

No. 98026-8

Court of Appeals No. 79621-6-I
Snohomish County Superior Court No. 06-1-02314-0

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

In re Personal Restraint of
Alejandro Garcia Mendoza,
Defendant/Petitioner.

COLLATERAL ATTACK ON JUDGMENT ENTERED IN THE
SNOHOMISH COUNTY SUPERIOR COURT
By the Honorable Linda C. Krese

PETITIONER'S SUPPLEMENTAL BRIEF

By:
Teymur Askerov
Attorney for Appellant
Black Law, PLLC
705 Second Avenue, Suite 1111
Seattle, WA 98104
(206) 623-1604

TABLE OF CONTENTS

I. INTRODUCTION1

II. ARGUMENT.....1

 A. MR. GARCIA'S STATUTORY CLAIM IS NOT TIME-BARRED
 BECAUSE *PADILLA* AND SUBSEQUENT STATE CASES
 EFFECTED A CHANGE IN LAW ON THE CONSTRUCTION
 AND APPLICATION OF RCW 10.40.200.....1

 B. MR. GARCIA IS ENTITLED TO RELIEF UNDER RCW
 10.40.200.....5

III. CONCLUSION.....10

TABLE OF AUTHORITIES

Cases

In re Personal Restraint of Greening, 141 Wn.2d 687 (2000).....2, 3

In re Personal Restraint of Stoudmire, 145 Wn.2d 258 (2001).....3

Padilla v. Kentucky, 559 U.S. 356 (2010)..... *passim*

In re Personal Restraint of Tsai, 183 Wn.2d 91 (2015).....*passim*

State v. Holley, 75 Wn. App. 191 (1985).....3, 7

State v. Jamison, 105 Wn. App. 572 (2001)5, 7

State v. Littlefair, 112 Wn.2d 749 (2002)9

State v. Martinez-Leon, 174 Wn. App. 753 (2013).....4, 5

State v. Orantes, 197 Wn. App. 737 (2017).....3

State v. Sandoval, 171 Wn.2d 163 (2011).....5, 7

Statutes

RCW 10.40.200.....*passim*

RCW 10.73.090.....1, 2

RCW 10.73.100.....2, 3, 7, 8

I. INTRODUCTION

On October 25, 2019, the Court ordered Petitioner, Alejandro Garcia Mendoza, (“Mr. Garcia”), to submit supplemental briefing addressing the State’s argument, raised in its reply brief in the Superior Court, that Mr. Garcia’s petition for post-conviction relief is time-barred because he has combined a time-barred claim (his claim for relief pursuant to RCW 10.40.200) with a timely claim (his claim for relief under Padilla v. Kentucky, 559 U.S. 356 (2010)). Mr. Garcia, by and through undersigned counsel, files the following supplemental brief pursuant to that order.

II. ARGUMENT

A. Mr. Garcia’s Statutory Claim is not Time-Barred because *Padilla* and Subsequent State Cases Effected a Change in Law on the Construction and Application of RCW 10.40.200.

The thrust of the State’s argument regarding the untimeliness of Mr. Garcia’s RCW 10.40.200 claim is that Padilla did not change the law with respect to the construction and application of RCW 10.40.200, and therefore claims pursuant to that statute are time-barred because they could have been raised prior to the issuance of the decision in Padilla. However, Washington state decisions construing Padilla have overturned prior narrow interpretations of RCW 10.40.200, and as a consequence claims based on RCW 10.40.200 should be exempt from RCW 10.73.090’s time limit on

collateral attacks under RCW 10.73.100(6) for the same reason that claims based on Padilla are. Specifically, because state cases construing Padilla and the requirements of RCW 10.40.200 in light of Padilla constitute a material significant change in the law that applies retroactively, claims based on RCW 10.40.200 should be exempt from the time limit on collateral attacks under RCW 10.73.100(6) when raised by defendants whose convictions became final prior to the issuance of the decision in Padilla.

RCW 10.73.100(6) provides that the time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on the fact that:

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 law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

RCW 10.73.100(6). A decision constitutes a “significant change in the law” for purposes of RCW 10.73.100(6) when it “has effectively overturned a prior appellate decision that was originally determinative of a material issue.” See In re Personal Restraint of Greening, 141 Wn.2d 687, 697 (2000). “One test to determine whether an appellate decision

represents a significant change in law is whether the defendant could have argued this issue before publication of the decision.” In re Personal Restraint of Stoudmire, 145 Wn.2d 258, 264 (2001).

This Court recently considered what constitutes a change in the law for purposes of RCW 10.73.100(6). In State v. Orantes, 197 Wn. App. 737 (2017), the Court held that a significant material change in law occurs within the meaning of RCW 10.73.100(6) where courts would have rejected a litigant’s claim prior to the change in case law. See id. at 739. Under this standard, it is clear that the change in law effected by Padilla also effected a change in the construction and application of RCW 10.40.200.

Prior to Padilla courts in Washington uniformly rejected claims under RCW 10.40.200 where the boilerplate advisement was read to the defendant and no other immigration advice was given. An example of how Washington courts construed RCW 10.40.200, prior to the sea change effected by Padilla is found in State v. Holley, 75 Wn. App. 191 (1985). The decision in that case makes clear that the only factor that courts considered in determining whether a violation of RCW 10.40.200 occurred is whether the boilerplate statutory warning found in a statement of defendant on plea of guilty was read to the defendant. After finding that the defendant in Holley submitted sufficient evidence to rebut the

presumption resulting from the presence of the immigration warning in his plea statement, the court explained as follows:

Thus, he is entitled to a hearing to attempt to persuade the trial court by a preponderance of the evidence, that he did not receive the statutory warnings . . . Therefore, we remand this matter to the [trial court] to determine whether: (1) defense counsel advised Holley not to read paragraph 17 of the statement of defendant on plea of guilty; (2) Holley, acting on the advice of counsel, in fact did not read paragraph 17; (3) Holley was advised of the possibility of deportation any other way; and (4) deportation is a collateral consequence of Holley's convictions

Id. at 201. The foregoing passage demonstrates that prior to Padilla Washington courts construed RCW 10.40.200 to be satisfied where a defendant was read the boilerplate advisement in a plea form. As a consequence, a defendant who had the statutory immigration advisement read to him from his plea form during his plea proceedings had no basis to raise a claim for relief under RCW 10.40.200.

As late as 2013, Division II of the Court of Appeals held in State v. Martinez-Leon, 174 Wn. App. 753 (2013), that a reading of the boilerplate immigration advisement was sufficient to satisfy the requirements of RCW 10.40.200 before Padilla was decided:

And, unlike Littlefair, Martinez-Leon signed a statement on the plea of guilty that provided, "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." . . .

Although Martinez-Leon’s defense counsel did not specifically advise him that a 365-day sentence on his assault conviction would result in definite deportation under United States immigration laws, such an obligation was not required before Padilla.

Id. at 762; see also State v. Jamison, 105 Wn. App. 572, 594 (2001) see id. at 594 (finding that defendant was properly warned under RCW 10.40.200 where the statement of defendant contained a standard advisement and prosecutor asked “Do you understand that if you are not a citizen . . . that this guilty plea will affect your ability to be in the United States?”).

Padilla and subsequent Washington decisions construing that case marked a departure from the line of cases holding that merely advising a defendant in general terms of possible immigration consequences is enough to satisfy RCW 10.40.200. In State v. Sandoval, 171 Wn.2d 163, 173 (2011), the state Supreme Court held that the presence of a standard advisement in a plea statement is not enough to establish that counsel’s duties under Padilla were satisfied. Then, in In re Personal Restraint of Tsai, 183 Wn.2d 91 (2015), the high court held that the boilerplate advisement found in Washington’s form plea statements was not itself the advice required by RCW 10.40.200 and that the statute gives noncitizens the “unequivocal right to advice regarding immigration consequences” and requires defense counsel to research and apply RCW 10.40.200 to his or her client’s case. See Tsai, 183 Wn. 2d at 101. The Court reasoned:

Our legislature did what Padilla did in 2010—it rejected the direct-versus collateral distinction as applied to immigration consequences, declaring that a noncitizen defendant must be warned of immigration consequences before pleading guilty. To give effect to this statute, the standard plea form in CrR 4.2 was promptly amended to include a statement warning noncitizen defendants of possible immigration consequences. *That warning statement is not, itself, the required advice; it merely creates a rebuttable presumption that the defendant has been properly advised.*

RCW 10.40.200’s plain language gives noncitizen defendants the unequivocal right to advice regarding immigration consequences and necessarily imposes a correlative duty on defense counsel to ensure that advice is provided. . . . While defense counsel’s duty to advise regarding immigration consequences is imposed by statute, reasonable conduct for an attorney includes carrying out the duty to research the relevant law. *In many cases defense counsel’s failure to fulfill his or her statutory duty may be due to an unreasonable failure to research or apply RCW 10.40.200, and there is no conceivable tactical or strategic purpose for such a failure.*

Tsai, 183 Wn.2d at 101 – 102 (emphasis added); (internal citations and quotation marks omitted). In so holding, the Court expressly overruled prior cases holding that a general advisement about immigration consequences was sufficient to satisfy RCW 10.40.200 and clarified that the statute requires defense counsel to research the immigration consequences of each particular case and provide clients with case-specific immigration advice. See id. at 106 – 07. (“Padilla superseded the theory underlying these decisions—that ‘anything short of an affirmative misrepresentation by counsel of the plea’s deportation consequences could

not support the plea's withdrawal. . . . This was a significant change in Washington law.”).

Consequently, because the change in law effected by Padilla and Tsai also effected a change in law in the construction and application of RCW 10.40.200, litigants whose cases became final before Padilla was decided should be permitted to raise claims under RCW 10.40.200 after the expiration of the one year time limit on collateral attacks pursuant to the exemption set forth in RCW 10.73.100(6).

Prior to the issuance of the decisions in Padilla, Sandoval, and Tsai, Mr. Garcia was precluded from arguing that a violation of RCW 10.40.200 occurred in his case, because under the holdings of cases like Holley and Jamison having the boilerplate warning in his statement of defendant on plea of guilty read to him by his attorney was sufficient to satisfy RCW 10.40.200. However, after the issuance of the decision in Tsai, it became clear that such advice was not sufficient to satisfy the requirements of RCW 10.40.200, and that his attorney was required to research and apply RCW 10.40.200 to Mr. Garcia's specific case, which she failed to do. See Tsai, 183 Wn.2d at 102. Thus, by overturning precedent that would have preclude him from arguing that a violation of RCW 10.40.200 occurred in his case, Tsai constituted a material change in law that is retroactively applicable to Mr. Garcia's case for purposes of the exemption from the

time-bar set forth in RCW 10.73.100(6). The Court should therefore review Mr. Garcia's statutory claim on the merits.

B. Mr. Garcia is Entitled to Relief under RCW 10.40.200.

As discussed above, based on the construction of RCW 10.40.200 outlined in Tsai, Mr. Garcia had an unequivocal right under RCW 10.40.200 to receive advice about the immigration consequences of his conviction from his defense attorney prior to entering a plea of guilty to the charges against him. See Tsai, 183 Wn.2d at 101 – 102 (“RCW 10.40.200’s plain language gives noncitizen defendants the unequivocal right to advice regarding immigration consequences and necessarily imposes a correlative duty on defense counsel to ensure that advice is provided.”).

Mr. Garcia’s has demonstrated a violation of that statutory right by presenting evidence, in the form of his own declaration as well as the declaration of his prior defense attorney, establishing that counsel failed to research and apply RCW 10.40.200 to Mr. Garcia’s case and explain to him what the specific immigration consequences to him would be if he pleaded guilty to possession of a controlled substance.

The plain language of RCW 10.40.200 does not require a showing of prejudice. Instead the statute commands that where a violation is shown, the “court, on the defendant’s motion, *shall* vacate the judgment and

sentence and permit the defendant to withdraw the plea of guilty.” RCW 10.40.200 (emphasis added). Courts construing RCW 10.40.200 have permitted withdrawal of a guilty plea by a noncitizen defendant upon a showing that the defendant did not receive immigration advice without a showing of prejudice. See State v. Littlefair, 112 Wn.2d 749, 769 (2002) (“In summary, RCW 10.40.200 gave Littlefair a statutory right, independent of any constitutional right, to be advised of the deportation consequences of his plea. He was not advised due to a series of miscues by his attorney and the trial court. Thus, we vacate the plea and sentence and remand for further proceedings.”). Because Mr. Garcia established a violation of RCW 10.40.200, he is entitled to relief from his conviction without a showing of prejudice.

The State argued in the trial court that RCW 10.40.200 does not require specific advice about the immigration consequences of a criminal conviction because the statute only imposes a duty on courts to ensure that a general advisement was provided, and that a court cannot possibly delve into the immigration consequences of every defendant’s criminal case. The State’s argument is unpersuasive for two reasons. First, it is directly contrary to the Supreme Court’s decision in Tsai, which held that RCW 10.40.200 imposes a duty on counsel to ensure that case-specific immigration advice is provided before a defendant enters a plea of guilty.

See Tsai, 183 Wn.2d at 101 – 102. Second, the State’s concerns about courts becoming involved in the nuances of every defendant’s immigration status are unwarranted. Because the statute imposes the duty to advise a defendant on criminal defense counsel, courts need only inquire of defense counsel during the plea colloquy whether the required advice was provided without getting into the details of every case. Indeed, courts have already been doing this since the time that the decision in Padilla was handed down. In cases where it is subsequently shown that counsel failed to provide the advice required by the statute and the conviction resulted in adverse immigration consequences, courts should give effect to the plain language of RCW 10.40.200 and vacate the conviction without a showing of prejudice.

III. CONCLUSION

Based on the foregoing reasons, the Court should reverse the decision of the Snohomish County Superior Court, vacate Mr. Garcia’s conviction and permit Mr. Garcia to withdraw his guilty plea.

Respectfully submitted this 4th day of November, 2019.

s/Teymur Askerov

Teymur Askerov, WSBA No. 45391

Alejandro Garcia Mendoza

705 2nd Avenue Suite 111

Seattle, WA 98104

Telephone: 206-623-1604

Email: tim@blacklawseattle.com

BLACK LAW PLLC

November 04, 2019 - 3:39 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 79621-6
Appellate Court Case Title: Personal Restraint Petition of Alejandro Garcia Mendoza
Superior Court Case Number: 06-1-02314-0

The following documents have been uploaded:

- 796216_Briefs_20191104153858D1436759_1061.pdf
This File Contains:
Briefs - Petitioners - Modifier: Supplemental
The Original File Name was 19-11-04 Final Supplemental Brief.pdf

A copy of the uploaded files will be sent to:

- Diane.Kremenich@co.snohomish.wa.us
- diane.kremenich@snoco.org
- sfine@snoco.org

Comments:

Sender Name: Teymur Askerov - Email: tim@blacklawseattle.com
Address:
705 2ND AVE STE 1111
SEATTLE, WA, 98104-1720
Phone: 206-623-1604

Note: The Filing Id is 20191104153858D1436759