

No. 33431-7-III
Consolidated with 33055-9-III
Grant County Superior No. 03-1-00957-4

FILED
April 15, 2016
Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Respondent,

vs.

MIGUEL BARAJAS VERDUZCO,
Appellant.

APPELLANT'S OPENING BRIEF

Brent A. De Young
WSBA #27935
De Young Law Office
P.O. Box 1668
Moses Lake, WA 98837
(509) 764-4333 tel
(888) 867-1784 fax
deyounglaw1@gmail.com

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. ASSIGNMENTS OF ERROR1

 A. The Trial Court Erred In Holding That *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) And *State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011) Did Not Apply After The Court Had Found That Mr. Barajas Verduzco Was Not Provided His CrR 7.2(b) Rights and Warnings By The Trial Court.....1

 B. The Trial Court Erred in Finding That Mr. Barajas Verduzco’s Trial Counsel Did Not Misadvise Him Regarding The Immigration Consequences of His Conviction1

 ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

 A. Does *In Re PRP of Tsai* Apply To Mr. Barajas Verduzco’s Consolidated Appeals?.....1

 B. Does Trial Counsel Misadvise His Client When He Trivializes The Seriousness of the Immigration Consequences By Advising His Client That A Deportation Can Be Solved If The Client Can Again Re-Enter The United States Without Permission And Then Hire Trial Counsel Privately For This Purpose1

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

III. ARGUMENT3

 A. The Washington Supreme Court’s Decision in *In Re PRP of Tsai* Requires That The Conviction in This Matter Be Vacated3

 B. Trial Counsel Provides Misadvice When He Misstates The Obvious Immigration Status Consequences of Deportation4

IV. CONCLUSION.....6

TABLE OF AUTHORITIES

Cases

In re Personal Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 351 P.3d 138 (2015) 4
In re PRP of Ramos, 30150-8-III, 30766-2-III 4
In Re PRP of Tsai..... i, 1
State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011) i, 1, 3, 4, 5, 6

Statutes

RCW 10.73.090 3
RCW 69.50.401(a)(1)(i)..... 2, 5
RCW 69.50.401(a)(1)(iii) 2, 5
RCW 9.41.170(1)..... 2
RCW 9A.56.140(1)..... 2
RCW 9A.56.150(1)..... 2

Federal Cases

Padilla V. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). i, 1, 3, 4, 6
Salviejo-Fernandez v. Gonzales, 455 F.3d 1063, 1066 (9th Cir. 2006) (citing *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 912 (9th Cir. 2004)) 5

Federal Statutes

8 U.S.C. § 1227(a)(2)(A)(iii) 6
INA § 101(a)(43)(B) 5
INA§ 237(a)(2)(A)(iii)..... 6

I. ASSIGNMENTS OF ERROR

- A. The Trial Court Erred In Holding That *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) And *State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011) Did Not Apply After The Court Had Found That Mr. Barajas Verduzco Was Not Provided His CrR 7.2(b) Rights and Warnings By The Trial Court
- B. The Trial Court Erred in Finding That Mr. Barajas Verduzco's Trial Counsel Did Not Misadvise Him Regarding The Immigration Consequences of His Conviction

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- C. Does *In Re PRP of Tsai* Apply To Mr. Barajas Verduzco's Consolidated Appeals?
- D. Does Trial Counsel Misadvise His Client When He Trivializes The Seriousness of the Immigration Consequences By Advising His Client That A Deportation Can Be Solved If The Client Can Again Re-Enter The United States Without Permission And Then Hire Trial Counsel Privately For This Purpose

II. STATEMENT OF THE CASE

On November 12, 2003, an Information was filed in the Grant County Superior Court arising from the results of search warrants which had been conducted at Mr. Barajas Verduzco's residence in Beverly, Washington on November 10, 2003. (CP 1-2)¹

At a preliminary hearing held on November 18, 2003, a public defender was requested by Mr. Barajas Verduzco and attorney Thomas Earl was appointed to represent him.

¹ Both Mr. Barjas Verduzco's direct appeal and personal restraint petition were consolidated by this Court. The trial court judge transferred the entire record to this Court with Petitioner's PRP. Citations will therefore include the additional record transferred to this Court by the trial judge.

On December 30, 2003, Mr. Barajas Verduzco pleaded guilty to Violation of the Uniform Controlled Substance Act, RCW 69.50.401(a)(1)(iii), Possession of Marijuana with Intent to Deliver (Crime Code 07331); Violation of the Uniform Controlled Substance Act, RCW 69.50.401(a)(1)(i), Possession of Cocaine with Intent to Deliver (Crime Code 07331); Possessing Stolen Property in the 1st Degree, RCW 9A.56.150(1) and RCW 9A.56.140(1) (Crime Code 02802); Alien in Possession of Firearm, RCW 9.41.170(1) (Crime Code 00527). (CP 3-12) On that same date, Mr. Barajas Verduzco was sentenced to serve 13 months confinement for Counts 1 and 2, and six months confinement for Counts 3 and 4, all confinement to run concurrently. The Defendant was also sentenced to serve 9 to 12 months of community custody on Counts 1 and 2. Finally, fines and court costs totaling \$890.70 were imposed on the Defendant. (CP 13-31)

On January 9, 2015, Mr. Barajas Verduzco timely filed a notice of direct appeal in the Division III Court of Appeals. (CP 63-68) The Appellant sought to enlarge the grounds initially listed in his notice of direct appeal by filing his Motion to Accurately State the Basis for Direct Appeal on March 30, 2015. On that same date, the Division III Court of Appeals commissioner denied Mr. Barajas Verduzco's direct appeal without reaching the issue of whether or not it was permissible for him in argument to include new grounds for his direct appeal. The dismissal of the direct appeal was then appealed to the Washington Supreme Court as a Motion for Discretionary Review on June 26, 2015. (Washington Supreme Court No. 91844-9) In the interim, on May 28, 2015, Mr. Barajas Verduzco filed a second direct appeal which included all of the grounds for his direct appeal. (COA No.33431-7) This second direct appeal was stayed pending the

Washington Supreme Court's decision on the first appeal. The Washington Supreme Court then issued a ruling on January 5, 2016 denying Mr. Barajas Verduzco's first appeal. On February 25, 2016, the stay was then lifted on the second appeal (COA 33431-7 consolidated with COA 33055-9) and in a letter dated February 25, 2016, this Court ordered the Appellant/Defendant to present his opening brief.

III. ARGUMENT

A. The Court, In Its March 14, 2014 Decision, Erred When It Held That *Padilla* And *Sandoval* Do Not Apply To Timely-Filed Collateral Motions.

The trial court, in its January 28, 2014 Memorandum Opinion, stated:

Under these circumstances, I am constrained to conclude that none of the Defendants received post-sentencing notice of the time limits for collateral attack. There is no evidence offered to suggest they did so. Under the authorities addressed in the Memorandum Opinion, this court thus concludes that the motions to withdraw guilty plea are timely under RCW 10.73.090.

The court must next determine whether (1) each defendant has made a substantial showing of entitlement to relief, or (2) a factual hearing will be necessary to resolve the motion.

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. As before *Padilla*, affirmative misadvice regarding immigration consequences is a different matter. Manzo and Barajas-Verduzco allege affirmative misinformation from trial counsel regarding immigration consequences. Rodriguez alleges only a failure to advise of such consequences.

(P.2 Court's Memorandum Opinion Letter (COA 33072-9 - CP 56-58))

In essence, the trial court stated, without providing any analysis or other authority, that Mr. Barajas Verduzco's collateral appeals were timely, yet that *Padilla* and *Sandoval* do not apply. Such decision leaves Mr. Barajas Verduzco with no other procedural options but to challenge this portion of the judge's order through the vehicle of an appeal and also to file a separate Personal Restraint Petition in order to establish those parts of his claim that occurred outside of the trial court's record. (See *In re PRP of Ramos*, 30150-8-III, 30766-2-III, Slip Opinion at Law and Analysis Section)

It has since been decided in the affirmative by the Washington Supreme Court whether that *Padilla* and *Sandoval* do operate retroactively to an otherwise untimely collateral appeal. *In re Personal Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 351 P.3d 138 (2015)

However, in the instant case, Mr. Barajas Verduzco also properly brings a direct appeal on the basis that he was not properly informed of his rights to file a direct appeal by the trial court.

In the Barajas Verduzco matter, trial counsel Mahr, now since disbarred, in the most myopic and limited sense, did tell Mr. Barajas Verduzco that he would be deported. (See October 30, 2011 Affidavit of the Defendant – point #3 - CP 32-33). However, it was the information provided to Mr. Barajas Verduzco after this that violated Mr. Mahr's Sixth Amendment duties to his client and made his assistance as counsel ineffective.

B. Mr. Barajas Verduzco Was Misadvised By His Attorney When His Counsel Told Him That He Could Solve His Immigration Status Issues Following His Conviction To These Charges.

Mr. Barajas Verduzco's trial counsel's Sixth Amendment failings in this matter are quite egregious. At the time of this conviction, trial counsel held himself out as an "immigration attorney".²

In advising Mr. Barajas Verduzco, trial counsel impermissibly "downplayed" the seriousness of the immigration consequences in this matter by informing Mr. Barajas Verduzco that it would be possible for him to gain legal status in the United States following conviction for this matter. *Sandoval* at 174.

At the time of Mr. Barajas Verduzco's conviction, it was settled law that a conviction under the same RCW to which Mr. Barajas Verduzco's was convicted was an aggravated felony under the immigration laws. The term aggravated felony includes, inter alia, "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." Under INA § 101(a)(43)(B), a controlled substance offense qualifies as an aggravated felony for immigration purposes only (1) if it contains a trafficking element; or (2) if it would be punishable as a felony under federal drug laws. *Salviejo-Fernandez v. Gonzales*, 455 F.3d 1063, 1066 (9th Cir. 2006) (citing *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 912 (9th Cir. 2004)). Mr. Barajas Verduzco's convictions for Possession of Marijuana with Intent to Deliver, RCW 69.50.401(a)(1)(iii) and Possession of Cocaine with Intent to Deliver, RCW 69.50.401(a)(1)(i) both easily meet this definition.

Trial counsel's promises to his client that he could ever be eligible to have legal immigration status following such these convictions were simply wrong.³

² Mr. Mahr was subsequently suspended for three years on November 10, 2009 and disbarred on December 27, 2010. Mr. Mahr was convicted in 2013 of the unlawful practice of law in Grant County.

Aggravated felonies are the most serious category of criminal offenses under the immigration law. *See*, 8 U.S.C. § 1227(a)(2)(A)(iii), INA§ 237(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable.")

IV. CONCLUSION

The trial court erred in finding that *Padilla* and *Sandoval* did not apply to a late-filed, but not untimely, collateral appeal.

Trial counsel affirmatively misadvised his client as to the specific and certain immigration consequences of conviction.

The conviction should be vacated and this matter remanded for trial.

Respectfully submitted this 15th day of April, 2016.

s/ Brent A. De Young
WSBA #27935
De Young Law Office
P.O. Box 1668
Moses Lake, WA 98837
(509) 764-4333 tel
(888) 867-1784 fax
deyounglaw1@gmail.com

Attorney for Appellant

³ Mr. Mahr was properly served court file-stamped copies of his former client's allegations as well as a subpoena duces tecum to appear to provide testimony in this matter. Mr. Mahr declined to appear. (CP 85)

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

MIGUEL BARAJAS VERDUZCO,
Defendant/Appellant.

APPELLANT'S OPENING BRIEF
CERTIFICATE OF SERVICE

I certify that on this 15th day of April, 2016, I caused to be sent by electronic mail,
a copy of APPELLANT'S OPENING BRIEF to:

Grant County Prosecuting Attorney
kburns@grantcountywa.gov
P.O. Box 37
Ephrata, WA 98823

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

Miguel Barajas Verduzco
P.O. Box 462
Beverly, WA 99321

s/ Brent A. De Young
WSBA #27935
De Young Law Office
P.O. Box 1668
Moses Lake, WA 98837
(509) 764-4333 tel
(888) 867-1784 fax
deyounglaw1@gmail.com

Attorney for Appellant