STATE OF MINNESOTA
IN COURT OF APPEALS
A11-86

State of Minnesota,
Respondent,

vs.

Jose Nava,
Appellant.

Filed December 19, 2011
Affirmed
Larkin, Judge

Ramsey County District Court
File No. 62-K3-06-001138

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

LARKIN, Judge

Appellant challenges his conviction of second-degree assault, arguing that the district court abused its discretion by denying his motion to withdraw his guilty plea. Because appellant's contentions that his plea was the result of ineffective assistance of counsel, unintelligent, and involuntary are without merit, we affirm.

FACTS

On January 31, 2006, appellant Jose Nava struck his ex-girlfriend with a piece of wood. The resulting injury to her forehead required stitches and staples. Appellant was charged with one count of second-degree assault, and he petitioned to plead guilty to the offense in May 2006. In exchange for his plea, the state agreed to a probationary sentence instead of the presumptive guidelines sentence, which was an executed prison term of 21 months.

During the plea hearing, and with the aid of an interpreter, appellant acknowledged that he had reviewed his entire plea petition with his attorney and an interpreter and that he understood its contents. Appellant also made the following acknowledgement on the record:

> COUNSEL: Now, specifically, Mr. Nava, I have in paragraph 19e indicated and gone over with you that you're not a citizen of the United States, correct?
> APPELLANT: Yes.
> COUNSEL: Your plea of guilty and conviction in this case could have an immigration consequence. I've advised you of that, right?
> APPELLANT: Yes.
> COUNSEL: And knowing that, you want to plead guilty?

APPELLANT: Yes.

Appellant also acknowledged that to avail himself of the terms of the plea agreement, he had to remain law-abiding and appear for sentencing. Appellant was further informed that if he failed to comply with those conditions, he would be unable to withdraw his guilty plea. The district court accepted appellant's plea petition and found that appellant's waiver of trial rights was voluntary and intelligent. Next, appellant provided a factual basis for the charge of second-degree assault. Following the plea, the district court agreed to release appellant pending sentencing on July 21. Appellant failed to appear at the sentencing hearing, and a warrant was issued for his arrest.

Four years later, appellant was apprehended and appeared before the district court for sentencing. At that time, he moved the district court to either enforce the terms of the plea agreement or to allow him to withdraw his guilty plea on the ground that he received ineffective assistance of counsel under *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). The district court found that appellant's attorney advised him regarding potential immigration consequences and therefore denied his motion to withdraw his guilty plea. The district court also denied appellant's request for sentencing consistent with the plea agreement, reasoning that appellant failed to abide by the condition that he appear for sentencing. The district court sentenced appellant to serve 21 months in prison. This appeal follows.

D E C I S I O N

I.

"A defendant does not have an absolute right to withdraw a valid guilty plea." *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). A district court may grant a

defendant's motion to withdraw a guilty plea before sentencing if the defendant establishes that "it is fair and just to do so." Minn. R. Crim. P. 15.05, subd. 2; *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989). When considering whether withdrawal is "fair and just," the district court must consider not only the reasons advanced by the defendant, but also any prejudice that granting the motion would cause the state because of its reliance on the guilty plea. Minn. R. Crim. P. 15.05, subd. 2; *Kim*, 434 N.W.2d at 266. We review the district court's denial of a motion to withdraw a guilty plea for an abuse of discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998).

To withdraw a plea based on ineffective assistance of counsel, a defendant must prove (1) that his counsel's representation fell below an objective standard of reasonableness and (2) that there is a reasonable probability that but for the deficient performance, he 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)). "We need not address both the performance and prejudice prongs if one is determinative." *State v. Nissalke*, 801 N.W.2d 82, 111 (Minn. 2011) (quotation omitted).

"The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Padilla*, 130 S. Ct. at 1482 (quotation omitted). "[A defendant] 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." *Bruestle v. State*, 719 N.W.2d 698, 705 (Minn. 2006) (quotations omitted).

Appellant did not provide evidentiary support for his ineffective-assistance-of-counsel claim in the form of an affidavit or testimony showing that his attorney's representation fell below an objective standard of reasonableness. *See id.* (noting that the petitioner failed to present any evidence, such as an affidavit, to prove that his counsel's representation fell below an objective standard of reasonableness). Instead, appellant relied solely on *Padilla*. In *Padilla*, the United States Supreme Court concluded that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel" and that *Strickland* applies to such claims. 130 S. Ct. at 1482. Thus, "counsel must inform her client whether his plea carries a risk of deportation." *Id*. at 1486. The Supreme Court accepted as true Padilla's assertion that his attorney failed to inform him of the risk of deportation and had in fact, "provided him false assurance that his conviction would not result in his removal from this country." *Id.* at 1478, 1483. On these facts, the Supreme Court concluded that Padilla had "sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*." *Id.* at 1483.

The facts in this case are readily distinguishable from those in *Padilla*. During the plea hearing, appellant acknowledged that his attorney had informed him that because he was not a citizen of the United States, his guilty plea and conviction "could have an immigration consequence." Appellant further acknowledged, in his plea petition, that those consequences included "deportation, exclusion from admission to the United States

or denial of naturalization." Appellant contends that an advisory in a plea petition is inadequate to comply with the mandate in *Padilla*, citing footnote 15 of the Court's opinion. But appellant misrepresents *Padilla* on this issue. First, there is no indication that Padilla submitted a petition to plead guilty. In fact, the opinion suggests otherwise. *See id.* at 1486 n.15 (finding it significant that "the plea form *currently* used in Kentucky courts provides notice of possible immigration consequences," suggesting that a plea petition containing such language was not used in Padilla's case (emphasis added)). Second, footnote 15 does not support appellant's contention. In footnote 15, the Court lists a number of states that require district courts to inform defendants of the possible immigration consequences of a guilty plea. *Id.* The Court used this list as support for its conclusion that it is indeed "critical" for counsel to "inform her noncitizen client that he faces a risk of deportation." *Id.* at 1486. Nowhere in the *Padilla* opinion does the Supreme Court state that a plea petition cannot be used to satisfy counsel's duty to inform a client of the risk of deportation.

In sum, because appellant was informed of the risk of deportation as required by *Padilla*, this case is factually distinguishable from *Padilla*, and appellant cannot solely rely on its holding to establish that his attorney's representation fell below an objective standard of reasonableness. *See id.* at 1483 (stating that "Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country" and concluding that this was "not a hard case in which to find deficiency"). Unlike the Court in *Padilla*, we cannot say that appellant "has sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*." *Id.* And in the absence of any other showing that

counsel's representation was objectively unreasonable, the district court did not abuse its discretion by denying appellant's motion to withdraw his guilty plea based on ineffective assistance of counsel.

II.

Appellant also challenges the constitutional validity of his plea. A guilty plea must be accurate, voluntary, and intelligent. *State v. Batchelor*, 786 N.W.2d 319, 323 (Minn. App. 2010), *review denied* (Minn. Oct. 19, 2010).

> The accuracy requirement protects the defendant from pleading guilty to a more serious offense than he or she could be properly convicted of at trial. The voluntariness requirement insures that the guilty plea is not in response to improper pressures or inducements; and the intelligent requirement insures that the defendant understands the charges, his or her rights under the law, and the consequences of pleading guilty.

Alanis v. State, 583 N.W.2d 573, 577 (Minn. 1998) (footnotes omitted).

With regard to the intelligence requirement, appellant concedes that he understood that he would receive the agreed-upon probationary sentence only if he complied with certain conditions, including appearing at the scheduled sentencing hearing. At the time of his plea, appellant was informed that if he failed to appear for sentencing, the district court could sentence him "however [it] saw fit," and that "[t]he [district] court [would] not accept the plea agreement and [would] likely sentence [appellant] to a more severe sentence than outlined in the plea agreement." Appellant was also informed that the statutory-maximum sentence was seven years. Appellant nevertheless contends that his

plea was unintelligent because he was not told that he would receive a 21-month sentence if he failed to comply with the conditions of the plea agreement.

Appellant argues that a plea is unintelligent if its consequences are described in terms of the statutory-maximum sentence instead of the presumptive sentence, citing *Batchelor* and a series of this court's unpublished opinions as support. His reliance on the unpublished opinions is misplaced. "Unpublished opinions of the Court of Appeals are not precedential." Minn. Stat. § 480A.08, subd. 3(c) (2004). Moreover, *Batchelor* does not hold that failure to inform a defendant of the precise sentence that will be imposed if the defendant violates a plea-agreement condition renders the plea unintelligent. 786 N.W.2d at 325 (holding that the district court did not abuse its discretion by denying the defendant's motion to withdraw his conditional guilty plea after he received a longer sentence for failing to appear at sentencing).

Finally, we fail to discern how appellant was prejudiced by the lack of information regarding the presumptive guidelines sentence in this case. Surely appellant does not mean to suggest that he would have *rejected* the plea agreement if he had been told that the risk associated with noncompliance with the conditions of the agreement was a 21-month sentence instead of the possibility of a seven-year sentence. Because the sentence imposed was within the sentencing range described to appellant at the time of his plea, appellant's plea was not unintelligent.

Appellant also asserts that his plea was involuntary. *See State v. Wukawitz*, 662 N.W.2d 517, 522 (Minn. 2003) (stating, with regard to the voluntariness requirement, that "when a plea rests in any significant degree on a promise or agreement of the prosecutor,

so that it can be said to be part of the inducement or consideration, such promise must be fulfilled" (quotations omitted)). Appellant once again inappropriately relies on an unpublished opinion of this court to support this assertion, *State v. Misters*, No. A10-1730, 2011 WL 3425988, at *1-3 (Minn. App. Aug. 8, 2011) (holding that the district court abused its discretion by denying a defendant's plea-withdrawal motion when he received a longer sentence than negotiated for failing to comply with a plea condition and the plea petition provided the defendant with the "absolute right to . . . withdraw [his] plea[s] of guilty and have a trial" if the district court did not approve the agreement). *See* Minn. Stat. § 480A.08, subd. 3(c).

In this case, appellant's petition to plead guilty expressly states that he would not be permitted to withdraw his plea if he failed to comply with certain conditions. Appellant was informed of this restriction, and the attendant conditions, on the record at the plea hearing. Because appellant was informed that he would not be allowed to withdraw his plea if the court rejected the plea agreement based on his noncompliance with specified conditions, there was no deviation from the plea agreement rendering his plea involuntary. *See State v. Hamacher*, 511 N.W.2d 458, 460 (Minn. App. 1994) (affirming the district court's denial of the defendant's motion to withdraw his guilty plea when he was explicitly told that he had no right to withdraw the plea if the district court rejected a stayed sentence).

In sum, appellant received exactly what he bargained for when he failed to comply with the conditions of his plea agreement: a sentence other than the one anticipated under the plea agreement, but less than the statutory-maximum sentence, and no guarantee of

plea withdrawal. Thus, his plea is constitutionally valid. *See Batchelor*, 786 N.W.2d at 324 (concluding that the defendant's plea was both voluntary and intelligent where he received "precisely what he bargained for" after failing to comply with a condition of his plea agreement).

III.

Appellant submitted a supplemental pro se brief, arguing that he is entitled to withdraw his guilty plea because he was not adequately informed of the sentencing and immigration consequences of the plea. Appellant's attorney argued these issues to this court, and we have concluded that they are unavailing. Appellant's pro se brief also raises new theories to support his ineffective-assistance-of-counsel claim. For example, appellant contends that his attorney told him to answer "yes" to all of the questions at the plea hearing and that his attorney did not bring an interpreter to their meetings at the jail. Because appellant did not raise these issues in the district court, we will not consider them on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that an appellate court will generally not consider matters not argued to and considered by the district court).

Affirmed.

Dated:

Judge Michelle A. Larkin