

FILED
Court of Appeals
Division III
State of Washington
10/31/2019 3:57 PM

COA No. 36557-3-III

Grant County Superior No. 94-1-00328-6

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Respondent,

vs.

JUAN CARLOS MENDOZA,
Appellant.

APPELLANT'S REPLY TO RESPONDENT'S 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..... iii

I. REPLY TO RESPONDENT’S BRIEF..... 1

 A. Declarations of the Defendant and of Trial Counsel Were
 Properly Supplemented to the Record on Review 1

 B. The State Misapplied the Second Prong of Strickland..... 2

 C. Mr. Mendoza Has Shown that He is Entitled to Relief as a Result
 of Trial Counsel’s Failure to Provide Specific Advice
 Regarding Immigration Consequences of His Guilty Plea..... 5

II. CONCLUSION..... 6

CERTIFICATE OF SERVICE..... 7

TABLE OF AUTHORITIES

Cases

Delgado v. Carmichael, 332 U.S. 388, 390-91, 68 S.Ct. 10, 92 L.Ed. 17 (1947).....2
Fong Yue Ting v. United States, 149 U.S. 698, 740, 13 S.Ct. 1016, 37 L.Ed. 905 (1893) .2
Francis v. INS, 532 F.2d 268 (CA2 1976).....3
Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 322, 121 S.Ct. 2271, 150
L.Ed.2d 347 (2001)..... 2, 3
Matter of Silva, 16 I. & N. Dec. 26, 30 (1976)2
Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) 2, 3
State v. Martinez, 161 Wn.App. 436, 253 P.3d 445 (2011)3
State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011)..... 1, 3
Strickland v. Washington, 466 U.S. 668 (1984) 1, 4

Statutes

INA §245i4
RCW 9A.44.050..... 1, 2
RCW 10.40.200.....3

I. REPLY TO RESPONDENT’S BRIEF

A. Declarations of the Defendant and of Trial Counsel Were Properly Supplemented to the Record on Review.

The Respondent, in its brief, avows that Mr. Mendoza cannot rely on documents outside of the record on review. Appellant moved to supplement the record on review with the two declarations of Mr. Mendoza and of his counsel “in the interests of judicial economy as it will preclude the necessity of the appellant filing a Personal Restraint Petition and a motion to consolidate with his direct appeal.” (05/09/2019 Appellant’s Motion to Supplement Record on Review) The State did not raise this objection when it had a duty to do so. The State acceded to this motion to supplement the record on review. Accordingly, it cannot now raise an issue that it has previously waived. (05/13/2019 - Respondent’s Answer to Appellant’s Motion to Supplement Record on Review)

Trial Counsel Ken Knox provided a declaration stating that he did not inform Mr. Mendoza of the specific immigration consequences of his plea and conviction. (Attachment D, page 1, #4 to February 26, 2019 Memorandum re: Timeliness) Attorney Knox initialed each and every page of Mr. Mendoza’s declaration which he reviewed. Mr. Mendoza provided a factual declaration dated October 10, 2018. (Attachment D, pages 3-4 to February 26, 2019 Memorandum re: Timeliness).

B. The State Has Misapplied the Second Prong of Strickland

The State's in its answer brief misapplies the second prong of *Strickland*. See *Strickland v. Washington*, 466 U.S. 668 (1984) The State argues that it would have been irrational under the circumstances for Mr. Mendoza to have rejected the plea offer and to have instead gone to trial. In support of this conclusion that State relies on the alleged facts contained in the probable cause statement (CP 3).

As a matter of course, allegations contained in any probable cause statement may or may not be the same facts elicited through testimony in the State's case at trial. The *Sandoval* decision is very similar in this regard to the instant matter. *State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011). The factual allegations in the *Sandoval* matter appear far worse for a defendant contemplating trial than those that appear in the instant matter. As to immigration status, Mr. Mendoza, had also achieved LPR status similarly to Mr. Sandoval. (See Appellant's Memorandum re: Timeliness, Attachment D – Declaration of Defendant) Mr. Sandoval's public defender had achieved a plea deal for Mr. Sandoval to a lesser charge which offered had a standard range of 73-90 months¹ less than the 6-12 months in his plea deal. *State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011)

The Washington Supreme Court in *Sandoval* found that he had met the requirement to show prejudice. The *Sandoval* decision stated:

¹ The standard range for rape in the second degree without enhancements was 78-102 months. (RCW 9A.44.050)

We accept the State's argument that the disparity in punishment makes it less likely that Sandoval would have been rational in refusing the plea offer. According to the State, if Sandoval were convicted of second degree rape, RCW 9A.44.050, a class A felony, he faced a standard sentencing range of 78-102 month's imprisonment and a maximum of a life sentence. Third degree rape, however, subjected Sandoval to a standard sentencing range of 6-12 months. However, Sandoval had earned permanent residency and made this country his home. 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*, 130 S.Ct. at 1481 (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," *Delgado 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) ("There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions."). Therefore, Sandoval has proved that his counsel's unreasonable advice prejudiced him.

State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011)

The State also misapplies the holding of *INS v. St. Cyr*, 533 U.S. 289, 322, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001), a federal case cited in the *Padilla* decision to the instant matter. (Respondent's Brief at 11). The *Padilla* decision, citing *St. Cyr*, the US. stated:

Like § 3 of the 1917 Act, § 212(c) was literally applicable only to exclusion proceedings, but it too has been interpreted by the Board of Immigration Appeals (BIA) to authorize any permanent resident alien with "a lawful unrelinquished domicile of seven consecutive years" to apply for a discretionary waiver from deportation. See *Matter of Silva*, 16 I. & N. Dec. 26, 30 (1976) (adopting position of *Francis v. INS*, 532 F.2d 268 (CA2 1976)). If relief is granted, the deportation proceeding is terminated and the alien remains a permanent resident.

Padilla at 359, 363 and 366.

The State appears to concede the fact Mr. Mendoza had only 3 years of lawful immigration status at the time of his conviction. Mr. Mendoza at the time of his conviction was ineligible for any such exercise of discretion. (*See* Brief of Respondent at 19)

None of the Washington precedential decisions published since *Sandoval* has held that the apparent strength of the state's evidence was an issue of any particular significance. The *Sandoval* standard for a defendant to show prejudice is quite clear in comparison with the subjective standard that the state wishes this Court to substitute.² This court should decline the state's invitation to set a new standard applicable to a defendant's showing of prejudice.

Finally, in regards to the *Sandoval* matter, the available public record shows that upon remand to the superior court for resetting of the trial date, that the prosecuting attorney dismissed all charges against Mr. Sandoval. Conversely, other defendants who have prevailed in post-conviction relief motions have not always fared as favorably as

² The State, in Respondent's Brief, on page 15, faults Mr. Mendoza for not providing an account of his thoughts/feelings regarding the RCW 10.40.200 warnings provided as part of the Statement of Defendant on Plea of Guilty CP 45-49.

Mr. Sandoval. In *State v. Martinez*, 161 Wn.App. 436, 253 P.3d 445 (2011). Mr. Martinez Ruiz, was retried by the state after this Court granted his post-conviction relief motion. Following a jury trial, Martinez was convicted of the same offense which had made him deportable.

The granting of a post-conviction relief motion does not always favor the defendant as the State seems to suggest. This could be true if the remedy were dismissal of the underlying charges as a result of a successful post-conviction relief motion. However, the legal remedy available to the defendant is limited to having another chance to resolve his case at the pretrial stage, or to proceed to trial. Despite these obvious risks in going to trial, which to the State are illogical³, a defendant faced with lifetime deportation and separation from friends and family should not be second-guessed based only on a limited subjective and arbitrary standard.

C. Mr. Mendoza Shows that He is Entitled to Relief as a Result of Trial Counsel's Failure to Provide Specific Advice Regarding Immigration Consequences of His Guilty Plea.

Mr. Mendoza was prejudiced under *Strickland* as a result of his Trial Counsel's deficient performance. See *Strickland v. Washington*, 466 U.S. 668 (1984).

³ The State on pages 10-20 of its Brief, assumes that Mr. Mendoza would likely have support in Mexico since he had only been "admitted" in lawful status for less than three years. Such conclusion has a common sense appeal. However it demonstrates a common misunderstanding of the reality of our immigration laws, in which a general rule often has a long list of exceptions and caveats. Apropos to this particular state's conclusion, Section 245(i) of the Immigration and Nationality Act made it possible for aliens who had crossed the border without permission to be "admitted" as lawful permanent residents if certain conditions applied and were not. Thus, it's not clear at all where Mr. Mendoza resided immediately prior to the date on which he was admitted to LPR status.

Trial Counsel's failure to provide specific advice required by *Padilla* and *Sandoval* rendered his performance ineffective and proximately caused prejudice to his client.

The evidence submitted by Mr. Mendoza is no different qualitatively than the evidence presented in *Sandoval*. If Mr. Mendoza had been properly advised as to the potential immigration consequences of his guilty plea, he could have then made an informed decision as to whether or not to plead guilty or he may very well have elected to go to trial⁴.

Mr. Mendoza has met his burden to show prejudice.

II. CONCLUSION

In view of the above, this court should grant Mr. Mendoza's request to vacate his conviction on the grounds stated and remand this case to the Grant County Superior Court for a new trial.

Respectfully submitted this 31st day of October, 2019.

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

⁴ The State relied on one of Mr. Mendoza's statements in his declaration to claim an ambiguity. Mr. Mendoza's statement could also be interpreted to mean that Mr. Mendoza understood that his counsel did not file an obviously frivolous 3.5/3.6 motion

Attorney for Appellant

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,
vs.
JUAN CARLOS MENDOZA,
Defendant/Appellant.

REPLY BRIEF
CERTIFICATE OF SERVICE

I certify that on this 31st day of October, 2019, I caused a copy of Appellant's
REPLY BRIEF to be sent by electronic mail to:

Grant County Prosecuting Attorney
P.O. Box 37
Ephrata, WA 98823

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

Juan Carlos Mendoza
c/o Maria Rodriguez
2201 Rd K SW
Mattawa, WA 99344

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

DE YOUNG LAW OFFICE

October 31, 2019 - 3:57 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36557-3
Appellate Court Case Title: State of Washington v. Juan Carlos Mendoza
Superior Court Case Number: 94-1-00328-6

The following documents have been uploaded:

- 365573_Briefs_20191031155700D3684713_9122.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was 20191031 Mendoza Juan Carlos - Reply to Respondents Brief.pdf

A copy of the uploaded files will be sent to:

- gdano@grantcountywa.gov
- kwmathews@grantcountywa.gov

Comments:

Sender Name: Shirley Diamond - Email: deyounglaw1@gmail.com

Filing on Behalf of: Brent Adrian De Young - Email: deyounglaw1@gmail.com (Alternate Email:)

Address:
PO Box 1668
Moses Lake, WA, 98837
Phone: (509) 764-4333

Note: The Filing Id is 20191031155700D3684713