

IN THE COURT OF APPEALS OF IOWA

No. 0-788 / 10-0141
Filed December 22, 2010

CHANG MING LIN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

The applicant appeals from the district court's order dismissing his application for postconviction relief. **AFFIRMED.**

Benjamin D. Bergmann and Alfredo Parrish of Parrish, Kruidenier, Dunn, Boles, Gribble, Parrish, Gentry, & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, John P. Sarcone, County Attorney, and Mark Taylor, Assistant County Attorney, for appellee State.

Heard by Sackett, C.J., and Vogel and Vaitheswaran, JJ. Tabor, J., takes no part.

VOGEL, J.

Chang Lin appeals from the district court's dismissal of his application for postconviction relief that asserted his trial counsel was ineffective for (1) failing to obtain an interpreter for him and (2) failing to advise him of the implications and consequences of a guilty plea. On appeal, he claims (1) the postconviction court should have found his trial counsel was ineffective for failing to procure an interpreter for the guilty plea proceeding; and (2) the postconviction court should have granted his application for a court-appointed interpreter during the postconviction relief hearing. Additionally, Lin raises a new claim that his trial counsel was ineffective for failing to advise him of the immigration consequences stemming from a guilty plea. We affirm.

I. Background Facts and Proceedings.

On March 21, 2007, Lin was charged with four drug-related charges. On May 23, 2007, pursuant to a plea agreement Lin pled guilty to conspiracy to deliver a controlled substance in violation of Iowa Code section 124.401(1)(d) (2007), and the other three counts were dismissed. Lin did not file a motion in arrest of judgment. On July 16, 2007, Lin was sentenced to a five-year prison term, which was suspended, and he was placed on probation for two years. Lin did not appeal his conviction and sentence.

On August 6, 2008, Lin filed an application for postconviction relief asserting that his trial counsel was ineffective for (1) failing to request an interpreter for him; and (2) for failing to advise him generally of the implications and consequences of a guilty plea. Because of these deficiencies, he claims his plea was "unknowingly and involuntarily submitted." On November 19, 2008, Lin

applied for a court-appointed interpreter for purposes of his postconviction relief application.

On November 23, 2009, a hearing was held on Lin's request for a court-appointed interpreter. Lin, his sister, and one of his trial attorneys testified. After considering the evidence presented, including Lin's testimony indicating that he was good at conversing in English, the postconviction court denied Lin's request for an interpreter.

Immediately following the ruling, the hearing on Lin's postconviction relief application was held. The parties stipulated that the court could consider the testimony presented in support of Lin's request for an interpreter, and then continued to introduce additional testimony. The evidence demonstrated that Lin was born in China and his native language was Fukienese and Mandarin. At the age of ten, Lin moved to the United States with his family and shortly thereafter began attending school, participating in an English as a second language program. Lin testified that he did not understand what was happening at the guilty plea hearing and he informed his attorneys of that. He also testified he previously ran a kiosk business at Jordan Creek Mall. Additionally, Lin testified he had several prior criminal charges, some of which he pled guilty and others he chose to proceed to trial. He also had previously been placed on probation and had his probation revoked. In none of those proceedings did Lin have an interpreter, nor was an interpreter necessary for him to communicate with his probation officer. Lin's sister testified that she speaks with Lin in both English and Mandarin, but that Lin communicates with his friends in English.

Lin's trial attorneys testified they specialize in criminal and immigration law and believed that Lin could understand them and did not need an interpreter. One of Lin's attorneys had previously represented Lin on an assault charge and in working with Lin during those proceedings had no indication that Lin did not understand him. In this case, both attorneys communicated with Lin several times, over the phone and in person. Prior to the plea proceeding, Lin went to the attorneys' office multiple times to discuss the case. One attorney testified,

[W]e have a very strong rule in the office that we cannot make decisions for our clients. If the client does not understand, he cannot make a decision on what he wants to do. So if there's the slightest, if there is the slightest issue of understanding, we would either ask the client to bring an interpreter, or in the alternative [] we will try to find an interpreter. . . . [Lin n]ever gave any indication that he did not understand what was going on. He asked questions. He told us clearly what he did not want, which was going to prison. We talked to him about immigration implications of his plea. He seemed to understand that. And at no time did he in any way, shape, or form indicate that he had a problem. Had he done so, we would have immediately asked that he bring an interpreter or we would have found one.

The other attorney stated that Lin expressed himself very well and they had numerous conversations in which they "understood each other in great detail and about some very technical matters." Further, he advised Lin of the immigration consequences, as Lin was a lawful permanent resident. Lin also communicated to his trial attorneys that he was concerned about the immigration consequences of entering a plea and did not want to be deported at some point in the future.

The postconviction court examined the guilty plea hearing transcript and found that Lin's answers to the trial court were appropriate, he informed the trial court he did not want an interpreter, and there was "no indication in the transcript of a need for an interpreter." The postconviction court found that Lin never

informed his trial attorneys that he did not understand them, and Lin did not have any trouble understanding his trial attorneys. Lin understood the English language and “meaningfully participated in the guilty plea that was tendered to the Court.” Lin’s claim that he was not informed of the implications and consequences of pleading guilty was not credible. The postconviction court specifically found Lin’s trial attorneys’ testimony to be more credible. Therefore, the court found Lin’s claims were without merit and dismissed his application for postconviction relief. Lin appeals.

II. Standard of Review.

We typically review postconviction relief proceedings for errors at law. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, we review constitutional claims de novo. *Id.*; see also *State v. Vance*, ___ N.W.2d ___, ___ (Iowa 2010) (“Ineffective-assistance-of-counsel claims have their basis in the Sixth Amendment to the United States Constitution.”). “[W]e give weight to the lower court’s findings concerning witness credibility.” *Ledezma*, 626 N.W.2d at 141.

In order to succeed on an ineffective-assistance-of-counsel claim, a defendant must prove by a preponderance of evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *Ledezma*, 626 N.W.2d at 142. “Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.” *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). Therefore, we may resolve a claim on either

prong. *Kirchner v. State*, 756 N.W.2d 202, 204 (Iowa 2008). “The two-pronged analysis applies to ineffective-assistance claims arising out of the plea process.”

Id.

III. Analysis.

A. Interpreter.

Lin asserts that his trial attorneys were ineffective for failing to procure an interpreter prior to entering the guilty plea. Although Lin testified that he did not speak the English language well enough to understand and effectively participate in the guilty plea proceedings, the evidence demonstrated otherwise. Lin communicated with his friends and family members in English and prior to his arrest, Lin was involved in running a business at Jordan Creek Mall. He had previous experience with the criminal justice system, including instances where his attorneys negotiated plea agreements with the State in 2004. One of Lin’s trial attorneys had previously represented him and testified that in that case as well as this one, there was no indication that Lin did not understand him. Lin’s other trial attorney testified that they conversed about “technical matters” and Lin understood his rights and what his options were. Lin’s trial attorneys’ testimony is confirmed by the guilty plea proceedings, during which Lin gave appropriate answers to questions by the trial court and his counsel, and informed the trial court that he did not need an interpreter and understood the proceedings. *Cf. Thongvanh v. State*, 494 N.W.2d 679, 682 (Iowa 1993) (“A reviewing court is unlikely to find that a defendant received a fundamentally unfair trial due to an inadequate translation in the absence of *contemporaneous* objections to the quality of the interpretation.” (emphasis added)). Further, after pleading guilty,

Lin completed an interview for the presentence investigation (PSI) report, during which he did not require an interpreter. For the report, Lin also handwrote his explanation of the crime, which the PSI report confirmed was written by Lin. When testifying at the postconviction relief, Lin indicated that he had written the explanation of his participation in the criminal activity. We agree with the postconviction court that the transcript of the guilty plea hearing, and the testimony and other evidence demonstrated the Lin did not need an interpreter and “meaningfully participated in the guilty plea that was tendered to the Court on the record.” As a result, there was no breach of his trial counsels’ duty and Lin’s ineffective-assistance-of-counsel claims fails.

Lin next asserts that his due process rights were violated because he required an interpreter to meaningfully participate in the guilty plea proceedings and the postconviction court applied a standard of “conversational minimal competence” when it should have applied a standard of “meaningful role in the proceedings” in determining whether an interpreter was necessary.¹ Generally, we will only review an issue raised on appeal if it was first presented to and ruled on by the district court.” *State v. Hernandez-Lopez*, 639 N.W.2d 226, 233 (Iowa 2002). Lin did not raise a due process argument during the postconviction proceedings, nor did he argue what standard of English proficiency should be applied. See *id.* (explaining that a “mere assertion that a statute is

¹ In addition, we note that following his guilty plea, Lin did not file a motion in arrest of judgment, nor did he file a direct appeal. See *State v. LaRue*, 619 N.W.2d 395, 397 (Iowa 2000) (explaining that a guilty plea waives any constitutional challenge, with certain exceptions); *State v. Miller*, 590 N.W.2d 724, 725 (Iowa 1999) (explaining that the failure to file a motion in arrest of judgment precludes a defendant from attacking a guilty plea, but the defendant may still challenge his guilty plea through an ineffective-assistance-of-counsel claim that his trial counsel was ineffective for failing to file a motion in arrest of judgment).

'unconstitutional' does not encompass every conceivable constitutional violation"). The State asserts "[i]t is unfair to fault the district court for applying the wrong standard when Lin never raised the issue." The State further asserts that there is no merit in Lin's argument because the district court did not apply a "conversational minimal competence" standard but actually applied the standard Lin is now advocating. We agree with the State that this issue is not preserved and even if it were, Lin's claim would fail. As discussed above, we agree with the postconviction court that Lin spoke and understood the English language. Further, Lin now asserts that the postconviction court should have determined whether he could play a "meaningful role in the proceedings," and the postconviction court specifically found Lin "meaningfully participated in the guilty plea that was tendered to the Court on the record."

Finally, Lin argues that his due process rights were violated because he did not have an interpreter for the postconviction relief hearing. As discussed above, the appointment of an interpreter was unnecessary for the guilty plea proceedings in 2007 and therefore, was unnecessary for the postconviction relief proceedings in 2009.

B. Guilty Plea Consequences.

Lin next asserts that his trial counsel was ineffective for failing to advise him that a conviction could result in deportation as required by *Padilla v. Kentucky*, 559 U.S. ___, ___, 130 S. Ct. 1473, ___, 176 L. Ed. 2d 284, ___ (2010). The State responds that this issue is not preserved for our review. Because this claim is raised for the first time in this appeal, we agree that it is not preserved. See *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a

fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.”).

However, because *Padilla* was not decided before the postconviction relief hearing, Lin argues that we should remand so that he could amend his postconviction relief application to include the claim. The postconviction relief hearing was held on November 23, 2009. At that time the Supreme Court had granted certiorari in the *Padilla* case and heard oral arguments, and the decision was issued on March 31, 2010. The State responds that at the time of Lin’s postconviction relief hearing, that “it was no secret” that the Supreme Court was deciding this issue, yet Lin’s postconviction relief counsel “chose not to raise the issue.” See *Vance*, ___ N.W.2d at ___ (discussing that an attorney would have discovered that the Supreme Court had granted certiorari in another state’s case on a widely debated issue). The proper remedy is not remand, but to apply for further postconviction relief, asserting that postconviction relief counsel was ineffective for failing to raise the issue during the first postconviction proceedings.

Nevertheless, the State would have us conclude the record is sufficient to address the claim and requests we do so in the interest of judicial economy. The State asserts that even assuming *Padilla* should be applied retroactively, Lin cannot prevail because both his trial attorneys and the trial court advised him of the possible immigration consequences. In *Padilla* the defendant raised an ineffective-assistance-of-counsel claim based upon his attorney’s failure to advise him that pleading guilty would subject to him to automatic deportation. *Padilla*, ___ U.S. at ___, 130 S. Ct. at 1486, 176 L. Ed. 2d at ___. The Supreme Court held that a *Strickland* analysis was applicable to his claim. *Id.* Under the

first prong of *Strickland*, “counsel must inform her client whether his plea carries a risk of deportation.” *Id.* Under the second prong of *Strickland*, a defendant must establish prejudice—that he would not have pled guilty had he been advised of immigration consequences. *Id.*; see *State v. Straw*, 709 N.W.2d 128, 137 (Iowa 2006) (explaining that a defendant who had already admitted to committing the crime, has the burden to prove that, but for counsel’s error, he or she would not have pled guilty and would have insisted on going to trial); *State v. Hallock*, 765 N.W.2d 598, 606 (Iowa Ct. App. 2009) (same).

In this case, Lin’s postconviction counsel did raise a claim that his counsel was ineffective for failing to advise him of the general implications and consequences of a guilty plea and there was testimony at the postconviction hearing regarding whether Lin was advised of immigration consequences. The transcript at the guilty plea hearing demonstrated that Lin’s trial attorneys had advised him of the immigration consequences. The trial court asked Lin if he was a United States citizen and Lin indicated that he was not. The following exchange occurred:

The Court: “Do you want to just go off the record for one minute and talk with him about that and any immigration or citizenship consequences related to this.”

Lin’s Attorney: “We have discussed citizenship and immigration consequences.”

.....

The Court: Do you understand if you plead guilty to this charge, . . . the conviction on this charge, if there is one, can result in some consequences to you, and I don’t know what all those are, but they could possibly involve a deportation or not being allowed to become a citizen or other really negative consequences. And I understand that Mr. Mayer and Mr. Said have been working with you, and they’re experts in that area, so they know a lot more about it than I do. But I want to make sure you know that there are some

consequences to a plea of guilty to this case. Do you understand that?

Defendant Lin: Yes, Your Honor.

The Court: All right. Mr. Mayer, you and Mr. Said have been advising your client of the different consequences and what might happen to him; is that correct?

Mr. Mayer: Yes, Your Honor.

Later during the hearing, the trial court again advised Lin that “[y]ou may well be deported.” At the sentencing hearing, the trial court once again informed Lin that “this may affect your immigration status.”

At the postconviction hearing, Lin testified that he initially told his co-defendant that he would not plead guilty because “[i]f I take [the plea deal], I get my green card revoked and I can’t be in America no more. And I keep telling [the co-defendant] that—that’s when our relationship went bad.” He also stated that one of his trial attorneys told him that he could lose his green card and he understood when the trial court told him “[t]hey [were] not going to renew my green card.” On cross-examination Lin claimed that he did not know he could be deported and all he thought was that his green card couldn’t be renewed, but admitted the trial court “probably” did tell him he could be deported. He then stated that at the time he pled guilty, “I was still afraid that I would have to go back, that I wouldn’t have my green card anymore.” One of Lin’s trial attorneys testified that Lin was advised of the immigration consequences of his plea. Lin’s other trial attorney testified that Lin was a lawful permanent resident and “would be up for renewal either in 2010 or 2011,” and this type of conviction would cause problems in regards to that. His attorney also testified that he advised Lin of the immigration consequences, including discussing deportation.

We find the record is sufficient to decide the claim. Having reviewed both the record from the plea and postconviction proceedings, we find that Lin was informed of the immigration consequences of his plea, including the possibility of deportation. Consequently, Lin cannot prevail on an ineffective-assistance-of-counsel claim based upon his attorneys' failure to advise him of such.

We find Lin's trial counsel was not ineffective and affirm the postconviction court's dismissal of Lin's application for relief. We further find no violation of Lin's due process rights at the postconviction relief hearing. We affirm.

AFFIRMED.