No. 43814-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

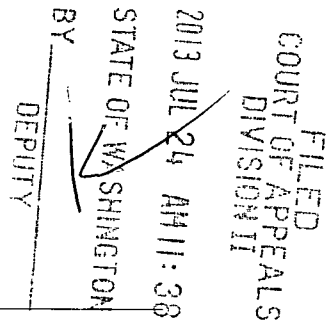
STATE OF WASHINGTON,

Appellant,

v.

BESS OVERMON,

Respondent.



ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Beverly G. Grant, Judge

BRIEF OF RESPONDENT

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A. STATEMENT OF THE CASE IN RESPONSE

1. Procedural Facts

Appellant Bess Overmon was charged by amended information with second-degree theft. CP 3; RCW 9A.56.002(1)(a); RCW 9A.56.040(1)(a). That same day, Overmon entered an Alford[1] plea to the amended information. CP 5-8. She was sentenced to three days of confinement. CP 12-21.

On March 21, 2011, Overmon filed a notice of intent to withdraw her plea and, after further proceedings, a formal motion was filed. CP 34-39 After a hearing before the Honorable Judge Beverly G. Grant on May 11, 2012, Overmon's motion to withdraw her plea was granted. CP 120; 1RP 9. [2] The prosecution appealed and filed an opening brief. See CP 36-40. This response follows.

2. Facts relating to offense

The allegation was that the Ms. Overmon reached into someone's pocket while that person was gambling at a casino and removed some unspecified amount of cash. CP 1-2.

3. Entry of the plea and motion to withdraw

On July 11, 2006, Judge Grant accepted the Alford plea. CP 27.

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[1] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[2] The verbatim report of proceedings in this case originally consisted of three volumes filed as transcripts and a fourth volume filed as clerk's papers. They will be referred to as follows:

the plea and sentencing proceedings of July 11, 2006, filed as clerk's papers, as designated on appeal, at CP 24-33;
the proceedings of May 11, 2012, as "1RP;"
the proceedings of May 29, 2012, as "2RP;"
the proceedings of August 9, 2012, as "3RP."

The parties discussed the fact that Overmon had initially been a "first time offender" but that Overmon had been sentenced to a Theft 2 in March of that year, while proceedings were pending, in another jurisdiction. CP 29.

During the colloquy, the court asked questions about whether Overmon understood that the court did not have to accept the agreement, that the court could impose certain costs and fees, and if she understood "that if you are not a citizen of the United States that the entry of this plea would be grounds for deportation or denial of rights to enter the United States." CP 29-30. The court read the plea statement indicating that Overmon was pleading "to take advantage of the state's offer" and that there was a "substantial likelihood of conviction" if she went to trial. CP 31. The court heard from Overmon's counsel about the circumstances of the incident and asking the court to follow the recommendation for a sentence of credit for the three days served. CP 31-32. The attorney went on:

> She, as my understanding, has consulted with an immigration attorney and that shouldn't lead to problems with this charge 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 32.

In the written statement of defendant on plea of guilty, there was no signature or other indications next to "boilerplate" language which provided "I am [_] am not [_] a United States citizen," and further provided that "a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization." CP 4-8. In contrast, in another

section, there were initials next to every section which was stricken out. CP 7.

In Fall of 2011, Overmon moved to withdraw her plea. CP 34-102. She argued that she should be allowed to withdraw her plea because she had been misadvised by counsel in entering the plea that there would be no deportation or other immigration consequences as a result of the plea but it turned out she was being subjected to removal proceedings because of the entry of the plea. CP 42-43. She noted that she had already served her sentence and had thought the matter was behind her but when she returned from a trip to England to visit her sick mom, she was stopped at the airport and, shortly thereafter, "the United States government initiated removal proceedings" against her which "continue to this date." CP 43.

In that briefing, Overmon discussed the applicability of Padilla v. Kentucky, __ U.S. ___, 130 S. Ct. 1473, 176 l. Ed. 2d 284 (2010), and recent cases on the topic, including State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011), in which the defendant was given incorrect advice about the immigration consequences of his plea at the same time he received a boilerplate warning from the court regarding immigration consequences. CP 46-48. She cited the relevant U.S. code provisions which establish that a person having been convicted of a "crime involving moral turpitude" is grounds for deportation or exclusion, as well as caselaw establishing the theft is considered such a crime for immigration purposes. CP 46-48. She also noted that, under those statutes, a "legal permanent resident" such as herself can be deported for a first conviction of a crime of moral turpitude if the crime is punishable by more than a year in custody and was

committed within five years of admission to the United States). CP 47. For a *second* conviction for theft, however, deportation is triggered "no matter the time of entry or length of the potential jail sentence." CP 47, citing, 8 U.S.C. § 1227 (1)(2)(A)(ii).

Overmon also noted that, even for the first conviction for theft, a legal permanent resident such as Overmon who leaves the United States and then tries to reenter can be denied such entry because of that conviction even if the conviction would not ordinarily trigger deportation. CP 47; see 8 U.S.C. § 1182(a)(2)(A)(i).

Overmon stated that her appointed attorney for the plea, Mr. DePan, told her that the "amount" taken in theft would control and protect Overmon against potential immigration consequences. CP 47. This was false, however, because the second conviction meant Overmon was subject to deportation regardless of length of the sentence or timing of the offense. CP 47-48. In addition, Overmon pointed out, DePan did not notify her that if she ever left the U.S., the conviction would bar her from reentry. CP 48. Finally, she argued that Padilla applied retroactively and that persuasive authority from the state and federal courts mandated that the Court find that Padilla and its progeny "do not create or constitute a 'new rule' but instead represent a significant change in the law." CP 47-48.

At the hearing on the motion to withdraw, DePan, who was former counsel, testified about what advice he gave and what he believed happened at the entry of the plea. 1RP 1-12. He initially said he could not recall specifics and only knew what his "typical practices" were in the

past. 1RP 5-7. Ultimately, he admitted to spending possibly about three hours with his client. 1RP 6-7. He also said it was possible other attorneys had covered early proceeding, conceding that he had a note from one such attorney in the file. 1RP 8. He did not recall conversations about immigration with Ms. Overmon but had read the transcript of the hearing. 1RP 8. He also said he would usually have asked if someone was a U.S. citizen, then recalled that he had learned on this case that Overmon was not a citizen, and thought she had a green card and was a "legal resident." 1RP 8. He said he would usually have contacted someone at the Immigrant Rights Project to find out "what the risk was" and he would have passed on that information to Overmon. 1RP 8-9. He did not recall specifically what that would have been, if it happened that way with Overmon. 1RP 9.

Actually, DePan admitted, it seemed that Overmon might have had another attorney who handled immigration matters, so he would not necessarily have talked to anyone and might just have "exceeded to whatever that immigration attorney said," assuming that attorney would know more. 1RP 9. He did not recall if someone had contacted him, though, and said they were an attorney, but did know he "somehow got the impression" such an attorney existed. 1RP 10.

DePan conceded that, based on what was said at the plea hearing, his advice to Overmon was based on his understanding that the value of the item allegedly stolen was such that "it shouldn't have any deportation effects for her." 1RP 10.

DePan admitted he would not have discussed "exclusion" at all.

1RP 9-10. He said he would not ever go into exclusion usually. 1RP 11.

Bess Overmon testified that she had not herself consulted with an immigration attorney at the time of the entry of the plea in this case. 1RP 13. She did not remember discussing her immigration status with him but she did remember telling DePan that she wanted to get the case over quickly, so that she could try to go home to Nigeria for a visit. 1RP 14. She thought he then asked if she was an immigrant and, when she said, "[y]es," that he said, "[w]ell, for the amount I don't think that would be a problem." 1RP 14.

When asked about how much time he spent with her, Overmon noted that DePan was not the only attorney who showed up to represent her over the short course of her case. 1RP 16.

Overmon testified about being stopped after coming home from a visit to England and the immigration proceedings then starting. 1RP 14-15. She only got an immigration attorney in conjunction with those proceedings. 1RP 15. It was only after that, about in 2009, that she got an immigration lawyer who ultimately advised her to contact someone about her plea. 1RP 17-19.

Overmon was clear that she did not have a conversation with her attorney about any immigration consequences to the plea. 1RP 15. She also said that if she had known there was going to be a problem with her immigration status, she would have taken her case to trial. 1RP 15.

In ruling, the trial court noted that it appeared that the "controlling case" was Padilla. 1RP 19. The parties argued about whether the issue was "time-barred," noting a new case where the court of appeals had held

that ineffective assistance under Padilla was not so barred, and another case to the contrary. 1RP 19-20. Counsel noted that Padilla had emphasized the fact that for at least 15 years "professional norms" imposed an obligation to give advise on immigration consequences. 1RP 23. The court noted that it appeared the issue was not "retroactivity" but rather whether counsel was ineffective. 1RP 23. The court made a finding that counsel was ineffective and that Overmon was not fully informed of the consequences of her plea. 1RP 24.

B. ARGUMENT IN RESPONSE

1. THE PROSECUTION FAILS TO CITE TO OR APPLY THE RELEVANT STANDARDS OF REVIEW AND FAILS TO PROPERLY CHALLENGE THE FINDINGS AND CONCLUSIONS REGARDING INEFFECTIVE ASSISTANCE AND THE GROUNDS FOR WITHDRAWAL OF THE PLEA

In its opening brief on appeal, appellant state argues, *inter alia*, that the trial court's findings "are not supported by the record or case law." Prosecution's Opening Brief (hereinafter "POB") at 6. More specifically, the prosecution declares, "the trial court's ruling that [the] defendant received ineffective assistance of counsel was not supported by the record," and that the trial court "did not even attempt to make the proper finding in light of the case law." POB at 10. In making these claims, the prosecution refers to several findings and conclusions and declares them "unsupported" by the record. POB at 10.

None of these arguments withstand review.

a. The prosecution has failed to properly challenge the lower court's findings

RAP 10.4(c) requires that, when "a party presents an issue which

requires study of a . . . finding of fact. . .the party should type the material portions of the text out verbatim or include them by copy in the text or in an appendix to the brief." See RAP 10.4(c); see In re Estate of Palmer, 145 Wn. App. 249, 264-65, 187 P.3d 758 (2008).

This Court's General Order 1998-2 (In Re the Matter of Assignments of Error) is also relevant. General Order 1998-2 (In Re the Matter of Assignments of Error). In that Order, this Court made a waiver of the requirement of a separate assignment of error for each finding of fact or conclusion of law challenged. General Order 1998-2 (In Re the Matter of Assignments of Error). But this Court cautioned that this waiver does not give parties license to fail to follow other parts of the Rules regarding proper briefing. Indeed, the Order specifically declares, "[t]his waiver is not intended . . : to relieve an appellant or cross-appellant of the duty to provide the verbatim text of any challenged. . . finding of fact, as required by RAP 10.4(c)."

Nowhere in the prosecutor's opening brief on appeal does there appear a verbatim text of any of the findings of fact the prosecution is challenging on appeal. See POB at 1-16. The prosecution has thus failed to provide this Court with the required information in order to decide the prosecution's claims under RAP 10.4(c). This Court should decline to comb the record to determine the actual language of the findings the prosecution wishes to challenge. See, e.g., Palmer, 145 Wn. App. at 264-65.

b. The prosecution has failed to argue the proper standard of review for its challenge to the factual findings and its claims are belied by the record

Even if the prosecution had not failed to properly challenge the lower court's findings, the prosecution would not be entitled to relief, because its arguments depend on what appears to be a misunderstanding about the proper standard of review and the requirements for challenging findings of fact on appeal, the prosecution has failed to properly challenge the findings and the prosecution cannot show that the trial court's conclusions and findings were in error.

First, the prosecution utterly fails to mention the proper standards which apply. POB at 1-16. Where, as here, a trial court has made factual findings, as this Court has recently noted, it views those findings with deference. See Wright v. Dave Johnson Ins. Inc., 167 Wn. App. 758, 275 P.3d 339, review denied, 175 Wn.2d 1008 (2012). In addition, the Court will "view the evidence and all reasonable inferences in the light most favorable to the prevailing party" when looking at challenged findings. 167 Wn. App. at 778.

Thus, in reviewing the trial court's findings of fact, this Court uses a deferential standard of review and takes the evidence and all reasonable inferences therefrom in favor of Ms. Overmon, the prevailing party below.

Here, the prosecution does not even mention - let alone address - this part of the standard of review. POB at 9-13. Yet the standard of review is crucial to knowing what quantum of evidence will be required to overturn the trial court's decision, to whom the benefit of reasonable inferences will flow and, ultimately, whether an appellant should be

granted relief. See Ronald R. Hofer, "*Standards of Review - Looking Beyond the Labels*," 74 MARQ. L. REV. 231, 232 (1991).

Thus, because of the deferential standard of review which applies, this Court will not disturb a trial court's finding of fact unless there is not "substantial evidence in the record" to support it. See State v. Echevarria, 85 Wn. App. 777, 782, 934 P.2d 1214 (1997). "Substantial evidence" is simply enough evidence to convict a rational, fair-minded trier of fact of the truth of the declared premise. Id. Further, "substantial evidence" can exist in the record even if there is conflicting evidence presented at trial. See Jarrard v. Seifert, 22 Wn. App. 476, 478, 591 P.2d 809 (1979).

It is these standards and principles which apply when an appellant argues that the trial court's findings of fact are "unsupported" by the record.

The prosecution first fails to cite to these standards and then fails to apply them to its claims about the facts below. For example, the prosecution paints a picture of a lower court judge who "simply" decided the motion below with "no analysis of the record and no application of case[s]" or of "case law at all." POB at 10. According to the prosecution, the trial court's findings were somehow wrong because the prosecution believes "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." POB at 10. Most egregious, the prosecution accuses, "[t]he trial court did not review the entire record" in making its decision. POB at 10.

But the record belies these claims. That record shows that, just

prior to hearing the arguments of the parties, Judge Grant specifically declared, "I've read the paperwork" that was filed in the case. 1RP 19. Further, in the written findings of fact and conclusions of law, Judge Grant detailed those materials that she considered, i.e., "the written motion of the Defendant, the response by the State, the arguments of undersigned counsel and the testimony, docket, records and documents in the case[.]" CP 116.

The prosecution has not assigned error to those representations by the judge, let alone shown that those declarations were somehow false. See POB at 9-13. And just because the judge did not rule the way the prosecution hoped is not proof that the judge betrayed her duties and lied in court documents and open court about whether she had read materials submitted to her in a criminal case.

Further, contrary to the prosecution's efforts to portray the judge's decision as made based on a "question" and without analysis or consideration of the caselaw or record, here the judge was an active participant in the proceedings, commenting throughout. First, before hearing testimony, the judge said, "I have read the briefs. I know basically the arguments being proffered." 1RP 3. Then, after hearing testimony from DePan and Overmon, the judge again stated that she had "read the paperwork," talked about whether Padilla was "the controlling case" and noted "some other cases" and similarities between Minnesota and Washington law. 1RP 19. A few moments later, the court heard lengthy argument about whether Padilla should control, what our courts of appeals have done recently, a case the prosecutor wanted to cite but could not give

specifics on because he had "printed out only the cover sheet," and the prosecution's theory that too much time had gone by, among other things. RP 23.

Throughout, the judge actively participated in arguments, noting at one point that one party's position was "the issue is not so much as to whether it's retroactive or not, but the key gravaman of the issue is whether or not was there an effective or ineffective assistance of counsel." 1RP 23.

The prosecution's attempts to portray the trial court as making a decision without even thinking about the law and facts are answered by the record, which shows that the court not only read and was familiar with the materials but knew cases and other matters which had been discussed in the documents filed by the parties.

Under scrutiny, the prosecution's other claims about the trial court's findings fare no better. The "findings" it claims are "not supported by the record" are, in fact, more than amply so supported. Again, however, the prosecution's failure to cite the relevant standard of review is telling. That standard requires taking the evidence in the light most favorable to Overmon and drawing reasonable inferences therefrom in her favor. See Wright, 167 Wn. App. at 778.

Applying that standard, the prosecution's apparent challenges to findings 4, 6, 11 and 12, and to conclusions 1, 2, 3, 4, 5 and 6 do not withstand review. See POB at 1. Again, because the prosecution failed to provide this Court with the "verbatim text" of the findings it purports to challenge, it is difficult to determine the actual allegations of the state and

Overmon submits that this Court should decline to comb the record for the prosecution in order to make the prosecution's case.

But in any event, the prosecution's assertions about the lack of evidence to support most of the trial court's findings are simply wrong. For example, the prosecution assigns error to Finding 6, which the prosecution summarizes as holding "that the time Mr. DePan was able to spend with defendant was no more than three hours." POB at 11. The prosecution declares that finding is "not supported by the record," based on its belief that "Mr. DePan had no independent recollection of this case." POB at 11.

There is no doubt that DePan said, at one point, that he had no such recollection. But he was also specifically asked about "how much time over the course of the entire case up to the point of the plea hearing" he had spent with his client and, in answer, he declared, "[i]n total I think three hours would be the outside." 1RP 7.

Indeed, DePan repeated this affirmation a few moments later when the parties returned after a recess off the record for another matter and the following exchange occurred:

> Q: I think we were talking about the totality of time that you spent, and you estimated the entirety of the case would have been three hours at the most?
>
> A: I think so, yes.

1RP 7.

It is difficult to conceive how the prosecution could so baldly declare that the trial court's finding, in finding 6, that DePan spent no more than 3 hours with Overmon prior to the entry of the plea is "not

supported by the record," given this testimony.

The prosecution also apparently challenges finding 4, again without providing that finding to the court. POB at 10. The prosecution says that the trial court's findings "reflect that Mr. DePan would not always represent defendant and had other counsel cover routine hearings," but that "[t]his is not supported by Mr. DePan's testimony" because, again, DePan said he had no independent recollection of the case and only had one note in his file from another attorney. POB at 10.

Again, the record belies the prosecution's claim. Below, DePan was specifically asked if it was "possible" that he had "coverage counsel on some of [Overmon's] earlier hearings," because "at times counsel get stuck in other courts." 1RP 7. DePan answered, "[t]hat's definitely true," that he had "a note in the file" from another attorney, Jane Pierson, "who did talk to Ms. Overmon on a date when I wasn't there, and she was covering for me." 1RP 7-8. Later, while she was testifying, Overmon was asked about how much time she spent with DePan prior to entering the Alford plea. 1RP 16. In answering, Overmon also noted that,"like three or four different times that I was here there was another attorney, I think his name was Bob too" and that this man and "another lady" had handled the case when DePan was not there. 1RP 16. This evidence is more than sufficient to uphold the trial court's finding in finding 4.

The other two findings the prosecution attempts to challenge appear to be findings 11 and 12. Again without setting those findings forth, the prosecution declares that there was no "support" for those "findings [which] reflect that Mr. DePan wasn't sure how much of the

information came from him and that he admitted that it was inaccurate." 1RP 11. Also on the same topic, the prosecutor faults the court for failing to make a finding that "DePan was clear that he was not an expert on these issues and so consulted with people who were." POB at 11.

Taking the former claim first, the prosecution has waived any argument of error for failing to make the factual finding. A party may not challenge a trial court's failure to make findings unless that party has submitted a contrary finding and had that submission rejected. See Downie v. Cooledge, 48 Wn.2d 485, 493, 294 P.2d 926 (1956). Here, not only did the prosecution not propose any "missing" finding to the trial court, the prosecutor did not object even orally to such "failure" below. 2RP 3, 3RP 2.

Regarding the other part of the findings, the prosecution does not even correctly summarize what they provide. The actual finding in finding 11 was that DePan "was not certain of the source of the misinformation provided to the Defendant - that the amount allegedly taken by Ms. Overmon would not subject her to deportation or exclusion if she pled guilty to Theft 2 - - whether that was from him or someone else." CP 117. The court also found, in finding 12, that DePan had confirmed at the motion hearing that Overmon had received the inaccurate information about the consequences of her guilty plea at the time of the plea and sentencing. CP 117.

The prosecution has not explained how these findings were unsupported by the record. DePan testified that, while he did not remember exactly what he said when he spoke to Overmon, he saw in the

record of the plea hearing that he had told Overmon that "this was a small enough or a de minimus amount alleged to have been stolen that it shouldn't have any deportation effects for her." 1RP 10. Further, the attorney admitted he would never have discussed exclusion with his client, because he did not know anything about that immigration consequence. 1RP 11. DePan recalled finding out Overmon was not a U.S. citizen and thought he would have contacted someone at the Immigration Rights Project to find out "what the risk was" but would not recall what he specifically advised Overmon. 1RP 9. And DePan thought he "would have then passed on to her what he told me and what her risks were" but also said it seemed that Overmon may have had an immigration attorney and in that case DePan would have "just exceeded to whatever that immigration attorney said." 1RP 9. Ultimately, DePan admitted, that it was his understanding "from talking to her [Overmon], was that she shouldn't face a deportation problem with this." 1RP 12.

The prosecution has not explained how this evidence is somehow insufficient to support the court's findings below, given the proper standard of review. Taking this evidence in the light most favorable to Overmon and drawing all negative inferences therefrom, the trial court's findings in finding 11 and 12 were more than amply supported.

Notably, the prosecution never once disputed below that the advice Overmon received about there being no potential immigration consequences because of the amount stolen was wrong. Instead, the prosecution argued about whether the case was time-barred, whether Padilla represents a "new rule," whether counsel was ineffective if the

immigration consequences were "collateral" and whether counsel was ineffective under Padilla because Overmon's "immigration consequences were unclear." CP 110.

The prosecution also challenges as "unsupported" conclusions of law 1, 2, 3, 4, 5 and 6. POB at 1. At the outset, the prosecution has failed to argue which portion of these conclusions of law are actually findings of fact which should be subject to review as such. POB at 1-14. But the standard of review for a finding of fact is different than the standard of review for a conclusion of law. See, e.g., State v. Cerrillo, 122 Wn. App. 341, 348, 93 P.3d 960 (2004).

In any event, the declarations the prosecutor finds fault with were all supported by substantial evidence in the record. The prosecution declares that there is "no evidence" to support conclusion of law 1, which provides, in relevant part, that "defendant intended to push the case to trial." POB at 12. "No evidence" implies that there was absolutely nothing upon which the court below could rely in making a factual finding. See, e.g., State v. Collins, 110 Wn.2d 253, 254 n. 1, 751 P.2d 837 (1988). But here, in her declaration, Overmon specifically declared that she "wanted to take the matter forward to trial" and that she would not have entered the plea if she had known about the immigration consequences it would trigger and would have gone to trial if she had known, as she "wanted to do in the first place." CP 36-37.

As if that was not enough, Overmon stated the following in her sworn testimony at the hearing: that she had "no idea this was going to be a problem" with her immigration status, and that if she would have known,

she would have "taken it to trial." 1RP 15. It was also established that she had set the case to go to trial before ultimately taking the plea. 1RP 15.

This is far more than "no" evidence to support the trial court's finding, in conclusion of law 1, that Overmon had set the matter for trial and "intended to push it to trial." That is, in fact, more than substantial evidence, sufficient for a fair-minded, rational trier of fact to have made the finding.

Further, this same evidence supports the conclusion the prosecution challenges as a "logical leap and not supported by the record" - that ineffective assistance of counsel and misinformation caused Overmon to resolve her case by plea. See POB at 12 (apparently challenging conclusion of law 5). Not only did Overmon testify to that effect, in her declaration she said that counsel told her the crime to which she was pleading "would not have any effect on anyone's immigration status because a Theft 2 involved a small amount of loss," and that she remembered him saying she did not think "that would be a problem" because of the amount involved. 1RP 14; CP 38. She remembered it because she was planning to go back to Nigeria at the time and she wanted to get things over so she could try to save money for the trip. 1RP 14.

Further, although the prosecution declares that there is nothing below indicating that there were proceedings pending in federal court, the prosecution itself declared in its briefing, "[t]he United States government has subsequently initiated removal proceedings against Ms. Overmon." CP 103.

The prosecution also suggests that counsel failed to "flesh out"

below that the advice Overmon got "may or may not" have been inaccurate. POB at 12. Again, the prosecution has failed to set forth verbatim the relevant conclusions, let alone indicate the specific language of those conclusions it claims are 1) findings of fact improperly designated as conclusions of law and 2) unsupported by sufficient evidence on review. POB at 13.

Further, the prosecution has waived the bulk of these claims. In finding 13, the trial court specifically found:

> Following the entry of her guilty plea and sentencing in this matter, Ms. Overmon heard from U.S. immigration authorities and discovered that, as a result of this plea, she was subject to both deportation and exclusion. U.S. immigration authorities have initiated deportation proceedings against Ms. Overmon.

CP 119. The prosecution has not assigned error to Finding 13. See POB at 1-16. Unchallenged findings are verities on appeal. State v. Hill, 123 Wn.2d 641, 646, 870 P.2d 33 (1994).

The finding in finding 13, unchallenged by the prosecution, clearly answers the question of whether there were, in fact, federal immigration matters pending.

And again, the prosecution is simply wrong in declaring that there was "no evidence" of such matters. Overmon's statement specifically declares that the federal government has "initiated an exclusion action" against her. CP 37. Overmon's sworn testimony similarly details that she had gotten stopped by immigration on her way back from the U.K. and that she was told there that she was "going to get a mail from the immigration court asking me to show up in court to defend this charges, that it was enough to trigger deportation." 1RP 16. She also testified that

she was told by her immigration attorney that she needed to "go back and take a look at the case." 1RP 17. And she described it having been a year before she "had to show up in immigration court." 1RP 18.

Further, in his pleadings on Overmon's behalf, counsel specifically argued the sections of 8 U.S.C. which applied. CP 46. He noted that someone convicted of a crime "involving moral turpitude" can be deported or excluded, that thefts are included in that definition, and that a second crime for moral turpitude triggers deportation no matter what. CP 47. He explained that Overmon had received guidance from DePan that the amount was insignificant and noted that, because Overmon had just entered a plea in another case, counsel should instead have known that the plea he was counseling her to enter would be a second conviction for "moral turpitude" because it was another theft, so that Overmon should have been told about the immigration consequences. CP 47-48.

The prosecution itself found and discussed the same sections of the federal code, although declaring that those provisions were "unclear" because "determining whether a particular crime is a crime involving moral turpitude is not an easy task." CP 49. But the prosecution never disputed that "theft" has long been recognized as a class "crime of moral turpitude" for immigration purposes. CP 103-11.

And again, the prosecution seems to focus only on the evidence it thinks the lower court should have looked at in making its decision, not all of the evidence the court had below.

The prosecution's challenges to the findings and conclusions are improperly brought, framed without compliance with this Court's

mandatory rules and unsupported by citation to the proper standards of review. The trial court did not err in finding that Overmon was not fully informed of the consequences of her plea and that her plea was not knowing, intelligent and voluntary. The prosecution's arguments to the contrary should be summarily rejected by this Court.

2. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S ORDER GRANTING OVERMON'S MOTION TO WITHDRAW HER PLEA

The prosecution also argues that the trial court should have transferred the case to this Court as a Personal Restraint Petition and that the court erred in finding that Padilla should be applied. POB at 1-16.

This Court should affirm the trial court's grant of the motion in this case. First, the prosecution has waived any argument that the trial court should not have heard evidence on the motion below, because the prosecutor failed to object - and even agreed - to the procedure. Although the prosecution argued in its response that the case should be transferred, it did not object at the hearing to having the trial court hear evidence. Instead, at the motion hearing, when the court indicated it wanted to hear testimony from counsel, the prosecutor did not object, instead declaring, "I am here to do whatever the Court wishes me to do." 1RP 3.

Second, while the prosecution is correct that the Supreme Court's subsequent decision in Chaidez v. U.S., __ U.S. __, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013), declared that the decision in Padilla was a "new rule" and that it should not apply retroactively in federal habeas cases, that does not answer the question here. Nor does it mean that the ineffective assistance Overmon received when counsel affirmatively misinformed her

about the immigration consequences of the plea cannot be redressed. An appellate court may affirm a trial court's decision on other grounds supported by the record. See State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

First, Chaidez does not control, because state courts are free to follow that ruling or grant greater relief to their citizens under their own laws of retroactivity. See Danforth v. Minnesota, 552 U.S. 264, 128 S. Ct. 1029, 169 L. Ed 2d 859 (2008). Washington has granted greater relief on collateral review than the constitutional minimum set in federal habeas cases. See, State v. Brand, 120 Wn.2d 365, 368, 842 P.2d 470 (1992). Indeed, our state laws on collateral review contains exceptions to the general one-year time limit (in RCW 10.73.100) which our highest court has described as "broad" and which the Court further stated were drafted that way in order to preserve the important role of collateral relief in ensuring justice. Brand, 120 Wn.2d at 368.

And the scope of relief and grounds for relief permitted under our laws is, in fact, greater than that provided under the federal habeas standards or in federal courts. See In re Runyan, 121 Wn.2d 432, 443, 853 P.2d 424 (1993).

In general, the Supreme Court has maintained some degree of "congruence" between the retroactivity analysis used in this state and the standards for retroactivity articulated by the U.S. Supreme Court. See In re Markel, 154 Wn.2d 262, 268, 111 P.3d 249 (2005). The Court has used the standard set forth in the plurality of Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), which applies "new" rules of

conduct of criminal prosecution to cases on collateral review only in specific situations, including that the rule "requires the observance of procedures implicit in the concept of ordered liberty." Teague, 489 U.S. at 301.

But our courts have yet to examine the confluence of our broad legislative grant of authority to grant relief when necessary in the interests of justice and the standards of Teague. Further, it does not appear that any Washington court has yet been presented with or addressed the implications of Danforth on the scope of that relief.

In Danforth, the U.S. Supreme Court specifically rejected the idea that the Teague analysis was in any way binding on the authority of state courts "to give broader effect to new rules of criminal procedure than is required" under Teague. Danforth, 552 U.S. at 267. The petitioner in Danforth had lost on direct appeal and his conviction had become final several years before the U.S. Supreme Court had held, in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), that testimonial statements must be excluded unless the defendant has the opportunity for cross-examination. Danforth, 552 U.S. at 267-68. In looking at his subsequent petition seeking relief, the highest court in Minnesota rejected his claims under Teague, finding that Teague mandated that result and that state courts were **required** to follow the Teague standard for retroactivity in deciding whether to grant state citizens relief under Crawford's new holding. Danforth, 552 U.S. at 268.

On review, the U.S. Supreme Court rejected that idea completely.

Beginning with discussion of the Fourteenth Amendment, the Danforth Court noted that the ratification of that amendment "radically changed the federal courts' relationship with state courts." 552 U.S. at 269-70. The Fourteenth Amendment had imposed "minimum standards of fairness on the States," the Court noted, which required them to provide defendants with the protections "implicit in the concept or ordered liberty." 552 U.S. at 269-70.

Next, the Court discussed its "somewhat confused and confusing 'retroactivity' cases," finding fault with even using the term "retroactivity," because that implies that "the right at issue was not in existence prior to the date the 'new rule' was announced." Danforth, 552 U.S. at 271. Instead, the Court held, "the underlying right necessarily pre-exists our articulation of the new rule." Id. The issue, the Court declared, is thus not "retroactivity" but "whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought." Id.

The Danforth Court then made it clear that Teague and its predecessor did not answer the question of "whether States can provide remedies for violations" of newly defined rights "in their own postconviction proceedings." Danforth, 552 U.S. at 275. Instead, the Court stated, those cases considered only "what constitutional violations may be remedied on federal habeas." 552 U.S. at 275.

Put simply, the Danforth Court declared, the Teague opinion makes it "clear that the rule it established was tailored to the unique context of federal habeas and therefore had no bearing on whether States

could provide broader relief in their own postconviction proceedings than required by that opinion. Danforth, 552 U.S. at 277.

The Danforth Court further noted that its rule of "nonretroactivity" in Teague was based on the Supreme Court's "power to interpret the federal habeas statute." Danforth, 552 U.S. at 278. As a result, because Teague was "based on statutory authority that extends only to federal courts applying a federal statute," the holding of Teague "cannot be read as imposing a binding obligation on state courts." 552 U.S. at 278-79.

In addition, the Court declared, the Teague rule of "nonretroactivity" was "fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings." Danforth, 552 U.S. at 280-81. The Teague rule was not intended to serve as a limit on state courts, the U.S. Supreme Court declared:

> It was intended to limit the authority of federal courts to overturn state convictions - not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions.

Danforth, 552 U.S. at 280-81. The Danforth Court also noted several state decisions in which state courts have decided to give retroactive effect despite a "nonretroactivity" holding of the U.S. Supreme Court. 552 U.S. at 285-86.

Put another way, the Court held, "the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law." 552 U.S. at 288. Federal law simply sets the minimum but states are free to exceed that minimum in providing its citizens "appropriate relief." Id. It is not "misconstruing the federal

Teague standard" for a state to give broader retroactive effect to the U.S. Supreme Court's "new rules of criminal procedure;" instead it is the exercise of the state in its own laws governing retroactivity in the post-conviction proceedings in that state. Danforth, 552 U.S. at 288. And the Court dismissed concerns of "nonuniformity" of results in different states which might arise, noting that "such nonuniformity is a necessary consequence of a federalist system of government." Danforth, 552 U.S. at 290.

The Court concluded,

> A decision by this Court that a new rule does not apply retroactively under Teague does not imply that there was no right and thus no violation of that right at the time of trial - only that no remedy will be provided in federal habeas courts.

552 U.S. at 289.

It does not appear that our Supreme Court has ever addressed or discussed the holding of Danforth. Instead, it appears that the Court has simply followed its pre-Danforth ruling that the Teague analysis should be followed. See In re Pierre, 118 Wn.2d 321, 823 P.2d 492 (1992).

Yet the Court has itself recognized that the exceptions of RCW 10.73.100 are broader than required to meet the federal minimum, that

> the Legislature chose to write the statute so that it allows exceptions when later developments bring into question the validity of the petitioner's continuing detention. . . These exceptions are broader than is necessary to preserve the narrow constitutional scope of habeas relief. The Legislature, of course, is free to expand the scope of collateral relief beyond that which is constitutionally required, and here it has done so to include situations which affect the continued validity and fairness of the petitioner's incarceration.

Runyan, 121 Wn.2d at 440, 444-45.

Further, the RCW 10.73.100 exceptions to the general one-year time limit are considered "broad" and were drafted that way in order to preserve the important role of collateral relief in ensuring justice. See Brand, 120 Wn.2d at 368.

It was the rule of Teague which the Court applied in Chaidez to hold that Padilla should not apply "retroactively." 133 S. Ct. at 1107. Thus, while Chaidez clearly answers the question of whether relief should be granted in federal court on *habeas* for those claiming error under Padilla, under Danforth it is not dispositive of the question before this Court.

There is an additional threshold issue of whether, under Chaidez, the holding of Padilla would be directly on point with the facts of this case. The Chaidez Court specifically distinguished the Padilla case as involving a failure by counsel to advise their client of potential immigration consequences from cases where courts had held that "misstatements about deportation could support an ineffective assistance claim." Chaidez, __ S.Ct. at 1112. That was not the issue in Padilla, the Court noted, which had held that "failure to advise about a non-criminal consequence could violate the Sixth Amendment." Chaidez, __ S. Ct. at 1112-13. It was this holding the Chaidez Court found was a "new rule" which did not apply retroactively. Chaidez, ___ S.Ct. at 1112-14.

Thus, under Chaidez, the holding of Padilla is limited not only in its application in federal habeas cases but also to the facts at issue in Padilla - i.e., the situation where there is *no* advice about a non-criminal consequence. That fact pattern in Padilla was specifically distinguished by

the Chaidez Court from the fact pattern here, where the issue was whether "a lawyer may not affirmatively misrepresent his expertise or otherwise actively mislead his client on any important matter, however related to a criminal prosecution." Chaidez, __ S. Ct. at 1113. In Chaidez, the petitioner relied on cases holding that such misrepresentation could be deemed ineffective assistance as evidence that the holding of Padilla did not announce a "new rule." Chaidez, ___ S. Ct. at 1111-13. The Court disagreed those cases were related to the holding of Padilla, stating that those cases simply showed that some courts "recognized a separate rule for material misrepresentations, regardless whether they concerned deportation or another collateral matter," but again pointing out that the claim in Padilla was not that there were misrepresentations but that there was a duty to advise which was not met. Chaidez, __ S. Ct. at 1112.

Washington law follows the rule that affirmative misadvice on a "collateral" consequence of a plea such as deportation can amount to a manifest injustice sufficient to support withdrawal of a plea. See, e.g., State v. Stowe, 71 Wn. App. 182, 858 P.2d 267 (1993). This is so even though defense counsel does not have an affirmative obligation to inform a client of all possible collateral consequences of a plea. 71 Wn. App. at 187. As this Court noted in Stowe:

> [T]he question here is not whether counsel failed to inform defendant of collateral consequences, but rather whether counsel's performance fell below the objective standard of reasonableness when he affirmatively misinformed Stowe of the collateral consequences of a guilty plea.

71 Wn. App. at 187. Further, this Court noted, such misadvice is "especially problematic" where, as here, a defendant enters an Alford plea.

Stowe, 71 Wn. App. at 187-88. Because the defendant in such a case denies guilt and such pleas represent a balancing of the various options rather than an admission of guilt, this Court said, a defendant who learns of additional potential consequences of such a plea may rapidly change their calculations about the costs and benefits of standing trial instead of accepting a plea. 71 Wn. App. at 188. As a result, this Court declared, "it may be manifestly unjust to hold the defendant to his earlier bargain." Stowe, 71 Wn. App. at 188.

Here, it would be unjust to reverse the trial court's decision that withdrawal of the plea was required. Overmon established to the trial court's satisfaction that she would not have entered the plea had she known it would mean deportation. The unchallenged findings show that deportation proceedings were the result. And counsel established below that counsel could have easily discovered that the crime was one of "moral turpitude" and that a second conviction was deportable.

This Court can affirm the trial court's decision on any ground supported by the record. Ms. Overmon entered a plea based upon misadvice by counsel which only came to light years later. She is now facing deportation as a result. Clearly, if she had been advised of these immigration consequences prior to the passage of the 30 day time limit for exercising her constitutional right to appeal, she would have. She was deprived of that right, however, because she was not aware of counsel's misstatements and ineffectiveness until years later, prior to filing the motion in this case. This Court should decline the prosecution's efforts to force Overmon to suffer deportation based upon her mistake in trusting

counsel's erroneous advice.

C. CONCLUSION

The trial court did not abuse its discretion in entering its findings and the prosecution's claims to the contrary are unsupported by proper argument or the evidence. Further, this Court should affirm the trial court's decision allowing withdrawal of the appeal because Overmon was affirmatively mislead about the immigration consequences of the plea and counsel was ineffective.

DATED this 22nd day of July, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel at the Pierce County Prosecutor's office, first class postage prepaid to Melody Crick, 930 Tacoma Ave. S, Room 949, Tacoma, WA. 98402 and Bess Overmon, 9917 Levesque Rd. E., Buckley, WA. 98321.

DATED this 22nd day of July, 2012.

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