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July 22, 2015
Court of Appeals

No. 72854-7-I

Division I

State of Washington

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SANGTACHAN FONG,

Appellant.

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

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

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

2. The trial court violated Mr. Fong's constitutional right to due process when it accepted Mr. Fong's guilty plea in the absence of a Mien language interpreter.

3. The trial court violated Mr. Fong's constitutional right to appear and his right to be present when it proceeded with the guilty plea in the absence of a Mien interpreter.

4. The trial court erred when it found that Mr. Fong's guilty plea was knowing, voluntary, and intelligently made.

5. In the absence of substantial evidence in the record, the trial court erred in finding that Mr. Fong's trial counsel clearly advised him of the immigration consequences of entering a guilty plea.

6. Mr. Fong was deprived of the effective assistance of counsel, as his counsel failed to request Mien interpreter, so that Mr. Fong could assist in his defense.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A criminal defendant has a Sixth Amendment right to present a defense, including to confront witnesses and to be present at one's

own trial. The Fourteenth Amendment guarantees a defendant's right to due process and fair proceedings. These rights entitle a non-English-speaking defendant to a competent interpreter. In Washington, the right to competent interpretation is also secured by statute under RCW 2.43. Where the trial court did not appoint an interpreter in Mr. Fong's native language, and where Mr. Fong testified that he failed to understand the nature or substance of his plea agreement, was the guilty plea entered in violation of Mr. Fong's constitutional rights, and should vacation of the plea be have been granted?

2. 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. Fong pled guilty to an offense which may render him deportable to the country of his birth, Laos, and he later moved to withdraw his plea. Mr. Fong's attorney never informed him he would be deported; indeed, he had no understanding of Mr. Fong's particular immigration status as a refugee. Instead, his attorney testified that he was focused on avoiding the firearm enhancement and did not research the immigration consequences. Did the trial court abuse its discretion in denying Mr.

Fong's motion to withdraw his guilty plea based on ineffective assistance of counsel?

C. STATEMENT OF THE CASE

Sangtachan Fong was born in Laos and spent several years of his childhood in a refugee camp in Thailand. 12/5/14 RP 8-9 (testimony of Mr. Fong's brother). He and his siblings moved to the United States when he was 16. Id. Mr. Fong's family was from a hillside farming community, and he was not given any formal education in Laos. Id. Other than the spoken Thai and Laotian that he picked up in the refugee camp, he does not read or write. Id. at 8-10. Mr. Fong and his siblings took a six-month English course at the Thai refugee camp, which included basic concepts to assist refugees with the resettlement process. Id. Mr. Fong also speaks Mien, a regional language spoken by the Hmong community.¹

After moving to Seattle, Mr. Fong attended high school, but dropped out when it became too difficult to follow the English instruction. Id. at 12-13. He cannot read or write in English. Id.; 12/9/14 RP 22-23. When he dropped out of high school, he began

¹ The language has been transcribed in the record as "Mian." However, the correct English spelling is actually "Mien." Further reading can be found here: https://en.wikipedia.org/wiki/Hmong%E2%80%93Mien_languages (last accessed July 20, 2015).

working with his father in a furniture assembly plant in Tukwila, where the Mien language was spoken in the workplace. 12/5/14 RP 13.

In 2012, due to allegations made by his stepdaughter, Mr. Fong was charged with one count of rape in the first degree. CP 1-7.

Mr. Fong's family hired a private attorney to defend him, and this attorney went to see Mr. Fong several times. 12/5/14 RP 20-23. The attorney advised Mr. Fong to plead guilty, and Mr. Fong did as he was told. CP 8-36. On March 27, 2013, Mr. Fong pled guilty to the charge. 3/27/13 RP 4-20. He received a sentence of 120 months incarceration. CP 37-47; 8/2/13 RP 10-14.

At some point after his conviction, Mr. Fong learned of the immigration consequences of his plea. Mr. Fong then moved to withdraw his guilty plea, and new counsel was appointed. Mr. Fong explained that he had not understood the terms of his plea, largely because he had not been provided with a Mien interpreter. He also stated that his trial counsel had failed to advise him of the immigration consequences of his guilty plea. 12/5/14 RP 39-41; 12/9/14 RP 30. Following an evidentiary hearing at which Mr. Fong's former trial counsel and Mr. Fong both testified, among other witnesses, the trial

court denied Mr. Fong's motion to withdraw his guilty plea. CP 127;

12/9/14 RP 31-34.

D. ARGUMENT

1. IT WAS A VIOLATION OF DUE PROCESS FOR THE TRIAL COURT TO ACCEPT MR FONG'S GUILTY PLEA WITHOUT PROVIDING AN INTERPRETER IN HIS NATIVE LANGUAGE.

a. Under the Sixth Amendment and the Due Process Clause, Mr. Fong had a constitutional right to an interpreter in the courtroom.

A non-English-speaking defendant has a constitutional right to a competent interpreter. State v. Ramirez-Dominguez, 140 Wn. App. 233, 243, 165 P.3d 391 (2007). A defendant's right to an interpreter is based on "the Sixth Amendment constitutional right to confront witnesses and the right inherent in a fair trial to be present at one's own trial." State v. Teshome, 122 Wn. App. 705, 711, 94 P.3d 1004 (2004) (quoting State v. Gonzales-Morales, 138 Wn.2d 374, 379, 979 P.2d 826 (1999)) (internal quotation omitted), review denied, 153 Wn.2d 1028, 110 P.3d 213 (2005). Due process requires that a person who is not fluent in English be provided a qualified interpreter during all legal proceedings. U.S. Const. amend. XIV; Const. art. 1, § 3; Gonzales-Morales, 138 Wn.2d at 379; Negron v. New York, 434 F.2d 386, 389 (2nd Cir. 1970). The right to competent interpretation is grounded in "considerations of fairness, the

integrity of the fact-finding process, and the potency of our adversary system of justice.” Negron, 434 F.2d at 389.

Similarly, the Washington Legislature has endorsed this task of the courts: “to secure the rights, constitutional or otherwise, of persons who, because of a non-English speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.” RCW 2.43.010.²

- b. The failure of the trial court to appoint a Mien interpreter for Mr. Fong at his guilty plea proceeding resulted in a plea that violated due process.

At Mr. Fong’s plea hearing on March 27, 2013, the trial court failed to conduct a sufficient inquiry under RCW 2.43.030 that Mr. Fong understood the proceedings without an interpreter. Although the court had access to Mr. Fong’s background and his limited abilities in English, the court asked Mr. Fong only one question at the hearing concerning his English language skills: “Do you have any problems understanding the English language at all?” 3/27/13 RP 5. Mr. Fong

² The right in Washington to an interpreter is broader than in federal court; however, both federal and state courts note that the foundation of the right rests on the belief that: “no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment.” United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973), cert. denied, 416 U.S. 907, 94 S.Ct. 1613, 40 L.Ed.2d 112 (1974).

replied, “No, no.” Id. Mr. Fong told the court that he was not able to read the Statement of Defendant on Plea of Guilty, but that his trial attorney had read it to him. Id. The court informed Mr. Fong that she, too, would read it to Mr. Fong in the courtroom. Id. The court never asked Mr. Fong if it would assist him to have a Mien interpreter present in the courtroom, so that he could actually understand the agreement.

The resulting record reflects several indications that Mr. Fong failed to understand or comprehend the significance of the plea proceedings. Throughout the proceedings, Mr. Fong never said more than one or two-word sentences, generally: “Yes,” “No,” or “I understand.” 3/27/13 RP 5-21. The only time Mr. Fong spoke English for longer than a two-word sentence were the following: He said: “He read it to me,” when the court asked whether Mr. Fong’s attorney had read the plea agreement to him. Id. at 5. Mr. Fong also once said, “Can you repeat, please?” when he did not understand the prosecutor. Id. at 12. And lastly, Mr. Fong once said, “I don’t remember.” Id. at 15.

Most important, when examining the record to determine Mr. Fong’s comprehension of the guilty plea, the court failed to consider whether he was tracking the allocution and the waiver of constitutional rights. It is more than concerning that when the court and the prosecutor

asked Mr. Fong whether he had fully considered the ramifications of the waiver of his rights, he was clearly confused, as follows:

COURT: Sir, your decision is based on your decision, and I'm glad you've had an opportunity to talk to your family about this, but is this your decision?

FONG: Yes.

COURT: Your own decision?

FONG: Yes.

STATE: And you've had the opportunity to talk to your attorney as much as you want?

FONG: Yes.

STATE: When they talked about the constitutional rights you're giving up; do you remember that?

FONG: Yes.

STATE: Do you remember what any of those are?

FONG: Guilty.

3/27/13 RP 14.³

Mr. Fong's guilty plea was not knowing, voluntary and intelligent, because the record shows that he did not understand the

³ Mr. Fong also mistakenly wrote the wrong initials throughout the plea form, writing "ST," rather than "SF," his actual initials. 3/27/13 RP 11; 12/5/14 RP 9.

nature and terms of the agreement or the court proceedings in the English language. Id. at 5-14.

- c. In the alternative, reversal should be granted because the trial court abused its discretion.

Even if this Court does not find a due process violation, this Court should reverse because Mr. Fong's motion to withdraw his plea was denied on untenable grounds, and because the trial court's factual findings are unsupported by the record.

A trial court's order on a motion to withdraw a guilty plea or vacate a judgment may be reviewed for an abuse of discretion. In re 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).

The trial court found "no credible evidence to support the defendant's claim that his plea was not knowing, voluntary and intelligently made." CP 127. This finding is not supported by the record, and is inconsistent with the evidence adduced at the evidentiary hearing, which revealed that Mr. Fong was not able to fully participate in the hearing without the aid of a Mien interpreter. 12/5/14 RP 72-76. The court's finding that Mr. Fong's plea was knowing, voluntary and

intelligent is therefore untenable, in light of the testimony of trial counsel, as well as that of Mr. Fong and his brother. Quismundo, 164 Wn.2d at 504. Reversal should be granted.

2. MR. FONG’S ATTORNEY DID NOT ACCURATELY ADVISE HIM OF THE IMMIGRATION CONSEQUENCES OF HIS PLEA.

- a. 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.”⁴ 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. Fong moved to withdraw his guilty plea in order to correct a manifest injustice, based upon both the ineffective assistance of

⁴ 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).

counsel, and the involuntariness of his plea. On appeal, he asserts both that trial counsel's ineffectiveness created a manifest injustice, requiring relief, and that his plea was involuntary. CrR 4.2(f); 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, 173-74, 249 P.3d 1015 (2011).

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); 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 State is offering a plea to a deportable offense. Id. at 368-69. Where the immigration consequences are less than clear, counsel must at least advise a noncitizen client the charge may carry a risk of adverse immigration consequences. Id. That the standard plea form carries boilerplate warnings does not satisfy an attorney’s obligations. Sandoval, 171 Wn.2d. at 173-74; State v. Martinez, 161 Wn. App. 436, 441-42, 253 P.3d 445 (2012).

This Court has recently recognized the importance of assessing a defendant’s full understanding of the immigration consequences of a conviction in State v. Chetty, 184 Wn. App. 607, 615-16, 338 P.3d 298, 303 (2014) (granting motion to extend time to file notice of appeal due to ineffective assistance of counsel).⁵ In Chetty, this Court observed that a conviction for an aggravated felony would result in almost certain deportation, and that this was “one of the simplest most elementary questions that any criminal defense attorney should know the answer to.” Id. at 612 (quoting immigration attorney, who stated it would be deficient performance for a criminal defense attorney to refer client to immigration attorney rather than to know this information).

⁵ Interestingly, Chetty involved immigration advice given by the same trial attorneys as Mr. Fong’s original attorney, as well as one other. 184 Wn. App. at 611.

In order to withdraw a guilty plea, a criminal defendant must 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).

Here, Mr. Fong 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 erred when it denied Mr. Fong’s motion to withdraw his plea. Padilla, 559 U.S. at 373-74; Sandoval, 171 Wn.2d at 175-76; Martinez, 161 Wn. App. at 441-42.

- b. The trial court erred when it found that Mr. Fong was adequately advised of the immigration consequences of his guilty plea and when it denied his motion to withdraw the plea for ineffective assistance of counsel.

Mr. Fong was deprived of the effective assistance of counsel because his attorney’s advice concerning the immigration consequences of his plea was inadequate. Mr. Fong would not have taken a guilty plea

and risked deportation, had he understood the risks to his refugee immigration status.

Although Mr. Fong's prior defense counsel testified he had told Mr. Fong he might face consequences that were "very adverse," the attorney also testified he did not know Mr. Fong's precise immigration status. 12/5/14 RP 37-38. This attorney stated that although he had represented Mr. Fong on this serious matter, and he had visited him several times to interview him about the case, he had taken less than one page of notes throughout his handling of the case. Id. at 24.

The attorney's testimony was ambiguous as to what he had advised Mr. Fong concerning immigration consequences, other than that the consequences would likely be "negative." Id. at 40. In fact, the attorney testified he did not even know, when advising Mr. Fong, that he had refugee status. Id. at 38, 40.

In addition, the testimony from the DOC employee who completed the Pre-Sentence Investigation (PSI) suggested that Mr. Fong had not been advised about deportation. 12/5/14 RP 18-19. Mr. Fong reported to the DOC officer that after his release, he planned to live with either his parents in Washington or his brother in Texas; Mr. Fong had

not been advised about the likelihood of deportation after serving his sentence. Id.

Like the defendant in Chetty, Mr. Fong's conviction for first degree rape, an aggravated felony, rendered him clearly and obviously deportable – and in jeopardy of losing his treasured status as a political refugee. Because Mr. Fong's attorney merely told him that he could discuss the immigration consequences with an immigration lawyer -- and indeed, did not even know what Mr. Fong's precise immigration status was -- this case resembles Chetty, and must be reversed due to the ineffective assistance of counsel. 184 Wn. App. at 615-16; 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. Fong asks this Court to reverse the order denying his motion to withdraw his guilty plea.

Respectfully submitted this 22nd day of July, 2015.

s/Jan Trasen

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


STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 72854-7-I
v.)	
)	
SANGTACHAN FONG,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF JULY, 2015, 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:

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SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF JULY, 2015.

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