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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

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PERSONAL RESTRAINT PETITION	)	NO. 35147-5
	)	
of	)	
	)	
VICTOR VALDOVINOS VAZQUEZ	)	
	)	Douglas County Superior
and	)	Court No. 161001576

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STATE OF WASHINGTON,	)
Respondent,	)
	)
v.	)
	)
VICTOR VALDOVINOS VAZQUEZ,	)
Petitioner/Appellant	)

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RESPONSE TO PETITION/APPEAL

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## A. INTRODUCTION

Mr. Victor A. Valdovinos Vazquez (defendant) through this combined appeal and personal restraint petition (PRP) seeks to withdraw his guilty pleas to two class C felonies and a gross misdemeanor, and to vacate his conviction due to ineffective assistance concerning the immigration consequences of his conviction. In his PRP defendant also asks that he receive specific performance of his original plea deal or an opportunity to challenge the search and seizure of the drug charge after the conviction is vacated.

In this response the State requests that the appeal and PRP be denied because the defendant ignored his attorney's advice to continue the proceedings for a week to consult with an immigration attorney prior to pleading guilty. If the conviction is vacated, defendant is not entitled to specific performance because there was no breach of any plea deal.

## B. STATEMENT OF THE CASE

The facts presented by defendant in his appeal, although accurate for the most part, fail to include pertinent details of his trial counsel's testimony at the CrR 7.8 hearing which are fatal to

his cause. In his appeal brief defendant left out the following portion of his trial counsel's testimony that served as the basis for the denial of his CrR 7.8 motion:

Q: Mr. Yedinak, did you inform Mr. Valdovinos that I (immigration attorney Mr. Brent De Young) had not reviewed his potential plea agreement?

A: I believe I did.

Q: Okay. How did you do so?

A: Well, I think what happened was when we had the Court hearing, the State indicated it wanted to add that charge and I informed Mr. Valdovinos that his best interest would be served if we waited a week so he could talk to you about that.

Q: Okay. But did you say, "Mr. De Young does not know about this --?"

A: Oh, I don't – No, I didn't say that.

VRP pp. 25 – 26.

In its letter ruling explaining the basis for denying the motion, the trial court stated the following:

From the totality of the facts it is difficult for the Court to discern how trial counsel could have been more clear in his advice and warnings to defendant to wait a week so that he

had time to communicate the new offer from the State. Mr. Yedinak encouraged the defendant to wait a week so that he had time to communicate the new offer with defendant's immigration attorney, and told defendant that a plea to the new drug possession charge could have adverse effects on his immigration status. It appears to the Court that Mr. Yedinak's advice to defendant was reasonable, and factually and legally correct, particularly in light of the adverse immigration consequences the defendant complains that he now faces.

CP 42.

The additional facts not mentioned by defendant in support of his contention for specific performance of the original plea deal are that neither he nor the State had come to any agreement about the additional drug charge prior to the plea hearing. The following discussion at the plea hearing illustrates the parties' lack of a plea agreement:

Mr. Valaas (prosecutor): Actually, Mr. Yedinak, I sent you another email after our telephone conversation.

Mr. Yedinak: I didn't receive that.

Mr. Valaas: Well, Mr. Valdovinos-Vazquez has another pending referral, so I wanted to incorporate all those, that pending referral into this agreement so he can get everything wrapped up instead of him being charged a month or two down the road with a new felony. And I sent –

Mr. Yedinak: Can you tell me what the nature of the new referral is?

Mr. Valaas: Yeah, it was just a possession of methamphetamine. When I emailed you I sent you a copy of

the report to so you could review it, so I think I sent you that email Thursday, so I was hoping to get everything wrapped up today.

VRP pp. 3 – 4.

This on the record exchange occurred in the defendant's presence. CP 21; VRP pp. 3 – 6. The plea hearing was then continued from the morning until the afternoon, at which time the prosecutor filed the amended information and the guilty plea was entered. VPR 5 – 7.

There is also no declaration from defense counsel describing any supposed breach of a plea bargain by the State.

## C. AUTHORITY AND DISCUSSION

### I. Trial counsel provided effective assistance.

Ineffective assistance of counsel can render a plea involuntary. *State v. Sandoval*, 171 Wash.2d 163, 169, 249 P.3d 1015 (2011). To prevail on his claim that his counsel was constitutionally ineffective, defendant must demonstrate that (1) defense counsel's performance was deficient and (2) the deficient performance resulted in prejudice. *State v. Thomas*, 109 Wash.2d 222, 225–26, 743 P.2d 816 (1987) (adopting test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674

(1984)); *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004). If defendant fails to demonstrate either prong, the reviewing court need not inquire further. *State v. Hendrickson*, 129 Wash.2d 61, 78, 917 P.2d 563 (1996).

A constitutionally competent defense attorney must advise a defendant of the immigration consequences of entering into a guilty plea. *Padilla v. Kentucky*, 559 U.S. 356, 367, 130 S. Ct. 1473, 176 L.Ed. 2d 284 (2010). In *Sandoval*, our Supreme Court held that “[i]f the applicable immigration law ‘is truly clear’ that an offense is deportable, the defense attorney must correctly advise the defendant that pleading guilty to a particular charge would lead to deportation.” *State v. Sandoval*, 171 Wash.2d at 170 (quoting *Padilla*, 559 U.S. at 369). However, “[i]f ‘the law is not succinct and straightforward,’ counsel must provide only a general warning that ‘pending criminal charges may carry a risk of adverse immigration consequences.’” *Id.*

Defendant’s resort to *Padilla*<sup>1</sup> and *Sandoval*<sup>2</sup> is not helpful in this situation. This is not a situation where defendant entered a plea based on trial counsel’s incorrect, or inadequate advice

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<sup>1</sup> *Padilla v. Kentucky*, 559 U.S. 356 (2010).

<sup>2</sup> *State v. Sandoval*, 171 Wash.2d 163, 249 P.3d 1015 (2011).

concerning immigration consequences. Here defense counsel specifically advised defendant to wait a week before entering a plea so that he could call the immigration attorney and discuss the new charge in the amended information. CP 42; VRP 25 – 26. It was the defendant's decision to go forward with the plea in opposition to his attorney's advice. As the trial court noted in its letter opinion:

The only other alternative to Mr. Yedinak was to refuse to assist and represent defendant in his plea once defendant made that decision. Such action is contrary to Mr. Yedinak's ethical responsibility to defendant, and his duties as an officer of the court.

CP 42.

As can be seen from the record trial counsel's performance was not deficient, and, under the *Strickland* analysis incorporated in *Padilla* and *Sandoval*, there is no further inquiry.

## II. Additional PRP requests.

If this court vacates the conviction and allows defendant to withdraw his guilty pleas, defendant has requested either the opportunity to challenge the search and seizure, or for specific performance of the original plea offer.

If the conviction is vacated the State agrees defendant would stand in the same procedural posture prior to entry of the plea, including the ability to raise any search and seizure issues.

However, under the facts and circumstances found in this matter the defendant would not be entitled to specific performance. A plea agreement is a contract between the prosecutor and the defendant. *In re Pers. Restraint of Lord*, 152 Wash.2d 182, 188, 94 P.3d 952 (2004). Due process requires a prosecutor to fulfill the terms of the agreement and recommend the agreed upon sentence. *Id.* at 189.

Prior to the defendant entering a guilty plea, the State informed defense counsel of a new drug charge it wanted to resolve either by combining the drug charge with the current charges or by means of a separate filing. VRP pp. 3 – 4.

Anticipating now that the State might continue forward with the drug prosecution if this matter is remanded, thus placing defendant in the same deportation situation he now faces, defendant essentially asks this court to foreclose the State from pursuing the drug charge through specific performance of the original plea deal. Defendant contends in his petition that he only agreed to plead guilty to the amended charges because he

thought it was the agreement that his immigration attorney had approved so as to avoid deportation consequences.

Defendant cannot point to anything in the record that suggests the prosecution, as an inducement to the plea, agreed with defense counsel to structure the plea deal to help defendant avoid deportation. The only plea agreement defendant can point to is the State would recommend a credit-for-time served sentence in exchange for a guilty plea, which occurred even with the addition of the drug charge. VRP p. 4.

III. Costs not requested.

The State is not requesting the imposition of costs in accordance with See *State v. Stump*, 185 Wash.2d 454, 458-465, 374 P.3d 89 (2016).

D. CONCLUSION

For the reasons noted above, the State requests the appeal and PRP be denied.

Respectfully submitted this 20<sup>th</sup> day of December, 2017.

  
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IN THE COURT OF APPEALS, DIVISION III  
FOR THE STATE OF WASHINGTON

PERSONAL RESTRAINT PETITION of	) Court of Appeals no. 35147-5 ) Douglas County no. 161001576 ) )
VICTOR VALDOVINSOS VAZQUEZ	) PROOF OF SERVICE (RAP 18.5(b)) )
STATE OF WASHINGTON Respondent	) ) )
v.	) )
VICTOR A. VALDOVINOS VAZQUEZ, Appellant	) ) ) )

I, W. Gordon Edgar, do hereby certify under penalty of perjury that on December 20, 2017, I provided e-mail service by prior agreement (as indicated), a true and correct copy of Response to Personal Restraint Petition/Appeal to:

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**Transmittal Information**

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