

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0736**

Bolus Andre Dimbiti, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed February 3, 2020
Reversed and remanded
Florey, Judge**

Olmsted County District Court
File No. 55-CR-16-8626

Cathryn Middlebrook, Chief Appellate Public Defender, Sean Michael McGuire, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Mark A. Ostrem, Olmsted County Attorney, Jennifer D. Plante, Assistant County Attorney, Rochester, Minnesota (for respondent)

Considered and decided by Florey, Presiding Judge; Johnson, Judge; and Segal, Judge.

UNPUBLISHED OPINION

FLOREY, Judge

Appellant seeks review of a postconviction court's summary denial of his petition to withdraw his guilty plea. Appellant argued in his petition that he received ineffective

assistance of counsel because his counsel failed to advise him of the clear immigration consequences of his guilty plea. We reverse and remand for an evidentiary hearing.

FACTS

Bolus Dimbiti was admitted to the United States as a refugee in 2012 and has not since gained citizenship. For the purposes of immigration law, Dimbiti is considered to be from South Sudan, though he has never been to that country.

In 2016, Dimbiti was charged in Olmsted County with aggravated robbery, second-degree assault, and gross misdemeanor felon-in-possession of a firearm. Dimbiti applied for a public defender, and J.K. was assigned to the case. The parties eventually reached a plea agreement, whereby Dimbiti was to plead guilty to second-degree assault with a dangerous weapon; specifically, the butt of a handgun. A hearing for the plea agreement was held. The following portions of the transcript of that hearing are relevant to this case:

J.K.: Mr. Dimbiti, I did indicate to you that I make no representations to you as to what effect this would have on any immigration proceeding. Is that correct?

DIMBITI: Correct.

J.K.: We did talk about that. Is that correct?

DIMBITI: Right.

J.K.: That's for another time. Clearly, it doesn't help, but we don't know what the effect of it is. Correct?

DIMBITI: Correct.

...

COURT: . . . Have you had opportunity to speak with an attorney regarding the immigration consequences if you wished?

DIMBITI: No.

COURT: Do you want an opportunity to speak with someone? Have you thought about that?

J.K.: And, Your Honor, as I understand it, my client will be meeting with someone in a couple of months for purposes of getting some papers or anything. We've talked about that.

COURT: Well, what is going to happen? Is it going to result in his deportation?

PROSECUTOR: I don't know, Your Honor.

J.K.: I don't know, Your Honor.

COURT: And the law is—

J.K.: I'm going to—

COURT: —not so helpful for us right now as to what we have to address and what we can address when someone's potential criminal history will—or may or may not affect their legal status. So is this one of those types of cases that will result in deportation proceedings being initiated or is it one of the gray areas where it's unknown?

J.K.: I think it's a gray area, Your Honor.

COURT: Okay.

J.K.: It's a gray area.

PROSECUTOR: I would agree with that, Your Honor. But just to be safe, if I could ask just one additional question.

COURT: Go ahead.

PROSECUTOR: Mr. Dimbiti, you've addressed the Court that you're not a permanent citizen of the United States. Is that correct?

DIMBITI: What's that?

PROSECUTOR: You've expressed to the Court that you're not a permanent citizen of the United States. Is that correct?

DIMBITI: Yes, sir.

PROSECUTOR: And you understand that a guilty plea or a conviction to the second-degree assault could result in your deportation. Correct?

DIMBITI: Yes.

PROSECUTOR: No additional questions, Your Honor.

COURT: And knowing this, you still want to move forward with your plea.

DIMBITI: Yes.

COURT: I'm not questioning you. I'm just wanting to make sure that you understand that there may be some immigration consequences. I'm not sure what those are. The attorneys are telling me that this falls within a gray area where we can't say you will be deported because of your conviction, but even if you are deported, that's something that you're going to accept because you want to move forward with the plea.

DIMBITI: Yes.

COURT: Am I putting words in your mouth or is that how you feel?

DIMBITI: That's how I feel.

COURT: Okay. I'll accept your plea, voluntary, accurate, and intelligent.

At sentencing, the parties informed the court that they agreed to an alternative factual basis for the underlying crime and wished to change the plea agreement. The parties agreed to change the assault to having been committed with a belt buckle, rather than a handgun as originally alleged.¹ This was to have the effect of changing the applicable statutory enhancement from “firearm” in subdivision 5 of section 609.11 to “dangerous weapon” in subdivision 4. The new agreement did not change the severity level or the maximum sentence, but it did change the mandatory minimum to twelve months and one day. The court agreed to accept the adjusted plea deal. Prior to Dimbiti pleading guilty to the charge with the new factual basis, the court and the prosecutor again addressed the topic of immigration consequences:

PROSECUTOR: Mr. Dimbiti, you understand that this may have immigration consequences? I’m asking you the same question that was asked before. You understand that?

DIMBITI: I understand.

PROSECUTOR: With the knowledge of all of your rights, you still want to go ahead with this; is that correct?

DIMBITI: Yes.

...

COURT: Do I understand that you are a citizen of the United States or you’re not a citizen of the United States?

DIMBITI: I’m not a citizen.

¹ The state agreed because, while a witness reported seeing a handgun during the assault, none was recovered at the scene, and it occurred outside at night.

COURT: Alright. So you have discussed with your attorney the ramifications of entering a plea to this charge on your immigration status; is that correct?

DIMBITI: Yes.

COURT: And knowing that and understanding your rights, you still desire to enter this plea of guilty; is that correct?

DIMBITI: That's correct.

COURT: Okay. The Court will accept the defendant's plea of guilty to the amended Count 2.

The district court sentenced Dimbiti to the mandatory minimum of one year and one day and awarded him credit for 382 days already served. This was in December 2017.

In June 2018, an immigration judge ordered Dimbiti's deportation. This came after the Department of Homeland Security (DHS) amended existing allegations² against Dimbiti to include the Olmsted County assault. The immigration court denied the possibility of asylum and withholding because it determined that the assault constituted a "particularly serious crime."

Dimbiti filed a postconviction petition that alleged, inter alia, ineffective assistance of counsel. He argued that the deportation consequence of his plea was clear, so J.K. should have advised him that pleading guilty *will* entail his deportation. But for J.K.'s deficient advice, Dimbiti argues, he would not have pleaded guilty.

² DHS had allegations pending against Dimbiti since 2014 for a prior theft conviction, but this is not relevant to the issue before us.

The postconviction court summarily denied Dimbiti's petition, concluding that it did not allege facts that would support a reasonable probability that he would not have pleaded guilty had he been advised differently. Dimbiti appealed.

DECISION

We review the denial of a postconviction petition for an abuse of discretion, but legal issues are reviewed de novo. *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015). This court will not reverse an order unless the postconviction court acted in an arbitrary or capricious manner, based its decision on an erroneous interpretation of the law, or made factual findings that were clearly erroneous. *Id.* A postconviction court need not grant a hearing on a claim if the files and records of the proceeding conclusively establish that the petitioner is not entitled to relief. Minn. Stat. § 590.04, subd. 1 (2018).

Minnesota courts apply the two-part test announced in *Strickland* to claims of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see *State v. Eling*, 355 N.W.2d 286, 293 (Minn. 1984) (applying *Strickland*). To succeed on his ineffective-assistance-of-counsel claim, Dimbiti must show (1) that his counsel's performance was deficient and (2) that such deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687. We analyze the first part of the test—whether counsel's performance was deficient—under an objective standard of reasonableness; and the second—whether the defense was thereby prejudiced—to determine whether the defendant has shown that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.*; *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994).

Dimbiti correctly points out that the applicable law for the substance of his ineffective-assistance claim is the United States Supreme Court’s holding in *Padilla v. Kentucky*, 559 U.S. 356 (2010). *Padilla* held that “counsel must inform her client whether his plea carries a risk of deportation,” and that failing to do so constitutes “deficient performance” for ineffective-assistance purposes. *Id.* at 374. Therefore, of the two-part *Strickland* test, *Padilla* sets a standard for the first—the question of whether his counsel’s performance was deficient. Here, the postconviction court did not address the first part and summarily denied Dimbiti’s petition on the second prong alone, reasoning that Dimbiti did not show that there was a reasonable probability that he would not have pleaded guilty even if had he been correctly advised. *Padilla*, however, still applies to this case.

It is true that a postconviction court may summarily deny a petition without an evidentiary hearing, but only where “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. While Dimbiti bears the burden of proving both prongs of the *Strickland* test and could therefore, hypothetically, be denied an evidentiary hearing if he is *conclusively* shown to be unable to meet just one of them, we do not believe that the facts of this case can support an adequate analysis of the second *Strickland* prong without consideration of the first. The unique factual situation here requires a synchronous analysis of both *Strickland* factors.

The problem with considering the prejudice prong alone is revealed by the cursory nature of the postconviction court’s analysis of that prong. The postconviction court found that Dimbiti’s defense was not prejudiced because he “understood that a guilty plea could result in deportation,” and the fact that he so pleaded anyway obviates any “reasonable

probability that . . . the result of the proceeding would have been different” had he been told it *will* result in his deportation. *Ecker*, 524 N.W.2d 712, 718 (Minn. 1994). To analyze only the second prong, the postconviction court had to assume, *arguendo*, that Dimbiti’s attorney was deficient. Because the “result” in this case is Dimbiti’s decision to plead guilty, the question before the postconviction court was whether Dimbiti would have pleaded guilty if his attorney was not deficient—a materially different scenario about which we know nothing because it was not addressed by the postconviction court below. There is nothing in the record or history of this case that casts light on what Dimbiti would have chosen to do had he been informed that his guilty plea guaranteed his deportation, so hazarding an answer to that question amounts to speculation. *See Lee v. United States*, 137 S. Ct. 1958, 1967 (2017) (observing that “where we are instead asking what an individual defendant would have done, the possibility of even a highly improbable result may be pertinent to the extent it would have affected his decision making”)

Reiterating and elaborating on the postconviction court’s analysis, the state argues that there is in fact an aspect of this case from which the postconviction court could glean Dimbiti’s decision had he been correctly advised—namely, that Dimbiti seemingly had little trouble deciding to plead guilty when he knew deportation was possible.³ Therefore, the state’s argument goes, it is not reasonably probable that Dimbiti would have done anything differently had the word “will” replaced “may.” Not only does this argument

³ The state points to several other aspects of this case and Dimbiti’s background that supposedly suggest that he would have pleaded guilty regardless. However, Dimbiti correctly retorts that these arguments were not raised below and as such are waived. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

require substantial guesswork as to the intricacies of one's unique background, values, and self-determination—which would fall far short of a “conclusive showing”—but to affirm on this basis would be to eviscerate United States Supreme Court constitutional precedent. *See Lee*, 137 S. Ct. at 1968-69 (stating that even where going to trial would *almost* certainly lead to deportation, “that ‘almost’ could make all the difference” with respect to a defendant's decision-making if he knows that the alternative would *certainly* lead to deportation).

The *Padilla* Court delineated attorneys' duties with respect to advising their clients on a decision's potential immigration consequences:

There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. 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.

Padilla, 559 U.S. at 369. The postconviction court's analysis and conclusion in this case, if affirmed, would render *Padilla*'s primary holding impotent. Were it permissible to deny a postconviction petition because the petitioner was aware that deportation was possible, attorneys representing non-citizen defendants need only say, in any instance, that deportation is a possibility. That is, if a court must only determine whether the petitioner knew that deportation was possible, as was done here, an attorney's ambiguous “maybe” would always preclude an ineffective assistance claim—even when the deportation consequence was blindingly clear—in clear contravention of *Padilla*. In such a case, when

the impending deportee seeks postconviction relief based on ineffective assistance of counsel, the court could summarily deny it because the defendant was aware that deportation was a possibility and therefore could not satisfy the second *Strickland* prong. The defendant could not obtain relief for ineffective assistance of counsel precisely because the defense attorney's conduct was constitutionally deficient under *Padilla*.

It is undisputed that J.K. did not advise Dimbiti that his guilty plea would result in deportation. Therefore, Dimbiti's ineffective-assistance-of-counsel claim turns on (1) whether he can demonstrate that J.K.'s performance was deficient under *Padilla*, which turns on whether the deportation consequence was clear and (2) whether he was prejudiced thereby under *Strickland*. Dimbiti makes sound arguments on both of these fronts, none of which can be adequately addressed without an evidentiary hearing. For the foregoing reasons, we reverse and remand this case for an evidentiary hearing consistent with this opinion.

Reversed and remanded.