STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1713

Michael Ray Whipple, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed June 3, 2013
Affirmed
Hudson, Judge

Crow Wing County District Court
File No. 18-K4-05-001644

David W. Merchant, Chief Appellate Public Defender, Cathryn Young Middlebrook, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Donald F. Ryan, Crow Wing County Attorney, Rockwell J. Wells, Assistant County Attorney, Brainerd, Minnesota (for respondent)

Considered and decided by Hudson, Presiding Judge; Schellhas, Judge; and Stauber, Judge.

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

HUDSON, Judge

In this postconviction appeal seeking relief from his 2005 guilty plea to third-degree criminal sexual conduct, appellant Michael Ray Whipple argues that *Padilla v.*

Kentucky, 559 U.S. 356, 130 S. Ct. 1473 (2010), applies to civil commitments and that his attorney was ineffective for failing to advise him of the possibility of being civilly committed before he pleaded guilty. Therefore, appellant argues, he is entitled to relief in the interests of justice pursuant to Minn. Stat. § 590.01, subd. 4(b)(5) (2010). Because *Padilla* is inapplicable to civil-commitment consequences, and because an attorney is not ineffective for failing to advise a client about this potential consequence, we affirm.

FACTS

In July 2005, appellant was charged with third-degree criminal sexual conduct arising out of allegations that he had sexual intercourse with a mentally disabled 15-year-old girl. On November 30, 2005, appellant appeared before the district court to resolve the charges in this case, as well as pending charges of solicitation of a child to engage in prostitution and solicitation of a child to engage in sexual conduct arising out of two other incidents. All three matters were resolved: appellant pleaded guilty to one count of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(b) (2004), and to one count of solicitation of a child to engage in sexual conduct in violation of Minn. Stat. § 609.352, subd. 2 (2004); the other charges were dismissed. That same day, appellant was sentenced to 48 months in prison for the criminal sexual conduct conviction, and 23 months for the solicitation conviction to be served concurrently.

In February 2009, while appellant was still incarcerated, Crow Wing County Human Services petitioned to civilly commit him as a sexual psychopathic personality (SPP) and sexually dangerous person (SDP). After appellant stipulated that there were sufficient facts to commit him as an SDP, the district court ordered the initial

commitment of appellant as an SDP; the petition to commit appellant as an SPP was dismissed. In September 2009, the district court reviewed appellant's case and ordered that he be indeterminately committed.

In the fall of 2010, appellant moved the district court to vacate his commitment under Minn. R. Civ. P. 60.02. The district court denied his motion, and appellant appealed, arguing, inter alia, that he received ineffective assistance of counsel because his attorney promised him that if he stipulated to commitment he would be released in a few years. On appeal, this court affirmed appellant's commitment, dismissing some of his claims as not justiciable and concluding that his ineffective-assistance argument lacked factual support. *See In re Civil Commitment of Whipple*, No. A10-2098 (Minn. App. May 23, 2011). Appellant never directly appealed his conviction.

On March 29, 2012, appellant filed a petition for postconviction relief seeking to withdraw his guilty plea. The district court denied appellant's petition, concluding that his claim was time barred under Minn. Stat. § 590.01, subd. 4(a)(1) (2010). This appeal follows.

D E C I S I O N

In reviewing a postconviction court's decision to grant or deny relief, this court reviews issues of law de novo and reviews factual findings for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007); *see also Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003) (noting that appellate courts "extend a broad review of both questions of law and fact" when reviewing postconviction proceedings)

(quotation omitted). "The decisions of a postconviction court will not be disturbed absent an abuse of discretion." *Pierson v. State*, 637 N.W.2d 571, 577 (Minn. 2002).

A petition for postconviction relief may not be filed more than two years from the date of conviction or sentence if no direct appeal is filed. Minn. Stat. § 590.01, subd. 4(a)(1). In his argument to the district court, appellant asserted that, although his petition was untimely, he was entitled to relief under the new-interpretation-of-law exception to the two-year time limit under Minn. Stat. § 590.01, subd. 4(b)(3) (2010). Appellant argued that the rule announced in March 2010 by the U.S. Supreme Court in *Padilla v. Kentucky*, that an attorney provides ineffective assistance if he or she fails to warn a client about possible deportation consequences stemming from a guilty plea, also applies to possible civil-commitment consequences. Because appellant's attorney did not warn him about the possibility of civil commitment following his guilty plea to criminal sexual conduct charges, he argued that he received ineffective assistance of counsel entitling him to withdraw his plea. Appellant further argued that he met the retroactivity requirement of Minn. Stat. § 590.01, subd. 4(b)(3), based on this court's ruling in *State v. Campos*, 798 N.W.2d 565 (Minn. App. 2011), *rev'd*, 816 N.W.2d 480 (Minn. 2012), that *Padilla* may be applied retroactively to individuals whose convictions were final prior to the *Padilla* ruling. The district court denied appellant's petition in part because *Campos* was subsequently reversed by the Minnesota Supreme Court, which concluded that *Padilla* was "a new rule of constitutional criminal procedure, but [was] not a watershed rule," and that therefore it cannot be given retroactive effect. *Campos v. State*, 816 N.W.2d 480, 499 (Minn. 2012).

Appellant now argues to this court that, although his postconviction petition was untimely, and although *Padilla* lacks retroactive effect, he is still entitled to relief under a different exception—Minn. Stat. § 590.01, subd. 4(b)(5) (2010), which provides that an untimely petition may be considered if "the petitioner establishes to the satisfaction of the court that the petition is not frivolous and is in the interests of justice." Arguments not made to or considered by the district court normally are not considered on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). However, we will reach the merits of appellant's argument in the interests of justice. *See* Minn. R. Crim. P. 28.02, subd. 11 (stating that an appellate court may address issues as justice requires).

This court looks to the following factors when considering whether to grant relief under the statutory interests-of-justice exception:

> (1) whether the claim has substantive merit; (2) whether the defendant deliberately and inexcusably failed to raise the issue on direct appeal; (3) whether the party alleging error is at fault for that error and the degree of fault assigned to the party defending the alleged error; (4) whether some fundamental unfairness to the defendant needs to be addressed; and (5) whether application of the interests-of-justice analysis is necessary to protect the fairness, integrity, or public reputation of judicial proceedings.

Carlton v. State, 816 N.W.2d 590, 607 (Minn. 2012) (citing *Gassler v. State*, 787 N.W.2d 575, 586-87 (Minn. 2010)).

Based on these factors, we conclude that appellant has failed to show that he is entitled to relief. Specifically, appellant's claim lacks substantive merit. Appellant bases his ineffective-assistance-of-counsel claim on *Padilla*, a case which was decided five years after appellant pleaded guilty, and which the Minnesota Supreme Court has

determined cannot be applied retroactively. *Campos*, 816 N.W.2d at 499. Moreover, the U.S. Supreme Court recently confirmed that *Padilla* cannot have retroactive effect because it announced a "new rule." *Chaidez v. United States*, 133 S. Ct. 1103, 1113 (2013). Because *Padilla* has no retroactive effect, appellant's ineffective-assistance-of-counsel assertion based on *Padilla* lacks substantive merit, and therefore neither qualifies for the new-interpretation-of-law exception nor the interests-of-justice exception.

Furthermore, even if *Padilla* could be applied retroactively, appellant's claim lacks merit because *Padilla* is inapplicable to civil-commitment consequences. In *Sames v. State*, 805 N.W.2d 565, 569–70 (Minn. App. 2011), we concluded that *Padilla* is limited to deportation consequences because *Padilla* focused on the unique nature of deportation and because lower federal courts had declined to extend *Padilla* to other conviction consequences. *Id.* at 570. Moreover, *Sames* reaffirmed the use of the direct/collateral consequences distinction to define which consequences an attorney is constitutionally required to warn a client about, concluding that deportation is a special circumstance that transcends this distinction. *Id.* Indeed, in *Chaidez*, the Supreme Court emphasized that while the direct/collateral distinction may be "apt . . . in other contexts," the distinction is uniquely ill-suited to deportation because the risk is "particularly severe," and "nearly an automatic result." *Chaidez*, 133 S. Ct. at 1110 (quoting *Padilla*, 130 S. Ct. at 1481). Although, as appellant points out, there are no published decisions holding that civil commitment is a collateral consequence about which an attorney is not required to warn his client, this court has held in several unpublished decisions that civil

commitment is a collateral consequence.[1] Because the application of *Padilla* is limited to deportation consequences, appellant's argument that he received ineffective assistance of counsel because he was not warned about the possibility of civil commitment following his guilty plea lacks merit. Therefore, we conclude that the district court did not err by denying his petition for postconviction relief.

Affirmed.

[1] This court has stated that "civil commitment is, at most, a collateral consequence following a criminal conviction" because it is a "separate, treatment-oriented, civil remedy based on a variety of factors beyond criminal convictions, most notably whether the individual's sexually dangerous conduct is attributable to mental illness and likely to continue." *Nicolaison v. State*, No. A11-1141, 2012 WL 539266, at *2 (Minn. App. Feb. 21, 2012), *review denied* (Minn. July 17, 2012); *see also Hatton v. State*, No. A12-0298 (Minn. App. Nov. 13, 2012), *review denied* (Minn. Jan. 29, 2013); *Nicolaison v. State*, No. A12-0187 (Minn. App. Nov. 5. 2012), *review denied* (Minn. Jan. 15, 2013); *Conard v. State*, No. A12-0122 (Minn. App. Oct. 1, 2012), *review denied* (Minn. Dec. 18, 2012). Unpublished decisions of this court are not precedential, but may be of persuasive value. Minn. Stat. § 480A.08, subd. 3(c) (2012); *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. 1993).