

IN THE COURT OF APPEALS OF IOWA

No. 3-026 / 12-0904
Filed March 13, 2013

NHAT HUYNH,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Warren County, Gregory A. Hulse,
Judge.

Nhat Huynh appeals from the district court's dismissal of his application for
postconviction relief. **AFFIRMED.**

Brent D. Rosenberg of Rosenberg & Morse, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney
General, John Criswell, County Attorney, and Douglas A. Eichholz, Assistant
County Attorney, for appellee State.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

Nhat Huynh appeals from the summary dismissal of his application for postconviction relief as untimely. He argues dismissal was improper as he presented material issues of fact in light of recent precedent.¹ We affirm, finding summary dismissal was proper under our supreme court's decision in *Perez v. State*, 816 N.W.2d 354 (Iowa 2012), and the United States Supreme Court's decision in *Chaidez v. United States*, ___ S. Ct. ____, 2013 WL 610201 (2013).

I. Facts and Proceedings.

Huynh is a permanent resident alien. In 2005, he pleaded guilty to possession of marijuana with intent to deliver. During the proceedings, Huynh's lawyer stated he had discussed the matter with "Huynh's immigration counsel" and that Huynh was entering into the plea agreement after "careful consideration of all the relevant facts and circumstances." The district court then asked Huynh whether he understood a conviction may affect his "status under federal immigration laws and . . . ability to get a passport or a visa." Huynh replied he understood. Huynh was convicted, and the court sentenced him to a term not to exceed five years, suspending the sentence and placing Huynh on probation for two years. He did not appeal from these proceedings and completed his term of probation.

In May of 2011, Huynh met with an immigration attorney who informed him that his conviction could cause him to be deported from the United States. He

¹ He also argues the merits of his application for postconviction relief; however, we cannot decide this for the first time on appeal. *State v. Ragland*, 812 N.W.2d 654, 659 (Iowa 2012) (finding dismissal of an application for postconviction relief improper and remanding for further proceedings); see also *Castro v. State*, 795 N.W.2d 789, 796 (Iowa 2011) (same).

filed an application for postconviction relief in September of 2011, alleging his counsel for his guilty plea did not inform him—or even misinformed him—regarding the immigration consequences of his conviction. This, he argued, was in violation of the requirements for effective assistance of counsel established after Huyhn pleaded guilty and was sentenced in *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486, (2010). The district court dismissed his application, ruling it untimely. He appeals from this dismissal.

II. Analysis

Our review of the dismissal of an application for postconviction relief is normally for errors at law; however, where the claim raised is constitutional in nature, our review is de novo. *Castro*, 795 N.W.2d at 793.

Our supreme court recently considered the effect of *Padilla* on untimely applications for postconviction relief in *Perez*. 816 N.W.2d at 356. *Perez*, a non-citizen of the United States, filed an application for postconviction relief nine years after his guilty plea and conviction for drug related charges. *Id.* He alleged his attorney did not advise him of the immigration consequences of his guilty plea. See *id.* The court found his application was untimely under Iowa Code section 822.3 (2009), whether or not it applied *Padilla* retroactively: “[W]e leave it to the Supreme Court to decide next term whether *Padilla* is retroactive. We hold only that if it is, *Perez* should have raised his claim regarding failure to advise of immigration consequences within the three-year limitations period of section 822.3.” *Id.* at 361.

The United States Supreme Court has now provided us with that guidance. *Chaidez*, 2013 WL 610201, at *3. In *Chaidez*, the Supreme Court

considered a claim of ineffective assistance of counsel under *Padilla* brought by a defendant who pleaded guilty and was convicted of an aggravated felony in 2004. *Id.* Immigration officials initiated removal proceedings against her in 2009. *Id.* The Court held Chaidez could not benefit from the requirements set forth in *Padilla*, concluding: “This Court announced a new rule in *Padilla*. Under *Teague*, defendants whose convictions became final prior to *Padilla* therefore cannot benefit from its holding.” *Id.* at *10 (referencing *Padilla*, 130 S.Ct. at 1473 and *Teague v. Lane*, 489 U.S. 288 (1989)).

Huynh’s conviction became final before the Supreme Court decided *Padilla*. *Padilla* is a new rule and only applicable to cases on direct review. Huynh also failed to file his application for postconviction relief within the three year statute of limitations. We affirm the dismissal of Huynh’s application as untimely.

AFFIRMED.