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Division III
State of Washington

Court of Appeals No. 33523-2-III
Grant Superior No. 06-1-00754-1

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ALVARO MOISES RAMOS,
Appellant.

APPELLANT'S DIRECT APPEAL BRIEF

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I. ASSIGNMENTS OF ERROR

- A. The Trial Court Erred By Transferring the Respondent’s CrR 7.8 Motion to This Court as a Personal Restraint Petition.
- B. The Trial Court Erred by Not Finding That Counsel’s Performance Was Deficient Under The Sixth Amendment on the Basis of His Failure to Provide Specific Immigration Consequences Warnings Prior to Plea.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. May a Trial Court Properly Transfer a CrR 7.8 Motion as a PRP After Finding That a Defendant Has Not Been Provided Specific Warnings as to the Immigration Consequences of His Plea, On the Basis That the Decision in State v. Sandoval Is Not Retroactive? (Assignment of Error “A”)
- B. If the Decision in State v. Sandoval is Retroactive, Should the Trial Court Vacate a Plea When the Uncontroverted Evidence Shows that Trial Counsel Was Ineffective? (Assignment of Error “B”)

III. ANSWERS TO ISSUES ON ASSIGNMENTS OF ERROR

- A. No. A Conviction Obtained As a Result of Ineffective Assistance of Counsel As Described by In RE: PRP of Tsai, Should Not Be Transferred Under CrR 7.8(c) as a Personal Restraint Petition to the Court of Appeals.
- B. Yes. Upon a Defendant’s Prima Facie Showing of Ineffective Assistance of Counsel As Described in State. v. Sandoval, and the State’s Failure to Show That Such Defendant Received Effective Assistance of Counsel – Such Conviction Must be Vacated.

IV. STATEMENT OF THE CASE

On November 22, 2006, a warrant was issued for the arrest of the Defendant, Alvaro Moises Ramos, on charges of Attempting to Elude Pursuing Police Vehicle,

RCW 46.61.024 and Driving While License Suspended or Revoked in the Second Degree – RCW 46.20.342(1)(b) based on an incident occurring on November 2, 2006 in Quincy, Washington in Grant County. (CP 1-2)

On March 24, 2009, Mr. Ramos made an initial appearance in the Grant County Superior Court. Attorney Frank Grigaliunas provisionally represented Mr. Ramos at his initial appearance. A copy of the Information was provided to Mr. Ramos, he was advised of his rights and an Order Setting Conditions of Release was entered. Mr. Ramos requested and was appointed counsel. The matter was then set over to March 30, 2009 for arraignment.

Formal arraignment was held on March 30, 2009. Mr. Ramos entered a plea of not guilty to each of the two counts. Attorney Brett Billingsley represented Mr. Ramos at this hearing.

On April 6, 2009, attorney Billingsley filed his Notice of Appearance on behalf of Mr. Ramos.

On May 26, 2009, Mr. Ramos pleaded guilty to one count of Attempting to Elude as part of a plea agreement. (CP 3-11) Under Section 11 of the Statement of Defendant on Plea of Guilty, the box is checked – “instead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.” The second count charging Driving While License Suspended or Revoked in the Second Degree – RCW 46.20.342(1)(b) was dismissed as part of the plea agreement. CP 3-11)

Sentencing followed immediately on that same day and Mr. Ramos was sentenced to 30 days with an option of conversion to community service, fines and costs. (CP 12-27)

At the completion of his jail time, Mr. Ramos was then transferred to the Northwest Immigration Detention Center (NWDC) in Tacoma, Washington. Mr. Ramos retained immigration counsel to represent him on his immigration matter. Mr. Ramos then learned at the NWDC that his conviction for felony eluding rendered him ineligible for any relief from removal from the United States. (CP 48-52)

A verbatim record of proceedings of the guilty plea and sentencing was filed on January 7, 2013 (CP 28-39)

The trial court judge does not discuss the collateral appeal rights with Mr. Ramos. No time limitations for the filing of an appeal are provided by the court.

Attorney De Young filed a notice of appearance on January 22, 2013

The matter was successively noted, struck or continued, and re-noted for a motion docket on January 29, 2013, February 5, 2013, February 8, 2013, March 13, 2013, and March 29, 2013.

Two declarations from trial counsel were filed on March 29, 2013. (CP 40-47)

Also on March 29, 2013, Mr. Ramos filed his own affidavit. (CP 49)

On March 29, 2013, Mr. Ramos' motion to vacate his guilty plea was noted for a motion docket.

On April 4, 2013, the matter was again noted for a motion docket. On April 19, 2013, the motion was special-set for a hearing on September 27, 2013.

On June 25, 2013 Mr. Ramos' immigration counsel, Amanda Stevens filed a declaration.

On July 22, 2013, a note for motion docket for a status hearing regarding scheduling was filed. The motion was continued on July 29, 2013, and again on August 5, 2013, and August 19, 2013.

On August 22, 2013, the state filed a motion for a continuance to the end of October, 2013.

On September 4, 2013, Mr. Ramos filed an amended memorandum of authorities for its motion to dismiss. On September 26, 2013, the state filed a responsive memorandum of authorities.

On September 27, 2013, the motion hearing was held and the parties provided argument and authorities. The defense also filed an answer in strict reply to the state's responsive memorandum of authorities filed on the previous day.

The court issued a decision on October 1, 2013. The court stated in its decision:

Villanueva Anguiano:

Defendant's motion is found not to be time-barred by RCW 10.73.090 because of the court's failure, at the time of sentencing, to advise him of the time limits of that statute, as required by CrR 7.2(b). There is nothing in the record to suggest that Defendant received the required advice by virtue of the unsigned attachment to the Judgment and Sentence.

Defendant is further found not to have made a substantial showing that he is entitled to relief. The *Padilla* standard does not apply retroactively to his case.

Finally, it is the court's conclusion that resolution of Defendant's motion will not require a factual hearing, all material matters being of record.

(Alvaro)Ramos:

For the same reasons, and upon the same conclusions set forth above, I have also entered an order transferring Mr. Ramos's motion to the Court of Appeals as a Personal Restraint Petition. (Mr. Ramos name added for clarity)

(CP 57-58)

On October 25, 2013, Mr. Ramos voluntarily withdrew his CrR 7.8 motion. (CP 68) The setting for October 28, 2013 for the purpose of transferring Mr. Ramos' CrR 7.8 motion as a personal restraint petition was stricken.

On June 18, 2014, Mr. Ramos filed a 2nd amended motion to vacate his guilty plea. Mr. Ramos also filed a second declaration of his own on the same day.

A motion to stay Mr. Ramos' motion was filed on July 7, 2014. The trial court denied this motion on July 14, 2014 holding that the filing of the note for motion alone was insufficient to cause the matter to be considered. The issue was re-filed with additional authority. The motion for a stay was denied on July 22, 2014.

On July 22, 2014, the defense filed a summary of the previously filed declarations in Mr. Ramos' motion. The summary listed the previously filed declarations and the filing dates of each.

On September 19, 2014, a note for motion docket was filed setting Mr. Ramos' motion to vacate his guilty plea on October 27, 2014.

On October 27, 2014, Mr. Ramos' motion to vacate his guilty plea was heard. The state also filed "State's Response to Defendants' Motions to Withdraw Guilty Pleas". In this response the state conceded:

In these matters before the Court, there is no evidence, nor does the State assert, that either of the above named individuals was ever correctly advised that he had a 30-day collateral appeal right after sentencing, as required by CrR 7.2(b). While that language is contained in each of the two judgment and sentences in question, neither is specifically signed for by the defendant and/or the interpreter who assisted him, nor is there any mention on the record regarding the collateral appeal rights in either of these two matters.

The defense filed an answer on the same day to the State's response.

Following the October 27, 2014 motion hearing, the court stated that it intended to deny the motion and to issue a further order transferring Mr. Ramos' CrR 7.8 motion to the court of appeals as a personal restraint petition. A further deadline for the court's action was set on November 17, 2014.

On November 10, 2014, the Defendant filed a note for motion on November 17, 2014 for the court to reconsider its decision of intent to transfer Mr. Ramos' CrR 7.8 motion as a personal restraint petition.

On November 17, 2014, the court heard Mr. Ramos' motion to reconsider as well proposed findings of fact and conclusions of law offered by Mr. Ramos. The Court decided transfer Mr. Ramos' CrR 7.8 motion without any additional findings of fact.

On November 21, 2014, Mr. Ramos filed an appeal of the court's decision to deny his CrR 7.8 motion and transfer it as a personal restraint petition to the court of appeals.

On December 1, 2014, the judge signed an order to transfer Mr. Ramos's motion as a personal restraint petition.

On November 21, 2014 a Notice of Direct Appeal was filed with the trial court. The single-page direct appeal notice appealed from the decision of the Grant County Superior Court which had considered both Mr. Ramos's CrR 4.2(d) , (f) and CrR 7.8

arguments. Although Mr. Ramos specified in his memorandum that he had not received any CrR 7.2(b) information from the court at sentencing, the commissioner found essentially that Mr. Ramos was bound to the reasons provided for appeal in his single-page November 21, 2014 Notice of Appeal. The panel upheld the commissioner's decision without providing any further legal authority.

On June 5, 2015 a second Notice of Direct Appeal was filed.

A motion for discretionary review of the denial of Mr. Ramos' first direct appeal was timely filed. That matter is currently pending a decision from the Supreme Court Commissioner, oral argument having already been heard.

V. IMMIGRATION LAW APPLICABLE TO THE CASE

VI. ARGUMENT

A. *In re Personal Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 351 P.3d 138 (2015) Is Applicable to Mr. Ramos' Matter

On May 17, 2015, the Washington Supreme Court resolved the question whether *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) applied to matters in which more than one year had passed since the imposition of the trial court's sentence.

In finding that *Padilla* did affirmatively apply to such cases, the Court held that when weighing trial counsel's Sixth Amendment duties to a defendant that such inquiry was a "garden-variety application[] of the test in *Strickland*" that simply

refines the scope of defense counsel's constitutional duties as applied to a specific fact pattern.” See *Tsai*, Slip Opinion at p. 7; quoting, *Chaidez v. United States*, 568 U.S., 133 Ct. 1103, 1107, 185 L. Ed. 2d 149 (2013)

The Court found that since *Padilla* did not announce a new rule under Washington law, it would therefore apply retroactively to matters on collateral review. *Ibid.*

Mr. Ramos’ conviction is a matter that falls squarely under this decision.

B. Trial Counsel’s Failure to Discuss the Specific Immigration Consequences With His Client Is Deficient And May Also Be Brought Beyond the One-Year Deadline of RCW 10.79.090 and RCW 10.73.100

Mr. Ramos’ appointed trial counsel provided two declarations regarding his representation of Mr. Ramos in this matter. (CP 40-45 and CP 46-47)

These declarations establish that trial counsel was never aware of Mr. Ramos’ immigration status during the course of his representation. Trial Counsel stated that he “had no reason to believe that Mr. Ramos was not a U.S. Citizen.”

The Appellant’s Declarations establish that he did not receive specific advice regarding the immigration consequences of his plea. (CP 48-52 and CP 57-58). The Appellant stated that he would not have pleaded guilty had he been correctly warned that he would simply be deported following conviction. *Ibid.*

VII. CONCLUSION

In view of the foregoing, this Court should reverse the Grant County Superior Court's Denial of the Appellant's CrR 7.8 Motion, Vacate the Appellant's Conviction and Remand this matter to the Grant County Superior Court for Trial.

Respectfully submitted this 29th day of December, 2015.

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