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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-821**

Sergey Ivanovich Simonovich, petitioner,
Respondent,

vs.

State of Minnesota,
Appellant.

**Filed December 12, 2011
Affirmed
Connolly, Judge**

Hennepin County District Court
File No. 27-CR-09-47546

Herbert Igbanugo, Igbanugo Partners International Law Firm, PLLC, Minneapolis,
Minnesota (for respondent)

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County
Attorney, Minneapolis, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

The State of Minnesota appeals from the district court's order granting
respondent's petition for postconviction relief and vacating his guilty plea on the ground

of ineffective assistance of counsel. Because we see no error in the district court's order, we affirm.

FACTS

In September 2009, respondent Sergey Ivanovich Simonovich, an alien, was charged with five felonies related to thefts of his employer's property. The complaint listed four counts of

THEFT OVER \$5,000 (AGGREGATED) (FELONY)
MINN. STAT. § 609.52, SUBD. 2(1), SUBD. 3(2), 3(5)
PENALTY: 0-10 YEARS AND/OR \$20,000

and one count of

RECEIVING STOLEN PROPERTY (FELONY)
MINN. STAT. § 609.53, SUBD. 1; § 609.52, SUBD. 3(2)
PENALTY: 0-10 YEARS AND/OR \$20,000.

Respondent signed a petition to plead guilty to two counts of theft over \$5,000 in exchange for dismissal of the remaining counts, restitution of \$81,646, and a sentence of 17 months in prison, stayed for three years, with 365 days in jail. The petition stated, "I understand that if I am not a citizen of the United States this plea of guilty may result in deportation, exclusion from admission to the United States, or denial of citizenship."

At his sentencing hearing, the district court questioned respondent's attorney.

THE COURT:	[Respondent] is not a citizen. Is that correct?
[ATTORNEY]:	That's correct, Your Honor.
THE COURT:	So there is going to be some immigration consequences potentially, too. Is that correct?
[ATTORNEY]:	That's correct, Your Honor.

THE COURT: What are the immigration consequences or what have you done to find out what they are?

[ATTORNEY]: . . . [Respondent] took it upon himself to contact an immigration lawyer, and I actually just recently spoke with an immigration lawyer this morning regarding [respondent's] specific issues with a specific statute number. . . .

THE COURT: Okay.

[ATTORNEY]: [The immigration lawyer] indicated that if this was an aggravated felony – it's an aggregate – but if it's an aggravated felony, it may very well be deportable.

THE COURT: What is an aggravated felony?

[ATTORNEY]: It appears that this might be an aggravated felony, meaning, under immigration law, because of the amount and because of the time, the 17 months stayed, that makes it an aggravated felony it appears. Now, I have counseled [respondent] that that is – it may very well be a deportable offense. In fact, we can go on the record and say this is a deportable offense. [Respondent] is fully aware of that. Now maybe he does not get deported, but I have counseled him that it is a deportable offense. He wishes to proceed as such.

THE COURT: All right. Then, [respondent], do you understand what your options are today?

[RESPONDENT]: Yes.

. . . .

THE COURT: All right. And you understand that by pleading guilty to those two counts, you may very well be admitting – or you are – let's assume you are admitting to offenses that would make you subject to deportation, correct?

[RESPONDENT]: Yes.

THE COURT: But you – weighing all the pluses and minuses of everything, you would rather go ahead and take the deal?

[RESPONDENT]: Yes.

Respondent was also questioned by his attorney as to his understanding of the plea petition he had signed. The attorney's last question was, "And just so the record is clear –and [the court] covered this as well–this is *possibly* a deportable offense. Do you understand that?" (Emphasis added.) Respondent answered, "Yes, I do." Respondent's attorney told the court, "[Respondent] has taken responsibility for his actions here, Your Honor, there is no question. He understands the severity of this, and he *may* very well end up deported as a result." (Emphasis added.) Nothing in the hearing transcript indicates that respondent's attorney believed or told respondent that deportation was a definite consequence of his guilty plea.

On June 30, 2010, respondent began serving his jail sentence. While he was in jail, immigration officials began deportation proceedings. Respondent retained a different attorney and petitioned for postconviction relief, specifically for the withdrawal of his guilty plea.

At the postconviction hearing, respondent's former attorney was a witness. The state's attorney asked him what the immigration attorney had said. Respondent's attorney answered:

That this matter, because of two reasons, was an aggravated felony. One was because of the 17 months. I informed [the immigration attorney] it was a stay of execution of a 17 months sentence. [Respondent] wasn't going to prison for 17 months. [The immigration attorney] told me that it doesn't matter. If it's a stay of execution of 17 months, even if he's doing less time, that's what is controlling, as well as the amount of the theft, the dollar amount.

The prosecutor then said, “The dollar amount of the theft being over \$10,000 would make it --” and respondent’s former attorney replied, “A separate potential deportation issue, yes.” He again answered “Yes” when asked: (1) if he had discussed these issues with respondent; (2) if he had told respondent “that these were deportable offenses because of the aggravated felonies”; and (3) if respondent had indicated “that he understood and that he was willing to take his chances.”

But respondent’s attorney also testified that “deportable” meant “you can be deported” but did not mean, “you will be deported.” He later explained his understanding of a deportable offense: “If ICE [Immigration and Customs Enforcement] picks [respondent] up, he’s deported. It’s up to ICE. Deportable is it’s a deportable offense, meaning, I’m not the one or the immigration lawyer is not the one deporting him; it’s ICE. They can deport him.” When asked, “And to you deportable is, . . . may be deported, right?” he answered, “Up to ICE, yes.” When asked, “So you never communicated to [respondent] that if he pleads guilty to this and the facts of this case that he will definitely be deported?” he answered, “I never used the term, ‘[respondent] will be deported if he enters this plea.’ I never used those exact terms, correct.”

The district court granted respondent’s petition for postconviction relief and vacated his guilty plea. The state challenges that decision, arguing that respondent had effective assistance of counsel when he pleaded guilty.

DECISION

A postconviction decision regarding a claim of ineffective assistance of counsel involves mixed questions of fact and law and is reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

It is undisputed that respondent is an alien. “Any alien who is convicted of an aggravated felony at any time after admission [to the United States] is deportable.” 8 U.S.C. § 1227 (2)(A)(iii) (2006). Within the meaning of this statute, “a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year” is an “aggravated felony.” 8 U.S.C. § 1101 (a)(43)(G) (2006).

The Supreme Court recently and definitively construed the phrase “is deportable” in the context of convicted aliens:

[T]he terms of the relevant immigration statute are succinct, clear and explicit in defining the removal consequence for Padilla’s conviction. *See* 8 U.S.C. § 1227(a)(2)(B)(i) (“Any alien who at any time after admission has been convicted of a violation of . . . any law . . . relating to a controlled substance . . . *is deportable*”).¹ The defendant’s] counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions This is not a hard case in which to find deficiency [in counsel’s performance]: the consequences of [the defendant’s] plea could easily be determined from reading the removal statute, his *deportation was*

¹ Compare 8 U.S.C. § 1227 (2)(A)(iii) (“Any alien who is convicted of an aggravated felony at any time after admission [to the United States] is deportable.”)

presumptively mandatory, and his counsel's advice was incorrect.

Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010) (emphasis added). *Padilla* concluded that, because counsel for a convicted alien had not advised him that, if he pleaded guilty, "his deportation was presumptively mandatory," *id.*, "his counsel was constitutionally deficient." *Id.* at 1487. Thus, under *Padilla*, when a statute says an alien who has been convicted of a certain offense "is deportable," that alien's deportation is "presumptively mandatory." *Id.* at 1483.

The error of the attorney in *Padilla* was more egregious than the error of respondent's former attorney because the *Padilla* attorney told his client "that his conviction would not result in his removal from this country," while respondent's former attorney told him that his conviction *might* result in his removal from this country. *Padilla* explained when such advice would be appropriate. "When the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." *Id.* (footnote omitted); *see also United States v. Orocio*, 645 F.3d 630, 642 (3rd Cir. 2011) (holding that attorney who did not affirmatively mislead alien client but "wholly failed to advise him of the near-certain removal consequence of pleading guilty to a controlled substance offense" provided

ineffective assistance).² Like the attorneys in *Padilla* and *Orocio*, respondent's former attorney failed to give correct advice when the deportation consequence was truly clear.

The record supports the district court's finding that respondent's claims "that he did not know that deportation was virtually certain, and that he would not have pleaded guilty . . . if he had known . . . are credible." The district court did not err in granting respondent's motion to vacate his guilty plea on the ground of ineffective assistance of counsel.

Affirmed.

² The state relies on *Hutchinson v. United States*, No. 1:06—cr—173, 2011 WL 5041002 *8 (M.D. Pa. Oct. 24, 2011) (holding that attorney who advised client of "a high probability that he would be deported" before a guilty plea did not provide ineffective assistance). This reliance is misplaced for two reasons. First, *Hutchinson*, as a federal district court case from another jurisdiction, is not dispositive of a case before this court. Second, the reasoning in *Hutchinson* is not persuasive. *Hutchinson* attempted to distinguish *Padilla* and *Orocio*: "In this case, unlike in *Padilla* or *Orocio*, Petitioner's counsel did advise him of the possibility that he would be deported if he pleaded guilty. . . . [and the attorney] testified that he advised Petitioner of a high probability that he would be deported." *Id.* But, when deportation is the certain consequence of a guilty plea, advising a client that deportation is a possible or even a highly probable consequence is not sufficient: "[W]hen the deportation consequence is truly clear . . . the duty to give correct advice [i.e., that deportation is certain] is equally clear." *Padilla*, 130 S. Ct. at 1483.