

FILED
DEC 02, 2015
Court of Appeals
Division III
State of Washington

NO. 30814-6-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

Estela Rojas Lopez

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii-iii

I. ASSIGNMENTS OF ERROR 1

 A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR..... 1

 B. ANSWERS TO ASSIGNMENTS OF ERROR..... 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT 3

RESPONSE TO ALLEGATION..... 9

IV. CONCLUSION 19

TABLE OF AUTHORITIES

PAGE

Cases

City of Sunnyside v. Lopez, 50 Wn.App. 786,
751 P.2d 313 (1988) 10

In re Personal Restraint of Merritt, 69 Wn.App. 419,
848 P.2d 1332 (1993) 11

In re Pers. Restraint Tsai, 193 Wn.2d 91,
351 P.3d 138 (2015) 3, 10, 13, 17

MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959) 9

State v. Barton, 93 Wn.2d 301, 609 P.2d 1353 (1980)..... 16

State v. ex rel. Carroll v. Junker, 79 Wn.2d 12,
482 P.2d 775 (1971) 9

State v. Cisneros-Berrueta, COA #29934-1 16

State v. Downing, 151 Wn.2d 265, 272-3 (2004)..... 9

State v. Garrett, 124 Wn.2d 504, 881 P.2d 185 (1994)..... 15

State v. Holley, 75 Wn.App. 191, 876 P.2d 973 (1994) 16

State v. Malik, 37 Wn.App. 414, 680 P.2d 770,
review denied, 102 Wn.2d 1023 (1984)..... 16

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (Wash. 1995) 12

State v. Neal, 144 Wn.2d 600, 30 P.3d 1255 (2001)9-10

State v. Prestegard, 108 Wn.App. 14, 28 P.3d 817 (2001) 11, 18

State v. Quismundo, 164 Wn.2d 499, 192 P.3d 342 (2008) 10

State v. Ross, 129 Wn.2d 279, 916 P.2d 405 (1996) 16

TABLE OF AUTHORITIES (continued)

PAGE

State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011)..... 13-15

State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990)..... 9

State v. Varga, 151 Wn.2d 179, 86 P.3d 139 (2004) 14

Supreme Court Cases

Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366,
88 L.Ed.2d 203 (1985)..... 14

Padilla v. Kentucky, ___ U.S. ___, 130 S.Ct. 1473,
176 L.Ed.2d 284 (2010)..... 13-17

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052,
80 L.Ed.2d 674 (1984)..... 14

Federal Case

U.S. v. Brito –Acosta, 595 F.Supp. 19 (1984) USCA, Ninth Circuit,
1992 United States District Court, E.D. Washington (1984)..... 15

Rules and Statutes

CrR 7.8 2, 9, 13

RAP 2.5(a) 10

RCW 10.40.200 17

RCW 10.73.100(6) 10

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant raises one issue on appeal, she dissects this one issue into three sub-issues. This issue and the sub-issues can be summarized as follows;

1. Appellant was prejudiced by trial counsel's failure to inform her of the immigration consequences of her plea and she should therefore be allowed to withdraw that plea.
2. At Appellant's motion hearing in 2012 to withdraw this 1991 plea the trial court erred when it determined the motion was time barred.
3. The trial court in 2012 erred when it found that counsel's performance in 1991 was not ineffective.
4. The trial court in 2012 erred when it found that trial counsel's actions in 1991 where Appellant would have argued a duress defense it she had known that the plea would result in an automatic deportation.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. Appellant should not be allowed to withdraw her plea. Her trial counsel in 1991 adequately informed Appellant of the consequences of her plea.
2. Appellant knew of the deportation consequences of her plea and further, her claim at the time of her plea was not the defense of duress but that she was totally innocent, in contradiction of her current claim.

II. STATEMENT OF THE CASE

Lopez pleaded guilty on May 6, 1991 and was sentenced to serve 21 months in prison she was told by the trial court to report at a later date, May 13, 1991. She did not turn herself into the jail as required by order of

the court and remained an absconder on warrant status until she was arrested and appeared on February 16, 2011 nearly twenty years after her original sentencing. The record supplied by Appellant in both the trial court and this court does not indicate where Appellant had been during her twenty years as a fugitive and it is unclear exactly when or for what reason Appellant was finally arrested or when the exact date of arrest occurred and what agency effected the arrest. Nor is it clear at this time where Appellant is. Appellant is not in the custody of the Washington State Department of Corrections according to their website and her “address” for this appeal is listed as “c/o Kristina Nichols” appellant counsel for this case. The State determined while addressing the court’s original order to remand this case for a hearing that Lopez had been deported from the United States. To the best of the State’s knowledge Lopez is still excluded from the country. She has not indicated to this court what the basis for that exclusion is or if it is permanent. Therefore, this court cannot determine if any action regarding this case would affect a change in that status or instead would be futile exercise.

At her CrR 7.8 hearing Appellant refused to subpoena her original trial counsel into court to make a record regarding his actions at the time of the plea. She argued that it was not her duty to bring counsel into court to establish that record. The trial court noted in its ruling that it was

Lopez's duty to perfect the record. (CP 71-2) After this matter was filed in this court and after appellant's brief was filed she moved this court to be allowed to supplement the record with an affidavit from that same counsel, an affidavit that was not offered in the trial court, therefore it was not a portion of the record upon which the trial court made its ruling. The State objected to that document, a Commissioner of this court granted leave to file that document. The State moved for reconsideration of that order. This court subsequently ruled that "[t]he appeal shall proceed on the basis of the trial court record." (Order Amending Order Granting in Part Respondent's Motion to Modify Filed February 13, 2013)

Appellant filed a Supplemental Brief on September 2, 2015. That supplemental brief addressed In re Tsai, 183 Wn.2d 91, 351 P.3d 138 (2015).

III. ARGUMENT

Appellant claims that she was at the time of her plea a non-English speaking individual citing to CP 6, 21. CP 6 is the sworn statement form at the end of the Statement of Defendant on Plea of Guilty, signed by the deputy prosecuting attorney, Mr. Victor Lara, Appellant, the Judge and an interpreter. This document does nothing to support a claim that Appellant could not speak the English language. The next CP referred to is CP 21 which is a self-serving affidavit filed at the time of Appellant's motion to

be allowed to withdraw her then twenty year old plea of guilty. These two items are wholly and totally refuted by the information contained in CP 7-17. The information supplied in the police reports as well as the recorded statement made by the individual who was in essence the middle-man for this drug transaction all clearly indicate that at the time of the drug transaction the person to whom she actually spoke was the Appellant herein.

The claim that she was not aware that she could or would be deported as a result of this plea is refuted by a question asked by Appellant to the trial court back in 1991:

THE DEFENDANT I would like to ask a question

THE COURT Yes

THE DEFENDANT After I've served my sentence, do you know if they're going to get me out to Mexico?

THE COURT I do not know that I am not in charge of that but it is entirely possible. Anything else?

MR LARA No, Your Honor
(CP 88-9)

Appellant claims now that she would have argued duress at trial but it is clear at the time of the plea she stated over and over that she was not part of the actual delivery and was in fact not there at the time of the drug transaction;

MR LARA That is correct, Your Honor We have discussed this matter The evidence that would be offered by the state basically comes from a police officer that would testify that on February 27 of this year, Miss Lopez delivered

cocaine to him Miss Lopez denies that, but she realizes that, if the officer should be believed, that she would be looking at a term of 45 to 51 months And rather than take that risk, she's indicated her willingness to plead guilty pursuant to Alford v North Carolina

...

THE DEFENDANT I'll plead and sign -- I'll sign and plead to be guilty because I don't want to do the 45 to 51 months, but that's -- I'm not guilty I didn't do anything I tried to explain all the truth, and they don't want to believe me So I don't want to keep going on with this, so I'd rather plead guilty, but I didn't do anything That's why I'm pleading guilty

...

THE DEFENDANT On the 27th I didn't do anything where they got me, but I'll plead guilty because I don't want to keep going on with this

THE COURT Very well I understand

THE DEFENDANT I'm trying to explain all the truth, and they don't want to believe me That's why I'd rather plead guilty, because I want to get the 21 months, I don't want to get the 45 to 51 months

...

THE DEFENDANT I pled guilty because I didn't want to risk for them to give me the 45 to 51 months Because I'm not guilty, but I tried to say all the truth that I can see there And I have got proof that I did not live there I've got the rent receipts where I was living the last time And I'd just barely been there three days, when I had got the rent, where they arrested me But they don't want to believe me what I'm saying, so that's why I'm going to plead guilty, because I don't want them to give me more time

CP 86

The court at the time of the entry of the plea stated;

THE COURT Thank you, **It appears to me that the defendant very ably understands all of the implications of today's proceedings She proclaims her innocence, but indicates she wishes to enter a plea of guilty to avoid the enhanced punishment that might be possible if found guilty of having**

committed this crime within a thousand feet of a school bus stop zone

I have taken the opportunity, prior to coming on the bench, to review various police documents, most particularly a report by Officer Merryman, who describes certain events of February 27, 1991, a subsequent report of, apparently, 3-5-91, and a tape recorded statement from a purported witness. In any event, it is clear that Officer Merryman's testimony would establish all elements of the crime of delivery.

CP's at page 5 contained within the Statement of Defendant on Plea of Guilty paragraph 14, although nearly unreadable, informed Lopez, even nearly twenty-five years ago, that ;

14. I understand that 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, expulsion from, admission to the United States, or denial of naturalization pursuant to the laws of the United States. (CP

The document following the statement of defendant on plea of guilty is a form was signed by all parties present at the hearing and is a certification that even if Appellant did not speak, read or understand English it was interpreted for her by a certified interpreter. Appellant was also asked at the time of the plea and sentencing hearing if she understood that document. She was questioned by her own counsel first;

MR LARA Miss Lopez, in front of you is a statement of defendant on plea of guilty which the interpreter read to you, is that correct?

THE DEFENDANT Yes

MR LARA Did you understand everything she read to You?

THE DEFENDANT Yes

MR LARA If you want the court to accept the plea, please sign here.

THE DEFENDANT I'll plead and sign -- I'll sign and plead to be guilty because I don't want to do the 45 to 51 months, but that's -- I'm not guilty I didn't do anything I tried to explain all the truth, and they don't want to believe me So I don't want to keep going on with this, so I'd rather plead guilty, but I didn't do anything That's why I'm leading guilty

Then this was reviewed again by the court:

THE COURT All right Now, Mrs Lopez or Miss Lopez, have the two pages of this document called statement of defendant on plea of guilty been read to you completely?

THE DEFENDANT Yes

THE COURT And that was done by the interpreter, Miss Reid?

THE DEFENDANT Uh-huh

THE COURT Did you understand everything that was read to you?

THE DEFENDANT Yes
(CP 80-2)

And finally:

THE COURT Now, I haven't told you all of your rights They were told to you from this piece of paper by the interpreter Did you understand what all of your rights are?

THE DEFENDANT Yes

THE COURT Has anybody forced you or threatened you in order for you to enter this plea of guilty?

THE DEFENDANT No I'm doing it voluntarily

THE COURT Thank you I saw the defendant sign this document, which includes, quote, plea pursuant to Alford v North Carolina, I am pleading guilty to avoid the possibility of a harsher sentence

And is that your statement, Miss Lopez?

THE DEFENDANT Yes
(CP 83)

Defendant was sentenced to serve 21 months in prison on May 6, 1991 she was granted a boon by the trial court and allowed to report to the court at a later date, May 13, 1991. She did not turn herself into the jail and remained an absconder on warrant status until she was arrested and appeared on February 16, 2011. The record is unclear exactly when or the reason for Appellant's final arrest or when the exact date the arrest occurred and what agency affected the arrest. As the trial court at the hearing on the motion to withdraw her plea stated:

THE COURT: All right. See, I'm troubled -- I'm troubled by the general concept here that somebody can be -- can plead guilty, be sentenced, and then skip town for 20 years and then come back and say, well, now that the law has changed, I'm entitled to withdraw my guilty plea. I mean, if -- if that is allowed, that's kind of rewarding somebody for not reporting for incarceration as required; isn't? Otherwise --

This motion should be denied. The fact is this court and the Supreme Court have on innumerable occasions ruled against this very type of request. The mechanism of "direct" appeal which this technically is, arises from the initial hearing or hearings and the trial itself or as is the case here from this initial set of hearings.

The right to appeal must be exercised within thirty days of the date of conviction. Appellant absconded for twenty years. She then moved for withdraw of her plea and was granted a hearing on that issue. The

court denied that motion and thereby Appellant has managed to avoid the consequences of her willful failure to report as ordered and has now been granted the right to appeal.

RESPONSE TO ALLEGATION

Lopez alleges one issue and then subdivides that issue into numerous subsections. She alleges the trial court improperly denied her motion under CrR 7.8 and that she should be allowed to withdraw her plea twenty years after the judgment was rendered. The motion that was denied by the trial court occurred before she had served a single day in prison on her term of incarceration due to her flight and fugitive status.

State v. Downing, 151 Wn.2d 265, 272-3 (2004) “We will not disturb the trial court's decision unless the appellant or petitioner makes "a clear showing . . . [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (citing MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959)).” This court will review a trial court's denial of a motion to vacate sentence under CrR 7.8 for an abuse of discretion. State v. Swan, 114 Wn.2d 613, 642, 790 P.2d 610 (1990). A trial court abuses its discretion when it exercises discretion in a manner that is manifestly unreasonable or based upon untenable grounds. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255

(2001). A decision is based on untenable grounds or made for untenable reasons when it was reached by applying the wrong legal standard. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

A trial court decision may be affirmed on any basis regardless of whether that basis was considered or relied on by the trial court. RAP 2.5(a); City of Sunnyside v. Lopez, 50 Wn. App. 786, 794 n.6, 751 P.2d 313 (1988). Therefore even if this court were to determine that the trial court was incorrect when it determined that the allegation raised was time barred this court may still affirm the denial on the factual grounds that the record is sufficient to support the plea and insufficient to require reversal or a remand hearing.

Lopez argues that she may present this allegation more than one year after her conviction because is it not time barred under RCW 10.73.100(6) and that the decision in In re Personal Restraint of Tsai 183 Wn.2d 91, 351 P.3d 138 (2015) is dispositive because it determined;

As applied to Washington, the holding in Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) is an affirmation of an old rule of state constitutional law--the duty to provide effective assistance of counsel includes the duty to reasonably research and apply relevant statutes. However, language in certain Washington appellate cases made it appear that this well-established rule did not apply to RCW 10.40.200. In superseding those cases, Padilla significantly changed state law.

Here Mr. Lara, trial counsel, was not called because Appellant argued that it was not her burden to supply that portion of the record. The appellant chose not to insure that this portion of the record was made. If Appellant wished to perfect the record regarding whether Mr. Lara actions at the time of the plea were ineffective she merely needed to call him before the trial court at the hearing to withdraw that plea. The trial court in its ruling specially refers to the fact that Lopez did not call Mr. Lara as a witness. As this court is well aware Mr. Lara himself has filed numerous motions for numerous clients attempting to indicate other attorneys did not advise their clients properly regarding the immigration consequences of their pleas. Mr. Lara is an attorney familiar with immigration laws and the consequences. Is simple search of the internet reveals that as far back as 1984 Mr. Lara was representing individuals who subjected to deportation, see In re Personal Restraint of Merritt, 69 Wn. App. 419, 425, 848 P.2d 1332 (1993).

In State v. Prestegard, 108 Wn.App. 14, 19, 28 P.3d 817 (2001) this court made it clear that past practice is sometime which in some instance can be dispositive:

ER 406 contains two disjunctive clauses, one permitting habit evidence of a person and the other permitting routine practice evidence of an organization:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Accordingly, a party wishing to establish an organization's routine practice need not meet the foundational requirements for establishing a person's habit.

The State can think of very few persons who are less likely to properly inform a client of the consequences of a criminal conviction than Mr. Lara.

This is nothing more than a claim of ineffective assistance of counsel. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (Wash. 1995):

Courts engage in a strong presumption counsel's representation was effective. State v. Brett, 126 Wash.2d 136, 198, 892 P.2d 29 (1995); Thomas, 109 Wash.2d at 226, 743 P.2d 816. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. State v. Crane, 116 Wash.2d 315, 335, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); State v. Blight, 89 Wash.2d 38, 45-46, 569 P.2d 1129 (1977). Accord State v. Stockton, 97 Wash.2d 528, 530, 647 P.2d 21 (1982) (matters referred to in the brief but not included in the record cannot be considered on appeal). The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the

appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal. See Washington State Bar Ass'n, Appellate Practice Desk Book § 32.2(3)(c), at 32-6 (2d ed. 1993) (citing *State v. Byrd*, 30 Wash.App. 794, 800, 638 P.2d 601 (1981)). Because neither Defendant here filed a personal restraint petition, the issue in these cases must be decided based on the trial records identified on appeal.

Tsai at 103, “This resolves Padilla's threshold question as applied to Washington law. Padilla thus becomes a "garden-variety application[] of the test in Strickland " that simply refines the scope of defense counsel's constitutional duties as applied to a specific fact pattern. Chaidez, 133 S.Ct. at 1107.”

Lopez’s trial counsel at the CrR 7.8 hearing repeated over and over that it was not his client’s burden to bring forth Mr. Lara, however it was the appellant’s duty to perfect the record such that it could be appealed and there would be sufficient information other than the bald assertion of the appellant. (RP 10-18) (It should be noted that throughout the verbatim report of proceedings original counsel Victor Lara’s name is spelled several different ways.)

State v. Sandoval, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011)
“Sandoval still has the burden of establishing the prejudice required for a claim of ineffective assistance of counsel based on an attorney's advice

during the plea bargaining process. See Padilla, 130 S.Ct. at 1485; Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).”

The Sixth Amendment right to effective assistance of counsel encompasses the plea process. State v. Sandoval, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011), (citations omitted). To establish that a plea was involuntary or unintelligent because of counsel’s inadequate advice, the defendant must satisfy the familiar two-part test set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984): objectively unreasonable performance, and second, prejudice to the defendant.

In weighing the two prongs found in Strickland, a reviewing court begins with a strong presumption that defense counsel’s representation was effective. In fact, the presumption “will only be overcome by a clear showing of incompetence.” State v. Varga, 151 Wn.2d 179, 199, 86 P.3d 139 (2004).

In Padilla, the Supreme Court refined the first Strickland prong to include criminal cases with the potential for “adverse immigration consequences.” 130 S. Ct. at 1486. Here, Lopez cannot satisfy either prong. First, as noted in the verbatim report of proceedings, (RP 10-11) Lopez acknowledged the immigration warnings by signing the Statement of Defendant on Plea of Guilty.

Second, her claim that counsel either did not advise her of any immigration consequences of her plea, or told her that there were no such consequences, are but bare assertions coming over 20 years since entry of her plea. Unlike the facts in Sandoval, which followed Padilla, we do not have corroboration from defense counsel as to what was said or left unsaid.

In contrast, defense counsel in Sandoval confirmed that he had advised his client incorrectly that he should plead guilty, and that there would be no immediate immigration consequences. Sandoval, 171 Wn.2d at 167. In Padilla, there is no record whether counsel corroborated the defendant's assertions, and the matter was remanded for further proceedings to determine whether he was prejudiced by the alleged ineffective assistance. 130 S. Ct. at 1487.

Because the presumption runs in favor of effective representation, a defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Mr. Lara has been actively involved in cases that address the consequences of immigration for decades; See, US v. BRITO-ACOSTA, 595 F.Supp. 19 (1984) USCA, Ninth Circuit, 1992, United States District Court, E.D. Washington (1984) **Victor H. Lara**, Daniel G. Ford, Thomas

B. Benjamin, Evergreen Legal Services, Farm Workers Division, Sunnyside, Wash., for plaintiffs. “This case presents yet another challenge to the constitutionality of the methods used by the Immigration and Naturalization Service (INS) in its efforts to enforce this nation's immigration laws.” Mr. Lara has also filed motions based on Padilla v. Kentucky, ___ U.S. ___, 130 S. Ct. 1473, 176 L. Ed. 2d 284 in this very court that were for a purposes identical to this appeal, See, State v. Cisneros-Berrueta COA# 29934-1.

Pre-existing law established clear requirements for guilty pleas. For the plea to be valid, due process required the court to advise the defendant of all direct consequences of her plea at the time of this plea, 1991, the immigration consequences were defined at collateral, not direct. The trial court was not required, in 1991, to advise the defendant of collateral consequences. State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980); State v. Ross, 129 Wn.2d 279, 916 P.2d 405 (1996). Immigration consequences were considered “collateral,” so the court was not required to cover them at the plea hearing. State v. Holley, 75 Wn. App. 191, 196, 876 P.2d 973 (1994); State v. Malik, 37 Wn. App. 414, 416, 680 P.2d 770, *review denied*, 102 Wn.2d 1023 (1984). A Washington statute, however, required courts to advise defendants that a criminal conviction could result in deportation, exclusion from admission,

or denial of naturalization. RCW 10.40.200. The court complied with that requirement here. While not reading the words directly from the Statement of Defendant on Plea of Guilty it is clear from the record that Mr. Lara and the court inquired of Lopez if she had been informed of the content and consequences laid forth in that statement on more than one occasion. (See above.)

While Tsai did state that that Padilla was a significant change in the law, it does not change the outcome or the method of analysis for this court. The court held that the Sixth Amendment requires “...under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the "mercies of incompetent counsel." Richardson, 397 U.S., at 771, 90 S.Ct. 1441, 25 L.Ed.2d 763. To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation.” Padilla, 130 S. Ct. at 1486. The court noted that when immigration consequences are unclear or uncertain, “a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” Id., at 1483.”

In the present case, Lopez did receive that advice in the plea statement. And manifested her knowledge of those consequences when she directly asked the court if she would be deported. Her trial counsel is

and was a very seasoned attorney who's practice involves immigration law.

Further as indicate by the trial court this defendant did not even serve her sentence. Even if she had appealed this issue directly the fact that she apparently fled the area and did not serve her time would have been a basis to dismiss this appeal.

The law is clear that “When assessing whether substantial evidence is present, we cannot rely on guess, speculation, or conjecture. State v. Prestegard, 108 Wn.App. 14, 23, 28 P.3d 817 (2001).

The first two short paragraphs in Tsai are dispositive;

A. As applied to Washington, Padilla did not announce a new rule, but it did effect a significant change in the law under RCW 10.73.100(6)

1. The unreasonable failure to give any advice about the immigration consequences of a guilty plea was already deficient performance in Washington under the ordinary *Strickland* test
(Tsai at 99)

The actions of Mr. Lara and the court cannot be considered an “unreasonable failure to give any advice.” The actions of the trial court, counsel for Lopez all facilitated by an interpreter, even though Lopez according to the police reports speaks English, were sufficient to allow the trial court and this court on review to determine that the allegation that this was an involuntary plea is false. Further, the allegations that Lopez

wished or wishes to pursue the defense of duress are contradicted by her own statements on the record where she states that she was nowhere near the drug sale. This argument is baseless.

Lopez requests that this court, at a minimum remand this for a hearing as was done in Jagana. The problem with that request is that Lopez has her day in court already. She was granted a hearing in the trial court where it was her duty to perfect a record upon which a determination could be made regarding the actions of Mr. Lara at the time of the original plea. She has a record.

This court has already reviewed the propriety of requiring a hearing with Mr. Lara being placed before the court to allow examination. This court determined that should not be allowed and that this case would/should stand or fall based on the record that Lopez established in the trial court. Once again as this court previously ruled “[t]he appeal shall proceed on the basis of the trial court record.” (Order Amending Order Granting in Part Respondent’s Motion to Modify Filed February 13, 2013) The other issue that was addressed in the motions, responses and rulings by this court is that there is no method by which this requested hearing could be conducted now that Lopez has been deported.

IV. CONCLUSION

For the reasons set forth above this court should deny allegations

set forth in this appeal.

Respectfully submitted this 2nd day of December 2015,

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DECLARATION OF SERVICE

I, David B. Trefry state that on December 2, 2015 emailed a copy, by agreement of the parties, of the Respondent's Brief, to Kristina M. Nichols at wa.appeals@gmail.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 2nd day of December, 2015 at Spokane, Washington.

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