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No. 68542-2-I

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

STATE OF WASHINGTON

Respondent

v.

JUAN OSORIO NICOLAS

Appellant

APPEAL FROM THE KING COUNTY
SUPERIOR COURT

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities.....	3
Assignment of Error.....	4
Statement of the Case.....	5-7
Argument.....	7-13
Conclusion.....	13
Certificate of Service.....	14

TABLE OF AUTHORITIES

Table of Cases

Padilla v. Kentucky, 130 S. Ct. 1423, ___ U.S.____
(2010).....9

Personal Restraint of Ness, 70 Wn. App. 817, __ P.2d __,
(1993);8

State v. Barton, 93 Wn.2d 301, 609 P.2d 1353 (1980).....8

State v. Littlefair, 112 Wn.App. 749, 51 P.3d 116 (2002),.....9

State v. Martinez, 29018-2-III
(Wa. Ct. App. Div. III, Apr. 21, 2011)..... 10

State v. Miller, 110 Wn. 2d 528, 756 P.2d 122 (1988).....8

Washington v. Sandoval, 173 W.2d 163 (2011).....10

Wood v. Morris, 87 Wn.2d 501, 503, 554 P.2d 1032 (1976)...8

I. ASSIGNMENT OF ERROR

A. ASSIGNMENT OF ERROR

1. The trial court erred when it denied the Appellant's Motion to Vacate Judgment and Sentence.

B. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Did the trial court error when it denied the Motion to Vacate Judgment and Sentence?

II. STATEMENT OF THE CASE

A. Statement of Proceedings

Mr. Solorio was charged with Delivery of a Controlled Substance in King County Washington. (CP 1) On July 1, 2011, after pleading guilty he was sentenced to 12 months and 1 day. (CP 29) On November 11, 2011, he filed a Motion to Vacate Judgment and Sentence. (CP 34) On February 29, 2012, the trial court denied the request. (CP 37) Notice of Appeal was timely filed. (CP 5)

Mr. Solorio is a Legal Permanent Resident. (RP 9) He is currently in Removal Proceedings and was being detained by Immigration and Customs Enforcement. He testified that he told his criminal defense attorney that he was a resident. (RP 9) He acquired his status through his United States citizen wife and has United State citizen children. (RP 10) His attorney

told him that by pleading guilty, it would not affect his immigration status. (RP 10)

During the meetings with his attorney, there was never a Spanish interpreter present. (RP 11) At times during the meetings, he did not understand what the attorney was saying. (RP 12) Mr. Solorio was told to plead guilty and he would get 12 months and 1 day. He would be done with the case and there would be no consequences. (RP 18)

At the conclusion of Mr. Solorio's testimony, the State called the defense attorney. Counsel informed Mr. Solorio that he would be deported. (RP 27) Counsel further stated that he never contacted an immigration attorney to discuss the case nor did he do any independent research into the immigration consequences. (RP 29-30) He thought that Mr. Solorio had been in contact with an immigration attorney. (RP 29)

As noted the trial court denied the Motion to Vacate Judgment and Sentence. The Court found that Mr. Solorio was informed of the consequences of the plea and that he would be

removed. (Finding 4.) The Court also found that the parties discussed the immigration consequences. (Finding 5) The Court also found the defendant not credible. Mr. Solorio challenges Findings of Fact 4, 5, and 7. As not being supported in the record.

III. ARGUMENT

A. The Trial Court erred when it denied the Motion to Vacate Judgment and Sentence.

As noted herein, Mr. Solorio filed a Motion to Vacate his Judgment and Sentence and Withdraw his Guilty Plea. The motion was paced on the fact that he was not informed of the immigration consequences of his pleading guilty to delivery of a controlled substance.

CrR 4.2(d) addresses the voluntaries of pleas. CrR 4.2(d) states:

The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequence of the plea. The court shall not enter a plea of guilty

unless it is satisfied that there is a factual basis for the plea.

It is Mr. Solorio's position that the plea that he entered did not comply with the requirements of CrR 4.2(d), in that the defendant did not fully comprehend what he was pleading guilty to nor did he understand the consequences of the plea.

A defendant must be fully informed of all the direct consequences of pleading guilty before the court accepts his plea of guilty. Personal Restraint of Ness, 70 Wn. App. 817, ___ P.2d ___, (1993); State v. Barton, 93 Wn.2d 301, 609 P.2d 1353 (1980) In addition a defendant must understand the sentencing consequences for a guilty plea to be valid. Wood v. Morris, 87 Wn.2d 501, 503, 554 P.2d 1032 (1976).

In State v. Miller, 110 Wn. 2d 528, 756 P.2d 122 (1988) the Washington Supreme Court held that the defendant, Miller, could withdraw his guilty plea where he did not understand the mandatory minimum sentence and the state could not show that prejudicial reliance on the plea. The plea must be withdrawn.

In Padilla v. Kentucky, 130 S. Ct. 1423, ___ U.S. ___ (2010) The United States Supreme held that defense counsel's failure to advise of the immigration consequences of a plea resulted in a violation of the Sixth Amendment. The Court further stated that defense counsel had a duty to at least investigate the immigration consequences in order to adequately advise the defendant.

In State v. Littlefair, 112 Wn.App. 749, 51 P.3d 116 (2002), the state Court of Appeals, Div. II, held that RCW 10.40.200 gives defendants a statutory right, apart from any Constitutional right, to be advised of the potential deportation consequences of a plea. This makes sense considering the plain language of the statute:

Prior to acceptance of a plea of guilty to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall determine that the defendant has been advised of the following potential consequences of conviction for a defendant who is not a citizen of the United States: Deportation, exclusion from admission to the United States, or denial of naturalization pursuant

to the laws of the United States. RCW 10.40.200(2).

In Washington v. Sandoval, the Washington Supreme Court held, "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." 171 Wn.2d 163, 170 (2011).

Under immigration law, the consequences of a drug conviction are quite clear. Section 212(a)(2)(A)(i)(II) of the INA (8 U.S.C. § 1182) renders a person removable for committing a "a violation (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))."

In a recent case, this Court recognized the clarity of immigration law with respect to drug convictions. State v. Martinez, 29018-2-III (Wa. Ct. App. Div. III, Apr. 21, 2011).

The Court held in that case that defense counsel's performance was deficient because he did not inform his client that a guilty plea would certainly render the client deportable. *Id.* The Court stated, "[P]ossessing a controlled substance with intent to deliver is an aggravated felony that, if committed by an alien, is a deportable offense. The law is clear." *Id.*

Given the clarity in immigration law with respect to the consequences of any drug conviction, Padilla and Sandoval imposed upon Mr. Solorio's counsel a duty to inform him of these potential consequences.

Mr. Solorio maintains that he was not informed. Furthermore, defense counsel admitted that he did not research the law regarding the immigration consequences. When Mr. Solorio plead guilty, he believed that there would be no consequences.

As noted the trial court found that Mr. Solorio was not credible. However, there is nothing in the record that

contradicted what Mr. Solorio said, he testified consistently. Thus the finding that he was not credible was in error.

Secondly, the trial court found that defense counsel did advise Mr. Solorio of the consequences of the plea. However, the record is clear that defense counsel by his own admonition did not research the immigration consequences. He did not contact an immigration attorney. Clearly, if counsel did not research the issue how can he advise his client of the consequences.

It is clear that Mr. Solorio did not enter a knowing plea. Finally, it is clear that he was denied effective assistance of counsel, when counsel failed to advise him of the consequences. Stating that you would be deported is not sufficient to inform a Legal Permanent Resident. Counsel has a duty to provide a defendant with information so that he can make an informed decision, that did not happen in the case at bar.

Mr. Solorio was provided ineffective assistance of counsel and thus the Motion to Vacate should have been granted.

IV. CONCLUSION

For the reasons stated herein it is respectfully requested that the Judgment and Sentence in this matter be vacated and that the matter be dismissed.

DATED this 29 day of October 2012.

Respectfully Submitted,



Nicholas Marchi, WSBA 19982
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Juan Osorio Nicolas

CERTIFICATE OF SERVICE BY MAIL

I, Nicholas Marchi, Attorney for the Appellant, hereby certify that I have mailed, on 10/29/12, via postage prepaid, a true copy of the Brief of the Appellant attached hereto to the following individuals:

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DATED this 29 day of October 2012.



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