STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1064

Felix Wemh, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed February 21, 2012
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CR-06-046609

Herbert A. Igbanugo, Igbanugo Partners Int'l Law Firm PLLC, Minneapolis, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Randall, Judge.*

* 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

WORKE, Judge

Appellant challenges the denial of his second postconviction petition, arguing that the district court erred by finding that his guilty plea was valid and that he received effective assistance of counsel. We affirm.

D E C I S I O N

Appellant Felix Wemh[1] filed a postconviction petition seeking to withdraw his 2006 guilty plea to third-degree assault. Appellant argues that the district court abused its discretion by denying his petition. A petitioner seeking postconviction relief must prove the facts in a petition by a "fair preponderance of the evidence." Minn. Stat. § 590.04, subd. 3 (2010). To meet that burden, the petition "must be supported by more than mere argumentative assertions that lack factual support." *Henderson v. State*, 675 N.W.2d 318, 322 (Minn. 2004). This court reviews a postconviction court's decision for an abuse of discretion. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). This court reviews findings of fact to determine whether the evidence is sufficient to sustain the findings and reviews legal issues and mixed questions of fact and law, including claims of ineffective assistance of counsel, de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004); *Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003).

Appellant argues that the district court should have granted his request to withdraw his guilty plea. A defendant may withdraw a guilty plea after sentencing if withdrawal is "necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05,

[1] Appellant is a resident alien.

subd. 1. Manifest injustice exists if a plea is invalid, meaning that the plea does not comply with constitutional due-process requirements that it be accurate, voluntary, and intelligent. *State v. Rhodes*, 675 N.W.2d 323, 326 (Minn. 2004).

Appellant claims that his plea was not accurate because it was obtained through leading questions. But in 2008, appellant filed his first postconviction petition. The district court denied appellant's petition, and this court affirmed that decision. *See Wemh v. State*, No. A09-388, 2009 WL 4573876 (Minn. App. Dec. 8, 2009). It is well settled that when "direct appeal has once been taken, all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief." *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976); *see Powers v. State*, 731 N.W.2d 499, 501 (Minn. 2007) (applying same rule to postconviction petitions, stating that "matters raised or known but not raised in an earlier petition for postconviction relief will generally not be considered in subsequent petitions for postconviction relief"); *see also* Minn. Stat. § 590.04, subd. 3 (stating that the district court may deny relief when issues were previously raised and decided). "There are two exceptions to the *Knaffla* rule: (1) a claim is so novel that the legal basis was not available on direct appeal, or (2) the interests of justice require review." *Perry v. State*, 731 N.W.2d 143, 146 (Minn. 2007). Under the second exception, a petitioner must show that the failure to previously raise the issue was not deliberate and inexcusable. *Id.*

Neither exception applies to appellant's challenge to the accuracy of his plea due to counsel's use of leading questions. The legal basis was available when appellant filed his first postconviction petition. And the interests of justice do not require review. In his

first petition, appellant sought to withdraw his guilty plea, arguing that no inquiry was made into his mental deficiency. *Wemh*, 2009 WL 4573876, at *2. An analysis of that claim required review of the transcript of the proceedings, which showed the type of questions appellant's counsel posed. Thus, appellant knew, or should have known, of this claim at the time of his first postconviction petition, and he does not explain his failure to raise the claim at that time. Additionally, appellant challenged the accuracy of the plea in his first postconviction petition, and the district court concluded that the plea was accurate because appellant admitted that he assaulted the victim. This issue is *Knaffla*-barred.

Appellant claims that his guilty plea was not voluntary because his counsel improperly pressured him and he suffers from a mental deficiency. Appellant's first postconviction petition challenged the voluntariness his plea, claiming that no inquiry was made into his mental deficiency. The district court concluded that the plea was voluntary. Appellant already raised this claim. He asserts, however, that new evidence shows that he was mentally incompetent at the time of his plea; this evidence includes: records of his receipt of social-security benefits due to his disability, his affidavit, his sister's affidavit, and a psychological assessment conducted four years after his guilty plea. But when appellant filed his first postconviction petition, he submitted a disability report dated November 25, 2002, summarizing his level of functioning. He also submitted records showing his receipt of social-security benefits, and an affidavit regarding his mental deficiency dated July 7, 2008, from his immigration attorney who was representing him in removal proceedings.

The district court considered this evidence in denying appellant's first petition. The examiner described appellant as being able to understand simple and repetitive instructions, and the district court found that despite his disability, appellant was able to understand his actions and the nature of his decisions. The district court concluded that the lack of discussion on the record regarding appellant's mental health did not entitle him to withdraw his plea, because the record and the pre-sentence-investigation report demonstrated that appellant understood the charges, his rights, and the consequences of his plea. This claim is also *Knaffla*-barred.

Appellant claims that his plea was not intelligent because he was unaware of immigration consequences. Appellant argues that under *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), his attorney was ineffective for failing to advise him that he would be deported if he pleaded guilty. The district court determined that *Padilla* did not apply retroactively to appellant's case. But in *Campos v. State*, this court stated that a defense counsel's duty to properly advise a client is not a new requirement; therefore, *Padilla* did not announce a new rule of criminal procedure. 798 N.W.2d 565, 570-71 (Minn. App. 2011), *review granted* (Minn. July 19, 2011). Because it is not a new rule of criminal procedure, *Padilla* is to be applied retroactively to cases on collateral review. *Id.* at 569. Based on *Campos*, the district court erred in failing to apply *Padilla* retroactively. But because *Campos* holds that *Padilla* is not a new rule, relief was available to appellant

when he filed his first postconviction petition. When appellant filed his first petition he knew that he was facing removal proceedings; therefore, this claim is *Knaffla*-barred.[2]

Finally, appellant argues that the district court erred by failing to consider evidence showing that he is innocent and evidence that he was mentally incompetent to enter a plea. This evidence includes: police reports, a psychiatric assessment, and affidavits from appellant and his sister. But this evidence was either presented when appellant filed his first postconviction petition or was available to appellant and should have been presented at that time. The district court did not abuse its discretion in denying appellant's second petition for postconviction relief.

Affirmed.

[2] Even if appellant's ineffective-assistance-of-counsel claim was not *Knaffla*-barred, an analysis of his claim demonstrates that it still fails. To sustain an ineffective-assistance-of-counsel claim, appellant bears the burden of proving that (1) his counsel's representation fell below an objective standard of reasonableness and (2) but for the deficient performance, appellant would not have pleaded guilty and would have insisted on a trial. *See State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). Padilla's attorney provided incorrect deportation-risk advice. 130 S. Ct. at 1478. Appellant's guilty plea petition is part of the record; in it, appellant acknowledges: "My attorney has told me and I understand that if I am not a citizen of the United States, conviction of a crime may result in deportation, exclusion from admission to the U.S.A., or denial of naturalization." Thus, the record shows that appellant's attorney advised of potential immigration consequences, thereby, providing reasonable representation.