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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

87297-0

No. 29400-5-III

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

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

SIGIFREDO GARCIA-BUENO,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that Mr. Bueno was fully cognizant of the parameters of the plea agreement, was not misinformed, was not misled in any fashion, and was totally aware of the immigration consequences that would flow from his conviction. Conclusion of Law No. 1; CP 78

2. The trial court erred in concluding that Mr. Bueno was not telling the truth regarding his lack of understanding of the immigration consequences of his plea and that he pled guilty because his attorney told him to. Conclusion of Law Nos. 2; CP 78-79

3. The trial court erred in concluding that Mr. Bueno's assertion that he did not understand the immigration consequences of his plea was not credible. Conclusion of Law No. 3; CP 79.

4. The trial court erred in concluding that Mr. Bueno's Motion to Vacate was time barred under RCW 10.73.090 and that the one-year time limit was not equitably tolled. Conclusion of Law No. 4; CP 79.

5. The trial court erred in concluding that Mr. Bueno's case was distinguishable from *State v. Littlefair*, and that Mr. Bueno was fully aware of the immigration consequences of his plea. Conclusion of Law No. 5; CP 79.

6. The trial court erred in concluding that Mr. Bueno had no basis to invoke equitable tolling. Conclusion of Law No. 6; CP 80.

7. The trial court erred in concluding that Mr. Bueno's motion was clearly time barred. Conclusion of Law No. 7; CP 80.

8. The trial court erred in concluding that Mr. Bueno's motion to vacate fails on the merits. Conclusion of Law No. 8; CP 80.

9. The trial court erred in concluding that Mr. Bueno's plea was entered knowingly, voluntarily and with a full understanding of the benefits and risks attendant thereto, including the immigration implications. Conclusion of Law No. 9; CP 80.

10. The trial court erred in concluding that Mr. Bueno's motion to vacate fails on the merits. Conclusion of Law No. 10; CP 80.

11. The trial court erred in concluding that Mr. Bueno has failed to demonstrate that failure to allow withdrawal will perpetrate a manifest injustice. Conclusion of Law No. 11; CP 80.

12. The trial court erred in denying Mr. Bueno's motion to withdraw his guilty plea.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Mr. Bueno's Sixth Amendment right to effective assistance of counsel violated when his attorney failed to correctly advise him that pleading guilty would lead to deportation, thus rendering his guilty plea involuntary or unintelligent?

2. Was Mr. Bueno's motion to withdraw his guilty plea not time barred. Did justice require the court to invoke the doctrine of equitable tolling where Mr. Bueno lacked the correct knowledge of immigration consequences at the time of his plea, due to his counsel's faulty advice?

C. STATEMENT OF THE CASE

Mr. Bueno was originally charged with delivery of methamphetamine and conspiracy to deliver methamphetamine. CP 1. Mr. Bueno has a 6th grade education, cannot speak, read or write English, can barely read and write Spanish, and speaks and understand only a poor quality form of Spanish. 8/20/10 RP 9, 27-28. At the advice of his attorney he entered into a plea bargain where he pled guilty to the conspiracy charge with a recommendation of seven days confinement, the amount of time he had already served. CP 77. The judge informed Mr. Bueno at the guilty plea hearing, "There could be immigration consequences if you are not a citizen of the United States." 2/24/05 RP 4.

Sometime after 8/25/08, Mr. Bueno received a notice of deportation proceedings from the Department of Immigration. 8/20/10 RP 42. He obtained different counsel than that at his guilty plea hearing and filed a motion to withdraw his guilty plea on 8/24/09. CP 77. His original counsel testified at the motion hearing that he told Mr. Bueno it would be very difficult to win at trial and if he lost he would immediately go to prison and be deported directly from prison. 8/20/10 RP 33-34. On the other hand, if he took the plea bargain and pled guilty to the conspiracy charge, he could avoid deportation as long as he didn't get arrested for anything and put in jail: "If you don't go back to jail, Immigration isn't going to get you this time. If you behave yourself, stay out of trouble, keep your nose clean, don't get put in jail for anything, you could go on for years and years and years without a problem." 8/20/10 RP 34.

The court found that Mr. Bueno's Motion to Vacate was time barred under RCW 10.73.090 and that the one-year time limit was not equitably tolled (Conclusions of Law Nos. 4 & 7; CP 79-80); that Mr. Bueno had no basis to invoke equitable tolling (Conclusion of Law No. 6; CP 80); that Mr. Bueno's case was distinguishable from *State v. Littlefair*, and that Mr. Bueno was fully aware of the immigration consequences of his plea (Conclusion of Law No. 5; CP 79).

The court also found that Mr. Bueno's motion to vacate failed on the merits (Conclusions of Law Nos. 8 & 10; CP 80); that Mr. Bueno was fully cognizant of the parameters of the plea agreement, was not misinformed, was not misled in any fashion, and was totally aware of the immigration consequences that would flow from his conviction (Conclusion of Law No. 1; CP 78); that Mr. Bueno was not telling the truth regarding his lack of understanding of the immigration consequences of his plea and that he pled guilty because his attorney told him to (Conclusions of Law Nos. 2 & 3; CP 78-79); and that Mr. Bueno had failed to demonstrate that failure to allow withdrawal would perpetrate a manifest injustice (Conclusion of Law No. 11; CP 80).

This appeal followed. CP 75.

D. ARGUMENT

1. Mr. Bueno's Sixth Amendment right to effective assistance of counsel was violated when his attorney failed to correctly advise him that pleading guilty would lead to deportation, thus rendering his guilty plea involuntary or unintelligent.

The Sixth Amendment right to effective assistance of counsel encompasses the plea process. *In re Pers. Restraint of Riley*, 122 Wn.2d 772, 780, 863 P.2d 554 (1993); *McMann v. Richardson*, 397 U.S. 759,

771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). Counsel's faulty advice can render the defendant's guilty plea involuntary or unintelligent. *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *McMann*, 397 U.S. at 770-71. To establish 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. *Hill*, 474 U.S. at 56-58.

Before *Padilla v. Kentucky*, --- U.S. ----, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), many courts believed that the Sixth Amendment right to effective assistance of counsel did not include advice about the immigration consequences of a criminal conviction. See *Padilla*, 130 S.Ct. at 1481 n. 9. However, in *Padilla*, the United States Supreme Court rejected this limited conception of the right to counsel. *Id.* at 1481-82. The Court recognized that deportation is "intimately related to the criminal process" and that "recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders." *Id.* at 1481. Because of deportation's "close connection to the

criminal process," advice about deportation consequences falls within "the ambit of the Sixth Amendment right to counsel." *Id.* at 1482.

Padilla describes the advice that a constitutionally competent defense attorney is required to give about immigration consequences during the plea process. "Immigration law can be complex," as *Padilla* recognizes, and so the precise advice required depends on the clarity of the law. *Id.* at 1483. If 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. *Id.* If "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.* In other words, even if immigration law does not reveal clearly whether the offense is deportable, competent counsel informs the defendant that deportation is at least possible, along with exclusion, ineligibility for citizenship, and any other adverse immigration consequences. *Padilla* rejected the proposition that only affirmative misadvice about the deportation consequences of a guilty plea, but not the failure to give such advice, could constitute ineffective assistance of counsel. *Id.* at 1484.

Padilla itself is an example of when the deportation consequence is "truly clear." *Id.* Jose Padilla pleaded guilty to transporting a significant amount of marijuana in his truck, an offense that was obviously deportable under 8 U.S.C. § 1227(a)(2)(B)(i):

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of ... relating to a controlled substance ..., other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is *deportable*.

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

(Emphasis added). This statute is "succinct, clear, and explicit in defining the removal consequence for Padilla's conviction." *Padilla*, 130 S.Ct. at 1483. By simply "reading the text of the statute," Padilla's lawyer could determine that a plea of guilty would make Padilla eligible for removal.

Id.

Similarly, in the present case, the charge to which Mr. Bueno pled guilty, conspiracy to deliver methamphetamine, is similar to the charge in *Padilla* and involves the same immigration statute. Therefore, the applicable immigration law "is truly clear" that the offense is deportable, and Mr. Bueno's attorney should have correctly advised him that pleading guilty to that particular charge would lead to deportation.

Mr. Bueno's facts are remarkably similar to those in *Sandoval*.

Sandoval's counsel advised him to plead guilty: "I told Mr. Sandoval that he should accept the State's plea offer because he would not be immediately deported and that he would then have sufficient time to retain proper immigration counsel to ameliorate any potential immigration consequences of his guilty plea." *Sandoval*, 171 Wn.2d at 167. Sandoval said, "I trusted my attorney to know that what he was telling me was the truth." *Id.*

Sandoval followed his counsel's advice and pleaded guilty. *Id.*

The statement on plea of guilty, that Sandoval signed, contained a warning about immigration consequences: "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, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." *Id.* During a colloquy with the court, Sandoval affirmed that his counsel, with an interpreter's help, had reviewed the entire plea statement with Sandoval. *Id.*

Before Sandoval was released from jail, the United States Customs and Border Protection put a "hold" on Sandoval that prevented him from being released from jail. *Sandoval*, 171 Wn.2d at 168. After deportation

proceedings against Sandoval then began, he moved to vacate his guilty plea on grounds that the plea was involuntary due to misadvice from counsel regarding deportation consequences. *Sandoval*, 171 Wn.2d at 163, 168. Sandoval claimed, "I would not have pleaded guilty . . . if I had known that this would happen to me." *Sandoval*, 171 Wn.2d at 168. After his motion was denied, Sandoval appealed, claiming his plea was not knowing, voluntary, or intelligent due to ineffective assistance of counsel. *Id.*

The State argued that Sandoval's counsel's advice was proper because his counsel discussed the risk of deportation with Sandoval, and counsel appropriately relied on his prior experience to assess Sandoval's chances and recommend a mitigation strategy. *Sandoval*, 171 Wn.2d at 172. The State further argued that counsel's assurance was limited to telling Sandoval that he would not be "immediately deported, not that he would never be deported. *Id.* The State also argued that the guilty plea statement contained a warning about the immigration consequences of pleading guilty, as required by RCW 10.40.200, and the judge confirmed in a colloquy that Sandoval reviewed the statement with his counsel. *Sandoval*, 171 Wn.2d at 172-73.

The Washington Supreme Court rejected these arguments for two principal reasons. First, the Court held defense counsel's mitigation advice may not be couched with so much certainty that it negates the effect of the warnings required under *Padilla*.

The required advice about immigration consequences would be a useless formality if, in the next breath, counsel could give the noncitizen defendant the impression that he or she should disregard what counsel just said about the risk of immigration consequences. Under *Padilla*, counsel can provide mitigation advice. However, counsel may not, as Sandoval's counsel did, assure the defendant that he or she certainly "would not" be deported when the offense is in fact deportable. That Sandoval was subjected to deportation proceedings several months later, and not "immediately" as his counsel promised, makes no difference. Sandoval's counsel's advice impermissibly left Sandoval the impression that deportation was a remote possibility.

Sandoval, 171 Wn.2d at 173.

The second reason the Court found Sandoval's counsel's advice was unreasonable was that the guilty plea statement warnings required by RCW 10.40.200(2) cannot save the advice that counsel gave. *Id.* RCW 10.40.200 and other such warnings do not excuse defense attorneys from providing the requisite warnings. *Id.* The Court noted that in *Padilla*, despite the warning about immigration consequences on Kentucky's plea forms, the Court concluded that the advice of *Padilla*'s lawyer was incompetent under the Sixth Amendment. The defendant was misadvised that he "did not have to worry about immigration status since he had been

in the country so long.' " *Sandoval*, 171 Wn.2d at 173-74 (citing *Padilla*, 130 S.Ct. at 1478).

The result is the same here. Just as *Padilla*'s lawyer incorrectly dismissed the risks of deportation, and *Sandoval*'s counsel's categorical assurances nullified the constitutionally required advice about the deportation consequence of pleading guilty, Mr. Bueno's counsel gave mitigation advice couched with so much certainty that it negated the effect of the warnings required under *Padilla*. Mr. Bueno's attorney assured him that if he took the plea bargain and pled guilty to the conspiracy charge, he could avoid deportation as long as he didn't get arrested for anything and put in jail: "If you don't go back to jail, Immigration isn't going to get you this time. If you behave yourself, stay out of trouble, keep your nose clean, don't get put in jail for anything, you could go on for years and years and years without a problem." 8/20/10 RP 34.

As in *Sandoval*, Mr. Bueno's counsel assured him that he probably would not be deported when the offense is in fact deportable. The fact that Mr. Bueno was subjected to deportation proceedings sometime later, and not "immediately" as his counsel promised if he went to trial, makes no difference. See *Sandoval*, 171 Wn.2d at 173. Mr. Bueno's counsel's advice impermissibly left him the impression that deportation was a

remote possibility. Therefore, Mr. Bueno has proved the performance prong of Strickland.

Mr. Bueno was prejudiced by his attorney's advice.

"In satisfying the 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." *Riley*, 122 Wn.2d at 780-81, 863 P.2d 554 (citing *Hill*, 474 U.S. at 59); 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). 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*, 130 S.Ct. at 1485. This standard of proof is "somewhat lower" than the common "preponderance of the evidence" standard. *Strickland*, 466 U.S. at 694.

In *Sandoval*, the Court concluded he had met this burden for the following reasons. Not only did Sandoval swear after-the-fact that he would have rejected the plea offer had he known the deportation consequence, but also his counsel said that Sandoval was "very concerned" at the time about the risk of deportation and Sandoval relied heavily on his lawyer's counsel. *Sandoval*, 171 Wn.2d at 175.

The State argued that the disparity in punishment between the plea bargain and going to trial (6-12 months versus 78-102 months) made it less likely Sandoval would have been rational in refusing the plea offer. *Id.* However, the Court observed that although Sandoval would have risked a longer prison term by going to trial, the deportation consequence of his guilty plea was also "a particularly severe 'penalty.'" *Id.* (citing *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 believed *Sandoval* would have been rational to take his chances at trial. *Sandoval*, 171 Wn.2d at 176 (citing *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.")).

The facts in the present case are indistinguishable from those in *Sandoval*. The evidence from the motion hearing shows that Mr. Bueno

relied entirely on the advice he received from his attorney. He pled guilty to avoid immediate deportation. Although he would have risked a longer prison term by going to trial, the deportation consequence of his guilty plea meant banishment or exile. It meant separation from his wife to whom he had been married for 13 years, as well as his children. 8/20/10 RP 24-25. It meant no means of support for his family. His wife had not worked since 2001. 8/20/10 RP 25. As in *Sandoval*, given the severity of the deportation consequence, Mr. Bueno would have been rational to take his chances at trial. See *Sandoval*, 171 Wn.2d at 176. Therefore, Mr. Bueno has proved that his counsel's unreasonable advice prejudiced him.

2. Mr. Bueno's motion to withdraw his guilty plea was not time barred. Justice required the court to invoke the doctrine of equitable tolling because Mr. Bueno lacked the correct knowledge of immigration consequences at the time of his plea due to his counsel's faulty advice.

RCW 10.73.090 is the applicable statute and provides in pertinent part:

- 1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.
- (2) For purposes of this section, "collateral attack" means any form of postconviction relief other than a direct appeal. "Collateral attack" includes ... a motion to withdraw a guilty plea....

In *In re Personal Restraint Petition of Hoisington*, 99 Wn. App. 423, 993 P.2d 296 (2000), the court of appeals held that "[t]he doctrine of equitable tolling applies to statutes of limitation but not to time limitations that are jurisdictional;" that RCW 10.73.090 "functions as a statute of limitation and not as a jurisdictional bar[;]" and thus that RCW 10.73.090 "is subject to the doctrine of equitable tolling." *In re Hoisington*, 99 Wn. App. at 431, 993 P.2d 296; see also *United States v. Patterson*, 211 F.3d 927, 930 (5th Cir.2000); *Valverde v. Stinson*, 224 F.3d 129, 133 (2d Cir.2000); *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir.1999); *Calderon v. U.S. Dist. Court*, 163 F.3d 530, 542 (9th Cir.), cert. denied, 523 U.S. 1063, 118 S.Ct. 1395, 140 L.Ed.2d 653 (1998).

Equitable tolling "permits a court to allow an action to proceed when justice requires it, even though a statutory time period has nominally elapsed." *State v. Duvall*, 86 Wn. App. 871, 874, 940 P.2d 671 (1997), review denied, 134 Wn.2d 1012, 954 P.2d 276 (1998). "Appropriate circumstances generally include 'bad faith, deception, or false assurances by the defendant, and the exercise of diligence by the plaintiff.'" *Id.* at 875, 940 P.2d 671 (quoting *Finkelstein v. Sec. Props., Inc.*, 76 Wn. App. 733, 739-40, 888 P.2d 161 (1995)). "Courts typically permit equitable tolling to occur only sparingly, and should not extend it to a 'garden variety

claim of excusable neglect.' " *Id.* (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435(1990)).

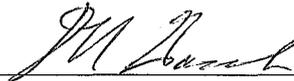
In *State v. Littlefair*, 112 Wn. App. 749, 51 P.3d 116 (2002), review denied, 149 Wn.2d 1020, 72 P.3d 761 (2003), the court of appeals equitably tolled RCW 10.73.090. The court concluded that Littlefair's evidence proved that he lacked knowledge of possible immigration consequences at the time of his plea due to a "bizarre series of events" and the mistakes of others. *Littlefair*, 112 Wn. App. at 763, 51 P.3d 116. Littlefair was a resident alien who moved to withdraw his guilty plea to a drug charge more than two years after the court entered his plea and sentence. *Id.* at 755, 51 P.3d 116. Although Littlefair signed a plea form containing the required immigration consequences, he argued he did not receive the required advisement because of mistakes by his attorney, the court, and the INS. *Id.* at 762, 51 P.3d 116. The Court concluded that the one-year time period in RCW 10.73.090 should be equitably tolled from the date of his plea (October 17, 1996) to the date on which he first discovered that deportation was a consequence of his plea (November 2, 1998). *Id.* at 762-63, 51 P.3d 116. Since Littlefair filed his motion within one year after November 2, 1998 his motion was not time-barred. *Id.*

Similarly in the present case, Mr. Bueno lacked knowledge of possible immigration consequences at the time of his plea due to mistakes by his attorney in misinforming him about the immigration consequences of his guilty plea. As in *Littlefair*, the one-year time period in RCW 10.73.090 should be equitably tolled from the date of Mr. Bueno's plea (2/5/05) to the date on which he first discovered that deportation was a consequence of his plea (sometime after 8/25/08). Since Mr. Bueno filed his motion within one year after 8/25/08, his motion was not time-barred.

E. CONCLUSION

For the reasons stated, the superior court's denial of Mr. Bueno's motion to withdraw his guilty plea should be reversed.

Respectfully submitted June 20, 2011.



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