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Court of Appeals
Division III
State of Washington

32414-1-III & 32420-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

FELIX RODRIGUEZ, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF GRANT COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. Mr. Rodriguez received ineffective assistance of counsel under the Sixth Amendment.
2. The court erred in declining to give retroactive effect to the rule announced in *Padilla.*

B. ISSUES

1. Does counsel's failure to advise a defendant of the immigration consequences of a proposed guilty plea constitute ineffective assistance of counsel?
2. Is the failure to advise a non-citizen defendant regarding possible deportation as a result of pleading guilty harmless error?
3. *Padilla* held that failure to advise a defendant of immigration consequences of a guilty plea is ineffective assistance of counsel.
    a. Under Washington law, should the rule in *Padilla* be applied retroactively?
    b. Does the retroactive application of this new rule render an otherwise untimely collateral attack timely?

C. STATEMENT OF THE CASE

Felix Rodriguez pleaded guilty to possession of cocaine in 2000 in exchange for the dismissal of a charge of being a minor in possession of intoxicants. (10/2/2000 RP 4) He sought to withdraw his guilty plea in 2012, alleging that he had not been advised of the immigration consequences of his plea and that he had received ineffective assistance of counsel. (528-1 CP 47, 75-135)[1]

Before accepting the guilty plea, the court advised Mr. Rodriguez: "If you plead guilty it will make it hard to become a citizen." (10/2/200 RP 4) Mr. Rodriguez, who is not a citizen, was deported in July 2001. (528-1 CP 34)

In 2003 Mr. Rodriguez pleaded guilty to possession of cocaine and driving while intoxicated. (10/13/2003 RP 5) On this occasion, no possible immigration consequences were mentioned. (10/13/2003 RP)

In 2012 Mr. Rodriguez sought to withdraw his guilty pleas, alleging he had not been advised of the immigration consequences of his pleas and had received ineffective assistance of counsel. (335-9 CP 53, 76-136; 528-1 CP 47, 75-135)

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[1] This appeal is comprised of four consolidated appeals, arising from two Superior Court cases: Nos. 00-1-528-1 and 01-1-335-9. COA numbers 324141 and 324159 involve Superior Court cause number 00-1-528-1. Documents relating to Superior Court Cause No. 00-1-528-1 are cited as (528-1 CP nn). COA numbers 324206 and 324168 involve Superior Court cause number 01-1-335-9. Documents relating to Superior Court Cause No. 00-1-528-1 are cited as (335-9 CP nn).

In both cases his former trial attorney provided affidavits stating:

> 5. I have never been experienced in the area of immigration law. If asked, I made it clear to my clients that I had no such knowledge.
>
> 6. When one of my clients was entering a guilty plea, . . . [i]f the defendant was not an English speaker, the interpreter would go through all of the points in the guilty plea statement with him. We would only discuss what was in the guilty plea statement.

(528-1 CP 38; 335-9 CP 44)

The trial court determined that the record did not demonstrate Mr. Rodriguez had been advised of the time limits for filing a collateral attack on his convictions and therefore ruled his motions were timely. (528-1 CP 54) The court further determined, however, that the claims of ineffective assistance of counsel, based on failure to advise him of possible deportation consequences of his guilty plea, lacked merit:

> In assessing the showing made by each defendant, this court has concluded that the *Padilla* requirement to advise criminal defendants of immigration consequences of a plea is not retroactive and thus applies to none of these cases.

(528-1 CP 53)

The trial court transferred these cases to the Court of Appeals as Personal Restraint Petitions. (528-1 CP 158; 335-9 CP 163) Counsel for Mr. Rodriguez filed a notice of appeal from each of the transfer orders. (528-1 CP 61; 335-9 CP 66)

D. ARGUMENT

CrR 7.8(c)(2) requires the trial court to transfer a motion to vacate judgment to the Court of Appeals unless it determines the motion is not time-barred under RCW 10.73.090 and the defendant has made a showing that he is entitled to relief:

> (2) *Transfer to Court of Appeals*. The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

CrR 7.8. The matter has been transferred pursuant to CrR 7.8. Accordingly, the issues for this court are whether the motion is barred by RCW 10.73.090 and whether the defendant has made a substantial showing that he is entitled to relief.

1. MR. RODRIGUEZ HAS MADE A SUBSTANTIAL SHOWING THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective

assistance of counsel, a defendant must prove deficient representation and a probability that he was prejudiced thereby:

> (1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

For Sixth Amendment purposes, counsel has a duty to advise a client of the adverse immigration consequences attendant on a proposed guilty plea. *Padilla v. Kentucky*, 559 U.S. 356, 365, 130 S. Ct. 1473, 1481, 176 L. Ed. 2d 284 (2010). Possession of a controlled substance has such consequences:

> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

8 U.S.C.A. § 1227.

Nevertheless, the lawyer who represented Mr. Rodriguez at the time of his guilty pleas did not advise him of the possible immigration consequences. (528-1 CP 38; 335-9 CP 44)

Trial counsel's failure to advise Mr. Rodriguez of immigration consequences before entry of these guilty pleas violated his duty under the Sixth Amendment to afford his client effective assistance of counsel. See *State v. Sandoval*, 171 Wn.2d 163, 175-76, 249 P.3d 1015 (2011). Given the severity of the immigration consequences of convictions for drug-related offenses, the constitutional error is rarely harmless. *Id.*; *State v. Martinez*, 161 Wn. App. 436, 442-43, 253 P.3d 445 (2011).

2. THE MOTION IS NOT TIME-BARRED.

A motion to vacate judgment is generally time-barred if filed more than a year after the judgment becomes final:

> (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.

RCW 10.73.090.

The motion is not time-barred, however, if a court determines that a significant change in the law, material to the conviction, should be applied retroactively:

> 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 . . . and 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.

RCW10.73.100.

A motion to vacate a guilty plea based on trial counsel's failure to advise a defendant of the immigration consequences of pleading guilty to certain offenses, claiming this failure constituted ineffective assistance of counsel, meets the requirements of RCW 10.73.100(6) and is thus not subject to the time limit of RCW 10.73.090. *In re Yung-Cheng Tsai*, 183 Wn.2d 91, 96, 351 P.3d 138 (2015).

a. The Padilla Rule Applies Retroactively On Collateral Review.

First, *Tsai* held that the rule announced in *Padilla* must be applied retroactively. 183 Wn.2d at 103. The court reasoned "new constitutional rules of criminal procedure usually apply only to matters on direct review, but old rules apply to matters on both direct and collateral review." 183 Wn.2d at 100 (*citing Whorton v. Bockting*, 549 U.S. 406, 416, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007) (*construing Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989))).

The court noted that Washington statute enacted in 1983 established the right of a non-citizen criminal defendant to advice regarding the immigration consequences of a guilty plea:

> [I]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 "Where an attorney unreasonably fails to research or apply relevant statutes without any tactical purpose, that attorney's performance is constitutionally deficient." 183 Wn.2d at 102 (*citing State v. Butler*, 17 Wn. App. 666, 675, 564 P.2d 828 (1977)); see *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (*citing Strickland*, 466 U.S. at 690–91). "The unreasonable failure to research and apply RCW 10.40.200 is as constitutionally deficient as the unreasonable failure to research and apply any relevant statute." 183 Wn.2d 102-03. Accordingly, failure to advise a client of the possible deportation consequences of a guilty plea has long been ineffective assistance of counsel in Washington. 183 Wn.2d at 103.

The court concluded: "Because *Padilla* did not announce a new rule under Washington law, it applies retroactively . . . ." 183 Wn.2d at 103.

b. *Padilla* Has Effected A Significant Change In The Law.

" 'If before the opinion is announced, reasonable jurists could disagree on the rule of law, the opinion is new.' " 183 Wn.2d at 104 (*quoting State v. Evans*, 154 Wn.2d 438, 444, 114 P.3d 627 (2005)).

For many years Washington's courts have declined to conclude that failure to advise a client of the immigration consequences of pleading guilty is ineffective assistance of counsel. 183 Wn.2d at 106-7; see *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 (1984).

Accordingly, the court concluded "*Padilla* superceded these decisions, significantly changing state law." 183 Wn.2d at 105.

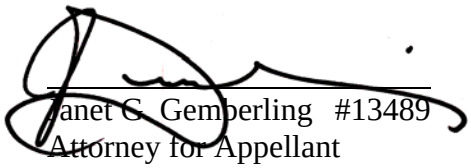
E. CONCLUSION

This court should hold that Mr. Rodriguez's motions to vacate his guilty pleas are not time-barred; *Padilla* should be applied retroactively to the facts in this case; Mr. Rodrgiuez has made a substantial showing that

he received prejudicial ineffective assistance of counsel at the time of his convictions; and the matter should be remanded for an evidentiary hearing on the merits of his claims. See 183 Wn.2d 107.

Dated this 14th day of March, 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,	)	No. 32420-6-III
	)	Linked w. 32414-1-III
vs.	)	
	)	CERTIFICATE
FELIX RODRIGUEZ,	)	OF MAILING
	)	
Appellant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on March 14, 2016, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Garth Dano
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I certify under penalty of perjury under the laws of the State of Washington that on March 14, 2016, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on March 14, 2016.

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