

FILED

OCT 19 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29595-8-III

STATE OF WASHINGTON
COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

MIGUEL CERVANTES VALDOVINES

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR
FRANKLIN COUNTY

BRIEF OF RESPONDENT

SHAWN P. SANT
Prosecuting Attorney

by: Frank W. Jenny, #11591
Deputy Prosecuting Attorney

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COUNTERSTATEMENT OF ISSUES

- (A) DOES A TRIAL COURT HAVE JURISDICTION TO CONSIDER A MOTION TO VACATE A CONVICTION THAT HAS ALREADY BEEN VACATED?
- (B) DID PADILLA V. KENTUCKY CONSTITUTE A CHANGE IN THE LAW THAT WOULD EXEMPT A DEFENDANT FROM THE ONE YEAR TIME LIMIT FOR BRINGING COLLATERAL ATTACKS?
- (C) DOES PADILLA HAVE ANY APPLICATION TO WASHINGTON, GIVEN THAT RCW 10.40.200 ASSURES DEFENDANTS IN WASHINGTON ARE ADVISED OF IMMIGRATION CONSEQUENCES PRIOR TO THEIR GUILTY PLEAS BEING ACCEPTED?
- (D) EVEN IF PADILLA DID ANNOUNCE A NEW RULE THAT HAD RELEVANCE TO WASHINGTON, WOULD IT APPLY RETROACTIVELY ON COLLATERAL REVIEW TO A CASE THAT WAS FINAL AT THE TIME PADILLA WAS DECIDED?
- (E) HAS DEFENDANT MET HIS BURDEN TO SHOW HE WAS PREJUDICED BY THE PERFORMANCE OF HIS COUNSEL?

COUNTERSTATEMENT OF THE CASE

Miguel Cervantes Valdovines (hereinafter defendant) was charged by information dated December 9, 1987, with Unlawful Possession of a Controlled Substance (Cocaine), committed on or about December 8, 1987. (CP 24-25). He executed a Statement of

Defendant on Plea of Guilty on December 22, 1987. (CP 29-30). His guilty plea was entered with the court that same day. (CP 18-19). After absconding for an extended period of time, he was finally sentenced on May 24, 1994. (CP 18-23). He received a sentence of 90 days in the county jail, with credit for 16 days previously served. (CP 20).

On March 11, 2005, defendant filed a "Petition for Vacation of Record of Conviction [pursuant to] RCW 9.94A.640." (CP 16-17). The trial court entered an "Order Vacating Record of Conviction" in March 22, 2005. (CP 14-15). It provided:

THIS MATTER having come before the Court by Petition pursuant to RCW 9.94A.640 and the Court having reviewed the files and records herein

IT IS HEREBY ORDERED, ADJUDGED AND DEGREED all court records pertaining to this matter are ORDERED VACATED and the Clerk is directed to seal this file and any agency or person holding records herein are ORDERED, to not disclose or release such records outside their agency other than under subsequent order of Court. PROVIDED this Order shall not prohibit sharing of information between Law Enforcement agencies or for use in subsequent prosecution.

(CP 14).

On November 10, 2010, defendant filed a “Motion and Memorandum in support of Motion to Vacate Judgment and Sentence.” (CP 6-13). The motion states:

At the time he plead [sic] guilty [defendant] was not a United States citizen. [Defendant] maintains that he was not informed of the immigration consequences of the plea. In addition, he maintains he was not informed of the consequences of the plea.

(CP 6). While this seems to imply there were other consequences of which he was not advised, the balance of the motion indentifies no consequences besides those relating to immigration. He argues his plea was not voluntary and he did not receive effective assistance of counsel because his attorney allegedly failed to advise him of the potential immigration consequences of his guilty plea. (CP 8-13).

The trial court denied the motion by order dated December 7, 2010. (CP 5). The order states: “Motion denied as judgment already vacated.” (CP 5).

RESPONSE TO ARGUMENT

(A) THE TRIAL COURT HAD NO JURISDICTION TO CONSIDER THE MOTION AS THE JUDGMENT HAS ALREADY BEEN VACATED.

The previous order vacating the judgment and sentence, which was entered on March 22, 2005, was expressly granted pursuant to RCW 9.94A.640. (CP 14). That statute provides in pertinent part:

- (1) . . . [T]he court may clear the record of conviction [for a qualified offender] by . . . [p]ermitting the offender to withdraw the offender's plea of guilty and to enter a plea of not guilty . . . and . . . by the court dismissing the indictment or information against the offender.

To "vacate" is defined as to annul, set aside, cancel or rescind; to render an act void, as in "to vacate an entry or record, or a judgment." State v. Noel, 101 Wn. App. 623, 627-27, 5 P.3d 747 (2000) (citations omitted). Vacation under RCW 9.94A.640 operates to clear the record of conviction in the same manner as did the former Probation Act (RCW 9.95.240), which applied to cases arising prior to the Sentencing Reform Act. Id. at 627.

A trial court must have jurisdiction in order to vacate a criminal conviction. Id. at 626-27. Jurisdiction means the power to hear and determine. State v. Barnes, 146 Wn.2d 74, 85, 43 P.3d 490 (2002). Generally, a valid judgment consists of three jurisdictional elements: jurisdiction of subject matter, jurisdiction of person, and power and authority to render a particular judgment. Id. A superior court acquires jurisdiction over a criminal case when

an information is filed and retains jurisdiction and authority to act when any amended information is filed. Id. at 86. However, such jurisdiction and authority to act terminates when the matter is dismissed; once a criminal case is dismissed, “[i]t is apparent no controversy now exists between the state and the defendant[.]” State v. Murrey, 30 Wash. 383, 385, 70 P. 971 (1902). As a court in another state has put it:

It is well settled that when a trial court empowered with jurisdiction over a criminal case sustains a motion to dismiss the indictment or information, the person accused thereunder is, in law, discharged from the accusation against him; there is, concomitant with that dismissal, no case pending against the accused and, accordingly, no jurisdiction remaining in the dismissing court.

State ex rel. Holmes v. Denson, 671 S.W.2d 896, 898-99 (Tex. Ct. Crim. App. 1984) (quoting Garcia v. Dial, 596 S.W.2d 524, 528 (Tex. Ct. Crim. App. 1980)). Once a trial court has lost jurisdiction over a criminal case by entering a dismissal, the only way jurisdiction might be re-obtained is through the filing of a new indictment or information into the court. See Holmes, 671 S.W.2d at 899. “Furthermore, it is likewise axiomatic that where there is no jurisdiction, the power of the court to act is as absent as if it did not

exist, and any order entered by a court having no jurisdiction is void.” Garcia, 596 S.W.2d at 528 (citations and quotes omitted).

Defendant merely argues that his vacated conviction continues to have collateral consequences. That does not answer the problem of the trial court’s lack of jurisdiction. Having previously vacated the judgment and sentence pursuant to RCW 9.94A.640, which by statute includes withdrawal of the guilty plea and dismissal of the information, the trial court had no jurisdiction to vacate the same judgment and sentence for a different reason. No controversy now exists between the State and the defendant and there is nothing upon which the trial court can pass judgment. See Murrey, 30 Wash. at 385. Since the trial court had no authority to grant the requested relief, it is unnecessary for this court to consider whether the motion would have been well taken under other circumstances.

(B) PADILLA DOES NOT CONSTITUTE A SIGNIFICANT CHANGE IN THE LAW. THUS, THE MOTION IS NOT EXEMPT FROM THE ONE-YEAR TIME LIMIT.

A trial court decision may be affirmed on any basis, regardless of whether that basis was considered or relied on by the trial court. RAP 2.5(a); City of Sunnyside v. Lopez, 50 Wn. App.

786, 794 n.6, 751 P.2d 313 (1988). Even if the merits of defendant's motion are considered, the trial court should be affirmed in its rejection of the motion.

First, the motion is time-barred. As noted above, defendant's motion was not filed until some 15 years after his judgment and sentence was filed with the clerk and became final. See RCW 10.73.090(3)(a). The motion was expressly brought pursuant to CrR 7.8. (CP 6). CrR 7.8 in turn states it is within the application of RCW 10.73.090 and .100. Subject to six exceptions listed in RCW 10.73.100, RCW 10.73.090(1) provides that any motion attacking a criminal conviction must be filed within one year of the judgment becoming final where the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction. The exceptions are for newly discovered evidence, an unconstitutional statute, double jeopardy, insufficient evidence where the defendant did not plead guilty, a sentence in excess of the court's jurisdiction, or a significant, material change in the law that applies retroactively.

There is no "immigration exception" to the one-year time limit. In addition, a claim that a defendant was not properly advised of the consequences of his guilty plea cannot be brought more than

one year after finality. See State v. King, 130 Wn.2d 517, 530-31, 925 P.2d 606 (1996); In re Pers. Restraint of Hemenway, 147 Wn.2d 529, 533, 55 P.3d 615 (2002); In re Pers. Restraint of Clark, 168 Wn.2d 581, 586-87, 230 P.3d 156 (2010). Moreover, claims of ineffective assistance of counsel are barred after one year. State v. Wade, 133 Wn. App. 855, 870, 138 P.3d 168 (2006) (“For good reason, a claim of ineffective assistance of trial or appellate counsel does not fall under the permissible grounds for collateral review more than one year after finality.”).

The defendant claims he comes within the exception in RCW 10.73.100(6) for a significant, material change in the law in the law that applies retroactively. The full text of that provision is as follows:

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

...

(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that

sufficient reasons exist to require retroactive application of the changed legal standard.

The defendant claims the recent United States Supreme Court case of Padilla v. Kentucky, __ U.S. __, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) constitutes a significant, material change in the law. In Padilla, the Court found the defendant in that case did not receive effective assistance of counsel at the time he pleaded guilty because his lawyer failed to advise him that his guilty plea could lead to deportation.

Under limited circumstances, a court case may constitute a significant change in the law that would exempt a defendant from the one year time limit. However, there is a difference between an appellate opinion that changes the law and one that merely applies settled law to new facts, or one that only corrects a common misunderstanding of the law.

In determining whether a court case represents a significant change in the law that would exempt a defendant from the time limit, a court considers whether the defendant could have made the same argument before the new law was decided. State v. Olivera-Avila, 89 Wn. App. 313, 321, 949 P.2d 824 (1997); In re Pers.

Restraint of Domingo, 155 Wn.2d 356, 365-69, 119 P.3d 816 (2005).

In Olivera-Avila, the defendant argued that State v. Ross, 129 Wn. App. 279, 916 P.2d 405 (1996) was a significant change in the law. Ross held that mandatory community placement is a direct consequence of a guilty plea; since the defendant in Ross was not advised of that provision, he was entitled to withdraw his guilty plea. However, the Olivera-Avila court noted that long before Ross, it was well established that a defendant must be advised of all direct consequences of a guilty plea. The defendant in Olivera-Avila, “like the defendant in Ross, could have argued that community placement was a direct consequence and that the failure to inform him of that consequence rendered his pleas involuntary.” Olivera-Avila, 89 Wn. App. at 322. “Since Ross did not create a significant, material change in the law, Mr. Olivera-Avila’s failure to raise the issue of his pleas’ constitutional validity in a timely manner precludes review now.” Id.

In Domingo, the defendants claimed that State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000) and State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000) amounted to a significant change in the law. Roberts and Cronin interpreted the complicity statute to

require a person intended to assist in the principal's specific crime before accomplice liability would attach. However, the court found the defendants could have made their same arguments before Roberts and Cronin were decided. While Roberts and Cronin may have corrected a commonly held misunderstanding of the law, they did not change the law. The court concluded: "Because we find that Roberts and Cronin do not constitute a significant change in the law of complicity, the instant petitions are time barred under RCW 10.73.090." Domingo, 155 Wn.2d at 369.

By the same token, Padilla is not a significant change in the law. Long before Padilla, it was well established that a defendant who pleads guilty is entitled to effective assistance of counsel. See Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). The defendant in our case could have made the same argument as the defendant in Padilla within one year of his judgment becoming final. No prior decision of the United States Supreme Court, the Washington Supreme Court, or the Washington Court of Appeals precluded such an argument.

Pre-existing law established clear requirements for guilty pleas. For the guilty plea to be valid, due process requires the court to advise the defendant of all direct consequences of his plea.

The court is not, however, required to advise the defendant of collateral consequences. State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980). Immigration consequences are considered “collateral”, so the court is not constitutionally required to cover them at the plea hearing. State v. Holley, 75 Wn. App. 191, 196, 876 P.2d 973 (1994); State v. Malik, 37 Wn. App. 414, 416, 680 P.2d 770 (1984). A Washington statute, however, requires courts to advise defendants that a criminal conviction could result in deportation, exclusion from admission, or denial of naturalization. RCW 10.40.200. This statute was complied with in this case. (CP 30).

Padilla changed none of this. That case has nothing to do with due process requirements for a valid guilty plea. Rather, it involved an allegation of ineffective assistance of counsel. The Court held that the Sixth Amendment requires counsel to “inform her client whether his plea carries a risk of deportation.” Padilla, 130 S. Ct. at 1486. The Court noted that when immigration 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.” Id. at 1483.

A court case may constitute a change in the law exempting a defendant from the one-year time limit where it effectively overrules a prior determinative case from the controlling jurisdiction. In re Pers. Restraint of Greening, 141 Wn.2d 687, 697, 9 P.3d 206 (2000). In Padilla, the United States Supreme Court noted the Kentucky high court had held that the failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim of ineffective assistance of counsel. Padilla, 130 S. Ct. at 1481. In a footnote, the Court noted that other jurisdictions had reached similar results. Padilla, 130 S. Ct at 1481 n.9. The cited cases are from Alabama, Arizona, Louisiana, and Pennsylvania, and the first, fourth, fifth, tenth, eleventh, and District of Columbia federal circuits. Id. Notably, the list does not include any cases from Washington. The United States Supreme Court in Padilla did not overrule any of its own prior decisions, and no Washington case has ever held that the failure to advise of immigration consequences of a guilty plea could not support an ineffective counsel claim. Defendant was free to bring this claim within one year of his judgment becoming final. His failure to do so precludes consideration now.

**(C) EVEN IF COUNSEL FAILED TO ADVISE OF
IMMIGRATION CONSEQUENCES,
DEFENDANT RECEIVED THAT
INFORMATION IN HIS GUILTY PLEA FORM.**

In footnote 15 of the Padilla Court's opinion, it is noted: "[W]e find it significant that the plea form currently used in Kentucky courts provides notice of possible immigration consequences." Padilla, 130 S. Ct. at 1486 n.15. The form in question was adopted in February, 2003. Id. The amendment of the plea form occurred after Mr. Padilla's judgment became final on October 4, 2002. See Commonwealth v. Padilla, 253 S.W.3d 482 (Ky. 2008). The implication is that if the new Kentucky plea form had been in use at the time Mr. Padilla pleaded guilty, he would have had no basis to withdraw his plea. The Court also stated: "Further, many states require trial courts to advise defendants of possible immigration consequences." Padilla, 130 S. Ct. at 1481 n.9. The Court then specifically cites Washington's RCW 10.40.200, which provides in pertinent part:

- (2) 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. A defendant signing a guilty plea statement containing the advisement required by this subsection shall be presumed to have received the required advisement.

A noncitizen criminal defendant is not entitled to an explicit oral warning that deportation may result from entry of a guilty plea; it is sufficient that the written guilty plea form contains such a warning, the defendant affirms that the form was read, and the form is signed by both the defendant and the defendant's counsel. State v. Cortez, 73 Wn. App. 838, 840-41, 871 P.2d 660 (1994).

It is only necessary that the defendant be correctly advised of the consequences of pleading guilty prior to the guilty plea actually being accepted. In re Pers. Restraint of Reize, 146 Wn. App. 772, 788, 192 P.3d 949 (2008). The advice need not come from counsel. Id. Any failure of the defense lawyer to advise the defendant of the consequences of a guilty plea is cured where the correct advice is included in a written guilty plea form or is provided by the court. Id.

A copy of defendant's statement of defendant on plea of guilty is in the clerk's papers at 29-30. It provides in paragraph 14:

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 30). The guilty plea form was signed by the defendant and his attorney. (CP 30). Paragraph 16 includes an acknowledgment that the defendant read and understood the form. (CP 30). The form is also signed by Phil Osuna, certified court interpreter. (CP 30).

Under vastly different circumstances, the court in State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011) found the advice in the plea form was not sufficient. Here, unlike in Sandoval, there is no showing that the warning was negated by any erroneous advice from counsel. The warning in the plea form precludes any claim based on Padilla.

In Sandoval, the court stated: “In Padilla, the Commonwealth of Kentucky used a plea form that notifies defendants of the risk of immigration consequences[.]” Sandoval, 171 Wn.2d at 173. This statement is factually wrong. As explained above, the new Kentucky plea form was not adopted until after Mr. Padilla entered his guilty plea. The statement was not essential to the court’s decision in Sandoval, as the advice in Mr. Sandoval’s

plea form was negated by erroneous advice from his counsel. This court relied on the Sandoval dicta in State v. Martinez, 161 Wn. App. 436, 442, 253 P.3d 445 (2011). However, the Court of Appeals is not required to follow the dicta of the Supreme Court. Pierson v. Hernandez, 149 Wn. App. 287, 305, 202 P.3d 1014 (2009). Since the Sandoval dicta rested on a clearly erroneous factual premise, it should not be followed.

(D) EVEN IF PADILLA DID ESTABLISH A NEW RULE OF LAW THAT HAD APPLICATION TO WASHINGTON, IT WOULD NOT APPLY RETROACTIVELY ON COLLATERAL REVIEW TO A CASE THAT WAS FINAL AT THE TIME PADILLA WAS DECIDED.

Even if Padilla did create a new rule of law that had application to Washington, it would not apply here. A new constitutional rule of criminal procedure will generally not be applied retroactively on collateral review to a case that was final when the new rule was announced. In re Pers. Restraint of Carter, 154 Wn. App. 907, 916, 230 P.3d 181 (2010) (citing Marquard v. Sec'y of Dept. of Corrections, 429 F.3d 1278, 1311 (11th Cir. 2005), which cited Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)); State v. Evans, 154 Wn.2d 438, 114 P.3d 627 (2005).

The only exceptions are where (a) the new rule places certain kinds of primary, private individual conduct beyond the power of the state to proscribe, or (b) the rule requires the observance of procedures implicit in the in the concept of ordered liberty. Evans, 154 Wn.2d at 444. Padilla does not place any conduct beyond the power of the state to proscribe. In addition, to qualify as implicit in the concept of ordered liberty, it is not enough for the right to be important; it must also play a vital, instrumental role in securing a fair trial. Evans, 154 Wn.2d at 445. Thus, the rule in Blakely v Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), which held a defendant was entitled to have a jury find the facts necessary to justify a sentence beyond the standard range, was not a watershed rule that applied retroactively on collateral review. Evans, 154 Wn.2d at 447-48.

By the same token, even if Padilla announced a new rule, it should not be applied retroactively here. Even assuming the Padilla rule is desirable, it is hardly implicit in the concept of ordered liberty. As the Padilla Court acknowledged, five states and six federal circuits had previously held that a failure to advise of immigration consequences could not support a claim of ineffective assistance of counsel. Padilla, 130 S. Ct. at 1481 n.9. The judges

in each of those 11 jurisdictions had taken oaths to uphold the constitution of the United States. Like the rule in Blakely, the Padilla rule is one that was open to good faith debate and disagreement, and not one implicit in the concept of ordered liberty.

(E) THE DEFENDANT HAS NOT SHOWN ANY PREJUDICE THAT WOULD JUSTIFY COLLATERAL RELIEF.

Moreover, a defendant collaterally attacking his conviction has the burden to show actual prejudice. State v. Ramos, 152 Wn. App. 400, 409, 114 P.3d 384 (2009). This threshold requirement must be met with facts, not merely conclusory allegations. Id. No facts have been presented to show prejudice here.

A defendant claiming ineffective assistance must show both deficient performance and resulting prejudice. State v. Rodriguez, 103 Wn. App. 693, 700-01, 14 P.3d 157 (2000). To meet the second prong of the test, the defendant must show that but for the ineffectiveness, there is a reasonable probability that the outcome would have been different. Id. at 701. A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. Id. If it is easier to dispose of an ineffectiveness claim on the ground of a lack of sufficient prejudice, that course should be followed. Id.

In Sandoval, which unlike the instant case involved a timely attack on a guilty plea, the defendant was “a noncitizen permanent resident of the United States.” See Sandoval, 171 Wn.2d at 167. He had “earned permanent residency and made this country his home.” Id. at 175. He told his attorney “that he did not want to plead guilty if the plea would result in his deportation.” Id. at 167. His attorney corroborated that he was “very concerned” that he would be held in jail after pleading guilty and subjected to deportation proceedings. However, counsel assured him that he would not be immediately deported. Id. Contrary to counsel’s assurances, the immigration authorities placed a “hold” on the defendant preventing his release from jail and commenced deportation proceedings. Id. at 168. The defendant swore after the fact that he would not have pleaded guilty if he had known that would happen to him. Id.

The Sandoval court acknowledged that in satisfying 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 but would have insisted on going to trial. Id. at 174-75. Such a reasonable probability exists if the defendant convinces the court that but for counsel’s errors, he

would have proceeded to trial. Id. at 175. It must be shown that a decision to reject the plea bargain would have been rational under the circumstances. Id.

The court in Sandoval found the defendant had met this burden. The court noted that not only had the defendant sworn after the fact that he would not have pleaded guilty if properly advised, his attorney corroborated that he was very concerned at the time about the risk of deportation. Id. at 175. It was clear the defendant had relied heavily on his attorney's erroneous advice minimizing the risk of deportation. Id. Finally, the court emphasized that the defendant had "earned permanent residency and made this country his home" and that deportation was a particularly harsh consequence under such circumstances. Id. at 175-76.

Similarly, the challenge to the guilty plea in Martinez, 161 Wn. App. 436, was timely. Mr. Martinez was a "legal alien" and a "lawful permanent resident." Id. at 438. He was not advised that he faced certain deportation as a result of his guilty plea. Id. Mr. Martinez asserted after the fact that he would not have pleaded guilty had he been properly advised and his attorney verified that deportation was a "material factor" for him. Id. at 443. Under these

circumstances, both prongs of the test for ineffective assistance of counsel were met. Id.

In contrast, the defendant in our case has not shown that his conviction resulted in any immigration consequences. He does not state that he ever achieved lawfully permanent residency or was ever lawfully within the United States. As such, he would have been subject to deportation whether convicted of a crime or not. See 8 U.S.C. § 1227(a)(1)(A)&(B) (alien who was inadmissible at time of entry or is present in violation of law is deportable regardless of whether convicted of crime). Prejudice from counsel's failure to advise of immigration consequences is not shown where the defendant would have been subject to deportation whether he pleaded guilty or not. People v. Mrugalla, 371 Ill. App. 3d 544, 311 Ill. Dec. 303, 868 N.E.2d 303, 307 (2007). He does not show that his guilty plea actually generated any deportation proceedings. Also unlike the defendants in Sandoval and Martinez, he makes only self-serving, uncorroborated statements that he attorney did not advise him regarding his immigration status. The purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether a defendant actually has evidence to support his allegations. In re Pers. Restraint of Rice,

118 Wn.2d 876, 886, 828 P.2d 1086 (1992). Another way in which the instant defendant is dissimilar to the defendants in Sandoval and Martinez is that he does not swear he would have rejected the plea bargain had he been advised differently. Nor does he provide any information to suggest it would have been a rational decision to go to trial. In addition, counsel's failure to advise of immigration consequences does not meet the prejudice prong where there is no plausible defense to the charge. Mrugalla, 868 N.W.2d at 307. None has been shown here.

Defendant has failed to meet his burden to demonstrate prejudice. Thus, the trial court's rejection of his motion should be affirmed even if the merits are considered.

CONCLUSION

On this basis of the points and authorities set forth above, it is respectfully requested that the court affirm the decision of the Superior Court for Franklin County.

Dated this 18th day of October, 2011.

Respectfully submitted,

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