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Court of Appeals
Division III
State of Washington
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No. 37056-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

DAVID MERAZ GUTIERREZ,

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 14-1-00763-5

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The trial court did not err in deciding that the defendant's trial attorney did not fall below objective reasonable standards.
- B. The trial court did not err in finding that the defendant's attorney did speak with him about the immigration consequences of a guilty plea.

II. STATEMENT OF FACTS

Key dates leading to a guilty plea:

June 20, 2014: An Information is filed charging the defendant with Possession of a Controlled Substance. CP 1-2

June 23, 2014: The defendant is arraigned. CP 10-11.

June 30, 2014: The defendant posts bail. CP 13.

August 21, 2014: The defendant fails to appear at an Omnibus hearing and a warrant is issued. CP 19-20.

October 2, 2014: The defendant is arrested on the warrant. CP 22.

October 3, 2014: The defendant appears in court after his arrest and his case is continued to October 9, 2014 to reset his trial date. CP 26.

October 9, 2014: The defendant pleads guilty and receives a 30-day sentence. CP 27-36, 40.

The guilty plea colloquy and Statement on Plea of Guilty:

The defendant stated he had gone over the Statement of Defendant on Plea of Guilty with his attorney and did not have any questions about it. CP 69-70. That Statement includes: “If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation or exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States.”

At the guilty plea hearing on October 9, 2014, the trial court’s colloquy with the defendant included this:

If you’re not a citizen of the United States, regardless of your immigration status, a plea of guilty or a finding of guilt after trial may have very significant negative immigration consequences to you, including deportation, exclusion from admission into the United States, or denial of naturalization pursuant to the laws of the United States. Under certain circumstance if you’re not a citizen of the United States, a plea of guilty or finding of guilt after trial will require deportation. You have right to have an attorney explain to you all of the potential immigration consequences of a plea or a finding of guilt. You should also understand that immigration proceedings are very complicated proceedings, and you would not be entitled to have a lawyer represent you in those immigration proceedings.

CP 67-68.

The defendant is not deported for several years and has problems with legal financial obligations:

The record shows at least that the defendant was not deported after serving his 30-day sentence and was in the country for several years thereafter:

June 23, 2016: An order is entered placing the defendant in the “Pay or Appear” program regarding legal financial obligations (LFOs). CP 49.

November 16, 2017: An order to Appear and Produce Information Regarding Income and Expenses is signed with a requirement that the defendant appear on December 14, 2017. CP 51.

December 14, 2017: The defendant appeared under this order and the matter was continued to January 25, 2018. CP 52.

January 25, 2018. The defendant failed to appear, and a warrant was issued. CP 54-55.

January 26, 2018: The defendant was arrested on the warrant. CP 56.

January 29, 2018: The defendant appears in court after the arrest and his LFO hearing is continued to February 8, 2018. CP 58.

February 8, 2018: The defendant fails to appear, and a warrant is issued. CP 60-61.

Thereafter, the defendant filed a motion on January 17, 2019 to Vacate and Withdraw his Guilty Plea. CP 76-85.

Testimony from the defense attorney from April 16, 2019:

The defense attorney, Ryan Swinburnson, testified at a hearing on April 16, 2019 on the defendant's motion to withdraw his plea that he did not remember the case specifically. RP at 14. However, he typically inquires of clients contemplating a guilty plea whether they are citizens, whether they have been contacted by ICE, and/or whether they have immigration concerns. RP at 6. If a defendant answers yes to any of these questions, Mr. Swinburnson asks the client if he or she would like to reset the case in order to speak with an immigration attorney. RP at 8. The defendant's brief mischaracterizes Mr. Swinburnson's testimony on this point by stating that he only asks whether a defendant "if they had immigration concerns." Br. of Appellant at 6-7.

If the client cannot afford to consult with an immigration attorney, Mr. Swinburnson has a contact with the Washington Defenders Association (WDA) for consultation. RP at 8-9. In this case, there was no indication from his file that Mr. Swinburnson consulted the contact. RP at 9. Again, the defendant on appeal mischaracterizes this testimony, stating that Mr. Swinburnson did not "reach out" to the WDA. Br. of Appellant at 6. The context of his testimony was that he would contact the WDA if a client was not a citizen, had immigration concerns, or had been contacted

by ICE and the client could not afford to contact an immigration attorney.
RP at 8-9.

Mr. Swinburnson noted that the guilty plea shortly after the defendant's failure to appear was probably not a coincidence; there is usually a discussion with the prosecutor about a possible Bail Jumping charge. RP at 14. If the defendant is facing a relatively short amount of jail time, a failure to appear can provide a motivation to plead guilty to avoid a Bail Jumping charge. *Id.* In his experience, with a client in Meraz-Gutierrez's position—facing perhaps a month of jail, with a possibility of a more serious charge of Bail Jumping—95% are more concerned about getting out of jail than with the immigration consequences of a guilty plea. RP at 6-7, 11.

In a memorandum decision, the trial court denied the defendant's motion to withdraw his plea. CP 117-21.

III. ARGUMENT

A. The trial court was correct to deny the motion because the defendant did not prove that his trial attorney was ineffective.

1. Standard on review

Generally, a trial court's decision on a motion to withdraw a guilty plea is reviewed for abuse of discretion. *State v. A.N.J.*, 168 Wn.2d 91, 106, 225 P.3d 956 (2010). Under CrR 4.2 (f), "The court shall allow a

defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.”

Counsel’s faulty advice can render the defendant's guilty plea involuntary or unintelligent. To establish whether the plea was involuntary or unintelligent because of counsel's inadequate advice, the defendant must satisfy the familiar two-part *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) test for ineffective assistance claims—first, objectively unreasonable performance, and second, prejudice to the defendant. Ordinary due process analysis does not apply. *State v. Sandoval*, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011).

2. The trial court did not abuse its discretion in finding the defense attorney did not fall below reasonable professional standards because the law on immigration in this case is not clear.

Padilla v. Kentucky, 559 U.S. 356, 369, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) set the standard for defense attorneys who represent a client with immigration issues:

Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice ALITO), a criminal defense attorney need do no

more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Here, the defendant argued at the trial court that the defense attorney was “not aware of the precise alien status” of the defendant—he was a Legal Permanent Resident—and the defense attorney “was not aware of the eligibility requirements for Cancellation of Removal as a form of relief from deportation in immigration courts.” CP 106.

However, the trial court Judge, the Honorable Cameron Mitchell, did his own research on the subject and concluded that it was not clear that the defendant was ineligible for a “Cancellation of Removal.” CP 120. Judge Mitchell cited 8 U.S.C.A. § 1229b (a) (2006), which provides:

Cancellation of removal for certain permanent residents: The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

- (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
- (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
- (3) has not been convicted of any aggravated felony.

It appears the defendant failed to meet these criteria. His Legal Permanent Resident card indicates it was issued on January 16, 2009. CP 115. According to his declaration, he has attended school from K-12

grades in the United States. CP 65. This was his first felony, according to the Judgment and Sentence. CP 38.

No other reported case has required a defense attorney to get into the weeds of immigration law and try to give precise advice when the statutes may be ambiguous. In *State v. Sandoval*, 171 Wn.2d 163, 167, 249 P.3d 1015 (2011) the defense attorney misadvised the defendant by stating that he would not be immediately deported. *In re Ramos*, 181 Wn. App. 743, 752, 326 P.3d 826 (2014) held that it was acceptable for a defense attorney to give general warnings when the defendant was convicted of First-Degree Theft because it was ambiguous whether that crime was an “aggravated felony” under immigration law. *State v. Manajares*, 197 Wn. App. 798, 814, 391 P.3d 530 (2017) held that the defense attorney giving general immigration advice about an *Alford* plea to a charge of Unlawful Imprisonment did not fall below reasonable standards because it was unclear whether that constituted a crime of moral turpitude for immigration law.

At most a defendant may be deemed “deportable” under immigration law. 8 U.S.C. § 1227 (a)(2)(B) (2008). That does not mean a defendant will absolutely, positively be deported. In this case, the defendant was not deported until about four years after he pleaded guilty. Perhaps there were reasons in addition to his plea herein causing his

deportation. Perhaps a change in Presidential administrations resulted in his deportation. But it would have been inaccurate for the defense attorney to advise the defendant he would definitely be deported.

The trial court did not abuse its discretion in finding that the defense attorney did not fall below reasonable professional standards.

3. The trial court properly found that the defense attorney discussed the immigration consequences of the plea with the defendant.

One of the few factual disputes at the hearing concerned the defendant's claim in his declaration that

Mr. Swinburnson never asked me anything about if I was a citizen or if I had any kind of immigration status. He just told me that if I took the deal that I had enough time in that I could be released right away. . . . Mr. Swinburnson never asked me if I was a US citizen or if I had any immigration status. I attended school K-12 in Kennewick. I graduated high school in 2007. Mr. Swinburnson might have thought that I was a US citizen because of that.

CP 64-65. Mr. Swinburnson testified he typically inquires whether a defendant has immigration concerns, has been contacted by ICE, or is a citizen.

The defendant assigns error to the trial court's finding that the defendant's version is unlikely. CP 119. The trial court reasoned that the defendant was not under cross-examination, had a motive to shade the truth, and told the court in the guilty plea colloquy that he had discussed

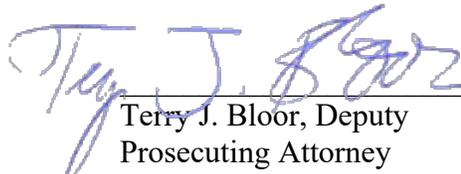
the written plea form with his attorney, which would include the advise that he could be deported. There is substantial evidence supporting the trial court's finding.

IV. CONCLUSION

The trial court did not abuse its discretion. The trial court went to the extent of doing its own research on immigration law. The court appears to be correct. It is not clear whether the defendant would definitely and absolutely be deported, and the defense attorney was correct to give him general advise that a plea would have immigration consequences.

RESPECTFULLY SUBMITTED on July 10, 2020.

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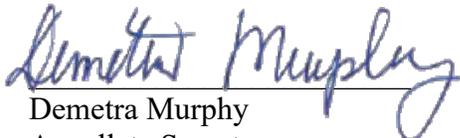
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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BENTON COUNTY PROSECUTOR'S OFFICE

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