FILED

Dec 9, 2016
Court of Appeals
Division III
State of Washington

32414-1-III, 32415-0-III, 32416-8-III, 32420-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

FELIX R. RODRIGUEZ, APPELLANT/PETITIONER

APPEAL FROM THE SUPERIOR COURT

OF GRANT COUNTY

APPELLANT/PETITIONER'S REPLY BRIEF

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A. ARGUMENT

Felix Rodriguez contends that his counsel rendered ineffective assistance during plea proceedings by failing to advise him that his convictions for possession of cocaine would result in mandatory deportation and exclusion from the United States. If counsel had advised him of the deportation consequences, he would have pled not guilty and gone to trial. Even after his conviction, if counsel had advised him of his right to withdraw his guilty plea, he would have done so, pled not guilty, and gone to trial. Thus, his attorney's repeated failures rendered his plea involuntary and unintelligent, and resulted in his convictions and subsequent deportations.

Trial counsel acknowledged that he would not have advised Mr. Rodriguez of the immigration consequences of his pleas, and the trial court record demonstrates the court did not determine whether this had been done. (335-9 CP 122-25, 157; 528-1 CP 146; 10/2/200 RP 2-4) The State has conceded that Mr. Rodriguez received ineffective assistance of counsel, that the convictions are not yet final because the court failed to advise him of his constitutional right to appeal, and that the appeals and personal restraint petitions presently before the court are timely. (Resp Br. at 9, 17-18)

Our legislature has given "noncitizen defendants the unequivocal right to advice regarding immigration consequences . . . ." *In re Yung-Cheng Tsai*, 183 Wn.2d 91, 101, 351 P.3d 138 (2015).

> The legislature finds and declares that in many instances involving an individual who is not a citizen of the United States charged with an offense punishable as a crime under state law, a plea of guilty is entered without the defendant knowing that a conviction of such offense is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. Therefore, it is the intent of the legislature in enacting this section to promote fairness to such accused individuals by requiring in such cases that acceptance of a guilty plea be preceded by an appropriate warning of the special consequences for such a defendant which may result from the plea.

RCW 10.40.200(1)

The statute requires the trial court, before accepting a guilty plea, to determine that a defendant has been advised of the potential immigration consequences of conviction:

> Prior to acceptance of a plea of guilty to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall determine that the defendant has been advised of the following potential consequences of conviction for a defendant who is not a citizen of the United States: Deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

RCW 10.40.200(2). A defendant who has signed a written acknowledgement that he has received the requisite advice is presumed to

have done so. *Id*. "That warning statement is not, itself, the required advice; it merely creates a rebuttable presumption the defendant has been properly advised." *In re Yung-Cheng Tsai*, 183 Wn.2d at 101; RCW 10.40.200(2); *State v. Sandoval*, 171 Wn.2d 163, 173, 249 P.3d 1015 (2011); see *State v. Holley*, 75 Wn. App. 191, 200, 876 P.2d 973 (1994).

When a defendant establishes that he did not receive the advice regarding immigration consequences and moves to withdraw his plea, the court is required to permit him to withdraw a guilty plea. This mandate applies even after judgment has been entered:

> If . . . the defendant has not been advised as required by this section and the defendant shows that conviction of the offense to which the defendant pleaded guilty *may* have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, *shall* vacate the judgment and permit the defendant to withdraw the plea of guilty and enter a plea of not guilty.

RCW 10.40.200(2).

The record discloses that the trial court did not attempt to determine whether Mr. Rodriguez had been advised as to the immigration consequences of conviction prior to accepting his pleas. (10/2/2000 RP 2-4; 335-9 CP 121-25)[1] Mr. Rodriguez was not advised of the consequences

[1] The court did inquire whether Mr. Rodriguez was aware that conviction could "make it very difficult to become a citizen." (10/2/200 RP 4; 335-9 CP 123-24) This is not, however, the warning the statute requires.

of conviction prior to entering his pleas, the convictions did result in his deportation and exclusion from the United States, judgment has been entered and Mr. Rodriguez has moved to withdraw his pleas. The trial court erred in declining to vacate the convictions and grant the motions. See *Holley*, 75 Wn. App. at 200; RCW 10.40.200(2).

The state contends that although former defense counsel provided ineffective assistance, Mr. Rodriguez was not prejudiced by counsel's deficient performance. (Resp. Br. 9-11)

A defendant receives ineffective assistance of counsel when his attorney's objectively unreasonable performance causes prejudice. *Sandoval*, 171 Wn.2d at 169; *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to show prejudice, Mr. Rodriguez must convince this court "that a decision to reject the plea bargain would have been rational under the circumstances." *Sandoval*, 171 Wn.2d at 175. "This standard of proof is 'somewhat lower' than the common 'preponderance of the evidence' standard." *Id.* (quoting *Strickland*, 466 U.S. at 694).

> Where a defense attorney makes "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," the attorney's performance is constitutionally deficient. *Id.* at 687, 104 S.Ct. 2052. Where that deficiency deprives the defendant of

> fair proceedings, the defendant has suffered prejudice because there is "a breakdown in the adversary process that renders the result unreliable." *Id.* Unreliable results caused by defense counsel's prejudicially deficient performance are constitutionally intolerable.

In re Yung-Cheng Tsai, 183 Wn.2d at 107.

The State first argues that "A bare allegation that a petitioner would not have pleaded guilty if he had known all of the consequences of the plea is not sufficient to establish prejudice under the *Strickland* test." *In re Pers. Restraint of Riley*, 122 Wn.2d 772, 782, 863 P.2d 554 (1993) (citing *In re Peters*, 50 Wn. App. 702, 705, 750 P.2d 643 (1988)). But the guilty plea in *Peters* was entered before RCW 10.40.200's effective date. See *In re Yung-Cheng Tsai*, 183 Wn.2d at 107. Moreover, Peters did not actually allege that he "would not have pleaded guilty had defense counsel advised of the consequences of deportation." *In re Peters*, 50 Wn. App. 702, 708, 750 P.2d 643, 647 (1988).

Under the plain language of RCW 10.40.200, not only was Mr. Rodriguez entitled to be advised of the consequences of his plea before the guilty plea hearing, based on counsel's failure to so advise him, he was entitled thereafter to have the plea withdrawn. Had counsel familiarized himself with the requirements of RCW 10.40.200, as the Supreme Court has now held he was required to do, Mr. Rodriguez's attorney would have advised him of his right to do so. At that stage of the proceedings, proof

that he would not have pleaded guilty had he known the consequences would not have been required. That such proof is now required is a direct consequence of counsel's ineffective assistance in failing to afford Mr. Rodriguez the benefits of RCW 10.40.200.

The State has presented numerous possibilities that would tend to support the conclusion that Mr. Rodriguez was not prejudiced because he would not have pleaded guilty even if he had known the immigrations consequences. In effect the State asks this court to speculate on the likely outcome of a trial based solely on the information available to the State. In fact many elements may factor into a defendant's decision and the rationality of the resulting decision may depend on these variables. See *Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011).

> Although Sandoval would have risked a longer prison term by going to trial, the deportation consequence of his guilty plea is also "a particularly severe 'penalty.' " *Padilla [v. Kentucky*, 559 U.S. 356], 130 S. Ct. [1473] at 1481, [176 L.Ed.2d 284 (2010)], (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740, 13 S. Ct. 1016, 37 L. Ed. 905 (1893)). For criminal defendants, deportation no less than prison can mean "banishment or exile," *Delgadillo v. Carmichael*, 332 U.S. 388, 390–91, 68 S. Ct. 10, 92 L. Ed. 17 (1947), and "separation from their families," *Padilla*, 130 S. Ct. at 1484. Given the severity of the deportation consequence, we think Sandoval would have been rational to take his chances at trial. *See Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 322, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001).

Id. at 175-76. These considerations likely factor into every defendant's plea decision, and the present case is no exception. Mr. Rodriguez had been living with his family in the United States throughout his adolescence. Deportation would have involved separation from his family and, in effect, banishment and exile. Under these circumstances, this court cannot conclude that an informed decision to plead "not guilty" would have been irrational.

The State claims that at least by 2003 Mr. Rodriguez knew the cocaine charge would subject him to deportation. In fact no evidence supports this argument. He states: "I saw the free lawyers that always come by there. I told them about my case and they said that there wasn't anything that could be done and that I would be deported." (335-9 CP 118) The deportation paperwork indicates his unlawful presence in the United States was one of the grounds for his deportation; there is no evidence the "free lawyers" explained the significance of his prior cocaine conviction. (Resp. Br. Appendix B; 335-9 CP 118)

Mr. Rodriguez's prior deportations, based on his having been in this country without having been properly admitted, and having reentered the country illegally, were for terms of ten and twenty years, respectively. (Resp. Br. Appendices B and C) As a result of his guilty pleas to what are considered aggravated felonies in the instant cases, he is liable to be

deported indefinitely. There is no evidence he was ever informed of that fact prior to entering his pleas.

The State argues that in light of the strength of the State's cases, his multiple prior contacts with law enforcement, and the fact that he was deportable as an undocumented alien, it would be irrational to conclude the State would have agreed to allow Mr. Rodriguez to plead guilty to non-deportable crimes only.

Because there was no trial, this court is not in a position to speculate on the relative strength of the parties' cases.

The State provides evidence that prior contacts between Mr. Rodriguez and law enforcement officers occurred, but does not provide any factual basis for these contacts. (Resp. Br. Appendix B) The record indicates that at the time of these offenses, Mr. Rodriguez had no other prior convictions. (528-1 CP 35; 335-9 CP 60) This court cannot assume that despite Mr. Rodriguez's right to be considered innocent until proven guilty, the State would have declined to offer a plea deal that did not include a deportable offense merely because of these prior "contacts." In any event, whether the State's position in possible plea negotiations would have been rational is not the issue here; the question is whether Mr. Rodriguez could have rationally decided to plead not guilty.

Absent evidence Mr. Rodriguez knew he could be deported even without being convicted of any of the charged crimes, his actual risk of deportation is not relevant to whether he could have made a rational decision to plead not guilty. Such a factor is properly weighed by trial counsel, the prosecutor, as well as the defendant, during the plea negotiations:

> By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

Padilla v. Kentucky, 559 U.S. 356, 373, 130 S. Ct. 1473, 176 L. Ed. 2d. 284 (2010). Certainly this court cannot presume, based solely on the strength of the State's case, and possible prejudice against Mr. Rodriguez based on "prior contacts," that the State would not have considered a plea agreement that would reduce the likelihood of deportation. Absent counsel's having undertaken such negotiations, and based on the

provisions of the plea agreement actually offered, a decision to plead not guilty would have been reasonable.

The Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Id*. at 373. Indeed, "[t]he severity of deportation . . . only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation." *Id*. at 373-74. Here, trial counsel's apparent unawareness of his client's immigration status raises the specter of a plea agreement that failed to include consideration by any of the parties of this important factor. Because Mr. Rodriguez was not aware of the immigration consequences of the plea offer, he failed to assert his right to plead not guilty with the possibility of receiving a more favorable offer.

Trial counsel's failure to advise Mr. Rodriguez of the immigration consequences of his guilty pleas deprived him of the opportunity to make informed decisions prior to entering pleas in these cases. By failing to advise him of his right to subsequently withdraw his pleas based on the absence of the requisite advice, trial counsel deprived him of his unconditional right to withdraw his pleas. By failing to ascertain his client's immigration status and include that factor in plea negotiations, defense counsel deprived Mr. Rodriguez of fully informed, meaningful

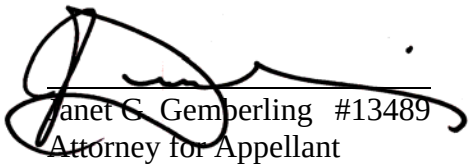
plea negotiations. Given the severity of the deportation consequences, and had he been properly informed and advised by counsel, a decision to plead not guilty and take his chances at trial would have been entirely rational.

B. CONCLUSION

The court should vacate Mr. Rodriguez's guilty pleas and convictions. See *State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011).

Dated this 9th day of December, 2016.

JANET GEMBERLING, P.S.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	Nos. 32414-1-III, 32415-0-III
	)	32416-8-III, 32420-6-III
vs.	)	
	)	CERTIFICATE
FELIX RODRIGUEZ,	)	OF MAILING
	)	
Appellant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on December 9, 2016, I served a copy of the Appellant/Petitioner's Reply Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on December 9, 2016, I mailed a copy of the Appellant/Petitioner's Reply Brief in this matter to:

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Signed at Spokane, Washington on December 9, 2016.

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