

IN THE COURT OF APPEALS OF IOWA

No. 2-603 / 11-1701
Filed September 6, 2012

**CANDIDA FUENTES ESCOBAR n/k/a
CANDIDA FUENTES MILLER,**
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert J. Blink,
Judge.

Candida Fuentes Escobar, n/k/a Candida Fuentes Miller, appeals the
dismissal of her application for postconviction relief. **AFFIRMED.**

Nichole M. Mordini of Davis Brown Law Firm, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, John Sarcone, County Attorney, and Frank S. Severino, Assistant
County Attorney, for appellee.

Considered by Vogel, P.J., and Danilson and Mullins, JJ.

DANILSON, J.

Candida Fuentes Escobar, n/k/a Candida Fuentes Miller, appeals the dismissal of her application for postconviction relief which challenged her trial counsel's failure to advise her about potential deportation consequences of her guilty plea. The district court deemed her claims untimely under Iowa Code section 822.3 (2011). Because no exception to the limitations period applies, we affirm.

I. Background Facts and Proceedings.

Miller is a native and citizen of Guatemala and a lawful permanent resident of the United States. On December 24, 2007, then eighteen-year-old Miller worked as a cashier. She was charged with theft in the second degree, in violation of Iowa Code sections 714.1 and 714.2(2) (2007), a class D felony, after she manipulated a cash register while ringing up a sale to permit the customer to leave without making full payment for the merchandise. She pled guilty to theft in the third degree, an aggravated misdemeanor, on February 2, 2008. She received a two-year suspended sentence, and successfully completed probation on March 11, 2009.

In May 2011, immigration agents arrested Miller and charged her as deportable on the basis of the suspended sentence in her theft case. Miller filed an application for postconviction relief on July 12, 2011, asserting trial counsel's failure to advise her about the potential immigration consequences of her plea and conviction resulted in ineffective assistance of counsel.

Miller filed an affidavit stating that she would have proceeded to trial and obtained immigration counsel if she had been alerted to the immigration consequences of the plea, but her defense counsel did not even inquire about her immigration status. Miller asserts her plea was made without any guidance or discussion as to the potential immigration implications, but concedes that the written guilty plea form she signed included a general immigration warning.

The United States Supreme Court decided *Padilla v. Kentucky* on March 31, 2010 (holding counsel must inform defendants whether their pleas carry a risk of deportation when that consequence is “truly clear”). 130 S. Ct. 1473, 1486. Approximately ten months later, the statute of limitations period applicable to Miller’s application for postconviction relief expired. Miller did not appeal her conviction or file an application for postconviction relief, until July 12, 2011.

The district court dismissed Miller’s application as time barred, noting that she had nearly a year after the *Padilla* case was decided and before the exhaustion of the limitations period in which to make her collateral attack. Miller asserts on appeal that the *Padilla* decision should support a new ground of law exception to the general limitations period.

II. Standard of Review.

“We normally review postconviction proceedings for errors at law.” *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011). “This includes summary dismissals of applications for postconviction relief.” *Id.* However, applications that allege ineffective assistance of counsel raise a constitutional claim that must be reviewed de novo. *Id.*

Claims of ineffective assistance are an exception to the error preservation rules. *State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010). However, a three-year limitations period generally applies to a postconviction action. Iowa Code § 822.3.¹

III. Discussion.

Miller asserts that she should enjoy the statutory exception to the general limitations period set forth in Iowa Code section 822.3 for a new ground of law. However, the language of the statute limits the exception to a “ground of fact or law that could not have been raised within the applicable time period.” Iowa Code § 822.3. Because *Padilla* was decided ten months before her limitations period expired, she had ample opportunity to make a timely application for postconviction relief under grounds announced in that case. Moreover, the deportation consequences were in existence at the time of her plea and sentencing, and could have been addressed in a postconviction proceeding within the full three-year period. *Lopez-Penalzoza v. State*, 804 N.W.2d 537, 542 (Iowa Ct. App. 2011).

Miller claims she was unaware her conviction would make her deportable. However, lack of knowledge is not a ground for exception from the statute of

¹ Iowa Code section 822.3 provides that a postconviction application must be filed “within three years from the date the conviction or decision is final or, in the event of an appeal, from the date the writ of procedendo is issued” with the exception of a “ground of fact or law that could not have been raised within the applicable time period.”

limitations found in section 822.3. See *State v. Edman*, 444 N.W.2d 103, 106 (Iowa Ct. App. 1989).²

Miller also asks our court to “create a more workable rule of law” to afford applicants a “meaningful opportunity to assert their new legal rights.” She alleges that ten months “between the elucidation of her Constitutional right and the (limitation) period’s end is not a reasonable opportunity.”

Miller seeks a construction of section 822.3 which would extend the period in which to file an application three years beyond the date of the new ground of law, even when that ground could have been raised within the original limitations period. To adopt such an interpretation would be to disregard the express language of section 822.3. We decline to do so.

“*Padilla* only applies retroactively if it is not deemed a new rule.” *Perez v. State*, 816 N.W.2d 354, 359 (Iowa 2012) (concluding the decision does not meet either exception for retroactive application of new constitutional rules of criminal procedure).³ If the rule announced in *Padilla* is an old rule of constitutional criminal procedure, Miller still had an opportunity to raise her counsel’s shortcomings within the three-year limitations period. See *id.* at 359-61.

² We also note her written guilty specifically stated, “I understand that if I am not a citizen of the United States that a criminal conviction or deferred judgment may result in deportation or other adverse immigration consequences under federal immigration laws,” consistent with Iowa R. Crim. P. 2.8 (2)(b)(5).

³ The United States Supreme court will likely determine whether *Padilla* is to be applied retroactively in its October 2012 term, as it granted certiorari in *Chaidez v. U.S.*, 132 S. Ct. 2101 (2012).

IV. Conclusion.

Neither *Padilla* nor Miller's late discovery of her immigration problems excuses her untimely application under Iowa Code section 822.3. No exception to the limitations period applies; thus, the district court correctly concluded that her application for postconviction relief was time-bared.

AFFIRMED.