STATE OF MINNESOTA
IN COURT OF APPEALS
A10-436

My Anh Nguyen, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed November 16, 2010
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CR-02-066377

Herbert A. Igbanugo, Igbanugo Partners International Law Firm, Minneapolis, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Paul R. Scoggin, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Klaphake, Presiding Judge; Shumaker, 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 challenges the denial of his postconviction-relief petition, in which he sought to withdraw a 2002 guilty plea to fifth-degree criminal sexual conduct after being

subject to potential immigration consequences, arguing that the district court erred in (1) finding that plea withdrawal was not necessary to correct a manifest injustice; (2) giving undue weight to appellant's delay in seeking relief; and (3) denying requests for an evidentiary hearing. We affirm.

D E C I S I O N

Appellant My Anh Nguyen moved to withdraw his guilty plea in a postconviction-relief petition after the Department of Homeland Security[1] (DHS) instituted removal proceedings against him. The district court denied his petition after finding that his guilty plea was valid and plea withdrawal was not necessary to correct a manifest injustice. A petitioner seeking postconviction relief must prove the facts in a petition by a "fair preponderance of the evidence." Minn. Stat. § 590.04, subd. 3 (2008). To meet that burden, the petition "must be supported by more than mere argumentative assertions that lack factual support." *Henderson v. State*, 675 N.W.2d 318, 322 (Minn. 2004).

This court reviews a postconviction court's decision for an abuse of discretion. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). This court reviews findings of fact to determine whether the evidence is sufficient to sustain the findings and reviews legal issues and mixed questions of fact and law, including claims of ineffective assistance of counsel, de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004); *Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003).

[1] The United States Citizen and Immigration Services is a bureau of the DHS that performs many of the administrative functions formerly carried out by the Immigration and Naturalization Service (INS).

Withdrawal of Guilty Plea

Appellant sought to withdraw his 2002 guilty plea to fifth-degree criminal sexual conduct. A defendant may withdraw a guilty plea after sentencing if withdrawal is "necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. Manifest injustice exists if a plea is invalid, meaning the plea does not comply with constitutional due-process requirements that the plea be accurate, voluntary, and intelligent. *State v. Rhodes*, 675 N.W.2d 323, 326 (Minn. 2004).

Accurate

Appellant first argues that his guilty plea was not accurate because he is innocent and the factual basis supporting his plea was based on leading questions. "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." *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). In order for a plea to be accurate there must be a proper factual basis supporting the guilty plea. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994).

Appellant was charged with fifth-degree criminal sexual conduct after two juvenile females observed him open the driver's side door of his parked vehicle, pull down his pants, and expose and rub his penis. Appellant pleaded guilty to fifth-degree criminal sexual conduct. "A person is guilty of criminal sexual conduct in the fifth degree . . . [if] the person engages in masturbation or lewd exhibition of the genitals in the presence of a minor under the age of 16, knowing or having reason to know the minor is present." Minn. Stat. § 609.3451, subd. 1(2) (2002). The statute does not define "lewd exhibition of the genitals." But the word "lewd" is defined as "obscene." *State v.*

Botsford, 630 N.W.2d 11, 17 (Minn. App. 2001), *review denied* (Minn. Sept. 11, 2001). The definition of "lewdness," under the statute prohibiting lewd and indecent behavior, "is the quality of being openly lustful or indecent." *City of Mankato v. Fetchenhier*, 363 N.W.2d 76, 78, 79 (Minn. App. 1985).

When appellant pleaded guilty, he provided a factual basis to support his plea. Appellant stated that he was driving and felt the urge to urinate. He pulled over, opened his door, and partially urinated. When he saw a car approaching, appellant stopped urinating and drove away. Just prior to stopping a second time, appellant saw young girls on the side of the road. He drove past the girls, pulled over, opened his door, and finished urinating. At that point, two girls stood nearby and were able to see appellant urinating. Appellant admitted that the girls were under 16 years of age and that he knew that by exposing his genitals and urinating in their presence he was violating the law. Appellant argues that urinating is not "masturbation or lewd exhibition of the genitals," but he admitted that he had his genitals exposed in the presence of girls who were under the age of 16. This conduct fits under the definition of a "lewd exhibition of the genitals" because it is obscene or indecent.

Appellant also argues that he lacked the requisite intent because he drove away from a group of girls because he did not intend to urinate in front of them. Under the statute, the definition of "in the presence of a minor" means "reasonably capable of being viewed by a minor." *State v. Stevenson*, 656 N.W.2d 235, 239 (Minn. 2003). Appellant was aware that there were minors in the area. He drove away from the girls, but he stayed in the same area; thus, he was aware that there were minors nearby who were

"reasonably capable" of viewing him. Appellant's admitted conduct fits under the statute.

Appellant next argues that he admitted committing indecent exposure and not fifth-degree criminal sexual conduct. A person is guilty of gross-misdemeanor indecent exposure if he willfully and lewdly exposes his body, or private parts thereof, or engages in any "open or gross lewdness or lascivious behavior, or any public indecency other than behavior specified in this subdivision" in the presence of a minor under the age of 16. Minn. Stat. § 617.23, subd. 2(1) (2002). The difference between the fifth-degree criminal-sexual-conduct statute and the indecent-exposure statute is that under the criminal-sexual-conduct statute, the person knows or has reason to know that a minor is present. Therefore, while appellant's conduct satisfies the elements of the lesser-included indecent-exposure statute, it also satisfies the elements of the criminal-sexual-conduct statute because he had reason to know that minors were reasonably capable of observing his conduct.

Appellant also claims that the district court failed to consider the additional information he provided with his petition. The district court found that the supplemental information provided a "thorough account of [appellant's] background and cite[d] multiple police reports in an attempt to raise factual issues that could have been argued at trial. However, such material was not part of the court record at the time of the plea." The district court concluded that, because appellant chose to plead guilty, he waived his right to raise "character issues or challenge factual issues concerning [the] underlying incident."

The district court appropriately refused to consider the supplemental information, which included a sworn statement from appellant, an affidavit from appellant's ex-wife, photographs of appellant with his family, police reports, and medical records. Appellant's sworn statement was taken in October 2009. The offense occurred in 2002. Appellant was given opportunities at his guilty-plea hearing and sentencing to make statements; thus, information in his sworn statement could have been presented to the court in 2002. And the statement is a self-serving affidavit that contradicts statements appellant made under oath when he pleaded guilty. *See Banbury v. Omnitrition Int'l, Inc.*, 533 N.W.2d 876, 881 (Minn. App. 1995) ("A self-serving affidavit that contradicts earlier damaging deposition testimony is not sufficient to create a genuine issue of material fact."). The statement from appellant's ex-wife and the photographs are not relevant. The police reports include the information in the factual basis that young girls observed appellant expose his penis in order to urinate. The medical records are for visits that occurred after the incident—the complaint was filed on August 20, 2002, and appellant's first complaint about his medical condition regarding his urgent need to urinate occurred on August 26, 2002. Thus, appellant's claim that his guilty plea was not accurate because he is innocent fails.

Appellant also argues that the factual basis for his plea was not adequate because it was based on leading questions. The supreme court stated that the use of leading questions to establish a factual basis is discouraged and that the defendant should "be encouraged to state in his . . . own words why he . . . is willing to plead guilty." *Ecker*, 524 N.W.2d at 717. But while the use of leading questions to establish a factual basis is

troubling, it does not necessarily invalidate a guilty plea. *Shorter v. State*, 511 N.W.2d 743, 747 (Minn. 1994).

A review of the transcript shows that appellant's attorney asked appellant yes-or-no questions. Appellant was asked if he was driving through an area in Minneapolis, if he felt the urge to urinate, if he pulled over to the side of the road, if he opened the door and partially urinated, if he saw a car coming and stopped urinating, if he drove away and stopped a second time, if he saw young girls just before he stopped, if he stopped past the girls and opened his door to finish urinating, and if he knew or should have known that two girls were able to see his genitals. Appellant admits to the same conduct now, but claims that he did not intend to expose his genitals in the presence of minors. But the transcript shows that appellant understood that he admitted exposing his genitals in the presence of minors.

> [Appellant's attorney]: —you are stating that you knew or should have known that there were two girls there when you opened the door to begin to urinate?
> [Appellant]: Yes.
> [Appellant's attorney]: And by doing that, you exposed your genitals in a manner that's in violation of a statute to these minor children there, is that correct?
> [Appellant]: That's correct.
> [Appellant's attorney]: And you admit that that's what you did?
> [Appellant]: Yes.
> [Appellant's attorney]: And that's what you are admitting to the charges today?
> [Appellant]: Yes.
> [Appellant's attorney]: And you are admitting that that was wrong to do that?
> [Appellant]: Correct.
> . . . .

> [Prosecutor]: Sir, you understand that the girls were under sixteen, correct?
> [Appellant]: Yes.

The factual basis is adequate because, despite the method of questioning, appellant admitted the elements of the offense, and indicated his understanding regarding his admitted conduct. Therefore, appellant's guilty plea was accurate.

Intelligent

Appellant also argues that his plea was not intelligent because his attorney failed to advise him that his guilty plea would result in his deportation. This presents an ineffective-assistance-of-counsel claim. To prevail on such a claim, appellant "must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding 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)). To satisfy his burden of proof, appellant "must do more than offer conclusory, argumentative assertions, without factual support." *State v. Turnage*, 729 N.W.2d 593, 599 (Minn. 2007). "We need not analyze both prongs of the *Strickland* test if either one is determinative." *Staunton v. State*, 784 N.W.2d 289, 300 (Minn. 2010).

Appellant relies on the United States Supreme Court decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). The Supreme Court held that an attorney "must inform [his or] her client whether his plea carries a risk of deportation." *Padilla*, 130 S. Ct. at 1486. Appellant's guilty-plea petition indicates that his attorney informed him, and

he understood, that if he was "not a citizen of the United States, conviction of a crime may result in deportation, exclusion from admission to the U.S.A., or denial of naturalization." Additionally, appellant's attorney discussed immigration consequences at length at the guilty-plea hearing. Prior to appellant pleading guilty, the following exchange occurred:

> [Attorney]: [W]e discussed the fact that you already had your interview with the INS for naturalization, is that correct?
> [Appellant]: Correct.
> [Attorney]: And this particular incident here was very much of a worry to you and the consequences of that?
> [Appellant]: Yes.
> [Attorney]: And you have discussed that with me in extensive discussions and stories back and forth about the consequences of what the INS might do if you plead guilty today, is that correct?
> [Appellant]: Correct.
> [Attorney]: And the general consensus to the answer is that we are not sure what the INS will do, is that correct?
> [Appellant]: Correct.
> [Attorney]: [B]y pleading guilty today you are continuing to take your chances with the INS on what they might do when this is reported to them, is that correct?
> [Appellant]: Correct.
> [Attorney]: And nothing has been said to you or told you or made any promises to you about the results of the INS's –
> [Appellant]: No.
> . . . .
>
> [Attorney]: [B]y pleading guilty you understand that there may be consequences unknown at this point?
> [Appellant]: I do.

The record shows that appellant was advised of possible consequences of his plea and his attorney demonstrated concern and thoroughness in showing that appellant was aware of potential consequences. Moreover, at appellant's January 2003 sentencing,

appellant's attorney asked the district court for guidance in acquiring transcripts from the plea hearing and sentencing because appellant needed "to appeal the turndown of the U.S. citizenship [application]." Thus, appellant *knew* that his citizenship application had been turned down because he planned to appeal that denial. Appellant's attorney met the requirement set forth in *Padilla* that an attorney must advise his client of the risk of deportation that pleading guilty carries. 130 S. Ct. at 1486.

But appellant claims that his counsel did not merely fail to warn him of the possible "immigration consequences" of his guilty plea, but failed to specifically warn him of the consequences on "his pending naturalization application." Appellant claims that "[b]eing denied citizenship and being removed from the country are two entirely different matters." The guilty-plea petition shows that, for these purposes, there is no discernable difference between the two situations and that appellant was advised of the possibility of each consequence. The petition notes that a conviction may result in "deportation, exclusion from admission to the U.S.A., or denial of naturalization." Thus, appellant fails to show that his attorney's representation was unreasonable. Therefore, appellant's guilty plea was intelligent.

Voluntary

Appellant also argues that his plea was not voluntary, asserting that he pleaded guilty "partly because his defense attorney convinced him that a jury would not believe him, a half-Vietnamese man, over the testimonies of two sympathetic, minor girls." When appellant pleaded guilty, he filed a petition to enter plea of guilty that indicates that he understood the charge against him and that he understood his trial rights and that he

was waiving those rights. He also indicated that "[n]o one, including [his] attorney . . . threatened [him]" in order to obtain his guilty plea, and that he was "freely and voluntarily" pleading guilty. There is no evidence to suggest that appellant's attorney improperly pressured appellant. Therefore, appellant's guilty plea was voluntary.

Harsh Deportation Consequences

Appellant argues that the court must grant him relief to correct a manifest injustice in light of the harsh deportation consequences. But appellant cites to no authority indicating that an individual must be permitted to withdraw a valid guilty plea in order to prevent deportation. This argument appears to stem from the requirement of an intelligent guilty plea. We have already determined that appellant's guilty plea was intelligently made. Appellant's guilty plea was valid and the district court did not abuse its discretion in denying his motion to withdraw his guilty plea in order to correct a manifest injustice.

Delay

Appellant also argues that the district court erred in giving undue weight to the delay in the filing of his petition. Appellant moved for relief in November 2009. The district court noted that appellant waited nearly seven years to request relief despite the transcript of appellant's plea indicating his awareness of possible consequences from the INS. This was also approximately seven years after appellant's sentencing when he *knew* that the INS denied his application. Appellant's argument is unavailing because although the district court noted the seven-year delay and the resulting potential prejudice to the state, the district court stated only that it "weigh[ed] against granting his motion," and

denied the motion after concluding that appellant's guilty plea was valid. The district court did not give undue weight to appellant's delay in filing his petition.

Evidentiary Hearing

Finally, appellant argues that the district court improperly denied his repeated requests for an evidentiary hearing. A postconviction court is required to hold an evidentiary hearing and make findings of fact and conclusions of law unless the petition, files, and records conclusively show that the petitioner is entitled to no relief. Minn. Stat. § 590.04, subd. 1 (2008). No evidentiary hearing is required if the petitioner fails to allege facts sufficient to entitle him to relief. *See Wayne v. State*, 747 N.W.2d 564, 565-66 (Minn. 2008). Allegations must be "more than argumentative assertions without factual support" to require an evidentiary hearing. *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997).

The district court concluded that an evidentiary hearing was not necessary because the parties cited to identical portions of the transcripts and there were no disputed material facts regarding the plea and conviction. The district court reviewed the record that was before the district court at the time of appellant's guilty plea and sentencing. Appellant's supplementary information was known or available at the time of the original proceedings. The district court was not required to conduct an evidentiary hearing because the district court had all of the information it needed in order to reach a decision. Therefore, the district court did not abuse its discretion in denying appellant's petition for postconviction relief.

Affirmed.