

NO. 74309-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

JORGE MADRIGAL  
(aka Jose Martinez),

Appellant.

FILED  
Nov 01, 2016  
Court of Appeals  
Division I  
State of Washington

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LORI KAY SMITH

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**BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED.

1. Whether the trial court properly denied the motion to vacate the judgment and sentence where the motion is an untimely collateral attack?

2. Whether the trial court properly denied the motion to vacate the judgment and sentence where the defendant failed to establish ineffective assistance of counsel because the evidence shows that the defendant was aware that deportation was a potential consequence of his guilty plea?

B. STATEMENT OF CASE.

Jorge Madrigal was charged in 1985 with possessing heroin with the intent to deliver. CP 1. The amount of heroin involved was 24 grams, with a street value of \$28,000. CP 2. Madrigal pled guilty to a reduced charge of possession of heroin. CP 4. The plea form read: "I understand that 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." CP 86. In regard to the State's recommendation, the form says "I have been informed and fully

understand that the Prosecuting Attorney will make the following recommendation to the court: See Attached, credit for time served: thirty five days, deportation, 12 months of community supervision, VAP [sic], Recoupment.” CP 84 (emphasis added). Madrigal signed the form, attesting that he fully understood it. CP 87. An interpreter certified that the entire form had been interpreted for Madrigal. CP 88.

As a result of the plea, Madrigal faced a standard range of 0 to 90 days of confinement. CP 13. If convicted as originally charged of possession with intent to deliver, Madrigal would have faced a standard range of 12 to 14 months of confinement. Former RCW 9.94A.320 (1985). The State’s sentencing form referenced “Deportation from USA” as part of its recommendation. CP 117. At sentencing, Madrigal received a sentence of 35 days with credit for 36 days served, resulting in his immediate release. CP 91.

In 2013, twenty-seven years after he was sentenced, Madrigal received a notice of removal proceedings from the Department of Homeland Security. CP 93. The stated basis for removal was that Madrigal was not lawfully admitted into the

country. CP 93. There is no mention of the 1985 conviction.

CP 93.

In July of 2015, Madrigal filed a motion to vacate his 1985 judgment and sentence, alleging ineffective assistance of counsel. CP 73-80. The superior court held a hearing on the motion to vacate the judgment and sentence. The defense elected not to present the testimony of Madrigal. RP 6. The defense purported to “rely” on Madrigal’s declaration, which asserted that his attorney “never told me that I could get deported for taking the guilty plea.” RP 6, 27; CP 94. Madrigal’s attorney from the 1985 case, Sydney Glass, testified via telephone. RP 6. Glass had no memory of representing Madrigal, but testified that it was his common practice to inquire into a client’s immigration status. RP 9. His practice was not to do “a special allocution regarding immigration consequences other than what was actually on the plea form.” RP 9. He also testified that the interpreter would have read the entire plea form to the client. RP 10, 15. He testified that he would have discussed the State’s recommendation with his client. RP 11. The court found that Madrigal had failed to establish ineffective assistance of

counsel, and denied the motion.<sup>1</sup> RP 41-42; CP 120-23. This appeal follows.

C. ARGUMENT.

1. MADRIGAL'S COLLATERAL ATTACK IS TIME-BARRED.

No petition collaterally attacking a judgment and sentence may be filed more than one year after the judgment becomes final, if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction. RCW 10.73.090(1); see In re Pers. Restraint of Runyan, 121 Wn.2d 432, 444, 449, 853 P.2d 424 (1993). A judgment becomes final on the date that it is filed with the clerk of the trial court if no appeal is taken. RCW 10.73.090(3). The judgment in this case became final in 1985. This collateral attack was filed 29 years later.

RCW 10.73.100(6) provides an exception to the one-year time limit if there has been a "significant change in the law" that is material to the conviction or sentence being challenged. At issue here is whether Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473,

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<sup>1</sup> The State argued in its briefing below that because Madrigal was informed of the potential deportation consequence the collateral attack was time-barred and should be transferred to this Court for consideration as a personal restraint petition pursuant to CrR 7.8. CP 102-04. However, the court denied the motion and did not transfer it.

176 L. Ed. 2d 284 (2010), is a significant change in the law material to Madrigal's conviction. In In re Pers. Restraint of Tsai, 183 Wn.2d 91, 107, 351 P.3d 138 (2015), the state supreme court addressed that question. After surveying Washington statutory and case law, the court held that whether Padilla constituted a significant change in the law depends on whether a non-citizen criminal defendant received *no* information about the potential for adverse immigration consequences or *incorrect* information about the potential for adverse immigration consequences. Id. Where the defendant received no information from his attorney about possible immigration consequences, the court held that Padilla is a significant change in the law because Washington courts would have rejected an ineffective assistance of counsel claim on that basis prior to Padilla. Id. at 106-07. In contrast, where the defendant received *incorrect* information from his attorney about immigration consequences, Padilla is not a significant change in the law because Washington courts have long recognized that incorrect advice about a collateral consequence can support a claim of ineffective assistance of counsel. Id. at 107-08. Based on this framework, Tsai's collateral attack based on an allegation of *incorrect* advice was time-barred and properly dismissed. Id. at

108. In contrast, the collateral attack of the joined defendant, Jagana, was not time-barred, since Jagana asserted that he had received *no* information about immigration consequences. Id. at 107. The court held that Jagana's allegation, "if true," would establish ineffective assistance of counsel and defeat the time bar. Id. Jagana's case was remanded for an evidentiary hearing as to whether the allegations were true. Id.

Applying the holdings of Tsai to the present case leads to the conclusion that because Madrigal failed to establish that he received no information about immigration consequences from his attorney, his untimely collateral attack is time-barred. The trial court rejected Madrigal's assertion that he received no information about potential immigration consequences by accepting Glass's testimony as credible. The trial court found that Madrigal was informed that deportation was a risk and potential consequence of his guilty plea through review of the plea form, which warned of the risk of deportation, and review of the State's recommendation for deportation. Madrigal thus failed to establish that he received no information about the potential for adverse immigration consequences. As such, pursuant to Tsai, Padilla is not a significant change in the law material to Madrigal's conviction.

Madrigal's motion does not fall within any exceptions to the one-year time bar. Although the trial court should have transferred the untimely collateral attack to this Court pursuant to CrR 7.8(c)(2), this Court can nonetheless affirm the trial court's denial of the time barred motion to vacate the judgment and sentence.

2. EVEN IF THIS COLLATERAL ATTACK WERE NOT TIME-BARRED, MADRIGAL FAILED TO ESTABLISH DEFICIENT PERFORMANCE.

Even if this collateral attack was not time-barred, the motion was properly denied. Madrigal failed to show that he received incorrect information about the risk of deportation.

The petitioner has the burden of establishing ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In Padilla, the Supreme Court held that in order to provide effective assistance of counsel, defense counsel must advise a noncitizen client regarding "the risk of deportation." Padilla, 559 U.S. at 367. Recognizing that immigration law is complex, the Court acknowledged that in most situations the deportation consequences are uncertain. Id. at 1483. The Court held that, "When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice

Alito), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” Id. When the “deportation consequence is truly clear,” the duty is to give correct advice. Id. Thus, deficient performance can be established by showing that 1) the risk of deportation is clear and counsel gave the defendant incorrect advice, or 2) the risk of deportation is uncertain and counsel failed to advise the client that the conviction could carry a risk of adverse immigration consequences. Id. See also State v. Sandoval, 171 Wn.2d 163, 172, 249 P.3d 1015 (2011).

As to what information Madrigal actually received, the testimony and court documents support the trial court’s conclusion that Madrigal was correctly informed that there was a risk of deportation as a result of his guilty plea. A petitioner’s self-serving affidavit, standing alone, does not establish ineffective assistance. In State v. Cervantes, 169 Wn. App. 428, 434, 282 P.3d 98 (2012), Division III held that the defendant’s “bald, self-serving statement [that counsel did not inform him of immigration consequences] without corroboration is insufficient to show deficient performance.” In this case, Madrigal elected not to testify and his declaration was not corroborated. In fact, the declaration was refuted by testimony

of his attorney that he would have reviewed the entire plea form and the State's recommendation with Madrigal, and thus the risk of deportation was necessarily communicated to Madrigal.

This case is unlike Padilla or State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011). In Padilla, defense counsel not only failed to advise Padilla of the risk of deportation but "also told him that he 'did not have to worry about immigration status since he had been in the country so long.'" 559 U.S. at 359. In Sandoval, defense counsel told Sandoval to plead guilty to rape in the third degree because "he would not be immediately deported." 171 Wn.2d at 167. However, U.S. Customs and Border Protection put a "hold" on Sandoval that prevented him from being released from jail and deportation proceedings began. Id. The state supreme court held that counsel's advice negated the effect of the information contained in the plea statement and "impermissibly left Sandoval the impression that deportation was a remote possibility." Id. at 173. In Madrigal's case, he was properly informed of the risk of deportation through review of the plea documents and the State's recommendation, and counsel said nothing that would negate the effect of those warnings.

The trial court did not err in concluding that Madrigal failed to establish deficient performance and thus failed to establish ineffective assistance of counsel.<sup>2</sup>

D. CONCLUSION.

The trial court's denial of the motion to vacate the judgment and sentence should be affirmed.

DATED this 1st day of November, 2016.

Respectfully submitted,

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<sup>2</sup> If this Court were to conclude that deficient performance was established, this matter must be remanded back to the superior court for a determination of prejudice, which was not addressed in the superior court's ruling and which requires a credibility determination.

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Nicholas Marchi, the attorney for the appellant, at nmarchi@carmarlaw.com, containing a copy of the Brief of Respondent, in State v. Jose Martinez, Cause No. 74309-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this    day of November, 2016.

  
Name:  
Done in Seattle, Washington