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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A18-0531**

Ernesto Reyes-Alcazar, petitioner,  
Appellant,

vs.

State of Minnesota,  
Respondent.

**Filed April 8, 2019  
Affirmed  
Cleary, Chief Judge**

Hennepin County District Court  
File No. 27-CR-15-11414

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Cleary, Chief Judge; and Halbrooks, Judge.

**UNPUBLISHED OPINION**

**CLEARY**, Chief Judge

Appellant Ernesto Reyes-Alcazar pleaded guilty to first-degree arson in violation of Minn. Stat. § 609.561, subd. 2(b) (2014). In postconviction proceedings, he moved to

withdraw his plea, claiming ineffective assistance of counsel. The postconviction court denied the motion. Now on the first review of his conviction, Reyes-Alcazar argues that the postconviction court erred in finding that counsel adequately informed him of the immigration consequences of his plea and in failing to order an evidentiary hearing on his other claims of ineffective assistance of counsel. He also argues for the first time that his plea was not accurate. We affirm.

## FACTS

In 2014, emergency personnel responded to a fire at M.R.'s house. The fire marshal determined that two fires had been intentionally set in-between the screen and storm doors at the front and back of the house. M.R. told police that she had received a text message from Reyes-Alcazar, her ex-partner, on the night of the fire. Reyes-Alcazar threatened to burn down M.R.'s house if she refused to let him into her house or go to his house. When the officers asked if M.R. still had the messages, she stated that she had deleted them. Police arrested Reyes-Alcazar and questioned him at the police station. After the officers read Reyes-Alcazar a *Miranda* warning, he invoked his right to counsel, but while walking back to his cell, he changed his mind and stated that he wanted to speak with the officers. After a few questions, officers asked Reyes-Alcazar where he started the fires. He responded:

I don't know. I already discussed the one when I had a lawyer present that way I'm not going to incriminate myself worse than I already am. But, like I said, it was just a mistake and I don't hold nothing against him, hurt no one. I'm a young man, I know what's wrong and right — the difference between right and wrong. So, it was just a mistake. Hopefully I can do something and fix my life. It was just a bad experience.

The officers continued to ask him what he meant by “mistake,” and eventually, Reyes-Alcazar confessed to starting the fires.

Reyes-Alcazar was charged with first-degree arson under Minn. Stat. § 609.561, subd. 2(b) and through, counsel negotiated a plea deal. At the plea hearing, Reyes-Alcazar agreed that counsel had explained that a conviction would impact his immigration case and “it’s very likely that that’s going to be the case.” Additionally, the district court cautioned Reyes-Alcazar that he should be advised on the immigration consequences of his plea and offered to give him more time to discuss the consequences with an attorney. Reyes-Alcazar responded that he wanted to move forward with the plea.

The state then established the factual basis. Reyes-Alcazar admitted that he went to M.R.’s house, demanded to come in, and threatened to start a fire. He also admitted that he reasonably anticipated that people were inside the home; that he started a fire; and that the fire damaged part of the house. Reyes-Alcazar signed a plea petition which included an explanation that he is not a United States citizen and that a guilty plea could result in deportation. This line was circled and “Padilla v. Kentucky” was written next to it. The district court accepted Reyes-Alcazar’s guilty plea and sentenced him pursuant to the plea agreement.

While serving his sentence, Reyes-Alcazar learned that his Deferred Action for Childhood Arrivals (DACA)<sup>1</sup> status had been revoked. Immigration and Customs

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<sup>1</sup> DACA is “a program under which noncitizens who come to the United States as children can receive a limited deferral from removal proceedings.” *Sanchez v. State*, 890 N.W.2d 716, 718 (Minn. 2017).

Enforcement had previously initiated removal proceedings against Reyes-Alcazar, but the proceedings were administratively closed when Reyes-Alcazar qualified for DACA. After his felony-arson conviction, Reyes-Alcazar no longer qualified for DACA, and the removal proceedings against him were reopened.

In 2017 and through new counsel, Reyes-Alcazar filed a petition for postconviction relief, requesting that the court allow him to withdraw his plea. He argued that counsel was ineffective for failing (1) to advise him of the immigration consequences of his guilty plea, and (2) to challenge the admissibility of his confession. The postconviction court granted the request for an evidentiary hearing solely as to the claim that he was not fully informed of the immigration consequences of his plea.

At the evidentiary hearing, Reyes-Alcazar and the attorney who represented him during the plea process testified. The postconviction court denied Reyes-Alcazar's motion to withdraw, finding that trial counsel credibly testified that he had multiple conversations with Reyes-Alcazar and advised him that pleading guilty to felony arson would result in deportation. The postconviction court concluded that counsel's performance was reasonable and accordingly, Reyes-Alcazar's claim failed. In a separate order and without an evidentiary hearing, the postconviction court rejected Reyes-Alcazar's claim that counsel was ineffective for failing to challenge Reyes-Alcazar's confession and the text messages sent by Reyes-Alcazar. The postconviction court found that any decision to pursue plea bargaining, rather than seek an evidentiary hearing on the admissibility of the evidence, was trial strategy. Because the claim was related to trial strategy, the postconviction court deferred to counsel's decision. On appeal, Reyes-Alcazar now argues

that the postconviction court erred in denying his motion to withdraw his plea and in declining to order an evidentiary hearing on his other claims.

## DECISION

Appellate courts review the denial of a petition for postconviction relief for an abuse of discretion. *Henderson v. State*, 906 N.W.2d 501, 505 (Minn. 2018). A postconviction court abuses its discretion if it “exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings.” *Id.* (quotation omitted). We review the postconviction court’s factual determinations for clear error and its legal determinations de novo. *Gulbertson v. State*, 843 N.W.2d 240, 244 (Minn. 2014).

A defendant does not have an absolute right to withdraw a guilty plea. *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). But upon a timely motion, a court must allow a defendant to withdraw his guilty plea if withdrawal is necessary to correct a manifest injustice. Minn. R. Crim. P. 15.05, subd. 1. “A manifest injustice exists if a guilty plea is not valid.” *Raleigh*, 778 N.W.2d at 94. “To be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent.” *Id.* “A defendant bears the burden of showing his plea was invalid.” *Id.* The validity of a guilty plea is a legal question that we review de novo. *Id.*

Reyes-Alcazar argues that trial counsel did not adequately advise him of the immigration consequences of a guilty plea. He asserts that this was ineffective assistance of counsel, rendering his guilty plea involuntary and unintelligent. *See Sanchez v. State*, 868 N.W.2d 282, 286 (Minn. App. 2015) (“Ineffective assistance of counsel renders a

guilty plea involuntary and unintelligent.”), *aff’d*, 890 N.W.2d 716 (Minn. 2017). In order to succeed on an ineffective-assistance-of-counsel claim, Reyes-Alcazar must satisfy a two-prong test. First, he must show that counsel’s representation fell below an objective standard of reasonableness. *Id.* at 287. Next, he must prove that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Id.* When reviewing “a postconviction court’s denial of relief on a claim of ineffective assistance of counsel, we will consider the court’s factual findings that are supported in the record, [and] conduct a de novo review of the legal implication of those facts on the ineffective assistance claim.” *State v. Nicks*, 831 N.W.2d 493, 503-04 (Minn. 2013).

We conclude that the postconviction court did not err in finding that counsel’s performance did not fall outside an objective standard of reasonableness. Under *Padilla v. Kentucky*, counsel has a duty to advise a noncitizen client regarding the risk of deportation. 559 U.S. 356, 367-69, 130 S. Ct. 1473, 1482-83 (2010). When the deportation consequences are unclear, counsel need only advise the client that a criminal conviction may result in adverse immigration consequences. *Id.* at 369, 130 S. Ct. at 1483. But if the deportation consequence is clear, counsel must accurately advise the client of that consequence. *Id.*

The postconviction court found that counsel advised Reyes-Alcazar that a conviction would subject him to deportation. This finding is supported by the record. Although the plea petition states that the guilty plea “may result in deportation,” counsel testified at the evidentiary hearing that he told Reyes-Alcazar multiple times that, if

convicted, he would be deported. The postconviction court found counsel's testimony to be credible despite Reyes-Alcazar's testimony that he was not advised of the deportation consequences. This court defers to credibility determinations made by the postconviction court. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992). Because counsel adequately advised Reyes-Alcazar that if convicted then he would be deported, counsel's performance did not fall below an objective standard of reasonableness.

Reyes-Alcazar argues that under *Padilla*, he is entitled to more specific advice on the immigration consequences, such as that he would no longer qualify for DACA. But the Court in *Padilla* focused on the ultimate deportation consequences of criminal charges and recognized that a noncitizen client may prioritize remaining in the country rather than a shorter jail sentence. *Padilla*, 559 U.S. at 368, 130 S. Ct. at 1483 (“[P]reserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.” (quotation omitted)). In other words, a defendant should be advised on whether he will be allowed to remain in the country if he is convicted of the crime charged so he may make an informed decision about whether he would accept a plea deal and be deported, or go to trial and risk a longer sentence in hopes that a not-guilty verdict will allow him to remain. Here, Reyes-Alcazar was told that he would be deported, and so he had the information he needed to make an informed decision. That is all that is required of counsel. Reyes-Alcazar does not cite any authority that would support his expansive reading of *Padilla* to require that counsel specifically advise a defendant that his DACA status would be rescinded.

Reyes-Alcazar also argues that the postconviction court abused its discretion when it declined to order an evidentiary hearing on his claim that counsel was ineffective for failing to file a motion to suppress any evidence of the text messages he sent to M.R. and the statement he gave to law enforcement. A petitioner is entitled to an evidentiary hearing “[u]nless 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 (2018). We review the denial of a request for an evidentiary hearing for an abuse of discretion. *Henderson*, 906 N.W.2d at 505. When deciding whether to grant an evidentiary hearing, a postconviction court must take the facts alleged in the petition as true and construe them in the light most favorable to the petitioner. *Andersen v. State*, 913 N.W.2d 417, 422-23 (Minn. 2018). If the petitioner’s alleged facts, taken as true, are legally insufficient to grant relief, then an evidentiary hearing is not required. *Henderson*, 906 N.W.2d at 505. Accordingly, in order to obtain an evidentiary hearing on a claim of ineffective assistance of counsel, Reyes-Alcazar must allege facts that, if taken as true, would establish that counsel’s performance fell below an objective standard of reasonableness, and that a reasonable probability exists that the outcome would have been different but for counsel’s errors. *Nicks*, 831 N.W.2d at 504.

The postconviction court did not err in declining to order an evidentiary hearing on Reyes-Alcazar’s claim. The postconviction court found that Reyes-Alcazar failed to allege facts that, if true, would show that counsel’s performance fell below an objective standard of reasonableness because Reyes-Alcazar’s claim was based on counsel’s strategic decisions. A decision not to file a motion to suppress evidence is related to trial strategy.

*See Carridine v. State*, 867 N.W.2d 488, 494 (Minn. 2015) (declining to consider counsel’s alleged failure to file a motion to suppress evidence and concluding the postconviction court did not abuse its discretion in denying the claim without an evidentiary hearing). There is a strong presumption that counsel’s performance was reasonable, and particular deference is given to trial strategy. *Carney v. State*, 692 N.W.2d 888, 892 (Minn. 2005). Appellate courts will generally decline to review ineffective-assistance-of-counsel claims based on trial strategy. *Sanchez-Diaz v. State*, 758 N.W.2d 843, 848 (Minn. 2008). We are convinced that, in this case, counsel’s decision to pursue plea negotiations instead of an evidentiary hearing was strategic and we defer to counsel’s strategy decisions.

Even if the postconviction court would have granted an evidentiary hearing, success on that claim was not certain. Reyes-Alcazar argues that his statement — “I already discussed the one when I had a lawyer present that way I’m not going to incriminate myself worse than I already am” — was, at the very least, an ambiguous request for counsel. He argues that, because the officers did not stop and clarify the statement, his confession was obtained in violation of *Miranda*. It appears that while a motion to suppress would not be frivolous, success was not certain. *See State v. Risk*, 598 N.W.2d 642, 649 (Minn. 1999) (“[N]ot every mention of the word ‘lawyer’ or ‘counsel’ or ‘attorney’ by a suspect ‘arguably’ suggests that the suspect wants a lawyer before submitting to further questioning.” (quotation omitted)); *State v. Hale*, 453 N.W.2d 704, 708 (Minn. 1990) (concluding that a defendant’s “fleeting, off-hand comment in mid-sentence about his future need for a good attorney in defending himself” was not arguably an invocation of his *Miranda* right to counsel). Under these circumstances, a reasonable attorney could

determine that it would be more advantageous to use the possibility of suppression as leverage in plea negotiations rather than risk losing the suppression motion.

Reyes-Alcazar argues that an evidentiary hearing should be held to determine whether counsel made a strategic decision and whether the strategy was reasonable. But the supreme court has previously held that a postconviction court did not abuse its discretion when it declined to hold an evidentiary hearing on counsel's strategy. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004) (concluding that appellant challenged his counsel's strategy and the postconviction court did not abuse its discretion in declining to hold an evidentiary hearing).

Finally, Reyes-Alcazar argues that he must be allowed to withdraw his plea under the manifest-injustice standard because his plea is not accurate. Reyes-Alcazar did not raise this issue in his postconviction petition. "It is well settled that a party may not raise issues for the first time on appeal from denial of postconviction relief." *Azure v. State*, 700 N.W.2d 443, 447 (Minn. 2005) (quotation omitted). Reyes-Alcazar does not frame his accuracy argument as an ineffective-assistance-of-postconviction-counsel claim. See *Schleicher v. State*, 718 N.W.2d 440, 445 (Minn. 2006) (concluding petitioner's ineffective-assistance-of-postconviction-counsel claim was properly raised on appeal from denial of first petition for postconviction relief); see also *Zornes v. State*, 880 N.W.2d 363, 369 (Minn. 2016) (holding that ineffective-assistance-of-trial-counsel claim must be raised on direct appeal if further development of the record is not required to consider the claim). Although in his reply brief, Reyes-Alcazar mentions ineffective assistance of counsel, new issues may not be raised in a reply brief. Minn. R. Civ. App. P. 128.02, subd. 3. Reyes-

Alcazar's claim regarding the accuracy of his plea is, therefore, forfeited for purposes of this appeal.

Because this is Reyes-Alcazar's first review of his conviction by postconviction, Reyes-Alcazar is not precluded from pursuing a claim of ineffective assistance of appellate counsel for failing to raise a claim that postconviction counsel was ineffective for failing to challenge the accuracy of appellant's guilty plea. *See Schneider v. State*, 725 N.W.2d 516, 521 (Minn. 2007) (concluding ineffective-assistance-of-appellate-counsel claim was not barred by *Knaffla* because appellant could not have known of appellate counsel's ineffective assistance at the time of direct appeal). We offer no opinion, however, as to the likelihood of success in pursuing such relief, other than to observe that Reyes-Alcazar did not have a direct appeal and was, therefore, entitled to the effective assistance of appellate counsel in the first review of his conviction by postconviction under the state constitution. *Compare Deegan v. State*, 711 N.W.2d 89, 98 (Minn. 2006) (holding that a defendant's right to the assistance of counsel under the Minnesota Constitution extends to one review of a criminal conviction, whether by direct appeal or a first review by postconviction proceeding), *with Ferguson v. State*, 826 N.W.2d 808, 816 (Minn. 2013) (stating defendant who was represented by counsel on direct appeal has no state constitutional right to counsel—"effective or otherwise"—in subsequent postconviction proceedings).

**Affirmed.**