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1. [Al-Shormani v. State, 2002 Minn. App. LEXIS 1298](#)

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[Al-Shormani v. State](#)

Court of Appeals of Minnesota

November 26, 2002, Filed

C9-02-572

Reporter

2002 Minn. App. LEXIS 1298 *; 2002 WL 31655182

Anwar Nagi Al-Shormani, petitioner, Appellant, vs. State of Minnesota, Respondent.

Notice: [*1] THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

Prior History: Hennepin County District Court. File No. 90689.

Disposition: Affirmed.

Core Terms

district court, postconviction, deportation, guilty plea, manifest injustice, ineffective assistance of counsel, stipulated facts, jury trial, rights, waive

Case Summary

Procedural Posture

Defendant was convicted in the Hennepin County District Court, Minnesota, for solicitation, inducement, promotion of prostitution, and criminal sexual conduct in the fifth degree and was sentenced to three years' probation. Thereafter, the trial court denied his motion for postconviction relief. Defendant appealed.

Overview

Defendant waived his right to a jury trial and submitted the case to the trial court on the facts contained in the police report and complaint. Following his conviction, the Immigration and Naturalization Service considered deporting defendant and he unsuccessfully sought postconviction relief. On appeal, defendant argued the trial court erred by refusing to vacate his conviction on the grounds of ineffective assistance of counsel or to avoid manifest injustice, and that the trial court should have granted him a postconviction relief hearing. The

appellate court initially noted deportation was a collateral consequence of a conviction and an attorney's failure to advise a defendant of that consequence was not ineffective assistance. The appellate court held trial courts were not required to vacate a conviction to avoid manifest injustice even though a defendant was not aware of the possible consequence of deportation. The appellate court concluded the trial court properly refused to hold a hearing on defendant's postconviction relief motion where there were no disputed material facts which had to be resolved to get to the merits of his postconviction claims.

Outcome

The judgment of the trial court was affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Postconviction Proceedings > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

[HN1](#) **Criminal Law & Procedure, Postconviction Proceedings**

Upon review, an appellate court affords great deference to the post-conviction court's decisions, and those decisions will not be disturbed absent an abuse of discretion. A postconviction proceeding is a collateral attack on a judgment which carries a presumption of regularity and which, therefore, cannot be lightly set aside.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Immigration Law > Duties & Rights of Noncitizens > Legal Representation

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > General Overview

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

[HN2](#) **Entry of Pleas, Guilty Pleas**

Defense counsel's failure to inform a defendant of the possibility of deportation as a result of a conviction from a guilty plea does not render that plea ineffective on the grounds of ineffective assistance of counsel. In those cases, the risk of deportation is a collateral as opposed to direct consequence of the conviction.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

[HN3](#) **Effective Assistance of Counsel, Trials**

Trial courts are not required to vacate a conviction to avoid manifest injustice even though a defendant was not aware of the possible consequence of deportation following a conviction.

Criminal Law & Procedure > Sentencing > Deportation & Removal

[HN4](#) **Sentencing, Deportation & Removal**

State courts have always left the deportation issues to the federal agencies authorized to deal with them.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

[HN5](#) **Criminal Law & Procedure, Postconviction Proceedings**

A hearing on a motion for postconviction relief is required only when there are disputed material facts which must be resolved to get to the merits of the postconviction claims.

Counsel: Herbert A. Igbanugo, Blackwell Igbanugo Engen & Saffold P.A., Minneapolis, MN (for appellant).

Mike Hatch, Attorney General, , St. Paul, MN; and Amy Klobuchar, Hennepin County Attorney, J. Michael Richardson, Assistant County Attorney, Minneapolis, MN (for respondent).

Judges: Considered and decided by Shumaker, Presiding Judge, Schumacher, Judge, and Klaphake, Judge. KLAPHAKE, Judge (dissenting).

Opinion by: ROBERT H. SCHUMACHER

Opinion

UNPUBLISHED OPINION

ROBERT H. SCHUMACHER, Judge

Appellant Anwar Nagi Al-Shormani claims the district court erred by refusing to vacate his conviction on the grounds of ineffective assistance of counsel or to avoid manifest injustice, and that the district court should have granted him a hearing on this issue. We affirm.

FACTS

On September 20, 2000, an 18-year-old woman called the Minneapolis police to report seeing a man in downtown Minneapolis who she claimed had solicited and assaulted her the previous day. The man was arrested and identified as **[*2]** Al-Shormani. He had a 1998 conviction in Dakota County for fifth-degree criminal sexual conduct. Al-Shormani was charged with solicitation, inducement and promotion of prostitution, and criminal sexual conduct in the fifth degree.

Al-Shormani, after consultation with his attorney, decided to waive his right to a jury trial and submitted the case to the court alone on the facts contained in the police report and complaint. The report included Al-Shormani's version of the events - that the young woman actually asked him for money and then offered

to have sex with him for money. The court found Al-Shormani guilty on March 19, 2001. The court stayed imposition of sentence, and placed him on probation for three years.

Sometime after his conviction, the Immigration and Naturalization Service learned of Al-Shormani's legal problems. Al-Shormani contends that the INS is considering deporting him under its authority to do so at its discretion pursuant to [8 U.S.C. § 1227\(a\)\(2\)\(A\)\(i\)\(2001\)](#) and/or [8 U.S.C. § 1227\(a\)\(2\)\(A\)\(ii\)\(2001\)](#). He then filed a petition for postconviction relief under [Minn. Stat. § 590.01](#) (2000). The [*3] state responded in writing opposing Al-Shormani's petition. The district court did not grant a hearing but denied the petition by order.

DECISION

[HN1](#) Upon review, this court affords great deference to the post-conviction court's decisions, and those decisions will not be disturbed absent an abuse of discretion. [Dukes v. State, 621 N.W.2d 246, 251 \(Minn. 2001\)](#). "[A] postconviction proceeding is a collateral attack on a judgment which carries a presumption of regularity and which, therefore, cannot be lightly set aside." [State ex. rel. Gray v. Tahash, 279 Minn. 248, 250, 156 N.W.2d 228, 229 \(1968\)](#) (citations omitted).

1. Al-Shormani contends that he was denied due process because of ineffective assistance of counsel, claiming his attorney failed to advise him that his conviction could lead to deportation. The Minnesota Supreme Court has unequivocally stated that [HN2](#) defense counsel's failure to inform the defendant of the possibility of deportation as a result of a conviction from a guilty plea does not render that plea ineffective on the grounds of ineffective assistance of counsel. [Berkow v. State, 583 N.W.2d 562, 563-64 \(Minn. 1998\)](#); [*4] [Alanis v. State, 583 N.W.2d 573, 578-79 \(Minn. 1998\)](#).

In those cases, the supreme court determined that the risk of deportation is a "collateral" as opposed to "direct" consequence of the conviction. [Berkow, 583 N.W.2d at 563-64](#); [Alanis, 583 N.W.2d at 578-79](#). Because it is a collateral consequence, defense counsel's failure to inform Al-Shormani of this possible repercussion of the conviction does not render the conviction invalid due to ineffective assistance of counsel. [Berkow, 583 N.W.2d at 563-64](#); [Alanis, 583 N.W.2d at 579](#).

2. Al-Shormani alleges that his conviction must be set aside to avoid manifest injustice. In [Alanis](#) and [Berkow](#),

the supreme court held that the [HN3](#) district courts were not required to vacate the convictions to avoid manifest injustice even though the defendants were not aware of the possible consequence of deportation. [Berkow, 583 N.W.2d at 563-64](#); [Alanis, 583 N.W.2d at 579](#). In those cases, the defendant had actually pleaded guilty to the charges. As such, [Alanis](#) and [Berkow](#) argued that their pleas were not "accurate, voluntary, and [*5] intelligent," and should be withdrawn. The supreme court disagreed, deciding that the pleas could stand. [Berkow, 582 N.W.2d at 563-64](#); [Alanis, 583 N.W.2d at 579](#).

In the present case, Al-Shormani did not plead. Instead, he had a trial. He now contends that the court trial on stipulated facts amounts to a guilty plea. Even if this were accurate, the [Alanis](#) and [Berkow](#) decisions defeat Al-Shormani's argument. In those cases, the defendants had in fact pleaded guilty, yet the convictions stood. Al-Shormani had a trial. He could have opted for a jury trial; he and his attorney made the strategic decision to have a trial before the court alone.

Al-Shormani claims that he may be subject to torture or even execution if he is deported to Yemen. Analyzing these claims and determining the proper course of action is appropriately left to the discretion of the INS. Al-Shormani is vague about the actual consequences of his return to Yemen, listing only possible outcomes ranging from execution to a decrease in the quality of medical care. He also references a variety of problems with which Yemen struggles, but it is unclear how this has more than peripheral [*6] relevance to the legal issues on appeal. In short, the [HN4](#) state courts have always left the deportation issues to the federal agencies authorized to deal with them. See [Berkow, 583 N.W.2d at 564](#); [Alanis, 583 N.W.2d at 579](#).

3. Al-Shormani also alleges he was denied due process because the district court did not allow a hearing on his postconviction petition. This argument was addressed and dismissed in [Alanis](#), which held that the district court did not abuse its discretion in refusing to hold a hearing. [Id. at 579](#). The [Alanis](#) court noted that [HN5](#) a hearing is required only when "there are disputed material facts which must be resolved to get to the merits of the postconviction claims." [Id.](#)

Rather than pointing to any disputed material facts, Al-Shormani has instead pointed to disputed legal theories, arguing his constitutional rights were violated based upon the undisputed events occurring prior to the postconviction petition. He did not raise any issue under

[Minn. R. Crim. P. 26.01](#) either in the district court or in this court.

Affirmed.

Dissent by: KLAPHAKE

Dissent

KLAPHAKE, Judge (dissenting)

Because I believe that [*7] appellant Anwar Nagi Al-Shormani has established a basis for postconviction relief, I respectfully dissent.

A close reading of appellant's petition and supporting affidavits shows that his inevitable deportation is only one of the bases asserted by him for relief. He also alleges ineffective assistance of counsel in connection with his "guilty plea," as he characterizes the procedure that led to his conviction, and claims that a "manifest injustice" has occurred. While the majority correctly notes that appellant did not plead guilty, but was found guilty following a stipulated bench trial, the majority fails to critically examine the procedure followed by the district court and counsel here.

Before a defendant can agree to a bench trial on stipulated facts, he or she must not only waive a jury trial, but also must acknowledge and waive other fundamental rights attendant to a trial, including the right to testify, call witnesses, and cross-examine those witnesses. [Minn. R. Crim. P. 26.01, subds. 1\(a\)](#) (procedure for waiver of jury trial), 3 (procedure for trial on stipulated facts). The record shows that appellant validly waived his right to a jury trial, both on the record and in [*8] writing. But the record is devoid of any attempt by either counsel or the district court to obtain appellant's acknowledgment and personal waiver of other rights fundamental to a fair trial, as required by [rule 26.01, subd. 3](#).

Without this acknowledgment and waiver, it cannot be concluded that appellant knowingly and voluntarily entered into an agreement to submit his case to the court on stipulated facts. See [State v. Halseth, 2002 Minn. App. LEXIS 1295, 653 N.W.2d 782](#) (Minn. App. Nov. 26, 2002) (reversing conviction where no valid waiver prior to stipulated court trial). Had this been a case involving a guilty plea, the failure of counsel and the district court to make a record of appellant's waivers clearly would have entitled him to withdraw his plea due

to a manifest injustice. Cf. [Alanis v. State, 583 N.W.2d 573, 579 \(Minn. 1998\)](#) (rejecting defendant's claim that withdrawal of plea necessary to correct manifest injustice, where record before district court at time plea entered indicates that plea was accurate, voluntary, and intelligent). A bench trial on stipulated facts should compel the same result where, as here, there is no record that the defendant acknowledged and personally [*9] waived fundamental trial rights.

I would therefore reverse the district court's summary denial of appellant's petition for postconviction relief. Because there was no record waiver of appellant's fundamental trial rights, I would reverse the conviction and remand for a new trial.

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