. § 609.222, subd. 1 (2016). Minnesota law defines “assault” as “the intentional infliction of . . . bodily harm upon another.” Minn. Stat. § 609.02, subd. 10(1) (2016). Gatica argues that it was “truly clear” he would be automatically deported for pleading guilty because second-degree assault constitutes both a crime of moral turpitude under 8 U.S.C. § 1227(a)(2)(A)(i)(I) (2012), and an aggravated felony under 8 U.S.C. § 1227(a)(2)(A)(iii) (2012). The argument is not convincing.

It is not clear that Gatica’s assault conviction constituted a crime of moral turpitude. The federal statute does not define crimes of moral turpitude. 8 U.S.C. § 1227(a)(2)(A)(i)(I). *Black’s Law Dictionary* defines “moral turpitude” as “[c]onduct that is contrary to justice, honesty, or morality; esp[ecially] an act that demonstrates depravity.” 1209 (11th ed. 2019). Federal appellate courts have variously defined the phrase. For example, the Eighth Circuit has referred to moral turpitude as “conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality 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) (quotation omitted); *see also Rohit v. Holder*, 670 F.3d 1085, 1089 (9th Cir. 2012) (defining “moral turpitude” as “crimes that are base, vile, or depraved—if they offend society’s most fundamental values, or shock society’s conscience” (quotation omitted)); *Amouzadeh v. Winfrey*, 467 F.3d 451, 455 (5th Cir. 2006) (providing a similar definition of moral turpitude). The moral-turpitude category is general and broad, and it could include a wide variety of crimes. But neither the statute nor caselaw clearly indicates that second-degree assault under Minnesota law is a crime of “moral turpitude.”

Gatica’s conviction is also not clearly an aggravated felony under 8 U.S.C. § 1227(a)(2)(A)(iii). The federal definition of “aggravated felony” includes “a crime of violence (as defined in section 16 of title 18, . . .) for which the term of imprisonment [is] at least one year.” 8 U.S.C. § 1101(a)(43)(F) (2012). A crime of violence is “an offense that has as an element the use . . . of physical force against the person or property of another.” 18 U.S.C. § 16 (a) (2012). Gatica’s crime certainly was one of violence, but it is not clearly an aggravated felony unless it also requires a “term of imprisonment [sic] at least one year.” 8 U.S.C. § 1101(a)(43)(F). Neither Gatica nor his attorney knew, at the time he pleaded guilty, how long his sentence would be. Second-degree assault can be punished by no more than seven years in prison. Minn. Stat. § 609.222, subd. 1. Gatica’s presumptive sentence was 21-months, but a pre-plea investigation supported a dispositional departure staying his sentence, and his attorney indicated his intent to request both a dispositional and durational sentencing departure. The variables at the time of

Gatica's plea made it unclear whether he would be automatically deportable under federal law.

Because the immigration consequences of Gatica's guilty plea were not "truly clear," Gatica's attorney was required to warn him only that he could face deportation. Gatica's plea agreement confirms that he was sufficiently warned and defeats his contention that his attorney represented him ineffectually.

Affirmed.