STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0187

Wayne Carl Nicolaison, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed November 5, 2012
Affirmed
Worke, Judge

Cook County District Court
File No. 16-CV-11-202

David W. Merchant, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Timothy C. Scannell, Cook County Attorney, Grand Marais, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Peterson, Judge; and Worke, Judge.

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

WORKE, Judge

Appellant argues that the district court erred by denying his postconviction petition as untimely under Minn. Stat. § 590.01, subd. 4(a) (2010). He asserts (1) that the Supreme Court's opinion in *Padilla v. Kentucky*, 130 S.Ct. 1473, 1483 (2010) applies

retroactively to exempt him from the two-year postconviction filing requirement, and (2) that he is entitled to relief in the interests of justice because his attorney failed to inform him of the possibility of being civilly committed upon pleading guilty to a criminal sexual conduct offense. We affirm.

FACTS

In 1980 appellant Wayne Carl Nicolaison pleaded guilty to first-degree criminal sexual conduct under Minn. Stat. § 609.342 (1980), after he broke into a woman's home and forced her at knife-point to repeatedly perform sex acts on him. In 1984, while released on parole, appellant sexually assaulted another woman and again pleaded guilty to first-degree criminal sexual conduct. In 1992, appellant was civilly committed as a sexual psychopathic personality and sexually dangerous person. The commitment was subsequently appealed and affirmed. *In re Wayne Carl Nicolaison,* No. C1-92-613 (Minn. App. July 14, 1992).

On September 27, 2010, appellant filed a pro se petition for postconviction relief alleging that his attorney failed to provide effective assistance of counsel because he failed to advise appellant during proceedings for the 1981 offense about the possibility of civil commitment. The district court denied appellant's petition as untimely without appointing counsel for appellant. Appellant initiated a pro se appeal which was dismissed upon proper motion after the state public defender's office was appointed to represent appellant. This court reversed the postconviction order and remanded to permit appellant to be represented by counsel before the postconviction court.

Following a hearing, the postconviction court again denied appellant's petition for postconviction relief on the basis that the petition was untimely and did not fall within any statutory exception to the two-year filing requirement. This appeal followed.

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 evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007); *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).

A criminal defendant may not file a petition for postconviction relief more than two years after the entry of judgment of conviction or sentence if no direct appeal is filed, unless a statutory exception applies. Minn. Stat. § 590.01, subd. 4(a)(1), (b) (2010). One exception is for "a new interpretation of federal or state constitutional or statutory law by either the United States Supreme Court or a Minnesota appellate court" that the petitioner must demonstrate is "retroactively applicable" to his case. *Id.*, subd. 4(b)(3). A new rule applies retroactively "(1) when the rule places certain specific conduct beyond the power of the criminal law-making authority to proscribe, or (2) when the rule is a 'watershed' rule of criminal procedure, and is a rule without which the likelihood of an accurate conviction would be seriously diminished." *Danforth v. State*, 761 N.W.2d 493, 496 (Minn. 2009).

Appellant argues that his petition falls within the new-interpretation-of-law exception based on the Supreme Court's ruling in *Padilla v. Kentucky*, 130 S. Ct. 1473,

1483 (2010). In *Padilla*, the Court held that an attorney provides ineffective assistance of counsel by failing to inform a criminal defendant of the possibility of deportation resulting from a guilty plea. *Id.* Appellant relies on a decision of this court, *Campos v. State*, 798 N.W.2d 565, 571 (Minn. App. 2011), *rev'd*, 816 N.W.2d 480 (Minn. 2012), which held that *Padilla* did not announce a new rule but was merely an extension of current precedent, and therefore applied retroactively to postconviction petitions. Appellant also argues that *Padilla* extinguished the distinction between direct and collateral consequences and should be applied broadly to require an attorney to advise a criminal defendant of any likely consequences flowing from a guilty plea.

During the pendency of this case, the Minnesota Supreme Court reversed this court's decision in *Campos*, holding that *Padilla* announced a new rule of constitutional criminal procedure that does not apply retroactively. *Campos v. State*, 816 N.W.2d 480, 499 (Minn. 2012). Therefore, appellant's argument that his postconviction petition falls within the exception for new interpretations of law must fail because this new rule cannot be applied retroactively and therefore does not qualify as an exception under Minn. Stat. § 590.01, subd. 4(b)(3). For this reason, the postconviction court did not err in ruling that the new-interpretation-of-law exception to the two-year postconviction filing requirement does not apply.

Appellant also challenges the district court's decision under the "interests-of-justice" exception to the two-year filing requirement. Minn. Stat. § 590.01, subd.

4(b)(5).[1] Appellant argues that, in the interests of justice, *Padilla* should be extended to apply to appellant's civil commitment consequence. For the interests-of-justice exception to apply, the petition for postconviction relief must be filed no more than two years from the time the claim arose. *Id.*, subd. 4(c); *see Sanchez v. State*, 816 N.W.2d 550, 557-58 (Minn. 2012). A claim for postconviction relief arises when the petitioner "knew or should have known that he had a claim." *Sanchez*, 816 N.W.2d at 560. According to appellant, his claim for postconviction relief arose when *Padilla* was released in 2010. Because appellant filed his pro se petition for postconviction relief in September 2010, he argues that his petition falls within the period prescribed by subdivision 4(c) and he is entitled to relief under subdivision 4(b)(5).

Appellant fails to prove that his petition qualifies for the interests-of-justice exception because Minnesota case law limits the application of *Padilla* to deportation consequences. *Sames v. State*, 805 N.W.2d 565, 569-70 (Minn. App. 2011). In *Sames*, this court reiterated the test for determining whether an attorney provided constitutionally ineffective assistance of counsel:

> To prevail on a claim of ineffective assistance of counsel, a defendant must prove, first, that counsel's performance was deficient because it 'fell below an objective

[1] Appellant appears to have raised the "interests-of-justice" exception under Minn. Stat. § 590.01, subd. 4(b)(5) for the first time on appeal. The district court did not consider this exception, nor was it raised in appellant's memoranda to the district court. Generally, an appellate court will not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). However, the court may review any order or ruling in the interests of justice. Minn. R. Crim. P. 28.02, subd. 11. Moreover, this court "liberally construe[s]" a petition for postconviction relief to determine whether any subdivision 4(b) exception was raised. *Roby v. State*, 787 N.W.2d 186, 191 (Minn. 2010) (holding that language referencing the "interests of justice" was sufficient to raise the subdivision 4(b)(5) exception)).

> standard of reasonableness' and, second, that the defendant was prejudiced by his counsel's deficient performance because 'a reasonable probability exists that, but for counsel's errors, the outcome would have been different.'

Id. at 567 (quoting *Staunton v. State*, 784 N.W.2d 239, 300 (Minn. 2010)). Minnesota courts follow the collateral-direct consequences distinction in determining whether an attorney's conduct fell below the standard for effectiveness. *Id.* at 568. Direct consequences are those that have a "definite, immediate and automatic effect on the range of a defendant's punishment." *Id.* (quoting *Kaiser v. State*, 641 N.W.2d 900, 604 n.6 (Minn. 2002)). Collateral consequences "are not punishment" but "are civil and regulatory in nature and are imposed in the interest of public safety." *Id.* (quoting *Kaiser*, 641 N.W.2d at 605). To meet the minimum standard of effective assistance, counsel must advise a client of direct consequences of a guilty plea, but not collateral consequences. *Id.; see also Alanis v. State*, 583 N.W.2d 573, 578-79 (Minn. 1998); *Berkow v. State*, 583 N.W.2d 562, 563-64 (Minn. 1998).

Appellant contends that *Padilla* overturned this direct-collateral distinction. However, this court expressly declined to apply the rationale of *Padilla* beyond deportation consequences. In *Sames* we concluded that because the Supreme Court "did not clearly state that the direct-collateral distinction should not be applied in cases not involving the risk of deportation," this court was "obligated to follow the precedent that binds us." 805 N.W.2d at 570. And, in a separate review of appellant's 1984 guilty plea, this court rejected appellant's same argument, holding that *Padilla* is inapplicable to civil commitment consequences. *Nicolaison v. State*, A11-1141 (Minn. App. Feb. 21, 2012). Furthermore, courts in other jurisdictions have refused to expand *Padilla* beyond the

scope of deportation consequences. *See, e.g.*, *United States v. Youngs*, 687 F.3d 56, 63 (2nd Cir. 2012); *Thomas v. State*, 365 S.W.3d 537, 545 (Tex. 2012); *People v. Hughes*, 953 N.E.2d 1017, 1025 (Ill. App. Ct. 2011). Because *Padilla* does not apply to civil commitment consequences, appellant's interests-of-justice claim fails.

Affirmed.