

ORIGINAL
FILED

APR 25 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 295958-III

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON

DIVISION III

STATE OF WASHINGTON

Respondent

v.

MIGUEL CERVANTES VALDOVINES

a.k.a. MIGUEL GOMEZ CERVANTES

Appellant

APPEAL FROM THE FRANKLIN COUNTY SUPERIOR
COURT

BRIEF OF APPELLANT

CARNEY & MARCHI, P.S.
Nicholas Marchi
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I. ASSIGNMENT OF ERROR

A. ASSIGNMENT OF ERROR

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

B. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Did the trial court err when it denied the Motion to Vacate Judgment and Sentence because the judgment had already been vacated on other grounds?

II. STATEMENT OF THE CASE

A. Statement of Proceedings

On May 24, 1994, Appellant was convicted in the Superior Court of Franklin County of Unlawful Possession of a Controlled Substance – Cocaine, in violation of RCW 69.50.301(d) (C.P. 18). On March 22, 2005, the Court vacated this conviction pursuant to RCW 9.94A.640 (C.P. 14). This statute allows for the vacation of a sentence once an offender has fulfilled all of the requirements of a sentence and has been discharged under RCW 9.94A.637.

On November 8, 2010, Appellant moved the Superior Court of Franklin County to vacate the judgment and sentence on constitutional grounds (C.P. 6). This motion was made because the original order vacating Appellant's conviction was not made on constitutional grounds, so it did not alleviate the immigration consequences of the conviction. The Judge denied the motion on December 7, 2010, on the grounds that the judgment had already been vacated (C.P. 5).

Appellant timely filed this appeal before the Court of Appeals for the State of Washington, Division III (C.P. 3).

III. ARGUMENT

A. The Trial Court Judge erred in denying Appellant's motion to vacate his conviction on constitutional grounds.

In the instant case, the Trial Court Judge held that Appellant does not have a right to seek a vacation of his conviction on constitutional grounds because a vacation on other grounds has already been granted (C.P. 5). This determination was made in error because it leaves Appellant without recourse with respect to the immigration consequences of his conviction.

The Sixth Amendment right to effective assistance of counsel encompasses the plea process. *In re Pers. Restraint of Riley*, 122 Wn.2d 772, 780 (1993); *McMann v. Richardson*, 90 S. Ct. 1441, (1970). In the instant case, Appellant's Sixth Amendment rights were violated during the plea process of his

original criminal proceedings because Appellant's counsel did not fulfill his duty under *Padilla* to inform his client of potential immigration consequences. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

If Appellant is not allowed to have his conviction vacated on these Sixth Amendment grounds, he will be subject to the immigration consequences of the conviction. These consequences may include deportation. Denying Appellant a chance to challenge his conviction in order to avoid these consequences violates his fundamental constitutional rights. Therefore, Appellant must be granted the opportunity to pursue a vacation of his conviction on Sixth Amendment grounds.

B. In order to be valid for immigration purposes, a conviction must be vacated on statutory or constitutional grounds.

In order for the vacation of a conviction to be valid for immigration purposes, the order must vacate the conviction as being statutorily or constitutionally invalid at the time that the conviction arose. *See Matter of Pickering*, 23 I. & N. Dec. 621

(BIA June 11, 2003) (conviction must be vacated on grounds of legal invalidity relating to the underlying criminal proceedings). The vacating court must declare the conviction to be invalid on the basis of a legal defect of some kind, such as ineffective assistance of counsel or a procedural inadequacy in the way in which a hearing was conducted.

In the instant case, the court already vacated Appellant's conviction under RCW 9.94A.640, which allows for the vacation of a conviction after an offender has fulfilled all requirements of a sentence (C.P. 14). Because this vacation was not due to a legal defect in the underlying criminal proceedings, however, it is not sufficient for immigration purposes. Rather, the conviction was vacated after the close of the original proceedings and is therefore invalid for the purposes of immigration law.

Judgments vacated under RCW 9.94A.640 are not completely removed from a defendant's record for the purposes of criminal law as well. The vacating statute itself states,

“Nothing in this section affects or prevents the use of an offender’s prior conviction in a later criminal prosecution.” RCW 9.94a.640(3). The Adult Sentencing Guidelines Manual provides clarification on this point: “[A] vacated conviction record may be used as an element of a crime in a later criminal prosecution.” Washington Sentencing Guidelines Comm’n, Adult Sentencing Guidelines Manual I-58 (2008). For the purposes of subsequent prosecutions, as in the context of immigration, RCW 9.94A.640 does not serve to effectively vacate the prior conviction.

Because Appellant’s existing vacated judgment is not valid in the context of immigration law (or in the context of subsequent prosecutions), Appellant now seeks to vacate his conviction on the constitutional ground that counsel did not meet his Sixth Amendment duty under *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). This case requires a criminal attorney to inform his client about the potential immigration consequences of a guilty plea. Appellant’s counsel did not inform him of the

immigration implications of his plea. The Washington Supreme Court recently applied *Padilla* in the context of state proceedings, holding that a defendant can be denied the right to effective assistance of counsel when his attorney erroneously tells him that the deportation consequences of a guilty plea can be mitigated. *Washington v. Sandoval*, No. 82175-5 (Wa. Sup. Ct. Mar. 17, 2011).

In addition to his rights under *Padilla*, Appellant's Washington statutory rights were violated when his criminal defense attorney failed to advise him of the potential immigration consequences of his plea. In *State v. Littlefair*, No. 24924-3-II (Ct. of App. of Wa., Div. II, Aug. 2, 2002), the state Court of Appeals, Div. II, stated 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.

In the instant case, Appellant moves to vacate on statutory grounds under *Littlefair* (in addition to the constitutional grounds of *Padilla*) because he was not informed of the potential immigration consequences of his plea.

Appellant seeks a vacation of his conviction under *Padilla* and *Littlefair* based upon an underlying defect in the original criminal proceedings—ineffective assistance of counsel. If granted, this vacation would thus be valid for immigration purposes. As there is no bar to vacating a case

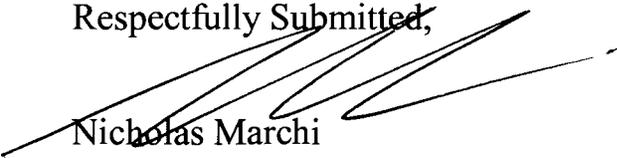
when a vacation on different grounds has already been granted, Appellant is within his rights in moving to vacate on constitutional and statutory grounds.

IV. CONCLUSION

For the above reasons, the Appellant respectfully requests that he be allowed to challenge his conviction on constitutional and statutory grounds.

DATED this 22nd day of April 2011.

Respectfully Submitted,



Nicholas Marchi
CARNEY & MARCHI, P.S.
Attorneys for Appellant.

CERTIFICATE OF MAILING

I, Nicholas Marchi, declare:

That my business address is 108 So. Washington Street, Suite 406, Seattle, WA 98104. That I served a true copy of the attached by placing said copy in an envelope, which was then sealed, and delivered to:

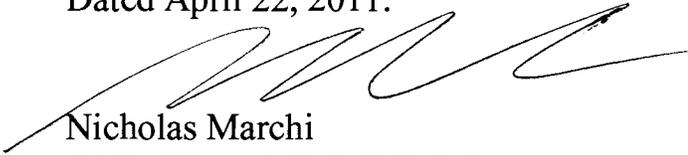
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Dated April 22, 2011.



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