

69824-9

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No. 69824-9

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

STATE OF WASHINGTON,

Respondent,

v.

CARLOS QUINTERO CISNEROS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY

BRIEF OF APPELLANT

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STATE OF WASHINGTON
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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in denying Mr. Quintero Cisneros's motion to withdraw his guilty plea.

2. In the absence of substantial evidence, the trial court erred in entering finding of fact 7, that Mr. Quintero Cisneros's attorney recalled having a conversation specifically regarding deportation as an immigration consequence of Assault of a Child in the Third Degree.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A defendant is deprived of his constitutional right to the effective assistance of counsel if his attorney fails to inform him that he is pleading guilty to a crime which is clearly a deportable offense. Mr. Quintero Cisneros, who has lived in the United States since he was a baby, pled guilty to third degree assault of a child with sexual motivation, a clearly deportable offense. The government later initiated removal proceedings and Mr. Quintero Cisneros moved to withdraw his plea. He said defense counsel did not advise him he would be deported and his attorney said he believed he properly advised him but could not remember specifically. Did the trial court abuse its discretion in denying Mr. Quintero Cisneros's motion to withdraw his guilty plea based on ineffective assistance of counsel?

C. STATEMENT OF THE CASE

Carlos Quintero Cisneros is a lawful permanent resident who has lived in the United States since he was a two-month-old baby. CP 56, 69. In April of 2008, when Mr. Quintero Cisneros was 20 years old, he had sex with a person who was between 14 and 16 years old. CP 1-4, 15. The State charged Mr. Quintero Cisneros with third-degree rape of a child. CP 1. Mr. Quintero Cisneros eventually entered an *Alford*¹ plea to third-degree assault of a child with sexual motivation. CP 5-17. Both the original charge and the crime to which Mr. Quintero Cisneros pled guilty are categorical aggravated felonies which qualify non-citizen defendants for removal from the country. CP 69-73, 79.

In 2010, the federal government initiated removal proceedings against Mr. Quintero Cisneros. CP 69. After hiring a succession of immigration attorneys who were eventually disbarred, Mr. Quintero Cisneros was finally referred to competent immigration counsel and criminal defense lawyers. CP 44-45, 104-07.

Mr. Quintero Cisneros filed a motion to withdraw his *Alford* plea on the basis of ineffective assistance of counsel because he had not been told that his conviction would result in deportation. CP 41-119. After an

¹ *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

evidentiary hearing, the superior court denied the motion. CP 157-160.

Mr. Quintero Cisneros appeals. CP 155-56.

D. ARGUMENT

The trial court abused its discretion in denying the motion to withdraw the guilty plea, because Mr. Quintero Cisneros was not advised of the immigration consequences of his plea.

1. A defendant is deprived of his constitutional right to the effective assistance of counsel if his attorney fails to inform him that he is pleading guilty to a crime which is clearly a deportable offense.

It is axiomatic that a criminal defendant has a constitutional right to the effective assistance of counsel. U.S. Const. amend. VI;² Const. art. I, § 22;³ *United States v. Cronin*, 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 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)

² The Sixth Amendment provides, in relevant part, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”

³ Article I, § 22 of the Washington Constitution provides, in relevant part, “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel”

(quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)). The right to the effective assistance of counsel extends to the plea bargaining process. *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

A defendant is entitled to relief based on ineffective assistance of counsel if (1) his attorney's performance was deficient and (2) the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687; *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

As to the performance prong, in the context of a plea agreement, an attorney's performance is deficient if he fails to inform his client whether the plea carries a risk of deportation. *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 1486, 176 L.Ed.2d 284 (2010). When 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 1483. If 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 a boilerplate warning does not satisfy counsel's obligations. *State v. Sandoval*, 171 Wn.2d 163, 173-74, 249 P.3d 1015 (2011).

As to the prejudice prong, "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*, 474 U.S. at 59). “Generally, this is shown by demonstrating to the court some legal or factual matter which was not discovered by counsel or conveyed to the defendant himself before entry of the plea of guilty.” *State v. Garcia*, 57 Wn. App. 927, 933, 791 P.2d 244 (1990). 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*, 130 S.Ct. at 1485).

A defendant may move to withdraw a guilty plea for failure of his attorney to properly inform him of immigration consequences even if the motion is made more than one year after the conviction became final, because *Padilla* and *Sandoval* constituted a “significant change in the law” for purposes of RCW 10.73.100(6). *In re the Personal Restraint of Jagana*, 170 Wn. App. 32, 36, 282 P.3d 1153 (2012).⁴

⁴ In *Chaidez*, the United States Supreme Court held that under federal law, *Padilla* is not retroactive to cases that were final when *Padilla* was decided. *Chaidez v. United States*, ___ U.S. ___, 133 S.Ct. 1103, 1105, 185 L.Ed.2d 149 (2013). Although Washington courts have engaged in a retroactivity analysis that is similar to the federal standard, the U.S. Supreme Court cannot, of course, dictate the construction of a Washington statute like RCW 10.73.100. *Jagana* therefore controls.

2. The trial court abused its discretion in finding that Mr. Quintero Cisneros was advised of the immigration consequences of his plea and in denying his motion to withdraw the plea for ineffective assistance of counsel.

In this case, Mr. Quintero Cisneros was deprived of the effective assistance of counsel because his attorney did not warn him he would be deported if he pled guilty to third-degree assault of a child with sexual motivation. Mr. Quintero Cisneros has lived in this country since he was a baby, and would not have pled guilty had he known he would be deported.

A trial court's order on a motion to withdraw a guilty plea or vacate a judgment is reviewed for abuse of discretion. *In re the Personal Restraint of Cadwallader*, 155 Wn.2d 867, 879–80, 123 P.3d 456 (2005). A trial court abuses its discretion if its decision “is manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). “The ‘untenable grounds’ basis applies if the factual findings are unsupported by the record.” *State v. Lamb*, 175 Wn. 2d 121, 127, 285 P.3d 27 (2012).

In this case, the motion was denied on untenable grounds because the factual findings are unsupported by the record. The trial court found that counsel discussed deportation as an immigration consequence of assault of a child in the third degree, but this finding is inconsistent with the exhibits and testimony. CP 158. The exhibits do show that trial

counsel told *the prosecutor* in e-mail that Mr. Quintero Cisneros would be deported. Ex. 1; CP 84. But counsel's file contained *no* letters informing *Mr. Quintero Cisneros* of this consequence.

Indeed, at the evidentiary hearing, Mr. Quintero Cisneros testified that he was *not* told he would be deported. CP 105-06; 12/12/12 RP 34-35. His trial attorney also testified at the evidentiary hearing. He said he remembered telling Mr. Quintero Cisneros "that this type of offense would cause him to be deported," but he did not remember whether he told Mr. Quintero Cisneros that he would be deported following a conviction on the *amended* charge to which he pled guilty or only that he would be deported if he were convicted of the *original* charge. 12/12/12 RP 7. Even after reviewing the e-mail he sent to the prosecutor, he did not remember anything specific about the discussion, just that he had a general conversation regarding immigration consequences. 12/12/12 RP 9-10.

When pressed by the prosecutor, trial counsel said, "based on my reading of this e-mail [to the prosecutor], I believe I did convey to him that he would be deported for this new charge in the plea offer." 12/12/12 RP 21. But he later reiterated, "I can't say specifically what I told him." 12/12/12 RP 29.

The trial court's finding that Mr. Quintero Cisneros was properly advised is untenable in light of trial counsel's equivocation and Mr.

Quintero Cisneros's insistence that he was not advised he would be deported. Mr. Quintero Cisneros's representation is highly credible in light of the fact that no reasonable person who had lived here from the age of two months would plead guilty to a crime which would result in automatic removal from the only country he had ever known as his home. The trial court's conclusion that Mr. Quintero Cisneros chose to plead guilty notwithstanding deportation because it would be better for his employment prospects makes no sense. 12/12/12 RP 59. If a person is deported, he has *no* employment prospects in this country, *and* he is banished from his home. *See Sandoval*, 171 Wn.2d at 175-76 (deportation is "a particularly severe penalty" akin to "banishment or exile," and "separation from ... family"). On this record, the only tenable finding is that counsel did not advise Mr. Quintero Cisneros he would be deported and if Mr. Quintero Cisneros had known of the immigration consequences, he would not have pled guilty. *See* CP 118. No matter how likely a conviction would have been after trial, it would not have amounted to the 100% likelihood of deportation resulting from the guilty plea. Accordingly, Mr. Quintero Cisneros was prejudiced, and the motion to withdraw the guilty plea should have been granted.

E. CONCLUSION

For the reasons set forth above Mr. Quintero Cisneros asks this Court to reverse the order denying the motion to withdraw the guilty plea.

DATED this 31st day of July, 2013.

Respectfully submitted,



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Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 69824-9-I
v.)	
)	
CARLOS CISNEROS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF JULY, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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STATE OF WASHINGTON

SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF JULY, 2013.

X _____ 