

FILED

OCT 28 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

29018-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

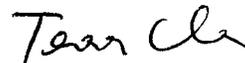
JOSE MARTINEZ,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

P.O. Box 40
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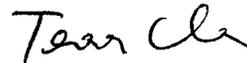
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Does an attorney “misadvise” by not advising, specifically by not advising a client that a guilty plea “requires his deportation” when the complexities and flux of immigration law make any such definitive expression impractical?
2. Did the Defendant receive effective assistance of counsel where, following the guilty plea, his attorney’s investigator unsuccessfully attempted to interview a complicit witness on parole?

IV. STATEMENT OF THE CASE

On December 3, 2008, the Defendant Jose Martinez pled guilty to delivering cocaine. CP 49-57. He signed the Statement of Defendant on Plea of Guilty directly below this language:

My lawyer has explained to me, and we have fully discussed, all of the above paragraphs and Attachment "A," if applicable. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge.

CP 55. At the plea hearing, the Defendant acknowledged the same orally.

THE COURT: Do you have any difficulty reading, writing, or understanding English?

THE DEFENDANT: A little, so so.

THE COURT: Okay. Were you able to go through this statement okay with Mr. McCool?

THE DEFENDANT: Yes.

THE COURT: And you understand it?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions about it?

THE DEFENDANT: No.

THE COURT: It appears that you just signed it; is that correct?

THE DEFENDANT: Yes.

RP 12/03/08 at 2.

Many paragraphs in the Statement are crossed out. CP 53-55. The language advising of immigration consequences was not crossed out. It states:

(i) 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 52. The court also verified that the Defendant was not a U.S. citizen. RP

12/03/08 at 6.

At the hearing, the Defendant demonstrated his proficiency in English. CP 151. He inquired about the meaning of a freely and voluntarily made plea. RP 12/03/08 at 7. He indicated that he read English, and then demonstrated this fact by reading aloud that facts of the offense. RP 12/03/08 at 8-9. The court accepted the plea, finding that it was knowingly, intelligently, and voluntarily made. RP 12/03/08 at 9.

The sentencing hearing was delayed by a post-conviction motion. CP124-26. The Defendant was sentenced almost a year later, on November 7, 2009. CP 62-74.

On December 1, 2009, after the sentencing hearing, the Defendant filed a motion to vacate the judgment, claiming that neither the court nor his counsel informed him that his plea could have immigration consequences or, in the alternative, that he was incorrectly advised he *might* be deported when there was no discretion on the matter. CP 128-34. In a supplemental declaration, the Defendant added a claim that his counsel failed to investigate inter alia the possible testimony of Angel Gonzalez. CP 297-326.

The Defendant was charged with possession cocaine in a school zone with intent to deliver (CP 1-3) and with two counts of delivery (CP 4-6) in a school zone. CP 9-11. A search warrant produced three baggies of cocaine and \$4000 in the Defendant's home, which he shared with his wife. The

delivery counts alleged delivery to Mr. Gonzalez in controlled buys with marked money, which was recovered from the Defendant's home. CP 4-6, 9-11.

In his supplemental exhibits, the defense investigator contacted Mr. Gonzalez after he had served his time in prison on the same case and was on parole. CP 306. The Defendant alleged that Mr. Gonzalez stated that he could not be certain, but "did not think" that the Defendant was involved and did not even think that he himself had been involved. CP 300, 309. He asked if he could hear the audio wire, so that he could be more definite. CP 309. However, when the defense investigator returned, his attempt to play the audio for Mr. Gonzalez was rebuffed. CP 309-10.

The motion was well briefed by both parties. CP 128-34, 149-206, 209-94, 297-326, 331-33. The court denied the motion. CP 337-38, 345-47. The court found that the Defendant understood the immigration consequences of his plea based on the court's colloquy and the Defendant's Statement on Plea of Guilty. CP 337, 345-46. And the court found that the allegations of failure to investigate did not establish sufficient new facts under CrR 7.8 to support vacation of plea and sentence. CP 346.

The Defendant renews these claims on appeal.

V. ARGUMENT

A. TRIAL COUNSEL DID NOT MISADVISE HIS CLIENT ABOUT IMMIGRATION CONSEQUENCES BY FAILING TO ADVISE THAT THE PLEA WOULD “REQUIRE” HIS DEPORTATION.

The Defendant argues that, under *Padilla v. Kentucky*, -- U.S. --, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), his defense counsel was required to advise him that he would necessarily be deported. Brief of Appellant at 24, 27-28. This is not the *Padilla* holding. *Padilla* does not require greater immigration advice to non-citizen criminal defendants than is already required under Washington law.

We now hold that counsel must inform her client whether his plea carries a *risk* of deportation.

Padilla, 130 S.Ct. at 1486 (emphasis added). This risk was communicated by virtue of the Statement of the Defendant on Plea of Guilty.

Jose Padilla, like Jose Martinez, was a long-term United States resident, but not a citizen. *Padilla*, 130 S.Ct. at 1477. Padilla’s lawyer assured him that a guilty plea would *not* affect his status in the country. *Padilla*, 130 S.Ct. at 1478. Padilla relied on that advice in making his decision to plead guilty. *Id.* The advice was wrong. Immigration law makes deportation “virtually” or “nearly” automatic for Padilla’s particular offense. *Padilla*, 130 S.Ct. at 1476, 1478, 1481.

The Kentucky Supreme Court held that counsel's performance was not ineffective, despite this affirmative misadvice, because deportation was a "collateral" consequence. *Id.* That decision conflicts with other decisions finding that an attorney's affirmative misrepresentation regarding a collateral consequence may affect the voluntariness of a plea. *United States v. Russell*, 686 F.2d 35 (D.C. Cir. 1982); *People v. Correa*, 485 N.E.2d 307 (Ill. 1985) (counsel's erroneous misrepresentation that guilty plea would not affect defendant's immigrant status was ineffective assistance and rendered guilty plea involuntary).

The United States Supreme Court reversed the Kentucky court, holding that "constitutionally competent counsel would have advised [Padilla] that his conviction for drug distribution made him subject to automatic deportation." *Padilla*, 130 S.Ct. at 1478. The court added that "[w]hether he is entitled to relief depends on whether he has been prejudiced, a matter that we do not address." *Id.* When deportation consequences are unclear or uncertain, "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." *Padilla*, 130 S.Ct. at 1483.

This holding, then, is no different from existing Washington law. Judges already are required by law to determine that the defendant has been

advised of immigration consequences. RCW 10.40.200. And this statute has been implemented by a court rule, which places the advisement in the plea form. CrR 4.2 at (6)(i). *Padilla* only makes this statutory duty also a Sixth Amendment requirement.

The plea agreement, read and signed by the Defendant Martinez, informed him about the risk of deportation.

The Supreme Court only imposes a general duty to advise for the most obvious immigration consequences. But immigration law is seldom clear either in the abstract or as applied to a particular defendant's circumstance. *Padilla*, 130 S.Ct. at 1487-94 (Alito, J., concurring).

Giving advice involves making predictions, and making predictions on the outcome of immigration proceedings is extraordinarily difficult. An exceptionally wide range of advice might be acceptable given the uncertainties.

Moreover, requiring too specific advice could be harmful to clients and to the orderly administration of justice.

If a defendant is warned that deportation is virtually certain following conviction of a charged crime, he may plead guilty to a lesser crime, and then later challenge his plea by claiming the threat of deportation was *overblown*. Similarly, if he is told he has a chance to avoid deportation, pleads guilty, and deportation proceedings are initiated, he will likely assert that the warning was *understated*. Given the complexity of the law, it may be difficult to assess whether the advice was *reasonable*, especially if the immigration system produces a result contrary to advice that seemed prudent at the time.

Amicus Brief of Washington Association of Prosecuting Attorneys at 11,

State v. Sandoval, (No. 82175-5). The Supreme Court spoke of Padilla's deportation as "virtually" certain, rather than certain. *Padilla*, 130 S.Ct. at 1478. Even experts are confounded by this area of law, which is in constant flux. They consider the law "bewildering," "almost overwhelming complex," "baffling," "contradicting," and labyrinthine. Amicus Brief of Washington Association of Prosecuting Attorneys at 8-9, *State v. Sandoval*, (No. 82175-5).

And the experts cannot agree. One justice writes that the immigration consequences for a transporting a large amount of marijuana in Kentucky can be "easily determined by reading the removal statute," because a defendant becomes "eligible" for deportation "for all controlled substances convictions except for the most trivial of marijuana possession offense." *Padilla*, 130 S.Ct. at 1483. Another justice notes that there are any number of exceptions to this interpretation, for example, solicitation or accessory after the fact. *Padilla*, 130 S.Ct. at 1489 (Alito, J., concurring). The Defendant's immigration counsel concurs with Justice Alito. CP 292 (Defendant's affidavit declaring that his immigration counsel has advised that solicitation is a non-deportable offense).

In this particular case, the Defendant claims that the law is simple and that "all" a defense attorney need do is read a single sentence in a single

statute. Brief of Appellant at 30-31. But the Defendant's own experts undercut this claim of simplicity or transparency of the law. The Defendant acquired affidavits of immigration experts (Siovhan Sheridan-Ayala and Brent DeYoung) to explain what an experienced criminal defense attorney could not. CP 283-89. They explained new terminology, various complicated defenses (such as asylum), as well as changes in practice that are more political than legal. And they speak of "current" immigration law, thereby demonstrating the constant state of flux in this area.

Even the bare classification of the offense is arguable. Ms. Sheridan-Ayala and Mr. DeYoung consider the Defendant's offense an aggravated felony. CP 284, 287. But Justice Alito cannot be so certain.

Defense counsel who consults a guidebook on whether a particular crime is an "aggravated felony" will often find that the answer is not "easily ascertained." For example, the ABA Guidebook answers the question "Does simple possession count as an aggravated felony?" as follows: "Yes, *at least in the Ninth Circuit.*" § 5.35, at 160 (emphasis added). After a dizzying paragraph that attempts to explain the evolution of the Ninth Circuit's view, the ABA Guidebook continues: "Adding to the confusion, however, is that the Ninth Circuit has conflicting opinions depending on the context on whether simple drug possession constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43)." *Id.*, § 5.35, at 161 (citing cases distinguishing between whether a simple possession offense is an aggravated felony "for immigration purposes" or for "sentencing purposes"). The ABA Guidebook then proceeds to explain that "attempted possession," *id.*, § 5.36, at 161 (emphasis added), of a controlled substance is an

aggravated felony, while “[c]onviction under the federal *accessory* after the fact statute is *probably not* an aggravated felony, but a conviction for accessory after the fact to the manufacture of methamphetamine *is* an aggravated felony,” *id.*, § 537, at 161 (emphasis added). Conspiracy or attempt to commit drug trafficking are aggravated felonies, but “[s]olicitation is not a drug-trafficking offense because a generic solicitation offense is not an offense related to a controlled substance and therefore not an aggravated felony.” *Id.*, § 5.41, at 162.

Padilla, 130 S.Ct. at 1489 (Alito, J., concurring).

Even if it could be “easily” determined that an offense was deportable, deportation is not actually automatic. ICE agents may overlook a defendant who is not easily found, because he is not in custody. CP 281 (Trial counsel acknowledging that the Defendant could avoid deportation simply by bailing out of jail before pleading guilty). Federal prosecutors may exercise discretion and elect not to file removal proceedings. CP 284 (Defendant’s expert acknowledging that “execution” of immigration laws varies under different administrations). Courts may find that they lack jurisdiction over removal proceedings. Once in immigration courts, defendants may contest whether their conviction meets the federal standards. And there may be defenses, which a criminal defense attorney cannot assess, such as asylum. CP 285.

There are no truly obvious cases. Therefore, a criminal defense

attorney can only fairly advise that there is a possibility of deportation following a conviction. This advisement of risk, but not certainty, meets the *Padilla* directive against silence. *Padilla*, 130 S.Ct. at 1484 (“When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all.”).

The Defendant urges this Court to find that want of specific advice is, in fact, a misadvisement. Brief of Appellant at 36-38. The prefix mis- is not defined in this way. A misadvisement is the giving of bad or wrong advice, not the failure to advise or the absence of specific advice.

Because the Defendant was advised of the risk of immigration consequences, and because more specific advice is not and should not be required, the Defendant’s trial counsel’s performance was not deficient.

B. TRIAL COUNSEL PROVIDED REASONABLY COMPETENT ADVICE TO ACTUALLY AND SUBSTANTIALLY ASSIST HIS CLIENT IN DECIDING WHETHER TO PLEAD GUILTY.

The Defendant claims that he received ineffective assistance of counsel prior to his decision to plead guilty. He argues that late-discovered evidence is proof of his attorney’s deficient performance in advising his client on pleading guilty and urges a thorough review under Sixth Amendment standards for effective assistance of counsel. Brief of Appellant at 26-27.

In order to show ineffective assistance of counsel, the Defendant has the burden of showing both (1) that his attorney's performance was deficient and (2) that this deficiency prejudiced him. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is that which falls below an objective standard of reasonableness. *State v. Horton*, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). But the courts begin with a strong presumption that a counsel's conduct fell within the wide range of reasonable professional assistance. *In re Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). To satisfy the prejudice prong of the ineffective assistance of counsel claim, the Defendant must show that counsel's performance was so inadequate that there is a reasonable probability that the result would have differed, thereby undermining our confidence in the outcome. *Strickland*, 466 U.S. at 694.

In the context of a guilty plea, the defendant must show that (1) his counsel failed to “actually and substantially [assist] his client in deciding whether to plead guilty,” *State v. McCollum*, 88 Wn. App. 977, 982, 947 P.2d 1235 (1997), quoting *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984), and (2) but for counsel's failure to adequately advise him, he would not have pled guilty. *McCollum*, 88 Wn. App. at 982, citing *Hill v. Lockhart*,

474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)). *See also State v. Holley*, 75 Wn. App. 191, 197, 876 P.2d 973 (1994) *citing State v. Malik*, 37 Wn. App. 414, 416, 680 P.2d 770 (1984).

The United States Supreme Court has held:

[A] decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be. Waiving trial entails the inherent risk that the good faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts.

....

Whether a plea of guilty is unintelligent and therefore vulnerable [] depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but whether that advice was within the range of competence demanded of attorneys in criminal cases.

McMann v. Richardson, 397 U.S. 759, 770-71, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970).

Counsel owes a lesser duty to a client who pleads guilty than to one who decides to go to trial, and in the former case counsel need only provide his client with an understanding of the law in relation to the facts, so that the accused may make an informed and conscious choice.

Wofford v. Wainwright, 748 F.2d 1505, 1508 (11th Cir. 1984).

There is no argument that the Defendant did not understand the crime with which he was charged. Therefore, his counsel provided him "with an understanding of the law in relation to the facts, so that the [defendant could]

make an informed and conscious choice.” *Wofford v. Wainwright*, 748 F.2d at 1508.

By pleading guilty, a defendant interrupts his attorney’s preparation for trial. Shortly before the guilty plea, trial counsel had filed a motion challenging the search warrant. CP 18-28, 30-48. In entering the plea, the Defendant opted not to pursue this or any other challenge to the evidence.

The decision to plead guilty is the client’s alone. RPC 1.2(a). A client who wishes to plead guilty before the attorney has had an opportunity to investigate every avenue, has a right to. So integral is this right to dignity and autonomy that it supercedes the right to effective assistance of counsel. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (giving the right to self-representation, which waives claims regarding effective assistance).

The Defendant attacks the State’s evidence. Brief of Appellant at 46-49. Without making any concession to the validity of such an attack, it should be noted that there are many reasons why a person may plead guilty in a knowing, intelligent, and voluntary way regardless of the strength of the State’s case. For example, an accused who knows he is guilty may choose to plead guilty regardless of the strength of the State’s case, because it is the honest thing to do, because he does not want to further burden witnesses with

a trial, because he does not look forward to the accusations of a trial, because it heals families and the community, because it provides him with an opportunity for desired treatment or penance, or simply to get out of custody. In this case, the guilty plea resulted in the Defendant's release from custody. With a 20-month sentence, credit for 260 days served (CP 68), and accounting for earned early release (RCW 9.94A.729(3)(c)), the Defendant could have been released as soon as he pled guilty.

To the extent that the Defendant suggests that his counsel was ineffective for negotiating a plea deal, thereby waiving his right to trial and to appeal, there was a legitimate trial strategy for making such a deal. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (defense counsel's legitimate trial strategy or tactics cannot be the basis for a claim of ineffective assistance of counsel). By pleading guilty, the Defendant avoided the risk of trial and received the significant benefit of the dismissal of two counts and all the enhancements.

The Defendant pled guilty to delivering cocaine on or about April 17, 2008. CP 49, 55. It was a plea negotiation that resulted in a significant benefit to the Defendant. *See* CP 9-11. One of the charges that the State agreed to drop was possession with intent to deliver. CP 1-3. The execution of a search warrant on the Defendant's home on April 22, 2008 resulted in

the seizure of baggies of cocaine, a large brick of cocaine, scales, and \$4000 cash. His home is within 1000 feet of numerous school bus stops. CP 1. If he had gone to trial on this count alone, a school zone enhancement could have doubled his sentence. RCW 69.50.435. Although the Defendant has prepared a challenge to this evidence (an unheard challenge to the search warrant - CP 18-28, 30-48), it was a reasonable tactic to avoid trial and plead to the reduced charge.

The Defendant argues that he has an alibi for the April 10 delivery charge. Brief of Appellant at 46. Because he did not plead guilty to this charge, we need not consider this claim even cursorily.

The Defendant argues that he has a “partial alibi” for the April 17 delivery charge. Brief of Appellant at 46. In fact, his witnesses do not account for the actual time of the delivery on April 17. CP 79-82, 312-13.

The Defendant argues that he does not believe the sergeant could have seen him from the distance of 250-300 feet. Brief of Appellant at 46; CP 315. But because the Defendant waived trial, the sergeant has not had an opportunity to clarify the Defendant’s misinterpretations of his statement.

The Defendant claims that Mr. Gonzalez indicated that he was unwilling to identify the Defendant as his drug dealer. Brief of Appellant at 47-48. This initial hesitant statement was followed by an apparent

recantation when Mr. Gonzalez, through his family members, refused to communicate further with the defense investigator. It is not surprising that a criminal defendant would be unwilling first to testify against his drug dealer and later to be put in a position of being charged with perjury. Because the marked money used by Mr. Gonzalez in purchasing cocaine was recovered from the Defendant's home within five days of the sale, there is little doubt as to the players.

None of the investigation conducted after the guilty plea provides "sufficient new facts under CrR 7.8 to support vacation of the guilty plea or of the judgment and sentence." CP 346.

In consideration of this new evidence brought in post-conviction motions, counsel's recommendation of the plea offer was within the range of competence demanded of attorneys in criminal cases. *McMann v. Richardson*, 397 U.S. at 770-71.

Nor is there any apparent prejudice. An appellant "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 130 S.Ct. at 1485. It is not rational to reject the state's generous plea offer for the mere reasons offered here (an alibi that is no alibi, a one-sided interpretation of the sergeant's statement, and a witness who was never confident and now is no longer cooperating).

The Defendant says that if he had the option, he would have preferred to have pled guilty to solicitation. CP 292. But this is a plea offer that does not appear to have been on the table. The state's offer was for a single count of delivery, reduced from three counts (possession with intent to deliver and two counts of complicity to deliver) with school zone enhancements. CP 9-11, 59-60.

The Defendant received effective assistance of counsel in deciding to plead guilty.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: October 27, 2010.

Respectfully submitted:



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