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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2268**

Jonatan Benjamin Gudino,
petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed December 12, 2011
Affirmed
Klaphake, Judge**

Dakota County District Court
File No. 19-K2-95-001924

Joy D. Bartscher, Rogosheske, Sieben, Atkins & Pugh, LLC, South St. Paul, Minnesota
(for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Elizabeth M. Swank, Maureen F. Caturia, Assistant Dakota County Attorneys, Hastings,
Minnesota (for respondent)

Considered and decided by Klaphake, Presiding Judge; Larkin, Judge; and
Stauber, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant Jonatan Benjamin Gudino challenges the district court's order denying
his postconviction petition, arguing that the district court abused its discretion by

reaching its decision without an evidentiary hearing and erred by ruling that the United States Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) did not apply to appellant's case.

Because the record here conclusively shows that appellant was not entitled to postconviction relief, the district court did not abuse its discretion by summarily denying his postconviction petition, and because appellant was afforded the protections required by *Padilla*, we affirm.

DECISION

Evidentiary Hearing

We review the postconviction court's determinations for an abuse of discretion. *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011). The postconviction court's findings are reviewed for clear error and issues of law are subject to de novo review. *Id.* We also review the postconviction court's decision to deny an evidentiary hearing for an abuse of discretion. *Ferguson v. State*, 645 N.W.2d 437, 446 (Minn. 2002).

A petitioner is entitled to a hearing on a postconviction 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 (2010). A postconviction petitioner should be afforded a hearing when “material facts are in dispute that must be resolved in order to determine the issue on the merits.” *Ferguson*, 645 N.W.2d at 446 (quotation omitted). But the allegations in the petition must be more than “argumentative assertions without factual support.” *Id.* (quotation omitted). If, as here, there is a claim of ineffective assistance of counsel, the petitioner must allege facts showing that his

attorney's representation was substandard and but for counsel's errors a different result would have been obtained. *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007).

Here, appellant's petition alleged that he had not been advised by his trial attorney that his guilty plea could result in removal proceedings. The petition included a copy of the Immigration Court's 2010 decision denying appellant's motion to terminate removal proceedings, and a copy of his rule 15 plea petition, which was signed by appellant at his guilty plea in 1996, and included acknowledgements that he had been told by his attorney that as a non-citizen, his guilty plea could make him subject to deportation, and that he understood the rights he was giving up by pleading guilty. The only allegation supporting appellant's claim of ineffective assistance of counsel is his current counsel's assertion in the postconviction petition that appellant was not informed of the consequences of pleading guilty. This claim is contradicted by appellant's plea petition, which he signed and which was filed with the district court in 1996. Appellant did not submit a personal affidavit with the petition, could not find the plea transcript, and did not offer proof that his trial counsel would support his claim. Under these circumstances, appellant has made only "argumentative assertions without factual support." *See Ferguson*, 645 N.W.2d at 446. Finally, in light of the length of time, nearly 15 years, that elapsed between entry of the guilty plea and the postconviction petition, it is unlikely that an evidentiary hearing would have added information to this file.

The postconviction court was presented with a plea petition filed with the district court at the time of the plea that demonstrates that appellant was advised of possible immigration consequences. Appellant presented nothing in opposition to this except the

bare allegations of the postconviction petition. The postconviction court did not abuse its discretion by concluding that the “files and records of the proceeding conclusively show that [appellant] is entitled to no relief.” Minn. Stat. § 590.04, subd. 1.

Impact of Padilla

Appellant asserts that the postconviction court erred by ruling that *Padilla* did not apply retroactively to his case. In *Padilla*, the United States Supreme Court held that Padilla was deprived of his right to effective assistance of counsel when his attorney assured him that he would not be deported if he pleaded guilty to a controlled substance crime. 130 S. Ct. at 1483-84. The Supreme Court further held that counsel has an affirmative duty in all cases to advise a non-citizen client that a guilty plea carries a risk of deportation. *Id.* at 1486. In rejecting prior decisions that concluded that because immigration issues were collateral consequences, failure to advise a client of that risk would not support a claim of ineffective assistance of counsel, the Supreme Court stated, “We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally reasonable professional assistance.” *Id.* at 1481 (quotation omitted).

This court has already determined that the *Padilla* decision applies retroactively to convictions that were final when the opinion was issued. *Campos v. State*, 798 N.W.2d 565 (Minn. App. 2011), *review granted* (Minn. July 19, 2011). We reasoned that *Padilla* did not announce a new rule of constitutional criminal procedure but merely applied “long-standing principles regarding ineffective assistance of counsel enunciated in *Strickland* to specific facts.” *Id.* at 569.

But the United States Supreme Court noted in *Padilla* that immigration law is a complex legal specialty; unless the crime with which a non-citizen is charged succinctly and clearly renders him removable, counsel's duty is limited to advising a "noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." 130 S. Ct. at 1483. Padilla was charged with controlled substance crime, which succinctly and clearly makes a person removable. *Id.* Appellant's conviction for financial transaction card fraud is not a crime that clearly renders a person removable; at most, under the precepts of *Padilla*, appellant's counsel was obligated to advise him of possible immigration consequences. *Id.* The plea petition here contained the sort of advisory approved by the Supreme Court in *Padilla* in cases where it is not clear whether a non-citizen is removable. *Id.* Appellant's claim of ineffective assistance of counsel is not sustainable, even in light of *Padilla* and *Campos*.

Affirmed.