

73111-4

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Court of Appeals  
Division I  
State of Washington

73111-4

NO. 73111-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

BAZEN S. KASSAHUN,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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## **A. ASSIGNMENT OF ERROR**

The trial court erred in failing to dismiss the felony DUI charge based on the constitutional infirmity of the underlying convictions.

## **B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

A prior conviction may not be used to aggravate a current offense where the prior judgment is constitutionally invalid. The state and federal constitutions require the waiver of criminal defendant's rights in conjunction with a guilty plea be knowing, intelligent and voluntary. Where the prior convictions were obtained without informing the defendant of the potential sentencing and immigration consequences, particularly in the case of a subsequent offense, were they constitutionally infirm such that they could not be used to aggravate the current offense to a felony?

## **C. STATEMENT OF THE CASE**

Mr. Kassahun was charged by amended information with felony driving under the influence (DUI), unlawful possession of a firearm in the second degree, violation of the uniform controlled substances act, driving while license suspended/revoked in the first degree, violation of ignition interlock requirement, making a false or misleading statement to a public servant and resisting arrest. CP 173-75.

Before trial, Mr. Kassahun moved to dismiss the felony DUI charge based on the constitutional infirmity of his prior DUI convictions in which he was advised of neither the possibility of enhanced penalties, nor the potential immigration consequences. CP 15-18; 10/21/14RP 3-14. The Honorable James Cayce denied the motion to dismiss. 10/21/14RP 15.

Mr. Kassahun thereafter entered guilty pleas to all the charges except DUI, to which he entered into a stipulation to facts and waiver of jury trial in order to preserve his challenge to the felony charge for appellate review. CP 23-59, 60-172, 176-205.

Judge Cayce found Mr. Kassahun guilty of DUI and sentenced him standard range concurrent sentences of 60 months for the felony DUI and unlawful possession of a firearm. CP 206-09. Lesser concurrent sentences were imposed for the remaining offenses as well. CP 209-10, 215-17.

Mr. Kassahun timely appealed. CP 218-24.

## D. ARGUMENT

**Mr. Kassahun's felony DUI charge should have been dismissed because he was never advised of the enhanced penalty provisions of RCW 46.61.5055 or potential immigration consequences in the prior proceedings.**

Mr. Kassahun timely moved to dismiss the felony DUI charge because the prior DUI convictions, which are alleged by the prosecutor to elevate the current offense to a felony, were constitutionally infirm.<sup>1</sup> CP 15-16; 10/21/14 RP 5-15. By declaration, filed in support of his motion, Mr. Kassahun averred that none of the four prior offenses

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<sup>1</sup> RCW 46.61.502, Driving Under the Influence, in its current form, provides in pertinent part:

- (1) A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state:
  - (a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or
  - (b) The person has, within two hours after driving, a THC concentration of 5.00 or higher as shown by analysis of the person's blood made under RCW 46.61.506; or
  - (c) While the person is under the influence of or affected by intoxicating liquor, marijuana, or any drug; or
  - (d) While the person is under the combined influence of or affected by intoxicating liquor, marijuana, and any drug.
- ....
- (5) Except as provided in subsection (6) of this section, a violation of this section is a gross misdemeanor.
- (6) It is a class C felony punishable under chapter 9.94A RCW, or chapter 13.40 RCW if the person is a juvenile, if:
  - (a) The person has four or more prior offenses within ten years as defined in RCW 46.61.5055; or
  - ....; or
  - (iv) A violation of this subsection (6) or RCW 46.61.504(6).

included any advisement that the conviction could be used to enhance the penalty for a subsequent DUI offense to a felony nor of immigration consequences of these convictions. CP 17-18.

**1. In order to aggravate a sentence, prior convictions must be constitutionally valid.**

A prior conviction which is determined to have been unconstitutionally obtained or which is constitutionally invalid on its face may not be used in subsequent proceedings. State v. Holsworth, 93 Wn.2d 148, 607 P.2d 845 (1980) (defendant may challenge the present use of a prior conviction based on a guilty plea which the defendant contends was involuntary); State v. Swindell, 93 Wn.2d 192, 607 P.2d 852 (1980) (constitutionally infirm prior could not support unlawful possession of weapon charge). Holsworth and Swindell further establish that in Washington a defendant may challenge the present use of a constitutionally defective judgement based on an involuntary guilty plea. In re Hemenway, 147 Wn.2d 529, 55 P.3d 615 (2002) (plea documents are relevant to facial validity determination when they disclose invalidity of judgment and sentence); In re Bush, 26 Wn.App. 486, 497–98, 616 P.2d 666 (1980). See also United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972) (remanding for reconsideration of sentence where two of the prior convictions

relied upon, were constitutionally invalid); Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967) (constitutionally deficient conviction records should have been deemed void in subsequent prosecution).

**2. Criminal defendants must be fully and accurately advised of the consequences of a guilty plea to be constitutionally valid.**

Constitutional due process of law requires a defendant be fully advised of the consequences of a guilty plea, including any mandatory minimum or possible maximum sentence and other sentencing consequences which flow from the conviction. Padilla v. Kentucky, 559 U.S. 356, 364-65, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). Moreover, due process requires that the defendant's guilty plea be knowing, voluntary, and intelligent. In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004) (citing Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)).

CrR 4.2 details further safeguards on the voluntariness of pleas:

The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

CrR 4.2(d). Knowing and intelligent in these circumstances must necessarily, therefore, include an understanding of the enhanced penalty provisions of RCW 46.61.5055 and the related immigration consequences. See Padilla, 559 U.S. at 363-66; State v. Sandoval, 171 Wn.2d 163, 171, 249 P.3d 1015 (2011). The State bears the burden of proving the validity of a guilty plea. Wood v. Morris, 87 Wn.2d 501, 507, 554 P.2d 1032 (1976).

A prior judgment is constitutionally invalid on its face where, without further elaboration, it evidences infirmities of constitutional magnitude. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002); In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 353, 5 P.3d 1240 (2000); In re Pers. Restraint of Thompson, 141 Wn.2d 712, 718, 10 P.3d 380 (2000). Where the defendant is not properly advised of the consequences, the guilty plea and conviction are constitutionally infirm because the plea was not knowing and voluntary. State v. Ross, 129 Wn.2d at 280; *but cf* City of Richland v. Michel, 89 Wn.App. 764, 770, 950 P.2d 10 (1998); State v. Preuett, 116 Wn.App. 746, 67 P.3d 1105 (2003).

The Court in Stoudmire and Thompson held that documents signed as part of a plea agreement may be considered in determining facial invalidity when those documents are relevant in assessing the

validity of the judgment and sentence. In Stoudmire, the court held the judgment invalid on its face, and the one-year bar did not apply, where the plea documents showed that some charges were filed after the statute of limitations had run, and thus showed that the judgment and sentence was invalid. Stoudmire, 141 Wn.2d at 354. Similarly, in Thompson, the plea documents showed that the petitioner had been charged with an offense that did not become a crime until nearly two years after the offense was committed, and thus those documents showed the judgment and sentence was invalid on its face. Thompson, 141 Wn.2d at 719. A client's intent to plead guilty does not excuse a lawyer from accurately explaining the important consequences of conviction and trying to minimize the negative consequences of conviction to the accused. State v. A.N.J., 168 Wn.2d 91, 113, 116, 118, 225 P.3d 956 (2010).

**a. Accurate advice regarding the sentencing implications of RCW 46.62.5055 was essential should be a prerequisite to using the prior convictions.**

The law is clear that the defendant must be informed of all direct consequences of the plea. State v. Ross, 129 Wn.2d 279, 280, 916 P.2d 405 (1996) (failure to inform Ross of 12-month community placement requirement renders plea invalid). Due process requires an

affirmative showing that a defendant entered a guilty plea intelligently and voluntarily. State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980) (citing Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)). Direct consequences are those which “represent[] a definite, immediate and largely automatic effect on the range of the defendant's punishment’.” Barton, 93 Wn.2d at 305. Certainly the elevation from a misdemeanor to a felony represents a definite and largely automatic effect on the defendant’s range of punishment. As such, the prior offenses used to aggravate the current offense is inconsistent with these most fundamental aspects of due process.

**b. Accurate immigration advice was also essential before using the priors.**

A thorough and complete understanding of the potential immigration consequences is essential because since the mid-1990s, immigration laws have imposed inexorably more stringent consequences upon non-citizens with felony convictions. Padilla, 559 U.S. at 360-64. Congress has expanded the types of deportable offenses, eliminated discretionary waivers, instituted rigorous

enforcement, and made deportation “practically inevitable” for a person convicted of a deportable crime. Id.<sup>2</sup>

Padilla set forth the basic rules regarding deportation as a penalty resulting from a criminal conviction: (1) if the immigration consequences are clear, the attorney must clearly and accurately explain those consequences; (2) unclear immigration consequences require general advice on the possibility of immigration consequences; and (3) the attorney must try to mitigate known immigration consequences in the plea process. 559 U.S. at 364-66; State v. Sandoval, 171 Wn.2d 163, 171, 249 P.3d 1015 (2011). Aggravated felonies disqualify even longtime permanent residents from seeking discretionary waivers from deportation. Sandoval, 171 Wn.2d at 171 (citing 8 U.S.C. §1227(a)(2)(A)(iii)). Plainly then the information provided in conjunction with the change of plea was inadequate.

As Padilla and Sandoval demonstrate, “[a] criminal defendant who faces almost certain deportation is entitled to know more than that it is possible that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty.” United States v. Bonilla, 637 F.3d

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<sup>2</sup> Starting in the 1990s, Congress has focused on “tighten[ing] the connections between the formerly separate criminal and immigration enforcement infrastructures,” thus ensuring swift transitions from conviction to deportation. Maureen A. Sweeney, Fact or Fiction: The Legal Construction of Immigration Removal for Crimes, 27 Yale J. on Reg. 47, 72 (2010).

980, 984 (9th Cir. 2011) (emphasis in original); see also State v. Martinez, 161 Wn.App. 436, 442, 253 P.3d 445, rev. denied, 172 Wn.2d 1011 (2011) (when client pled guilty to aggravated felony, counsel’s discussion of possibility of deportation coupled with warnings in the guilty plea form were deficient because “deportation was certain”). Padilla commands that “when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.” 559 U.S. at 364-66.

A guilty plea must “represent[] a voluntary and intelligent choice among the alternative courses of action open to the defendant.” North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). The case law demonstrates that a knowing, intelligent and voluntary plea requires a thorough understanding of the immigration consequences. That the particular result might be contingent or speculative does not eliminate this requirement. As the Court ruled in Sandoval, “the guilty plea statement warnings required by RCW 10.40.200(2) cannot save the advice that counsel gave.” Sandoval, 171 Wn.2d at 173. A court’s general warning “that a guilty plea ‘could lead to deportation’” is insufficient to correct counsel’s misadvice when deportation was a legally mandated consequence of the conviction. Id.

For the alien defendant most concerned with remaining in the United States, especially a legal permanent resident, it is not at all unreasonable to go to trial and risk a ten-year sentence and guaranteed removal, but with the chance of acquittal and the right to remain in the United States, instead of pleading guilty to an offense that, while not an aggravated felony, carries “presumptively mandatory” removal consequences

United States v. Orocio, 645 F.3d 630, 645 (3d Cir. 2011).

**3. Mr. Kassahun was entitled to relief from his felony DUI conviction.**

The prosecution bore the burden of establishing the prior convictions it sought to use to elevate the current offense to a felony were constitutionally valid. Holsworth, 93 Wn.2d at 157-58. Where Mr. Kassahun was never advised of the sentencing implications of his plea in the event of a subsequent conviction and the nearly inevitable immigration consequence of such an aggravated felony conviction, the constitutional right to due process of law should preclude the use of those prior offenses to aggravate the current charge. See e.g. Padilla, 559 U.S. at 364-66; Sandoval, 171 Wn.2d at 173.

**E. CONCLUSION**

For the reasons stated herein, Mr. Kassahun asks this court to reverse his felony DUI conviction and remand for further proceedings.

Respectfully submitted this 17<sup>th</sup> day of November 2015.

*s/ David Donnan*

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 73111-4-I
	)	
BAZEN KASSAHUN,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17<sup>TH</sup> DAY OF NOVEMBER, 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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