STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0040

Emad Gh Al Rousan, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed August 3, 2020
Affirmed
Worke, Judge
Dissenting, Jesson, Judge

Ramsey County District Court
File No. 62-CR-17-7191

Christian R. Peterson, Christian R. Peterson Law Office, Maple Grove, Minnesota (for appellant)

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

Lyndsey M. Olson, City Attorney, Steven Heng, Assistant City Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Worke, Judge; and Jesson, Judge.

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

WORKE, Judge

Appellant challenges the district court's denial of his petition for postconviction relief and his motion to withdraw his guilty plea, arguing that he received ineffective

assistance of counsel concerning the immigration consequences of pleading guilty. We affirm.

FACTS

On November 9, 2017, appellant Emad Gh Al Rousan pleaded guilty to misdemeanor violation of an order for protection (OFP) that prohibited him from calling his wife. *See* Minn. Stat. § 518B.01, subd. 14(b) (2016). At the plea hearing, the district court asked whether Rousan had enough time to discuss the case with his attorney. Rousan responded that he had. When questioned by his attorney, Rousan confirmed that he had gone through the plea petition "line-by-line" with her. The plea petition contained a clause that read, "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." The plea petition also stated that Rousan had fully discussed his constitutional rights with his attorney. Rousan's attorney signed the plea petition indicating that she "personally explained the contents of the . . . petition to [Rousan]" and Rousan confirmed that he signed the petition with the intent to plead guilty.

Neither Rousan's attorney, the prosecutor, nor the district court inquired about whether Rousan had been advised about the immigration consequences of pleading guilty. After Rousan provided a factual basis to support his plea stating that he had called his wife in violation of the OFP, the district court found that Rousan had made a knowing, intelligent, and accurate waiver of his rights, and that the factual basis supported the plea. The district court deferred acceptance of the plea until sentencing. On January 11, 2018,

the district court accepted Rousan's guilty plea and sentenced him to 90 days in jail, stayed for one year, and placed him on probation for one year.

On January 22, 2019, Rousan was discharged from probation. On September 11, 2019, Rousan filed a petition for postconviction relief, or in the alternative, a motion to withdraw his guilty plea. Rousan claimed that he was entitled to postconviction relief because his counsel failed to advise him of immigration consequences.

Rousan filed a supporting affidavit stating that he was born in Jordan in 1968, he came to the United States in 2010 as a permanent lawful resident, he was not a U.S. citizen, his attorney never asked him about his immigration status nor "explained that there would be immigration consequences," and he would not have pleaded guilty had he known about the immigration consequences. Rousan stated that as a result of pleading guilty, an immigration judge had ordered his deportation on July 26, 2019.

On December 12, 2019, the district court summarily denied Rousan's requested relief. The district court determined that because the plea petition and transcript from the plea hearing established that Rousan's attorney had advised him that pleading guilty may result in deportation, his counsel was effective because he was not convicted of an offense that would result in automatic deportation. This appeal followed.

D E C I S I O N

Rousan challenges the district court's summary denial of his petition for postconviction relief, arguing that he was entitled to relief because his counsel did not advise him regarding the immigration consequences of his plea.

In reviewing a district court's denial of a petition for postconviction relief, this court reviews the district court's factual findings for clear error, its legal conclusions de novo, and its decision whether to grant relief for an abuse of discretion. *Sanchez v. State*, 890 N.W.2d 716, 719-20 (Minn. 2017). To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness," and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984).

"The objective standard of reasonableness is defined as representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *State v. Vang*, 847 N.W.2d 248, 266-67 (Minn. 2014) (quotations omitted). There is a strong presumption that counsel's performance was reasonable. *Swaney v. State*, 882 N.W.2d 207, 217 (Minn. 2016). When one prong of the *Strickland* test is determinative, an appellate court does not need to address the other prong. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

In *Padilla v. Kentucky*, the United States Supreme Court held that the Sixth Amendment requires counsel to inform a noncitizen defendant about the immigration consequences of a guilty plea, including deportation. 559 U.S. 356, 374, 130 S. Ct. 1473, 1486 (2010). The Minnesota Supreme Court has summarized an attorney's obligation as follows:

> *Padilla* establishes that 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. 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, 890 N.W.2d at 721.

In denying Rousan's postconviction petition, the district court relied on its determination that Rousan's conviction for violation of an OFP would not result in certain deportation. Rousan contends that the removal consequences as a result of pleading guilty to Minn. Stat. § 518B.01, subd. 14(b), were clear and thus his counsel's general advice about potential immigration consequences was not reasonable.

The Immigration and Nationality Act (INA) provides that a permanent resident is removable if "the court determines [they have] engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued." 8 U.S.C. § 1227(a)(2)(E)(ii) (2012). While the issue of whether the immigration consequences of pleading guilty to violation of an OFP pursuant to Minn. Stat. § 518B.01, subd. 14(b), are truly clear has not been squarely addressed in Minnesota, other jurisdictions have addressed this issue.

In *State v. Ramos-Curiel*, the Washington Court of Appeals considered whether a defendant received ineffective assistance of counsel when his attorney failed to advise him that his guilty plea to a violation of a domestic-violence no-contact order would result in certain deportation under the INA. No. 49048-0-II, 2017 WL 4005142, *2 (Wash. Ct. App. Sept. 12, 2017), *review denied* (Wash. Aug. 8, 2018).

The Washington Court of Appeals, after examining the analyses undertaken by federal courts[1], determined that a conviction for a violation of a domestic-violence no-contact order under Washington law would not necessarily subject the defendant to deportation.[2] *Id.* at *4. The court stated,

> [T]he immigration consequences of pleading guilty to violation of a domestic violence no contact order are complex and not easily determined by simply reading the text of 8 U.S.C. section 1227(a)(2)(E)(ii). Rather, determining the immigration consequences . . . required defense counsel to look beyond the text . . . , ascertain the proper mode of analysis in light of conflicting federal circuit court opinions, and apply the proper analysis to the circumstances of [the defendant]'s case. Even after making such a determination, counsel could not be certain that [the defendant] would be deported . . . , since an immigration court would be required to make certain factual determinations about the nature of the no contact order

[1] *See Alanis-Alvarado v. Holder*, 558 F.3d 833, 836 (9th Cir. 2009) (applying modified categorical approach in determining whether petitioner's conduct constituted deportable offense pursuant to 8 U.S.C. § 1227(a)(2)(E)(ii)); *see also Garcia-Hernandez v. Boente*, 847 F.3d 869, 872 (7th Cir. 2017) (declining to apply either the categorical approach or the modified categorical approach as language of 8 U.S.C. § 1227(a)(2)(E)(ii) calls for focus on state court's determination regarding defendant's violation of the protective order).

[2] While the protective order in *Ramos-Curiel* was a domestic-violence no-contact order and the protective order in this case was an OFP, this distinction is irrelevant because the language of 8 U.S.C. § 1227(a)(2)(E)(ii) applies to protective orders generally.

> violation under either the modified categorical approach of the Ninth Circuit or the analysis employed by the Seventh Circuit.

Id. at *5.

Our review of federal caselaw leads us to the conclusion that the immigration consequences of Rousan's guilty plea were not truly clear. Notably, the language of 8 U.S.C.A. § 1227(a)(2)(E)(ii) requires an immigration court to make certain determinations about the nature of the protective order and the alien's conduct. *See Garcia-Hernandez v. Boente*, 847 F.3d at 872 ("The key language, 'the court determines,' does not require a conviction of a particular kind . . . . [w]hat matters is what the court 'determines.'"). This required determination does not make it so that an alien convicted of an OFP violation is clearly subjected to deportation. Therefore, despite the lack of plea-hearing inquiry regarding immigration consequences, the general immigration advisory in the plea petition—which Rousan reviewed with his attorney—was sufficient to comply with the requirements of *Padilla*. Because Rousan received effective assistance of counsel regarding potential immigration consequences, the district court did not err by denying his petition for postconviction relief. As the performance prong is dispositive, we do not address whether Rousan demonstrated prejudice.

We recognize that deportation due to Rousan's guilty plea to a misdemeanor offense may seem harsh, and Rousan's request for postconviction relief shows that remaining in the United States is important to him. *See Padilla*, 559 U.S. at 368, 130 S. Ct. at 1483 (recognizing that "preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence" (quotations omitted)). In our view,

while counsel's performance was reasonable, this case highlights the importance of ensuring that a noncitizen defendant is truly making an informed decision about pleading guilty. *See id.* at 373-74, 130 S. Ct. at 1486 (noting "severity of deportation . . . only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation").

Affirmed.

JESSON, Judge (dissenting)

I respectfully dissent.

An immigration judge ordered appellant Emad Gh Al Rousan, a lawful permanent resident of the United States, deported as a result of his guilty plea to violation of an order for protection (OFP)—a misdemeanor.[1] The Sixth Amendment to the United States Constitution entitles criminal defendants like Rousan to effective assistance of counsel. The question before us is whether Rousan received constitutionally adequate advice regarding the immigration consequences of his guilty plea before deciding to enter it. The answer to this question hinges on whether conviction of an OFP violation "clearly subject[ed]" Rousan to deportation. *Sanchez v. State*, 890 N.W.2d 716, 721 (Minn. 2017). If so, his counsel should have advised him of this fact. *Id.* Otherwise, a general advisory—like the one provided here—about potential immigration consequences suffices. *Id.* After reviewing the text of the immigration statute at issue and comparing it with two previously analyzed statutes, I conclude that the immigration consequences of Rousan's guilty plea were truly clear. The Constitution entitled Rousan to better legal advice.

I begin by considering the relevant immigration statute. The Immigration and Nationality Act (the Act) includes categories of criminal offenses which render a

[1] The record does not contain documents from Rousan's immigration court proceedings. But when considering whether to grant an evidentiary hearing on a postconviction petition, the "postconviction court considers the facts alleged in the petition as true and construes them in the light most favorable to the petitioner." *Brown v. State*, 895 N.W.2d 612, 618 (Minn. 2017).

noncitizen[2] subject to removal from the United States. *See* 8 U.S.C. § 1227(a)(2) (2012). One such criminal offense is the violation of an OFP. 8 U.S.C. § 1227(a)(2)(E)(ii). The Act states that a noncitizen "*is deportable*" if a court "determines [that he] has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued." *Id.* (emphasis added). Based solely on the language of the statute, I conclude that pleading guilty to violating an OFP subjects Rousan to removal from the United States.[3]

My conclusion is bolstered by comparing the statute at issue here (violation of an OFP) with two previously analyzed statutes. In *Padilla v. Kentucky*, the United States Supreme Court concluded that the immigration consequences for pleading guilty to transporting a large amount of marijuana in a tractor trailer were truly clear. 559 U.S. 365, 359, 368-69, 130 S. Ct. 1473, 1477, 1483 (2010). Similar to the provision of the Act at issue here, the portion of the INA dealing with controlled-substance crimes states that a noncitizen who "has been convicted of a violation of . . . any law or regulation . . . relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, *is deportable*." 8 U.S.C. § 1227(a)(2)(B)(i) (emphasis

[2] Although the statute uses the term "alien," the Act defines "alien" as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (2012).

[3] In reaching a conclusion to the contrary, the majority opinion relies heavily on an unpublished case from the Washington Court of Appeals and its analysis of federal law. That case is not precedential in the state of Washington. *See* Wash. Rev. Code § 2.06.040 (2019) (explaining that unpublished opinions are not precedential). Nor does it dictate the outcome here. Because I conclude that the text of the statute alone is clear enough to entitle Rousan to more specific advice, I do not look to persuasive authority.

added). The Supreme Court concluded that the terms of this statute were "succinct, clear, and explicit in defining the removal consequences for Padilla's conviction."[4] *Padilla*, 559 U.S. at 368, 130 S. Ct. at 1483.

In contrast, the Minnesota Supreme Court, in *Sanchez*, determined that provisions of the INA dealing with aggravated felonies were not truly clear. 890 N.W.2d at 723. Sanchez pleaded guilty to third-degree criminal sexual conduct for "sexual penetration of a person between 13 and 16 years of age." *Id.* at 722. The Act explains that a noncitizen "convicted of an aggravated felony . . . is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). The Minnesota Supreme Court concluded that, like in *Padilla*, this statute is truly clear that the commission of certain crimes—aggravated felonies—subjects a noncitizen defendant to removal from the United States. *Sanchez*, 890 N.W.2d at 722.

But unlike *Padilla*, the supreme court determined that the Act is "*not* clear about which offenses qualify as aggravated felonies." *Id.* (emphasis added). The supreme court observed that the category of aggravated felonies includes a broad range of offenses—including "murder, rape, or sexual abuse of a minor"—but does not define "sexual abuse of a minor." *Id.* (quotation omitted). And because the offense was undefined, an

[4] Accordingly, the Supreme Court determined that by reading the text of the statute—which "specifically command[ed] removal for all controlled substances convictions except for the most trivial of marijuana possession offenses"—Padilla's counsel could have easily determined that the guilty plea would make Padilla "eligible for deportation." *Padilla*, 559 U.S. at 368, 130 S. Ct. at 1483. Because the immigration statute made Padilla's deportation "presumptively mandatory" and his counsel provided incorrect advice, the Supreme Court held that Padilla satisfied the first prong of the ineffective-assistance-of-counsel standard. *Id.* at 369, 1483.

immigration court would likely have to review federal administrative guidance and other federal statutes to determine whether an offense qualifies as an aggravated felony. *Id.* at 722-23. Accordingly, the Minnesota Supreme Court concluded "that the relevant immigration statutes were not truly clear about whether Sanchez would be subject to removal after pleading guilty." *Id.* at 723.

Comparison of these two cases suggests that the statute at issue here is more similar to *Padilla* than *Sanchez*. It clearly states the consequences (removal from the United States) for a noncitizen committing a specific act (violating the portion of an OFP intended to protect the holder from threats, harassment, and bodily harm). This statute, in contrast with the one at issue in *Sanchez*, does not encompass a broad spectrum of criminal offenses requiring additional analysis to determine if the charged offense falls within the contemplated conduct. Rather, like the statute in *Padilla*, its terms are "succinct, clear, and explicit in defining the removal consequences." 559 U.S. at 368, 130 S. Ct. at 1483. I would conclude that the immigration consequences of Rousan's guilty plea to violating an OFP were truly clear.

True clarity does not require absolute certainty. *See Sanchez*, 890 N.W.2d at 723 (concluding that it was unclear "whether Sanchez would be *subject to removal*" based on his plea—not whether it was clear he would actually *be removed* from the United States). And in other contexts, courts have declared that "[c]lear and convincing evidence is shown where the truth of the facts asserted is *highly probable*."[5] *Christie v. Estate of Christie*,

[5] Courts apply the clear-and-convincing-evidence standard in cases involving certain types of civil commitment, allegations of attorney misconduct, and the termination of parental

911 N.W.2d 833, 839 (Minn. 2018) (quotation omitted) (emphasis added). Yet absolute certainty is what the district court here—and some courts elsewhere—appear to adopt as the standard. I do not read precedent as requiring that removal from the United States be an absolute certainty in order to conclude that the immigration consequences of a guilty plea are clear. And here, the immigration statute *is* truly clear: violation of the portion of an OFP intended to protect the holder from threats, harassment, or bodily injury renders a noncitizen deportable. No more need be said. This clarity entitled Rousan to better legal advice than a general advisory that there "may" be immigration consequences as a result of his plea. Rousan never received that advice. I would reverse and remand.[6]

rights. *See In re Linehan*, 518 N.W.2d 609, 613 (Minn. 1994) (civil commitment as a psychopathic personality); *In re Disciplinary Action Against Andrew*, 465 N.W.2d 576, 577 (Minn. 1991) (attorney misconduct); *In re Welfare of Children of K.S.F.*, 823 N.W.2d 656, 663 (Minn. App. 2012) (termination of parental rights).

[6] I would conclude that Rousan satisfied the first prong of the *Strickland* test demonstrating that his counsel's performance was deficient. *See Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064 (1984). As a result, I would remand for the district court to determine whether he met the second prong, requiring a showing of prejudice. *See id.* at 693-94, 2068.