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Consolidated with 33052-4-III
Grant County Superior No. 03-1-00956-6

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Respondent,

vs.

MARIA MANZO,
Appellant.

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

- A. The Trial Court Erred In Holding That *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, 249 P.3d 1015 (2011) Did Not Apply After The Court Had Found That Ms. Manzo Was Not Provided Her CrR 7.2(b) Rights and Warnings By The Trial Court
- B. The Trial Court Erred in Finding That Ms. Manzo's Trial Counsel Did Not Misadvise Her Regarding The Immigration Consequences of Her Conviction

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1. Does *In re Personal Restraint of Tsai*, 183 Wn.2d 91, 351 P.3d 138 (2015) Apply To Ms. Manzo's Consolidated Appeals?
- 2. Does Trial Counsel Misadvise His Client When He Downplays The Seriousness of the Immigration Consequences By Agreeing With the State That His Client Will Be Deported When He Has Advised His Client to the Contrary That Deportation is Not a Certainty?

II. STATEMENT OF THE CASE

On November 10, 2003, an Information was filed in the Grant County Superior Court accusing Maria Manzo of the crimes of Violation of Uniform Controlled Substance Act (RCW 69.50.401(a)(1)(iii)) – Possession of Marijuana with Intent to Deliver; Violation of Uniform Controlled Substance Act (RCW 69.50.401(a)(1)(i)) – Possession of Cocaine with Intent to Deliver; Possession of Stolen Property in the First Degree (RCW 9A.56.150(1) and RCW 9A.56.140(1)); and Alien in Possession of Firearm (RCW 9.41.170(1)) (CP 1-2).

Ms. Manzo was arrested and made an initial appearance in the Grant County Superior Court on November 12, 2003. Arraignment was scheduled for November 18, 2003.

On November 13, 2003, Attorney Adolfo Banda filed a Notice of Appearance on behalf of Ms. Manzo.

In evaluating Ms. Manzo's guilty plea, her trial counsel assumed that if she didn't admit to specific facts, that she could avoid immigration consequences. Mr. Banda's affidavit provides:

11. I was present for Ms. Manzo's guilty plea. I had her do an Alford Plea. It is my understanding that this is better for immigration because the client avoids making any particular statements about the crime which could be used against her later.

(CP 33-34)

An Alford Plea Hearing was held on January 12, 2004. At that time, Ms. Manzo entered a Plea of Guilty (CP 6-17) to the Amended Information – Conspiracy to Commit Violation of Uniform Controlled Substance Act (RCW 69.50.401(a)(i) & RCW 9A.28.040 - Possession of Cocaine with Intent to Deliver. (CP 4-5)

On that same date, Ms. Manzo was sentenced to serve sixty (60) days in the Grant County Jail. Fines were also imposed. (CP 18-32)

On April 11, 2014, Ms. Manzo timely filed an appeal of the Grant County Superior Court decision dated March 17, 2014 to the Court of Appeals – Division III. (CP 59-64)

On January 9, 2015, Ms. Manzo timely filed a notice of direct appeal in the Division III Court of Appeals. (CP 58-67). The Appellant sought to enlarge the grounds initially listed in her notice of direct appeal by filing her Motion to Accurately State the

Basis for Direct Appeal on March 30, 2015. On that same date, the Division III Court of Appeals commissioner denied Ms. Manzo's direct appeal without reaching the issue of whether or not it was permissible for her, in argument, to include new grounds for her direct appeal. The dismissal of the direct appeal was then appealed to the Washington Supreme Court as a Motion for Discretionary Review on June 19, 2015. (Washington Supreme Court No. 91831-7) In the interim, on May 22, 2015, Ms. Manzo filed a second direct appeal which included all of the grounds for her direct appeal. (COA No. 33432-5) This second direct appeal was stayed pending the Washington Supreme Court's decision on the first appeal. The Washington Supreme Court then issued a ruling on January 5, 2016 denying Ms. Manzo's first appeal. On April 25, 2016, the stay was then lifted on the second appeal (COA 33432-5) and this matter was then consolidated with Ms. Manzo's PRP (COA 33052-4). This opening brief is now presented.

III. ARGUMENT

- A. The Trial Court Erred In Holding That *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, 249 P.3d 1015 (2011) Did Not Apply After The Court Had Previously Found That Ms. Manzo Was Not Provided Specific Immigration Consequences Warnings.

The trial court, in its January 28, 2014 Memorandum Opinion, stated:

Under these circumstances, I am constrained to conclude that none of the Defendants received post-sentencing notice of the time limits for collateral attack. There is no evidence offered to suggest they did so. Under the authorities addressed in the Memorandum Opinion, this court thus concludes that the motions to withdraw guilty plea are timely under RCW 10.73.090.

The court must next determine whether (1) each defendant has made a substantial showing of entitlement to relief, or (2) a factual hearing will be necessary to resolve the motion.

In assessing the showing made by each defendant, this court has concluded that the *Padilla* requirement to advise criminal defendants of immigration consequences of a plea is not retroactive and thus applies to none of these cases. As before *Padilla*, affirmative misadvice regarding immigration consequences is a different matter. Manzo and Barajas-Verduzco allege affirmative misinformation from trial counsel regarding immigration consequences.

(P.2 Court's Memorandum Opinion Letter (CP 56-58))

The trial court's findings here affirm that it saw the issue as not whether or not Ms. Manzo's had been provided specific advice that she would be deported, but rather whether she had met a different standard of proof – whether or not her trial counsel had affirmatively misadvised her as to the immigration consequences of her conviction. The court, in this excerpt, concluded without the benefit of any analysis that Ms. Manzo had not been misadvised by her trial counsel regarding the immigration consequences of her conviction.

In applying the holdings of other similar matters, there was sufficient evidence for the trial court to have concluded even under the inapplicable higher standard that Ms. Manzo was indeed misadvised of the clear immigration consequences of her conviction.

In *State v. Littlefair*, 112 Wn.App. 749, 51 P.3d 116 (2002), review denied, 149 Wn.2d 1020, 72 P.3d 761 (2003), the defendant did not receive the required RCW 10.40.200 warnings because his attorney had crossed them out because he subjectively believed that his client was a United States citizen. In granting Littlefair relief and vacating his conviction, the appellate court held:

[T]he unique circumstances here are appropriate for equitable tolling. When Littlefair pleaded, he did not know that he was likely to be deported. His lack of knowledge was not due to any fault or omission on his part; rather, it was due to a series of mistakes by his attorney, the court, and arguably the INS. The attorney failed to inquire about citizenship. He had also stricken subsection (n), contrary to the instructions on the written plea form. Quite reasonably and understandably, Littlefair did not think the stricken subsections applied to him, so he did not read them. The court failed to note that subsection (n) had been stricken contrary to the form's instructions, and it did not ascertain whether Littlefair had been properly advised of possible deportation consequences. Neither Littlefair nor the court initialed the subsections that had been stricken, so subsection (n) was not noted even for its absence. Inexplicably, the INS delayed more than two years before notifying Littlefair that he was subject to deportation, (internal cite omitted) and during that entire period, Littlefair was unaware that deportation was a consequence of his plea.

Littlefair at 762-3

Similarly in the instant case, Ms. Manzo's attorney failed to inform his client of the certainty of deportation. Even when the subject of deportation fortuitously came up in the court, trial counsel did not take the opportunity to express his uncertainty regarding deportation as he believed that he had no duty to speak up since he wasn't certain whether or not Ms. Manzo would in fact be deported. (*See* 02/22/2012 and 04/18/2013 Declarations of Trial Counsel (CP 35-36 and CP 54-55)).¹

B. Ms. Manzo was Either Misadvised By Her Attorney or Her Attorney Improperly Downplayed the Certainty that Deportation Was a Virtually Certainty Consequence That Would Follow Her Conviction.

Mr. Manzo's trial counsel's Sixth Amendment shortcomings in this matter are quite apparent from the record.

¹ Without trial counsel's candid admissions regarding these points it would have been virtually impossible for Ms. Manzo to show that her trial counsel had informed her otherwise.

At the time of Ms. Manzo's conviction, it was settled law that a conviction under the same RCW to which Ms. Manzo was convicted was, and continues to be, an aggravated felony under the immigration laws. The term aggravated felony includes, inter alia, "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." Under INA § 101(a)(43)(B), a controlled substance offense qualifies as an aggravated felony for immigration purposes only (1) if it contains a trafficking element; or (2) if it would be punishable as a felony under federal drug laws. *Salvieto-Fernandez v. Gonzales*, 455 F.3d 1063, 1066 (9th Cir. 2006) (citing *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 912 (9th Cir. 2004)). Ms. Manzo's conviction for Conspiracy to Commit Violation of Uniform Controlled Substance Act, RCW 69.50.4021(a)(1)(i) and RCW 9A.28.040, Possession of Cocaine with Intent to Deliver easily meets this definition.

Once Ms. Manzo pleaded guilty, her deportation was virtually certain.

In advising Ms. Manzo that deportation was not certain, and also compounding that error by downplaying the State's assertions regarding deportation, trial counsel impermissibly downplayed the seriousness of the immigration consequences to Ms. Manzo. *Sandoval* at 174. (*State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011)) In *Sandoval*, the defendant pleaded and was convicted of rape in the 3rd degree, an aggravated felony under the immigration laws. Trial counsel improperly downplayed the certainty of deportation by informing his client that although the conviction made him deportable that an immigration lawyer could somehow "ameliorate" the deportation consequences of this conviction.

Aggravated felonies are the most serious category of criminal offenses under the immigration law. *See*, 8 U.S.C. § 1227(a)(2)(A)(iii), INA§ 237(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable.") This applies without time limit or expiration as these rules are written. *Ibid.*

IV. CONCLUSION

The trial court erred in finding that *Padilla* and *Sandoval* did not apply to a late-filed, but not untimely, collateral appeal.

Trial counsel failed to properly inform his client of the immigration consequences of her conviction. Trial counsel also affirmatively misadvised his client as to these specific and certain immigration consequences by improperly downplaying the risks of deportation. The trial court further erred by not finding so based on the record before it.

The conviction in this matter should be vacated and remanded for further proceedings.

Respectfully submitted this 1st day of July, 2016.

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APPELLANT'S OPENING BRIEF
CERTIFICATE OF SERVICE

I certify that on this 1st day of July, 2016, I caused a copy of APPELLANT'S
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