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Division III
State of Washington
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No. 37056-9-III
Benton County Superior No. 14-1-00736-5

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Respondent,

vs.

DAVID MERAZ GUTIERREZ,
Appellant.

APPEAL BRIEF

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I. ASSIGNMENT OF ERROR

- A. The Trial Judge erred when he found that Mr. Meraz Gutierrez had not met his burden to establish that his attorney's representation fell below an objective standard of reasonableness
- B. The Trial Court Erred in Finding That Mr. Meraz Gutierrez, by Declaration, Claimed That His Attorney Never Discussed Any Immigration-Related Issues with Him At All.

ISSUES AND ANSWERS PERTAINING TO ASSIGNMENTS OF ERROR

- 1. May a court in review of trial counsel's compliance with *Padilla-Sandoval* immigration consequence warnings, with uncontroverted evidence of trial counsel's failure to ascertain his client's precise immigration status and uncontroverted evidence that of trail counsel's failure to provide any warnings of the discoverable certain deportation consequences, find that trial counsel's negligent performance was nevertheless excused on the basis that a litigant has not established that his deportation was related to his trial counsel's negligence when the parties have never argued otherwise?
 - A. Neither *Padilla, Sandoval* or any other subsequent precedential decision compel or support this particular application by a trial court.
- 2. When a trial court reviews trial counsel's established practices and procedures regarding the provision of immigration consequences warnings, does the burden shift to the defendant to affirmatively prove his eligibility for relief from deportation but for the malpractice of his attorney?
 - A. Not answered in *Padilla, Sandoval* or any other precedential decision. Nevertheless the issue should be moot due to the State's failure to ever contest the issue of Mr. Meraz Gutierrez's deportation.

3. If the second question is answered in the affirmative, did Mr. Meraz Gutierrez make a sufficient showing that he would have been eligible for relief but for the oversight of his trial counsel, in pleading out his case prior to the that he would have been eligible for relief
 - A. Assuming arguendo that the burden properly shifted to Mr. Meraz Gutierrez, an examination of the federal rule, 8 USC 1229b(a) would have alerted his trial counsel to the issue of his eligibility for relief. Trial counsel's admitted practices and procedures were simply ineffective to gather any of the basic information needed to advise Mr. Meraz Gutierrez. Even if Mr. Meraz Gutierrez had the advanced knowledge to understand that the timing of his plea was a "concern" his trial counsel established by testimony that he would have not been able or willing to provide him such information. Informing an appointed client to go out and hire an immigration attorney would seem to undercut the process of utilizing the WDA's resources to meet appointed counsel's 6th amendment duties.

II. STATEMENT OF THE CASE

On June 20, 2014, an Information (CP 1-2), and a Motion for Arrest / Detention (Probable Cause)(CP 3-4) were filed in the Benton County Superior Court by the Benton County Prosecuting Attorney. The Information charged Mr. Meraz Gutierrez with the crime of Unlawful Possession of a Controlled Substance – Methamphetamine as per RCW 69.50.4013(1) relating to an incident occurring on June 17, 2014.

An Order for Warrant (CP 5), as well as an Arrest Warrant (CP 6) were signed by the Benton County Superior Court Judge. An Arraignment Warrant was issued and set an initial appearance for June 23, 2014.

Mr. Meraz Gutierrez was apprehended and made an initial appearance in the Benton County Superior Court on June 23, 2014 in front of the Hon. Judge Robert Swisher. The defendant was given court-appointed counsel. (CP 12). An Advice of Rights form (CP 10) was signed and the matter set for omnibus hearing on July 17, 2014, pre-trial on July 31, 2004 and trial on August 11, 2014. An order setting conditions of release was also signed and bail was set in the amount of \$5,000.00. (CP 11)

The matter was heard on July 17, 2004. A motion hearing was scheduled for July 31, 2014. (CP 16)

A stipulated order for continuance of the pre-trial hearing was entered on July 31, 2014 and a waiver of speedy trial signed. (CP 17)

The matter next came on for motion hearing on August 21, 2014. (CP 19) The defendant was not present and a bench warrant was ordered by the Hon. Bruce Spanner. (CP 20)

On October 3, 2014, a hearing was held with the defendant in custody. An order was signed on conditions of release with no bail. (CP 25) Attorney Swinburnson was not present.

The matter was scheduled for October 9, 2014. At that time, the defendant signed a plea of guilty to the crime of Unlawful Possession of a Controlled Substance. (27-36) The defendant was sentenced on the same date to the crime of Unlawful Possession of Controlled Substance – Methamphetamine (RCW 69.50.4013(1) (CP 37-45). The defendant was to serve 30 days confinement in the Benton County jail with fines, fees and other costs totaling \$2,295.00.

On September 14, 2018, attorney Brent De Young entered a Notice of Appearance on behalf of the defendant. (CP 62) A Limited Waiver of Attorney/Client Confidentiality was filed (CP 63) along with a Declaration of the Defendant. (CP 64-74)

On January 17, 2019, a Motion to Vacate Sentence and Withdraw Guilty Plea was filed in the Benton County Superior Court (CP 76-85) The Motion was noted for hearing on February 28, 2019. (CP 90-91)

On January 17, 2019, a Subpoena Duces Tecum was filed with the court compelling Attorney Ryan Swinburnson to respond to the Motion to Vacate filed on the defendant's behalf. (CP 86-87)

On January 29, 2019, an additional Subpoena Duces Tecum was filed with the Court. (CP 88-89)

The motion hearing set for February 28, 2019 was canceled. (CP 92-93)

Subpoena duces tecum was filed again on March 22, 2019. (CP 93-94)

The matter was re-noted for motion hearing on April 16, 2019. (CP 95-96)

On April 16, 2019, the motion hearing was held in front of the Hon. Judge Cameron Mitchell. (CP 104) The matter was taken under advisement.

On May 2, 2019, a Memorandum re: Admissibility of the Defendant's Permanent Residence Card was filed with the court. (CP105-110)

On June 7, 2019, a Declaration of Defendant re: Admissibility of Permanent Residence Card was filed. (CP 111-115)

On August 14, 2019, Judge Mitchell issued the Court's Decision denying the - defendant's motion to vacate guilty plea and sentence. (CP 117-121)

The defendant then filed a Notice of Appeal of that decision to the Court of Appeals – Division III on September 10, 2019. (CP 123-129)

Comes now this briefing.

III. ARGUMENT

- A. The trial court erred in finding that Mr. Meraz Gutierrez did not meet his burden in showing that trial counsel failed to provide effective assistance of counsel?

Several additional relevant details were brought to light during the 2019 trial court hearing in this matter. These additional points were not addressed in the judge's memorandum decision. These are as follows:

1. Trial counsel's established procedure to establish the nationality and immigration status consisted of asking his client "if they had any immigration concerns" and that this was usually in the context of entering a guilty plea. (*April 16, 2019 Transcript of Hearing pp. 6-7, 18*)
2. Trial counsel testified that his general practice for noncitizen clients with questions regarding the immigration consequences was to inform the client that they should hire an immigration attorney to receive this advice. (*April 16, 2019 Transcript of Hearing p. 10*)
3. Trial counsel testified that he did not have any file notes pertinent to Mr. Meraz Gutierrez's case. He further testified that he did not reach out the WDA for any assistance concerning immigration consequences that might apply to Mr. Meraz Gutierrez. (*April 16, 2019 Transcript of Hearing p. 9*)
4. Trial counsel testified that he was aware of that the Washington Defender's Association conducted regular CLE trainings in the area of immigration consequences of criminal convictions and the effective representation of noncitizen clients. He further testified that he had attended previous WDA immigration-related CLE trainings. (*April 16, 2019 Transcript of Hearing p. 18*)
5. Trial counsel testified that he did not recall if he had ever attended any specific WDA CLE training which discussed "Cancellation of Removal". He stated that he was unaware of this form of relief from deportation for certain legal permanent residents. (*April 16, 2019 Transcript of Hearing pp. 18-19*)

It is conceded as a truism that trial counsel is not required to work at the level of an immigration attorney. Nevertheless trial counsel is required to seek out and to appreciate the existence of immigration-status issues when representing his clients.

A question such as “Do you have any immigration concerns” although broad, is simply insufficient to rely on for the purpose of determining a client’s citizenship status. The question assumes that the client already knows that she or he has a potential issue at some point in the future. In all of *Padilla-Sandoval* litigation, the defendants were unaware that they had any “immigration concerns” until they were placed into removal proceedings. In this matter, Mr. Meraz Gutierrez provided by affidavit that he did not know that he would be deported until he arrived at the immigration court in-custody jail. At that late point in time, Mr. Meraz Gutierrez learned that his conviction made him ineligible for any relief and that his deportation was a certainty. He was deported.¹ (CP 38, 52)

Post *Padilla-Sandoval* precedent has established that general advice from trial counsel to her client that if she has immigration concerns she should hire an immigration attorney is insufficient to meet counsel’s sixth amendment obligations. *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)

Sixth Amendment duties of trial counsel, in this instance, to provide a clear warning as to deportability to her client cannot be generally offloaded to an assigned

¹ The State never contested that Mr. Meraz Gutierrez was deported as a result of this conviction. RP 47 The State’s argument was that the *RCW 10.40.200* warnings in the *Statement of Defendant on Plea of Guilty* were sufficient to meet the 6th amendment duties under *Padilla* and *Sandoval*. Had it contested this point in its April 12, 2019 briefing, immigration court documents would have been provided.

client with the burden of finding and hiring an immigration attorney. *Sandoval* at 167 (trial counsel’s advice to client to see an immigration attorney to ameliorate the immigration consequences of a conviction insufficient to meet Sixth Amendment duties.)

B. The Trial Court Erred in Finding That Mr. Meraz Gutierrez Claimed That His Attorney Never Discussed Any Immigration-Related Issues With Him At All.

The trial court judge appears to have concluded that Mr. Meraz Gutierrez stated under oath that his lawyer did not discuss *any* immigration-related issues with him. (RP 54 p. 3) Mr. Meraz Gutierrez made no such sweeping statement. His declaration contains two items of information concerning the discussions that Mr. Meraz Gutierrez had with his attorney concerning immigration status issues. Mr. Meraz Gutierrez stated that: 1) Attorney Swinburnson never asked him if he “was a [United States] citizen”; and 2) Attorney Swinburnson never asked him if he “had any kind of immigration status”. (CP 38)

Mr. Meraz Gutierrez’s statement that he had been educated fully (kindergarten through twelfth grade) in the United States clearly relates to his own subjective opinion why his attorney might not have thought to go into his citizenship status more fully. It’s unclear why the trial court judge stated that the immigration consequences information mandated by RCW 10.40.200 and its discussion in the context of the counseled plea by Attorney Swinburnson to Mr. Meraz Gutierrez, his client, did not take place. The sworn testimony of Attorney Swinburnson corroborates the conversation between attorney and

client regarding the RCW 10.40.200 information in the guilty plea. (*April 16, 2019 Transcript of Hearing p. 16*)

IV. CONCLUSION

The trial court erred in finding that Mr. Meraz Gutierrez did not meet his burden in showing that his trial counsel failed to provide effective assistance of counsel. To the extent that the trial court relied on it as a factual basis, the trial court erred when it found that Mr. Meraz Gutierrez stated in his declaration that his attorney never discussed any immigration-related issues with him at all.

The sentence in this matter should be vacated and the matter remanded for further consideration.

Respectfully submitted this 11th day of May, 2020.

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APPEAL BRIEF
CERTIFICATE OF SERVICE

I certify that on this 11th day of May, 2020, I caused a copy of Appellant's
APPEAL BRIEF to be sent by electronic mail to:

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

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