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No. 52801-I-I-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON., Respondent,
v.
FEN SHOU CHEN, Appellant.

APPELLANT'S OPENING BRIEF

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April 19, 2019

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INTRODUCTION

On December 1, 2017, Appellant Fen Shou Chen (“Chen”) was arrested and charged with one count of Manufacture of a Controlled Substance-Marijuana, under RCW 69.50.401, and one count of Unlawful Use of a Building for Drug Purposes under RCW 69.53.010, in Grays Harbor County Superior Court.

Chen was not able to post the bond amount as ordered by the Court and was in custody at Grays Harbor County Jail from the date he was arrested and charged until his sentencing of March 26, 2018. Chen was arrested with dozens of other Chinese defendants, in which none of the defendants spoke any English. However, most of the defendants spoke the Cantonese dialect of Chinese, in which a Cantonese interpreter was provided for each and every hearing in court. Some of the defendants spoke Mandarin, in which a Mandarin-speaking interpreter was provided for in court.

Chen is a legal permanent resident in the United States. Chen is originally from the Fujian Province in China, where the dialect is Fuzhou, and not Mandarin Chinese or Cantonese. Ms. Karrie Young (“Young”) was appointed as Chen’s public defender, and had represented Chen at each of his hearings in court. On March 23, 2018, after remaining in custody since December 1, 2017, and on the advice of Young, Chen decided to plead guilty to Count I, with the anticipation that Court would

approve the agreed upon recommendation of the parties that Chen would be released from custody based upon credit for time served. The Court approved Chen's plea of guilty to Count I and sentenced Chen to jail time with credit for time served, which would have resulted in Chen being immediately released upon sentencing, on March 26, 2018.

During Chen's processing to be released from Grays Harbor County Jail, Immigration and Customs Enforcement ("ICE") agents took custody of Chen, and the United States of America had initiated deportation proceedings against Chen based upon 8 U.S.C., Sec. 1227, in which a conviction for the unlawful manufacture of marijuana is deportable. This issue has not contested by the Court or the parties. Chen was (and still remains) in ICE custody at the Northwest Detention Center in Tacoma, Washington.

On June 4, 2018, Chen motioned the Court to withdraw his guilty plea, based upon the Court's failure to provide him with a Fuzhou interpreter during his meetings with Young, all of his court hearings and at his plea of guilty and sentencing. As a result of not having a proper interpreter at any of this attorney meetings and any of his court hearings, Chen did not fully understand the process of his criminal case and Young was not able to provide effective advice to Chen during his plea of guilty and sentence. Furthermore, Young's advice to Chen that there was a "low

probability” that Chen would be deported by ICE if he plead guilty proved incorrect and ineffective and now Chen is in deportation proceedings.

A motions hearing to withdraw Chen’s plea of guilty was heard on July 6, 2018, in which the Court considered the motion and examined Young about her representation and advice to Chen in regards to the guilty plea. Judge David Edwards noted that Young had failed in her duties to adequately advise Chen about the possibility of being deported but did not ultimately rule on the motion until September 9, 2018, in which the Court denied Chen’s motion to withdraw the plea of guilty. RP 33.

ASSIGNMENTS OF ERROR

1. The trial court erred in denying Chen’s motion to withdraw his guilty plea based upon the Court’s failure to provide Chen with a Fuzhou interpreter for his court hearings and meetings with his court-appointed attorney. (Assignment of Error No. 1).

2. The trial court erred in denying Chen’s motion to withdraw his guilty plea based upon Young’s failure to provide effective legal counsel when she failed to advise Chen that the probability of him facing deportation was greater than what she had advised. (Assignment of Error No. 2).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in denying Chen’s motion to withdraw

his guilty plea based upon the Court's failure to provide Chen with a Fuzhou interpreter for his court hearings and meetings with his court-appointed attorney?

2. Did the trial court err in denying Chen's motion to withdraw his guilty plea based upon Young's failure to provide effective legal counsel when she failed to advise Chen that the probability of him facing deportation was greater than what she had advised?

STATEMENT OF THE CASE

A. State of Washington Files Information Against Chen

On November 30, 2017, the State of Washington files the information against Chen for one count of Manufacture of a Controlled Substance-Marijuana, under RCW 69.50.401, and one count of Unlawful Use of a Building for Drug Purposes under RCW 69.53.010. CP 1.

B. Chen Enters into Plea Agreement Sentence Recommendation and Statement of Defendant on Plea of Guilty

On March 23, 2018, Chen enters into a plea agreement sentence recommendation. CP 38. Chen also enters a plea of guilty to Count I. CP 39.

C. Chen is Sentenced

On March 26, 2018, the Court enters its Findings of Fact and Conclusions of Law. CP 42. Chen is sentenced and receives credit for time served. CP 43.

D. Chen Files Motion to Withdraw Guilty Plea

On June 4, 2018, Chen files his motion and affidavit to withdraw his guilty plea. CP 46, 47, and 48. Young files her declaration on June 26, 2018. CP 52. The State files its response on July 3, 2018. CP 57. Interpreter Ping Lau files her declaration on July 6, 2018. CP 60. Further supplemental correspondence is filed by the State on July 16, 2018. CP 61.

E. Trial Court Denies Chen's Motion to Withdraw Guilty Plea

On September 19, 2018, Judge Edwards denies Chen's motion to withdraw his plea of guilty. CP 62. Judge Edwards held that Chen had a clear understanding of the words that were spoken during the March 23, 2018 entry of the guilty plea and during the colloquy with the defendant.

F. Chen Files a Notice of Appeal

On October 16, 2018, Chen files his notice of appeal. CP 64. Chen remains in custody with ICE at the Northwest Detention Center in Tacoma, Washington.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING CHEN'S MOTION TO WITHDRAW GUILTY PLEA BECAUSE HE WAS NOT AFFORDED A PROPER AND QUALIFIED INTERPRETER

The trial court's order denying Chen's motion to withdraw guilty plea based upon the fact that Chen was never afforded a proper and qualified interpreter in the Fuzhou dialect of Chinese, is an abuse of discretion, and is reviewed accordingly.

A. The Trial Court Abused Its Discretion in Denying Chen's Motion to Withdraw Guilty Plea Because Chen Was Never Afforded a Proper and Qualified Fuzhou Interpreter

Chen is a native of the Fujian Province in China, which speaks the Fuzhou dialect, and not Mandarin or Cantonese, the two most popular dialects in China. Chen was never afforded a Fuzhou interpreter, despite requesting for a Fuzhou interpreter since the beginning of his hearings. Chen decl. pg. 2, lns. 9-11. The only interpreters offered by the Court were Mandarin interpreters, which is significantly different than the Fuzhou dialect. Chen decl. pg. 2, lns 5-9.

Chen has a Sixth Amendment right to have a competent and qualified interpreter for his court proceedings. *State v. Gonzalez-Morales*, 138 Wn.2d 374, 979 P.2d 826 (1999), *State v. Teshome*, 122 Wn. App. 705, 711, 94 P.3d 1004 (2004), *review denied*, 153 Wn.2d 1028, 110 P.3d 213 (2005). See also *In re the Matter of the Personal Restraint of Khan*, 184 Wn.2d 679, 363 P.3d 577 (2015). Furthermore, RCW 2.43.010, in part, states:

It is hereby declared to be the policy of this state to secure the rights, constitutional or otherwise, of persons who, because of 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 proceeds unless *qualified* interpreters are available to assist them. (*Emphasis added*).

The State responded in its response to Chen's motion to withdraw his guilty plea by citing *State v. Ramirez-Dominguez*, 140 Wn. App. 233, 165 P.3d 391 (2007), in which a defendant had questioned the interpreter's

adequacy, and the Court basically focused on whether the rights of the non-English speaking defendant have been protected.

Here, despite his repeated requests for a Fuzhou interpreter for his court proceedings and meetings with his attorney, none was ever provided to Chen. Chen had a basic understanding of Mandarin at the proceedings in which simple continuances were granted pending resolution of the case. However, the Fuzhou dialect is a substantially different dialect than Mandarin in which Chen could not understand the legal or formal form of the Mandarin language. A court appointing an interpreter who spoke a substantial different dialect from the defendant's dialect should be a basis for prejudice on a defendant in a criminal matter, especially in a plea of guilty and its immigration consequence of pleading guilty to a felony on a lawful permanent resident.

II. THE TRIAL COURT ERRED IN DENYING CHEN'S MOTION TO WITHDRAW GUILTY PLEA BECAUSE HE WAS NOT EFFECTIVELY COUNSELED BY HIS ATTORNEY AS TO THE IMMIGRATION CONSEQUENCES OF PLEADING GUILTY

The trial court's order denying Chen's motion to withdraw guilty plea based upon the fact that Chen was not effectively counseled by his attorney as to the immigration consequences of pleading guilty the felony charge, is an abuse of discretion, and is reviewed accordingly.

A. The Trial Court Abused Its Discretion in Denying Chen's Motion to Withdraw Guilty Plea Because Chen Was Never Effectively Counseled by His Attorney Regarding the Immigration Consequences of Pleading Guilty to the Felony Charge

Chen, a lawful permanent resident in the United States, agreed to plead guilty to Count I, in hopes of finally being released from Grays Harbor County Jail after spending almost four months in custody. Chen decl., pg. 3, Ins. 5-7. At no time was there ever a Fuzhou interpreter assisting Young in her meetings with Chen, and when there were critical times of discussing the consequences of pleading guilty and going through the plea itself, no Fuzhou interpreter was used, causing Chen to have a limited understanding of what was happening. Chen decl., page 3, Ins. 10-12. Young conceded that there were gaps in communication with her client, and that she did not believe that Chen had understood her to fully understand any potential immigration consequences of pleading guilty to the felony. Young decl., page 2, Ins. 15-21. His limited understanding during his meeting with Young was that there was “little to no” chance of Chen facing any immigration consequence as a result of his guilty plea. Chen decl., page 3, Ins. 10-12.

As indicated in the prior briefings in this matter, the U.S. Supreme Court clarified the issue of the defense lawyer’s duty to his or her alien client in a criminal case. In *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010), the Supreme Court put the onus on the defense counsel to correctly advise an alien defendant of potential immigration consequences for a conviction. In *State v. Sandoval*, 171 Wn.2d 163, 173, 249 P.3d 1015, 1020 (2011), the Court found that defense counsel left an impression with the client that deportation was a remote possibility.

Here, there is no dispute that a conviction of Count I, the Manufacture of a Controlled Substance – Marijuana, is Class C Felony, which is subject to deportation under 8 U.S.C., Sec. 1227. Since Chen is only a lawful permanent resident, he is subject to deportation if he is convicted of a felony. Chen specifically asked his counsel whether he would face deportation and his limited understanding from her that there was “little to no” chance of deportation. Young concedes that there were gaps in communication with Chen in which Chen did not ultimately understand his attorney. As a result, Young, whether it was the fact that she did not have the assistance of a Fuzhou interpreter to adequately assist her in communicating with Chen, or whether she gave the incorrect advice to Chen as to the immigration consequences, gave ineffective counsel to Chen. Chen is now facing a dangerous and uncertain future in deportation proceedings with ICE.

CONCLUSION

For the foregoing reasons, the Court should:

1. Accept Chen’s motion to withdraw his guilty plea; and
2. Remand this matter for trial to the trial court.

Respectfully submitted,



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DECLARATION OF SERVICE

I hereby certify that I served by email (RTrick@co.grays-harbor.wa.us), on
April 19, 2019, a copy of:

Appellant's Opening Brief, to the following party:

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c/o Randy Trick, deputy prosecutor
Grays Harbor Co. Prosecutor's Office
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Montesano, WA 98536-3621

I declare under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct.

DATED this 19th day of April, 2019 at Newcastle, Washington.

By:



Terence K. Wong, WSBA No. 24502

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