NO. 43814-3

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

BESS OVERMON, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Beverly G. Grant, Judge

No. 05-1-05483-4

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR.

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1. Did the trial court err under CrR 7.8 when it considered defendant's untimely motion to withdraw her guilty plea rather than transferring the untimely motion to the Court of Appeals?

2. Did the trial court err when it found that defendant had received ineffective assistance of counsel and as such, her plea of guilty five years prior was not knowing, voluntary and intelligent where the record and case law do not support such a finding?

3. Did the trial court err in considering ***Padilla*** when ***Padilla*** is not retroactive and as such, not applicable to defendant's case?

C. STATEMENT OF THE CASE.

On November 7, 2005, the State charged defendant, Beth Overmon with one count of theft in the first degree. CP 1-2. Defendant was represented by Mr. Robert DePan from the Department of Assigned Counsel. RP 4, CP 24-33. During this time, defendant had a pending second degree theft charge in Kitsap County that she pleaded guilty to prior to the resolution of the Pierce County charge. CP 40-102.

On July 11, 2006, defendant pleaded guilty to an amended charge of theft in the second degree before Judge Beverly Grant. CP 3, 5-8, 24-33. During the hearing, the trial court asked defendant if she understood that, "the entry of this plea would be grounds for deportation or denial of rights to enter the United States." CP 24-33, page 6. Defendant stated that she understood. CP 24-33, page 6. During the same hearing, Mr. DePan informed the court that it was his understanding that defendant had conferred with an immigration attorney and this plea should not result in adverse immigration consequences. CP 24-33, page 8. Defendant did not file a direct appeal.

The record below indicates that in 2008, defendant took a trip to England and upon her return to the United States was denied access based on her conviction. CP 40-102. The United States government has apparently initiated removal proceedings against defendant. CP 40-102. Over four years after her time for collateral attack expired, and three years after her return to the country, defendant filed in the trial court a motion to withdraw her guilty plea. CP 40-102. The State responded to the motion. CP 103-113. The trial court did not transfer the untimely motion to the Court of Appeals, but instead held a hearing on the merits of the motion on May 11, 2012. RP 1-27. The trial court found that defendant received ineffective assistance of counsel and was entitled to withdraw her guilty plea. RP 24, CP 116-119, 120.

The State filed a timely notice of appeal of the court's decision granting defendant's motion to withdraw her guilty plea. CP 121-122.

D. ARGUMENT.

1. THE TRIAL COURT ERRED WHEN IT CONSIDERED DEFENDANT'S UNTIMELY MOTION TO WITHDRAW HER GUILTY PLEA.

"Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders." ***In re Hagler***, 97 Wn.2d 818, 823, 650 P.2d 1103 (1982) (citing ***Engle v. Issac***, 456 U.S. 107, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982)). These costs are significant and require that collateral relief be limited in state as well as federal courts. ***Hagler***, 97 Wn.2d at 824. Because of the costs and risks involved, there is a time limit in which to file a collateral attack. The statute that sets out the time limit provides:

> No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

RCW 10.73.090(1).

The court rules give specific guidance to the trial court on how to treat a collateral attack. CrR 7.8(c)(2) states

> The court *shall* transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

CrR 7.8(c)(2)(emphasis added). The transfer is non-discretionary if defendant is time barred under RCW 10.73.090. "If the challenge is untimely, the court shall transfer it to the Court of Appeals." ***State v. Flaherty***, __Wn.2d__, __P.3d__ (2013 WL 992123)

In that instant case, defendant's case was final on July 11, 2006, the day her judgment and sentence entered in this case. CP 12-21. Defendant did not file a direct appeal. Defendant filed a motion to withdraw her guilty plea on November 21, 2011, over four years after the one year time limit had expired. CP 40-102. As such, under CrR 7.8(c)(2), the trial court was required to transfer the petition to the Court of Appeal unless the court determined that it was not valid on its face or was not rendered by a court of competent jurisdiction. *See* RCW 10.73.090(1). The trial made neither of those findings. In fact, the trial court was the one who took the plea in 2006. CP 24-33. Further, there was no allegation that the judgment and sentence was not valid on its face. The trial court had no discretion to hold a fact finding hearing or decide the motion itself when

the court rule directed that it send the motion to the Court of Appeals. The trial court never even addressed the time bar, despite the fact that the State pointed it out in their brief and on the record. RP 20-22, CP 103-113. The trial court ignored the court rule and ignored the time bar. The trial court did not have discretion to hold a hearing. The motion should have been immediately transferred to the Court of Appeals. The trial court erred in holding a fact finding hearing and in deciding defendant's motion to withdraw her guilty plea.

2. THE TRIAL COURT ERRED WHEN IT FOUND DEFENDANT HAD RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS ENTITLED TO WITHDRAW HER GUILTY PLEA WHEN SUCH FINDING WAS NOT SUPPORTED BY THE RECORD OR CASE LAW.

The State does not believe the trial court should have reached the issue of ineffective assistance of counsel as defendant's motion was untimely. However, should this Court review the trial court's findings, the trial court's findings are not supported by the record or case law.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article 1, Sec. 22 of the Constitution of the State of Washington. The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984).

When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* The court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that "the essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect."

The test to determine when a defendant's conviction must be overturned for ineffective assistance of counsel was set forth in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by the Washington Supreme Court in ***State v. Jeffries***, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The test is as follows:

> First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment.
>
> Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. 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.

Id. *See also* ***State v. Walton***, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995); ***State v. Denison***, 78 Wn. App. 566, 897 P.2d 437, *review denied*, 128 Wn.2d 1006 (1995); ***State v. McFarland***, 127 Wn.2d 322, 899 P.2d 1251 (1995); ***State v. Foster***, 81 Wn. App. 508, 915 P.2d 567 (1996), *review denied*, 130 Wn.2d 100 (1996).

State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 56 (1992), further clarified the intended application of the ***Strickland*** test.

> There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

Citing ***Strickland***, 466 U.S. at 689-90.

Under the prejudice aspect, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. Because the defendant must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel's performance was deficient. ***Strickland***, 466 U.S. at 697, ***Lord***, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. ***McFarland***, 127 Wn.2d at 335 (citing ***State v. White***, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." ***Strickland***, 466 U.S. at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510 U.S. 944 (1993). Defendant has the "heavy burden" of showing that counsel's performance was deficient in light of all surrounding circumstances. ***State v. Hayes***, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689.

There is no requirement that the trial court advise a defendant orally on the record that there may be deportation consequences with his plea. ***State v. Cortez***, 73 Wn. App. 838, 841, 871 P.2d 660 (1994).

Even if the trial court was permitted to hold an evidentiary hearing on defendant's motion, the trial court's ruling that defendant received ineffective assistance of counsel was not supported by the record. Further, the trial court did not even attempt to make the proper finding in light of the case law laid out above. The trial court simply asked the parties, "Well can't I do both? Can't I make a ruling saying that I find there was ineffective assistance of counsel, that she was not fully informed of the consequences and you take that up?" RP 24. When the State stated that

the State could appeal such a ruling the trial court stated, "So that's what I'll do." RP 24. There was no analysis of the record and no application of case. There was no mention of the transcript from the plea hearing in making this decision or an analysis of the fact that the trial court itself had informed defendant she would have deportation consequences. The trial court simply asked a question and the question became her ruling. The trial court did not review the entire record, did not make any findings in terms of the transcript of the plea hearing or defendant's statement on plea of guilty. The trial court did not apply case law at all. The trial court's ruling was bereft of analysis or facts.

The trial court's findings of fact and conclusions of law also are not supported by the record. Mr. DePan, who was defendant's counsel at the time of plea, testified at the hearing on defendant's motion to withdraw her guilty plea. RP 5. Mr. DePan stated that he had no independent recollection of defendant or her case. RP 5. Mr. DePan went over his normal procedures but reiterated that he could not remember this particular case. RP 6-7. Mr. DePan also testified that he had coverage counsel and had a note in the file from coverage counsel on one date. RP 8. Yet despite this testimony, the trial court's findings reflect that Mr. DePan would not always represent defendant and has other counsel cover routine hearings. CP 116-119, finding of fact number 4. This is not supported by Mr. DePan's testimony. Further, the trial court found that the time Mr. DePan was able to spend with defendant was no more than three

hours. CP 116-119, finding of fact number 6. Again, this is not supported by the record as Mr. DePan had no independent recollection of this case. RP 5-7.

Mr. DePan also went through his normal practice of who he contacts for advice and then how he advises his client's when there is a potential immigration issue. RP 8-9. He also went through the specific advice given to defendant in this case and where it came from. RP 9-11. The transcript of the plea hearing showed that Mr. DePan told the court, "She, as my understanding, has consulted with an immigration attorney and that shouldn't lead to problems with this charged for this amount of money, it's my understanding. I don't know what to say about that so I would have to go with the person who has expertise in that area regarding deportation." CP 24-33, page 8. Defendant herself cannot even remember the conversations with Mr. DePan. RP 13-14. Yet the trial court's findings reflect that Mr. DePan wasn't sure how much of the information came from him and that he admitted that it was inaccurate. CP 116-119, findings of fact 11 and 12. Neither of these is supported. Mr. DePan never admitted the information was inaccurate and he stated that he wasn't sure how much came from the immigration people his office consults with or how much came from defendant's own immigration attorney. RP 9. Mr. DePan was clear that he was not an expert on these issues and so consulted with people who were. RP 8-9. This fact is not reflected at all in the findings.

In addition, the trial court found that defendant intended to push the case to trial. CP 116-119, conclusion of law number 1. However, the transcript from the plea hearing makes it clear that defendant was pleading guilty freely and voluntarily and no promises had been made to her in exchange for the plea. RP 6-8. There was no evidence that defendant wanted to push the case to trial. The trial court also found that the ineffective assistance of counsel and misinformation caused defendant to resolve her case by guilty plea. CP 116-119, conclusion of law number 5. Again, this is a logical leap and not supported by the record. Defendant had also entered a plea in Kitsap county around the same time. CP 40-102. The record of the plea hearing shows defendant was resolving cases. CP 24-33, pages 7-8. There is nothing that shows that immigration issues were the only reasons she resolved her case.

Finally, the fact that defendant may or may not have been given inaccurate advice was never fleshed out on the record or in defendant's motion. There is nothing from any immigration attorney indicating that the proceedings supposedly pending against defendant are a result of this plea or from any inaccurate information. There was absolutely no evidence presented of any proceedings pending against defendant. For the trial court to find that defendant received inaccurate information, that defendant's immigration issues were easily ascertainable and that Mr. DePan failed in advising defendant in this regard, the trial court needed far more information that it had. CP 116-119, conclusions of law numbers 2,

3, and 4. There was simply no evidence to support any of these findings. The trial court erred in holding a hearing on defendant's motion and further erred in finding ineffective assistance of counsel where the trial court did not follow the directives of case law in making its findings and the findings made are not supported by the case law. Therefore, the trial court erred in granting defendant's motion.

3. THE TRIAL COURT ERRED IN CONSIDERING *PADILLA* AS *PADILLA* IS NOT RETROACTIVE AND AS SUCH, NOT APPLICABLE TO DEFENDANT'S CASE.

The State does not believe the trial court should have ever reached the issue of whether ***Padilla v. Kentucky*** applied to defendant's case as defendant's motion was time barred. ***Padilla v. Kentucky***, ___ U.S. ___, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010). However, the trial court did state that it believed that ***Padilla*** was the controlling case. RP 19.

In ***Padilla***, the Court held that the failure of counsel to inform their client whether their plea carries a risk of deportation qualifies as ineffective assistance of counsel. ***Padilla***, 130 S. Ct. at 1484. The State argued below that ***Padilla*** did not apply retroactively. CP 103-113. The trial court never addressed this case law or explained how it determined ***Padilla*** was the controlling case and how it found that it applied retroactively. The trial court's statement that ***Padilla*** was controlling is not

supported by any analysis or any determination that it applied to defendant's case retroactively.

Whether or not a holding is to apply retroactively turns on whether the rule is considered a change in the existing law or a "new rule" under ***Teague***. ***Teague v. Lane***, 489 U.S. 288, 300, 109 S. Ct. 1060 (U.S., 1989)(rehearing denied). New rules will not apply retroactively to criminal cases on collateral review unless they fall within an enumerated exception. *Id.* at 304-305, 310. A case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. *Id.* at 301. Stated another way, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final. *Id.* In the instant case, defendant never asserted that ***Padilla*** created a new rule.

At this point, no Washington court has addressed the issue of whether or not ***Padilla*** is to apply retroactively. While the Washington cases ***Sandoval*** and ***Martinez*** both adopted and applied ***Padilla*** to Washington law, neither case addressed the issue of ***Padilla***'s retroactivity, as ***Sandoval*** was a personal restrain petition and ***Martinez*** was within the one year time limit. ***State v. Sandoval***, 171 Wn.2d 163, 249 P.3d 1015 (Wash., 2011); ***Washington v. Martinez***, 161 Wn. App. 436, 253 P.3d 445 (Wash. App. Div. 3, 2011)(*review denied*). Under RCW 10.73.100(6), a court must have determined that sufficient reasons

exist to require retroactive application of a changed law. Currently, no Washington court has done so.

However, since the trial court's ruling in this case, the United States Supreme Court has made it clear that the decision in ***Padilla*** does not apply retroactively to any cases already final on direct review. ***Chaidez v. U.S.***, __U.S., 133 S. Ct. 1103, 1106-1113,___ L.Ed.2d___ (2013). Defendant's case was final on July 11, 2006, the day her judgment and sentence entered. Defendant did not file a direct appeal and her one year time period for collateral attack expired on July 11, 2007. Defendant filed her motion to withdraw her guilty plea well after her case was final. ***Padilla*** does not apply to defendant as it does not apply retroactively and she is not entitled to relief. The trial court erred in finding that ***Padilla*** controlled.

E. CONCLUSION.

The trial court held a fact finding hearing and decided defendant's untimely motion to withdraw her guilty plea despite a clear directive that it send the motion to the Court of Appeals. The trial court's ruling is woefully devoid of legal analysis and application of case law and the findings of fact and conclusions of law do not support the ruling and are

not supported by the record. The State respectfully requests that this Court reverse the trial court's ruling that granted defendant's motion to withdraw her guilty plea.

DATED: March 22, 2013.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3.22.13 Teresa Kahn
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PIERCE COUNTY PROSECUTOR

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