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I. ASSIGNMENTS OF ERROR

1. Appellant assigns error to the denial of his motion to withdraw his pleas or in the alternative, vacate his convictions.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in ruling that the motion to withdraw the plea or vacate the judgment was barred under RCW 10.73.090?

2. Do the decisions in *Padilla v. Kentucky*, *State v. Sandoval*, and *State v. Martinez* represent a “significant change in the law...which is material to the conviction” thus triggering the exception to the time bar in RCW 10.73.100 (6)?

3. Assuming that the one year limitation on moving for relief from judgment in RCW 10.73.090 applied, should it be deemed “equitably tolled” under the facts of this case?

III. STATEMENT OF THE CASE

A. Procedural History Overview

Ricardo Martinez–Leon was charged in an amended information with unlawful imprisonment and assault in the fourth degree. CP 1–2. While out of custody, he appeared before Judge Stonier on May 11, 2006 for a change of plea hearing. He was represented by appointed counsel Lisa Tabbut at the time of the hearing. CP 27,29, 31. After acceptance of the plea, the court set the matter over for sentencing. At the sentencing hearing, which was held May 25, 2006, the court imposed a sentence of 60 days on the unlawful imprisonment charge, and 365 days with 365 days suspended on the assault in the fourth degree. Mr. Martinez–Leon’s appointed counsel did not ask the court to impose any lesser sentence on the misdemeanor charge.

On June 27, 2011, Mr. Martinez–Leon, through present counsel, moved for an order permitting withdrawal of his pleas of guilty, or in the alternative, for vacation of the convictions. After a number of continuances at the request of the state, a hearing was held on the motion on September 9, 2011. The parties in the meantime had filed additional memoranda on the question of whether any relief was time barred. CP 75–100, 101–110. After hearing argument, the court took the matter under advisement, and then filed a written decision on October 31, 2011 denying any relief and purporting to transfer the matter to this court as a personal restraint petition. CP 114–117. Mr. Martinez–Leon filed a timely notice of appeal from the court’s ruling. CP 118–122.

B. Plea Hearing

At Mr. Martinez–Leon’s plea hearing on May 11, 2006, his trial lawyer indicated he was making a “straight” plea to fourth degree assault, and an *Alford*¹ plea to the charge of unlawful imprisonment. CP 31.² Mr. Martinez–Leon told the court several times during the plea colloquy that he did not understand everything that was going on. CP 32. The court attempted to assess Mr. Martinez–Leon’s understanding of the trial rights he was giving up by entering the plea. CP 32–33. At one point the matter

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

² The transcript of the plea hearing and sentencing hearing were both attached to the Motion for Relief from Judgment, and hence are found in the Clerk Papers.

recessed so that trial counsel and the interpreter could confer with Mr. Martinez–Leon. CP 34.

The court ultimately explained the elements of the crime to Mr. Martinez–Leon, and the maximum punishment for each count. CP 38–39. The court explained the prosecutor’s recommendation, and that appellant would be prohibited from owning firearms as a consequence of the convictions. CP 39–40. The court discussed the factual basis for the plea with Mr. Martinez–Leon. CP 40–43. However, the court never discussed in any way the potential immigration consequences which would flow from the convictions.³

C. Sentencing hearing

At the sentencing hearing, held on May 25, 2006, Mr. Martinez–Leon’s lawyer asked the court to follow the agreed recommendation of the parties for a 60 day sentence. She did not ask the court to consider a sentence of less than 365 days for the misdemeanor count. CP 47. The court imposed a sentence on the misdemeanor count of 365 days with 365 days suspended, and as to the felony unlawful imprisonment count a sentence of 60 days. CP 12–21, 48.

³ The plea form, which Mr. Martinez–Leon signed, did have a provision in it, pursuant to CrR 4.2 as follows: “If I am not a citizen of the United States, 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 pursuant to the laws of the United States.” The court did not conduct any colloquy about this paragraph.

D. Hearing on motion to vacate or withdraw plea

Mr. Martinez–Leon filed an affidavit in support of his motion to withdraw his plea which said that he had not been advised by his trial lawyer that a fourth degree assault domestic violence conviction would be considered an “aggravated felony”⁴ for the purposes of immigration law if the sentence included a potential maximum of 365 days, regardless of how many were suspended. He also said that his lawyer had not told him that a conviction for unlawful imprisonment would be a separate ground for deportation if it were a crime of domestic violence. CP 71–74.

Lisa Tabbut, Mr. Martinez–Leon’s trial lawyer, was aware of the fact that he was not a citizen of the United States. She did not advise him that if he received a sentence of 365 days on the misdemeanor charge that it would be considered an “aggravated felony” and he would be deported. She did not ask the court for a sentence of less than 365 days because she was not aware at the time that if the sentence was only 364 days, it would not be considered an “aggravated felony.” She did recall telling him that deportation was a “possible” consequence of the plea to the felony charge. CP 69–70.

⁴ A non–citizen convicted of an “aggravated felony” is subject to deportation. 8 U.S.C. 1227. “Aggravated felony” includes, among other offenses, an assault for which the term of imprisonment at least one year. 8 U.S.C. 1101(a)(43). The one year limit applies even if a portion of the sentence is suspended or deferred. 8 U.S.C. 1101 (a)(48). So long as the court here imposed a sentence that included a 365 day consequence, the misdemeanor assault charge here became, for immigration purposes, an “aggravated felony.”

David Shomloo, Mr. Martinez–Leon’s immigration lawyer, filed a declaration that indicated his client was a lawful permanent resident who had achieved that status in June of 2000. He explained the concept of an “aggravated felony” under immigration law, and gave his opinion that competent counsel would have either been aware of this definition and its implications, or consulted with immigration counsel to learn about the implications of an “aggravated felony” for a lawful permanent resident. It was his opinion that the immigration consequences were “truly clear” under the *Padilla*⁵ standard, and that Mr. Martinez–Leon had suffered prejudice as a result of the fact that his trial lawyer was unaware of the immigration consequences of the plea agreement.

The prosecutor argued that the motion for relief was time barred under RCW 10.73.090 and under CrR 7.8. RP 8–9.⁶ She also argued that the doctrine of equitable tolling did not apply. RP 10–11.

The court indicated it had some concerns about whether the immigration consequences of the plea were clear and asked for additional information about this.⁷ He noted the fact that Mr. Martinez–Leon had not yet been deported in the five years since the entry of the plea. RP 19.

⁵ *Padilla v. Kentucky*, 509 US ____, 130 S. Ct.1473, 176 L. Ed. 2d 284 (2010)

⁶ The VRP of the September 9 hearing will be referred to as RP _____. As noted above, transcripts of the other two hearings are in the Clerk’s Papers.

⁷ At this point in the proceedings, Mr. Shomloo’s declaration had not been filed with the trial court.

E. Court's Written Ruling

In the written ruling filed about six weeks after the hearing, the court held that the motion for relief was time barred. CP 114. The court ruled that the requirement that an immigrant defendant be warned about potential implications of a conviction was not a “significant change in the law”, since this obligation had existed by statute already. The court ruled that equitable tolling did not apply, since the court interpreted Ms. Tabbut’s statement that she had told Mr. Martinez–Leon that deportation was a *possible* consequence of a felony conviction more credible than Mr. Martinez–Leon’s statement that she had not properly advised him. The court agreed that Ms. Tabbut had been ineffective by not asking for a sentence of less than 365 days on the misdemeanor charge, which the court opined it might have granted if asked. CP 116. However, the court ruled that even this claim was time barred. Despite having made a ruling on the merits of the motion, the trial court purported to transfer the case to this court as a personal restraint petition. CP 116–117.

III. ARGUMENT AND AUTHORITY

A. Standard of review

A trial court's denial of a CrR 7.8 motion is reviewed for an abuse of discretion and will not be reversed absent an abuse of that discretion. *State v. Martinez*, 161 Wn. App. 436, 259 P.3d 1109 (2011). “A trial court abuses its discretion when it bases its decisions on untenable or unreasonable grounds.” *State v. Pierce*, 155 Wn. App. 701, 710, 230 P.3d

237 (2010). Under CrR 7.8(b)(5), a court may grant relief from judgment for "[a]ny other reason justifying relief from the operation of the judgment." Ineffective assistance of counsel is a reason to justify relief.

Martinez, supra at 441.

- B. The trial court erred in ruling that the motion for relief from the judgment was time barred because the *Padilla* decision represents a "significant change in the law."

In denying relief, the trial court relied principally on RCW 10.73.090, which sets out a one year time limit⁸ for "collateral attacks" on a judgment, an umbrella term which includes motions to vacate a conviction or motions to withdraw a plea. RCW 10.73.100 provides that the statute may be tolled⁹ or is not applicable under certain circumstances,

⁸ The statute provides in part as follows:

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

(2) For the purposes of this section, "collateral attack" means any form of postconviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.

⁹ RCW 10.73.100 provides in pertinent part that:

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds: ...

(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

such as a “significant change in the law....which is material to the conviction.”

There was a “significant change in the law” which took place between the time of Mr. Martinez–Leon’s plea and the time of his motion for relief, which was filed on June 27, 2011, within six months of his discovery that the two convictions were being asserted as grounds for his deportation. That significant change was wrought by the United States Supreme Court’s decision in *Padilla v. Kentucky*, 599 U.S. ____, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). Before *Padilla*, many state courts, including Washington’s¹⁰, concluded that the immigration consequences of a criminal conviction were “collateral consequences”, and thus were not recognized as a basis for a claim of ineffective assistance of counsel. In *Padilla* for the first time the Supreme Court held that trial counsel had the duty to give accurate advice about the immigration consequences of a conviction. This was indeed a “significant change” in the law regarding ineffective assistance of counsel.

Washington’s Supreme Court followed *Padilla* in its decision in *State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011). In a proceeding strikingly similar to the present case, the defense lawyer had told Sandoval he would *not* be immediately deported if he pled guilty to a charge of rape

¹⁰ See e.g. *State v. Martinez–Lazo*, 100 Wn. App. 869, 877, 999 P.2d 1275 (2000), Review denied at 142 Wn.2d 1003 (2000).

in the third degree, and would have time to consult with immigration counsel to “ameliorate” any potential consequences of the plea. The plea statement contained the same warning as the one in this case, i.e. that for a non-citizen, the plea of guilty might have immigration consequences. Sandoval filed an appeal from the denial of his motion to withdraw his plea and also filed a personal restraint petition, alleging that he received ineffective assistance of counsel in connection with the decision to plead guilty.

The *Sandoval* court noted that **before** *Padilla*, “many courts believed that the Sixth Amendment right to effective assistance of counsel did not include advice about the immigration consequences of a criminal conviction.” 171 Wn. 2d at 169-60. **After** *Padilla*, however, defense counsel has an obligation to give accurate advice about the immigration consequences of a plea, so long as those consequences are clear. The court went on to hold that the consequences of a conviction for third degree rape, which would be classified as an “aggravated felony” for immigration purposes, were sufficiently clear that the obligation to give accurate advice arose. Both *Padilla* and *Sandoval* rejected the notion that only affirmative misadvice would constitute ineffective assistance. *Padilla*, 130 S. Ct at 1484, *Sandoval* at 170. Both courts also rejected the idea that the advisement of potential consequences in the plea form satisfied the constitutional obligation to give accurate advice. *Sandoval* at 173, citing *Padilla* at 1486. The *Sandoval* court concluded that his lawyer had

rendered ineffective assistance because the consequences of a plea to an “aggravated felony” were sufficiently clear that he should not advised his client that deportation was a remote possibility. The court went on to find that Sandoval suffered prejudice, the second prong of the *Strickland* test of ineffective assistance of counsel, because he would have gone to trial had he known he would be deported after a plea, despite the state’s argument that he had much to gain by accepting the plea. *Sandoval* at 175–176.

Sandoval was followed in short order by the Court of Appeals in *State v. Martinez*, 161 Wn. App. 436, 259 P.3d 1109 (2011). As in the present case, Martinez moved to withdraw his guilty plea and appealed from the denial of the motion. The court noted that failure to advise a client about a clearly deportable offense constituted ineffective assistance of counsel. The court again rejected the state’s argument that the plea form advisement was sufficient to apprise the defendant that a conviction could have immigration consequences. Martinez met the second prong of the *Strickland*¹¹ test because he said he would have chosen trial had he known of the certainty of deportation that his plea would trigger. The court remanded to the trial court to allow withdrawal of the plea.

The trial court here incorrectly asserted that *Sandoval* did not change the law regarding the obligation of counsel to advise correctly about the immigration consequences of a plea of guilty. CP 114. To the contrary, as noted above, *Sandoval* pointed out that before *Padilla*, many

¹¹ *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984)

courts held that a claim of ineffective assistance could *not* be based on inaccurate or no advice about immigration consequences. Washington was among these states. See e.g. *State v. Martinez–Lazo*, 100 Wn. App. 869, 877, 999 P.2d 1275 (2000), *Review denied* at 142 Wn.2d 1003 (2000). *Padilla*, and the Washington cases which follow and implement it, represent a significant change in the law from the time of Mr. Martinez–Leon’s guilty plea in 2006. Consequently, the trial court abused its discretion in not applying the exception to RCW 10.73.100 (6) and in ruling that the motion for relief was time barred.

C. The trial court should have applied the doctrine of “equitable tolling.”

Even if *Padilla* and its progeny did not represent a “significant change in the law”, the trial court should have applied the doctrine of “equitable tolling” to the time limitation of RCW 10.73.090 and ruled that the motion for relief was timely.

“The doctrine of equitable tolling permits a court to allow an action to proceed when justice requires it, even though a statutory time period has nominally elapsed.” *State v. Littlefair*, 112 Wn. App. 749, 758, 51 P.3d 116 (2002), quoting *State v. Duvall*, 86 Wn. App. 871, 874, 940 P.2d 671 (1997), *review denied*, 134 Wn.2d 1012 (1998).

In *Littlefair*, a motion to withdraw the guilty plea was brought more than two years after the judgment, and the state argued that the motion was time–barred. The court rejected that argument, and noted that Littlefair was entitled to the benefit of equitable tolling because his

lawyers had not advised him about the potential immigration consequences of a conviction, and he did not become aware of those consequences until INS notified him more than two years after his conviction of its intention to deport him based on the criminal conviction.

In the case at bar, Mr. Martinez–Leon should also be given the benefit of the doctrine of equitable tolling. He was not aware until his recent arrest in January of 2011 at the Houston airport that Homeland Security was going to attempt to have him removed from the country. Like Mr. Littlefair, he did not become aware of the immigration consequences of his convictions until well after the convictions were deemed “final,” and like Littlefair, he was not accurately advised by his lawyer of those consequences at the time of the entry of his plea. As his lawyer’s declaration acknowledges, she was not even aware of the significance of the definition of “aggravated felonies” and did not ask for a disposition that could have avoided the misdemeanor assault charge from being considered an “aggravated felony” by asking for a sentence with a top end of 364 days.¹²

Statutes of limitation sometimes depend on a party’s discovery that he has been injured and are tolled until then. An example is a claim of attorney malpractice, which features the “discovery rule” regarding the

¹² The maximum term for gross misdemeanors has been lowered by the Legislature to 364 days, to avoid immigration consequences just like the ones involved in this case. See SSB 5168, Ch. 96, Laws of 2011, effective July 22, 2011.

statute of limitations.¹³ In the present case, Mr. Martinez–Leon did not “discover” his potential legal injury from the inadequate advice he received concerning his guilty plea until Homeland Security brought the consequences home to him by arresting him. Justice requires the application of equitable tolling to the facts of this case, particularly when the relief sought will have no effect on the sentence that Mr. Martinez–Leon has already served, but may have a significant effect on his ability to remain in this country. The trial court erred in not applying the doctrine of equitable tolling to this case.

V. CONCLUSION

The trial court denied relief based on the time limitation in RCW 10.73.090. It erred in doing so, because it did not apply the applicable exception to the one year limitation based on RCW 10.73.100 (6), when there has been a “significant change in the law... which is material to the conviction.” Here, the significant change came about in the *Padilla* case, which held for the first time that defense counsel do not render effective assistance of counsel when they do not advise clients about clear immigration consequences which flow from a guilty plea.

Padilla and *Sandoval* clearly apply to the present case, since the immigration consequences of an “aggravated felony” are sufficiently clear

¹³ See, e.g. *Peters v. Simmons*, 87 Wn.2d 400, 406, 552 P.2d 1053 (1976); *Hipple v. McFadden*, 161 Wn. App. 550, 255 P.3d 730 (2011)

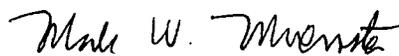
that competent defense counsel could determine them, or at least consult with immigration counsel who could point out the huge iceberg directly ahead of the client's ship in time to change course. Mr. Martinez-Leon submits that the trial court abused its discretion, since its decision was based on the untenable ground that *Sandoval* and *Padilla* did not represent a significant change in the law which affected his case.

Even if the trial court was correct in ruling that *Padilla* was not a significant change that would bring Mr. Martinez-Leon's case within the exception of RCW 10.73.100 (6), the court erred in ruling that the doctrine of equitable tolling did not apply. Mr. Martinez-Leon did not find out about the legal effect of his conviction until 2011 when he was arrested by ICE, and had not been accurately advised by his lawyer, or the court about this consequence. As in *Littlefair*, a case with similar facts, the doctrine of equitable tolling should have been applied by the trial court.

Appellant respectfully requests that the trial court's order denying relief be reversed, and that this court remand to the trial court to allow either the withdrawal of his guilty pleas, or modification of the judgment and sentence.

Dated this 30 day of January, 2012

LAW OFFICE OF MARK W. MUENSTER

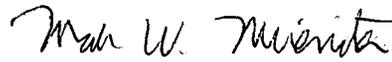


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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of: Appellant's opening brief upon AMIE HUNTER, counsel for respondent and to the appellant, Ricardo Martinez-Leon at the addresses indicated below by depositing the same in the mail of the United States at Vancouver, Washington, on the 30th day of January, 2012 with postage fully prepaid.

Dated this 30th day of January, 2012



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