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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.

APPEAL BRIEF

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III. STATEMENT OF THE CASE

On July 11, 1994, an Information was filed in the Grant County Superior Court charging Juan Carlos Mendoza, with the crime of Violation of Uniform Controlled Substance Act, RCW 69.50.401(d), Possession of Cocaine. (CP1) On that same date, the defendant was given appointed counsel, Ken Knox (CP 5), and the matter was reset for arraignment on July 18, 1994.

On July 18, 1994, an acknowledgment of advice of rights was signed by Mr. Mendoza (CP 14-15), an order of indigency was entered, and appointed counsel Ken Knox filed a notice of appearance in the matter.

The arraignment was continued to September 12, 1994 with a pre-trial hearing set for September 19, 1994.

On September 12, 1994, the hearing was continued to September 19, 1994 due to a judicial conflict.

On September 19, 1994, a waiver of speedy trial was entered (CP 31) and the matter was scheduled for trial run on September 27, 1994.

The matter did not go forward on September 27, 1994, but was instead continued for a motion hearing and pre-trial conference on November 7, 1994 and trial date was reset to November 15, 1994.

The scheduled November 7, 1994 hearing was stricken and rescheduled to November 14, 1994. A new waiver of speedy trial was concurrently entered (CP 39). Trial was rescheduled for November 22, 1994.

On November 17, 1994, Mr. Mendoza entered a guilty plea (CP 45-49) to an amended information (CP 44) charging one count of Violation of Uniform Controlled Substance Act, RCW 69.50.401(d), Possession of Cocaine.

Sentencing was continued to November 28, 1994.

Mr. Mendoza did not appear for his sentencing hearing and a bench warrant was ordered for his arrest. (CP 57)

Sentencing was completed on May 30, 1995. Mr. Mendoza was sentenced to serve eleven (11) days of confinement in the Grant County jail with credit for eleven (11) days previously served, community custody of twelve (12) months, and ordered to pay fines and fees totaling \$1,445.30. (CP 65-74)

On August 1, 2000, a request for termination/discharge was filed by the Department of Corrections (DOC) with a proposed order for transfer of supervision. An Order Transferring Supervision from the Department of Corrections to the Grant County

Clerk for the purpose of collecting unpaid legal financial obligations was signed by the Hon. Judge Kenneth Jorgensen. (CP 94)

On August 31, 2007, a Certificate and Order of Discharge were signed in chambers by Judge Jorgensen. (CP 95)

On September 24, 2009, attorney Carlos Villarreal of Roach Law Office filed a motion for expungement of record on Mr. Mendoza's behalf. The basis for the motion for the statutory expungement is unclear. The matter was noted for hearing on October 5, 2009. (CP 97) Attorney Villarreal asked the court for a continuance and advised that he would re-note the motion. The hearing was accordingly stricken.

On February 2, 2011, attorney Nicholas Jones of Roach Law Office filed a notice of appearance in the matter. (CP 98) No substitution was filed with attorney Villarreal as it appears that attorney Villarreal had not filed a notice of appearance in 2009. Attorney Jones also filed a Motion for Order Vacating and Dismissing Conviction under RCW 9.94A.640 (statutory vacation). (CP 99-101) An affidavit of the defendant, Mr. Mendoza, was also filed outlining his compliance with the requirements to qualify for a statutory vacation. (CP 102-103) The motion was noted for hearing on March 8, 2011.

On March 25, 2011, an Order Vacating Conviction and an Order of Dismissal were signed by Grant County Superior Court Judge Evan Sperline. (CP 108-109) The basis for the vacation and dismissal of the conviction was under RCW 9.94A.640 (statutory vacation).

On January 16, 2019, attorney Brent De Young entered a notice of appearance on behalf of Mr. Mendoza. On that same date, a Notice of Appeal of the Defendant's Guilty Plea and Judgment and Sentence was filed in the Grant County Superior Court.

Division III of the Washington Court of Appeals scheduled the matter for hearing on February 27, 2019 on the Commissioner's docket to review the timeliness of Mr. Mendoza's appeal. A Memorandum re: Timeliness was requested to be filed by February 13, 2019.

On February 13, 2019, counsel for Mr. Mendoza requested and was granted an extension of time to file the Memorandum re: Timeliness. The Memorandum due date was continued to February 19, 2019.

On February 19, 2019, counsel for Mr. Mendoza requested a second extension of time to file the Memorandum re: Timeliness. This request was also granted and the Memorandum was instructed to be filed on February 26, 2019.

The Commissioner's hearing re: timeliness was rescheduled to March 13, 2019.

On April 9, 2019, the Court of Appeals issued a decision finding that Mr. Mendoza's appeal was timely and a perfection letter was sent to the Appellant on April 9, 2019.

The designation of record was completed on May 7, 2019. The parties stipulated to supplement the record to include Mr. Mendoza's declaration dated October 10, 2018 and Attorney Knox's declaration dated October 27, 2018, both of which declarations were attached to the Memorandum re: Timeliness filed with the Court of Appeals on February 26, 2019.

Comes now this briefing.

IV. ARGUMENT

A. Mr. Mendoza's Trial Counsel's Performance Was Deficient Under The Sixth Amendment on the Basis of His Failure to Provide Specific Immigration Consequences Warnings Prior to Plea.

In the instant case, 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 also reviewed Mr. Mendoza's factual declaration dated October 10, 2018. (Attachment D, pages 3-4 to February 26, 2019 Memorandum re: Timeliness). Attorney Knox initialed the copy of Mr. Mendoza's factual allegations and included this as an attachment to his own declaration.

Both *Padilla* and *Sandoval* require that trial counsel provide specific advice of regarding the immigration consequences of their noncitizen clients' guilty pleas. (*Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010); *State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011))

The Washington Supreme Court in *Sandoval* stated:

The second reason that *Sandoval's* counsel's advice was unreasonable, contrary to the State and WAPA's argument, is that the guilty plea statement warnings required by RCW 10.40.200(2) cannot save the advice that counsel gave. In *Padilla*, the Commonwealth of Kentucky used a plea form that notifies defendants of a risk of immigration consequences, and the Court even cited RCW 10.40.200, noting the Washington statute provides a warning similar to Kentucky's. *See* 130 S.Ct. at 1486 n. 15. However, the Court found RCW 10.40.200 and other such warnings do not excuse defense attorneys from providing the requisite warnings. Rather, for the Court, these plea-form warnings underscored (internal citation omitted) "how critical it is for *counsel* to inform her noncitizen client that he faces a risk of deportation." *Id.* at 1486.

State v. Sandoval, 171 Wn.2d 163, 173 249 P.3d 1015 (2011).

B. The Immigration Consequences to Mr. Mendoza Were Sufficiently Clear That Trial Counsel Was Obligated to Provide Specific Warnings.

As provided above, at the time of Mr. Mendoza's conviction, it was clear at the time of his plea that a conviction for Violation of Uniform Controlled Substance Act, RCW 69.50.401(d), Possession of Cocaine would be considered a crime involving a controlled substance under the immigration laws and would cause Mr. Mendoza's certain deportation regardless of his precise noncitizen immigrant status.¹

The Immigration and Nationality Act (INA) divides the grounds for deportation² into two separate categories: inadmissible and removable/deportable. The grounds of inadmissibility are found in Section 212 of the INA and the grounds for removal at Section 237. Generally speaking, grounds of inadmissibility apply only to non-citizens seeking admission to the United States. However, the phrase "seeking admission" is a term of art and its application encompasses far more than a noncitizen's attempt to obtain a visa or to cross the US border. Admission means lawful entry into the U.S. after inspection and authorization by an immigration officer. INA § 101(a)(13). Non-citizens who have been present without any immigration status are considered "inadmissible" if

¹ As a noncitizen, Mr. Mendoza's immigration status would either be as a legal permanent resident or as an alien without any lawful immigration status. Mr. Mendoza had no lawful immigration status at the time of his conviction, although he was the beneficiary of an immigration petition filed on his behalf by his parent.

² The U.S. immigration law contains different grounds upon which non-citizens may be returned back to their country of origin. Currently, the Immigration and Nationality Law uses the term "removal" to mean "deportation. The term "removal" replaced the word "deportation" in the 1996 updates to the INA for the purpose of identifying the updated penalty provisions in the 1996 law that would apply to noncitizens. The passage of time has now made the number of deportation cases brought under the pre-1996 law extremely rare. Therefore, the terms "deportation" and "removal are currently used interchangeably

they entered the United States without inspection by crossing the border at a place other than a designated border crossing. INA § 212(a)(6). Legacy INS (now the Department of Homeland Security “DHS” in practice charged grounds of inadmissibility against non-citizens who had not achieved legal permanent resident (LRP) status. If the non-citizen was a LPR, that individual was instead charged with being deportable for having been convicted of a crime listed in INA §237(a)(1). The conviction crimes listed in both Sections 212(a) and 237(a) of the INA correspond to each other. That is, a criminal conviction that is listed as a ground of inadmissibility would also have a corresponding ground of removability.³

Mr. Mendoza was sentenced by the Grant County Superior Court on May 30, 1995. On June 1, 1995 Mr. Mendoza was served an Order to Show Cause and Notice of Hearing Date (OSC).

The Notice provided the immigration law violation allegation as follows:

Section 241(a)(2)(B)(i) of the Immigration and Nationality Act, as amended, in that, at any time after entry, you have 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 102 of the Controlled Substances Act, 21 U.S.C. 802).

The OSC provided notice of the government’s allegations against Mr. Mendoza.

- 1) You are not a citizen or national of the United States;
- 2) You are a native of Mexico and a citizen of Mexico
- 3) You entered the United States at or near Nogales, Arizona on or about July 1990.
4. You were not then inspected by an Immigration Officer

³ Possession of a firearm is an exception to this pattern. Conviction for possession of a firearm is a ground of removability, but it does not have a corresponding ground of inadmissibility. INA § 237(a)(2)(C).

5. You were convicted in Superior Court, Grant County Washington for the offense of Possession of a Controlled Substance, to wit: Cocaine in violation of RCW 69.50.401(d) a felony on May 30, 1995.

See July 12, 2019, Attachment A

The immigration judge ordered Mr. Mendoza deported on June 15, 1995.

See July 12, 2019, Attachment B

Mr. Mendoza was the beneficiary of an immigration petition filed on his behalf. The petition was filed by his father and had been approved as filed and was given a priority date of August 20, 1991. At the time of his conviction in Grant County, Mr. Mendoza had a path to lawful status.

See July 12, 2019, Attachment C

C. Trial Counsel Should Have Offered Plea Alternatives Which Would Have Protected His Client's Immigration Status.

1. Plea Negotiations Must Consider a Defendant's Immigration Status

To a noncitizen, immigration consequences are almost always the most serious of all the automatic consequences following from a conviction. For example, if a noncitizen, whether she is a lawful permanent resident, or if she is simply present without lawful authority in the United States for any period of time, pleads to an aggravated felony, she has virtually guaranteed her deportation. This obvious disparity in

punishment has always been apparent. This has resulted in corrective efforts by both the legislature and by the appellate courts. The passage of RCW 10.40.200 by the Washington State legislature is one example of this recognition. Another is the passage of SHB 5168 which lowered the maximum number of days possible sentence for a gross misdemeanor from 365 days to 364.

The Legislature's intent is stated in Sec. 1.

The legislature finds that a maximum sentence by a court in the State of Washington for a gross misdemeanor can, under federal law, result in the automatic deportation of a person who has lawfully immigrated to the United States, is a victim of domestic violence or a political refugee, even when all or part of the sentence to total confinement is suspended. The legislature further finds that this is a disproportionate outcome, when compared to a person who has been convicted of certain felonies which, under the State's determinate sentencing law, must be sentenced to less than one year and hence, either have no impact on that person's residency status or will provide that person an opportunity to be heard in immigration proceedings where the court will determine whether deportation is appropriate. Therefore, *it is the intent of the legislature to cure this inequity by reducing the maximum sentence for a gross misdemeanor by one day.*

SHB 5168, Sec. 1 (2011)

It seems not a far-fetched notion that the legislature and appellate courts are communicating a clear message to the criminal justice system: immigration consequences matter. See also, *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010); *State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011); *In re Personal Restraint of Tsai*, 88770-5, (May 7, 2015) (consolidated with *In re Personal Restraint of Jagana*, 89992-4).

The instance of plea bargaining is increasing in frequency, from 84% of federal cases in 1984 to 94% by 2001. Fisher, George, *Plea Bargaining's Triumph: A History of*

Plea Bargaining in America, Stanford University Press (2003). See also Chin, Gabriel J. & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 698 (2002). The State will likely reply that it has no duty to offer any plea bargain at all. Facially, such a statement has some appeal. For practitioners in the criminal law, it is simple, authoritative and it relieves the parties so inclined from the extra work involved. Under such a bright-line policy, the State need not weigh proffered alternative pleas which might involve the amending of the Information to include additional counts to which conviction would yield the same amount of incarceration without the dire immigration consequences. Such an alternative plea would also raise the defendant's criminal history score. Under this policy offered by the State, defense counsel would, in theory, be relieved of his Sixth Amendment duties to spend additional time with his client determining whether or not her conviction would result in certain deportation. He would be spared the additional drudgery of inquiring into his client's immigration status to determine whether or not she has the requisite number of years present in the United States so that she might have a possibility of applying for cancellation of removal for nonpermanent residents in the immigration court following conviction.

Another of the State's well-worn counter-arguments is that noncitizens shouldn't be given "better" deals than citizens. However, this statement cries out for a definition of the term "better." Some prosecutors believe this means that any recognition of immigration status in plea negotiations puts a defendant on a higher footing than a noncitizen. This argument is without merit. Much of the time, it requires only a diligent reading of the police reports to identify several plea alternatives which would 1) result in

the same or greater amount of incarceration and fines, and; 2) hold the defendant accountable by punishing him for his criminal actions. For example, for an individual charged with possession of a controlled substance, a detailed reading of the police reports might reveal that the defendant used a family member's or a company's vehicle at the time of arrest. Taking a motor vehicle outside of the scope of permission by the owner (RCW 9A.56.075), is also a class C felony. Such defendant could also additionally plead to solicitation to possess the controlled substance identified in the police report without any immigration consequences. *In re Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984) also provides defense counsel with a wide possibility of resolving criminal matters while protecting immigration status.

2. Trial Counsel's Duty of Competence Extends to Plea Negotiations.

For the State to suggest that plea negotiations involving the defendant's immigration status are not somehow "off limits" draws an arbitrary distinction and confounds the clear intentions of legislature and the applicable precedential decisions.

Trial counsel's duties to Mr. Mendoza extended through all parts of his representation. In *Missouri v. Frye*, 132 S.Ct. 1399 (2012), and *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), the Supreme Court held that the Sixth Amendment right to effective assistance of counsel applies at the plea bargaining stage.

In the instant case, trial counsel had a duty to pursue plea negotiations as required by his Sixth Amendment duties. Trial counsel was ineffective by allowing the State, in effect, to waive trial counsel's constitutional requirement of competence.

D. Mr. Mendoza Was Prejudiced Under *Strickland* As A
Result Of His Trial Counsel's Deficient Performance.

Mr. Mendoza does not have to show actual and substantial prejudice but must show that he is entitled to relief for one of the reasons listed in RAP 16.4(c). (*Sandoval* at 166, quoting *In re Pers. Restraint of Grantham*, 168 Wn.2d 204, 214, 227 P.3d 285 (2010)); (*State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) ("If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal."))

RAP 16.4(c) states:

- (c) Unlawful Nature of Restraint. The restraint must be unlawful for one or more of the following reasons:
- (1) The decision in a civil or criminal proceeding was entered without jurisdiction over the person of the petitioner or the subject matter; or
 - (2) The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or
 - (3) Material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government; or
 - (4) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the changed legal standard; or
 - (5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding or civil proceeding instituted by the state or local government; or

(6) The conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

(7) Other grounds exist to challenge the legality of the restraint of petitioner.

(RAP 16.4(c)).

In *Sandoval*, the appellant/defendant claimed a constitutional violation. Therefore he still was required to meet the two-part test of *Strickland*. *Strickland v. Washington*, 466 U.S. 668 (1984). “In satisfying the (second) prejudice prong, a defendant challenging a guilty plea must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Sandoval* at 175 (citing *In re Pers. Restraint of Riley*, 122 Wn.2d at 780-8, 863 P.2d 554 (1993)(citing *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)); accord *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 254, 172 P.3d 335 (2007); *State v. Oseguera Acevedo*, 137 Wn.2d 179, 198-99, 970 P.2d 299 (1999) (internal citations omitted). A “reasonable probability” exists if the defendant “convince[s] the court that a decision to reject the plea bargain would have been rational under the circumstances.” *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010). This standard of proof is “somewhat lower” than the common “preponderance of the evidence” standard. *Strickland v. Washington*, 466 U.S. (1984) at 694.

In the *Padilla* matter, the U.S. Supreme Court justices only determined that Mr. Padilla had satisfied the first prong of *Strickland*. The matter was remanded back to Kentucky for determination as to whether or not the second prong of *Strickland* was met.

The *Sandoval* case completed a full *Strickland* analysis. It accepted the State's argument that the disparity in punishment made it less likely that Sandoval would have been rational in refusing the plea offer. A conviction for second degree rape, RCW 9A.44.050, would have risked a standard sentencing range of 78-102 months imprisonment to a maximum of a life sentence while third degree rape had a standard sentencing range of only 6-12 months.

Since Sandoval had earned permanent residency, the court found that the deportation consequence of his guilty plea was "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," *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, the court was persuaded that Mr. Sandoval would have been rational to take his chances at trial. *Sandoval* at 176 (citing *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 322, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001)).

Similarly, Mr. Mendoza had but one chance to remain in the United States by avoiding a removal order from the Immigration Court. His conviction took away that chance and left him with no viable possibilities for relief from removal.

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

V. CONCLUSION

Trial counsel was ineffective because he did not independently ascertain his client's precise immigration status and then determining the specific immigration consequences that would result from his conviction to Possession of a Controlled Substance. By not providing Mr. Mendoza advice concerning the specific immigration consequences that would result from his plea and conviction, trial counsel's performance was deficient under the Sixth Amendment.

Mr. Mendoza was prejudiced under both prongs of *Strickland* as a result of trial counsel's deficient performance.

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 12th day of July, 2019.

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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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

APPEAL BRIEF
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I certify that on this 12th day of July, 2019, I caused a copy of Appellant's
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