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Washington State Supreme Court

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88770-5
NO. 89992-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of

MUHAMMADOU JAGANA,

Petitioner.

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF MOVING PARTY.

The respondent, State of Washington, asks for the relief designated in Part 2.

B. STATEMENT OF RELIEF SOUGHT.

The State requests that this Court deny Jagana's motion for discretionary review of the Court of Appeals' decision denying the personal restraint petition.

C. FACTS RELEVANT TO MOTION.

In August of 2005, Muhammadou Jagana was charged by information with the crime of possession of cocaine. Appendix C.¹ The Certification for Determination of Probable Cause reflects that Jagana was found with 16.1 grams of crack cocaine, an amount with a street value of approximately \$1300. Appendix C.

Jagana had no known criminal history, thus his standard range was calculated to be 0 to 6 months. Appendix C. In exchange for a plea of guilty, the State agreed to recommend two months of work release and one month of community service.

¹ Appendices A-D referenced herein were attached to the State's Response to Personal Restraint Petition filed June 20, 2011.

Appendix C. In the Statement of Defendant on Plea of Guilty, which was translated for Jagana and which he signed and represented that he understood, he was advised: "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."

Appendix C, at 7.

Email exchanges between the prosecuting attorney and Jagana's attorney at the time of the plea reveal that the immigration consequences of the plea were a central consideration for the parties. Appendix D. The exchange reveals that Jagana's attorney consulted with immigration advisors before advising Jagana to plead guilty to the charge of possession of cocaine: "I consulted with my immigration advisors about the proposal to offer solicitation to deliver." Appendix D. In one email, Jagana's attorney states, "I appreciate you trying to help Mr. Jagana out with the immigration situation." Appendix D. The emails reflect that the State was willing to allow Jagana to plead guilty to an alternative charge of solicitation, which would have resulted in a higher standard range, but may have had fewer immigration consequences. However, the

State was unwilling to reduce the charges further. Appendix D. Jagana chose to plead guilty to the charge with the lowest standard range. Appendix C. Jagana had two other public defenders assigned to his case prior to his plea. Appendix E.

Jagana was sentenced to three months of electronic home detention on June 7, 2006. Appendix A. The judgment and sentence was filed with the clerk of the trial court on June 9, 2006. Appendix A. Jagana did not appeal.

In November 2010, Jagana filed this collateral attack in the superior court, alleging that he received ineffective assistance of counsel because defense counsel "did not advise me of any of the immigration consequences of the conviction on my immigration status." Affidavit of Defendant (submitted with motion to vacate judgment), at 1. The motion to vacate the judgment and sentence was transferred to the Court of Appeals for consideration as a personal restraint petition. Jagana submitted no information about his immigration status or the immigration consequences that he faces as a result of this conviction. Jagana stated only that he is not a United States citizen. Affidavit of Defendant, at 1. Jagana presented no federal statutes or case law in his briefing that shed light on the immigration consequences of this conviction.

In addition, Jagana has never presented evidence from any of his three defense attorneys as to whether or not immigration consequences were discussed with him at any point.

In August of 2012, the Court of Appeals issued a published opinion in this case concluding that Padilla v. Kentucky, ___ U.S. ___, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), was a significant change in the law pursuant to RCW 10.73.100(6), but not a new rule of criminal procedure pursuant to the retroactivity analysis of Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). Thus, the Court of Appeals concluded that Jagana's petition was not untimely. The Court of Appeals remanded for an evidentiary hearing as to whether Jagana received ineffective assistance of counsel.

The State filed a motion for discretionary review. While that motion was pending, the United States Supreme Court decided Chaidez v. United States, ___ U.S. ___, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013). In August of 2013, this Court remanded Jagana's petition back to the Court of Appeals for reconsideration in light of Chaidez. The Court of Appeals then withdrew its published opinion, and directed the parties to provide additional

briefing. After four months, Jagana had failed to provide any additional briefing to the Court of Appeals, and the State moved to dismiss the petition. In response, Jagana filed a statement of additional authorities, but no briefing. The Court of Appeals entered its order denying Jagana's personal restraint petition.

D. REASONS WHY REVIEW SHOULD BE DENIED.

1. JAGANA'S PETITION WAS PROPERLY DISMISSED BECAUSE PADILLA V. KENTUCKY DOES NOT APPLY RETROACTIVELY TO CASES THAT WERE FINAL BEFORE MARCH 31, 2010; THERE IS NO BASIS FOR DISCRETIONARY REVIEW.

Jagana filed this untimely collateral attack, arguing that Padilla is a significant change in the law pursuant to RCW 10.73.100(6). While Padilla is a significant change in the law, it is not a change that applies retroactively to cases that became final before March 31, 2010. Because Jagana's conviction became final in 2006, this collateral attack is time-barred pursuant to RCW 10.73.090.

No petition collaterally attacking a judgment and sentence 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. RCW 10.73.090(1); see In re Pers. Restraint of Runyan, 121 Wn.2d 432, 444, 449, 853 P.2d 424 (1993). A judgment becomes final on the date that it is filed with the clerk of the trial court if no appeal is taken, or the date that the appellate court issues its mandate if the conviction is appealed, whichever is later. RCW 10.73.090(3). The judgment in this case became final on June 9, 2006.

RCW 10.73.100(6) provides an exception to the one-year time limit if there has been a “significant change in the law” that is material to the conviction or sentence being challenged. RCW 10.73.100 reads, in relevant part:

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

(6) 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 or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

A significant change in the law can be material to a defendant's conviction or sentence only if the change in the law is retroactive to the defendant's case. See State v. Abrams, 163 Wn.2d 277, 291, 178 P.3d 1021 (2008); In re Pers. Restraint of Bonds, 165 Wn.2d 135, 140 n.2, 196 P.3d 672 (2008). In Chaidez v. United States, supra, 133 S. Ct. at 1113, the United States Supreme Court held that Padilla v. Kentucky is a new rule of criminal procedure that does not apply retroactively to cases that were final before March 31, 2010. Thus, Padilla cannot be the basis for relief in this case.

This Court has adopted the retroactivity standard set forth in Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), and applied in Chaidez. See In re Pers. Restraint of Haghighi, 178 Wn.2d 435, 309 P.3d 459 (2013); State v. Evans, 154 Wn.2d 438, 447, 114 P.3d 627 (2005); In re Pers. Restraint of Markel, 154 Wn.2d 262, 273, 111 P.3d 249 (2005); In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 324-27, 823 P.2d 492 (1992) (noting that "we have attempted from the outset to stay in step with the federal retroactivity analysis."). Most recently, in Haghighi, this Court stated, "this court has consistently and repeatedly followed and applied the federal retroactivity analysis as

established in Teague.” 178 Wn.2d at 441. Although Haghighi argued for abandonment of the Teague standard, this Court held that, “The Teague framework is supported by roughly 25 years of precedent, and neither Haghighi nor the concurrence/dissent provide adequate basis for jettisoning such a firmly established principle of law.” Id. at 443.

A motion for discretionary review of a Court of Appeals decision denying a personal restraint petition is governed by the considerations set forth in RAP 13.4(b). RAP 13.5A. The Court of Appeals decision in this case does not conflict with a decision of this Court or another decision of the Court of Appeals. Retroactivity analysis does not present a constitutional issue. The standards governing retroactivity of new rules of criminal procedure was recently addressed and decided in Haghighi, 178 Wn.2d 443, and is not an issue of substantial public importance.

The new rule of criminal procedure announced in Padilla v. Kentucky does not apply retroactively to cases that became final before March 31, 2010. Because Jagana’s case became final in 2006, Padilla does not apply retroactively to his case. His petition was properly denied, and there is no basis for review.

2. JAGANA'S ARGUMENT THAT A RETROACTIVITY ANALYSIS OTHER THAN TEAGUE V. LANE SHOULD BE EMPLOYED IS BEING RAISED FOR THE FIRST TIME IN THIS MOTION FOR DISCRETIONARY REVIEW.

In the Motion for Discretionary Review, Jagana argues for the first time that this Court should employ a retroactivity analysis that differs from the analysis this Court has consistently applied based on Teague v. Lane. No such argument has been previously made by Jagana, either in the Court of Appeals or in this Court when the State's motion for discretionary review was pending.² This Court generally does not consider issues raised for the first time in a petition for review. Fisher v. Allstate Insurance Co., 136 Wn.2d 240, 252, 961 P.3d 350 (1990).³

² Although counsel for Jagana was granted two extensions of time to file an answer to the State's motion for discretionary review in July of 2013, no answer was filed.

³ Moreover, Jagana's argument about "principles of redressibility" misapprehends the scope and purpose of retroactivity analysis. There is no question that a petitioner raising a meritorious claim of ineffective assistance of counsel based on Padilla for the first time in a timely PRP would be entitled to relief as long as the conviction became final after the Padilla decision was issued in 2010. However, the Teague retroactivity analysis recognizes that the "application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." Teague, 489 U.S. at 309. If petitioners are allowed to raise claims based on new rules of criminal procedure that were adopted long after their convictions occurred, there would be no finality in criminal convictions.

3. JAGANA HAS FAILED TO PRESENT A PRIMA FACIE SHOWING OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Even if Padilla was applied retroactively to Jagana's conviction, he has failed to make a sufficient showing to warrant a reference hearing. In a personal restraint petition, if a petitioner fails to make a prima facie showing of ineffective assistance of counsel, the petition must be dismissed. In re Pers. Restraint of Rice, 118 Wn.2d 876, 885, 828 P.2d 1086 (1992). A petitioner must demonstrate through affidavits that he has competent, admissible evidence to establish the facts that entitled him to relief. Id. at 886.

In this case, Jagana's petition is based solely on a self-serving assertion that he was not informed of the immigration consequences of his conviction. However, the plea form clearly advised Jagana that the conviction could be grounds for deportation. Appendix C, at 7. And the email exchange provided by the State shows that defense counsel consulted with an immigration advisor while negotiating the plea, and that the immigration consequences of a possession of cocaine conviction versus a conviction for solicitation to commit a drug offense were a central concern during those negotiations. Jagana has never

provided any information as to his actual immigration status and what effect the 2006 conviction has had on that status. As such, he has failed to show deficient performance. See State v. Cervantes, 169 Wn. App. 428, 434, 282 P.3d 98 (2012) (appellant's "bald, self-serving statement" that counsel did not inform him of the immigration implications of his plea, without corroboration, was insufficient to demonstrate deficient performance).

In Padilla, the Court held that in the "undoubtedly" numerous cases in which the immigration consequences of a criminal conviction are unclear or uncertain, defense counsel need do no more than advise a noncitizen client that the conviction may carry a risk of adverse immigration consequences. 559 U.S. at 369. Only when immigration consequences are "truly clear" must defense counsel specifically advise the noncitizen client of those consequences. Id. Jagana was advised through the plea form that his conviction would have some adverse immigration consequences. Jagana has failed to make prima facie showing that defense counsel was deficient in failing to correctly advise him of "truly clear" immigration consequences. Thus, even if Padilla were to be applied retroactively to his case, dismissal of his petition would still be the proper result.

E. CONCLUSION.

Jagana's petition was properly denied and review is not warranted.

DATED this 25th day of March, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Broman, the attorney for the respondent, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Answer to Motion for Discretionary Review, in IN PERSONAL RESTRAINT OF JAGANA, Cause No. 89992-4, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name

Done in Seattle, Washington

3/26/14

Date