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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1572

Raymond Baba Atimbaneme, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed June 10, 2019
Affirmed
Johnson, Judge

Dakota County District Court
File No. 19HA-CR-13-2209

Cathryn Middlebrook, Chief Appellate Public Defender, Chelsie M. Willett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

James C. Backstrom, Dakota County Attorney, Dain L. Olson, Assistant County Attorney, Hastings, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Klaphake, Judge.[*]

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[*]Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

JOHNSON, Judge

In June 2015, Raymond Baba Atimbaneme, a lawful permanent resident, pleaded guilty to identity theft. Two months later, federal immigration authorities detained him and began removal proceedings, which resulted in his deportation. In June 2017, Atimbaneme petitioned for post-conviction relief. He sought to withdraw his guilty plea on the ground that his former attorney provided him with ineffective assistance of counsel by not sufficiently advising him of the immigration consequences of pleading guilty. The post-conviction court held an evidentiary hearing and denied Atimbaneme's petition after finding that his former attorney sufficiently advised him that he would be subject to mandatory deportation if he pleaded guilty. We conclude that the post-conviction court did not clearly err in that finding and, thus, did not err by denying Atimbaneme's post-conviction petition. Therefore, we affirm.

FACTS

Between April and June of 2013, Atimbaneme, while employed at a bank, applied for and received three loans using the identities of three bank customers. Each loan was in the amount of $20,000. After conducting an internal investigation, the bank reported Atimbaneme to the police. In July 2013, the state charged Atimbaneme with theft by swindle, in violation of Minn. Stat. § 609.52, subd. 2(a)(4) (2012), and identity theft, in violation of Minn. Stat. § 609.527, subd. 2 (2012).

In June 2015, Atimbaneme and the state entered into a plea agreement in which Atimbaneme agreed to plead guilty to identity theft, and the state agreed to the dismissal of the theft-by-swindle charge. During the plea hearing, Atimbaneme's attorney asked him, "I have . . . discussed with you at length the potential consequences of this conviction with ICE or Immigration and Customs Enforcement, is that correct?" Atimbaneme responded, "Yes." The prosecutor inquired whether Atimbaneme understood that there would be "some immigration consequences" as a result of his guilty plea, and Atimbaneme responded that he so understood. After accepting Atimbaneme's plea, the district court proceeded to the issue of sentencing. Atimbaneme requested a downward dispositional departure, and the state requested a presumptive sentence of 48 months of imprisonment. The district court granted Atimbaneme's motion and stayed imposition of a 48-month sentence for 10 years.

In August 2015, federal immigration authorities detained Atimbaneme and began removal proceedings. After an administrative hearing, an immigration judge determined that Atimbaneme's identity-theft conviction is an "aggravated felony," as that term is defined in the Immigration and Nationality Act (INA), *see* 8 U.S.C. § 1101(a)(43) (2012), and that Atimbaneme must be deported because he is an "alien who is convicted of an aggravated felony at any time after admission," *see* 8 U.S.C. § 1227(a)(2)(A)(iii) (2012). In February 2016, the immigration judge issued a removal order. Atimbaneme was deported to Ghana in June 2016.

In June 2017, Atimbaneme filed a *pro se* petition for post-conviction relief. In his petition, Atimbaneme alleged that he received ineffective assistance of counsel because his former attorney did not sufficiently advise him of the immigration consequences of pleading guilty, specifically, that he would be subject to mandatory deportation. After Atimbaneme filed his petition, an assistant state public defender began representing him.

In April 2018, the post-conviction court held an evidentiary hearing on Atimbaneme's petition. Atimbaneme appeared by telephone from Ghana. Atimbaneme's post-conviction attorney called his former attorney as a witness. On direct examination by Atimbaneme's post-conviction attorney, Atimbaneme's former attorney testified that it was his standard practice when representing a defendant facing potential immigration consequences to consult with an immigration attorney and to share the immigration attorney's assessment with his client. He also testified that he followed his standard practice in Atimbaneme's case. On cross-examination, the state introduced an exhibit consisting of e-mail messages that the former attorney and the immigration attorney exchanged in September 2014. In one message, the immigration attorney wrote, "Your advice is that the immigration judge will find that you have been convicted of an aggravated felony, subjecting you to mandatory detention and deportation, and that he will have no choice but to take away your permanent residency."

Atimbaneme testified on his own behalf. He testified that, at their first meeting, his former attorney said that he did not believe that Atimbaneme would be deported but that he would consult with an attorney with expertise in immigration law. Atimbaneme also testified that, on the day he pleaded guilty, his former attorney told him that he would not be deported because he was married to a United States citizen, had children, had been present in the country for several years, had been employed, and was a first-time offender. Atimbaneme further testified that his former attorney never shared with him the results of any consultation with an immigration attorney. According to Atimbaneme, his former attorney did not tell him that he would be subject to deportation if he pleaded guilty and, in fact, told him that he believed that Atimbaneme would not be deported but simply might not be able to become a United States citizen.

The state called one witness: the director of the Immigrant Law Center (ILC), who is the attorney with whom Atimbaneme's former attorney consulted before Atimbaneme's plea hearing. She testified that the immigration consequences to Atimbaneme were "truly clear" and that she advised Atimbaneme's former attorney that he "would be subjected to mandatory detention and deportation." She also testified that she had no direct contact with Atimbaneme and did not know whether his former attorney had given him the advice she recommended.

After the hearing, both parties submitted supplemental memoranda. In July 2018, the post-conviction court issued an order denying Atimbaneme's petition. The post-conviction court agreed with Atimbaneme's premise that the immigration consequences of pleading guilty were "truly clear" and that Atimbaneme's former attorney had "an affirmative duty . . . to properly advise him as to the consequences of his plea." But the post-conviction court found that Atimbaneme's former attorney satisfied that duty by "provid[ing] Petitioner with clear advice as to the consequences of his guilty plea prior to its entry." Atimbaneme appeals.

D E C I S I O N

Atimbaneme argues that the post-conviction court erred by denying his post-conviction petition. Specifically, he argues that the post-conviction court erred by finding that his former attorney sufficiently advised him of the immigration consequences of his guilty plea.

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6. This right is the "right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984) (quotation omitted). To prevail on an ineffective-assistance-of-counsel claim, a defendant must satisfy two requirements:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 104 S. Ct. at 2064. The two-part *Strickland* test applies to a claim that a defendant received ineffective assistance of counsel in connection with a guilty plea. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S. Ct. 366, 370 (1985). To satisfy the second *Strickland* requirement in the context of a guilty plea, a defendant must prove "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59, 106 S. Ct. at 370. If one of the *Strickland* requirements is not satisfied, a court need not consider the other requirement. *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017).

In *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010), the United States Supreme Court held that the Sixth Amendment right to counsel requires a criminal-defense attorney to advise a client who is not a citizen of the immigration consequences of pleading guilty, including the risk of deportation. *Id.* at 367-74, 130 S. Ct. at 1482-86. The Court stated that, if the applicable immigration statute "is not succinct and straightforward" such that deportation consequences are unclear, an attorney need only advise a client that "pending criminal charges may carry a risk of adverse immigration consequences." *Id.* at 369, 130 S. Ct. at 1483. But if the deportation consequences of a guilty plea are "truly clear," an attorney has a duty to accurately advise a client of those consequences. *Id.* A showing that an attorney failed to advise a non-citizen client of "truly clear" deportation consequences is sufficient to satisfy the first requirement of the *Strickland* test. *Id.* The Minnesota Supreme Court has summarized an attorney's obligations under *Padilla* as follows:

> *Padilla* establishes that criminal-defense attorneys must take some affirmative steps before allowing a noncitizen client to accept a plea deal. First, at a minimum, an attorney must review the relevant immigration statutes to determine whether a conviction will subject the defendant to a risk of removal from the United States. Second, if conviction of the charged offense clearly subjects the defendant to removal from the United States, the attorney has a constitutional obligation to advise the defendant of this fact before he or she enters a guilty plea. If it does not, then a general advisory warning about the possible immigration consequences of a guilty plea is sufficient.

Sanchez v. State, 890 N.W.2d 716, 721 (Minn. 2017).

A person may file a post-conviction petition to challenge his or her criminal conviction. Minn. Stat. § 590.01, subd. 1 (2016). A post-conviction petition "shall contain . . . a statement of the facts and the grounds upon which the petition is based and the relief desired," and "[a]ll grounds for relief must be stated in the petition or any amendment thereof unless they could not reasonably have been set forth therein." Minn. Stat. § 590.02, subd. 1(1) (2016). "[T]he burden of proof of the facts alleged in the petition shall be upon the petitioner to establish the facts by a fair preponderance of the evidence." Minn. Stat. § 590.04, subd. 3 (2016). In reviewing a post-conviction court's denial of a claim of ineffective assistance of counsel, this court applies a clear-error standard of review to the post-conviction court's factual findings, a *de novo* standard of review to the post-conviction court's legal conclusions, and an abuse-of-discretion standard of review to the post-conviction court's ultimate decision whether to grant relief. *Sanchez*, 890 N.W.2d at 719-20.

In this case, the post-conviction court denied Atimbaneme's post-conviction petition because it determined that the performance of his former attorney was not deficient. The post-conviction court found that Atimbaneme's former attorney "provided Petitioner with clear advice as to the consequences of his guilty plea prior to its entry." The post-conviction court relied on the testimony of Atimbaneme's former attorney, which it found credible. The post-conviction court specifically found that Atimbaneme's former attorney "shared [the ILC attorney's] opinion with Petitioner and answered Petitioner's follow-up questions." The post-conviction court also found that Atimbaneme's former attorney "advised [Atimbaneme] that he would be deported if he pleaded guilty, as that was what [the ILC attorney] advised." The post-conviction court's findings are supported by the record of the evidentiary hearing, especially the testimony of Atimbaneme's former attorney.

Atimbaneme challenges the post-conviction court's central finding of fact by arguing that his former attorney did not communicate to him on the day of the plea hearing that deportation was certain. Atimbaneme emphasizes evidence that his former attorney's file contained a handwritten note from the day of the plea hearing stating that "ICE will most likely deport." Atimbaneme contends on appeal that such a statement is "grossly inaccurate" because deportation was certain, not merely likely. But the evidence concerning the handwritten note is not the only evidence of what Atimbaneme's former attorney told him. When asked whether he advised Atimbaneme "that he would be deported if he pleaded guilty," the former attorney testified, "I advised him that that's what our immigration lawyer's assessment was." Later in his testimony, the former attorney testified that his notes are not intended to be a transcript of the entirety of his conversations with a client, that his routine practice is to read an immigration attorney's written opinion to his client, and that he believes that he did so in Atimbaneme's case. The former attorney's testimony concerning his handwritten note puts the note in context. At the evidentiary hearing, Atimbaneme did not elicit any testimony from his former attorney that he did not fully communicate the deportation consequences of a guilty plea to Atimbaneme on the day of the plea hearing. Thus, the handwritten note does not undermine the post-conviction court's finding that Atimbaneme's former attorney properly advised Atimbaneme of the immigration consequences of pleading guilty.

Atimbaneme also challenges the post-conviction court's central finding of fact by contending that his former attorney "contradicted himself by first stating that he recalled having a discussion regarding the 2014 Immigrant Law Center email, but later admitting that he did not actually have an 'independent recollection' of discussing the Immigrant Law Center email with Atimbaneme." The former attorney's testimony was not perfectly consistent, but it nonetheless supports the post-conviction court's key finding. He most often testified about how he usually handles a case involving a client who is not a United States citizen, and he also testified about what he "would have" done, consistent with his usual practice, in Atimbaneme's case. When pressed on whether he was "certain" that he communicated the ILC's assessment to Atimbaneme, he testified, "I . . . made sure I discussed the specific results that we received back from the Immigration Law Center with him so that he would be aware of what those consequences would be." When questioned further as to whether he specifically recalled that discussion with Atimbaneme, he testified as follows: "I don't have an independent recollection. But I know that based upon the seriousness of the file, the seriousness of the response I received from the Immigration Law Center, that I would not have proceeded to negotiate and enter a plea on his behalf without making sure that he understood" the immigration consequences of a guilty plea. The post-conviction court surely understood that district-court public defenders handle many cases and interact with many clients and cannot be expected to specifically recall every conversation with every client years after they have occurred. Considered in that light, and considered as a whole, the former attorney's testimony is sufficient to support the post-conviction court's finding that the former attorney properly advised Atimbaneme of the immigration consequences of pleading guilty.

Furthermore, we note that the factual dispute that the post-conviction court was asked to resolve was much broader than the narrower question whether Atimbaneme's former attorney advised him that deportation was likely as opposed to certain. Atimbaneme had executed an affidavit stating that, at the time of the guilty plea, his former attorney told him that deportation was *unlikely* based on several factors that are completely absent from the e-mail message that the ILC attorney sent to Atimbaneme's former attorney. Atimbaneme's testimony was consistent with his affidavit. In a post-hearing memorandum, Atimbaneme argued that his former attorney's advice was "inaccurate" because he told Atimbaneme that "the only immigration consequence would be that he would not be able to be a U.S. citizen." Atimbaneme did not argue, at least not clearly, that his former attorney failed to fulfill his duty by not advising Atimbaneme that deportation was certain rather than merely likely. The post-conviction court specifically stated in its order that Atimbaneme's testimony was not credible. In light of the factual issue framed by the parties' arguments, the post-conviction court did not clearly err by finding that Atimbaneme's former attorney properly advised him of the immigration consequences of pleading guilty. In light of that finding, the post-conviction court did not err by concluding that Atimbaneme's former attorney's performance was not deficient and, thus, that the former attorney did not provide him with ineffective assistance of counsel.

In sum, the post-conviction court did not err by denying Atimbaneme's petition for post-conviction relief.

Affirmed.