

COA III No. 321941
consolidated with
COA III No. 325695
Okanogan County Superior Court No. 98-1-00299-7

FILED
Jun 23, 2015
Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

JOSE LUIS GONZALEZ CASTANEDA,
Appellant.

APPELLANT'S SUPPLEMENTAL BRIEF

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Comes now counsel for the Appellant, Jose Luis Gonzalez-Castaneda, and presents this supplemental briefing on behalf of the appellant. This additional authority is provided based on the May 7, 2015 decision of the Washington Supreme Court, *In re Personal Restraint of Tsai*, 88770-5, (May 7, 2015) (consolidated with *In re Personal Restraint of Jagana*, 89992-4).

I. THE TSAI DECISION SUPPORTS THE APPELLANT'S MOTION TO VACATE HIS CONVICTION.

A. Tsai Decided That *Padilla v. Kentucky* Does Not Present A "New Rule" As To *Teague* Retroactivity Analysis. *Padilla* Is Simply A New Application Of *Strickland* And Is Therefore Retroactive.

The Washington Supreme Court in *Tsai* held that *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) as applied to Washington state law 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. *In re Personal Restraint of Tsai*, 88770-5, (May 7, 2015) (consolidated with *In re Personal Restraint of Jagana*, 89992-4).

Previously, there was much conjecture as to whether Washington would simply follow the federal courts' lead, which had already found in *Chaidez v. United States*, 568 U.S. ___, 133 S. Ct. 1103, 1107, 185 L. Ed. 2d 149 (2013), that *Padilla* did announce a new rule. Therefore, as to federal cases, it would not apply retroactively to matters on collateral review.

Other federal case law suggested that Washington might easily come to a different conclusion regarding retroactivity. In *Danforth v. Minnesota*, 552 U.S. 264, 279-81, 128

S. Ct. 1029, 169 L. Ed. 2d 859 (2008), both the Minnesota trial court and Court of Appeals had concluded that *Crawford*¹ did not apply retroactively under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L. Ed. 2d 334 (1989), as *Crawford* had made a new rule which drew a distinction between testimonial and non-testimonial evidence. The Minnesota State Supreme Court agreed with this analysis. However, the Minnesota State Supreme Court did not exercise judicial restraint and went on to reach a much broader conclusion that state courts are not free to give a decision of the U.S. Supreme Court announcing a new constitutional rule of criminal procedure broader retroactive application than that given by the U.S. Supreme Court. *Danforth* 552 U.S. at 268-269.

In recognition of the rights of the individual states to develop their own jurisprudence, the U.S. Supreme Court in *Danforth* stated: "[w]e have never suggested" that the strict constraints upon retroactivity under *Teague* should "constrain[] the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion[,] and [we] now hold that it does not." 552 U.S. at 266.

Danforth stated: "[a] close reading of the *Teague* opinion makes clear that the rule it established was tailored to the unique context of federal habeas, and therefore had no bearing on whether States could provide broader relief in their own post-conviction proceedings than required by that opinion." *Id.* at 277.

Washington generally follows the federal common law rule concerning the retroactive application of criminal procedural holdings found in *Teague*. *State v. Evans*, 154 Wn.2d 438, 444 (2005). If a holding constitutes a "new rule," it will be given retroactive application to cases on collateral review only if, inter alia, "the rule requires

¹ *Crawford v. Washington*, 541 U.S. 36 (2004).

the observance of procedures implicit in the concept of ordered liberty." *Id.* (quoting *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321,326 (1992)).

"New" cases are those:

...that 'break[] new ground or impose[] a new obligation on the States or the Federal government [or] ... if the result was not dictated by precedent existing at the time the defendant's conviction became final.' If before the opinion is announced, reasonable jurists could disagree on the rule of law, the opinion is new.

Id. (quoting *Teague* and citing *Beard v. Banks*, 542 U.S. 406, 411, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004)).

Hence a "new rule" will be applied retroactively only if it meets the high bar of being "implicit in the concept of ordered liberty." However, if the holding does not constitute a new rule, and is simply a new application of a preexisting rule, this limitation on retroactive application does not apply.²

Even though a law might not qualify as "new" (as the term is used in *Teague* and its progeny), such law may yet qualify as a "significant change" as the term is used in RCW 10.73.100(6). Albeit that the two rules serve similar purposes³, the terminology of a federal judicial doctrine is also freighted with a slightly different technical meaning than a rule derived from the Washington legislature. Thus, it was unnecessary for the Washington Supreme Court to construe the two provisions in strict harmony.⁴ It therefore found that as applied to Washington law, *Padilla* was just such a case. (*Tsai*,

² This particularly lucid explanation of the *Teague* retroactivity principle is quoted verbatim from a 2011 decision of the Honorable Judge Leila Mills from the Kitsap Superior Court.

³ See *Gilmore v. Taylor*, 508 U.S. 333, 351 (1993) (O'Connor, J., concurring) (the purpose of the retroactivity doctrine under *Teague* is to ensure the finality of judgments), *In re the Pers. Restraint of Bonds*, 165 Wn.2d 135, 141 (2008) (the purpose of RCW 10.73.090 is to "manage the flow of post-conviction collateral relief petitions by requiring collateral attacks to be brought promptly.) Limiting attacks to a one-year period, except in instances provided in RCW 10.73.100, also promotes finality of judgments."

⁴ The *Teague* retroactivity rule and the time bar rule at RCW 10.73.100 are not *in pari materia*. *Tsai*, Slip Opinion at p.12

Slip Opinion at 7.)

Tsai held that historically, for Washington State jurisprudence, the RCW 10.20.400 warnings were an explicit rejection of the direct vs. collateral appeal warnings distinction as applied to immigration consequences of criminal convictions. LAWS OF 1983, ch. 199 § 1(1), codified at RCW 10.40.200(1); *Tsai*, *Slip Opinion* at p.8; Fnt 1.

B. The Uncontroverted Facts From the Different Declarations Offered on Behalf of the Appellant Demonstrate That He Was Not Warned of the Specific Immigration Consequences of His Conviction and That Such Conviction Would Cause Him to Lose His Lawful Permanent Resident Status.

Mr. Gonzalez-Castaneda provided a declaration regarding his recollections of his decision to plead guilty.

...

3. I pleaded guilty to the crime of Murder in the Second Degree on June 18, 2001.
4. I do not remember everything that happened in the case since it was a long time ago.
5. What I do remember clearly was that I was never told that this would definitely cause me problems with immigration. I thought that as soon as I completed my sentence, I would be released here in the United States to serve out my probation.
6. I pleaded guilty to this crime because my lawyer told me it was the best deal he could get for me.
7. If I had known that pleading guilty to this crime would absolutely cause me to be deported from the United States, I would have not pleaded guilty but would have chosen to go to trial and to take my chances.

...

(other content omitted)

November 15, 2013 Declaration of the Defendant (CP 39-40)

Attorney Connolly, trial counsel for Mr. Gonzalez-Castaneda, provided a declaration on behalf of Mr. Gonzalez-Castaneda. His declaration provides, in part:

- ...
7. I would not have been aware of any particular immigration consequences attached to the plea entered by Mr. Castaneda. I have reviewed the transcript of sentencing. The transcript reflects that there was no certainty as to whether or not Mr. Castaneda might be deported as a result of his conviction.

 8. I am informed that Mr. Castaneda states that he was not informed by the court that he was waiving his right to an appeal. Unfortunately, I cannot provide any further information regarding this issue as I did not take any notes at that time. Certainly a transcript of the guilty plea would be the most accurate source of information to be consulted in making this determination.

 9. As to my general practice, I would have gone over the guilty plea statement with Mr. Castaneda. This would have been with the assistance of the court's interpreter if the client did not speak English. The advice that I would have given any client would have been exactly as that provided on the guilty plea form. It was not my practice to deviate from the form or to give additional information unless a client asked a question or needed additional information to understand the guilty plea form. As this was a plea agreement we would not have discussed the filing an appeal beyond the warnings provided in the guilty plea form.

...
(other content omitted)

October 10, 2013 Declaration of Trial Counsel Dan Kevin Connolly (CP 43-44)

As corroborated by trial attorney Connolly, the trial court's sentencing hearing reflected that Mr. Gonzalez-Castaneda was not provided any specific warnings as to the certain deportation consequences that would result from his guilty plea to Murder in the Second Degree. The transcript of the sentencing hearing provides, in part:

...
Court: Sir, after you serve your sentence you will be placed on 24 months of community placement with the Department of Corrections. During that

two-year period, assuming that you are not deported from this country, which would certainly be a possibility, you will need to comply with certain requirements. Those are: Reporting regularly to the Department of Corrections; Keeping the Department advised of your address and place of employment; Not using or possessing any illegal controlled substances; Pay your legal financial obligations on a regular basis; Not using, owning or possessing any firearms or ammunition; and having your general living arrangements approved by the Department of Corrections. And the Court would also require that you not associate with anyone who has a felony criminal history and not associate with any persons who use or possess illegal controlled substances. Do you have any questions, Mr. Gonzalez?

...
(other content omitted)

Transcript of 10/23/2001 Sentencing Hearing (CP 60-61)

CrR7.2(b)-(c) provides:

(b) Procedure at Time of Sentencing. The court shall, immediately after sentencing, advise the defendant:

- (1) of the right to appeal the conviction;
- (2) of the right to appeal a sentence outside the standard sentence range;
- (3) that unless a notice of appeal is filed within 30 days after the entry of the judgment or order appealed from, the right to appeal is irrevocably waived;
- (4) that the superior court clerk will, if requested by the defendant appearing without counsel, supply a notice of appeal form and file it upon completion by the defendant;
- (5) of the right, if unable to pay the costs thereof, to have counsel appointed and portions of the trial record necessary for review of assigned errors transcribed at public expense for an appeal; and

(6) of the time limits on the right to collateral attack imposed by RCW 10.73.090 and .100. These proceedings shall be made a part of the record.

(c) Record. A verbatim record of the sentencing proceedings shall be made.

The sentencing hearing transcript shows that none of these warnings were provided by the sentencing court. (CP 45-63)

Finally, it appears in the record that Mr. Gonzalez-Castaneda was claiming self-defense as a reason for shooting the victim after the victim had forced his way into the house to confront Mr. Gonzalez-Castaneda.

In most unusual form, Mr. Gonzalez-Castaneda's own guilty plea contained this equivocal statement regarding his plea:

11. ALFORD PLEA (IN PART)

The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement: On 9/29/98, in the State of Washington. I shot and killed Thomas Marchand after he forced his way into the home where I was residing. He was intoxicated on drugs and alcohol, armed with a firearm and he confronted me. I acted in self-defense after Tom Marchand provoked an incident. I wish to plead guilty to a reduced charge to avoid the risk a jury may convict me of 1st degree murder.

06/08/2001 Statement of Defendant on Plea of Guilty (CP 15-24 at 22)

II. CONCLUSION

Tsai applies to this matter. Mr. Gonzalez-Castaneda was not informed by his trial counsel of the very certain deportation consequences of his guilty plea. Mr. Gonzalez-Castaneda insisted in his guilty plea that he had acted in self-defense. It would have been logical for him to choose to go to trial and to take his chances rather than agreeing to certain deportation.

Respectfully submitted this 22nd day of June, 2015.

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CERTIFICATE OF SERVICE

I certify that on this 22nd day of June, 2015, I caused a copy of APPELLANT'S
SUPPLEMENTAL BRIEF to be sent by electronic mail to:

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And by U.S. Mail, first-class postage prepaid to:

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