STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0717

Mikhail Nikolayevich Glushko, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed February 18, 2014
Affirmed
Kalitowski, Judge

Hennepin County District Court
File No. 19HA-CR-08-4601

Herbert A. Igbanugo, Igbanugo Partners Int'l Law Firm PLLC, Minneapolis, Minnesota (for appellant)

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

James C. Backstrom, Dakota County Attorney, Thomas Lockhart, Assistant County Attorney, Hastings, Minnesota (for respondent)

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

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

KALITOWSKI, Judge

Appellant Mikhail Nikolayevich Glushko challenges the district court's denial of his petition for postconviction relief. Appellant seeks to withdraw his guilty plea,

claiming that (1) he received ineffective assistance of counsel, and (2) his guilty plea was not intelligent, accurate, or voluntary. We affirm.

D E C I S I O N

In April 2010, appellant, a Russian refugee, pleaded guilty to third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(b) (2006). In October 2011, appellant petitioned for postconviction relief, seeking to withdraw his guilty plea. The district court summarily denied his petition. On appeal, this court affirmed in part and remanded the district court's order. *Glushko v. State*, No. A12-0102, 2012 WL 4328998, at *1 (Minn. App. Sept. 24, 2012). On remand, the district court denied appellant's petition, finding that he received effective assistance of counsel.

A defendant seeking to withdraw a guilty plea after sentencing does so by petitioning for postconviction relief. *James v. State*, 699 N.W.2d 723, 727 (Minn. 2005) (citing Minn. Stat. § 590.01 (2004)). "When reviewing a postconviction court's decision, we examine only whether the postconviction court's findings are supported by sufficient evidence." *Lussier v. State*, 821 N.W.2d 581, 588 (Minn. 2012) (quotation omitted). We review a district court's decision to deny a petition to withdraw a guilty plea for an abuse of discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998). As to issues of fact, we determine whether the evidence is sufficient to sustain the postconviction court's findings, and we review issues of law de novo. *Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003).

Appellant asserts that the district court should have permitted him to withdraw his guilty plea because he received ineffective assistance of counsel. We review the denial

of an ineffective-assistance-of-counsel claim in a postconviction petition de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

To prevail on a claim of ineffective assistance of counsel, appellant must allege facts that demonstrate (1) that his counsel's performance fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's errors, the outcome would have been different. *Staunton v. State*, 784 N.W.2d 289, 300 (Minn. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064 (1984)). And the burden of proof is on the defendant, who must overcome "a strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007). When a defendant fails to prove either deficient performance of counsel or resulting prejudice, the claim of ineffective assistance of counsel fails. *State v. Blanche*, 696 N.W.2d 351, 376 (Minn. 2005).

Appellant contends that his attorney fell below the standard of reasonableness established in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). In *Padilla*, the United States Supreme Court held that to provide effective assistance of counsel, an attorney must inform his client whether pleading guilty carries a risk of deportation. 130 S. Ct. at 1476. The *Padilla* defendant pleaded guilty to transporting a large amount of marijuana in his tractor-trailer, which was a deportable controlled-substance crime. *Id.* at 1477-78. The defendant was not advised of the deportation risks and his attorney incorrectly told him that he "did not have to worry about immigration status since he had been in the country so long." *Id.* at 1478.

The Court determined that because the governing statute "addresse[d] not some broad classification of crimes but specifically command[ed] removal for all controlled substances convictions except for the most trivial of marijuana possession offenses," Padilla's deportation was presumptively mandatory. *Id.* at 1483. As such, 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 [governing] statute, which . . . specifically command[ed] removal" for the offense to which Padilla pleaded guilty. *Id.* Because "the terms of the relevant immigration statute [were] succinct, clear, and explicit in defining the removal consequence for [the defendant's] conviction" and defense counsel's advice was incorrect, defense counsel's performance in *Padilla* fell below an objective standard of reasonableness. *Id.* 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 a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.*

Appellant argues that because he pleaded guilty to "criminal sexual conduct in the third degree, an 'operation predator' conviction/offense," he clearly faced mandatory deportation under federal law. Therefore, his counsel could have read the applicable statutes and determined that he was subject to automatic removal. We disagree.

First, unlike the controlled substance offense pleaded to in *Padilla*, the deportation consequences of third-degree criminal sexual conduct are not explicit. Rather, the consequences hinge on whether third-degree criminal sexual conduct qualifies as "sexual

abuse of a minor," and thus renders it a deportable "aggravated felony." 8 U.S.C. §§ 1101(a)(43)(A), 1227(a)(2)(A)(iii) (2006). And actual deportation, as opposed to eligibility for deportation, is a function of the federal government subject to the intricacies of immigration law. Given the nature of appellant's offense and resulting complexity of the analysis needed to define an "aggravated felony" and "sexual abuse of a minor," we conclude that the governing statute here falls within the broad classification of crimes cited by the *Padilla* Court that only require counsel to advise of the risk of immigration consequences. *See Padilla*, 130 S. Ct. at 1483 (stating when the governing law is not "succinct and straightforward" an attorney need only advise of the risk of adverse immigration consequences). Therefore, appellant's counsel was not categorically required to advise him that deportation was mandatory.

Second, we previously remanded this case to supplement the district court record regarding the pre-plea conversations between appellant and his attorney. *Glushko*, 2012 WL 4328998, at *3. The supplemented record shows that appellant's plea attorney met with him approximately two to four times prior to the plea hearing to discuss his case and the immigration implications. His attorney advised him "that a felony of this magnitude is the type that could cause [appellant] to be deported." He further told appellant that his crime "was a crime that would - - which would subject him to deportation if the authorities were so inclined to move forward." In addition, appellant's plea attorney sought advice from an immigration attorney, who stated that there was a likelihood that appellant would be deported. Appellant's attorney conveyed this risk to appellant and also provided appellant with the immigration attorney's contact information. Lastly,

appellant signed a plea agreement that stated the following: "My attorney has told me and 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 of America or denial of citizenship."

On this record, we conclude that appellant's plea counsel provided him with reasonable assistance of counsel. Moreover, appellant cannot satisfy the prejudice prong of *Strickland*. The record contains no evidence indicating that the outcome would have been different but for counsel's error. And because appellant's counsel satisfied the standards laid out in *Padilla* and *Strickland*, it follows that appellant made his plea with knowledge of the consequences and that the plea was therefore intelligent.

Appellant also contends that the withdrawal of his plea is necessary because it was not accurate. In appellant's previous appeal, this court specifically addressed appellant's contention that his plea was not accurate. *Glushko*, 2012 WL 4328998, at *3-4. This court concluded that "the district court was within its discretion when it denied appellant's claim that his plea was not accurate . . . ." *Id.* at *4. Therefore, under the well-established rule laid out in *State v. Knaffla*, the accuracy issue of appellant's plea is barred from our consideration. 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976) (declining to consider postconviction claims previously raised in a direct appeal or which should have been known and raised in a direct appeal); *see* Minn. Stat. § 590.01, subd. 1 (2010) (stating that "[a] petition for postconviction relief after a direct appeal has been completed may not be based on grounds that could have been raised on direct appeal of the conviction").

Finally, appellant claims his plea was not voluntary. But because appellant provides no support or argument for this assertion, we decline to address it. *See McKenzie v. State*, 583 N.W.2d 744, 746 n.1 (Minn. 1998) (applying the rule that issues alluded to but not argued in the brief are waived).

We conclude that the district court did not abuse its discretion in denying appellant's motion to withdraw his guilty plea.

Affirmed.