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**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A19-0747**

Simon Duku Boateng, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed January 13, 2020**
**Affirmed**
**Ross, Judge**

Scott County District Court
File No. 70-CR-16-20782

Stephen V. Grigsby, Northfield, Minnesota (for appellant)

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

Ronald Hocevar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Rodenberg, Judge; and Jesson, Judge.

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

**ROSS**, Judge

Simon Boateng received a stay of adjudication after pleading guilty to violating an order for protection. He later sought to withdraw his plea in a postconviction petition, arguing that his attorney was ineffective for having failed to advise him that the terms of

his plea would render him deportable. The district court denied the petition, concluding that Boateng failed to demonstrate that providing specific advice about the actual immigration consequences was necessary to meet the objective standard of reasonableness. We affirm because Boateng failed to offer any evidence that he would not have pleaded guilty but for his attorney's alleged ineffective assistance.

## FACTS

Simon Boateng was a permanent resident seeking United States citizenship when the state charged him with violating an order for protection (OFP). *See* Minn. Stat. § 518B.01, subd. 14(b) (2016). He pleaded guilty only after his attorney advised him, generally, that his plea could have immigration consequences. The district court entered a stay of adjudication in April 2017, placing Boateng on probation for one year.

Boateng petitioned for postconviction relief in October 2018, seeking to withdraw his guilty plea for alleged ineffective assistance of counsel. Boateng argued that his counsel's advice that receiving a stay of adjudication would avoid immigration consequences was ineffective assistance of counsel and that, but for the ineffective assistance, he would not have pleaded guilty but gone to trial.

Boateng testified at an evidentiary hearing that he made his immigration status known to Matthew Mankey, his defense attorney. Mankey informed him that there *could be* immigration consequences. Mankey testified that he knew that Boateng was not a citizen and that a conviction might create immigration consequences. But he did not undertake any "specific research" about any possible consequences, hoping that a stay of adjudication would avoid them.

The district court recognized that a conviction for violating an OFP is a deportable offense and that a stay of adjudication under a guilty plea is tantamount to a conviction under federal immigration law. *See* 8 U.S.C. §§ 1101(a)(48)(A)(ii), 1227 (2018). The district court found that Boateng "was given the standard warning regarding immigration consequences of a criminal guilty plea" and that Mankey did not provide any "false assurances" to Boateng.

The district court concluded that Boateng failed to establish that, under an objective standard of reasonableness, an attorney must give specific advice of the actual immigration consequences. It acknowledged that *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010), held that an attorney's failure to address the potential immigration consequences of a guilty plea "can be grounds" for an ineffective-assistance-of-counsel claim. But it declined to rely on *Padilla* as establishing the objective standard of reasonableness in Boateng's case because Mankey did not misadvise Boateng. The district court therefore concluded that Boateng could not demonstrate ineffective assistance of counsel and denied the petition.

After Boateng appealed and the parties completed briefing, this court identified a potentially dispositive issue not addressed in the district court or in the parties' appellate briefs. We directed the parties to consider whether the district court had subject-matter jurisdiction over Boateng's postconviction petition when Boateng had not been convicted of a crime. *See Lunzer v. State*, 874 N.W.2d 819, 823 (Minn. App. 2016) (holding that the district court lacked subject-matter jurisdiction over a postconviction petition of a

defendant whose stay of adjudication was not a conviction for the postconviction statute's purposes). The parties addressed the issue at oral argument.

**D E C I S I O N**

Boateng asks us to reverse the district court and remand to allow him to withdraw his plea, arguing that the district court properly exercised subject-matter jurisdiction but erred by applying an affirmative-misadvice standard to his attorney's failure to advise him of plea consequences. The state urges us to affirm because the district court lacked jurisdiction, because its order was correct on the merits, or because Boateng failed to demonstrate that he would not have pleaded guilty. We have carefully considered the record and conclude that we need not decide whether the district court had subject-matter jurisdiction or properly imposed an affirmative-misadvice standard. This is because, even assuming proper jurisdiction and assuming Boateng was given constitutionally deficient advice, he failed to present *any* evidence indicating that, but for the deficiency, he would not have pleaded guilty.

We review a district court's denial of a postconviction petition seeking to withdraw a guilty plea for an abuse of discretion. *Sanchez v. State*, 890 N.W.2d 716, 719–20 (Minn. 2017). To demonstrate ineffective assistance of counsel, Boateng must establish both that his counsel's representation was unreasonably substandard and 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." *Campos v. State*, 816 N.W.2d 480, 486 (Minn. 2012) (quotation omitted). We need not address both prongs when one is dispositive. *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013).

The state asks us to affirm the district court on the theory that Boateng failed to prove the second ineffective-assistance element: prejudice. We observe that the state never developed a challenge to Boateng's position on the prejudice element in the district court. And a party generally may not raise on appeal an issue not argued to or considered by the district court. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But the supreme court has held that this court erroneously failed to address a respondent's previously unraised argument on appeal where the argument supported the district court's decision and "there are sufficient facts in the record for the appellate court to consider the alternative theories, there is legal support for the arguments, and the alternative grounds would not expand the relief previously granted." *State v. Grunig*, 660 N.W.2d 134, 137 (Minn. 2003). The *Grunig* court based that holding on a rule that expressly applies to review in the supreme court rather than to review in appellate courts generally and did not explain why it was applying the rule to appeals to this court. *See id.* (reversing when this court did not accept a new argument under Minn. R. Crim. P. 29.04, subd. 6, which governs the "Procedure for Appeals from Court of Appeals"). But because the *Grunig* court held that we erred by failing to apply the supreme court rule to a court of appeals proceeding, we will follow the holding. *See State v. Curtis*, 921 N.W.2d 342, 346 (Minn. 2018) ("The court of appeals is bound by supreme court precedent . . . ."). The factual record regarding prejudice here is clear, there is legal support for the state's argument, and crediting the argument would not expand the district court's decision. We will therefore address the state's previously unraised challenge to whether Boateng proved the second element of his ineffective-assistance-of-counsel claim.

Boateng failed to prove prejudice. A defendant satisfies the prejudice element by showing 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." *Campos*, 816 N.W.2d at 486. This means that he must prove that he "suffer[ed] actual prejudice," and he must do so by a preponderance of the evidence. *State v. Blanche*, 696 N.W.2d 351, 376 (Minn. 2005). We review whether he met this burden by considering the "totality of the evidence" presented to the district court. *Andersen*, 830 N.W.2d at 10.

Boateng failed to support his claim of prejudice with any evidence whatsoever. Rather than provide evidence of prejudice, Boateng offered only his postconviction attorney's argument that, "Had [he] been accurately advised regarding the consequences of pleading guilty given the highly probable immigration consequences, there is no logical reason for him not to have taken the case to trial." And Boateng's testimony focused on his immigration status at the time of his plea, the facts he made known to Mankey, and the potential consequences of his plea. Mankey's testimony focused on his failure to conduct specific research or inform Boateng of the actual immigration consequences of his plea. At no point did Boateng's postconviction counsel ask Boateng how receiving correct advice would have affected his decision in contrast to the allegedly incorrect advice, nor did his counsel otherwise introduce evidence to prove the fact. The factual record is simply silent on it.

Asked at oral argument to address the lack of evidence of prejudice, Boateng's appellate counsel directed us to the following portion of Mankey's testimony:

> I believe that Mr. [Boateng] had an immigration attorney, an African fellow. I did not know him. When he came to see me, I recommended that he go to the Karam law office. I have worked with them in the past, and I found them to be quite competent. I believe that -- well, not I believe. I know that Mr. Prokosch informed me that if this plea were withdrawn and he were to replead to a Disorderly Conduct, that all the immigration consequences would go away.

Boateng's theory is that Mankey's testimony clearly implies that Boateng was seeking to withdraw the plea specifically to avoid the immigration consequence and that Boateng would not have pleaded guilty had he known of the immigration consequence. The referenced testimony is not evidence that Boateng would have opted for trial if not for his attorney's allegedly deficient advice. It is instead merely Mankey's hearsay recollection about another attorney's advice along with a potential remedy to the consequence of Boateng's plea.

The gist of Boateng's argument is that the prejudice here is self-evident from his litigation decisions. The argument is unconvincing. It implies that a defendant's current attempt to withdraw a plea based on allegedly flawed advice is proof that he would not have initially pleaded guilty but for the flawed advice. Taken to its logical end, this framing would obviate any need to prove the prejudice element in any case raising a *Padilla* challenge. But the *Padilla* Court's reasoning undermines the notion:

> Accepting his allegations as true, Padilla has sufficiently alleged constitutional deficiency to satisfy the first prong . . . . Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy [the] second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance.

559 U.S. at 369, 130 S. Ct. at 1483–84.

And Boateng's argument ignores an essential premise of his plea-withdrawal strategy before the district court: that Boateng would withdraw his plea *and* "replead to a Disorderly Conduct," a lesser offense, and thereby escape "all the immigration consequences." Mankey testified that the state never offered a disorderly-conduct plea. The options actually available to Boateng were the stay-of-adjudication plea deal he received, or a trial on the merits with the risk of a guilty verdict and conviction. We will not assume that Boateng's desire to escape immigration consequences is evidence that he would not have pleaded guilty and risked trial.

Because Boateng presented no evidence tending to prove the second ineffective-assistance element, his claim failed as a matter of law. The district court therefore properly denied his request to withdraw his guilty plea.

**Affirmed.**