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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-462**

Hernando Quintero Mono, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed November 14, 2011
Affirmed
Worke, Judge**

St. Louis County District Court
File No. 69-K4-96-600673

Eric L. Newmark, Richard Student, Gaskins Bennett Birrell & Schupp, Minneapolis, Minnesota (for appellant)

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

Mark S. Rubin, St. Louis County Attorney, Leslie E. Beiers, Assistant County Attorney, Duluth, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Wright, Judge; and Worke, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges the district court's denial of his petition for postconviction relief, in which he requested to withdraw his guilty plea to second-degree criminal sexual

conduct, claiming that his attorney was ineffective for failing to advise him that he would be deported if he pleaded guilty. We affirm.

DECISION

On November 5, 1996, appellant Hernando Quintero Mono, a resident alien, pleaded guilty to second-degree criminal sexual conduct, in violation of Minn. Stat. § 609.343, subd. 1(a) (1996). In 2010, appellant petitioned for postconviction relief seeking to withdraw his guilty plea. The district court denied appellant's petition without an evidentiary hearing.

This court reviews the district court's denial of a postconviction petition without a hearing for an abuse of discretion. *Chambers v. State*, 769 N.W.2d 762, 764 (Minn. 2009). A district court must hold an evidentiary hearing unless "the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2010). A hearing "is not required unless facts are alleged which, if proved, would entitle a petitioner to the requested relief." *Fratzke v. State*, 450 N.W.2d 101, 102 (Minn. 1990). "Allegations in a postconviction petition must be more than argumentative assertions without factual support." *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007) (quotation omitted). The petitioner has the burden of establishing facts by a fair preponderance of the evidence that would warrant reopening the matter. *Hummel v. State*, 617 N.W.2d 561, 564 (Minn. 2000).

Appellant sought to withdraw his guilty plea, claiming that his attorney was ineffective for failing to advise him that he would face mandatory deportation if he pleaded guilty. To withdraw a plea on the basis of ineffective assistance of counsel,

appellant bears the burden of proving that (1) his counsel's representation fell below an objective standard of reasonableness and (2) but for the deficient performance, appellant 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)). This court reviews a district court's decision to deny a plea withdrawal for an abuse of discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998).

Appellant argues that his attorney fell below the standard of reasonableness established by the Supreme Court in *Padilla v. Kentucky*. 130 S. Ct. 1473 (2010). Padilla pleaded guilty to a deportable offense. *Id.* at 1478. But his attorney failed to advise him of the risk of deportation and, worse, also told Padilla that he did not have to worry about deportation because of the length of time he had lived in the United States. *Id.* The Supreme Court held that to provide constitutionally effective representation, an attorney must advise a client that his guilty plea carries a risk of deportation. *Id.* at 1486. The Court concluded that Padilla's attorney "could have easily determined that his plea would make him eligible for deportation simply from reading the text of the [relevant] statute, which . . . specifically command[ed] removal" for the offense to which Padilla pleaded guilty. *Id.* at 1483. The Court noted, however, that when deportation consequences are unclear or uncertain because the law "is not succinct and straightforward . . . a criminal defense attorney need do no more than advise . . . that pending criminal charges may carry a risk of adverse immigration consequences." *Id.*

The Immigration and Naturalization Service (INS) commenced removal proceedings against appellant under Section 240 of the Immigration and Nationality Act because of his aggravated-felony conviction and ordered his removal in March 2010. Appellant claims that his attorney could have merely read the text of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and advised appellant that his conviction would be classified as an “aggravated felony” and that persons convicted of “aggravated felonies” are subject to mandatory removal.

In 1996 the IIRIRA’s definition of an “aggravated felony” was amended to include “sexual abuse of a minor.” *Lovan v. Holder*, 574 F.3d 990, 992 (8th Cir. 2009). The amendment applied to convictions prior to the amendment’s enactment. *Id.* Thus, appellant pleaded guilty to an aggravated felony that would require removal from the United States. However, at the time of appellant’s guilty plea, it was uncertain whether a particular form of relief from removal or deportation was available to him. *See e.g., I.N.S. v. St. Cyr*, 533 U.S. 289, 295, 121 S. Ct. 2271, 2276 (2001) (stating that a particular section of the Immigration and Nationality Act of 1952 permitted resident aliens to apply for waiver from deportation). Therefore, although appellant’s attorney could have determined that an aggravated-felony conviction could lead to deportation, the actual effect on appellant’s immigration status was unclear. Appellant fails to show that his attorney performed below an objective standard of reasonableness because, as the district court noted, immigration law was “very much in flux at the time of the plea and sentencing,” and, as a result, it was unclear how the law would apply to appellant.

The record shows that appellant's attorney satisfied the requirements of *Padilla*.

At the plea hearing, appellant's attorney stated:

I have told [appellant] that I am not saying [he] will be deported, because his wife and his children are United States citizens. However, I can make no guarantee.

I also told [appellant] issues of deportation for this [] crime are not within the province or the jurisdiction of either the Court or the St. Louis County Attorney's Office.

Prior to the district court accepting appellant's guilty plea, appellant's attorney stated:

as the Court knows this last fall the United States Congress radically changed various statutes having to do with the deportation status of people who are legally in the United States who have been charged and convicted with a crime. I personally spoke to [an immigration attorney], as well as encouraged [appellant's] wife to call [the attorneys] and [she] did. This is a St. Paul law agency that only does immigration law.

[I]f the Court announces a sentence here, whether it involves incarceration or not, [appellant] is very possibly deportable and I don't know how to say that word in Spanish but he can be deported. I stress that nobody's saying he will be or will not be. There's no way of making that prediction, but this is one of many, many offenses that they can deport somebody and I've done my best to explain to my client that fact.

Additionally, appellant signed a guilty-plea petition that indicates: "My attorney has told me and I understand that if I am 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." Appellant's attorney provided effective assistance of counsel by advising appellant of the risk of deportation if he pleaded guilty.

Affirmed.