STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0102

Mikhail Nikolayevich Glushko, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 24, 2012
Affirmed in part and remanded; motion denied
Kalitowski, Judge

Dakota County District Court
File No. 19HA-CR-08-4601

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

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

James C. Backstrom, Dakota County Attorney, Thomas E. Lockhart, Assistant County Attorney, Hastings, Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Halbrooks, Judge; and Hudson, Judge.

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

KALITOWSKI, Judge

In this postconviction appeal, appellant Mikhail Nikolayevich Glushko argues that the district court erred by denying him an evidentiary hearing and that he is entitled to

withdraw his plea of guilty to third-degree criminal sexual conduct because he received ineffective assistance of counsel and his plea was not intelligent or accurate. The state responds that appellant waived an evidentiary hearing, that his plea was effectively counseled and valid, and that parts of appellant's brief should be stricken. We deny the state's motion to strike, and we affirm in part and remand.

D E C I S I O N

Appellant was born in Russia and was admitted to the United States as a refugee in 2000, but he has not obtained permanent-resident status. In November 2008, the state charged appellant with third-degree criminal sexual conduct for having sexual intercourse with H.M.D. Appellant was 20 years old at the time of the offense and H.M.D. was 15.

On April 27, 2010, appellant appeared before the district court for a plea hearing and indicated that he had reached a plea agreement with the state. The agreement provided for appellant to plead guilty to third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(b) (2008), and for respondent to seek a stay of imposition and probation for up to five years, drop two other unrelated charges, and take no action on an unrelated probation violation.

During the plea colloquy, appellant acknowledged that he had discussed the plea petition with plea counsel with an interpreter present, and that he understood the plea petition. Appellant signed the petition on the record. The petition states, "My attorney has told me and I understand that if I am not a citizen of the United States this plea of guilty may result in deportation, exclusion from admission to the United States of America or denial of citizenship." Appellant's attorney did not ask any questions

specifically pertaining to the immigration consequences of the plea during the colloquy. But the prosecutor asked appellant if he was "aware that if Immigration and Customs Enforcement is aware of this conviction, there is a very good chance that [he] could be deported?" Appellant answered, "Yes." The district court accepted the plea and sentenced appellant in accordance with the plea agreement.

On November 1, 2011, appellant filed a postconviction petition requesting to withdraw his guilty plea. In the petition, he alleged that the U.S. Department of Homeland Security (DHS) had initiated deportation proceedings in which DHS charged him with removability because he had been convicted of an "aggravated felony."[1] The petition also states that appellant's conviction of criminal sexual conduct falls within the parameters of a program called "Operation Predator," which makes appellant a priority for deportation.

In his postconviction petition, appellant claimed that he had received ineffective assistance of counsel under *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), and that his plea was invalid because it was not intelligent or accurate. The district court denied the petition without a hearing. Appellant filed a motion to reconsider and requested an evidentiary hearing. The district court held a hearing limited to the issue of whether to hold an evidentiary hearing. At the hearing, appellant's postconviction counsel stated, "I don't believe an evidentiary hearing is necessary. I think this case is clear cut, and the issue is whether, but for the advice he received, whether the advice he received impacted

[1] *See* 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1101(a)(43)(A) (2006).

the plea process." The district court denied appellant's requests for reconsideration and an evidentiary hearing.

I.

We first address appellant's argument that the district court erred by denying his request for an evidentiary hearing. In postconviction proceedings, "[a]n evidentiary hearing is required whenever material facts are in dispute that have not been resolved in the proceedings resulting in conviction and that must be resolved in order to determine the issues raised on the merits." *Hodgson v. State*, 540 N.W.2d 515, 517 (Minn. 1995). Here, appellant waived a hearing when he conceded to the district court that an evidentiary hearing was not necessary because the district court could resolve his claims as a matter of law. Because appellant waived an evidentiary hearing, we cannot say the district court erred by not conducting a hearing.

II.

We next address appellant's substantive arguments for plea withdrawal. A criminal defendant does not have an absolute right to withdraw a guilty plea. *Shorter v. State*, 511 N.W.2d 743, 746 (Minn. 1994). But the Minnesota Rules of Criminal Procedure provide that a plea of guilty may be withdrawn "upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1.

We review a district court's decision to deny the withdrawal of a guilty plea for an abuse of discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998). As to issues of fact, we determine whether the evidence is sufficient to sustain the postconviction

court's findings. *Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003). As to issues of law, we exercise de novo review. *Id.*

Ineffective Assistance of Counsel

To prevail on his ineffective-assistance-of-counsel claim, appellant must demonstrate (1) that his counsel's performance fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). In *Padilla*, the Supreme Court held that the first *Strickland* prong requires that in the context of plea negotiations, "when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear." 130 S. Ct. at 1483. We review the denial of an ineffective-assistance-of-counsel claim in a postconviction petition de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

The first step in assessing appellant's ineffective-assistance-of-counsel claim is to ascertain how—if at all—plea counsel advised appellant with respect to deportation before the guilty plea was entered. But the record here contains no evidence of plea counsel's immigration-related advice. Unlike typical ineffective-assistance-of-counsel cases, there are no affidavits or testimony from appellant or plea counsel describing plea counsel's advice. *Cf. Robinson v. State*, 567 N.W.2d 491, 495 (Minn. 1997) (stating that when considering a claim of ineffective assistance of counsel, "a court needs to hear testimony from the defendant, his or her trial attorney, and any other witnesses who have knowledge of conversations between the client and the attorney" because such testimony

is necessary to "determine whether in fact the trial attorney communicated the [requisite information]"). Furthermore, the transcript reveals that plea counsel did not question appellant about his understanding of the deportation consequences of his plea at the plea hearing. The transcript indicates only that appellant acknowledged that he had discussed the plea petition with counsel, that he understood the petition, and that he signed the petition, which acknowledged that plea counsel had informed him, and he understood, that the plea "may result in deportation."

Appellant cites the advice he received during the plea colloquy that a guilty plea would create "a very good chance that [appellant] could be deported[.]" He asserts that his deportation was certain because he was convicted of an aggravated felony and argues that the colloquy advice fell below the *Padilla* standard of effective assistance of counsel as a matter of law because it did not convey the certainty of deportation. This argument assumes that the allegedly inadequate advice came from appellant's plea counsel. But it was the prosecutor who asked appellant to acknowledge the likelihood of deportation. And as discussed above, the record, including the plea-hearing transcript, contains no evidence as to what deportation-related advice appellant received from his counsel.

Further complicating our review, the district court denied the ineffective-assistance-of-counsel claim based in part on a finding regarding pre-plea conversations that are not part of our record. The court found that "[t]his [c]ourt is the [c]ourt that accepted [appellant's] guilty plea and is aware of [his] actual knowledge of the immigration consequences of [his] conviction and [his] discussion of those consequences with his attorney, as the issue was discussed extensively by the parties throughout the

pre-trial process." These conversations are not transcribed in the record, and there is no evidence from which we can determine the substance of the conversations.

On the record before us, we cannot determine what advice, if any, appellant received from plea counsel before entering his guilty plea. Thus, we cannot determine whether the district court's finding as to the pre-plea conversations supports its conclusion that appellant's attorney correctly advised appellant as to the likelihood that he would be deported as a result of his plea. Therefore, we conclude that appellate review of this ineffective-assistance-of-counsel claim can only be accomplished by supplementation of the district court record. *See State v. Bowles*, 530 N.W.2d 521, 537 (Minn. 1995) (remanding for supplementation of the record where the record did not reveal facts essential to appellate review). And because appellant's claim that his plea was not intelligent is based on his understanding of the immigration consequences of his plea, the record is also not adequate to review this claim. Therefore, we remand to the district court to supplement the record and address appellant's claims.

Accuracy of Plea

Appellant also argues that his plea is inaccurate because plea counsel elicited a factual basis for the plea using only leading questions. We disagree. Although discouraged, the use of leading questions to establish the factual basis for a plea does not necessarily render the plea inaccurate. *See State v. Raleigh*, 778 N.W.2d 90, 95 (Minn. 2010). In *Raleigh*, the court explained that "the accuracy requirement ensures that a defendant does not plead guilty to a crime more serious than that of which he could be

convicted if he elected to go to trial." *Id.* And the court held that Raleigh's plea satisfied this objective because it established the statutory elements of the crime. *Id.*

A person commits third-degree criminal sexual conduct by engaging in "sexual penetration" with a complainant who "is at least 13 but less than 16 years of age" when the person "is more than 24 months older than the complainant." Minn. Stat. § 609.344, subd. 1(b). Appellant admitted that he had sexual intercourse with H.M.D. when he was 20 years old and H.M.D. was 15 years old. As in *Raleigh*, appellant's plea satisfies the accuracy objective because it establishes the elements of third-degree criminal sexual conduct.

In summary, we conclude the district court was within its discretion when it denied appellant's claim that his plea was not accurate, but we remand to supplement the record with respect to appellant's ineffective-assistance-of-counsel claim and his claim that his plea was not intelligent in such proceedings as the district court deems appropriate.

III.

Respondent moves to strike several parts of appellant's brief that refer to appellant's family and immigration histories and that contain references to the Operation Predator program. Respondent argues that these references contain information that is outside of the record on appeal. We disagree.

The record on appeal "consists of the papers filed in the district court, the offered exhibits, and the transcript of the proceedings, if any." Minn. R. Crim. P. 28.02, subd. 8. Appellant's family and immigration histories are part of the record on appeal because

they are contained in an affidavit filed in the district court. And appellant alleged that he was the subject of an Operation Predator deportation in his postconviction petition, which was filed in the district court. Although the record contains no support for this allegation, this appeal requires us to determine whether the allegations in appellant's postconviction petition are sufficient to warrant postconviction relief. Therefore, we treat appellant's references to Operation Predator not as fact, but as a restatement of the allegations in his postconviction petition.

Affirmed in part and remanded; motion denied.