This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).

STATE OF MINNESOTA
IN COURT OF APPEALS
A11-71

Karl Anthony Edwards, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed August 15, 2011
Affirmed
Muehlberg, Judge[*]

Ramsey County District Court
File No. 62-K6-97-1674

Marcus A. Jarvis, Jarvis & Associates, P.C., Burnsville, Minnesota, and

Magdalena B. Metelska, Minneapolis, Minnesota (for appellant)

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

John J. Choi, Ramsey County Attorney, Mark N. Lystig, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Larkin, Judge; and Muehlberg, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

MUEHLBERG, Judge

Appellant Karl Anthony Edwards appeals from a postconviction court's denial of his second petition for postconviction relief without granting an evidentiary hearing. Appellant pleaded guilty to a controlled substance crime in 1997 after his attorney allegedly told him he would only be subject to immigration removal proceedings if he received jail time for his crime. In this appeal of his second unsuccessful petition to withdraw his guilty plea on the basis of ineffective counsel, appellant argues that the postconviction court erred by denying him relief because he qualifies for exceptions to the postconviction-relief time bar. Because appellant's petition failed to allege sufficient facts that, if established, would prove that his counsel was ineffective, we affirm.

FACTS

In 1996, appellant drove his car to a residence to drop off an individual who was to receive a large package of marijuana and bring it back to appellant. The state charged appellant with fifth-degree controlled substance crime, conspiracy to possess more than 42.5 grams of marijuana, in violation of Minn. Stat. §§ 152.025, subd. 2(1), .096, subd. 1, 609.05 (1996). In 1997, appellant pleaded guilty and was promised a stay of imposition of his sentence. At his sentencing hearing, appellant's counsel argued that he should receive a stayed sentence with no jail time because of his immigration status:

> [Appellant] is not a citizen of the United States and if he becomes incarcerated, there is a good chance that he will then have an immigration hold put on him and will not get out of custody and may end up being sent back to Jamaica because of the instant offense.

The district court stayed the imposition of his sentence and placed appellant on probation without imposing jail time as a condition of the stay. He did not appeal.

Eleven years later, in January 2009, appellant received notice to appear for removal proceedings under the Immigration and Nationality Act. The notice stated that if at any time after entering the United States an individual is convicted of a controlled substance crime, other than a single offense involving possession for one's own use of 30 grams or less of marijuana, that individual may be removed from the United States. It indicated that appellant was removable because he is not a citizen or national and was convicted of a qualifying controlled substance crime.

On May 4, 2009, appellant filed his first petition for postconviction relief, seeking to withdraw his guilty plea. He asserted that his decision to plead guilty was "neither voluntary nor intelligent" because it was based "solely on the advice given by [his attorney] that he would not be deported if an agreement that would keep him out of jail was reached." The postconviction court denied appellant's petition without a hearing. It found that the petition was not timely and that immigration proceedings that result from a guilty plea are collateral consequences that do not require withdrawal of a guilty plea.

He appealed, and after appellant's oral argument to the court of appeals, the United States Supreme Court decided *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482-83 (2010), holding that an attorney's failure to advise a client that his guilty plea carries a risk of deportation may be constitutionally deficient representation. In an unpublished opinion, we affirmed the district court's findings and held that *Padilla* did not apply to

appellant's case. *Edwards v. State*, A09-1432, 2010 WL 1753327, at *3 n.1 (Minn. App. May 4, 2010), *review denied* (Minn. Jun. 15, 2010). Appellant did not seek review from the United States Supreme Court.

On October 8, 2010, appellant filed a second postconviction petition, claiming again that he received ineffective assistance of counsel. The postconviction court held that our opinion in *Edwards* was the law of the case and denied his petition. He appeals again.

D E C I S I O N

Appellant challenges the postconviction court's dismissal of his second postconviction petition without a hearing. Postconviction courts must set an evidentiary hearing on a petition unless "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 hearing "is not required unless facts are alleged which, if proved, would entitle a petitioner to the requested relief." *Fratzke v. State*, 450 N.W.2d 101, 102 (Minn. 1990). "Allegations in a postconviction petition must be more than argumentative assertions without factual support." *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007) (quotation omitted). The petitioner has the burden of establishing facts by a fair preponderance of the evidence that would warrant reopening the matter. *Hummel v. State*, 617 N.W.2d 561, 564 (Minn. 2000). We will not disturb a postconviction court's decision absent an abuse of discretion. *Leake*, 737 N.W.2d at 535.

Appellant argues that the postconviction court erred when it dismissed his ineffective assistance of counsel claim. He contends that his counsel gave him incorrect

immigration advice in 1997 by telling him that he would only be deported if he received jail time. He argues that he is therefore entitled to withdraw his guilty plea. *See* Minn. R. Crim. P. 15.05, subd. 1 (stating that a defendant may withdraw a guilty plea if "withdrawal is necessary to correct a manifest injustice").

To receive a postconviction hearing on an ineffective-assistance-of-counsel claim, a petitioner must allege facts that would "affirmatively show that his attorney's representation fell below an objective standard of reasonableness, and that but for the errors, the result would have been different." *Wilson v. State*, 582 N.W.2d 882, 885 (Minn. 1998); *see Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). The petitioner bears the burden of proof on an ineffective assistance of counsel claim, and there is a strong presumption that "counsel's performance fell within a wide range of reasonable assistance." *State v. Miller*, 666 N.W.2d 703, 716 (Minn. 2003) (quotation omitted). We review counsel's performance based on professional standards at the time of counsel's challenged conduct. *Bruestle v. State*, 719 N.W.2d 698, 705 (Minn. 2006).

We conclude that the postconviction court was not required to provide an evidentiary hearing based on appellant's allegations. A petitioner has the burden to allege facts that would entitle him to relief. *See State v. Kelly*, 535 N.W.2d 345, 348-49 n.2 (Minn. 1995) (explaining that the standard to set an evidentiary hearing is less than the standard of proving ineffective counsel). And a postconviction court is justified in denying a petition without a hearing where the petitioner has not presented evidence that supports his allegations. *See Bruestle*, 719 N.W.2d at 705 (holding that postconviction

court was not required to order a hearing where petitioner presented no evidence to show that counsel was ineffective, including no expert testimony or affidavits from unaffiliated defense attorneys commenting on counsel's representation); *Townsend v. State*, 582 N.W.2d 225, 229 (Minn. 1998).

In his petition, appellant asserted merely that his counsel "told [him] that he would not be deported as long as he served no jail time and stayed out of custody." He included with his petition an affidavit asserting his innocence. He did not explain to the postconviction court what the immigration law provided in 1997. He did not show that the advice of his counsel was incorrect in 1997. He did not offer affidavit testimony of another attorney who could testify that his counsel's performance was deficient in 1997. Without any information about the professional standards for criminal-law attorneys giving immigration advice at the time of counsel's challenged conduct, the postconviction court could not evaluate appellant's counsel's effectiveness. Thus, appellant did not allege sufficient facts that, if proved, would demonstrate that his counsel rendered ineffective assistance, *see Fratzke*, 450 N.W.2d at 102, and, the postconviction court was justified in denying appellant postconviction relief.

Appellant also argues that the postconviction remedy act violates the Fourteenth Amendment because other postconviction petitioners have obtained relief after the

statutory time bar and he has not. Because appellant did not allege a sufficient basis for relief in his petition, we need not address his equal protection argument.

Affirmed.