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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1141**

Wayne Carl Nicolaison, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed February 21, 2012
Affirmed
Bjorkman, Judge**

Hennepin County District Court
File No. 27-CR-84-902392

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Schellhas, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges the district court's denial of his postconviction petition, arguing that the district court erred by concluding that (1) the United States Supreme

Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), does not warrant consideration of appellant's untimely petition and (2) *Padilla* does not apply to appellant's ineffective-assistance-of-counsel claim. We affirm.

FACTS

In 1985, appellant Wayne Nicolaison pleaded guilty to first-degree criminal sexual conduct and was sentenced to 121 months' imprisonment. He did not appeal but filed two unsuccessful postconviction petitions challenging his sentence. In January 1992, while serving that sentence, Nicolaison was indefinitely civilly committed as a psychopathic personality. *In re Nicolaison*, No. C1-92-613, 1992 WL 160843 (Minn. App. July 4, 1992) (affirming commitment). He remains subject to commitment at a state security hospital. *See Nicolaison v. Ludeman*, No. A10-1567, 2011 WL 691859 (Minn. App. Mar. 1, 2011) (affirming denial of discharge petition), *review denied* (Minn. May 17, 2011).

On January 14, 2011, Nicolaison petitioned for postconviction relief, arguing that he should be permitted to withdraw his guilty plea because he received ineffective assistance of counsel by virtue of his attorney's failure to advise him of the potential of civil commitment. Nicolaison acknowledged that the petition was not filed within the two-year limitations period in the postconviction statute but argued that *Padilla* brings his petition within the exception to the statute of limitations for postconviction petitions based on "a new interpretation of federal or state constitutional or statutory law" that "is retroactively applicable to the petitioner's case." *See* Minn. Stat. § 590.01, subd. 4(b)(3) (2010). The district court disagreed and denied the petition, reasoning that

(1) postconviction relief does not apply to civil-commitment consequences, (2) *Padilla* does not bring Nicolaison’s untimely petition within the “new interpretation” exception, and (3) *Padilla* does not apply to a claim of ineffective assistance of counsel premised on failure to advise of potential civil commitment. This appeal follows.

D E C I S I O N

A district court’s decision on a postconviction petition will not be reversed absent an abuse of discretion. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). On appeal of a postconviction decision, we review issues of law de novo and issues of fact for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007).

I. *Padilla* does not satisfy the exception to the postconviction statute of limitations for petitions based on a “new interpretation” of the law.

A postconviction petition filed more than two years after the entry of judgment of conviction or sentence, or disposition of a direct appeal, is untimely and subject to summary dismissal unless the petitioner can establish one of the statutory exceptions. Minn. Stat. § 590.01, subd. 4(a), (b) (2010); *see also Johnson v. State*, 801 N.W.2d 173, 177 (Minn. 2011) (stating that an untimely petition that does not satisfy any of the exceptions “should not be considered on the merits”). Nicolaison argues that the exception for postconviction petitions based on a “new interpretation” of the law applies. Minn. Stat. § 590.01, subd. 4(b)(3). We disagree. *Padilla* held that an attorney must advise a client whether his guilty plea carries a risk of deportation in order to provide constitutionally effective representation. 130 S. Ct. at 1486. While *Padilla* effectively overruled Minnesota cases holding otherwise, the decision was based on the

constitutional right to effective representation, as articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), which “is hardly new.” *Campos v. State*, 798 N.W.2d 565, 570 (Minn. App. 2011) (citing *Teague v. Lane*, 489 U.S. 288, 301, 109 S. Ct. 1060, 1070 (1989)), *review granted* (Minn. July 19, 2011). In *Campos*, this court determined that “*Padilla* does not announce a new rule of criminal procedure.” *Id.* at 571. Although *Campos* focused on whether *Padilla* was a “new rule of criminal procedure,” not whether *Padilla* qualifies as a “new interpretation” of the law under Minn. Stat. § 590.01, subd. 4(b)(3), Nicolaison does not advance any reason for distinguishing between the two almost identical analytical frameworks. We therefore conclude that *Padilla* does not satisfy the “new interpretation” exception to the two-year postconviction statute of limitations to warrant review of Nicolaison’s untimely petition.

II. The holding of *Padilla* does not apply to Nicolaison’s claim of ineffective assistance of counsel.

Nicolaison also challenges the district court’s alternative reason for rejecting his petition—that *Padilla* does not apply to civil-commitment consequences. While *Padilla* plainly applies to deportation consequences, Nicolaison argues that *Padilla*’s holding more broadly rejects Minnesota law that distinguishes between direct penal consequences and collateral civil consequences of a guilty plea when evaluating the constitutional effectiveness of counsel. *See Alanis v. State*, 583 N.W.2d 573, 578-79 (Minn. 1998) (recognizing direct-collateral distinction); *see also Kaiser v. State*, 641 N.W.2d 900, 903-05 (Minn. 2002) (applying the distinction to reject claim of ineffective assistance of

counsel premised on failure to advise of predatory-offender registration requirement). We are not persuaded.

The Supreme Court discussed the direct-collateral distinction because the Kentucky Supreme Court had held, much like our supreme court in *Alanis*, that failure to advise about the risk of deportation did not amount to ineffective assistance of counsel because deportation is a collateral consequence. *Padilla*, 130 S. Ct. at 1481. But the Supreme Court emphasized that it had “never applied” such a distinction, and expressly declined to decide whether the direct-collateral distinction is generally “appropriate.” *Id.* at 1481-82. And we have specifically declined to abandon the distinction in the wake of *Padilla*, reasoning that *Padilla* does not require it, Minnesota precedent adopting the distinction still applies in other contexts, and it is not the role of this court “to revisit settled caselaw.” *Sames v. State*, 805 N.W.2d 565, 570 (Minn. App. 2011), *review denied* (Minn. Dec. 21, 2011).

Applying that distinction here, we conclude that civil commitment is, at most, a collateral consequence following a criminal conviction. Civil commitment 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. *See* Minn. Stat. §§ 253B.02, subd. 18b (defining sexual psychopathic personality), .185 (addressing procedure for civil commitment) (2010); *Call v. Gomez*, 535 N.W.2d 312, 319-20 (Minn. 1995) (reiterating that civil commitment is remedial, not punitive, and the primary goal is treatment); *see also Alanis*, 583 N.W.2d at 578 (defining direct consequences of a guilty plea as “those

which flow definitely, immediately, and automatically from the guilty plea”). Accordingly, we conclude that the district court did not err in ruling that *Padilla* does not require defense counsel to advise their clients of possible civil-commitment consequences of a guilty plea.

Because Nicolaison failed to establish that an exception to the postconviction statute of limitations applies to the merits of his ineffective-assistance-of-counsel claim, the district court did not err by summarily denying Nicolaison’s untimely postconviction petition.

Affirmed.