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Supreme Court No. 98026-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 79621-6-I

In re the Personal Restraint of:

Alejandro Garcia Mendoza,

Petitioner.

PETITIONER'S REPLY TO STATE'S ANSWER TO MOTION FOR
DISCRETIONARY REVIEW

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I. INTRODUCTION

Alejandro Garcia Mendoza (“Mr. Garcia”), Petitioner, by and through undersigned counsel files the following reply to the State’s answer (“Answer”) to his motion for discretionary review.

II. ARGUMENT

Much like the Court of Appeals decision in this case, the State’s briefing misconstrues this Court’s opinion in In re Personal Restraint of Tsai, 183 Wn.2d 91, 351 P.3d 138 (2015), and urges this Court not to accept review. Because Tsai clearly overturned appellate precedent on the interpretation of RCW 10.40.200, this Court should reject the State’s arguments and accept discretionary review in this case.

First, the State asserts that while the Court of Appeals rejected Mr. Garcia’s statutory claim, it permitted him to proceed with his constitutional claim. See Answer at 3. The State fails to mention that Mr. Garcia’s constitutional claim of ineffective assistance of counsel pursuant to Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d (2010), was rejected by the Superior Court in this case in part because it found that if Mr. Garcia was already removable from the United States for prior convictions, he was ineligible for relief under Padilla in the instant case because he could not show prejudice. See App. A at 5 – 6.

Second, the State argues that Tsai did not hold that RCW 10.40.200 requires specific advice about the immigration consequences of a particular guilty plea and that all that the statute requires is that defendants be provided with the generic immigration warning found in a standard CrR 4.2 statement of defendant on plea of guilty. See Answer at 4 – 6. But, that is exactly the opposite of what this Court stated in Tsai. In Tsai, this Court stated expressly about the warning included in a form CrR 4.2 plea statement:

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. . . .

Tsai, 183 Wn.2d at 101 – 102 (emphasis added). It must be presumed that this Court meant what it said in Tsai. The only way to interpret the passage quoted above is that in Tsai this Court construed RCW 10.40.200 to require specific advice about the immigration consequences of a guilty plea to be provided by counsel in every single case, separate and apart from counsel's duty under Padilla v. Kentucky. The Court's opinion and the plain language of the statute also make clear that where the required advice is not provided by criminal defense counsel a violation of RCW 10.40.200 occurs.

Nor is there any lack of clarity as to the remedy for a violation of RCW 10.40.200. The statute expressly states that where a violation of RCW 10.40.200 is shown, the court “shall” vacate the conviction and permit the defendant to withdraw the guilty plea:

If, after September 1, 1983, the defendant has not been advised as required by this section and the defendant shows that conviction of the offense to which the defendant pleaded may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization . . . the court, on defendant’s motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty and enter a plea of not guilty.

RCW 10.40.200(2). The statute does not require a showing of prejudice nor have courts construing the statute required such a showing. See In re Personal Restraint of Peters, 50 Wn. App. 702, 705, 750 P.2d 463 (1998) (“After this date, if a defendant is not advised as required by RCW 10.40.200(2) and shows that conviction of the offense to which a guilty plea was entered may lead to deportation, the court shall vacate the judgment and permit the withdrawal of the plea.”); State v. Littlefair, 112 Wn. App. 749, 762, 51 P.3d 116 (2002).

The State cites Sandoval and Tsai in support of the proposition that claims under RCW 10.40.200 are subject to the standard test for ineffective assistance of counsel announced by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), and

that a showing of prejudice is therefore required. See Answer at 5 – 6. But, neither of those cases directly addressed claims for relief pursuant to RCW 10.40.200. They addressed claims of ineffective assistance of counsel under the Sixth Amendment. However, “RCW 10.40.200 gave [Mr. Garcia] a statutory right, independent of any constitutional right to be advised of the deportation consequences of his plea.” See Littlefair, 112 Wn. App. at 769.

The State also contends that this Court’s opinion in Tsai could not have changed the interpretation of RCW 10.40.200, otherwise attorneys who failed to research and apply the statute before Padilla was decided could not be held responsible for failing to anticipate the change in law. See Answer at 6. The State’s argument is unpersuasive because as explained in Tsai Washington cases predating Padilla simply held that counsel had no obligation to advise defendants of the immigration consequences of criminal convictions, indicating that Washington precedents had misconstrued criminal defense counsel’s duties with respect to immigration advice for years. See Tsai, 183 Wn. 2d at 106 – 07.

Furthermore, the case law makes clear that prior to the issuance of the decision in Tsai RCW 10.40.200 was not interpreted to impose any duties on criminal defense counsel. As explained in Mr. Garcia’s motion for discretionary review in this matter, prior to Tsai Washington courts

held that a reading of the boilerplate warning found in a defendant's statement of defendant on plea of guilty was sufficient to satisfy the requirements of RCW 10.40.200. See e.g., State v. Cortez, 73 Wn. App. 838, 841, 871 P.2d 660 (1994) (“The statement on plea of guilty signed by Mr. Cortez contains a written notice that conviction would result in deportation. Mr. Cortez presented no evidence that he did not understand the rights set forth in his plea agreement or had any difficulty with the English language.”). Overturning prior precedents, Tsai held for the first time that RCW 10.40.200 created an “unequivocal right” to advice about immigration consequences, and imposed on counsel the duty to ensure that the required advice is provided. See id. at 183 Wn.2d at 101 – 102. Tsai also announced for the first time that the boilerplate advisement found in a form CrR 4.2 statement of defendant on plea of guilty was “not itself the required advice.” Id.

Finally, the State argues that construing RCW 10.40.200 to require case-specific advice about the immigration consequences of a guilty plea would impose an “impossible obligation” on plea courts because courts have no way of knowing what advice a criminal defendant received from his or her attorney and lack the capacity to get acquainted with the immigration issues involved in every defendant's case. See Answer at 6 – 7. But, RCW 10.40.200 creates a simple procedure and a remedy for

situations where criminal defense counsel fails to provide accurate case-specific immigration advice to a non-citizen defendant as required by that statute. Specifically, the statute provides that where a defendant shows that he or she was not correctly advised about the immigration consequences of a guilty plea by criminal defense counsel the presumption arising from the presence of the standard immigration advisement in the defendant's statement of defendant on plea of guilty is rebutted, and on the defendant's motion the court shall vacate the judgment and sentence and permit the defendant to withdraw the guilty plea without a showing of prejudice. See RCW 10.40.200. Contrary to the State's arguments, the construction of RCW 10.40.200 announced by this Court in Tsai and advanced by Mr. Garcia in this case will not impose any new burdens on plea courts.

III. CONCLSUION

For the foregoing reasons, and the reasons set forth in Mr. Garcia's motion for discretionary review, the Court should grant discretionary review in this case.

DATED this 28th day of February, 2020.

Respectfully submitted,

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