

FILED
Sep 02, 2015
Court of Appeals
Division I
State of Washington

Supreme Court No. 92275-6

(Court of Appeals No. 71802-9-1)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent

v.

SACIID KASIM NADIF,

Petitioner.

FILED

SEP 23 2015

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
CRF

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Saciid Nadif, appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Nadif appealed from a King County Superior Court conviction. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUE PRESENTED FOR REVIEW

A defendant is denied his constitutional right to the effective assistance of counsel when his attorney fails to inform him that he is pleading guilty to a crime which is a deportable offense. Where a defendant moved to withdraw his guilty plea, due to the fact that his trial counsel assured him he might not be deported, due to the unstable political climate in his home country, was trial counsel ineffective, and should review be granted pursuant to RAP 13.4(b)(1), (3)?

D. STATEMENT OF THE CASE

Saciid Nadif was born in the war-torn country of Somalia and moved to the United States approximately 18 years ago. 3/7/14 RP 29-31. He immigrated with his siblings as a teenager, and obtained refugee status in Seattle; he has lived here ever since. Id. Mr. Nadif considers Seattle – and moreover, the United States -- his home, with no intention of returning to the dangers of his homeland. Id.

Following an argument with his wife on January 5, 2013, Mr. Nadif was charged with one count of assault in the second degree, domestic violence. CP 1-2. An enhancement was added because the incident occurred while the couple's 11 year-old child was home. RCW 9.94A.535(3)(h)(ii); CP 1-2.

On October 17, 2013, Mr. Nadif pled guilty to the charge, in exchange for an agreed sentencing recommendation of 24 months incarceration: 9 months for the assault, and 15 months for the enhancement. 10/17/13 RP 3-16; CP 12-26.

On December 20, 2013, Mr. Nadif informed the trial court that he intended to move to withdraw his guilty plea, and new counsel was appointed. 12/20/13 RP 2-4; CP 90.

On March 7, 2014, an evidentiary hearing was held on the motion to withdraw the guilty plea. Mr. Nadif argued he should be permitted to withdraw his plea because his attorney had not informed him of the immigration consequences of his guilty plea. 3/7/14 RP 34, 39-40, 43-44. Mr. Nadif also argued that his plea had not been knowingly, voluntarily and intelligently entered. *Id.* at 39-42. Following an evidentiary hearing at which Mr. Nadif's former trial counsel and Mr. Nadif both testified, the trial court denied Mr. Nadif's motion. CP 34-36; 3/25/14 RP 4-6.

Mr. Nadif appealed his conviction, arguing that trial counsel had been ineffective. On August 3, 2015, the Court of Appeals affirmed his conviction. Slip Op. at 5-6.

He seeks review in this Court. RAP 13.4(b)(1), (3).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT, AND A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW IS INVOLVED. RAP 13.4(b)(1), (3).

1. The trial court abused its discretion when it found that Mr. Nadif was adequately advised of the immigration consequences of his guilty plea and denied his motion to withdraw the plea for ineffective assistance of counsel.

Mr. Nadif was deprived of the effective assistance of counsel because his attorney's advice regarding the immigration consequences of his plea was misleading and incomplete. Mr. Nadif would not have taken a guilty plea and risked deportation, had he understood the risks to his immigration status.

A trial court's order on a motion to withdraw a guilty plea or vacate a judgment is reviewed for an abuse of discretion. In re the Personal Restraint of Cadwallader, 155 Wn.2d 867, 879-80, 123 P.3d 456 (2005). A court abuses its discretion when an "order is manifestly unreasonable or based on untenable grounds." State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (internal citations omitted). A discretionary decision

“is based ‘on untenable grounds’ or made ‘for untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *Id.* (internal citations and emphasis omitted).

Mr. Nadif’s motion was denied on untenable grounds, because the trial court’s factual findings are unsupported by the record. The trial court found that Mr. Nadif’s trial counsel had “clearly advised” him that “deportation would occur” if he entered a guilty plea. CP 35 (Findings of Fact, Line 8). This finding is not supported by the record, and is inconsistent with the evidence adduced at the evidentiary hearing.

While Timothy Leary, Mr. Nadif’s former trial attorney, testified that he had told appellant that he would be facing “immigration consequences,” Mr. Leary’s testimony was ambiguous as to what he advised Mr. Nadif about those consequences. 3/7/14 RP 14-16, 23-25. Mr. Leary testified that he assured Mr. Nadif that the United States “has, for a long period of time, elected to not deport its people ... who are residents or Somali citizens, same for Vietnam and same for a handful of other countries.” *Id.* at 14 (emphasis added). Mr. Leary suggested Mr. Nadif could arrange a voluntary departure from the United States and return to Somalia. *Id.* Mr. Leary also discussed looking for an “immigration safe, immigration friendly” option for which Mr. Nadif to plead guilty. *Id.* at 15.

At the same evidentiary hearing, Mr. Nadif testified that he did not understand from his conversations with Mr. Leary that he was pleading guilty to a deportable offense. 3/7/14 RP 34. Mr. Nadif stated that he was concerned about immigration consequences, and that his attorney discussed the implications of a guilty plea on his green card. Id. at 32-33. Mr. Leary said he would consult an immigration attorney before proceeding further, but Mr. Leary never did so. Id.

Even more importantly, Mr. Leary's own testimony indicates how equivocal his advice was concerning the immigration consequences that would befall appellant in "24 months or ten years." CP 35 (Findings of Fact, Line 8). Mr. Leary first testified as follows:

And what I said to him is that the driving concern that I had in this case was that, you know, he's going to be facing immigration consequences. The question is, do you face that in two years or do you face that in ten years, based on the State's representations that they would be seeking ten years [sic] exceptional sentence after trial.

3/7/14 RP 16 (emphasis added).

According to Mr. Leary, he never used the word "deportation" with his client – only "immigration consequences" – when advising him. This testimony came immediately following Mr. Leary's testimony concerning his advice to Mr. Nadif regarding the United States policy not to deport its residents to Somalia. Id. at 14.

Mr. Leary also testified as follows regarding the “two or ten” phrase:

I again reminded him of that [adverse immigration consequences], and would have referenced, but again, my prior point of, do you want to face immigration consequences in two years or do you want to face them in ten years, because there wasn't an option on the table that would have mitigated the immigration consequences.

Id. at 23 (emphasis added).

Again, Mr. Leary testified he used only the phrase “immigration consequences,” and never used the word “deportation” in advising Mr. Nadif. Id. at 23. Although Mr. Leary later asserted that Mr. Nadif was aware this was a deportable offense, Mr. Leary equivocated in his testimony, quickly stating, “there were questions as to whether he would be, in fact, deported based on the lack of – the instability in Somalia, but that was a possibility.” Id. at 25.

The trial court’s findings were not based on substantial evidence, as the court specifically found, “Mr. Nadif was clearly advised that is [sic] was a matter of 24 months or 10 years when deportation would occur.” CP 35 (Line 8) (emphasis added). The record reveals that trial counsel’s advice to Mr. Nadif was anything but clear. The court’s finding that Mr. Nadif was properly advised is therefore untenable, in light of trial counsel’s equivocation and Mr. Nadif’s testimony he was not advised he would be deported. Quismundo, 164 Wn.2d at 504; Padilla v. Kentucky, 559 U.S.

356, 373-74, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010); State v. Sandoval, 171 Wn.2d 163, 175-76, 249 P.3d 1015 (2011); State v. Martinez, 161 Wn. App. 436, 441-42, 253 P.3d 445 (2012); see supra § 2.

Likewise, the Court of Appeals decision substantially misunderstood vital portions of the record by stating that Mr. Leary used the word “deportation” with Mr. Nadif. Slip op. at 3, lines 8-9. The Court of Appeals distinguished this case from this Court’s leading jurisprudence writing, “unlike Sandoval, defense counsel informed Nadif that he would be facing deportation whether it was in two years if he pleaded guilty or in ten years if he were found guilty at trial.” Slip op. at 3. This is simply not consistent with the testimony at trial.

In his own testimony, Leary was clear that he never used the word “deportation” with Mr. Nadif, and only used the equivocal phrase “immigration consequences.” 3/7/14 RP 16, 23. Therefore, this Court need not disturb the credibility findings made by the Court of Appeals; upon a careful review of the record, it is clear that trial counsel’s immigration advice was anything but clear.

Accordingly, the Court of Appeals decision affirming Mr. Nadif’s conviction is in conflict with decisions of this Court, and a significant question of law under the state and federal constitutions is involved. Review should be granted. Sandoval, 171 Wn.2d at 175-76; Padilla, 559

U.S. at 373-74; Const. art. I, § 22; U. S. Const. Amend. VI. RAP 13.4(b)(1), (3).

2. A criminal defendant is deprived of his constitutional right to counsel where his attorney fails to inform him that he is pleading guilty to a crime which will result in his deportation.

Pursuant to CrR 4.2(f), a defendant may withdraw a plea of guilty “whenever it appears that the withdrawal is necessary to correct a manifest injustice.”¹ A manifest injustice may be established in four non-exclusive ways under CrR 4.2(f): 1) denial of the effective assistance of counsel; 2) a plea not ratified by the defendant; 3) a plea that was involuntary; or 4) a breach of the plea agreement by the prosecutor. State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996) (citing State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991)) (internal citation omitted).

It is well settled that a criminal defendant has a constitutional right to the effective assistance of counsel. U.S. Const. amend VI; Const. art. I, § 22; United States v. Cronie, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of

¹ A “manifest injustice” must be “obvious, directly observable, overt [and] not obscure.” State v. Pugh, 153 Wn. App. 569, 577, 222 P.3d 821 (2009).

the prosecution` to which they are entitled.” Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)).

In order to show ineffective assistance of counsel, a defendant must show: 1) his attorney’s performance was deficient; and 2) the deficiency of the performance caused prejudice. Strickland, 466 U.S. at 687; State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In the context of a plea agreement, an attorney’s performance may be deficient if he or she fails to inform a client whether a guilty plea carries a risk of deportation. Padilla, 559 U.S. at 373-74. Where the deportation consequence of a plea is clear, counsel has a duty to inform the client that the State is offering a plea to a deportable offense. Id. at 368-69. Where the immigration consequences are unclear, counsel must at least advise a noncitizen client that the charge may carry a risk of adverse immigration consequences. Id. The fact that the standard plea form carries boilerplate warnings does not satisfy an attorney’s obligations. Sandoval, 171 Wn.2d at 173-74; Martinez, 161 Wn. App. at 441-42.

To show prejudice, “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.” In re

Personal Restraint of Riley, 122 Wn.2d 772, 780-81, 863 P.2d 554 (1993) (citing Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)). If a decision to reject the plea bargain “would have been rational under the circumstances,” prejudice is established. Sandoval, 171 Wn.2d at 175 (citing Padilla, 559 U.S. at 372).

Mr. Nadif was deprived of his constitutional right to the effective assistance of counsel because he was not adequately advised of the adverse immigration consequences of his guilty plea. Because the trial court abused its discretion by denying Mr. Nadif’s motion to withdraw his plea, reversal should have been granted on appeal. Padilla, 559 U.S. at 373-74; Sandoval, 171 Wn.2d at 175-76; Martinez, 161 Wn. App. at 441-42.

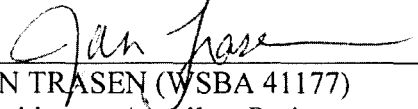
Accordingly, because the Court of Appeals decision is in conflict with decisions of this Court, and because a constitutional question is raised, this Court should grant review. RAP 13.4(b)(1), (3).

F. CONCLUSION

For the above reasons, the Court of Appeals decision should be reviewed, as it is in conflict with decisions of this Court, and a significant question of law under the state and federal constitutions is involved. RAP 13.4(b)(1), (3).

DATED this 2nd day of September, 2015.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Jan Trasen", written over a horizontal line.

JAN TRASEN (WSBA 41177)
Washington Appellate Project
Attorneys for Petitioner

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 SACIID KASIM NADIF,)
)
 Appellant,)

No. 71802-9-1
DIVISION ONE
UNPUBLISHED OPINION

FILED: August 3, 2015

2015 AUG -3 AM 10:51
COURT OF APPEALS
STATE OF WASHINGTON

TRICKEY, J. — An attorney has a duty to advise a noncitizen defendant of the immigration consequences of his plea. Failure to do so may constitute ineffective assistance of counsel. Here, however, the record reveals that defense counsel advised the defendant of potential immigration consequences that could attach to his conviction for second degree assault. Additionally, the defendant's statement of guilty plea contained a paragraph on possible immigration consequences, including deportation, exclusion of admission to the United States, and denial of naturalization. That portion of his plea was read aloud at the hearing and acknowledged by the defendant before the court accepted the guilty plea. Accordingly, we affirm the trial court's denial of the defendant's motion to withdraw his guilty plea.

FACTS

Saciid Kasim Nadif pleaded guilty to second degree assault-domestic violence of his wife. Nadif also pleaded guilty to the aggravating factor that the offense occurred within the sight or sound of the couple's minor child.

In exchange for his plea, the State agreed to recommend 24 months of incarceration, 9 months for the assault and 15 months for the enhancement. At

sentencing, Nadif's counsel, Timothy Leary, withdrew because of potential ineffective assistance allegations. The trial court assigned new counsel. Nadif then moved to withdraw his guilty plea under CrR 4.2(f), alleging that his defense counsel provided ineffective assistance of counsel for failing to advise him that he was facing certain deportation. Alternatively, Nadif contended that his plea was involuntary because he had not been informed of the immigration consequences.

After an evidentiary hearing, the trial court denied the motion. Nadif timely appeals, contending that the trial court abused its discretion in denying his motion to withdraw his guilty plea.

ANALYSIS

Under CrR 4.2(f), the trial 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." We review the trial court's decision on a motion to withdraw a guilty plea for an abuse of discretion. State v. Lamb, 175 Wn.2d 121, 127, 285 P.3d 27 (2012). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. Manifest injustice is a "demanding standard." State v. Taylor, 83 Wn.2d 594, 597, 521 P.2d 699 (1974).

To prevail on an ineffective assistance of counsel claim, Nadif must show both that his counsel's performance was deficient and that he was prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). In Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), the United States Supreme Court held that under the Sixth Amendment right to

counsel, as articulated in Strickland, counsel has a duty to provide advice relating to deportation.

Nadif's reliance on State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011), as support for finding counsel deficient is misplaced. In Sandoval, defense counsel told his client "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." 171 Wn.2d at 167. Here, unlike Sandoval, defense counsel informed Nadif that he would be facing deportation whether it was in two years if he pleaded guilty or in ten years if he were found guilty at trial.

At the evidentiary hearing, Leary and Nadif offered conflicting testimony about whether Leary had informed Nadif that a guilty plea may result in deportation proceedings. Leary testified that he had discussed immigration issues with Nadif several times. Nadif told Leary that he was a citizen of Somalia and that his green card had expired two years earlier. Leary also advised Nadif that the crime with which he was charged, second degree assault, was a crime subject to deportation. Leary clearly advised Nadif that he would be subject to deportation although there might be a question of whether he would actually be deported due to the instability in Somalia.

Before Nadif pleaded guilty, Leary unsuccessfully tried to negotiate a reduced charge from a felony. Before trial, the State informed Leary by letter that it was seeking an exceptional sentence of ten years because of the significant injuries inflicted on Nadif's wife and the fact that the assault occurred in front of the child. If Nadif pleaded guilty, the State agreed to remove the aggravator of excessive injuries for second degree assault.

Leary provided Nadif with a written copy of the State's offer. Nadif did not wish to plead guilty and the matter proceeded to trial.

Prior to the start of trial, Leary had negotiated with the State to not introduce the photographic evidence of the wife's injuries if Nadif pleaded guilty. Without that plea, the graphic photographs were going to be admitted. Nadif changed his mind the second day of trial after the CrR 3.5 hearing when the court made its decision to admit the 911 tape.

The court adjourned, giving defense counsel time to speak with his client. Leary testified that he reviewed the plea agreement with Nadif. He further testified that it was his practice to go over each and every paragraph in a plea agreement. Leary again informed Nadif that his guilty plea would have adverse immigration consequences, reminding him that his choice was to face those immigration consequences in two years if he pleaded guilty or risk facing them in ten years if he were found guilty. Leary averred that he had spoken with Nadif at length about the consequences, including how this would impact his ability to get a green card.

Nadif testified at the hearing that he had spoken with Leary approximately four times. Nadif stated that when he first hired Leary, Nadif told Leary that he knew that there were immigration consequences to his case because it was a felony. Nadif testified that he expressed concerns about his expired green card, but that Leary told Nadif that he would contact an immigration attorney and get back to him, but never did so. Nadif further testified that he was only advised about the proposed plea offer from the State just before trial, when he was informed that his wife was going to testify.

When Nadif finally agreed to plead guilty, he testified that he was confused and misinformed and was just signing papers. Nadif alleged that he had not read the papers

and that his attorney just told him where to sign and what to say. Nadif claimed that he was never informed that he would in fact be deported if he pleaded guilty.

However, Nadif's testimony is contradicted by the record. At the time Nadif agreed to the plea in open court, the prosecutor specifically read aloud the following clause contained in the plea agreement that Nadif signed:

[I]f [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.¹

Nadif acknowledged that he was aware of this and that he still wanted to plead guilty. After acknowledging that Nadif agreed to the plea, the court queried counsel on whether he had in fact advised Nadif of the immigration consequences of his plea. Assured that Nadif was so advised, the court found his plea to be voluntarily, knowingly, and intelligently made.

The court found Leary's testimony regarding his interaction with Nadif and the ensuing discussion about the sentence and immigration consequences credible. The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from such evidence are all matters within the province of the trier of fact. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The court also noted that Nadif's answers to questions at the plea hearing demonstrated that his plea was knowing and voluntary.

The record amply supports the court's findings of fact and conclusions of law regarding counsel's effectiveness and the validity of Nadif's plea. Nadif failed to demonstrate a manifest injustice.

¹ Report of Proceedings (RP) (Oct. 17, 2013) at 8-9.

No. 71802-9-1 / 6

Affirmed.

Trickey, J

WE CONCUR:

Jan J

Appelwhite J

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71802-9-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: September 2, 2015