STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1495

Raymond Leroy Thomas, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed March 24, 2014
Affirmed
Stauber, Judge

Clay County District Court
File No. 14K302000418

Cathryn Middlebrook, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Appellate Public Defender, St. Paul, Minnesota (for appellant)

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

Brian J. Melton, Clay County Attorney, Pamela Harris, Assistant County Attorney, Moorhead, Minnesota (for respondent)

Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and Stauber, Judge.

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

STAUBER, Judge

Appellant argues that the district court erred by denying his postconviction petition as time-barred because his attorney failed to advise him that he could be civilly

committed following his guilty plea to second-degree criminal sexual conduct and first-degree burglary. We affirm.

FACTS

In September 2002, appellant Raymond Thomas pleaded guilty to one count of second-degree criminal sexual conduct and one count of first-degree burglary arising out of an incident that occurred in March 2002. According to the complaint, appellant entered a neighbor's apartment and sexually assaulted an eight-year-old girl. Appellant was sentenced to 33 months in prison and ten years' conditional release for the sexual assault conviction and also received a concurrent 68 month prison sentence for the burglary conviction. Appellant was subsequently civilly committed to the Minnesota Sex Offender Program.

On January 9, 2013, appellant filed a pro se petition for postconviction relief, seeking to withdraw his guilty plea. He argued that he received ineffective assistance of counsel because his attorney failed to advise him of the civil-commitment consequences of pleading guilty to criminal sexual conduct, and therefore he should be permitted to withdraw his plea. On June 21, 2013, the district court denied appellant's petition without a hearing, concluding that appellant's petition was time-barred by the two-year time limit under Minn. Stat. § 590.01, subd. 4 (2012), and because the rule announced in *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010), requiring attorneys to inform their clients about deportation consequences of entering a guilty plea is not applicable to civil-commitment consequences. This appeal followed.

D E C I S I O N

I.

In reviewing a postconviction court's decision to grant or deny relief, this court reviews issues of law de novo and reviews factual findings for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007); *see also Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003) (noting that appellate courts "extend a broad review of both questions of law and fact" when reviewing postconviction proceedings) (quotation omitted). "The decisions of a postconviction court will not be disturbed absent an abuse of discretion." *Pierson v. State*, 637 N.W.2d 571, 577 (Minn. 2002).

Appellant argues that the district court erred by dismissing his postconviction petition as untimely because the state never raised timeliness as a defense, and, therefore, the defense was waived. The postconviction statute contains two time-bar provisions. The first is Minn. Stat. § 590.01, subd. 4(a), which states that "[n]o petition for postconviction relief may be filed more than two years after the later of: (1) the entry of judgment of conviction or sentence if no direct appeal is filed; or (2) an appellate court's disposition of petitioner's direct appeal." The second provision is Minn. Stat. § 590.01, subd. 4(c), which states that "[a]ny petition invoking an exception provided in paragraph (b) must be filed within two years of the date the claim arises." Paragraph (b) states that "[n]otwithstanding paragraph (a), a court may hear a petition for postconviction relief if," among other things, the petitioner "asserts a new interpretation of . . . law" or "the petitioner establishes to the satisfaction of the court that the petition is

not frivolous and is in the interests of justice." Minn. Stat. § 590.01, subd. 4(b). The state did not raise either time-bar as a defense.

In *Carlton v. State*, 816 N.W.2d 590 (Minn. 2012), the Minnesota Supreme Court considered whether the time limit under Minn. Stat. § 590.01, subd. 4(c), was a statute of limitations and subject to waiver, or whether it was a jurisdictional bar not subject to waiver. After considering the purpose of the statute and its legislative history, the supreme court concluded that the time limit was subject to waiver, primarily because it did not create a new cause of action, but rather was intended to supplant common-law habeas corpus petitions. *Carlton*, 816 N.W.2d at 600-07. Because the state failed to raise the time-bar defense under section 590.01 subdivision 4(c), the supreme court agreed to consider the appellant's interests-of-justice argument, even though the appellant failed to file his petition within the two-year time frame established by 4(c). *Id.* at 606-07. "The reasoning in *Carlton* applies with equal force to subdivision 4(a)." *Hooper v. State*, 838 N.W.2d 775, 781 (Minn. 2013). Therefore, appellant is correct that the state has waived timeliness as a defense to his petition. Accordingly, we next consider the merits of appellant's argument that, under *Padilla*, he is entitled to withdraw his guilty plea.

II.

Padilla held that an attorney provides constitutionally ineffective legal assistance when he fails to inform his client of the possibility of deportation following a guilty plea. 559 U.S. at 374, 130 S. Ct. at 1486. Appellant argues that the "rule in *Padilla* must be . . . evenly applied to all defendants facing serious collateral consequences of which they were not informed prior to waiving their constitutional rights and pleading guilty,"

and that the rule should be extended to civil-commitment consequences. "We review the denial of postconviction relief based on a claim of ineffective assistance of counsel de novo because such a claim involves a mixed question of law and fact." *Hawes v. State*, 826 N.W.2d 775, 782 (Minn. 2013). "To establish ineffective assistance of counsel, the petitioner must show both that: (1) his trial attorneys' performance fell below an objective standard of reasonableness; and (2) a reasonable probability exists that, but for his attorneys' errors, the outcome of the trial would have been different." *Id.*

In *Sames v. State*, 805 N.W.2d 565, 569-70 (Minn. App. 2011), this court concluded that *Padilla* was limited to deportation consequences only. This court stated that "there are countervailing reasons to limit *Padilla* to the context of deportation. The *Padilla* Court did not discuss—indeed, did not even mention—any of the other myriad consequences of a guilty plea. Rather, the Court focused on 'the unique nature of deportation.'" *Id.* (quoting *Padilla*, 559 U.S. at 357, 130 S. Ct. at 1481). This court also reaffirmed the direct/collateral consequences distinction previously established by caselaw. *Id.* at 570. An attorney is required to advise a client about direct consequences of a guilty plea, which are "those which flow definitely, immediately, and automatically from the criminal defendant's plea of guilty, namely the maximum sentence and any fine to be imposed." *Alanis v. State*, 583 N.W.2d 573, 574 (Minn. 1998), *abrogated in part by Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010), *as recognized in Campos v. State*, 816 N.W.2d 480, 485 (Minn. 2012). But an attorney is not required to advise a client of collateral consequences of a guilty plea, which includes anything that is not a direct consequence. *Id.*

There is no published case that has held that civil commitment is a collateral consequence of a guilty plea. But this court has held in numerous unpublished opinions that "civil commitment is, at most, a collateral consequence following a criminal conviction" because it 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." *Nicolaison v. State*, No. A11–1141, 2012 WL 539266, at *2 (Minn. App. Feb. 21, 2012), *review denied* (Minn. July 17, 2012); *see also Whipple v. State*, No. A12-1713, 2013 WL 2372168, at *3 (Minn. App. June 3, 2013), *review denied* (Minn. Aug. 20, 2013), *Hatton v. State*, No. A12–0298, 2012 WL 5476127, at *2 (Minn. App. Nov. 13, 2012), *review denied* (Minn. Jan. 29, 2013); *Nicolaison v. State*, No. A12–0187, 2012 WL 5381852, at *2 (Minn. App. Nov. 5. 2012), *review denied* (Minn. Jan. 15, 2013); *Conard v. State*, No. A12–0122, 2012 WL 4476628, at *2 (Minn. App. Oct. 1, 2012), *review denied* (Minn. Dec. 18, 2012). Unpublished decisions of this court are not precedential, but may be of persuasive value. Minn. Stat. § 480A.08, subd. 3(c) (2012); *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993).

Appellant argues that he is entitled to relief under two exceptions found in section 590.01, subdivision 4: the exception for new interpretations of law, and the interests-of-justice exception. *See* Minn. Stat. § 590.01, subd. 4(b)(3), (5). Under the new-interpretation-of-law exception, the claimed new interpretation must be "retroactively applicable to the petitioner's case." *Id.*, subd. 4(b)(3). Appellant concedes that *Padilla* has no retroactive effect. But appellant urges that "the *Padilla* rule should be considered

a watershed rule as applied to the uniquely severe consequences of civil commitment to the Minnesota Sex Offender Treatment Program" and therefore it should be applied retroactively.

Both the Minnesota Supreme Court and the United States Supreme Court have held that *Padilla* does not apply retroactively. *Chaidez v. United States*, 133 S. Ct. 1103, 1113 (2013); *Campos*, 816 N.W.2d at 482. In *Chaidez*, the Supreme Court concluded that *Padilla* announced a "new rule," which under caselaw meant that the rule could not be applied retroactively. 133 S. Ct. at 1111. There are two exceptions that permit a "new rule" to be applied retroactively: "'[W]atershed rules of criminal procedure' and rules placing 'conduct beyond the power of the [government] to proscribe.'" *Id.* (quoting *Teague v. Lane*, 489 U.S. 288, 311, 109 S. Ct. 1060, 1076 (1989)). The Supreme Court did not consider whether the *Padilla* rule would fit under the exception for "watershed rules." *Id.* at 1107 n.3. But the Minnesota Supreme Court did consider the watershed rule exception, and concluded that *Padilla* did not announce a watershed rule. *Campos*, 816 N.W.2d at 499. The supreme court stated that the rule was not a watershed rule because it did not decrease the likelihood of an inaccurate conviction as the rule is only implicated where the defendant admits guilt, and because the rule only affects a "small subset of defendants." *Id.* at 498-99. Even if we were to apply *Padilla* to civil commitment consequences, such a rule could not be applied retroactively to appellant's case. The rule would still only affect a "small subset" of those defendants who face civil commitment consequences, and it would only concern defendants who admit guilt.

Appellant also argues that he is entitled to relief under the interests-of-justice exception. This court looks to the following factors when considering whether to grant relief under the interests-of-justice exception:

> (1) whether the claim has substantive merit; (2) whether the defendant deliberately and inexcusably failed to raise the issue on direct appeal; (3) whether the party alleging error is at fault for that error and the degree of fault assigned to the party defending the alleged error; (4) whether some fundamental unfairness to the defendant needs to be addressed; and (5) whether application of the interests-of-justice analysis is necessary to protect the fairness, integrity, or public reputation of judicial proceedings.

Carlton, 816 N.W.2d at 607 (citing *Gassler v. State*, 787 N.W.2d 575, 586–87 (Minn. 2010)). Appellant's claim fails under the first prong because his claim lacks substantive merit. As previously explained, the holding in *Padilla* is limited to deportation consequences and does not apply in the civil commitment context. *See Sames*, 805 N.W.2d at 569-70. Moreover, the rule in *Padilla* is a new rule, and not a watershed rule, therefore it cannot apply retroactively to appellant's 2002 guilty plea, even if it could be applied to his civil-commitment consequence. *See Chaidez*, 133 S. Ct. at 1113; *Campos*, 816 N.W.2d at 482.

Affirmed.