

71802-9

71802-9

No. 71802-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,  
Respondent,  
v.  
SACIID NADIF,  
Appellant.

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FILED  
JAN 11 2011  
CLERK OF COURT  
JAN TRASEN  
ATTORNEY FOR APPELLANT

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY

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OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it denied Mr. Nadif's motion to withdraw his plea of guilty.

2. In the absence of substantial evidence in the record, the trial court erred in finding that Mr. Nadif's trial attorney "clearly advised that it was a matter of 24 months or 10 years when deportation would occur." CP 35.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A defendant is denied his constitutional right to the effective assistance of counsel when his attorney fails to inform him that he is pleading guilty to a crime which is a deportable offense. Mr. Nadif pled guilty to an offense which renders him clearly deportable to the country of his birth, Somalia, and he later moved to withdraw his plea. Mr. Nadif testified his attorney never informed him he would be deported. Instead, his attorney testified he told him he might not be deported, due to the unstable political climate in his home country. Did the trial court abuse its discretion in denying Mr. Nadif's motion to withdraw his guilty plea based on ineffective assistance of counsel?

C. STATEMENT OF THE CASE

Saciid Nadif was born in the war-torn country of Somalia and moved to the United States approximately 18 years ago. 3/7/14 RP 29-31. He immigrated with his siblings as a teenager, and obtained refugee status in Seattle; he has lived here ever since. Id. Mr. Nadif considers Seattle – and moreover, the United States -- his home, and has no intention of returning to the dangers of his homeland. Id.

Following an argument with his wife on January 5, 2013, Mr. Nadif was charged with one count of assault in the second degree, domestic violence. CP 1-2. An enhancement was added because the incident occurred while the couple's 11 year-old child was home. RCW 9.94A.535(3)(h)(ii); CP 1-2.

On October 17, 2013, Mr. Nadif pled guilty to the charge, in exchange for an agreed-on sentencing recommendation of 24 months incarceration: 9 months for the assault, and 15 months for the enhancement. 10/17/13 RP 3-16; CP 12-26.

On December 20, 2013, Mr. Nadif informed the trial court that he intended to move to withdraw his guilty plea, and new counsel was appointed. 12/20/13 RP 2-4; CP 90.

On March 7, 2014, an evidentiary hearing was held on the motion to withdraw the guilty plea. Mr. Nadif argued he should be permitted to withdraw his plea because his attorney had not informed him of the immigration consequences of his guilty plea. 3/7/14 RP 34, 39-40, 43-44. Mr. Nadif also argued that his plea had not been knowingly, voluntarily and intelligently entered. *Id.* at 39-42. Following an evidentiary hearing at which Mr. Nadif's former trial counsel and Mr. Nadif both testified, the trial court denied Mr. Nadif's motion. CP 34-36; 3/25/14 RP 4-6.

Mr. Nadif timely appeals. CP 47-49.

D. ARGUMENT

MR. NADIF'S GUILTY PLEA WAS INVALID,  
BECAUSE HIS ATTORNEY DID NOT  
ACCURATELY ADVISE HIM OF THE  
IMMIGRATION CONSEQUENCES OF HIS PLEA.

1. The trial court abused its discretion when it found that Mr. Nadif was adequately advised of the immigration consequences of his guilty plea and denied his motion to withdraw the plea for ineffective assistance of counsel.

Mr. Nadif was deprived of the effective assistance of counsel because his attorney's advice concerning the immigration consequences of his plea was misleading and confusing. Mr. Nadif would not have

taken a guilty plea and risked deportation, had he understood the risks to his immigration status.

A trial court's order on a motion to withdraw a guilty plea or vacate a judgment is reviewed for an abuse of discretion. In re the Personal Restraint of Cadwallader, 155 Wn.2d 867, 879-80, 123 P.3d 456 (2005). A court abuses its discretion when an "order is manifestly unreasonable or based on untenable grounds." State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (internal citations omitted). A discretionary decision "is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." Id. (internal citations and emphasis omitted).

Here, Mr. Nadif's motion was denied on untenable grounds, because the trial court's factual findings are unsupported by the record. The trial court found that Mr. Nadif's trial counsel had "clearly advised" him that "deportation would occur" if he entered a guilty plea. CP 35 (Findings of Fact, Line 8). This finding is not supported by the record, and is inconsistent with the evidence adduced at the evidentiary hearing.

Although Timothy Leary, Mr. Nadif's former trial attorney, testified that he had told appellant that he would be facing "immigration



consequences,” Mr. Leary’s testimony was ambiguous as to what he advised his client those consequences would be. 3/7/14 RP 14-16, 23-25. Mr. Leary testified that he assured Mr. Nadif that the United States “has, for a long period of time, elected to not deport its people ... who are residents or Somali citizens, same for Vietnam and same for a handful of other countries.” Id. at 14 (emphasis added). Mr. Leary suggested Mr. Nadif could arrange a voluntary departure from the United States and return to Somalia. Id. Mr. Leary also discussed looking for an “immigration safe, immigration friendly” option for which Mr. Nadif to plead guilty. Id. at 15.

At the same evidentiary hearing, Mr. Nadif testified that he did not understand from his conversations with Mr. Leary that he was pleading guilty to a deportable offense. 3/7/14 RP 34. Mr. Nadif stated that he was concerned about immigration consequences, and that his attorney discussed the implications of a guilty plea on his green card. Id. at 32-33. Mr. Leary said he would consult an immigration attorney before proceeding further, but Mr. Leary never did so. Id.

Even more importantly, Mr. Leary’s own testimony indicates how equivocal his advice was concerning the immigration consequences that

would befall appellant in “24 months or ten years.” CP 35 (Findings of Fact, Line 8). Mr. Leary first testified as follows:

And what I said to him is that the driving concern that I had in this case was that, you know, he’s going to be facing immigration consequences. The question is, do you face that in two years or do you face that in ten years, based on the State’s representations that they would be seeking ten years [sic] exceptional sentence after trial.

3/7/14 RP 16 (emphasis added).

According to Mr. Leary, he never used the word “deportation” with his client – only “immigration consequences” – in advising him. This testimony came immediately following Mr. Leary’s testimony concerning his advice to Mr. Nadif regarding the United States policy not to deport its residents to Somalia. Id. at 14.

Mr. Leary next testified using the “two or ten years” phrase again, as follows:

I again reminded him of that [adverse immigration consequences], and would have referenced, but again, my prior point of, do you want to face immigration consequences in two years or do you want to face them in ten years, because there wasn’t an option on the table that would have mitigated the immigration consequences.

Id. at 23 (emphasis added).

Again, Mr. Leary testified he used only the phrase “immigration consequences,” and never used the word “deportation” in advising Mr.

Nadif. Id. at 23. Although Mr. Leary later asserted that Mr. Nadif was aware that this was a deportable offense, Mr. Leary equivocated in his testimony, quickly stating, “there were questions as to whether he would be, in fact, deported based on the lack of – the instability in Somalia, but that was a possibility.” Id. at 25.

On this record, the trial court’s findings are not based on substantial evidence, as the court specifically found, “Mr. Nadif was clearly advised that is [sic] was a matter of 24 months or 10 years when deportation would occur.” CP 35 (Line 8) (emphasis added). The record reveals that trial counsel’s advice to Mr. Nadif was anything but clear. The court’s finding that Mr. Nadif was properly advised is therefore untenable, in light of trial counsel’s equivocation and Mr. Nadif’s testimony he was not advised he would be deported. Quismundo, 164 Wn.2d at 504; Padilla v. Kentucky, 559 U.S. 356, 373-74, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010); State v. Sandoval, 171 Wn.2d 163, 175-76, 249 P.3d 1015 (2011); State v. Martinez, 161 Wn. App. 436, 441-42, 253 P.3d 445 (2012); see supra § 2.

2. A criminal defendant is deprived of his constitutional right to counsel where his attorney fails to inform him that he is pleading guilty to a crime which will result in his deportation.

Pursuant to CrR 4.2(f), a defendant may withdraw a plea of guilty “whenever it appears that the withdrawal is necessary to correct a manifest injustice.”<sup>1</sup> A manifest injustice may be established in four non-exclusive ways under CrR 4.2(f): 1) denial of the effective assistance of counsel; 2) a plea not ratified by the defendant; 3) a plea that was involuntary; or 4) a breach of the plea agreement by the prosecutor. State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996) (citing State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991)) (internal citation omitted).

Here, Mr. Nadif moved to withdraw his guilty plea in order to correct a manifest injustice, based upon both the ineffective assistance of counsel, and the involuntariness of his plea. On appeal, he asserts exclusively that trial counsel’s ineffectiveness created a manifest injustice, requiring relief. CrR 4.2(f); Padilla, 559 U.S. at 373-74; Sandoval, 171 Wn.2d. at 173-74.

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<sup>1</sup> A “manifest injustice” must be “obvious, directly observable, overt [and] not obscure.” State v. Pugh, 153 Wn. App. 569, 577, 222 P.3d 821 (2009).

It is well settled that a criminal defendant has a constitutional right to the effective assistance of counsel. U.S. Const. amend VI; Const. art. I, § 22; United States v. Cronin, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)).

In order to show ineffective assistance of counsel, a defendant must show: 1) his attorney’s performance was deficient; and 2) the deficiency of the performance caused prejudice. Strickland, 466 U.S. at 687; State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In the context of a plea agreement, an attorney’s performance may be deficient if he or she fails to inform a client whether a guilty plea carries a risk of deportation. Padilla, 559 U.S. at 373-74. Where the deportation consequence of a plea is clear, counsel has a duty to inform the client that the State is offering a plea to a deportable offense. Id. at

368-69. Where the immigration consequences are unclear, counsel must at least advise a noncitizen client that the charge may carry a risk of adverse immigration consequences. Id. The fact that the standard plea form carries boilerplate warnings does not satisfy an attorney's obligations. Sandoval, 171 Wn.2d at 173-74; Martinez, 161 Wn. App. at 441-42.

To show prejudice, "a defendant challenging a guilty plea must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." In re Personal Restraint of Riley, 122 Wn.2d 772, 780-81, 863 P.2d 554 (1993) (citing Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)). If a decision to reject the plea bargain "would have been rational under the circumstances," prejudice is established. Sandoval, 171 Wn.2d at 175 (citing Padilla, 559 U.S. at 372).

Mr. Nadif was deprived of his constitutional right to the effective assistance of counsel because he was not adequately advised of the adverse immigration consequences of his guilty plea. The trial court abused its discretion by denying Mr. Nadif's motion to withdraw his plea; remand and reversal should be granted. Padilla, 559 U.S. at 373-74; Sandoval, 171 Wn.2d at 175-76; Martinez, 161 Wn. App. at 441-42.

E. CONCLUSION

For the reasons set forth above, Mr. Nadif asks this Court to reverse the order denying his motion to withdraw the guilty plea.

Respectfully submitted this 31<sup>st</sup> day of October, 2014.

A handwritten signature in black ink, appearing to read "Jan Traesen", written over a horizontal line.

JAN TRASEN - 41177  
Washington Appellate Project - 91052  
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71802-9-I
v.	)	
	)	
SACIID NADIF,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, NINA ARRANZA RILEY, STATE THAT ON THE 31<sup>ST</sup> DAY OF OCTOBER, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] SACIID NADIF 4258 S. 137 <sup>TH</sup> PL. TUKWILA, WA 98168	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 31<sup>ST</sup> DAY OF OCTOBER, 2014.

x 

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