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Court of Appeals
Division III
State of Washington

32353-6-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICOLAS ALMIRON,

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 5889
Pasco, Washington 99301
(509) 545-3561

TABLE OF CONTENTS

Page No.

I. **IDENTITY OF RESPONDENT** 1

II. **RELIEF REQUESTED** 1

III. **ISSUES** 1

IV. **STATEMENT OF THE CASE** 1

V. **ARGUMENT** 7

It is Improper for the Court's Commissioner to Raise an Issue Sua Sponte which the Defendant Did Not Allege Below and, in Fact, Has Explicitly Conceded 7

The Particular Claim was Not Alleged Before the Superior Court 7

The Defendant's Counsel Provided Effective Assistance ... 8

The Court's Sua Sponte Raising of This Issue is Not Necessary 13

VI. **CONCLUSION** 15

TABLE OF AUTHORITIES

State Cases

Page No.

Alverado v. Wash. Public Power Supply Sys., 111 Wn.2d 424, 759 P.2d 427 (1988) 13

In re Pers. Restraint of Coats, 173 Wn.2d 123, 267 P.3d 324 (2011) 13

Ledgering v. State, 63 Wn.2d 94, 385 P.2d 522 (1963) 8

Matthias v. Lehn & Fink Prods. Corp., 70 Wn.2d 541, 424 P.2d 284 (1967) 7

Maynard Inv. Co. v. McCann, 77 Wn.2d 616, 465 P.2d 657 (1970) 14

State v. Martinez, 161 Wn. App. 436, 253 P.3d 445 (2011) 8, 9

State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011) 9, 10

State ex rel. York v. Board of County Comm'rs, 28 Wn.2d 891, 184 P.2d 577 (1947) 8

United States Supreme Court Cases

Page No.

Anders v. California, 386 U.S. 738, 87 S.Ct. 1396,
18 L.Ed.2d 493 (1967) 13

Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473,
176 L.Ed.2d 284 (2010) 10, 11, 12

Statutes and Rules

RAP 2.5 7

RAP 12.1 13

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 conviction of the Appellant.

III. ISSUES

1. Whether it is conceded in the record that the Defendant was properly advised that his convictions would result in his exclusion?
2. Whether the issue raised by this Court's Commissioner sua sponte is necessary to reach a proper decision or a judicial usurpation of an adversary function?

IV. STATEMENT OF THE CASE

On August 13, 2012, the Defendant Nicolas Almiron was charged with theft in the first degree, possessing a stolen firearm, possessing stolen property in the first degree, trafficking in stolen property in the first degree, and possessing marijuana with intent to deliver. CP 6-9.

On December 3, 2012, the Defendant pled guilty to reduced

charges. CP 13-23. The firearm charge was amended to possessing an *unlawful* (or short-barreled) firearm, and the trafficking charge was excluded. CP 10-12. The Statement of Defendant on Plea of Guilty states that for a non-citizen a guilty plea is grounds for deportation, exclusion from admission, or denial of naturalization. CP 17, para. (6)(i).

At the hearing, the Defendant's attorney Julie Brown explained:

> We have gone over his status and he has consulted with both an immigration attorney here in town, Wendy Hernandez, as well as he is currently represented in regards to his immigration status by an attorney on the west side, who will meet with him in Tacoma when he arrives. We have gone over the possible result of guilty pleas on this case, that any form of guilty plea on this case could in fact and will likely result in exclusion from the United States.

RP 4.

The standard sentencing range was 9-18 months. CP 15. The prosecutor recommended a sentence of ten months and required full restitution for all originally charged counts. CP 17. Three days later, the Defendant received the recommended sentence (300 days with credit for 117 days served). CP 31.

Less than one year later, on October 28, 2013, the Defendant filed a CrR 7.8 motion to vacate the judgment and sentence with regard to count three only (possessing marijuana with intent to deliver). CP 47. In the

motion, he alleged that his attorney misrepresented that his conviction on count three "would not prevent him from seeking relief from removal" and that "the VUCSA charge was not an issue for immigration." CP 48, 51.

The claim in the motion is inconsistent with the Defendant's sworn affidavit, which is attached to the motion. In the affidavit, the Defendant asks to withdraw his guilty plea (not to vacate a single count only). CP 69. He states that his attorney Julie Brown told him that she did not know what the immigration consequences could be (not that she misadvised him), and that he should contact an immigration attorney. CP 67-68.

The superior court granted the State's motion to require Ms. Brown to provide a declaration regarding her representation. CP 70-72, 81-82. Her responsive declaration details the multiple factual inaccuracies in the Defendant's affidavit. Where he claimed that she only met with him twice (CP 68), his attorney's declaration describes the content of six meetings (CP 119). Where he claimed she did not review the police reports with him (CP 68), she declared that after reviewing discovery with her client, she gave him a copy of discovery "an inch and half thick" to read overnight, verified that he did not need an interpreter to review the materials, and then returned to talk about the discovery a second time (CP 119). Where he claimed she did not contact an immigration attorney (CP

68), his attorney declared that she had consulted with local immigration attorney Wendy Hernandez (CP 118). Where he claimed she did not investigate the case (CP 69), she declared that she worked with her client to uncover what explanation he could have for being in possession of "so much" stolen property, guns, and drugs, and whether there was any basis to challenge the search warrant; she also consulted with character witnesses (CP 119). Where he claimed she did not investigate the immigration consequences of conviction (CP 69), his attorney declared that the immigration consequences were the "main focus" of the case and that she spoke "extensively" with her client about those consequences both in private and in the oral record at change of plea (CP 118).

The attorney could not fail to be aware of this concern as the Defendant had an immigration hold pending trial. CP 119. "[E]very time [they] met," they discussed the immigration consequences of the charges. *Id.* In consultation with an immigration attorney, Ms. Brown made a significant effort to analyze the effect of different convictions on the Defendant's immigration status. CP 118-19. However, **the prosecutor was not willing** to dismiss or significantly reduce justified charges to spare the Defendant from deserved immigration consequences. CP 119.

Unable to obtain an agreement from the prosecutor which would

prevent deportation, Ms. Brown finally negotiated a plea to a significantly reduced sentence. *Id.* She was aware of the immigration consequences, as was her client, but it was the best deal she could make. In her declaration, Ms. Brown comments that she is worried that "no one has explained to Mr. Almiron, that if he successfully withdraws his guilty plea, he would be back on his original charges." *Id.*

In his first reply, the Defendant acknowledged that in the transcript of the change of plea hearing, Ms. Brown stated that with these convictions the Defendant "would be" excluded from the United States. CP 83-84. The Defendant conceded that this advice was accurate as the Delivery of Marijuana conviction rendered him ineligible to obtain legal status. CP 84. Instead, he argued that Ms. Brown should have acted as an immigration specialist and provided him with the details of what arguments or strategies he could employ in immigration proceedings. CP 84 ("while he may have been told he would be deported, current case law requires that he be fully informed of [ ] what relief is available to him in Removal Proceedings").

The superior court judge solicited responses from both sides to Ms. Brown's declaration, explaining his intention to rule on the briefs. CP 120. The Defendant's new counsel filed a further reply, arguing that the

previous counsel could have tried to negotiate a different plea. CP 123-24. The Defendant did not request to submit live testimony and did not request oral argument. The court then denied the motion. CP 126-30.

The Defendant appeals from the denial of the CrR 7.8 motion. CP 131-33. The lone assignment of error raised on appeal challenges whether the lower court followed the *procedure* set forth in CrR 7.8(c)(2) an (3). Appellant's Brief at 4, 7.

The appeal argues that the superior court can only rule on the merits of a CrR 7.8 motion if the motion is timely. Appellant's Brief at 5. And he asserts the court failed to make a finding that his motion was timely. Appellant's Brief at 4. However, there was no challenge to the timeliness of a motion, properly made within a year of the judgment. CP 24, 47, 73-80. He argues that if his motion was untimely, then it must be transferred to the court of appeals. Appellant's Brief at 6. In reviewing the State's Motion on the Merits, this Court's Commissioner has found the motion was timely and, therefore, the superior court had authority to decide the matter. Commissioner's Ruling at 2.

The Defendant argues that if the lower court concludes there is no need for a factual hearing, that it must transfer the matter to the court of appeals. Appellant's Brief at 6-7. The lower court directed and reviewed

additional facts before making a determination. CP 81-82, 118-19. This Court's Commissioner has found that "[w]hile not designated a show cause hearing," the superior court's review of the file and request for the declaration from trial counsel were a proper procedure which authorized its denial of the motion. Commissioner's Ruling at 2.

Although finding no merit in the issues raised on appeal, the Commissioner denied the Motion on the Merits, raising an issue not raised before the trial court or in the Appellant's Brief. Commissioner's Ruling at 2-3 (whether defense counsel at trial properly advised client of the likelihood versus the certainty of deportation). Because the Commissioner decided the issues raised in the Appellant's Brief in the State's favor, they are not revisited here.

V. ARGUMENT

IT IS IMPROPER FOR THE COURT'S COMMISSIONER TO RAISE AN ISSUE SUA SPONTE WHICH THE DEFENDANT DID NOT ALLEGE BELOW AND, IN FACT, HAS EXPLICITLY CONCEDED.

The particular claim was not alleged before the superior court.

The general rule is that a reviewing court will not consider for the first time on appeal an issue or theory not presented to the trial court. RAP 2.5(a); *Matthias v. Lehn & Fink Prods. Corp.*, 70 Wn.2d 541, 543,

424 P.2d 284 (1967); *Ledgering v. State*, 63 Wn.2d 94, 97, 385 P.2d 522 (1963); *State ex rel. York v. Board of County Comm'rs*, 28 Wn.2d 891, 913, 184 P.2d 577 (1947). At the trial level, the Defendant's original allegation was that his trial counsel gave him NO information on immigration consequences. CP 67-68. In his first reply, he amended his claim, acknowledging he was advised he "would" be deported, but alleging that his criminal counsel was required to also act as his immigration counsel to provide him with strategies for "available relief." CP 84. In his second reply, he argued that Ms. Brown should have been able to negotiate a different deal, although Ms. Brown's declaration already set forth her strenuous but vain efforts to persuade the prosecutor. CP 119. The Defendant *did not* allege before the superior court that his counsel erred by stating that deportation was likely, but not certain.

Because the argument was not made, neither the State nor Ms. Brown addressed this suggestion. It is improper to raise this question for the first time on appeal.

The Defendant's counsel provided effective assistance.

The Commissioner's Ruling suggests, but does not decide, that the only proper advice would be that deportation is a certainty. Commissioner's Ruling at 3. The Ruling cites *State v. Martinez*, 161 Wn.

App. 436, 447-48, 253 P.3d 445, *review denied* 172 Wn.2d 1011 (2011), which in turn relies upon *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) and *State v. Sandoval*, 171 Wn.2d 163, 170, 249 P.3d 1015 (2011). None of these cases make a distinction between advice that deportation is likely versus certain.

In *Martinez*, the defendant alleged that "his counsel failed to inform him his plea could have immigration consequences." *State v. Martinez*, 161 Wn. App. at 440. In the alternative, the defendant alleged that he was misadvised that there were only "mere grounds" for deportation. *Id.* His attorney had no independent recollection. *Id.*

> Mr. Martinez claims his counsel solely discussed the possibility of deportation while counsel claims he cannot remember exactly how he advised Mr. Martinez but admits he knew little about immigration law. Taken together it is apparent counsel did not warn Mr. Martinez his eligibility was certain.

State v. Martinez, 161 Wn. App. at 441. The decision does not hinge on the distinction between certain and likely.

In *Sandoval*, the attorney advised the client that "he would not be immediately deported and that he would then have sufficient time to retain proper immigration counsel to ameliorate any potential immigration consequences of his guilty plea." *State v. Sandoval*, 171 Wn.2d at 167.

Counsel expected that his client would be released with time served *before* he came to the attention of immigration authorities. This would have been accurate, but for the prosecutor's communication with ICE. An ICE hold was placed on Mr. Sandoval immediately after his plea and before he could be released. The supreme court held that counsel's "mitigation advice may not be couched with so much certainty that it negates the effect of the warnings required under *Padilla*." *State v. Sandoval*, 171 Wn.2d at 173. The reference to "certainty" here has to do with the "mitigation advice", i.e. Sandoval's counsel's advice that he would be released before he came to the attention of ICE and that there would be an opportunity to ameliorate immigration consequences. This discussion does not state that it is deficient for counsel to explain that being rendered deportable means certain, as opposed to likely, deportation. It does not suggest any error in Ms. Brown's advice.

The United States Supreme Court decision in *Padilla v. Kentucky* noted that deportation for an aggravated felony is extremely likely, but not an absolute certainty.

> Under contemporary law, if a noncitizen has committed a remov*able* offense after the 1996 effective date of these amendments, his removal is *practically* inevitable *but for* the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal

> for noncitizens convicted of particular classes of offenses. *See* 8 U.S.C. § 1229b. *Subject to limited exceptions*, this discretionary relief is not available for an offense related to trafficking in a controlled substance. *See* sec. 1101(a)(43)(B); § 1228.

Padilla v. Kentucky, 559 U.S. at 363-64 (emphasis added). Deportation would not be mandatory, but only "presumptively mandatory." *Padilla v. Kentucky*, 559 U.S. at 369. Mr. Padilla's counsel "could have easily determined that his plea would make him *eligible* for deportation." *Padilla v. Kentucky*, 559 U.S. at 368 (emphasis added) (quoting statute that the offense is deport*able*). But Mr. Padilla's counsel "provided him false assurance that his conviction would *not* result in his removal from this country." *Id.* (emphasis added).

None of these cases hold or even suggest that it is error to advise that with an aggravated felony the defendant is likely to be deported. To parse Ms. Brown's language to find error is contrary to the legal standard. Judicial scrutiny of counsel's performance in an ineffective assistance claim must be highly deferential. *Padilla v. Kentucky*, 559 U.S. at 371 (quoting *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Under *Padilla*, Ms. Brown's advice was precisely correct. "[A] any form of guilty plea on this case could in fact and will likely result in exclusion from the United States." RP 4.

Even the Defendant Almiron himself conceded that this advice reasonably amounted to the statement that he "would" be excluded. CP 83-84.

"Moreover, to obtain relief on this type of claim a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. at 372 (citing *Rose v. Flores-Ortega*, 528 U.S. 470, 480, 486, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000)). Here, Ms. Brown explained that she struggled with her client to come up with an explanation for how he came to be in possession of so much stolen property, guns, and drugs and to find a viable challenge to the search warrant. CP 119. She was not hopeful of his chances at trial. Under the facts of this case, "he may very well have gone to prison before heading to Tacoma on his immigration hold." CP 119. Counsel tried, but was unable, to convince the prosecutor to accept a guilty plea to any charge that would not render the Defendant deportable. CP 118-19. His likely outcomes then were (1) go to trial, be found guilty, serve a prison term and be deported or (2) plead guilty, serve a shorter jail term and be deported. Under these circumstances, it would have been irrational to reject a plea to a significantly reduced term of incarceration with no hope of avoiding deportation.

The Court's sua sponte raising of this issue is not necessary.

The court has inherent authority to consider issues not raised by the parties, but only if *necessary to reach a proper decision. Alverado v. Wash. Public Power Supply Sys.*, 111 Wn.2d 424, 429, 759 P.2d 427 (1988); *see also* RAP 12.1(b) (court may raise issue not set forth in briefs if the issue "should be considered to properly decide a case")). "'[Courts of review] are not in the business of inventing unbriefed arguments for parties sua sponte … .'" *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 138, 267 P.3d 324 (2011) (quoting *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999)).

This is an appeal from a denial of a CrR 7.8 motion which came approximately ten months after the judgment and sentence. Counsel on appeal did not file an Anders brief. Under *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), if counsel on appeal finds his case to be wholly frivolous, he may file a brief which refers to anything in the record that might arguably support an appeal and invite the court to fully examine the proceedings to decide whether the cases is frivolous. No similar invitation was extended here.

Here the Defendant has been represented by three attorneys. Ms. Brown still advocates for her client, expressing concern that "no one has

explained to Mr. Almiron that if he successfully withdraws his guilty plea, he would be back on his original charges." CP 119. Nicholas Marchi advocated zealously for his client before the superior court. But after consultation with his client and review of the record and Ms. Brown's declaration, he conceded that Ms. Brown told Mr. Almiron he "would" be deported. CP 84. On appeal, in the face of this record, the appellate attorney's only claim regards the procedure under CrR 7.8.

This is not that case where judicial usurpation of an adversary function is necessary to properly decide the case. *See Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 625-28, 465 P.2d 657 (1970) (Neill, J., dissenting). The Commissioner is raising an issue that was not overlooked, but explicitly and properly conceded.

VI. CONCLUSION

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

DATED: February 11, 2015.

Respectfully submitted:

Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

David Gasch <gaschlaw@msn.com> Nicolas Almiron c/o David N. Gasch P.O. Box 30339 Spokane, WA 99223	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED February 11, 2015, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**