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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0672

Gary Paul Johnston, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed January 21, 2020
Affirmed
Slieter, Judge
Dissenting, Randall, Judge*

Olmsted County District Court
File No. 55-CR-17-2002

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

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

Mark A. Ostrem, Olmsted County Attorney, Jennifer D. Plante, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Slieter, Judge; and Randall, Judge.

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* 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

SLIETER, Judge

Appellant challenges the district court's summary denial of his petition for postconviction relief. Because appellant received a stay of adjudication and has since been discharged from probation without having had the stay of adjudication vacated, appellant cannot seek relief under the postconviction statute. We affirm.

FACTS

The state charged appellant Gary Paul Johnston, a non-United States citizen, with (1) malicious punishment of a child, in violation of Minn. Stat. § 609.377, subd. 1 (2016); and (2) domestic assault, in violation of Minn. Stat. § 609.2242, subd. 1(2) (2016). Johnston accepted the terms of a plea agreement which provided that in exchange for Johnston's guilty plea to domestic assault, the malicious-punishment-of-a-child offense would be dismissed and he would receive a one-year stay of adjudication. The plea petition included the following provision:

> Further, I understand that if I am not a citizen of the United States, my plea of guilty to this crime may result in deportation, exclusion from admission to the United States or denial of naturalization as a United States citizen.

During the plea colloquy, the district court questioned Johnston about his immigration status.

> THE COURT: Are you a U.S. citizen?
> THE DEFENDANT: No.
> THE COURT: You are not?
> THE DEFENDANT: I'm not a U.S. citizen.
> THE COURT: Where are you a citizen?
> THE DEFENDANT: Irish, Irish citizen.

> THE COURT: How long have you been in the U.S. here?
> THE DEFENDANT: Seven years.
> THE COURT: Okay. Do you understand that when – now, there's not a conviction here, but a stay of adjudication, so you do face a conviction at some point. Do you understand that conviction could lead to deportation, failure to be admitted into the United States, failure to become a citizen if you wanted to be?
> THE DEFENDANT: Yes, ma'am.
> THE COURT: Do you have any questions about any of that immigration issue or consequences?
> THE DEFENDANT: No.

Johnston then provided a factual basis to support his guilty plea. The district court accepted the guilty plea, ordered a stay of adjudication and established terms of the stay, and placed Johnston on probation.

On June 23, 2018, Johnston completed his probation and was discharged. Three days later, Johnston received a notice of hearing in removal proceedings in federal immigration court.

On December 17, 2018, Johnston moved for postconviction relief seeking to withdraw his guilty plea due to ineffective assistance of counsel and requested an evidentiary hearing. Johnston submitted an affidavit in support of his petition explaining that his criminal defense attorney failed to properly advise him of the immigration consequences and that he would not have entered his plea had he known the deportation consequence for his plea.

The postconviction court, without an evidentiary hearing, denied Johnston's petition reasoning that Johnston could not obtain relief under the postconviction statute because he

had not received a conviction for the domestic assault and was now fully discharged from probation. This appeal follows.

D E C I S I O N

Johnston argues that he is entitled to postconviction relief in the form of plea withdrawal because his stay of adjudication is prompting immigration removal proceedings against him. The state contends that the district court properly denied Johnston's postconviction petition because there was no conviction. The postconviction court properly ruled that postconviction relief is unavailable to Johnston because he was not and will not be convicted of the criminal offense now that he is discharged from probation.

The postconviction statute provides that "a person *convicted of a crime*" may seek relief to address violations of that person's rights under the Constitution or laws of the United States or the state, or address scientific evidence unavailable at the time of trial. Minn. Stat. § 590.01, subd. 1 (2018) (emphasis added). Whether a stay of adjudication constitutes a disposition that allows for postconviction relief is a question of statutory interpretation that appellate courts review *de novo*. *See Dupey v. State*, 868 N.W.2d 36, 39 (Minn. 2015).

Minnesota appellate courts recognize that a person may obtain relief pursuant to the postconviction statute when there is a conviction. *See id.* at 41; *see also Lunzer v. State*, 874 N.W.2d 819, 822 (Minn. App. 2016). A stay of adjudication does not result in a conviction being entered or sentence imposed at that time. *State v. Greenough*, 915 N.W.2d 915, 918-19 (Minn. App. 2018). "Because a defendant who has received a stay of adjudication has not been adjudicated guilty, [o]nly when a stay of adjudication is

vacated can that defendant be convicted and sentenced." *Id.* at 919 (alteration in original) (quotation omitted).

In *Dupey*, the supreme court addressed whether a stay of adjudication granted under Minn. Stat. § 152.18, subd. 1 (2006), constituted a conviction, and it concluded that it did not. 874 N.W.2d at 40 n.2. Because a stay of adjudication under section 152.18, subdivision 1, is not a conviction, similarly a stay of adjudication as a sentencing disposition cannot constitute a conviction to permit a person to obtain postconviction relief until the stayed sentence is vacated. *Lunzer*, 874 N.W.2d at 822 (holding that a person cannot seek postconviction relief when he or she only receives a stayed sentence).

Despite the supreme court's precedent in *Dupey* and our decision in *Lunzer*, Johnston argues that because his stay of adjudication under federal law is considered to be a conviction, he is "a person convicted of a crime, [and] he has a right to petition for postconviction relief because his Constitutional right[] to the effective assistance of counsel was violated."

This court "is bound by supreme court precedent." *State v. Curtis*, 921 N.W.2d 342, 346 (Minn. 2018); *see also State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010) ("The district court, like this court, is bound by supreme court precedent and the published opinions of the court of appeals . . . ."), *review denied* (Minn. Sept. 21, 2010). The supreme court interpreted the postconviction statute and determined that it does not apply when a person receives a stay of adjudication. *See Dupey*, 868 N.W.2d at 41; *see also Lunzer*, 874 N.W.2d at 822. Adopting Johnston's theory on appeal would contradict appellate caselaw recognizing that stays of adjudication are not convictions until the stay is vacated.

We are therefore compelled to affirm the district court's decision because Johnston did not receive a conviction.[1]

Affirmed.

[1] We acknowledge the harsh result in this case for Johnston, but we must follow the supreme court's precedent in *Dupey* and affirm the district court's decision.

RANDALL, Judge (dissenting)

I respectfully dissent. The majority correctly sets out this case. The case turns on Johnston's petition for postconviction relief to determine an issue of ineffective assistant of counsel. Johnston claims that there is sufficient evidence in the record to justify a finding that he received ineffective assistance of counsel and therefore he should be allowed to withdraw his guilty plea to a misdemeanor, which was the result of a plea agreement for a stay of adjudication. Johnston successfully completed his stay of adjudication and therefore never had a conviction. Minnesota law recognizes that a successfully completed stay of adjudication means that no guilty plea was ever formally entered on the record and none can be entered now. *See Dupey v. State*, 868 N.W.2d 36, 41 (Minn. 2015); *State v. Greenough*, 915 N.W.2d 915, 918 (Minn. App. 2018).

Minnesota's stay of adjudication sentence was created, refined, and meant to give a charged defendant a chance to escape the lifetime consequences of a criminal record. *See State v. Lee*, 706 N.W.2d 491, 495-96 (Minn. 2005). A stay of adjudication is a boon to our criminal justice system. It is the favored tool, when deserved. *See* Minn. Stat. § 152.18 (2016) (creating statutory stay of adjudication for certain first time controlled substance crimes).

A criminal conviction, either felony or gross misdemeanor—or sometimes a misdemeanor—can often hamper or completely deny a citizen's chance at the following extensive categories: trying to rent; trying to get a job with the city, county, or state; trying to get any job in law enforcement; trying to get any job in healthcare, particularly when a position involves contact with the elderly, disabled or juveniles; trying to get into the

military; trying to get a federal position; trying to get a teaching position, or any position within a school system where there is contact with juveniles. *See* 10 U.S.C. § 504 (2012) (disallowing persons convicted of felony offenses from enlisting in the armed services); Minn. Stat. § 609A.03(c) (2018) (identifying factors for a district court to address an expungement petition that includes difficulties caused by the conviction with securing employment, housing, and other necessities); *Kim v. State*, 434 N.W.2d 263, 266-67 (Minn. 1989) (recognizing employment consequence as a potential consequence from a guilty plea); *Sames v. State*, 805 N.W.2d 565, 565 (Minn. App. 2011) (recognizing loss of firearm as a potential collateral consequence to a guilty plea); *State v. Washburn*, 602 N.W.2d 244, 246 (Minn. App. 1999) (recognizing loss of driving privileges as a potential consequence to a guilty plea); *see also* Christopher Uggen & Robert Stewart, *Piling On: Collateral Consequences and Community Supervision*, 99 Minn. L. Rev. 1871, 1875-80 (2015) (identifying a wide-array of economic, physical, and social consequences imposed on criminal defendants).

Those charged with a crime but who were given a stay of adjudication and that have successfully completed probation, leading to a clean criminal record, do not suffer the "Sisyphus Syndrome" that those with a criminal record must overcome.

Somehow, the present federal immigration policy has "weaponized" Minnesota's stay of adjudication and the government is now using Minnesota's stay of adjudication to deport Johnston. *See* 8 U.S.C. § 1101(a)(48)(A) (2012) (defining that one way a conviction occurs is when "the alien has entered a plea of guilty or nolo contendere or has admitted

sufficient facts to warrant a finding of guilt, and the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed").

Today's federal immigration and deportation laws and proceedings belong in the Ninth Circle of Hell described in Dante Alighieri's "Inferno," which is part of the three volume series, The Divine Comedy. Charon weeps.

Are not the 56 signers of the Declaration of Independence—our revered founding fathers—still immigrants and sons of immigrants? Would both Brigadier General Casimir Pulaski of Poland and Major General Marquis de Lafayette of France—heroes of the revolutionary war—today be classified as undocumented aliens?[1]

I do not believe that Minnesota law has any business becoming an unwitting agent for federal immigration and deportation policy. "Bad men need nothing more to compass their ends, than that good [people] should look on and do nothing." John Stuart Mill, *Inaugural Address Delivered to the University of St. Andrews* 74 (Longmans, Green, Reader, and Dyer ed., 1867).

After successful completion of a stay of adjudication you are then discharged, with no criminal record. *See Dupey*, 868 N.W.2d at 41. So there is no plea to withdraw. *Id.*; *see also Lunzer v. State*, 874 N.W.2d 819, 821-22 (Minn. App. 2016). Minnesota law does not recognize that Johnston is convicted of any crime. Federal immigration law claims to

[1] *See* H.R.J. Res. 26, 111th Cong., 123 Stat. 2999 (2009) (proclaiming Casimir Pulaski, killed in action in the revolutionary war, to be an honorary citizen of the United States posthumously); S.J. Res. 13, 107th Cong., 116 Stat. 931 (2002). Major General Marquis de Lafayette, who was instrumental in many key battles of our revolutionary war, including Yorktown, was conferred honorary citizenship of the United States posthumously).

recognize Johnston as having been convicted of the equivalent crime and subject to deportation for that reason. *See* 8 U.S.C. §§ 1101(a)(48)(A), 1227(a)(2)(E)(i) (2012); 18 U.S.C. § 16(a) (2012). Johnston should not be damned to this absurd result.

Johnston argues we should remand to the district court for an evidentiary hearing on the issue of ineffective assistance of counsel. *See State v. Nicks*, 831 N.W.2d 493, 504 (Minn. 2013); *State v. Caldwell*, 803 N.W.2d 373, 388 (Minn. 2011).

The record—based on Johnston's affidavit—is clear that Johnston may have a good chance of prevailing at an evidentiary hearing on his ineffective-assistance-of-counsel claim. Johnston's attorney went to the trouble of associating with an immigration attorney on the consequences of Johnston, an alien, pleading guilty and receiving a stay of adjudication. Both attorneys advised Johnston that if he successfully completed probation he would then have no conviction that would trigger deportation or re-entry issues. The district court furthered this erroneous advice when it advised Johnston that, if he did not complete his probation, and if a conviction was entered, then it could lead to failure to be admitted into the United States and failure to become a citizen. The advice of Johnston's attorney, his immigration attorney, and the district court was confusing, certainly unintentionally so, but still confusing and induced Johnston to plead guilty with a promise of a stay of adjudication thus foregoing his right to a jury trial. This conditional plea was based on the advice that successful completion of a stay of adjudication would not put him in harm's way.

If, on remand, the district court finds that Johnston received effective assistance from counsel, it can deny the petition for postconviction relief. If, on the other hand, on

remand the district court finds that there was erroneous advice from Johnston's counsels and the court, the district court can choose a remedy. There is no reason for the district court at that point to give Johnston what he asked for, the right to withdraw his guilty plea. As the majority points out, after successful completion of a stay of adjudication "there is no plea to withdraw from." The case is over. So what the district court judge can do is "expunge" the charge. That would eliminate the basis that federal immigration law claims exposes Johnston to be a deportable alien. The state should not complain because they are not out anything. With Johnston completing probation successfully, their intention of ensuring that Johnston is a lawful individual has been met. All they have now is an old charge and nothing more.

This sequence will likely end up on appeal again. With the full record, our supreme court would have a fresh look at a way to keep Minnesota from becoming an agent of the federal government's immigration and deportation policies. If the federal government can construe a "Minnesota non-criminal act" to be enough of a crime upon which to deport Johnston, then justice allows Minnesota law to construe "a Minnesota non-crime" in this specific situation to have even the initial charge expunged and wiped from Johnston's record.

Justice requires that Johnston have a chance to fight deportation. He may or may not be successful, but with expungement of even the initial charge, Johnston has a fighting chance.

I dissent and would remand to the district court for an evidentiary hearing on Johnston's claim of ineffective assistance of counsel.